

2010

Obama's Constitution: The Passive Virtues Writ Large

Richard A. Epstein

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Epstein, Richard A., "Obama's Constitution: The Passive Virtues Writ Large" (2010). *Constitutional Commentary*. 900.
<https://scholarship.law.umn.edu/concomm/900>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Symposium
Conservative and Libertarian Reactions to the
Obama Administration

OBAMA'S CONSTITUTION: THE PASSIVE
VIRTUES WRIT LARGE

*Richard A. Epstein**

THE FADING OBAMA MYSTIQUE

There is little doubt today about Barack Obama's political orientation. He is a man of the Left. Yet in the fall of 2008, during the height of the Presidential Election, there were endless debates as to whether Obama counted as a political moderate who understood that it was necessary to govern from the center or whether he a strong left-of-center politician who had mastered the lesson that radical politicians had to present themselves in a way that went against type. The standard political economy story that had some currency at the time was that he would turn out to be a moderate on the grounds that all presidential nominees move to court the median voter. That impression was reinforced by his choice of advisors, many of whom like Lawrence Summers, were retooled Clintonites who were thought to be on the conservative wing of the Democratic Party. And most powerfully, that image was reinforced by his evident rhetorical elegance, his nice blue ties and his calm demeanor. Taken together, his presentation of self was an effective means to disarm those critics who insisted that his politics put him, as his voting record suggested, to the left of center of the American legal system.

It is this studied ambiguity that makes Obama so hard to read. It is instructive that in the fall of 2008 many people asked whether Obama counted as a socialist—a question that needed (and still needs) a nuanced answer. Obama did not, and does not

* Professor of Law, University of Chicago.

believe, in the government ownership over the means of production. What he believes in is the extensive regulation by government of the private firms that are responsible for production, which may be achieved by any and all methods that are available to a President and the Congress: taxes, mandates, regulations, subsidies. The hard question is just how far he is prepared to push on these levers of government power. Well, that debate is over. As one centrist democrat put it to me, ruefully, "we were both wrong. Obama is surely to the left of where I thought he would be. But then again he is to the left of where you thought he would be as well." I am not quite sure that the last half of this observation is true, but without question he has sought to move the ratio of public to private expenditures and influence harder and faster on more issues than any president in recent years. He is in favor of market liberalization on issues like medical marijuana and stem cell research, but otherwise his mindset is quite clear. The defects that we have in the current situation all stem from too little government regulation not from too much. He sees the health care system as one in which private insurance markets have failed; the global warming issue as one in which massive restrictions on emissions are needed; the labor markets as suffering from declining real income because of a want of effective union organization; financial markets as failing because of greedy bankers and weak and divided oversight. And so on down the line.

Sadly his rhetoric has become more strident and less coherent since the Democratic Party lost the Senate seat in Massachusetts, in what counts as one of the most stunning reversals in political fortune ever in the United States. Rather than mend his ways, bashing the banks has become the current fixation, in the hope that the antagonism toward Wall Street will allow him to pick up Republican support for showing that he is made of sterner stuff, even if that means saddling the banks with a set of punitive regulations and taxes, which will only further set back the economy.

But, it will be asked, how deep are his convictions? On this point, the issue is complicated to say the least. It is common knowledge today that Obama now faces deep resentment from the left-wing of the Democratic Party that is, if anything, further to the left than he is. The issue, which at one time was confined to blogs on the Left, has now become grist for the mainstream press. To many of these people he is an ineffective compromiser,

under the unprincipled spell of Rahm Emanuel, who does not see the imperative need to take over the healthcare system root and branch and, for all I know, nationalize the banks as well. Obama's realist side makes one appreciate just how difficult it is to govern from the center, when the dispersion of political sentiment in the nation are greater than they have ever been. My own sense is that Obama does not disagree in principle with these critiques, but senses, however vaguely, that he cannot possibly win reelection if he caters to exclusively his own political base. So his strategy has been to engage in a go-slow attitude that seeks to buy off some of his major opponents—the pharmaceutical industry, the insurance industry—with well-timed, but inelegant compromises. For the purists in his party, that willingness of compromise with the devil counts as a form of political treason. For a working politician, it counts as first step in political survival.

Yet note that this is a debate about tactics, and not about principles. There is a question of whether Obama has any principles. To the response that he does not, I can only say that I think that his political instincts are deep, and are consistent with the arc of his life. The origins of his belief system date back long before he took up golf. His views I think were formed during his college and law school years. They were strengthened by his years in Chicago, where Obama never worked in any trade or business, but was always a political organizer who learned to form, when appropriate, alliances with business figures. His stint at the University of Chicago Law School only strengthened his earlier tendencies. Obama taught one portion of constitutional law (race, due process and equal protection) for many years. His teaching was effective, but left no intellectual footprint, for he had none to leave. Indeed, there is little evidence from the twelve or so years that we overlapped at the University of Chicago that he thought hard about the current issues of health, environment, labor and financial legislation that are the centerpieces of his legislative program. Certainly, he had little or no engagement with either conservative or libertarian thought during his years as a senior lecturer. Then, as now, he was more comfortable in the company of allies than critics.

I do not regard this as a new revelation. During his successful campaign, I spoke out against the conventional wisdom and questioned as well Hyde Park's adoration of its most prominent first citizen. I took the position, based on a

combination of personal knowledge and public pronouncements, that Obama was a man of the Left who said what he meant, and after a fashion meant what he had said. One of my reasons was so simple that even a cynic could approve. With evident trepidation, I read the Platform for the Democratic Party in 2008, “Renewing America’s Promise”¹ and concluded that it showed not the slightest awareness that some principled limitations had to be placed on the government’s power to tax and to regulate. Its constant calls for instant action—Affordable Health Care for All Americans—were to my mind not just campaign rhetoric. They contained the seeds of the destruction that eventually resulted in the shipwreck of the Democratic healthcare reform efforts. It is not possible to increase access and control costs at the same time—this platform gave a powerful indication of the extent to which Obama had departed from the moderately centrist strategy that Bill Clinton took on, at least after the Republicans gained control of the Congress in 1994. There are no such corrections in the offing here.

FROM POLITICAL MYSTIQUE TO JUDICIAL NOMINATIONS

The strong emphasis of legislative transformation shows in his attitude toward the federal courts. The big story about the Obama administration on the legal front is how little it seems to care about the judicial nominations or the judicial process in general. His rate of nominations has been slow and the rate of confirmations has been even slower. As Jonathan Adler has noted in his blog on the Volokh Conspiracy,² the explanation could be that judicial nominations are pushed to the rear because of the other major items on the agenda. In the alternative, there are process explanations. One possibility is that Obama—who has shown no distaste for executive power—has centralized too much of the process in the White House, has engaged in a vetting process that drives away competent people from the White House, or has been overwhelmed by resistance in the Senate, including individual holds on particular nominees.

1. See <http://www.democrats.org/a/party/platform.html>.

2. Jonathan Adler, *Where Are Obama’s Judicial Nominees?*, October 18, 2009, available at <file:///Documents/Articles/Obama%20and%20the%20Constitution/ADler%20on%20nonnominations.webarchive>.

Obama did, of course, preside over a full-court press to appoint then-judge Sonia Sotomayor to the Supreme Court. The opposition to her from the Republican side talked in part about her extracurricular work for La Raza and other Latino and Latina groups. Most of that criticism did not amount to a hill of beans if only because pointless claims of that sort are common in conference settings. Indeed, the best line of her mostly drab confirmation hearings was her bittersweet observation that her invocation of a “wise Latina woman” did not go down well even before a sympathetic audience, which is probably all for the better.

What matters more was her view on judicial behavior. It was quite clear that during the hearing she did not voice any radical views on her future role on the bench. Instead, she contented herself with saying that judges interpret and do not make laws, and she would be bound by the legal tradition of which she is a part. To the left this was an implicit rejection of the “living constitution.” To the right it was belated recognition that its brand of originalism deserved greater respect than it received. Yet working at this level of generality tells us very little. In the few decisions of late, she has sided with the liberal bloc, most notably in *Citizens United v. Federal Election Commission*.³ Prior to her elevation to the Supreme Court much of her work was regarded as solid and sensible by most observers. Indeed, she was (rightly) castigated for her views on two key cases, only one of which reached the Supreme Court. These two decisions may give some hint as to her future performance on the Supreme Court.

The first of these was *Didden v. Village of Port Chester*,⁴ which took an astonishingly casual view, even by the lax standards of *Kelo v. City of New London*,⁵ toward the public use limitation found in the takings clause to the Constitution. *Kelo* was notorious insofar as it sanctioned a taking of private property for redevelopment by another private party solely for purposes of economic development. The proposed New London plan was an economic farce from the outset, and the land still stands vacant over four and one-half years after the decision came down. But bad as *Kelo* was on the textual foundation it

3. 130 S. Ct. 876 (2010).

4. 173 Fed. Appx. 931 (2d Cir. 2006).

5. 545 U.S. 469 (2005).

was not wholly unprincipled. It rested on the assumption that there was an outer limit to the public use test that prohibited any outright transfer from A to B that was not sanctioned by extensive and inclusive public hearings and deliberation. When the political process was working, the political blessing provided an appropriate answer to the public use question that survived judicial review.

In contrast *Didden* involved no public hearings or deliberations. The Town of Port Chester had placed one Greg Wasser in charge of new development for the entire town, and he unilaterally informed Didden that he would condemn the property for his own use unless the independent developer gave him a large cash payment or a piece of the project for free. There was no public process at all, except for a decision of the Village to rubber stamp Wasser's request. What was needed was some serious discussion of the limits of *Kelo*. What was given was a *per curiam* opinion, which Sotomayor joined, that was so cursory it was hard to believe that she took the matter seriously at all.

Her second major gaffe involved affirmative action where, in another *per curiam* opinion in *Ricci v. deStefano*,⁶ she essentially gave the New Haven local government carte blanche to disregard the elaborate system put in place to deal with the promotion of firefighters on the ground that it could have contained some measure of bias, given the disproportionate outcomes on the standardized tests. Her decision was overturned by the usual five-four conservative-liberal split, but what was most instructive was that even the decision of the four dissenters, led by Justice Ginsburg, would have required that New Haven make out some good faith or for-cause showing as to why it disregarded the results of the tests; this was more restrictive than Sotomayor's decision, which gave New Haven a free pass on the question.⁷

To these two cases, it is possible to add a third high profile case, *Maloney v Cuomo*,⁸ which skirted the question of whether the Second Amendment protection of the right to bear and keep arms bound the states. *Maloney* never addressed incorporation but rested on a reading of the Privileges or Immunities Clause of the Fourteenth Amendment, but applied a rational basis test to

6. 129 S. Ct. 2658 (2009).

7. *Id.*

8. 554 F.3d 556 (2d Cir 2009).

the issue, and found the statute, banning the use of nunchukos, constitutional. *Maloney* was decided after the Supreme Court's game-changing decision in *District of Columbia v. Heller*,⁹ which contained explicit language by Justice Scalia that required the District to meet something more than the rational basis test in order to sustain the statute.¹⁰ But *Maloney* regarded the matter as one for rational basis analysis under the privileges or immunities clause of the Fourteenth Amendment, which is, I think, the one position that is clearly wrong.¹¹

There is a common thread that runs through these three decisions. All of them adopted the hands-off rational basis point perspective to the occult art of constitutional interpretation. That is precisely what Obama wants in a Supreme Court Justice. The essence of rational basis interpretation lies in its strong presumptive acceptance of the legislative will, which is disregarded only when no conceivable rationale for the decision may be advanced. Complex legislation always involves difficult tradeoffs, so that it is hard to find anything that passes that is so conspicuously depraved that nothing can be said on its behalf, especially by the interest group that championed its adoption. If the standard is that the statute or executive action should pass muster if it generates some discrete benefit to some group of individuals, regardless of costs to others, the game is over.

Here's why. No statute will gain passage if it leaves everyone worse off. So long as it is possible to dress up the legislation with some fancy rationale, it will pass. Or to put it otherwise, there has long been some talk that mere "naked preferences" show a "raw" form of political power that requires them to be struck down.¹² But it is easy to dress up preferences by showing that some group of individuals is given release against rising prices, or is it, falling prices, or is it price stagnation? No matter, there is always some evil to combat.

Given this frame of mind, the standard of review becomes so overpowering that the substantive issue scarcely matters. The three Sotomayor cases just mentioned deal with issues that could not be further apart: property rights, affirmative action, and

9. 128 S. Ct. 2783 (2008).

10. *Heller* 128 S. Ct., at 2817n.27.

11. See Richard A. Epstein, *Does the Second Amendment Bind Frank Easterbrook?*, 77 U. CHI. L. REV. (forthcoming 2010).

12. See, Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

guns. But the rational basis test flattens the substantive issues; it ignores the textual differences; and it turns substantive differences into mere details in the grand scheme of things. The rational basis test inverts the original design of the Constitution. No longer is government to be regarded as a necessary evil with limited powers. It is to be regarded as a welcome manifestation of the popular will. The duty of judges may not be to celebrate these statutes, although they often do. But it is at the very least to defer to the outcomes of the political branches, not to resist them.

It is worth noting, moreover, that this orientation is not unique to Democrats. Republicans take the same attitude when it comes to state intervention on issues of personal liberty to which Democrats (rightly) take a small government attitude, such as the use of medical marijuana, which provoked yet another strong pro government decision in *Gonzales v. Raich*.¹³ The Obama administration may dislike this decision on the merits, but it need not play any constitutional trump card. It can simply announce that it will respect the right of any state to administer its own medical marijuana law. The substantive approach of the two parties is far apart, but at least on the constitutional issues, the Democratic Party has few desires to advance its own political agenda through constitutional litigation, even if it has no desire to back down on cases such as *Roe v. Wade*, which set the agenda 36 years ago.

Against this background, it is clear how the Sotomayor appointment and her jurisprudence fit with the Obama game plan for the courts. She is willing to cut him a lot of slack in the political space. It is equally clear that he was not troubled by the fact that her background also contains clear conservative elements. Her litigation experience in private practice centered on commercial law and intellectual property. It remains to be seen whether this will influence how she thinks about these questions. Her public service was in the prosecutor's office. Her life story speaks of a woman who made a personal odyssey that started in the projects, went from Princeton to Yale, to the corridors of power. But the constitutional attitude of deference on all new initiatives that come within her purview is consistent with the larger Obama approach. His ambitious agenda depends on judges who are prepared to stand off to one side, by rejecting

13. 545 U.S. 1 (2005).

all the arguments raised against his government programs, many of which rely on unprecedented levels of government coercion.

And those attacks will come on both grounds of federalism and individual rights. Some of these attacks will be odd to say the least. Before the legislation cratered, there were many efforts to announce that national healthcare legislation is unconstitutional on the grounds that physician-patient relations are local matters that are outside the reach of the Commerce Clause. The argument was that individual autonomy was overridden by this new intrusion of the federal government. I disliked the earlier healthcare bill as much anyone but thought that the strongest constitutional argument against it was that it treated the private insurers as regulated public utilities who, at the end of the day, could not earn a sufficient rate of return to remain in business.¹⁴ But the Commerce Clause argument mistakenly cast the autonomy issue as a federalism issue when it is in fact one about individual entitlements against government, which should be as powerful against state action as against federal action. Structured as a commerce clause argument it will not, and, under current law, should not win a single vote at any level of the judicial system.

The coercive nature of the current legislative program does mean, however, that the attacks on the Obama program based on individual rights could stand an outside chance of success. The requirement that individuals take out insurance that works against their own interest, or pay a tax if they choose not to, raises the level of government coercion to new heights. There is a respectable argument at least that this measure of coercion represents a denial of liberty or the loss of private property or both. But so long as a rational basis test gives lots of running room for political actors, it does not matter what theory is raised against a new major program. Program survives, attack fails: end of story.

14. See *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional*, *Medical Progress Today* (Manhattan Institute) http://www.medicalprogresstoday.com/enewsletters/mpt_ind.php?pid=1834&nid=250 and at Point of Law.com, <http://www.pointoflaw.com/columns/archives/2009/12/impermissible-ratemaking-in-he.php>. For the shorter version, see Richard A. Epstein, *Harry Reid Turns Insurance Into a Public Utility*, available at http://online.wsj.com/article/SB10001424052748704304504574610040924143158.html?mod=rss_opinion_main.

The same could, and should, be said of another piece of dormant legislation, the Employee Free Choice Act, whose major provisions allow for card check to displace union elections, and forces the employer into a binding two-year “contract,” without judicial review from an arbitral panel appointed by the Federal Mediation and Conciliation Board housed in the Obama Department of Labor.¹⁵ The coercive power of the state is nightmarish in its implication if it can force people to enter into losing transactions. But once again, the rational basis might well be made to work its magic in these contexts, precisely because it is not bound by any traditional conception of individual justice. Recall, for example, that we have on the books many examples of government power that offends the usual principles of justice, including retroactive taxes that look like takings as well.¹⁶ But there is an upward fight on this issue because the Supreme Court has said on more than one occasion that an appeal to settled expectations has no traction as a constitutional principle. Today there is an increasing disquiet in conservative circles about the unbounded possibilities of coercive legislation. More to the point, there is a willingness on the part of some judges to make creative judicial arguments to escape from past precedent.

One recent decision in this vein is *Guggenheim v. City of Goleta*,¹⁷ where the question was whether Goleta’s rent stabilization law ran afoul of the takings clause. Like all rent stabilization statutes, Goleta used a formula that set the rent at which mobile home owners could occupy for their exclusive benefit land owned by other individuals. As is the case with all rent control statutes, the owner of the “pad” could not evict a tenant at the expiration of the lease, but was required to renew the lease on disadvantageous terms, except in a few cases where termination was for cause, e.g. nonpayment of rent. Worse still, the owner who sold the pad could sell along with it the right to remain on the premise. The net effect is that the sale price for the RV embedded the future discounted value for the pad.

15. For my discussion, see RICHARD A. EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT* 157–74 (2009).

16. See, e.g., *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976).

17. 582 F.3d 996 (9th Cir. 2009). For my extended comments, see Richard A. Epstein, *Takings Law Made Hard*, REGULATION 4 (Winter 2009–2010), available at <http://www.cato.org/pubs/regulation/regv32n4/v32n4-1.pdf>.

When Justice O'Connor was faced with a physical takings challenge on this arrangement in *Yee v. City of Escondido*,¹⁸ she reached the incredible conclusion that there was no physical taking because the landowner had let the mobile home owner onto the property. Permit entry for a year and it is as if you have allowed entry for an indefinite term.¹⁹ The pad owner in that case did not press the regulatory takings issue, so once the physical taking claim was rebuffed the case was at an end. Undeterred, Jay Bybee in the Ninth Circuit cut through the doctrinal thicket that came his way, and held that the entire statute was amenable to a facial challenge because it operated as a per se regulatory taking. It was only fitting irony that it cited the Sunstein article, noted above, that spoke about naked preferences in support of a conclusion that cut pretty much in the opposite direction.

There is a sobering lesson here. The same types of judicial machinations that have long been used on behalf of liberal causes are available to conservative judges as well. The Obama administration wants and needs judges who will not be party to those maneuvers. But otherwise it has little to gain from seeking judges who think that it is their job to move the ball forward. That is not true, however, for the conservatives who fear liberal judges in part because they will *not* reverse the current constitutional status quo. Needless to say, these same conservatives also fear liberal judges for their potential decisions in a raft of mid level statutory and common law claims that do not go to ultimate constitutional issues that impact the Obama agenda. Obama clearly cares about these second level issues, as well he should, but for him the key question is how high they stand on the overall agenda. With the debacle of the health care bill and the renewed emphasis of job creation, we know the answer to that question: not as high as his big ticket items on the legislative front. So in a world of limited resources, and in his case, diminished political capital, nominations for appeals court and district court take a back seat. The powder is, I suspect, being kept dry for the nomination of a replacement for Justice Stevens, Justice Ginsburg or both. But the twists and turns in particular cases should be allowed to obscure the basic point that on high-stakes constitutional issue, Obama wants judges who preserve the status quo, not those with a sense of intellectual

18. 503 U.S. 519 (1992).

19. *Id.* at 529-30.

adventure and excitement. For this he needs a cooperative Supreme Court. If that court is to have any bold spirit, it will be to overrule decisions that place a crimp in the power of the federal government to do as it will. *United States v. Lopez*²⁰ is an obvious target on the Commerce Clause, even though it has been completely contained by subsequent Supreme Court and lower court opinions. What he must hope for is the surprise resignation of a conservative justice, which would lead surely allow a liberal appointment that could undo what little remains of *Lopez*. An old Chinese curse says "May you live in interesting times." Court lovers and court haters always find themselves in that unenviable position.

20. 516 U.S. 549 (1995).