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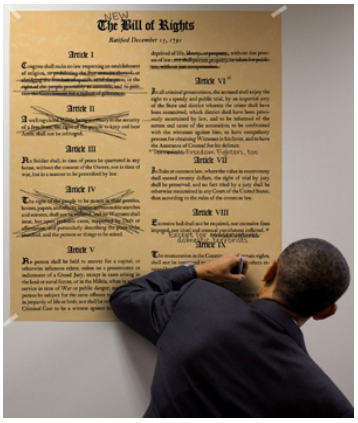
JUDICIAL REVIEW V JUDICIAL ACTIVISM

> "No legislative act ... contrary to the Constitution, can be valid." --Alexander Hamilton in Federalist No. 78 (1787)



Last week, seeing that his signature legislative achievement was in jeopardy, Barack Hussein Obama fired a shot across the bow of the Supreme Court as it considered the constitutionality of his so-called "Patient Protection and Affordable Care Act" (a.k.a., ObamaCare). Obama warned the court against "judicial activism."

"I am confident," proclaimed Obama, "that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. I just remind conservative commentators that for years what we have heard the biggest problem on the bench was judicial activism or a lack of judicial restraint. That an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example and I am pretty confident that this Court will recognize that and not take that step. ... [T]hat's not just my opinion, that's the opinion of a whole lot of constitutional law professors and academics and judges and lawyers who have examined this law."

Actually, as Obama knows well, the Supreme Court's consideration of ObamaCare is *not* an example of judicial activism as Obama erroneously claims, unless the Court actually upheld the institution of socialized medicine as constitutionally compliant.

In fact, SCOTUS is exercising appropriate judicial review as outlined in Article III of our Constitution, and established as precedent in 1803 with the Court's Marbury v. Madison decision under Chief Justice John Marshall. In that fundamental case, Marshall wrote, "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. ... [T]he framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."

Marbury v. Madison is often derided as the beginning of the end of Liberty. However, it certainly was consistent with our Framers' intent, as Alexander Hamilton wrote in Federalist No. 78: "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

The unfortunate consequence of the Marbury precedent is that it rendered the Constitution vulnerable to broad extra-constitutional interpretation, should the courts ever become highly politicized -- as

indeed they did in the 20th century, from FDR forward.

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Judicial review was and remains a foundational component of republican federalism and was instituted to preserve Liberty. However, as Thomas Jefferson feared when warning the judiciary could become the "despotic branch," the federal court's checks and balances have been adulterated by judicial activists who, in the words of the venerable Senator Sam Ervin, "interpret the Constitution to mean what it would have said if [they], instead of the Founding Fathers, had written it."

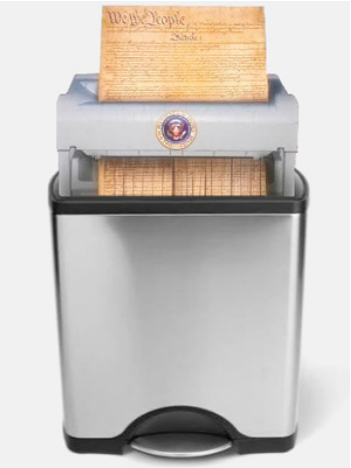
Thus, now, as Jefferson warned, "The Constitution [will be] a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please."

Setting aside Obama's fallacious assertion that ObamaCare "was passed by a strong majority of a democratically elected Congress" (a 219-212 House vote with 34 Democrats defecting does not constitute a "strong majority"), his condemnation of "judicial activism" is the height of hypocrisy, given that judicial diktat is the primary tool the Left uses to amend our Constitution to comport with their political agenda. However, it should be noted that judicial activism can take the form of both judicial intervention *or judicial inaction* -- turning a blind eye to the violation of our Constitution.

Notably, in contrast to Obama's feigned concern for judicial activism in the challenge to ObamaCare, another egregious example of his hypocritical prevarication would be his administration's failure to defend against legal challenges to the Defense of Marriage Act, which passed in 1996 under Bill Clinton's tenure. The margin then was 342 to 67 in the House and 85 to 14 in the Senate -- which actually *is* a "strong majority of a democratically elected Congress."

Of course, congressional margins of support for a piece of legislation should have no bearing on proper judicial review and ruling on such legislation.

Obama's warning in regard to the High Court's review of ObamaCare handed Republicans an outstanding opportunity to score a touchdown with a national discourse on the subject of appropriate judicial review v judicial activism. Unfortunately, Republicans fumbled the ball, perhaps because too many old-guard Beltway-types have been drinking Potomac water for so long that they can't readily distinguish the difference between the proper constitutional role of the Supreme Court and judicial activism -- or worse, they can distinguish the difference, but choose not to because they support judicial activism when it advances their political agenda.



Constitutional scholar Mark Levin draws the distinction between constitutional judicial review v judicial activism as follows: "Originalists believe that the powers enumerated specifically in the Constitution are the only powers of the federal government, unless the Constitution is formally amended. Originalists generally interpret provisions of the Constitution (and, when applicable, statutes) narrowly. In other words, these judges attempt to look at the plain meaning of the law. They believe in a clearly delineated separation of powers. ... A judicial activist, on the other hand, construes the Constitution broadly and rejects some of its provisions outright (or gives them superficial acknowledgment) if they interfere with the desired outcome. In essence, activist judges make, rather than interpret, the law."

Levin concludes, "When the judiciary utilizes outcome-determinative reasoning, rather than adhering to the Constitution, the result can be

catastrophic. ... The extreme left has scored few victories at the ballot box. They must rely on the tyranny of an activist judiciary to advance their policy agenda."

I would argue that the result of judicial activism is, inevitably, catastrophic. Tyranny is the certain consequence of judicial activism (rule of men), and history records no instance of tyranny that was not catastrophic.

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On the authorized role of SCOTUS review, Robert Bork, one of the greatest jurists of the 20th century, wrote, "Judges may look to the text, structure, and history of the Constitution but are prohibited from inventing extra-constitutional rights. Originalism seeks to promote the rule of law by imparting to the Constitution a fixed, continuous, predictable meaning."

The bottom line is this: Our Constitution established a republican form of government predicated upon Rule of Law. Endeavoring to undermine our authentic Constitution, Leftist legislators and judicial activists, in abject violation of their sacred oaths to "support and defend" our Constitution, are replacing it incrementally with their so-called "living constitution." They are slowly digging away at our Republic's foundation of Liberty assured by Rule of Law, and they are backfilling with the tyranny of a dumbocracy.

The most influential Leftist organization in the nation is the Democrat Party, and its activist cadre organizer, MoveOn.org, has issued the following charge: "It's time to reclaim Democracy. It's time for a 99 percenter Spring." Make no mistake -- they are serious.

Fellow Patriots, dire warnings of the rise of socialism have emerged in every election cycle since the 1960s, but this election *is* the most critical in the history of our Republic. If we do not muster enough support to defeat the socialist propaganda of the Left, they will have four more years to fully implement Democratic Socialism, and its eradication will be unlikely, short of another call to arms for the current generation of American Patriots.