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Let's Give Up on the Constitution

By **LOUIS MICHAEL SEIDMAN** DEC. 30, 2012

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AS the nation teeters at the edge of fiscal chaos, observers are reaching the conclusion that the American system of government is broken. But almost no one blames the culprit: our insistence on obedience to the Constitution, with all its archaic, idiosyncratic and downright evil provisions.

Consider, for example, the assertion by the Senate minority leader last week that the House could not take up a plan by Senate Democrats to extend tax cuts on households making \$250,000 or less because the Constitution requires that revenue measures originate in the lower chamber. Why should anyone care? Why should a lame-duck House, 27 members of which were defeated for re-election, have a stranglehold on our economy? Why does a grotesquely malapportioned Senate get to decide the nation's fate?

Our obsession with the Constitution has saddled us with a dysfunctional political system, kept us from debating the merits of divisive issues and inflamed our public discourse. Instead of arguing about what is to be done, we argue about what James Madison might have wanted done 225 years ago.

As someone who has taught constitutional law for almost 40 years, I am ashamed it took me so long to see how bizarre all this is. Imagine that after careful study a government official — say, the president or one of the party leaders in Congress — reaches a considered judgment that a particular course of action is best for the country. Suddenly, someone bursts into the room with new information: a group of white propertied men who have been dead for two centuries, knew nothing of our present situation, acted illegally under existing law and thought it was fine to own slaves might have disagreed with this course of action. Is it even remotely rational that the official should change his or her mind because of this divination?

Constitutional disobedience may seem radical, but it is as old as the Republic. In fact, the Constitution itself was born of constitutional disobedience. When George Washington and the other framers went to Philadelphia in 1787, they were instructed to suggest amendments to the Articles of Confederation, which would have had to be ratified by the legislatures of all 13 states. Instead, in violation of their mandate, they abandoned the Articles, wrote a new Constitution and provided that it would take effect after ratification by only nine states, and by conventions in those states rather than the state legislatures.

No sooner was the Constitution in place than our leaders began ignoring it. John Adams supported the Alien and Sedition Acts, which violated the First Amendment's guarantee of freedom of speech. Thomas Jefferson thought every constitution should expire after a single generation. He believed the most consequential act of his presidency — the purchase of the Louisiana Territory — exceeded his constitutional powers.

Before the Civil War, abolitionists like Wendell Phillips and William Lloyd Garrison conceded that the Constitution protected slavery, but denounced it as a pact with the devil that should be ignored. When Abraham Lincoln issued the Emancipation Proclamation — 150 years ago tomorrow — he justified it as a military necessity under his power as commander in chief. Eventually, though, he embraced the freeing of slaves as a central war aim, though nearly everyone conceded that the federal government lacked the constitutional power to disrupt slavery where it already existed. Moreover, when the law finally caught up with the facts on the ground through passage of the 13th Amendment, ratification was achieved in a manner at odds with constitutional requirements. (The Southern states were denied representation in Congress on the theory that they had left the Union, yet their reconstructed legislatures later provided the crucial votes to ratify the amendment.)

In his Constitution Day speech in 1937, Franklin D. Roosevelt professed devotion to the document, but as a statement of aspirations rather than obligations. This reading no doubt contributed to his willingness to extend federal power beyond anything the framers imagined, and to threaten the Supreme Court when it stood in the way of his New Deal legislation. In 1954, when the court decided *Brown v. Board of Education*, Justice Robert H. Jackson said he was voting for it as a moral and political necessity although he thought it had no basis in the Constitution. The list goes on and on.

The fact that dissenting justices regularly, publicly and vociferously assert that their colleagues have ignored the Constitution — in landmark cases from *Miranda v. Arizona* to *Roe v. Wade* to *Romer v. Evans* to *Bush v. Gore* — should give us pause. The two main rival interpretive methods, “originalism” (divining the framers’ intent) and “living constitutionalism” (reinterpreting the text in light of modern demands), cannot be reconciled. Some decisions have been grounded in one school of thought, and some in the other. Whichever your philosophy, many of the results — by definition — must be wrong.

IN the face of this long history of disobedience, it is hard to take seriously the claim by the Constitution's defenders that we would be reduced to a Hobbesian state of nature if we asserted our freedom from this ancient text. Our sometimes flagrant disregard of the Constitution has not produced chaos or totalitarianism; on the contrary, it has helped us to grow and prosper.

This is not to say that we should disobey all constitutional commands. Freedom of speech and religion, equal protection of the laws and protections against governmental deprivation of life, liberty or property are important, whether or not they are in the Constitution. We should continue to follow those requirements out of respect, not obligation.

Nor should we have a debate about, for instance, how long the president's term should last or whether Congress should consist of two houses. Some matters are better left settled, even if not in exactly the way we favor. Nor, finally, should we have an all-powerful president free to do whatever he wants. Even without constitutional fealty, the president would still be checked by Congress and by the states. There is even something to be said for an elite body like the Supreme Court with the power to impose its views of political morality on the country.

What *would* change is not the existence of these institutions, but the basis on which they claim legitimacy. The president would have to justify military action against Iran solely on the merits, without shutting down the debate with a claim of unchallengeable constitutional power as commander in chief. Congress might well retain the power of the purse, but this power would have to be defended on contemporary policy grounds, not abstruse constitutional doctrine. The Supreme Court could stop pretending that its decisions protecting same-sex intimacy or limiting affirmative action were rooted in constitutional text.

The deep-seated fear that such disobedience would unravel our social fabric is mere superstition. As we have seen, the country has successfully survived numerous examples of constitutional infidelity. And as we see now, the failure of the Congress and the White House to agree has already destabilized the country. Countries like Britain and New Zealand have systems of parliamentary supremacy and no written constitution, but are held together by longstanding traditions, accepted modes of procedure and engaged citizens. We, too, could draw on these resources.

What has preserved our political stability is not a poetic piece of parchment, but entrenched institutions and habits of thought and, most important, the sense that we are one nation and must work out our differences. No one can predict in detail what our system of government would look like if we freed ourselves from the shackles of constitutional obligation, and I harbor no illusions that any of this will happen soon. But even if we can't kick our constitutional-law addiction, we can soften the habit.

If we acknowledged what should be obvious — that much constitutional language is broad enough to encompass an almost infinitely wide range of positions — we might have a very different attitude about the obligation to obey. It would become apparent that people who disagree with us about the Constitution are not violating a sacred text or our core commitments. Instead, we are all invoking a common vocabulary to express aspirations that, at the

broadest level, everyone can embrace. Of course, that does not mean that people agree at the ground level. If we are not to abandon constitutionalism entirely, then we might at least understand it as a place for discussion, a demand that we make a good-faith effort to understand the views of others, rather than as a tool to force others to give up their moral and political judgments.

If even this change is impossible, perhaps the dream of a country ruled by “We the people” is impossibly utopian. If so, we have to give up on the claim that we are a self-governing people who can settle our disagreements through mature and tolerant debate. But before abandoning our heritage of self-government, we ought to try extricating ourselves from constitutional bondage so that we can give real freedom a chance.