



BY ROBERT A. LEVY

## Chairman's Message Constitutional Basics for President Obama

**W**ith 12 years under his belt as lecturer and senior lecturer at the estimable University of Chicago Law School, President Barack Obama is no stranger to the Constitution. Nonetheless, he accepts the fashionable yet flawed notion of a malleable, “living” document, which has sufficient structural flexibility to accommodate rapidly changing social, economic, and technological conditions. Obama’s invocation of that theory will be to appoint judges who “stand up for social and economic justice” and have “empathy . . . to understand what it’s like to be poor, or African-American, or gay, or disabled, or old.”

Of course, no rational person is anti-empathy or opposed to social and economic justice. The question, instead, is whether a judge’s application of those values should dictate how he interprets the Constitution. An alternative view, embraced by “textualists,” is that constitutional interpretation must be anchored in the words of the document itself, not the subjective policy preferences of judges, however empathetic. When “structural flexibility” is required, the Framers crafted an amendment process by which the Constitution can be updated.

Meanwhile, the written text is bedrock; and from it, our new president should extract two lessons in particular. First, and most important, the Framers gave us a limited federal government with strictly enumerated powers. The Preamble tells us that government gets its powers from “We the People,” not vice versa. The body of the Constitution identifies those powers with specificity. Then the Tenth Amendment reminds us, “The powers not delegated to the United States by the Constitution . . . are reserved to the States . . . or to the people.” That’s our principal defense against an abusive national government—but not our only defense.

A second textually explicit safeguard is the separation of powers among the three branches—legislative, executive, and judicial. As Obama presides over America’s largest-ever injection of public funds into the used-to-be-private economy, he would do well to reexamine the very first sentence of Article I: “All legislative Powers herein granted shall be vested in a Congress.” Only the legislature, not the executive branch, is authorized to make laws. Yet the Treasury Department has obviously been immersed in the lawmaking business—initially to purchase troubled assets; then to acquire part ownership of insolvent companies; and, finally, to reverse itself and start over again. With each day’s newspaper came reports that the rules of the game had changed—without congressional input.

Earlier, the national government had encouraged debt and leverage by double-taxing dividends while making interest deductible. The Federal Reserve had

maintained artificially low rates—another incentive to borrow. Fannie Mae and Freddie Mac, with implicit taxpayer-backed guarantees, had purchased and securitized risky mortgages to fund “affordable” housing. Then, to unravel the mess, Congress endorsed the socialization of a key economic sector by giving an executive official virtual *carte blanche* over our financial institutions. The predictable outcomes: redistribution of wealth from taxpayers to individuals and businesses who took excessive risks; substitution of politicians for shareholders as corporate decisionmakers; and a handcuffed version of capitalism, frustrated in the performance of its periodic restorative function—purging transactors who are inefficient or incompetent.

Congress provided no coherent guidance to the executive branch when it enacted the Troubled Asset Relief Program, which essentially authorized the Treasury Department to experiment with hundreds of billions of tax dollars—unconstrained power, unaccountable to the taxpayers, and unconstitutional. To be sure, that horse has already left the barn. Nobody seriously expects the president to admit that he and his predecessor exercised unconstitutionally delegated legislative powers. Still, Obama might acknowledge that the bailout raised crucial constitutional questions. At least that would buttress the case for dumping the program as soon as the perceived emergency has ended. And it would caution Congress against abdicating responsibility for laws that have effectively nationalized large segments of the financial community.

President Obama is a remarkable man who has come to office at a decisive moment in history. As he grapples with our nation’s problems, he must reaffirm that government is bound “down from mischief by the chains of the Constitution.”



A concluding, unrelated note: This is the first of my *Policy Report* messages as chairman of the Cato Institute. I am privileged to head the board, and especially honored to succeed Bill Niskanen, who served splendidly for 23 years and continues as director and chairman emeritus. Like Bill, I am committed to the principles of limited government, individual liberty, free markets, and peace. The implementation of those principles will require a prodigious effort and significant resources. Fortunately, no organization has officers, administrators, and policy professionals who are more dedicated to promoting liberty. As chairman, I promise our supporters that the Cato Institute will remain vigilant in pursuit of that goal.

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