2013

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LAST NOVEMBER, THE FEDERALIST SOCIETY gathered in Washington, D.C., to mark its thirtieth anniversary at its annual convention. This was no ordinary assembly. The conservative legal movement came together to celebrate three decades of astonishing success in changing the way judges, lawyers, scholars, and citizens think about the law. But it also met in the aftermath of *National Federation of Independent Business v. Sebelius* and Chief Justice John Roberts's opinion upholding the President's health-care law.

Both before and during the conference, conservative legal scholars were sharply divided about the decision. Some conservatives saw it as a model of judicial restraint and praised the Chief Justice for leaving questions of self-government up to the electorate. Other conservatives saw it as an abdication of the judicial duty to enforce the limits of the federal government's enumerated powers. Still more legal conservatives—especially those of a libertarian bent—thought Roberts had sanctioned the health-care law's unjust violation of individual rights.

The *NFIB* decision exposed divisions in the conservative legal movement that have existed for decades. Legal conservatism has long stood for a modest judicial role that tends to defer to current legislative majorities. But legal conservatism has also stood for originalism, the idea that judges should enforce the original meaning of the Constitution and its amendments. When opposing the fabrication of constitutional rights by judges, judicial restraint and originalism have reinforced one another. As the reaction to Chief Justice Roberts's opinion in *NFIB* demonstrated, however, some originalists think judicial restraint permits the elected branches to do things the founding generation never could have imagined, let alone ratified.

JOEL ALICEA is a law clerk for Judge Diarmuid F. O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit. The views expressed here are wholly his own.

As these tensions have become increasingly apparent in recent years, legal conservatives have evinced significant disagreement over the future of their movement and the place of judicial restraint within it. The disagreement centers on two questions: What is judicial restraint? And should the conservative legal movement affirm it? The answers to these questions must be understood through the prism of originalism, which for better or worse is the default theory of legal conservatism. The principal contenders for control over the movement's future all claim as their foundation the conviction that judges must enforce the original meaning of the Constitution. So does originalism demand judicial restraint, or is originalism undermined by such restraint?

THE ORIGINS OF ORIGINALISM

As a historical matter, it is quite striking that the conservative legal movement is seriously rethinking its dedication to judicial restraint. That principle has been a pillar of legal conservatism since the late judge Robert Bork launched the modern originalist project in a 1971 *Indiana Law Journal* article entitled "Neutral Principles and Some First Amendment Problems." Bork's intellectual inspiration for originalism was the work of his friend and fellow Yale law professor Alexander Bickel, who forcefully advocated judicial restraint. Bickel famously emphasized that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now." He called the problem of unelected judges overturning a democratically enacted law the "counter-majoritarian difficulty."

Bork's analytical framework started from similar premises. The American constitutional system, according to Bork, recognizes that both majorities and minorities can be tyrannical, and it guards against abuses by both. Seduced by its own power, the majority can craft legislation that invades "the areas properly left to individual freedom." A minority, on the other hand, may attempt to thwart the majority's exercise of its rule "where its power is legitimate." By balancing majoritarian and counter-majoritarian interests, the constitutional system is meant to solve this problem, which Bork called the "Madisonian Dilemma." But it always confronts the question of how to define the legitimate bounds of both majority power and minority protections. Bork believed that society had entrusted the courts with the duty of judicial review—and

its attendant power to invalidate legislation—precisely to articulate these boundaries.

According to Bork, the Supreme Court under Chief Justice Earl Warren had articulated illegitimate boundaries in its eagerness to recognize new constitutional rights. Bork argued that the Supreme Court was given its power by the Constitution, and the Constitution owed its legitimacy to the consent of the people. Judges, in order to serve the people, were therefore bound to use the Constitution as their guide in determining when majorities should rule and when their power should be limited. Judicial review in the style of the Warren Court, based as it was on the justices' "own moral views," amounted to "claim[ing] for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat."

Bork's concern was that judicial power—like all power—could be misused. Originalism was his way of solving this problem. He believed that, by rooting judicial review in the original meaning of the Constitution, judges would be applying principles and rules ratified and amended by the people themselves. They would apply "certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution." Bickel's counter-majoritarian difficulty would disappear—or so Bork argued.

Thus, the dawn of the conservative legal movement came after the night of the Warren Court, and given this context it makes sense that originalism and judicial restraint were rhetorically and intellectually intertwined. The movement Bork inspired set a high threshold for the exercise of judicial review, perhaps higher than Bork himself intended. The movement combined Bork's originalism with an aversion to striking down popular enactments: Originalism would guide judges in determining when an act was unconstitutional, but the Court would intervene only where the act's unconstitutionality was beyond question.

In insisting on this level of restraint, the movement took its cue from the 19th-century legal theorist James Bradley Thayer, who argued that judicial review was only appropriate "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." This Thayerian principle was echoed eloquently in Justice John Marshall Harlan's dissent in *Lochner v. New York*, a 1905 case striking down New York's maximum-hour law for bakers. Harlan argued that a statute had to be "plainly and palpably unauthorized" to be held unconstitutional, and

he saw no basis for the Court's willingness to strike down the New York maximum-hour statute. The Supreme Court renounced *Lochner* in 1937 in the case of *West Coast Hotel Co. v. Parrish*, and *Lochner* soon became synonymous with judicially manufactured rights.

Given the conservative legal movement's affinity for Thayerian judicial restraint, it was no coincidence that its early exponents frequently drew an analogy between the decisions in *Lochner* and the 1965 case *Griswold v. Connecticut*, the landmark Warren Court decision recognizing a right of married couples to use contraception. Indeed, Bork's "Neutral Principles" explicitly likened the two cases and said there was "no justification for the Court's methods" in either. For Bork and other early advocates of originalism, decisions like *Griswold* were nothing more than the resurrection of *Lochner*, this time employed for the cause of the sexual revolution rather than economic laissez faire.

THE PEOPLE THEMSELVES

Bork's theory, like those of most of his originalist descendants, grounds judicial review in the will of the sovereign people. Princeton professor Keith Whittington has explained that popular-sovereignty theories like Bork's implicitly distinguish between the people's acting in their sovereign capacity and the people's acting in ordinary politics. This distinction is critical. When the people act in their sovereign capacity by creating or amending a constitution, they engage in a form of lawmaking that is higher than ordinary legislating: The popular sovereign imposes limits on its own power, structuring when, how, and by whom that power can be exercised. In this way, the Constitution guides and restricts day-to-day politics.

When the people act in ordinary politics, on the other hand, they do not do so in their sovereign capacity. Their daily political actions are of a different kind, which is the necessary consequence of having a popularly approved constitution that structures and limits ordinary politics. If the everyday activities of legislating were acts of the sovereign, then each piece of legislation would be equivalent to a constitutional amendment, and the enterprise of constitutionalism would be pointless. Adherence to a constitution vindicates the people's power to act in their sovereign capacity by respecting the restrictions they put in place.

Conversely, ignoring a constitution reduces all lawmaking to ordinary politics and deprives the popular sovereign of the power to

structure political action. Abolishing the people's ability to act as sovereign is dangerous for several reasons. First, by reducing all action to the domain of everyday politics, it renders the structures of governance a matter of convenience, open to change as political winds dictate. It would, to quote Federalist No. 49, "deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability." Such an abdication of the constitutional structure would threaten ordered government and ordered liberty.

Second, it puts the rights and duties recognized by positive law up to a continuous majority vote, raising the specter of majority tyranny. As Alexis de Tocqueville argues in *Democracy in America*, liberty is imperiled when power confronts no obstacle; it does not matter whether that power is a monarch or a majority.

Third, as Whittington points out, when the distinction between sovereign rule and everyday politics collapses, it has the effect of shifting the locus of sovereignty from the people to their government. As the people grow accustomed to seeing their elected representatives exercise sovereign functions on their behalf, they and their representatives soon lose sight of who the sovereign is. When government, rather than the people, becomes sovereign, meaningful restrictions on its power become difficult to theorize, as Blackstone acknowledged when he said of the British system: "True it is, that what the Parliament doth, no authority upon earth can undo."

The Constitution is rooted in the principle that sovereignty justly resides in the people and not the government. The people as sovereign have established the Constitution to set limits on government power, and this necessarily means limiting their own ability to act when they engage in ordinary—as opposed to constitutional—politics. Whenever the judiciary is presented with a dispute involving a conflict between ordinary politics and the sovereign will, the judiciary has the authority and duty to act on the people's behalf, overrule the majority of the moment, and vindicate the limits the sovereign people have imposed on themselves.

This basis for judicial review was the one sketched by Chief Justice John Marshall in *Marbury v. Madison*. But, as Marshall recognized, such a theory makes sense only if the will of the sovereign people as enacted in the Constitution trumps the will of current majorities. If it

does not, there can be no basis for judicial review, and no point to it. As Marshall argued,

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

If judges derive their duty and power of review from the ability of the popular sovereign to set limits on majoritarian action, then it follows that any deviation from those limits must be prevented. To do otherwise would be to make ordinary legislative or executive actions the equivalent of constitutional revisions, to render a written constitution meaningless, and to shift the locus of sovereignty to government.

THE LIMITS OF THAYER

In the decades since Bork wrote his article, Thayerian judicial restraint has fallen out of favor with most originalists. And rightly so: Originalism's grounding in the will of the people puts it in tension with Thayer's approach to judicial restraint.

Thayerian judicial restraint is most salient where one can offer a non-frivolous interpretation of the Constitution to uphold a law, but the judge believes that the interpretation, though not obviously wrong, is nonetheless incorrect. A Thayerian judge, loyal as he is to the principle of not striking down the will of the majority unless its unconstitutionality is "not open to rational question," would uphold the law under these conditions.

But few matters in constitutional law are obvious, and originalists can and do disagree about original meaning. The weight of historical materials might point toward one interpretation, but that does not make another interpretation frivolous. Few challenges could meet the Thayerian criterion, and a great many laws that the Court in its best judgment believes to be unconstitutional would thus be upheld. When this occurs, the Court abandons the duty that authorizes judicial review in the first place: to guard the limits of governmental power when a concrete dispute requires that those limits be enforced.

More fundamentally, the idea of Thayerian judicial restraint implicitly privileges ordinary politics over the sovereign will. Thayer is prepared to countenance violations of the sovereign will (where those violations are not obvious) out of deference to current majorities. In their focus on the counter-majoritarian difficulty, advocates of Thayerian judicial restraint turn away from the will of the sovereign people. The distinction between constitutional and ordinary politics collapses.

Perversely, in its efforts to respect current majorities, the Court may actually assign more power to itself. When the Court takes a highly deferential posture toward popular enactments, it will do all it can to avoid invalidating legislation, even to the point of giving laws implausible interpretations to avoid ruling them unconstitutional. This is the principal criticism leveled against Chief Justice Roberts's opinion in *NFIB* by many legal conservatives. The Chief Justice's adoption of Thayerian judicial restraint led him to interpret language that he conceded most naturally *requires* the purchase of insurance to instead offer consumers the *choice* of purchasing insurance or paying a tax. The joint dissent by Justices Scalia, Kennedy, Thomas, and Alito accused the Chief Justice's opinion of essentially rewriting the statute and creating a tax that Congress had not authorized: "In the name of restraint, it overreaches." Whether the specific criticisms of the Chief Justice are correct or not, the furor over his opinion illustrates the danger of Thayerian judicial restraint: In the justices' eagerness to respect Congress, they might displace it.

Advocates of Thayerian judicial restraint frequently cite the gravity of judicial review as the basis for their caution. They quite rightly point out that the consequences of judicial review are sobering: An unelected group withdraws a question from popular deliberation, determining what the nation must or must not do. The ability to override this judicial decision is limited, even for those who do not believe that the judiciary is the final word on the meaning of the Constitution.

All true. But this focus on the dangers of striking down popular enactments is one-sided. It minimizes the obligation to enforce the sovereign will—and the perils of failing to do so. The judiciary cannot write new limits and rights into the Constitution, but neither can it overlook its obligation to protect the limits and rights that are in the text. Thayerian judicial restraint admirably hesitates before overruling the people's representatives, but hesitation must not become abdication.

If judicial review is ultimately justified by the judiciary's mandate to enforce the boundaries the people have written into the Constitution, then that justification is undermined just as much by the unwillingness to guard those boundaries as it is by the invention of new ones. Advocates of Thayerian judicial restraint are correct when they counsel humility, but, by setting the bar for unconstitutionality as high as they do, they ignore the mission given to them by the people. Humility becomes hubris.

Thayerian judicial restraint is therefore self-defeating in that it undermines the basis for judicial review. If the Court believes a law is unconstitutional, then it must strike the law down, even if the law is not *indisputably* unconstitutional. To do otherwise is to undermine the will of the popular sovereign, and it is that will that authorizes judicial review in the first place. A Thayerian approach to restraint risks aggrandizing power to the judiciary, all while disclaiming robust judicial authority. The conservative legal movement has largely left the extreme judicial restraint of Bork's era behind, and it was right to do so.

Libertarian Activism

The decline of Thayerian judicial restraint has coincided with the rise of aggressive libertarian theories of judicial review, and it is these theories that have forced legal conservatives to decide whether judicial restraint should have a prominent role in their movement's future. Libertarians and conservatives have always had an uneasy relationship within the conservative legal movement, as they have had in the broader conservative political coalition. Libertarians never quite signed on to Thayerian judicial restraint, and until recently most libertarians would probably have considered themselves non-originalists. They would have followed Judge Richard Posner or Professor Richard Epstein in advocating theories that give freer rein to their political philosophies.

The ascendancy of libertarianism within the conservative legal movement can probably be traced to the New Federalism decisions of the Rehnquist Court. In the 1990s, the Supreme Court signaled a willingness to re-examine the limits on federal power that had been significantly loosened during the New Deal. In the 1997 case *Printz v. United States*, for instance, the Court held that the federal government could not commandeer state officials to carry out federal law. Similarly, in 1995's *United States v. Lopez* and 2000's *United States v. Morrison*, the

Court made clear that there were real restrictions on the federal government's power to regulate the economy under the commerce clause.

Both libertarians and conservatives had been calling for this kind of re-evaluation of the so-called New Deal settlement for decades, but the Rehnquist Court's New Federalism decisions were particularly encouraging for the libertarian wing of the conservative legal movement. Libertarians saw the Court's newfound willingness to constrain federal power as an invitation to redefine right-leaning constitutional doctrine along libertarian lines. That kind of project would require the Court to take an especially active role in policing the boundaries of federal power in the economic and regulatory spheres. When Bork wrote "Neutral Principles," he compared *Lochner* with *Griswold* to showcase what he saw as unprincipled exercises of judicial power, and the conservative legal movement largely agreed with him. Now that the Court was back in the business of taking limits on federal power seriously, libertarians began calling for a return to *Lochner*-era jurisprudence.

The most important figure in the rise of libertarian theories of judicial review has been Georgetown professor Randy Barnett. It was Barnett who argued the 2005 case of *Gonzalez v. Raich* before the Supreme Court in an effort to further restrict the scope of Congress's powers. He is also widely acknowledged to have been the intellectual force behind the constitutional challenges to the recent health-care law that culminated in *NFIB v. Sebelius*.

Barnett has developed a theory that purports to weld originalism to aggressive judicial review. He contends that the only basis for loyalty to the Constitution is that it is procedurally just: The procedures it requires are likely to ensure that laws are "*necessary* to protect the rights of others and...*proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed." Because Barnett believes the Constitution sets up procedures that meet these criteria, he thinks we must preserve the procedures by remaining faithful to the text's original meaning.

Barnett is also a pre-eminent scholar of the Ninth Amendment, and he has concluded that the Ninth Amendment and the Fourteenth Amendment's privileges or immunities clause enshrine judicially enforceable unenumerated rights in the Constitution. Herein lies the key concept that aligns Barnett's theory with libertarianism: the so-called presumption of liberty.

To protect the unenumerated rights of the Ninth and Fourteenth Amendments, Barnett would have courts presume that most challenged federal laws are unconstitutional. He writes that the presumption "places the burden on the government to establish the necessity and propriety of any infringement on individual freedom." A law is only proper if it prohibits wrongful action or regulates rightful action, and it is only necessary if "there were no less restrictive alternatives to the liberty-restricting means that were chosen." This second requirement is borrowed from current First and Fourteenth Amendment jurisprudence and is a hallmark of strict scrutiny, a constitutional test that laws rarely pass.

Barnett's theory provides an intellectual framework that many libertarians and conservatives now embrace, and, in the contest for the future of the conservative legal movement, the presumption of unconstitutionality is the greatest competitor to judicial restraint of any variety. There is nothing restrained about Barnett's judiciary. Not only does his theory spurn deference to popular enactments, it presumes most are invalid. Skepticism of legislative majorities replaces skepticism of judicial power. For Barnett, there is no counter-majoritarian difficulty; it is the tendency of majorities to infringe on liberty that is the difficulty.

Barnett offers legal conservatives a tempting bargain: Now that they constitute a significant portion of the federal judiciary, they could give effect to their skepticism of governmental authority using the judicial power — all while claiming fidelity to the Ninth and Fourteenth Amendments. Legal conservatives of Bork's era would have rejected the deal out-of-hand. Today's conservative legal movement must do the same.

Constitutional Judicial Review

The most basic tenet of American constitutionalism holds that no branch of the federal government may act without constitutional authorization. The states may act unless the Constitution forbids it, but the federal government is limited to the powers granted to it by the Constitution. This bedrock principle is made clear by the text of the Tenth Amendment and is perhaps the most celebrated characteristic of our Constitution among libertarians, including Barnett.

The presumption of unconstitutionality violates this core principle. Conservatives and libertarians must not forget that the theory of enumerated powers extends to the judiciary. Like the President or Congress,

the federal courts must trace their actions to a source of positive law and, ultimately, to the Constitution itself. Indeed, the Court has recognized this principle in several landmark cases. In the pivotal 1938 case *Erie Railroad Co. v. Tompkins*, for instance, the justices dramatically restricted the power of federal courts to create federal common law, the kind of judge-developed law that state courts—which are not bound by the federal doctrine of enumerated powers—routinely elaborate. The justices did so, in part, because "no clause in the Constitution purports to confer such a power upon the federal courts." For the same reason, federal courts have an obligation to ensure that they have jurisdiction over a case before hearing it: The federal courts have no power to hear cases beyond what the Constitution and the Congress have authorized.

There is significant evidence that the enactors of the Constitution understood and expected that the judiciary would have the duty to enforce the Constitution through judicial review—along with the attendant power to strike down unconstitutional legislation. But nowhere does the Constitution expressly provide for this power. The judiciary's authority to declare laws unconstitutional is therefore an inferred one.

Although he certainly did not invent judicial review, Chief Justice Marshall's opinion in *Marbury* contains the traditional justification for it: If the Constitution is higher law than ordinary statutes, and the Constitution and a statute conflict, then the judiciary must give effect to the Constitution. But notice that Marshall's rationale permits judicial review only where there is a conflict between constitutional and statutory law. In the absence of such a conflict, there is no basis for invaliding a statute, since the court can resolve the case before it without exercising this form of the judicial power. Justice Scalia, dissenting from the Court's opinion in the 2013 Defense of Marriage Act case, *United States v. Windsor*, made this point incisively: "[Judicial review] is not only not the 'primary role' of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us." Judicial review, then, is a necessary implication of the Court's role in resolving controversies between litigants, but, where a dispute does not bring the Constitution and a statute into conflict, judicial review is unauthorized.

Barnett's presumption eliminates the need to demonstrate a conflict between the Constitution and a statute. By assuming that a statute that restricts freedom in any way is unconstitutional, this theory presumes that

the judiciary has authority to strike that law down. The mere assertion of unconstitutionality is sufficient where the government has not shown "the necessity and propriety of any infringement on individual freedom."

Where does the judiciary derive the power to strike down a law the unconstitutionality of which has not been proven? Perhaps Barnett would point to the Ninth and Fourteenth Amendments, arguing that they require judges to enforce unenumerated rights. But as Barnett concedes, even his interpretation of these amendments does not *require* the adoption of his presumption of unconstitutionality. The presumption is a jurisprudential test he created to implement the Ninth and Fourteenth Amendments, and judges could just as easily choose another test if they agreed with his interpretation of those amendments.

The Constitution does not authorize judges to strike down a law unless they believe the law is in conflict with the Constitution. Barnett's presumption amounts to an unconstitutional power grab by the judiciary, permitting it to do what no other branch of the federal government may do: act without constitutional warrant. The presumption of unconstitutionality certainly keeps the political branches within limits, but it ignores the problem of keeping the judiciary itself within limits. If, as Barnett says, judges are the watchmen of our constitutional boundaries, who is watching the watchmen? Barnett's theory abolishes a foundational limit on judicial power in order to limit majoritarian power. It trades one leviathan for another, less accountable one.

AN ORIGINALISM FOR THE PEOPLE

Where does this leave the conservative legal movement? With Thayerian judicial restraint rejected on the one hand and libertarian judicial aggressiveness rejected on the other, what remains? The answer is the conservative legal movement's familiar anchor: originalism.

The guiding principle of conservative legal thought should be that the judiciary will strike down laws that, in the courts' best judgment, violate the original meaning of the Constitution. Thayerian judicial restraint is thus inappropriate, but so, too, are judicial actions that go beyond what the document's original meaning supports.

Of course, the extent to which this principle restricts judicial review depends on one's theory of originalism. It would be ridiculous, for instance, to say that the Supreme Court can strike down a law only when it can find historical evidence that this kind of law was considered

unconstitutional by those who enacted the constitutional provision at issue. The Court does not need to provide proof, for instance, that the founding generation considered the constitutionality of the thermal imaging of houses without a warrant (to borrow the facts of the 2001 case of *Kyllo v. United States*) in order to rule on such a case. Clearly, the principles embodied in the text of the Fourth Amendment are what matter in a case like *Kyllo*.

Sometimes, however, the language of a text can be consistent with a variety of principles. For example, does the establishment clause of the First Amendment forbid a national church, any interference with state churches, or all government action that supports religion? These are very different principles, and all of them—with varying degrees of plausibility—could be read into the language of the establishment clause. But the relevant question is which principle did *the people* place in the Constitution? For that, judges must resort to historical evidence of how the people understood the text. Only then will the judiciary operate within the confines of the power delegated to it by the popular sovereign.

This principle captures the concept of judicial restraint, properly understood. True restraint acknowledges that judicial authority ends at the limits of original meaning. Real judicial humility recognizes that a judge's primary obligation is to the will of the popular sovereign as manifested in the Constitution's original meaning, and that failing to enforce that will is an act of judicial abdication or, worse, hubris. Judges owe the people their best judgment about the original meaning of the Constitution and its application to particular cases—nothing more and nothing less.

This view of restraint is more consistent with Bork's theory than is Thayerian judicial restraint. If Bork was right that the legitimacy of judicial review depends on the Court's balancing of majority and minority tyranny, then why tip the scale in favor of majority tyranny? Likewise, why side with Barnett and tip the scale in favor of minority tyranny? Why not keep the scale where the Constitution—that is to say, *the people*—set it? If judicial review is justified by the judiciary's role in enforcing the sovereign will of the people, then its authority extends only as far as the sovereign will has commanded. Equally important, however, is the judiciary's responsibility to enforce that will when, in the Court's best judgment, the current majority has violated it.

Recovering a proper understanding of judicial restraint is essential to the future of the conservative legal movement. Legal conservatism stands at a crossroads. Having largely rejected Thayerian judicial restraint, it can choose to abandon its intellectual heritage and embrace the judicial aggression of libertarian theories of judicial review, or it can opt for the path that is more true to the concerns that called it into being. It can champion real judicial restraint.