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July 11, 2013: Should We Discard the Constitution?

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Title: Should We Discard the Constitution?

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7/11/2013—In a recent issue of the New York review of books, Georgetown University law professor David Cole reviews a book by Lewis Michael Seidman entitled *On Constitutional Disobedience*. According to Cole, Seidman argues that we should give up on the Constitution altogether. Not only are individual decisions bad, such as *Citizens United*, and not only is it harmful allowing the Supreme Court to have the final word on important social issues, the whole notion of constitutionalism itself is little good and mostly bad. The question is, what should we expect from the Constitution? It seems to me we should expect very little. After all, public officials should not be violating the Constitution all the time. I don't mean that it would be wrong to do so, but that presumably they would know better. If constitutional litigation goes on all the time, there is something wrong. The something wrong is expecting the Supreme Court to resolve difficult social questions. Gay marriage is a perfect example. Having won partial victories recently in the Supreme Court, including an important victory in the Windsor case holding DOMA unconstitutional, the ACLU in Pennsylvania filed suit challenging Pennsylvania's prohibition on gay marriage. But all the political momentum right now is favoring gay marriage. Why should the courts step in at all? My mentor and teacher suggested to me recently that law is not politics. Law is logic. And that is especially true when law is at its best. Politics is not that. Politics is about accommodation and making arrangements and seeing things from another point of view. Public life, and specially disputes in public life, are not resolvable through logic. When proponents of gay marriage argue that the traditional definition is irrational, for example, they are engaging in a kind of self-delusion. It just cannot be irrational to favor leaving a core institution of society the way it has been for thousands of years. The Court earned its pay twice over the last 10 years. And maybe that should be enough. The first instance was in 2004 in *Hamdi v. Rumsfeld*, in which the Supreme Court put a bit of a break on President Bush's war on terror. It was not a very big decision, but it was a halt and a needed one. The second instance is a decision I greatly disagreed with, the Obamacare case, *National Federation of Independent Business v. Sebelius*. The reason this case is important is that it raised the issue of limited government. I don't really agree that there should be important limits on what Congress can do. But the fact that there are such limits and that the Supreme Court will occasionally enforce them, is a very good habit for a democratic people. How long would we remain free if limits on government were not even an issue? So by all means keep the Constitution and the Supreme Court. Just be satisfied with less from both.