2012

Chief Justice Roberts and the Changing Conservative Legal Movement

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The Witherspoon Institute
July 10, 2012
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The clash between Chief Justice Roberts' opinion and that of the joint dissenters is best seen as a clash between two visions of judicial restraint, and two eras of the conservative legal movement.

At the sprightly age of 57 and less than seven years into his term as chief justice, John Roberts looks like a man whom time has left behind. The reaction among legal conservatives to the Roberts opinion in *National Federation of Independent Businesses v. Sebelius* (the healthcare case) has been brutal. Many have accused the chief justice of exchanging the black robes of the jurist for the trappings of the politician. The chief justice is said to have "blinked" and "failed [his] most basic responsibility." Noted originalist scholar Mike Rappaport strongly implied that Roberts is "both a knave and a fool." The cataloguing could go on.

As much as these reactions reveal about differing views on a hotly contested question of constitutional law, they are at least as interesting because of what they say about the state of the conservative legal movement. Today's legal conservatives view the chief justice's opinion as judicial abdication, but it was not too long ago that the philosophy reflected in Roberts' opinion would have been conservative orthodoxy. The truth is that the conservative legal movement's conception of judicial restraint has changed, departing from the view it held when it emerged from the constitutional wilderness to which it had been banished during the Warren Court. *NFIB v. Sebelius* displays a conservative legal movement in transition—and one that is increasingly leaving the judicial restraint in Roberts' opinion behind.

Roberts lays down a theory of judicial restraint early in his opinion. Quoting his nineteenth-century brethren, the chief justice states: "'Proper respect for a co-ordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'"

Justice John Marshall Harlan eloquently voiced this view of judicial restraint in his dissent in *Lochner v. New York* (1905). Harlan argued that a statute must be "plainly and palpably unauthorized by law" to be held unconstitutional. One of the Progressive Movement's titanic figures—Felix Frankfurter—would adopt this as his mantra and carry it onto the Supreme Court. There he would watch his fellow New Deal justices turn against the principle preached by anti-Lochner jurists for a generation. By the time Frankfurter retired in 1962, the Warren Court's revolution in constitutional law was well under way.

It was precisely this revolution that inspired a counterrevolution: the conservative legal movement. Robert Bork's 1971 Indiana Law Journal article calling for a jurisprudence of "neutral principles" and a return to the intentions of the Founders raised the banner around which modern originalism was formed. The standard was taken up a few years later by then-Justice Rehnquist in his

lecture "The Notion of a Living Constitution," and soon the prolific Raoul Berger had entered the fray with his book Government by Judiciary. The movement achieved major success with dizzying speed when Ronald Reagan was elected president and his attorney general, Edwin Meese, oversaw fundamental change in the federal judiciary.

Of course, originalism was not—and is not—the entirety of the conservative legal movement. There has always been a vocal libertarian element, especially with the rise of the law and economics movement. Similarly, there has been a strain of legal conservatism that rejects originalism on the one hand and libertarian ideology on the other. But when it comes to constitutional interpretation, originalism has been the default theory of legal conservatism, and it is appropriate to look at how originalism developed for insight into the broader movement.

As Princeton professor Keith Whittington has explained, the conservative legal movement of the early years was "reactive" and "motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger courts." As such, "the primary commitment within this critical posture was to judicial restraint."

This was the restraint of Harlan's *Lochner* dissent resurrected, with its emphasis on deference to legislative majorities. Bork made the connection between the Warren Court's decision in *Griswold v. Connecticut* and the *Lochner* Court's infamous opinion quite explicit, as did Rehnquist. The call for a judiciary that was deferential to legislative enactments was a theme of this period.

All that soon began to change. Scholars began to place less emphasis on the judicial restraint of Bork and Rehnquist. It was not so much that judicial restraint lost pride-of-place in originalist theory as much as the conception of restraint transformed. Whittington captured this new way of thinking about restraint in his book Constitutional Interpretation: "An originalist Court may well find itself quite active in striking down legislation at odds with the clear requirements of the inherited text. Originalism requires deference only to the Constitution and to the limits of human knowledge, not to contemporary politicians."

From this perspective, judicial restraint entails adherence to the original meaning: no more but also no less. Stare decisis might have a role to play, depending on one's theory of originalism, but generally if the originalist judge thinks a statute is unconstitutional, he has an obligation to strike it down. A judge that adopts the attitude of Justice Harlan—waiting until a law is "plainly and palpably" unconstitutional—is too likely to subordinate the Constitution to the errant judgment of today's self-interested legislators.

That is not to say that this new view of judicial restraint amounted to judicial "activism" or disregarded the respect due to the political branches. The difference was one of emphasis: how far should a judge go to uphold a statute at the risk of deforming the Constitution? The new view thought Justice Harlan went too far. The old judicial restraint was dismissed, in the words of Whittington, as "judicial passivism."

Judicial restraint used to mean that a judge should bend over backwards to avoid striking down a law, and this view was once widely held within the conservative legal community. But this idea has long since

faded from the scene, and judicial restraint is less likely to be thought of by today's legal conservatives as coinciding with judicial nonintervention. How many statutes the Court strikes down is simply beside the point for today's legal conservative; the question is why the Court struck down the statutes that it did.

And so we arrive at *NFIB v. Sebelius*. The chief justice's opinion displays a clear embrace of the old judicial restraint. He announces that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Although the joint dissenters would likely agree with this principle, the key word is "reasonable." The Justice Harlan conception of judicial restraint leads Roberts to stretch the language of the statute far beyond what the dissenters believe is reasonable—or indeed constitutional.

Roberts first analyzes the individual mandate under the commerce and necessary and proper clauses of the Constitution and concludes that it cannot be upheld on those grounds. Writing for the Court, the chief justice invokes the canon of constitutional avoidance quoted above, requiring the justices to adopt "every reasonable construction" to avoid striking down the statute. Roberts proceeds to hold that the health care law does not impose a legal mandate to purchase health insurance. Rather, he reinterprets the statute as levying a tax on those who fail to acquire insurance, which he holds was a constitutional exercise of Congress's taxation power.

The chief justice's opinion is full of acknowledgments that his interpretation is a creative one. He sets the bar low for constitutionality by saying that "the question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one." He concedes that "the statute reads more naturally as a command to buy insurance than as a tax," that it "states that individuals 'shall' maintain health insurance," and that "the most straightforward reading of the mandate is that it commands individuals to purchase insurance." Yet, despite these interpretive data—and a good deal more, as the dissenters point out—the chief justice concludes that the insurance requirement can be justified as a tax.

The reason Roberts does so is that his view of judicial restraint in *NFIB v. Sebelius* requires him to go to the limits of plausibility to save the statute. The dissenters, who express a different view of restraint, refuse to go that far.

The old conception of judicial restraint is evident in the chief justice's theme that the Court is a legal—rather than political—body. At the beginning of his opinion, he is at pains to state: "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions." Then, at the conclusion, almost identical language: "But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people." Like the legal conservatives of the 1970s, the Roberts opinion emphasizes the modesty of the judicial role and the importance of deferring to legislative majorities.

Just as the old theory of judicial restraint came under intellectual attack, so too does Roberts' opinion for the Court—and for the same reasons. The problem with the old theory of judicial restraint, so the critique

goes, is that in straining to sustain the will of today's fleeting majority, a judge may ignore a fairly clear constitutional command from the original popular sovereign: the people who enacted the Constitution. The more recent idea of restraint sees the old way as a straightforward abdication of a judge's duty to safeguard the limits of political power. Where a law is unconstitutional, it must be declared so, and the judge who contorts a law to save it is viewed as engaging in the very activism he disclaims.

This contemporary view of judicial restraint is on full display in the joint dissent. The four justices lambast the Roberts opinion: "The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching." In a fascinating peroration, the dissenters appeal to the same values underlying the old version of judicial restraint, but they see it better expressed in their own willingness to jettison the healthcare law entirely:

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The clash between the chief justice's opinion and that of the joint dissenters is therefore best seen as a clash between two visions of judicial restraint, and two eras of the conservative legal movement.

Of course, Roberts and the joint dissenters have nuanced views on judicial restraint, and *NFIB v. Sebelius* does not define those views. Justice Scalia has long advocated judicial modesty and deference to legislative majorities, as seen in his dissent in *Planned Parenthood v. Casey* (1992), and the chief justice joined the Court's opinion in *Citizens United v. FEC* (2010) in the face of heated political opposition. The point here is simply to identify the tensions within the conservative legal movement evident in the *NFIB* opinions.

The overwhelmingly negative response to the chief justice's analysis shows just how far the movement has distanced itself from the old theory of restraint, embracing instead a view that cares less about how many statutes are struck down than about why they are invalidated. For the chief justice, his opinion is the epitome of judicial modesty. For the dissenters, it is the height of judicial arrogance. Roberts thinks his actions are compelled by respect for the coordinate branches of government; the dissenters see his actions as flouting the Constitution that called that government into being. And at this moment in the history of the conservative legal movement, Roberts stood alone.