

## THE WAGES OF CRYING JUDICIAL RESTRAINT

RANDY E. BARNETT\*

In September 2005, the *Wall Street Journal* asked if I would write a tribute to Chief Justice William Rehnquist, who had just passed away. In thinking about the future of federalism, the Supreme Court and the Constitution, it is fitting to quote from that piece. Here is how it begins: “Today we mourn the death of William Rehnquist. One day soon we may mourn the death of his legacy—the jurisprudence of the Rehnquist Court.”<sup>1</sup> And here is part of how it ends:

As the new chief justice (assuming he is confirmed), will John Roberts assume the role of his mentor William Rehnquist—for whom he clerked—and lead the Roberts Court to enforce the Constitution’s original plan of limited federal power? . . . A judicial withdrawal from enforcing the original limits on the powers of Congress would undo the New Federalist legacy of William Rehnquist.<sup>2</sup>

Then there was this comment on President Bush’s choice to fill Justice O’Connor’s seat on the Court (for which then-Judge Alito was eventually selected):

As the president now decides who next to nominate, he would uphold the Constitution by selecting a person with a firm and demonstrated commitment to the Rehnquist Court’s New Federalism legacy. Only such a choice would continue the movement to restore the ‘first principles’ of constitutionally limited government that William Rehnquist

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\* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. Director, Georgetown Center for the Constitution.

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1. Randy E. Barnett, Op-Ed., *William Rehnquist*, WALL ST. J., Sept. 6, 2005, <http://online.wsj.com/article/SB112596560700032247.html>.

2. *Id.*

affirmed so eloquently. One can hardly imagine a sadder end to the tenure of William Rehnquist than that his most prized and important contribution to constitutional law is aborted by a conservative Republican president and a Republican-controlled Senate.<sup>3</sup>

So eight years later, where does the New Federalism stand? After the Affordable Care Act case,<sup>4</sup> there is good news and there is bad news.

First, the good news. Five Justices voted to affirm the proposition that the Constitution creates a government of limited and enumerated powers and that the courts will enforce those limits.<sup>5</sup> To understand why this victory was possible, it is important to understand that there are not just two versions of federalism, pre-New Deal and post-New Deal. There is also a third version.<sup>6</sup> The failure to recognize the third version goes a long way to explain why most of my academic colleagues predicted that the right would have no chance to prevail in our constitutional challenge to the individual insurance mandate.<sup>7</sup>

The first version of federalism is the pre-New Deal version. This version affirms that the Constitution established a national government of limited and enumerated powers, that those powers should be interpreted according to their original meaning, and that much of what the federal government tried to do before the New Deal, and did during the New Deal and after, is unconstitutional.<sup>8</sup> Obviously, something we might call the

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3. *Id.*

4. *Nat'l Fed'n Of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

5. See *Nat'l Fed'n of Indep. Bus.* at 2591–93 (opinion of Roberts, C.J.); *id.* at 2642–43 (joint dissent). I defend this characterization of the decision in Randy E. Barnett, *Who Won the Obamacare Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. (forthcoming).

6. See Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 286 (2008) (exploring the evolution of constitutional federalism from the Founding to the post-New Deal era).

7. See, e.g., *Over 100 Law Professors Agree on Affordable Care Act's Constitutionality*, CTR. FOR AM. PROGRESS, [http://www.americanprogress.org/issues/2011/01/pdf/law\\_professors\\_ACA.pdf](http://www.americanprogress.org/issues/2011/01/pdf/law_professors_ACA.pdf) (last visited Mar. 12, 2012) (noting that legal challenges to the Patient Protection and Affordable Care Act “seek to jettison nearly two centuries of settled constitutional law”). I provide extensive citations to articles by law professors before the decision dismissing the merits of the challenge in Barnett, *supra* note 5.

8. Cf. John F. Manning, *Federalism and Constitutional Generality*, 122 HARV. L. REV. 2003, 2020–21 (2009) (noting that the pre-New Deal Court “sought to identify formal categories separating ‘commerce’ from activities such as manufacturing, to restrict federal regulation to activities having a ‘direct’ effect upon interstate commerce, and

“New Deal vision of federalism” supplanted the pre-New Deal version, but its exact content is not as obvious as some believe.

The post-New Deal vision of federalism has been interpreted by progressives, quite beyond what the Court has actually said, as repudiating the idea that the Constitution enumerates certain limited congressional powers and that these limits are to be enforced by the courts. This progressive vision of the post-New Deal federalism essentially says that Congress has the plenary power to legislate as it will with respect to the national economy.<sup>9</sup> Put another way, the Commerce and Necessary and Proper Clauses combine to create a “National Problems Power” vested in Congress.

Because most law professors held this vision of the New Deal, it came as quite a shock to them when the Rehnquist Court established the New Federalism.<sup>10</sup> The New Federalism established the proposition that there were limits that were compelled by what Chief Justice Rehnquist referred to as “first principles” of constitutional government.<sup>11</sup> That these limits would be enforced by the Court<sup>12</sup> seemingly rejected and repudiated the progressive vision of the post-New Deal constitutionalism that, up to that point, had seemed orthodoxy.

But did this New Federalism of the Rehnquist Court go all the way back to the pre-New Deal vision of federalism under

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to limit the [Commerce Clause] to its apparent purpose of authorizing regulation of interstate commerce as such (as opposed to regulation of such commerce to achieve desirable social ends in intrastate matters” (footnotes omitted)).

9. See, e.g., Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477, 478 (2001) (noting that the post-New Deal pre-Rehnquist Court had, with little exception, “carefully refrained from giving judicial teeth to the idea that the national government was one of enumerated powers”); cf. Manning, *supra* note 8, at 2022 (noting that the New Deal Court “made clear not only that intrastate activity fell within the Commerce Clause if it affected interstate commerce, but also that almost any activity, however marginal to the national economy, could have the requisite effect” on interstate commerce).

10. Cf. Manning, *supra* note 8, at 2020 (describing the New Federalism as an effort by the Court “to reassert constraints on Congress’s Article I powers without restoring the full array of limitations that it had applied prior to [the Court’s] 1937 acquiescence in the New Deal’s expansion of federal power”).

11. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) (Rehnquist, C.J.) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.” (citing U.S. CONST. art. I, § 8, cl. 3)).

12. See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000) (holding that the Commerce Clause does not empower Congress to create a civil remedy for victims of gender-motivated violence); *Lopez*, 514 U.S. at 559–61 (holding that the Commerce Clause does not empower Congress to ban the possession of handguns in school zones).

which the original meaning of congressional powers listed in Article I, Section 8 was enforced? Did it even hope to do so? The thought that the New Federalism represented a return to the pre-New Deal vision worried much of the academy.<sup>13</sup> In 2005, when *Gonzalez v. Raich*<sup>14</sup> was decided, however, most academics breathed a sigh of relief. “Aha!” they thought. “The Rehnquist Court is no longer even going to try enforcing the original limits of the Constitution. We are back to where we started: the progressive understanding of the New Deal, according to which Congress can do whatever it wants as long as it has something to do with the national economy.”<sup>15</sup>

This view, though, was an inaccurate interpretation of what the *Raich* case did and what the Rehnquist Court established. The New Federalism of the Rehnquist Court was a genuinely *new* federalism. It was not a return to the pre-New Deal version of federalism. Instead, it was an alternative vision of post-New Deal constitutionalism—an alternative to the progressive vision.

In place of the progressive vision of “anything goes,” the New Federalism might be summarized as “this far and no further,”<sup>16</sup> provided that this principle is not taken literally to mean that Congress can never exercise any new power. Rather, this vision of the New Deal stipulates that everything that the New Deal and Warren Courts authorized Congress to do remains constitutional. The Court has accepted that.<sup>17</sup> However, if Congress wants to go beyond what it has done before, if it wants to exercise a new and unprecedented power, then Congress bears a

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13. See, e.g., Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927, 927 (2000) (speculating that the Rehnquist Court viewed itself as being “in a position to restore the . . . relation between the nation and the states” to the “vision of federalism embodied in the original Constitution”).

14. 545 U.S. 1, 15, 22 (2005) (holding that the Commerce Clause and Necessary and Proper Clause empower Congress to criminalize the cultivation and possession of marijuana for medical purposes, despite the existence of a contrary state law).

15. See, e.g., Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 719 (2006) (concluding that “*Raich* turns *Lopez*'s substantive limitations on what activities Congress can constitutionally regulate into procedural limits that Congress will generally be able to easily overcome”); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932 (2005) (“We are unlikely to see a lower federal court, after *Raich*, strike down an act of Congress on Commerce Clause grounds . . .”).

16. Cf. *Morrison*, 529 U.S. at 613 (Rehnquist, C.J.) (“[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature.”) (emphasis added).

17. See *Morrison*, 529 U.S. at 613–18; *Lopez*, 514 U.S. at 556–57 (reaffirming the continuing validity of landmark New Deal Commerce Clause cases).

heavy burden to explain why such a new power is justified and why the principles justifying its creation do not lead to the conclusion that Congress has plenary power over the national economy,<sup>18</sup> a proposition that the Rehnquist Court rejected.<sup>19</sup> The “this far and no further” approach to federalism is unfortunate—I prefer the more originalist pre-New Deal approach—but it surely beats the progressive vision of “anything goes.”

In sum there are three precepts of the Rehnquist Court’s New Federalism vision of federal power after the New Deal. First, the powers already approved by the Court are taken to be settled. Second, any new power must be justified. Third, any purported justification must not lead to the progressive vision of an unlimited and plenary congressional power, but must somehow preserve the original vision of Article I, Section 8 as establishing a national government of limited and enumerated powers.

The Affordable Care Act challenges posed the following question: Was the Roberts Court still prepared to hew to the “this far and no further” vision of post-New Deal constitutionalism? Or had a majority finally accepted the law professor’s “anything goes” interpretation of the New Deal that gave Congress a plenary and unlimited power over the national economy? To the shock and dismay of many law professors, the litigation revealed that the Rehnquist Court’s vision of the New Federalism is still alive, and in fact pretty well. We learned that there are still five votes for the proposition that Congress’s commerce power is limited, that the Necessary and Proper Clause is not a *carte blanche* to get around the limits of the Commerce Clause, and that the courts are in a position to draw a line and say, “this far and no further.”<sup>20</sup>

Because the individual insurance mandate was a literally unprecedented claim of congressional power, the government bore a genuine burden to justify this claim of power by presenting a rationale that was not going to lead to vesting an unlimited amount of power in Congress.<sup>21</sup> Because it failed to meet that burden, the government lost on this particular issue presented by the case. This was a huge victory. After *National*

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18. See *Lopez*, 514 U.S. at 562–64, 567–68.

19. See *id.* at 567–68.

20. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–93 (2012) (opinion of Roberts, C.J.); *id.* at 2642–43 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

21. *Id.* at 2586 (opinion of Roberts, C.J.); *id.* at 2647–48 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

*Federation of Independent Business*, law professors can no longer assert that current doctrine comports with the “anything goes” approach to the Commerce and Necessary and Proper Clauses, as they had prior to the lawsuit.

But, while the really good news was the reaffirmation and extension of the New Federalism, the really bad news was the outcome of the case upholding most of Obamacare. Although five Justices were able to identify a line beyond which Congress may not go, and to find that a statute mandating that individuals enter into a contractual relationship with a private company crossed that line, the Court largely upheld the Affordable Care Act.<sup>22</sup>

To reach this result, the Chief Justice adopted what he called a “saving construction.” Instead of invalidating the statute as it had been enacted, he decided to rewrite the Affordable Care Act’s text and to eliminate the mandatory “requirement” part of Section 5000A, leaving only the “penalty,” which he then recharacterized as a tax because it was so modest as to lack a punitive character. He then upheld this substantially rewritten provision as constitutional.<sup>23</sup>

Why did this happen and what does this mean going forward? To answer these questions, we must distinguish between “judicial conservatism” and the position that might be called “constitutional conservatism.” Simply put, judicial conservatism is the doctrine of judicial restraint. It is the idea that judges should defer to the popularly elected branches of government in deciding on the scope of governmental powers. Professor James Bradley Thayer advanced perhaps the strongest formulation of judicial deference, contending that a statute should be invalidated only when its unconstitutionality is “so clear that it is not open to rational question.”<sup>24</sup> In *National Federation of Independent Business*, Chief Justice Roberts observed that “[p]roper respect for a coordinate branch of the government’ requires that [the Court] strike down an Act of Congress only if ‘the lack of constitutional authority to pass [the] act in

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22. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

23. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2594–98 (opinion of Roberts, C.J.); see also Barnett, *supra* note 5 (explaining in greater detail the way in which Chief Justice Roberts “saved” the statute by revising it).

24. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

question is clearly demonstrated.”<sup>25</sup> Judicial conservatism, which advocates judicial restraint, has been favored by many in the Federalist Society, and by other conservatives, for as long as there has been a Federalist Society.

The constitutional conservative alternative—which fortunately enjoys an increasing popular valence these days—is that the Constitution limits all three branches of the federal government, and that it is the duty of the judiciary to enforce those limits against the other two branches—a duty from which it should not shrink.<sup>26</sup> In contrast with judicial conservatism’s preoccupation with “judicial restraint,” constitutional conservatism endorses “judicial engagement.”<sup>27</sup>

So what did we learn from this particular lawsuit? First, we learned five conservative Justices are not enough. If you only have five votes, there is a very good likelihood that, if the pressure is turned up sufficiently high, someone is going to break. We had to run the table in this case. We had to get a unanimous vote of the only five votes that were willing to entertain the principle that there are limits on federal power and that Congress had exceeded these limits in this case. We had to get a unanimous vote of the five Justices who were actually listening to this part of the argument, and we failed to get a unanimous vote. So we learned that five votes are not enough.

But there is a second lesson for some members of the Federalist Society to consider carefully. Should you not reconsider your rhetorical and substantive commitment to judicial restraint? After all, did not judicial restraint provide one Justice with an excuse for failing to enforce the line that even he acknowledged existed? In *National Federation of Independent Business*, four Justices adhered to their duty to uphold the enumerated limits imposed by the Constitution on the Congress, at least as interpreted through this New Federalism vi-

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25. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2579 (opinion of Roberts, C.J.) (third alteration in original) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)).

26. See, e.g., *Hettinga v. United States*, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J., concurring) (“The judiciary has worried incessantly about the ‘countermajoritarian difficulty’ when interpreting the Constitution. But the better view may be that the Constitution *created* the countermajoritarian difficulty in order to thwart more potent threats to the Republic . . .”).

27. See Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845 (2012). See generally *Symposium on Judicial Engagement*, 19 GEO. MASON L. REV. 845–1070 (2012).

sion of “this far and no further.”<sup>28</sup> Because the Chief Justice was not prepared to do that, however, he looked for an out.<sup>29</sup>

The philosophy of judicial conservatism with its doctrine of judicial restraint gave him the out he sought, a cloak that allowed him to “save” the statute in the name of deferring to the popularly elected Congress.<sup>30</sup> That is the irony, of course. Because of his vote, the Court ended up deferring to a Congress and an enactment that was so unpopular that the House of Representatives switched parties in no small measure because of it.<sup>31</sup>

Going forward, consider whether “judicial restraint” is really the judicial philosophy that the Federalist Society wants to advocate. Perhaps instead we want Justices who not only profess a belief in the principles of federalism and limited and enumerated powers, but also have the character and the fortitude to enforce these principles in the face of withering public pressure by the media and intelligentsia.<sup>32</sup>

In *National Federation of Independent Business*, we saw what it looks like when four Justices will do just that. But, unfortunately, we lacked the fifth vote. In the future, Congress and the Executive must be prudent in who they favor to fill these judicial roles. We need “constitutional conservative” judges who understand that their proper role is to stand with the people, not with Congress, by enforcing the constraints contained in the law that was enacted by the people to limit the powers of those

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28. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2642–43 (joint dissent).

29. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012), [http://www.cbsnews.com/8301-3460\\_16257464549/roberts-switchedviews-to-uphold-health-care-law/](http://www.cbsnews.com/8301-3460_16257464549/roberts-switchedviews-to-uphold-health-care-law/).

30. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593–94 (opinion of Roberts, C.J.) (construing the individual mandate as imposing a tax after invoking the canon of constitutional avoidance and giving the Patient Protection and Affordable Care Act “the full measure of deference owed to federal statutes”).

31. In the month that the Court decided *Nat'l Fed'n of Indep. Bus.*, a Gallup poll pegged Congress's approval rating at 17%. See Frank Newport, *Congress Approval at 17% in June*, GALLUP, June 11, 2012, <http://www.gallup.com/poll/155144/Congress-Approval-June.aspx>. One week after the Court upheld the Patient Protection and Affordable Care Act, a Gallup poll showed that 46% of Americans believed that the Act would hurt the economy, while only 37% thought the Act would help it. See Frank Newport, *Americans See More Economic Harm Than Good in Health Law*, GALLUP, July 5, 2012, <http://www.gallup.com/poll/155513/Americans-Economic-Harm-Good-Health-Law.aspx>.

32. See Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. FORUM 1 (2012) (describing the vociferous campaign waged against the conservative justices in general, and Chief Justice Roberts in particular, after the case was submitted).



who govern us. We need judges with the judicial character to withstand the opprobrium of the Harvard Law School faculty, the editorial board of the *New York Times*, and even of Jeffrey Rosen. Otherwise, the New Federalism legacy of William Rehnquist that I described upon his death will in fact expire. But not yet. Not yet. In *National Federation of Independent Business v. Sebelius*, we have moved the ball far forward from where it was upon his demise,<sup>33</sup> though we still have a long way to go.

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33. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586–87 (opinion of Roberts, C.J.) (observing that “[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated” and that the Act’s individual mandate “does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce . . . on the ground that their failure to do so affects interstate commerce”); see also *id.* at 2648 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (noting that “forgo[ing] participation in an interstate market is not itself commercial activity . . . within Congress’ power to regulate” under the Commerce Clause); see also Barnett, *supra* note 5 (explaining how the doctrine established in *NFIB* moved constitutional law in a positive direction).