

RETHINKING LEGAL CONSERVATISM

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I appreciate so much the invitation to contribute to this debate, and before I gently chide my colleagues for what they have been doing for the last few years, I want to offer some words of praise. First, as to Professor Randy Barnett, who was described as the “intellectual godfather” of the health care challenge,¹ he is also the person right now who is making law professors relevant again to the real world. It is a wonderful example that he has set for the legal academy. Second, let me say a word about my dear friend Paul Clement, who was described by Judge Sykes at the outset of this panel as “one of the finest Supreme Court advocates.” I actually think he is *the* finest Supreme Court advocate practicing today. For anyone who did not hear those three days of the health care argument and listen to him, I have not heard a more marvelous set of arguments in my life, and it was quite a spectacular thing to see.

The timing of this convention is auspicious. I suspect that I am much happier than most members of the Federalist Society at this particular moment, but I am not here to gloat.² I am really here to say that members of the Federalist Society should be happy, particularly if you take seriously the notion that the

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1. See, e.g., Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 19, 2010, <http://www.nytimes.com/2010/12/20/US/politics/20states.html>; Josh Blackman, *Barnett on the New Deal Settlement, the New Federalism, and the Constitutional Gestalt after NFIB*, JOSH BLACKMAN’S BLOG, (Feb. 21, 2013), <http://joshblackman.com/blog/2013/02/21/barnett-on-the-new-deal-settlement-the-new-federalism-and-the-constitutional-gestalt-after-nfib/>.

2. The remarks took place on Thursday, November 15, 2012. President Obama had won his campaign for reelection the previous Tuesday, November 6, 2012.

Federalist Society stands for taking the law back and returning government to the people. From that vantage point, I suggest that the 2012 election will serve those principles well. The reason is not the trite notion that “Obama is better,” but goes back to what Professor Barnett noted about the two essential strands in the Federalist Society.³ One is the strand that he called “judicial conservatism,” the tradition of judicial restraint. The other, which he embraces, he labels “constitutional conservatism” — the idea that the third branch of government must robustly enforce constitutional principles, apart from any tradition of deference to the elected branches.⁴

When I was in law school, it seemed that the Federalist Society had won the argument by standing for the first principle, the tradition of judicial restraint. That principle deeply influenced my generation of lawyers: Judges are unelected, and if there is doubt as to whether a law is unconstitutional, those judges should defer to political processes. I believed that was what the Federalist Society stood for. It was a deeply held and powerful belief, and it influenced my entire generation of law students and what we wound up doing afterwards.

I see today a total breakdown in that basic philosophy, and it is visible even in Professor Barnett’s eloquent work. In his books on the Ninth Amendment,⁵ which are marvelous (and marvelously wrong), or in his celebration of the Supreme Court’s refusal to accept the constitutionality of the Affordable Care Act on Commerce Clause grounds—even though that Act regulated seventeen percent of the gross domestic product—one begins to wonder what is left of the tradition of judicial restraint. Indeed, the arguments in Professor Barnett’s book are not much different from those sometimes advocated by the last Carmack Waterhouse Professor at Georgetown, Mark Tushnet. There is a deep similarity in the structure of the argument that the constitutional conservatives and many traditional liberals have been making about the role of the judiciary in policing state and federal boundaries.

3. See Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL’Y 925, 930–31 (2013).

4. *Id.* at 930.

5. RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* vol. 1 (Randy E. Barnett ed., 1991); RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT*, vol. 2 (Randy E. Barnett ed., 1993).

There is a sense that everyone has lost their bearings a little bit. Even the Chief Justice's opinion in *National Federation of Independent Business v. Sebelius* suffers from these problems. Its first pages begin with the point that Professor Barnett discusses: the idea that there is no precedent for the health care legislation and it is therefore presumptively unconstitutional.⁶ Call this doctrine the antinovelty canon. The Chief Justice says, "Sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress' action."⁷ Neither the majority opinion nor the United States has located any historical analogs for this novel structure. That is step one (and it borrowed heavily from Chief Justice Roberts's very recent opinion for the Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*). Step two of the opinion states, in effect, "Do not worry about the constitutional problem because I can rewrite the statute in a way that makes it constitutional."⁸ Chief Justice Roberts thus used a saving construction, which itself borrowed heavily from his very recent opinion for the Court in *Northwest Austin Municipal Utility District Number One v. Holder*,⁹ where the Court rewrote a statute—in that case, the Voting Rights Act—to make it constitutional.

The antinovelty canon and rewriting power, however, are at war with one another. The former posits that novel statutes are constitutionally disfavored; the latter ensures that the Court can fashion a statute so novel that it has not even once been enacted. They both suffer from their own flaws. The antinovelty canon, which holds that something is presumptively unconstitutional simply because it has not been done before, is not anchored in the text, structure, or history of the Constitution. It sounds very much like something called a "penumbra" that other Justices alluded to in the 1960s.¹⁰ What is more, the antinovelty canon is contrary to perhaps the most important

6. Compare *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586–91 (2012), with Barnett, *supra* note 2, at 928–29.

7. *Nat'l Fed. of Indep. Bus.*, 132 S. Ct. at 2586 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

8. See, e.g., *id.* at 2594–2600.

9. See *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 567 U.S. 193 (2009).

10. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

and foundational Supreme Court opinion ever, *McCulloch v. Maryland*.¹¹

The Chief Justice's second step was to rewrite the statute to save it from constitutional difficulty, which is a move that in general does not, and should not, insulate it from criticism on grounds of judicial activism. After all, this step requires the Court to author a statute that has literally never been enacted before. This rewriting is similar to what happened with the Voting Rights Act and its bailout provision. Nobody believed that the Act's bailout provision meant what the Court said it did, but that is the interpretation that the Court ultimately upheld.¹² A similar type of outcome came in the Affordable Care Act case, and the result of it is that we now have an opinion blessing a statute that is so unprecedented that literally nobody has ever enacted it in American history.¹³ This approach strikes me as the wrong one to take.

The debate about judicial activism has resonated with the same tired mantras for years. Essentially, judicial activism appears to be nothing more than a charge lobbed at a decision that a certain group of people do not like. The response to that charge is equally pedestrian: "Oh, that's not being activist because that was clearly unconstitutional, and the Court is simply returning to the tradition of constitutional restraint." That response is what the left said for forty years when they defended all sorts of decisions by the Warren Court striking down statutes. It is now what conservatives are saying when the current Supreme Court strikes down legislation that conservatives disfavor. Activism is the charge levied at the last judicial decision that one did not like. It is time to end that debate and return to a more precise definition of the perils of judicial activism.

There is a path forward. It is a solution that has been around since 1893. It is James Bradley Thayer's solution: If something is not clearly unconstitutional, courts should defer to the political branches.¹⁴ Professor Barnett and I can disagree about the Affordable Care Act, or any number of other pieces of legisla-

11. 17 U.S. (4 Wheat.) 316, 415 (1819) (asserting that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs").

12. See *Nw. Austin Mun. Utility Dist. No. One*, 567 U.S. at 206–11.

13. See *Nat'l Fed. of Indep. Bus.*, 132 S. Ct. at 2595–2600.

14. JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (1893).

tion, but it seems to me that it is important to return to that idea of judicial restraint as an impulse, a disposition, a way of thinking about the role of a judge in our tripartite system of government. That notion holds that because the judiciary is the branch of government that is unelected, we should be suspicious of it and we should try to ensure that, unless something is clearly unconstitutional, the courts should not use judicial review as a license to strike down legislation with which they happen to disagree.

In that sense, the 2012 election really is good news for the Federalist Society. We are currently behind the veil of ignorance. We do not know what the retirements will be on the Supreme Court. For the last eight years, the political left, when it comes to judicial discussions, has sounded very much like the preconfirmation Judge Bork in preaching the gospel of judicial restraint, and conservatives have been encouraging interpretations of the Constitution that sound much more like those favored by Chief Justice Warren.

This is the time for us to think through whether an entity as august as the Federalist Society should embrace Professor Barnett's invitation to move toward a constitutional conservatism. It strikes me as dangerous in terms of the underlying issues, but more importantly, as a step away from the fundamental insight that the Federalist Society had, which was that judges should be restrained because they lack the democratic pedigree of the political branches. There should be an impulse of judicial restraint, and, unless something is clearly unconstitutional, courts should not be mucking around with legislation and declaring it unconstitutional, no matter how novel it may be.