



## The Invisible Constitution The Judicial Philosophy of Barack Obama

There is an old story about the late comedian W. C. Fields, resting on his deathbed. An avowed atheist, Fields was thumbing through a Bible. When asked about this apparent inconsistency, he is said to have quipped that he was *looking for loopholes*. President Obama is a former Constitutional law professor whose political and economic policies have shown little respect for the Constitution. One may assume that his law course was used to find constitutional loopholes.

### A Ruling Impediment

One of the residual affects of the Tea Party Movement during the last election was a born-again respect for the Constitution. When the new Republican House of Representatives assumed power in January of 2011, its first order of Congressional business was the reading of the Constitution in its entirety. While this act had its theatrical and media aspects, it was rich in a symbolism, riven with the promise of a return to the sober rule of its founding principles. It also included an implicit pledge that the House would derail the Obama legislative juggernaut that had so abused and distorted the document.

Like his position on a myriad of issues, Obama's judicial philosophy is nearly as opaque as a city in a blackout. Throughout his brief political career, he has dropped some breadcrumbs that may help to illuminate his thinking. Given his presidential policies, one can reasonably assume that the president regards *the Law of the Land* as a serious impediment to his political agenda. In a candid interview on Sept. 6, 2001 with Chicago Public Radio station WBEZ-FM, Obama noted that the Supreme Court under Chief Justice Earl Warren *didn't break free from the essential constraints that were placed by the Founding Fathers in the Constitution*. Obama believes his agenda is saddled with an antiquated instrument that is purely negative in its outlook.

Obama also told the interviewer the Warren Court was *not that radical* because it never considered the *issues of redistribution of wealth* that would have restored an equitable economic balance to American society. He left little doubt that he believes the Constitution needs to be scrapped, rewritten or,

even more dangerously, reinterpreted by activist judges who would use it to achieve *economic justice in society*.

### A Negative Charter

It is becoming more apparent that the redistribution of wealth is at the heart of Obama's judicial philosophy. A restrictive Constitution frustrates his presidential efforts in helping the poor and those who need serious assistance in managing their lives. To him the Constitution is a *negative charter* that blocks the road to *economic justice*. Obama believes the free enterprise system is nothing more than *Social Darwinism*, where cutthroat competition oppresses the poor. He let this idea slip in his *spread the wealth* comment to *Joe the Plumber* during his 2008 campaign.

As president he believes the current legislative landscape needs radical change in order for him to impose his necessary reforms. He seeks enabling legislation that will provide the courts, which are little more than instruments of social justice, with enough legislative licenses to make these changes.

The purpose of the Constitution was never the redistribution of wealth or some fuzzy notion of social justice but the preservation of individual liberty and limits on government. Obama and most of his recent predecessors have used its *implied powers*, *elastic clause* and the *commerce clause* to blur the constitutional distinctions among the three branches of government, opening the gates for monetary profligacy. With Obama in office, the Constitution is all that stands between the American people and a gradual tyranny.

According to blogger Dr. Mark Hendrickson, Obama's philosophy of law is called *legal positivism*. It means there is no inherent or necessary connection between the law and ethics or morality. This frees judges to do whatever they want to do. America's *negative charter* prevents people and government from interfering with the right of people to employ their lives, their energy and their property in the way of their choosing without infringing on the rights of another. Positive law compels others to perform specific actions. Under positive law, a citizen can be incarcerated for not doing what he is ordered to do, like buying an insurance policy or even a GM automobile.

## Dark Matter

When law is positive, society is hierarchical, as in Orwell's *Animal Farm* where *all animals are equal, but some are more equal*. When this happens there is no rule of law, but merely a system of privileges that engenders social instability and divisiveness. Such a philosophy is the favorite tool of those who believe that government power is primary and individual rights are expendable in the pursuit of the greater good of the collective community. Positive order negates individual freedom and invariably leads to a tyranny of a controlling government that subjugates the natural rights of their citizens in favor of its social engineering philosophy.

Despite his own constitutional expertise, President Obama has relied on the positivist thinking of his former mentor, Harvard law professor Lawrence Tribe, who has assumed a leadership role as one of Obama's legal advisers. To properly assess the president's legal philosophy, Tribe's 2008 book, *The Invisible Constitution*, is an invaluable source.

Tribe believes that any productive constitutional debate should center, not on whether there exists an *invisible* or *unwritten* Constitution but on what it contains. Tribe believes that the Constitution contains vast amounts of *dark matter*. There are sections of the document that are *there* but *invisible* to the reader's eyes. Textual analysis will reveal these hidden messages and will cover the exigencies of the evolving times. Tribe's exercise in constitutional whimsy is reminiscent of Harry Blackmun's legendary *penumbra* when he mysteriously found a shadowy subtext in the Constitution that enabled the landmark *Roe v. Wade* decision in 1973, which legalized abortion across the land.

## A Creeping Tyranny

In his 2006 book *The Audacity of Hope* Obama proclaimed that the Constitution, even though this was unwritten, was designed to *force us into a conversation* that would periodically reveal the nation's needs amid its ever-changing circumstances. This conversation, without a word of concern for the original intent of the founding fathers, would expose the dynamic nature of the document. This underscores Tribe's and Obama's belief that the Constitution is *a living document, and must be read in the context of an ever-changing world*.

The idea of a *Living Constitution* can also be referred to as *loose constructionism*, which claims that the ruling document has its own dynamic that puts it in a state of perpetual change. First introduced by judicial positivist, Justice Oliver Wendell Holmes, Jr. in 1920, Holmes believed that constitutional decisions had to be made in *light of our whole experience and not merely in that of what was said a hundred years ago*. This idea became popular in the mid-1930s in response to the Supreme Court's principled refusal to approve the radical regulatory policies of the Roosevelt administration.

Over the last several decades, the Court's heavy reliance on a *Living Constitution*, has resulted in the steady expansion of the powers and scope of the federal government to the detriment of the states and the American citizens. The intent of a written constitution with prescribed procedures for legal change is to

prevent this kind of *creeping tyranny* and the inevitable chaos that erupts after the people realize that their freedoms have virtually vanished.

According to blogger George Neumayr, Obama's idea of a *living Constitution* is a misnomer. In effect, he favors a *dead Constitution* just a blank piece of paper that he can circumvent at will, such as his bevy of unconfirmed czars, the Environmental Protection Agency's (EPA) virtual enactment of cap and trade, the funding of ObamaCare through an unlimited access to Federal Reserve money and his unilateral attack on Libya.

## Troubling Amendments

Obama and his legal advisers, including Professor Tribe, have a difficult time accepting the fact that the Bill of Rights was designed to protect the states and individuals from a centralized control. With the dawning of the Progressive era of Woodrow Wilson and later Franklin Roosevelt, an activist Supreme Court turned these amendments against the people. Since the 1940s, the Court has delighted in curtailing the nation's First Amendment traditions by using the Bill of Rights and the 14<sup>th</sup> Amendment to take religion completely out of public schools and advance political correctness.

The First Amendment is especially troublesome for Obama. *Free speech for me but not for thee* is his guiding principle. The president and his former White House chief of staff Rahm Emanuel were not averse to using their bully tactics on political allies as well as their enemies. Howard Kurtz of the *Washington Post* has reported that when networks began complaining over broadcasting some of his insipid speeches, Emanuel called, not the program directors, but the CEOs of the networks or their parent companies in an effort to ensure compliance.

Because of the preponderance of conservative talk show hosts, such as Rush Limbaugh and Glenn Beck, who always have Obama in their gun sights, Obama has flirted with bringing back the *Fairness Doctrine* to insure *proper ideological balance* on the radio networks. The real reason behind this is not deceptive *fairness* but the elimination of conservatives from the airwaves.

With regard to the Second Amendment, Obama has consistently paid no more than a nuanced lip service to the individual right to bear arms. In 2004 he said *I think that if the government were to confiscate everybody's guns unilaterally that I think that would be subject to constitutional challenge*. He didn't say it would be unconstitutional, just *subject to constitutional challenge*. Second Amendment rights are merely another part of his *animated conversation* about changing laws he does not like. Stripped of his rhetorical legerdemain, Obama is an anti-gun politician who has voted for a ban on virtually all rifle ammunition used for hunting and sport shooting and for the criminal prosecution of persons who use firearms in self-defense, as well as a complete ban on handgun ownership.

## A Second Coming

Obama's affection for a *Living Constitution* suggests an interesting parallel with Franklin Delano Roosevelt. While FDR attended Harvard and Columbia Law School,

Obama attended Columbia and Harvard Law. Both have a charismatic personality that elicited adoration from supporters and visceral disdain from opponents. And both pursued the presidency at a time of economic crisis despite having no real understanding of the most rudimentary economics.

Obama's economic plan represents an elevation of Roosevelt's class-warfare principle, which stated that *taxes shall be levied according to ability to pay*. Roosevelt was paraphrasing Karl Marx, whose maxim declared, *from each according to his abilities, to each according to his needs*. Like FDR, Obama and his gang of czars have engendered devotional support across the nation, not just from academic, intellectual or philosophical equals but also from thousands of ordinary people who cannot fathom all the complexities and nuances of his pronouncements. With faith and hope as their muse they follow him mindlessly like so many lemmings heading for the cliff. Like FDR, Obama is skilled at applying a Machiavellian pragmatism to the Constitution in his quest for additional powers and the speedy expansion of government power.

With Roosevelt as a historical mentor, Obama hopes to establish a more liberal Supreme Court that he can use to usurp the necessary powers to equalize American society for the poor, the gay, the old, and ethnic minorities with empathy and compassion, rather than coldly administering to the letter of the law. In this regard Obama is likened to the *second coming of FDR*, who sought to pack the Supreme Court with justices like Chief Justice Charles Evans Hughes, whose constitutional philosophy rested on the false assumption that the Constitution means *whatever the Supreme Court says it means*.

### The Soft Underbelly

The Catholic bishops should be aware of Obama's constitutional disdain and his attempts to seduce them with his repetitive appeal to social justice. Because of the Church's deep concern for the poor who Obama pretends to help, Obama's legal philosophy has had a great appeal for many within the American magisterium. Speaking in July 2007 at a conference of Planned Parenthood, he said that the country needed judges who possessed the *empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges*. This explains his choice of liberal Hispanic Catholic Sonya Sotomayor to fill David Souter's seat.

However Obama's stance on homosexual marriage has caught the bishops' attention. His order to the Department of Justice

to refrain from defending the Defense of Marriage Act, a federal bill signed into law in 1996 by President Bill Clinton, is another example of his cherry-picking approach to constitutional law. The U.S. Bishops' Office of General Counsel said the Obama administration's decision *represents an abdication of its constitutional obligation to ensure that laws of the United States are faithfully executed*. According to the Catholic News Service, *Marriage has been understood for millennia and across cultures as the union of one man and one woman. Homosexual marriage amounts to the virtual annulment of the rich symbolism and meaning of God's design for human sexuality. Homosexual activity violates the self-giving which the Gospel says is the essence of Christian marriage*.

Many believe that Obama is a *bone fide* enemy of the Catholic Church by virtue of his passionate opposition to Church teachings on the life issues. He has voted for all funding bills for abortion. He has never voted for any law that protected the unborn, even after their accidental births. He has voted in favor of expanding embryonic stem cell research and many argue that ObamaCare is designed to promote passive euthanasia.

Author George Weigel noted that the Obama regime is playing political games with the Church. Ever since 2008 Obama has attempted to drive a wedge through the Church with his appeal to issues about the poor and the oppressed. Weigel believes Obama's 2009 controversial visit to Notre Dame targeted Catholic intellectuals and their institutions, which he described as *the soft underbelly* of Catholic resistance to his *radical agenda*.

### Anything Goes

It is a given that the president has shown little respect for the Constitution and the freedom it protects. Obama sees the Constitution as an intellectual *Rubik's cube* that he can twist any way that is necessary to solve the problems of the poor, the oppressed and anyone who will help his re-election. The Church and all others of good faith need to understand his strategy and vow to expose it. They must oppose his policies, not only on the life issues but also his subversion of the economic liberty that the Constitution protects. Because of the *invisible constitution*, the nation has become-not a nation of laws-but a nation of men, where as the Cole Porter tune suggests, *anything goes*.

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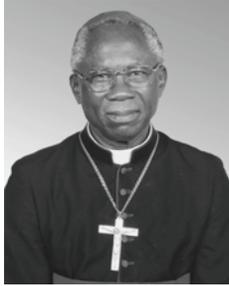
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