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On Constitutional Disobedience

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On Constitutional Disobedience

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Introduction:

The Gaudy Contradictions of American Constitutionalism

When the 112th Congress met for the first time on January 6, 2011, members of the House of Representatives made history by reciting aloud the Constitution of the United States. The unprecedented reading managed to combine high drama and low farce in approximately equal doses.

Some moments were authentically inspiring. The recitation began with newly elected Speaker John Boehner intoning the majestic words of the Constitution's preamble. Congressman John Lewis, a civil rights hero who almost a half century earlier stood his ground on the Edmund Pettus Bridge while rampaging police split his head open, read the powerful commands of the Thirteenth Amendment. Only two days before she was gunned down in Tucson, Congresswoman Gabrielle Giffords recited the First Amendment's guarantees of freedom of speech and religion.

But if the planners of the exercise thought that they could isolate this celebration of constitutional text from the often tawdry, frequently absurd, almost always hyper-partisan reality of contemporary American politics, they were sadly mistaken. It turned out, for example, that the leadership had decided against actually reading all of the constitutional text. Instead, they mandated recitation of a bowdlerized version so as to avoid forcing members to read aloud embarrassing parts of the document that, for example, endorsed slavery. Before

the reading could get under way, there was a ludicrous and unseemly squabble on the floor about which parts of the document would be read and which parts politely ignored.

When the reading finally began, members at first paid close attention and followed along with their pocket Constitutions. As the recitation progressed through some of the Constitution's more obscure clauses, however, they seemingly lost interest. Members consulted their smartphones and fidgeted in their seats. Some left the chambers. When the reading reached Article II, sec. 1, providing that the president must be a "natural-born citizen," a woman in the gallery rose and shouted "Except Obama! Except Obama! Help us, Jesus! My name is Theresa." She was escorted out of the chambers before she could fully identify herself.

In short, the occasion was marked by an incongruous mixture of reverential invocation of constitutional text as a symbol of national unity, cynical disregard for and boredom with what the text actually said, and bare-knuckled efforts to utilize the text for contemporary political purposes. It perfectly captured the gaudy contradictions at the center of modern American constitutionalism.

In this book, I explore the too often ignored issue at the center of these contradictions. My topic is the problem of constitutional obedience. Should we, after all, feel obligated to obey this deeply flawed, eighteenth century document? Suppose, for example, President Obama really was born outside the United States. Why should this matter to us?

If the organizers of the congressional reading thought about this question at all, they no doubt assumed that the answer was easy. I am certain that many of the readers of this book share this view. A proposal that we systematically ignore the Constitution will strike many

as stupid, evil, dangerous, or all three. But the congressional reading itself demonstrated the arguments for constitutional obedience are far more fragile than commonly acknowledged.

To see the problem, we need to start with the fact that the newly empowered House Republicans had a decidedly contemporary motive for their celebration of this ancient text. The Republicans, and especially their Tea Party supporters, believe that the Constitution strongly supports political objectives like defeating national health care, preserving gun rights, sharply restricting taxation, and limiting the power of the federal government. It was for just this reason that they coupled the opening ceremony with a change in House rules that made new legislation subject to a point of order if it was unaccompanied by a statement of the provisions of the Constitution that authorized it and an argument for its constitutionality. Precisely because the Constitution has near-sacred status, Republicans think that they can use it as a powerful political weapon to defeat their adversaries.

The question I want to address is whether we should accede to this power. Suppose, for the moment, that the Tea Partiers are right and that the Constitution means what they say it means. Why, then, should the rest of us obey its commands? For many of us, the Tea Party constitution is deeply pernicious. Put succinctly, it mandates a country that we do not want to live in. If forced to choose between obedience to such a document and fundamental principles of justice, shouldn't we choose justice?

Of course, the Tea Partiers may be misinterpreting the Constitution. Perhaps, as properly understood, the Constitution commands none of the results they favor. But if the document authorizes implementation of policies that Tea Partiers hate, then why should *they*

obey its commands? Put more generally, why should *anyone*, on the left, the right, or in the center, renounce positions of policy and principle that she favors simply because those policies and principles are inconsistent with the Constitution?

The standard answer, of course, is that the Constitution, in the words of its preamble, was adopted by “We the People.” The framers provided for state ratification by popularly chosen state conventions. For a time, debate over the selection of delegates to the conventions and over the proposed constitution itself consumed the country. The United States engaged in what amounted to a long-running national seminar on governance, political theory, and the kind of country its citizens wished to live in. The upshot was ratification by all thirteen states. Because “We the People” chose to be bound by this text, “We the People” are now obligated to obey it.

Unfortunately, there are many things wrong with this story. We can start with the awkward fact that the Constitution itself was born of disobedience. The delegates were summoned to Philadelphia to amend the existing Articles of Confederation, not to displace it. They immediately decided to ignore their mandate as well as the requirements spelled out in the Articles for its alteration. Why should we feel obligated to obey their handiwork when they themselves disobeyed the legal limits on their power?

Perhaps the voice of the people should be allowed to override the law, but at this late date, we cannot know what the people’s voice actually said. As historians of ratification have demonstrated, the process was shot through with political shenanigans, systematic suppression of the views of the Constitution’s opponents, misrepresentation, and outright coercion. We

can only guess at what a majority of people who participated in the ratification process “really” thought. Indeed, it is a myth to suppose that the people can ever somehow speak clearly and directly without their voice being distorted by flawed, real world political mechanisms that translate their voice into a legal mandate.

This problem is compounded by the fact that many people were not considered “people” in late eighteenth century America. No women, African Americans, or Indians and few individuals without property were allowed to cast votes. More significantly, no one alive today had anything to do with the ratification process. As Thomas Jefferson famously insisted, the world belongs to the living. It is hard to see how even a pristine process that perfectly captured the views of eighteenth century America can bind the very different people who populate the United States today.

These are all reasons that ought to give us pause about the Constitution’s binding force. But there is another reason that is at once simpler and more powerful than any of these. The test for constitutional obligation arises when one thinks that, all-things-considered, the right thing to do is X, but the Constitution tells us to do not-X. It is only in this situation that constitutional obligation really has bite. It is only then that if we obey the Constitution, we are doing so for the sole reason that we are bound to obey. But who in their right mind would do this? If we are convinced after taking everything into account that one course of action is right, why should we take another course of action just because of words written down on a piece of paper more than two hundred years ago?

As a practical matter, in the real world, almost no one changes her opinion about anything important just because of the Constitution. We regularly avoid this distasteful necessity by reading the Constitution so as to support the opinions we already hold. Progressives insist on their reading while conservatives insist on theirs. We are asked to believe that it is no more than coincidence that the supposedly good faith and politically neutral effort of both sides to understand the same eighteenth century text leads each side to read it in a fashion that embodies its own contestable political programs while delegitimizing the programs of its adversaries. Or, more precisely, we are asked by each side to believe that its disinterested reading leads to this result, while the other side's manipulation of text and history amounts to a cynical, politically motivated effort to distort the Constitution's true meaning.

To be sure, there is a way to read the Constitution that avoids this sort of division. The Constitution could be a symbol of national unity if we focused on its commands at the most abstract level. Almost no one disagrees with the great goals of forming a more perfect union and providing for the common defense. Almost everyone supports liberty and equality in the abstract. We could all embrace the Constitution if we read it as a work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes.

I believe that this is, in fact, the way that the Constitution should be read. The Constitution might provide us with a common vocabulary we could use to discuss our disagreements. Speaking on the one hundred fiftieth anniversary of the Constitution's ratification, Franklin Roosevelt endorsed this version of constitutionalism:

The Constitution of the United States was a layman's document, not a lawyer's contract. That cannot be stressed too often. Madison, most responsible for it, was not a lawyer; nor

was Washington or Franklin, whose sense of the give-and-take of life had kept the Convention together.

This great layman's document was a charter of general principles, completely different from the "whereases" and the "parties of the first part" and the fine print which lawyers put into leases and insurance policies and installment agreements.

The problem, though, is that this reading sidesteps rather than solves the problem of obedience. The obligation of obedience arises only when we are asked to do something that we otherwise would not want to do. But everyone can support their political agenda by referring to constitutional ideals at the most abstract level. If the Constitution allows all of us to do whatever we want to do, then the problem of obedience never arises. It makes sense to talk about obeying the law, but no sense to talk about obeying a symphony or a painting.

In the rough and tumble of contemporary politics, neither side is interested in inspiring us with a work of art that requires nothing. Both sides want to treat the Constitution as law that commands real outcomes. The upshot is that both progressives and conservatives are content to beat each other around the head and shoulders with charges of constitutional infidelity.

In this book, I argue that this is no way to engage in serious and authentic dialogue about the issues that divide us. We should give up on the pernicious myth that we are bound in conscience to obey the commands of people who died several hundred years ago. Rather than insisting on tendentious interpretations of the Constitution designed to force the defeat of our adversaries, we ought to talk about the merits of their proposals and ours.

Could the country survive this sort of honest airing of our differences? Defenders of constitutionalism argue that the abandonment of constitutional obligation would lead to chaos or tyranny. Their worries take a variety of forms. Sometimes, the concern is about settling disputes concerning the nuts and bolts of government. Without a constitution, how would we decide how long a President should serve or, indeed, whether there should be a President? How would we know when a bill became a law or whether someone claiming to be a Senator really was one?

Others argue that the Constitution has served us well for over two hundred years and that there is little reason to believe that better arrangements are on offer. In particular, the Constitution provides vital protections for civil liberties. Without it, nothing would stop the government from establishing an official religion, jailing dissidents, or seizing all private property.

Still others are willing to recognize that constitutionalism is a myth, but they claim that it is a necessary one. Even if it is empty or regularly disregarded, the Constitution serves as a symbol of national unity, a secular religion. Without it, we would lose the necessary illusion that we are one people with a common history and destiny.

There are good reasons to be skeptical about these arguments. Have powerful actors really abstained from violating civil liberties just because of words written on a piece of paper? Are people really incapable of coordinating their activities and avoiding chaos without a constitution? Does the success of our country really depend on belief in a myth?

I address these questions at length in the rest of this book. For now, it is enough to note a contradiction at the root of all of these positions. As we have already seen, constitutionalists celebrate our founding document because it is an act of popular sovereignty – a command of “We the People.” Popular sovereignty, in turn, entails a faith that left to their own devices ordinary people can make decisions about their own lives and about the nature of their government. But insistence on constitutional obligation rejects just this faith. When a political actor tells someone “you must do this because the Constitution requires it,” the actor demands that people forsake their own deeply held moral and prudential judgments and obey commands promulgated by others. In this sense, the case for constitutional obedience is self-refuting. In the name of self-governance, it insists that people should not be allowed to make unfettered decisions about the questions that matter most to them.

Perhaps, indeed, the people cannot be trusted to make these decisions for themselves. But if that is true, we ought to stop pretending that we have a polity based on popular sovereignty. Paradoxically, if instead we are to remain faithful to the great goals of the Constitution, we must first free ourselves from the yoke of constitutional obligation. Constitutionalists need to stop making deeply authoritarian demands about what we must do. Once they stop, “We the People” can begin the kind of open ended and unfettered dialogue that is the hallmark of a free society.

Chapter Two:

The Argument Briefly Stated

The American Constitution is the oldest currently in force in the world. It was written generations before the advent of the technological, material, cultural, and moral conditions that define modern American life. When the framers did their work, America was a small, preindustrial society huddled along the eastern seaboard. A large portion of the country's economy depended upon slave labor. Travel was arduous and treacherous. Communication beyond one's immediate environment took weeks or months. The framers knew nothing of nuclear weapons, mass production, multiculturalism, cell phones, professional sports, modern birth control, or global warming. They had never heard of Martin Luther King Jr., Bill Gates, Albert Einstein, Adolph Hitler, or Lady Gaga. It is impossible to imagine what they would have thought of women's liberation, evolution, gay marriage, psychoanalysis, reality television, globalization, or the war on terror.

This gap between them and us provides a powerful argument for giving up on constitutional obedience. Surely, the sheer oddity of making modern decisions based upon an old and archaic text ought to give constitutionalists pause. They insist that we follow the commands of people who knew nothing of our problems and have nothing to do with us, indeed, who are not even biologically related to most of us. In what sense are their hopes, fears, preoccupations, and obsessions our own?

Some defenders of constitutional obedience attempt to meet this objection by relying on the so-called “living Constitution.” On this view, the Constitution can be brought up to date by reading its vague commands in light of contemporary realities. Yes, the framers would have been astounded to discover that, say, “due process of law” meant the right to engage in same sex sodomy, but precisely because the framers did not understand our world, we should read their language in a modern context. Indeed, on this view, the very decision to formulate constitutional commands in majestic generalities implies a decision to allow the language to change and grow over time.

Unfortunately, however, this response is vulnerable to a number of devastating objections. First, no one claims that all of the Constitution can be made “living.” Some of its most pernicious provisions are as positively, absolutely dead as the Wicked Witch of the West. Unfortunately, though, unlike the Wicked Witch, dead constitutional language continues to rule from the grave.

For example, constitutional language creating the grotesquely malapportioned Senate, mandating a presidential election system that allows the loser of the popular vote to assume office, or providing no congressional representation for residents of the District of Columbia are hardly written in majestic generalities. As constitutional scholar Sanford Levinson has argued, provisions like these are “hard wired.” Their specificity makes them resistant to reinterpretation, and they saddle us with results that few contemporary Americans would defend on the merits.

True, in theory, the language might be changed by constitutional amendment, but the amendment provisions of Article V are exceedingly cumbersome. These provisions are, themselves, hard wired. As a practical matter, they make the amendment process useless when powerful minorities benefit from the status quo.

What about more general guarantees like equal protection and due process of law? We can indeed at least sometimes escape the tyranny of the past with regard to these provisions if we interpret them in light of contemporary realities. As many modern originalists complain, however, this freedom comes at the expense of authentic obligation. If “due process” means whatever contemporaries think that it ought to mean, then we are no longer bound by constitutional language in a meaningful sense. What originalists fail to point out, though, is that if we instead cabin the provisions by interpreting them according to their “original public meaning” or the framers’ specific intent, we are stuck with eighteenth century judgments about twenty first century problems.

Advocates of the “living Constitution” respond to this dilemma by insisting that the values expressed in these provisions are enduring even if the application of those values to facts on the ground changes over time. One might be forgiven, though, for suspecting that the values are enduring precisely because they don’t bind us to very much. It does not require much work to construct an argument for or against almost any outcome based on “equality” or “liberty.” For example, abortion rights protect the equality and liberty of pregnant women, but abortion prohibitions protect the equality and liberty of unborn children. To the degree that

the results commanded by constitutional values are indeterminate, the obligation of constitutional obedience fails to take hold.

Suppose, though, that the values are at least occasionally determinate enough to decide contested cases. We still have not solved the fundamental riddle of obedience. Either contemporary Americans share these values or they do not. If we already share the values, then we will strive to implement them not because they are part of the Constitution, but because we agree with them. If we do not share them, then we remain without an answer to the question why we should be bound by a past generation's discredited moral intuitions.

Of course, contemporary Americans might be divided about particular values. Perhaps, for example, a majority of the people as a whole reach one conclusion about a value or about the application of a value, but a majority of the people in a particular state reach a different conclusion. Any society, including our own, must find a way to work out disagreements like this.

There are many possible methods. We might, for example, systematically promote compromise between conflicting value judgments. We might allow local communities to decide questions for themselves, or we might cede control to national majorities. We might even have an elite body like the Supreme Court make value judgments for all of us.

It is hard to imagine, though that a sensible person would cede the value choice to a relatively small group of people who knew nothing about modern society, who are long dead, and who held values that virtually no American would accept today. Yet this is precisely what constitutional obedience demands., This fundamental problem with constitutional obligation is

not just theoretical. Insistence on constitutional obligation is a way that some people exercise power over other people. As free citizens, we have a right to be provided with a reason before such power is exercised. But people exercising the power of constitutionalism are usually excused from the obligation to provide reasons for why we should be bound by constitutional commitments. They need not respond to even the most powerful arguments premised on policy and principle for a course of action. Instead, they are empowered to say “no” just because of words written on very old parchment. Free Americans should not put up with this sort of arbitrariness and arrogance.

That in a nutshell is the argument against constitutional obedience. What are the arguments in favor? In what follows, I briefly summarize my best understanding of these arguments and explain, as an introductory matter, why they should not prevail. The first part of the chapter provides a thumbnail sketch of some of the major points constitutionalists regularly make along with brief responses. The second part outlines an answer to the theoretical claims made by constitutionalists. The third part begins the task of dispelling worries about the likely consequences of disobedience.

It is important to add that my ambitions for this chapter are very modest. I do no more than provide an introductory sketch of various arguments for and against constitutionalism. I hope to convince readers that there is indeed a problem with constitutional obedience and that the simple responses to this problem do not resolve it. In the chapters that follow, I discuss in much more detail the harms produced by constitutionalism and the flaws in the arguments advanced by its defenders.

Ten Arguments for Constitutional Obedience and Why They All Fail

Suppose, then, that the Constitution, properly interpreted, commands us to do one thing, but that our all-things-considered judgment is that it is just, or wise, or prudent to do something else. Why should we privilege constitutional text over our all-things-considered judgment? Here are the main possibilities together with very brief rejoinders:

1. The Supremacy Clause of Article VI makes the Constitution the supreme law of the land. The Supremacy Clause states that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” This language clearly establishes that, *if we choose to obey the Constitution*, then it is the supreme law of the land. But the Clause has this effect only if the Clause, itself, is obeyed, and whether it, along with the rest of the Constitution, should be obeyed is the very question in controversy. Obviously, no text can validate itself. If it could, then any of us could write our own constitution, declare it supreme, and thereby command the obedience of others. It follows that we must look outside the Constitution for reasons why we should follow its commands.

2. In Chief Justice John Marshall’s words, “all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.” Marshall is surely correct in his premise, but the conclusion that we should obey constitutional commands does not follow for reasons similar to those that defeat the first point. Of course, the framers of the Constitution wanted their commands to be obeyed. Why else would they have spent a hot, miserable summer behind closed doors and windows in

Philadelphia? Anyone who asserts power wants the assertion to be successful. But the bare assertion of power coupled with a desire to succeed does not provide a reason why we should obey. If it did, we would be obligated to follow the wishes of every petty tyrant who sought to inflict his will upon us.

3. “We the people” consented to the Constitution by duly ratifying it. We are therefore morally bound to obey it. Although constitutional apologists persist in ignoring or denying the fact, an important driving force behind the new Constitution came from speculators who had bought up Revolutionary War debt at pennies on the dollar and then wanted the national government to impose high taxes to insure that the debt would be redeemed at face value. The Constitution was designed to reduce the power of the state governments that threatened these interests and, more broadly, to protect the emerging commercial class at the expense of farmers and debtors. To be sure, the document was ultimately ratified, but not without considerable hanky-panky and coercion directed against opponents. Nothing like all the people participated in the Constitution’s ratification. Large segments of the population, including women, slaves, Indians, and people not owning property, were mostly excluded from the ratification process. Moreover, the process itself was arguably illegal. Amendments to the Articles of Confederation – the only thing that the Constitutional Convention was authorized to propose -- required the unanimous consent of the states, whereas the Constitution provided for its own ratification when only nine of the thirteen states agreed. As if all this were not enough to dispose of this argument, the ratification process demonstrated at most that a majority of Americans then alive consented to be ruled by the

Constitution. It does nothing to demonstrate that the people alive today consent. Why should we be morally bound by other people's mistaken judgments?

4. If we don't like the Constitution, we can always amend it. The amendment process spelled out in Article V of the Constitution is exceedingly cumbersome. Indeed, the American Constitution is more difficult to amend than any other constitution in the world. As a practical matter, then, amendment is often not an effective alternative to disobedience. In any event, the amendment argument, like the Supremacy Clause argument, leads us in a circle. The very question in dispute is whether Article V, like the rest of the Constitution, should be obeyed. The answer to that question cannot rest simply on the existence of Article V.

5. The framers were wise men who wrote a document that provides a good framework for government. One might begin by questioning just how wise they were and just how good a framework they provided. Doubtless, the framers produced a document that marked an important advance in political theory. But the history of ideas did not end with their work. Today, many of their ideas seem strange, to say the least, and even when their judgments are not morally repulsive many of them have been overtaken by events. Among other things, many of the framers believed that it was appropriate for some people to own other people, that a government need not concern itself with the views of non-Whites, women, or people not owning property, and that a federal government with sharply constricted powers could effectively govern the nation. Even as amended and interpreted, the document they wrote has many anomalies, of which, perhaps, the most egregious is the overrepresentation of small states in the Senate.

Suppose, though, that we put all this to one side. Even if we stipulate the putative wisdom of the framers, the stipulation cannot provide a solution to our problem. Of course, *to the extent* that the judgment of the framers matches our own all-things-considered judgment – that is, *to the extent* that we think that they were wise – we should follow their commands. But then we are following constitutional commands not because we are obligated to do so, but because they coincide with our own all-things-considered judgment. Obligation takes hold only when there is a gap between a constitutional command on the one hand and our all-things-considered judgment on the other. No matter how excellent the constitutional text, its excellence does nothing to explain the riddle of obedience when such a gap emerges.

6. If we did not obey the Constitution, the result would be anarchy or tyranny. One might start again by quarreling with the premise. Other successful, nonanarchic and nontyrannical countries like the United Kingdom and Australia seem to do just fine without a written Constitution. In fact, as I discuss in Chapter Four, we seem to have done just fine even though, in large ways and small, we have regularly violated a variety of constitutional provisions.

In any event, the tyranny and anarchy point can be assimilated into our all-things-considered judgment. Tyranny and anarchy are bad states of affairs. To the extent that following a constitutional provision wards them off, most people will reach an all-things-considered judgment that we should follow the provision. But we need to make contextual decisions about whether and when these risks are real and whether and when they outweigh countervailing reasons for ignoring the text. For example, 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 the risks lie on the other side, the anarchy and tyranny argument does nothing to support constitutional obedience. When the risks are large, constitutional obligation is unnecessary because almost everyone will make an all-things-considered judgment that we should follow constitutional text.

7. Without the Constitution, our civil liberties would be at risk. Once again, the examples of countries like the United Kingdom and Australia throw considerable doubt on this proposition. It is far from obvious that these countries, which lack written constitutions, have less robust traditions of protection for civil liberties than countries with constitutional protections. In our own country, Supreme Court enforcement of constitutional text has done little to protect civil liberties in moments of crisis when our commitment to them has been tested. In any event, it is quite mysterious why anyone would think that words written on a piece of paper could possibly stand in the way of abusive exercise of government power. As many of the framers themselves recognized, the Constitution provides nothing more substantial than "parchment barriers." The only real protection for civil liberties is an engaged and tolerant public willing to respect and defend minority rights. Blind obedience to constitutional text actually discourages rather than promotes this kind of engagement.

8. The framers were wise enough to write a constitution that is so vague that there is no need to disobey it. Much of the Constitution's language – for example, its guarantees of equal protection, due process, and the privileges and immunities of citizens – is, indeed open

textured. Unfortunately, some of its most problematic provisions – for example its requirement that the President be a “natural born citizen” – are not. To the extent that the language is open textured, its vagueness avoids but does not solve the problem of constitutional obedience. When the Constitution is so vague that we can always do whatever we want and still remain within its strictures, the problem of constitutional obedience never arises. In these situations, the document simply does not constrain us. When the Constitution is sufficiently precise to meaningfully constrain us, the problem of constitutional obedience arises but remains unsolved.

9. The method by which the Constitution was adopted guaranteed that the framers took the long view, which should be preferred to decisions made in the heat of a particular political moment. The premise is, once again, subject to challenge. On the one hand, the framers, like all politicians, were concerned with immediate political issues, and, as noted above, some of their motivations for writing the Constitution were quite unlovely. On the other, we should not underestimate the capacity of our contemporary leaders for statesmanship. Assuming for the sake of argument that the premise is correct, we would still have to weigh the virtues of an abstract long range view against the vices of constitutional commands that are obsolete or fail to take account of current exigencies. Ultimately, there is no escape from making our own, modern, all-things-considered judgment about whether to follow old commands or take a fresh look.

10. We should obey the Constitution because, based on our experience as a people, we have come to believe that it is good policy to obey. It is an important truth that the

framers have no actual power to rule us from the grave. The Constitution has modern force only because we allow it to rule us. It is also undoubtedly true that many Americans accept the requirement of constitutional obedience as basic axiom of our system. But how many Americans have seriously thought about whether promoting a norm of constitutional obedience really is good policy? How many, instead, accept the axiom reflexively without considering its destructive effect on our political culture and on the goal of self-governance? The aim of this book is to generate serious thought on this subject. My hope and belief is that the norm of constitutional obedience cannot survive this sort of scrutiny. Of course, I may be wrong; readers may ultimately be unconvinced by my argument. But it is surely a mistake to cut off the argument before it begins with the circular assertion that the American people should obey the Constitution simply because the American people currently think that it is good policy to obey it.

What Constitutions Are For, and Why We Don't Need Them

Can it really be that the arguments sketched above are all that the case for constitutional obedience amounts to? Surely, one might fairly ask, there must be more to the position than this? The answer is that there is a little more, but, in truth, not much. One can state these arguments at a higher level of abstraction and dress them up with the paraphernalia of fancy political theory, but, ultimately, we are just applying heavy doses of lipstick to the same old pig.

Still, on the assumption that sometimes high theory has value, this section moves back from specific arguments we have already discussed and addresses the problem from a more

general perspective. From this vantage point, we can focus on the problem constitutions are supposed to address in the first place. I argue that the problem is real enough, but that constitutions don't solve it.

What follows is a ruthlessly stripped down version of the often abstruse political theory said to support constitutional governance. The theory originates with the erosion of faith in the divine right of kings in the eighteenth century. If the will of God did not justify political authority, then what did? Of course, one possibility is that political authority is simply a fact in the world that has no justification. Perhaps it amounts to no more than power exercised by the strong against the weak. We may have prudential reasons for obeying our rulers – we don't want to be executed or imprisoned – but we have no moral reasons. An only slightly less bleak view holds that there is nothing that justifies the particular exercise of political authority, but that even tyrannical government is superior to the chaos that would result if there were no authority at all.

Classical liberal theorists were unsatisfied with either of these answers. They wanted a theory of government that gave people a reason in principle why government edicts should be obeyed. The problem of creating such a theory is especially acute in diverse societies where people have different religious commitments and different political and personal goals. In a political culture where everyone already agrees about most matters of importance, the problem of authority is much less serious. In modern societies where we not only tolerate but also prize a wide diversity of views, we need a theory for why political losers should accept their losses.

Liberal theorists solve the problem of political legitimacy by claiming that even people who disagree about political outcomes can agree on the method by which their disagreement can be settled. Such an agreement, once it is achieved, creates political legitimacy and prevents social disintegration. This meta-agreement – an agreement about what to do when we disagree – is enshrined in a constitution. It can take two forms. Sometimes, the meta-agreement commands assent because its terms are substantively just. One might believe, for example, that the constitutional guarantees of free speech and equal protection should be obeyed because they state important principles of political justice. Other constitutional provisions, say, the requirement that the President be at least 35 years of age or the precise division of authority between the federal government and the states, are not necessarily commanded by substantive justice. They nevertheless deserve obedience because of what we might call procedural justice. The key idea here is that it is better to accede to a particular method for settling our disagreements -- even if it is imperfect -- than to bicker endlessly about things that should be settled one way or the other.

To illustrate the force of this argument, consider the following parable: For years, a country has been wracked by a bitter and bloody civil war. Eventually, both sides agree to a written truce. The agreement is not perfect. It is a compromise. Still, it contains measures that are important to both sides. It is the best agreement that either side could reasonably expect to negotiate, and all agree that peace is better than endless war. Advocates for constitutional government argue that once the agreement is signed, both parties are obligated to obey its terms. There is no doubt that this argument has intuitive force, but will it really withstand analysis? In fact, the argument is riddled with problems.

The bare fact of the agreement provides no reason in principle why anyone should obey its terms. We have already seen that consent cannot bind future generations who were not at the table. It turns out, though, that it cannot even bind those who were at the table. After all, both sides reached the agreement under duress. They “agreed” only because this was the sole means available to staunch the flow of blood. Of course, so long as the alternative to abiding by the agreement is continued or renewed civil war, both sides have a prudential reason to follow its terms. But if the balance of power shifts, or if the agreement proves too burdensome, there is no principled reason why a party should subordinate its conception of justice to a truce that was forced upon it. Surely, liberated France had no obligation to respect the agreement that it had previously reached with Hitler. Nor should the Egyptian people feel bound to an agreement providing special protections for the military when those protections reflect no more than the military’s power at the moment when they were granted.

Even if the unadorned fact of agreement does not produce an obligation to obey, there might be other reasons for obedience. Perhaps the terms of the original agreement are substantively just. But we have already seen that claims of substantive justice sidestep rather than support arguments for obedience. If the terms of the agreement are just, then they should be obeyed because they are just. The agreement itself adds nothing to this obligation.

Perhaps, then, the terms are procedurally just in the sense that they settle questions that are better resolved one way or the other than left open to continued dispute. Sometimes, no doubt, this argument has force. It would not be a good state of affairs if we had an argument about the length of a president’s term every four years. But there is no reason to

think that constitutional obligation is necessary to settle matters like this. The widespread sense that there is a need for closure provides motivation enough. In the United Kingdom, there is no constitutional provision that requires fresh parliamentary elections every five years, but the length of parliamentary sessions is nonetheless not a subject for debate.

Indeed, on some occasions, constitutional disobedience may do a better job of avoiding needless debate than constitutional obedience. As agreements age and become increasingly irrelevant to contemporary disputes, it may well be that departures from them, rather than mindless adherence to them, will best produce civic peace.

None of this is to deny that civic peace is a good. Liberal theorists were right to focus on how it can be maintained in a just fashion. The irony, though, is that the best strategy for a just peace involves forsaking, rather than insisting upon, constitutional obligation. An approach that focuses on obedience is bound to produce simmering grievances that, left unattended, risk political unraveling. Stubborn insistence that a society's foundational document embraces principles that some citizens find abhorrent is bound to lead to disaffection.

We might better achieve civic unity with a Constitution that provides a vocabulary and an abstract set of ideals that everyone can agree to. Precisely because everyone can agree to them, these ideals command nothing. We have already seen that under this approach to constitutionalism, obedience plays no role. An obligation to obey takes hold only when one has a duty to do something one would otherwise not want to do. A poetic constitution does not compel anyone. The very indeterminacy of such a constitution might nonetheless entice people into a continued peaceful discussion about what is to be done. The realization that

other people, who adhere to the same ideals we do, reach radically different conclusions about what those ideals entail might lead us to focus on the contingency and fragility of our own commitments. Even if we are unprepared to give up on those commitments, we might at least generate enough empathy for our opponents to want to resolve our differences peacefully.

At least that is the hope. Surely, that hope is more consistent with our ideal of self-governance than the cynical effort to bludgeon people into a contestable conceptions of justice simply because of the claim that those commitments are inconsistent with an antique document.

The Consequences of Disobedience

The discussion in the previous section was on a high level of abstraction. But aren't there real, practical problems that would be created by giving up on constitutional obedience? For example, how would elections be organized? How would we know the boundaries between federal and state power? How would the Supreme Court decide cases and justify its decisions?

In fact, the demise of constitutional obedience would produce less change than one might expect. As we have already seen, many provisions in the Constitution are extraordinarily vague and sweeping. These provisions already allow decision makers -- whether Supreme Court Justices, members of Congress, or ordinary citizens -- to incorporate their contemporary all-things-considered judgments without bringing into question the binding force of text. Of course, there are other provisions that are much more specific. As I demonstrate in Chapter Four, we have simply ignored some of these provisions when they have gotten in our way. We have done so without attracting much notice and without threatening the overall edifice of

constitutionalism. If the collapse of a culture of obedience caused us to ignore other senseless provisions, so much the better.

It does not follow, though, that we would ignore all of the specifics. Our all-things-considered judgment will often be that the framers settled matters in more or less the right way. Even when we disagree with the framers, we will often conclude that it is better to have the matter settled one way or the other than to insist that it be settled the right way. We will therefore continue our current practices not because we are compelled to do so but because our all-things-considered judgment is that this is the best way to proceed.

There is, to be sure, a lurking difficulty with this scenario. In my argument so far, I have claimed somewhat simplistically that “we” would make all-things-considered judgments. But, of course, there is no disembodied “we.” There are only political institutions – the state of Wyoming, the Food and Drug Administration, the President, and so forth – who claim the authority of “we.” Without a constitution, how are “we” to express our decision to, say, do away with the Supreme Court? How would “we” decide which institutions were authoritative?

This is a problem, alright, but it is not a problem that the Constitution can solve. The ultimate argument against constitutional obedience is that it is, itself, a choice that “we” must make. After all, the framers have no actual power over us. Constitutional obedience ultimately rests on contemporary consent. But consent by whom and through what institutions? At the moment before constitutional obedience takes hold, there is obviously no binding constitution in place and, therefore, no institution that can legally mandate constitutional obedience. Yet somehow the “we” in “We the people” ends up being expressed. In the same mysterious

fashion, it would find expression without constitutional obedience. Constitutional obedience merely poses the chicken and egg problem of which institutions legitimate political structures. It cannot resolve it.

It follows that upending a culture of constitutional obedience would have much less impact than is commonly supposed. If it has little practical effect, why bother? Although an end to constitutional obligation would not produce the results that many fear, it would have some salutary consequences. As we have already seen, in current political debate it is permissible, and sometimes highly effective, to counter an argument for a proposal with the assertion that “that’s unconstitutional!” As things now stand, the only response to this assertion is “no it’s not!” What follows, then, is a tendentious and ultimately beside-the-point argument about the meaning of the Constitution, with each side endorsing a reading of the text that just happens to support its political position.

If the culture of constitutional obedience were disrupted, these discussions would end, and, I think, our politics would be better for it. If nothing else, it is embarrassing to watch political participants on both the left and right twist constitutional language to meet their policy objectives. But the problem with modern constitutional argument goes beyond mere embarrassment. It is ultimately deeply authoritarian to try to end an argument by insisting on the sanctity of a particular text.

This move relieves the advocate of the duty we should all have – to explain and justify our positions to our fellow citizens. Free societies value authentic and open ended dialogue about what is to be done. The claim that “it’s unconstitutional” is a way to bring the discussion

to an end. We would be much better off if we could agree to ban the claim from our political lexicon.

