

## ELECTIONS MATTER

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The invitation to speak at the 2010 Federalist Society National Lawyers Convention was especially meaningful to me as I consider myself to be the last of a dying breed. When pressed, I usually have considered myself a moderate, and I have long feared that there are not many of us left.

As I listened to my fellow panelists at the Convention,<sup>1</sup> I got the feeling that I was correct. I was also struck, frankly, by what I did not hear. Despite the recent 2010 midterm elections in which Republicans had retaken control of the House of Representatives and substantially narrowed the Democratic party's control of the Senate, there was no elation. I expected the attendees to be energized by these recent victories, but instead I heard a great deal of dissatisfaction with the Constitution, the Congress, and the Supreme Court.

As the last of my kind, I took heart at what was not said by my fellow panelists. I took heart that nobody was looking to the courts to save us, that nobody expressed the view that the courts ought to strike down the individual mandate provision

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1. See Michael Stokes Paulsen, *How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837 (2011); Mark V. Tushnet, *Entrenching Good Government Reforms*, 34 HARV. J.L. & PUB. POL'Y 873 (2011); Randy Barnett, Remarks at the 2010 Federalist Society National Lawyers Convention, Enumerated Powers, the Tenth Amendment, and Limited Government (Nov. 18, 2010); Ted Cruz, Remarks at the 2010 Federalist Society National Lawyers Convention, Enumerated Powers, the Tenth Amendment, and Limited Government (Nov. 18, 2010).

of President Obama's major overhaul of the health care system and pull us back from the brink on which many attendees believe we are teetering. It is a good thing that no one argued that the courts are the answer to our constitutional dilemma.

After two years of an active, Democratic controlled Congress and considerable anger in the conservative ranks of the Republican party (and the academy), what is a judicially moderate, or modest, judge to do? I ask the question in this manner because the Chief Justice of the United States, who was once one of the most illustrious members of the august Federalist Society, famously suggested in his confirmation hearings that a judge or justice should aspire to be modest in his work.<sup>2</sup> He explained then, and since, that judicial modesty requires Justices to find consensus as much as possible, to avoid unnecessary concurrences or dissents, and to opt for narrower rulings—and avoid overturning well-settled precedent—to minimize both the opportunities for discord on the Court and interference with democratic decisionmaking.<sup>3</sup> A modest judge respects the work of the other branches as well as that of the judiciary. As someone who considers himself a moderate, I am strongly drawn to this ideal. The question, then, is whether it still has any place in our constitutional world.

The answer that I wish to offer is the one given by some of our most eminent judges. Faced with questions not unlike those that have confronted—and will soon again confront—the Supreme Court, these jurists have eloquently maintained time and again that under our Constitution, elections matter. This is a position that many, if not most, members of the Federalist Society have long maintained. Members of the Federalist Society know that the Constitution does not embody a particular political party's values or agenda, and I believe you would agree that the Supreme Court should not interpret the Constitution to help only one political party by advancing its political interests or agenda. The Constitution vests considerable discretion in political authorities, who remain politically accountable for their choices. The 2010 midterm elections reflected the elec-

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2. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong.* 55 (2005) (Statement of John G. Roberts Jr., Nominee to be Chief Justice of the United States).

3. *Id.*

torate's attitudes on the direction of the country, including the Obama Administration's massive overhaul of the health care system.<sup>4</sup> That is as it should be. Indeed, one of the greatest traditions of the Federalist Society has been the effort of its members to keep the courts from overturning democratic decisionmaking. Many Federalist Society members have been among the most eloquent critics of Supreme Court decisions that they believe have undermined the electoral process. How much easier it is, we all know, to get five Justices to agree to a proposition as a matter of constitutional law than to get that proposition approved by Congress or fifty state legislatures. As a moderate, I have long found this tradition to be appealing; it is a tradition that refuses to abandon the Constitution and accepts that elections matter. Judicial modesty is an aspect of this tradition. I believe that the judicially modest jurist defers but does not abdicate to the political process.

Consider the admonitions of several judges and Justices who have been models of judicial modesty. What they have to say is as relevant today as it was when they first said it. I begin near the beginning with the great Chief Justice John Marshall. As we all know, Chief Justice Marshall wrote the Supreme Court's first construction of the Commerce Clause in *Gibbons v. Ogden*.<sup>5</sup> In *Gibbons*, he defined the Commerce Clause power as "the power . . . to prescribe the rule by which commerce is to be governed."<sup>6</sup> He further defined the power to reach any "commercial intercourse . . . which concerns more States than one."<sup>7</sup> The great Chief Justice realized that the Court had defined the scope of congressional power to regulate interstate commerce as so broad as to inevitably raise the question of what its limits might be. He answered that the principal limitation on Congress's Commerce Clause power was the design of the federal political process, in which the States were formally represented in both the House of Representatives and the Senate so that they

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4. See Chris Cillizza, *What effect did health-care reform have on election?*, WASH. POST, Nov. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/07/AR2010110705311.html> (The effect of the health care law on the elections was "a point of considerable contention" and quoting a senior Democratic strategist that "The election wasn't a referendum on health-care reform, per se. But there is no question it played a role in the overarching narrative.").

5. 22 U.S. (9 Wheat.) 1 (1824).

6. *Id.* at 196.

7. *Id.* at 193–94.

could block any federal laws encroaching upon or invading their sovereignty. Chief Justice Marshall's answer was that States were adequately protected from congressional overreaching because members of Congress were politically accountable for the reach and content of their regulations of interstate commerce. His answer was, in short, that elections matter.

Consider further the insights of another Chief Justice, William Howard Taft, who knew a thing or two about the Constitution and the balance of power among the three branches. In 1925, he declared that:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.<sup>8</sup>

This was a rather remarkable thing to have come from Chief Justice Taft, but it was not a remarkable thing for a judge to think, either then or now.

Over the next decade, the Supreme Court rejected constitutional challenges to Social Security. In both *Steward Machine Co. v. Davis*<sup>9</sup> and *Helvering v. Davis*,<sup>10</sup> a majority of the Court's Republican Justices joined with Justice Brandeis to uphold Congress's authority to enact the Social Security Act pursuant to its taxing and spending powers. Of perhaps particular significance, Justice Benjamin Cardozo suggested that in determining whether a federal taxing or spending measure had been made in the "general welfare"<sup>11</sup> the Court should defer to the judgment of Congress. As he explained:

The conception of the spending power advocated by [Alexander] Hamilton . . . has prevailed . . . . Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at

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8. *Brooks v. United States*, 267 U.S. 432, 436–37 (1925).

9. 301 U.S. 548 (1937).

10. 301 U.S. 619 (1937).

11. U.S. CONST. art. I, § 8, cl. 1.

large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. When such a contention comes [to the Court, it] naturally require[s] a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.<sup>12</sup>

He was writing in 1937.

Justice Cardozo was saying that elections matter. In light of what my fellow panelists have said,<sup>13</sup> I do not think Justice Cardozo would have feared—and I do not fear—constitutional conventions. I do not fear the political process in the least. I welcome political discourse. Indeed, I welcome vigorous political discourse. I even welcome the opportunity to rethink things in the political sector. So, I am all for whatever a constitutional convention does—or does not do. It is all fine with me as a constitutional law professor.

I should note, however, that Justice Cardozo added:

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II [of the Social Security Act], it is not for [the Court] to say. The answer to such inquiries must come from Congress, not the courts. [The Court's] concern here, as often, is with power, not with wisdom.<sup>14</sup>

Less than a decade later, another modest jurist, Justice Harlan Fiske Stone, wrote for a unanimous Court in *United States v. Darby*,<sup>15</sup> upholding the constitutionality of two challenged provisions of the Fair Labor Standards Act. First, he explained that the law's prohibition of the shipment of proscribed goods in interstate commerce was constitutional because, in part:

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over

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12. *Helvering*, 301 U.S. at 640–41 (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936)).

13. See *supra* note 1.

14. *Helvering*, 301 U.S. at 644.

15. 312 U.S. 100 (1941).

which the courts are given no control . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions, is within the constitutional authority of Congress.<sup>16</sup>

Justice Stone went on to say that:

[T]hese principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart* . . . by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes . . .

*Hammer v. Dagenhart* has not been followed . . . [T]he thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force.<sup>17</sup>

Regarding the validity of the law's wage and hour requirements, Justice Stone said that, "the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power."<sup>18</sup> As for the reach of that power, he explained that Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."<sup>19</sup>

More recent pronouncements of some prominent Republican-appointed jurists are perfectly consistent with these earlier ones. In *Gonzales v. Raich*,<sup>20</sup> the Court considered a challenge to the Controlled Substances Act, which was part of a "comprehensive regime to combat the international and interstate traffic in illicit drugs"<sup>21</sup> by "prohibit[ing] the local cultivation and use

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16. *Id.* at 115 (citations omitted).

17. *Id.* at 115–16.

18. *Id.* at 120–21.

19. *Id.* at 121.

20. 545 U.S. 1 (2005).

21. *Id.* at 12.

of marijuana," even cultivation that complied with state law authorizing its use for medicinal purposes.<sup>22</sup> In rejecting the argument that regulating the personal use of marijuana was outside the scope of Congress's regulatory authority, Justice Stevens wrote for the Court:

One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye," under any commonsense appraisal of the probable consequences of such an open-ended exemption.<sup>23</sup>

Similarly, in his concurrence in *Raich*, Justice Scalia, who once cautioned that originalist judges should not expect to make "the world anew,"<sup>24</sup> made an even more forceful statement on behalf of judicial deference to a comprehensive regulatory scheme enacted pursuant to the Necessary and Proper Clause and the Commerce Clause. As he wrote, Congress possesses "regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . [even when they] do not themselves substantially affect interstate commerce."<sup>25</sup> Congress has this power if the activities are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>26</sup>

A conservative jurist, Charles Fried, who knows a thing or two about the Commerce Clause as a great student of the law and Harvard Law School professor, stated the case for judicial

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22. *See id.* at 5.

23. *Id.* at 28–29 (citation omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 563 (1995)).

24. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION* 129, 139 (Amy Gutmann ed., 1997).

25. *Raich*, 545 U.S. at 34–35 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

26. *Id.* at 36.

deference with similar force when commenting on the constitutionality of the individual mandate. In response to an argument that states could somehow refuse to comply with the new health care law, he declared: “[The] notion that a state can just choose to opt out is just preposterous. One is left speechless by the absurdity of it.”<sup>27</sup> It is absurd because it violates Supreme Court doctrine dating back to the Marshall Court and established further by the Civil War. Professor Fried’s comment is merely a more current, albeit more colloquial, variation of the traditional doctrine recognizing plenary federal power to regulate interstate commerce.

Even more recently, in *United States v. Comstock*,<sup>28</sup> the Supreme Court voted seven to two to uphold the constitutionality of a federal law allowing a district court, upon the motion of the Department of Justice, to detain indefinitely a “sexually dangerous” federal prisoner beyond the time when the prisoner would otherwise be released. This decision was significant for two reasons. First, it recognized broad federal authority whenever Congress combined its Necessary and Proper Clause authority with any of its other powers.<sup>29</sup> Second, the Chief Justice, in accord with his principles of judicial modesty, joined the Court’s opinion without a word of hesitation.<sup>30</sup>

Last but not least, consider what another Republican jurist said on this topic in 2000. Rejecting an argument that the Endangered Species Act unconstitutionally barred a local landowner from killing an animal protected by the Act, then-Chief Judge J. Harvie Wilkinson III declared, “[T]he judiciary has the duty to ensure that federal statutes and regulations are promulgated under one of the enumerated grants of constitutional authority. It is our further duty to independently evaluate whether a ‘rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.’”<sup>31</sup> After this restatement of the doctrine and the court’s deferential stan-

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27. Nina Totenberg, *Opponents Work to Block Health Bill at State Level*, NPR, Mar. 23, 2010, <http://www.npr.org/templates/story/story.php?storyId=125039441>.

28. 130 S. Ct. 1949 (2010).

29. *See id.* at 1958.

30. *See id.* at 1953.

31. *Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000) (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)).



dard of review of Commerce Clause enactments, Judge Wilkinson went on to say that:

If we were to decide that this regulation lacked a substantial effect on commerce and therefore was invalid, we would open the door to standardless judicial rejection of democratic initiatives of all sorts. Courts need not side with one party or the other on the wisdom of this endangered species regulation. We hold only as a basic maxim of judicial restraint that Congress may constitutionally address the problem of protecting endangered species in the manner undertaken herein. The political, not the judicial, process is the appropriate arena for the resolution of this particular dispute.<sup>32</sup>

I agree with Judge Wilkinson. His statement reflects the mindset we can expect courts to have now and in the future in Commerce Clause cases.

So, I am happy to say that, as we all consider how much, if at all, we should refashion Commerce Clause jurisprudence in the future, we appear to be disposed in the right direction. We should be thinking politically, not judicially, and we should be recognizing that the proper forum for such thinking is outside the courts. I have shared a pattern of decisionmaking by a series of exemplars of judicial modesty, all eminent Republican jurists. The positions of these judges comprise one of the best traditions of the Federalist Society and one of the best traditions, frankly, in American law. This is by no means the only tradition of the Federalist Society, but it is one that seems particularly fitting to reintroduce now. It is a tradition that is especially important to remember in the aftermath of the 2010 mid-term elections. Under this tradition, elections matter, they have always mattered, and they will continue to matter in the future, and courts are not supposed to overturn—or lightly displace—them. This is one of the greatest constitutional traditions bequeathed to us by the Framers, and it is a tradition of the Federalist Society with which I have been always glad to associate.

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32. *Id.* at 506.