Is the Constitution Still Relevant?

Exclusive: The U.S. Constitution has become part of today’s political battlefield, with the Right claiming to be its true defender and the Left questioning why the old parchment should undercut democratic choices in the modern age. But neither side seems very interested in what the document actually did, says Robert Parry.

By Robert Parry

There are two major schools of thought about the U.S. Constitution. One from the Left argues that it’s an outdated structure that should not be allowed to inhibit actions necessary to meet the needs of a modern society. And one from the Right, that only a “strict constructionist” reading of the Constitution and respect for the Framers’ “original intent” should be allowed.

But the problem with these two views is that neither is logically consistent or honest. The Left, for instance, embraces important constitutional liberties, such as habeas corpus, freedom of speech, and prohibitions against “cruel and unusual punishments” and unreasonable searches and seizures regardless of the exigencies of the moment.

Yet, the Left disdains much of the Constitution for its anti-democratic and even immoral compromises, which enabled the new governing document to emerge from the Constitutional Convention in 1787 and narrowly win ratification in 1788. Not only did the Constitution countenance slavery, it undercut democracy by giving two senators to each state regardless of population (and originally having them appointed by state legislatures, not elected by the people).

Why, ask many on the Left, should modern American society be restricted by the
judgments of a small group of propertied white men many of them slaveholders who died two centuries ago? Why should old compromises, which now seem ridiculously quaint and wrongheaded, be allowed to distort and constrain democratic judgments in 2013?

As Georgetown University constitutional law professor Louis Michael Seidman wrote in a recent New York Times op-ed, much of the fault behind today’s gridlock in Washington can be traced to the “archaic, idiosyncratic and downright evil provisions” of the U.S. Constitution. He added:

“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.”

The Right’s Distortions

While the Left tends to view the Constitution as an irretrievably flawed document (albeit with individual liberties that the Left loves), the Right has made political hay by presenting itself as the Constitution’s true defenders. The Right argues for what it calls “strict construction” and “original intent.”

Yet, even right-wing Supreme Court justices who wax eloquently about “originalism” will twist the Framers’ words and intentions when ideologically convenient, such as when Antonin Scalia inserted restrictions in the Commerce Clause during his opposition to the Affordable Care Act although James Madison and the Framers left the congressional power to regulate interstate and national commerce unlimited.

Indeed, from a strict reading of the Constitution, Madison had a much more robust respect for the democratic decisions of the elected branches of government than does today’s Right.

In oral arguments on “Obamacare” in 2012, Scalia fretted about the possibility that Congress might use the Commerce Clause to mandate compulsory broccoli purchases, but Madison seemed to understand that if Congress and the President were nutty enough to do something like that, the voters would have the commonsense to un-elect those representatives at the next opportunity.

However, rather than trusting in Madison’s language giving Congress the unlimited power to regulate commerce, Scalia insisted on second-guessing the Framers by applying his own judgments about what limitations should be in the Commerce Clause.

Scalia’s Constitutional re-write was accepted by his fellow right-wingers,
including Chief Justice John Roberts, although at the last minute Roberts joined with four Democratic justices to deem the Affordable Care Act constitutional under the taxing power of Congress. Still, Roberts rejected the Commerce Clause as justification after he arbitrarily eliminated some 18th Century definitions of the word “regulate.”

In other words, Scalia and Roberts played games with the Constitution to make it fit with their political biases. They really didn’t give a hoot about “strict construction.” [For details, see Robert Parry’s America’s Stolen Narrative.]

Similarly, when Scalia and four other Republican justices wanted George W. Bush in the White House, they suddenly discerned in the Fourteenth Amendment’s demand for “equal protection under the law” an “original intent” to ensure Bush’s Florida victory in Election 2000 though the amendment was adopted after the Civil War to protect the rights of former black slaves, not white plutocrats.

Thus, the U.S. Constitution has become something like a secular Bible, with people using different parts to justify whatever their desired positions already are. Instead of letting the words of the Constitution guide their governance, they let their governing interests dictate how they interpret the Constitution.

But the Right much more than the Left has built a cottage industry around this practice, sending well-funded “scholars” back in time to cherry-pick (or fabricate) quotes from the Framers to support whatever the Right wants done. The Right’s commitment to “strict construction” is only a facade.

Changing Reality

That the modern American Right twists historical reality, I suppose, should not come as a shock. After all, today’s Right has organized itself around propaganda regarding current events, from talk radio to Fox News to ideological think tanks. So, why should anyone expect anything different about how the Right would deal with history?

The Right also understands that national mythology is a powerful force, very effective in manipulating Americans into believing they are standing with the Founders even if the history has to be falsified to achieve that emotional response. Many Tea Partiers, it seems, will eagerly eat up a stew of bad history served by the likes of Glenn Beck.

Thus, we have key chapters of that early history effectively expunged, such as the disastrous reign of the Articles of Confederation from 1777 to 1787. The Articles declared the 13 states “sovereign” and “independent” with the central government just a “league of friendship” with little power.
Because of that original structure, the United States was lurching toward catastrophe by 1787, with a major revolt erupting in western Massachusetts (the Shays’ Rebellion) and European powers plotting how to exploit divisions between the states and regions. General George Washington, in particular, worried that the hard-won independence of the new country was in jeopardy.

So, to understand what Washington, Madison and other key Framers were trying to do with the Constitution, you must first read the Articles of Confederation, i.e., what prompted the Constitutional Convention in Philadelphia in 1787. Washington and Madison were so determined to correct the flaws of the Articles that they defied their instructions, which were to propose some changes to the Articles. Instead, they threw out the old system.

The Framers replaced the Articles and the emphasis on states’ rights and a weak central government with nearly the opposite, a structure that made the federal government much more powerful and its law supreme across the land. Sovereignty was transferred to “We the People” and the states were left mostly with responsibility for local matters.

At the time, opponents of the Constitution, known as the Anti-Federalists, were keenly aware of what Washington and Madison had engineered, and these skeptics fought fiercely against the federal power grab, just barely losing in several key states, such as Virginia, New York and Massachusetts.

A Revised Narrative

Yet, by recreating the Founding Narrative so it jumps from the Declaration of Independence in 1776 directly to the U.S. Constitution in 1787, the modern Right has learned that it can convince ill-informed Americans that the Constitution was devised as a states’ rights document with a weak central government, when nearly the opposite was the case.

The key to the Right’s false narrative is to delete (or ignore) the Articles of Confederation and thus eliminate what Washington and Madison were reacting against.

So, what the American people are now stuck with is a debate in which one side (the Left) largely dismisses the relevance of the Constitution (beyond some cherished individual rights) and the other (the Right) lies about what the document was designed to do. Thus, the nation finds itself in something between a muddle and a quandary.

The best path to firmer ground would seem to be, twofold: a serious effort to reclaim the real history of the Constitution from the charlatans on the Right and a recognition that the Constitution, as amended, creates an imperfect but
still workable framework for democratic change, a rebuff to some on the Left.

The reality is that the Framers did include broad and flexible powers in the Constitution, so future elected representatives could work their will on matters important to the “general Welfare.” As already noted, the Commerce Clause was not limited by the Framers; it was restricted by the current majority of right-wing ideologues who sit on the U.S. Supreme Court.

And as for the Left, it should recognize that with some political changes, such as the expanded use of primaries and caucuses to select Democratic and Republican candidates, filibuster reform and some more public financing of campaigns the Constitution allows for a reasonably vibrant, though clearly imperfect, democratic process.

Today’s political crisis can more accurately be blamed on the Right’s well-funded propaganda machine which has succeeded in supplanting history and science with propaganda and disinformation and the failure of the Left and the Center to fight as hard for the truth as the Right fights for its fallacies.

Investigative reporter Robert Parry broke many of the Iran-Contra stories for The Associated Press and Newsweek in the 1980s. You can buy his new book, America’s Stolen Narrative, either in print here or as an e-book (from Amazon and barnesandnoble.com).