THE DAILY CALLER
OPINION

When all is politics, nothing is law

By Roger Pilon
05/18/2012

Long-time establishment apologists Norman Ornstein (AEI) and Thomas Mann (Brookings) have generated a lot of ink lately, pro and con, over their claim that our "dysfunctional" government is the fault of Republican "extremists" whose party has become "an insurgent outlier in American politics," blocking measures for economic recovery, climate change, health-care reform, and much else.

Well, for the legal branch there's a more complex but not much more subtle variation of the Ornstein/Mann thesis that academic lawyers of the progressive persuasion — I repeat myself — have been peddling in recent years. It's that "a nascent movement of pro-business and libertarian federal judges and think tank activists" have been working for some time to resurrect "a series of legal doctrines that have been dormant since the New Deal," all "to dismantle the post-New Deal regulatory state" and restore something called "the Constitution in Exile." Coined by D.C. Circuit Judge Douglas H. Ginsburg in a 1995 Cato Institute article, that term refers to the limited government Constitution we all pretty much lived under for 150 years, before Franklin Roosevelt's infamous 1937 Court-packing threat cowed the Court into crafting what now passes for "constitutional law" — not to be confused with the Constitution itself.

The legal version of the Ornstein/Mann thesis is on display in, among many other places, The New Republic of May 4, in George Washington University Professor Jeffrey Rosen's "Second Opinions," from which the above quotes are taken. Rosen's title alludes to the six and a half hours of Obamacare oral argument in the Supreme Court at the end of March — a "train wreck" for those who'd confidently predicted the Act's constitutionality. But it alludes also, and more immediately, to an opinion that came down two weeks later from the D.C. Circuit, *Hettinga v. United States*. There the three-judge panel upheld a 2005 amendment to a complex system of milk marketing price controls dating back to 1937, the effect of which was to penalize an enterprising dairyman for the benefit of cartelized competitors — an egregious assault on economic liberty. As an inferior court, the panel had no choice, due to long-standing precedents, but to uphold the statute. But the decision generated a blistering concurrence by Judge Janice Rogers Brown, joined by Chief Judge David Sentelle, "notable not only for its anti-statist

editorializing," Rosen writes, "but also because it suggests that the Affordable Care Act will be far from the last federal regulation to be threatened by conservative judicial activism."

And so we come to the heart of the problem for Rosen and his progressive colleagues — it's the "conservative judicial activism" against which Obama himself railed after the High Court made it clear that his major legislative accomplishment was constitutionally suspect. Trouble is, though, you've got to say more than "activism" if you're going to make the charge stick; you've got to show why, for example, it's acceptable for judges to defer to the political branches when "mere" economic liberties are at issue, and Rosen's piece is devoid of any such effort. As the Pacific Legal Foundation's Tim Sandefur noted, nowhere in his article does Rosen even try to address the substance of the matter. Instead, he gives us a "caricature of a one-sided partisan cabal," Sandefur says. He continues:

Rosen finds it easier to draw this conflict as a merely partisan one — and to emphasize not the broader legal debates, not whether or not Judge Brown's criticism of modern constitutional law has merit, but instead simply to emphasize the vulgar personal benefits that the current, distorted constitutional doctrine brings to a specific class of people, and the risk to their personal income, should these disputes gain an audience at the Supreme Court.

Like the Ornstein/Mann thesis, then, it's all politics, not law. And for good reason: that's what the New Deal constitutional revolution that Ornstein, Mann, and Rosen are defending was all about — politicizing law. This distinction between economic and noneconomic liberties, which so animates Judge Brown's trenchant concurrence, stems not from the law of the Constitution but from the famous footnote four of the Court's 1938 *Carolene Products* decision. The Court drew it to enable the New Deal's regulatory and redistributive schemes to pass constitutional muster — through a further distinction between "strict" judicial scrutiny, which the Court would give to statutes implicating noneconomic liberties, and "rational basis" scrutiny, which the Court would employ when *economic* liberties were at issue, a test that in practice has removed virtually all constitutional protection from the kind of political assault Mr. Hettinga endured.

To be clear, it's not that Rosen is oblivious to these issues — far from it. In fact, he asks why it was that "a relative moderate" like Judge Thomas Griffith, who did not join Judge Brown's concurrence, would nonetheless "profess himself 'by no means unsympathetic' to the views of the most radical partisans of the Constitution in Exile." He speculates:

Perhaps because the terms of legal debate have been so dramatically changed by [Georgetown University Law Professor Randy] Barnett. In less than two years, he has managed to transform the notion that the health care mandate was unconstitutional from a far-fetched idea into a principle that may soon be endorsed by all five of the Supreme Court's conservatives.

Yes, Barnett has made a major contribution to shifting the constitutional debate over the health care mandate; and yes, that debate is just part of a much larger one about the role

of the courts in restoring the "Constitution in Exile," as Rosen goes on to say. But that debate has been going on for far longer than two years, since the mid-1970s, even if many in the insulated legal academy have been slow — or disinclined — to acknowledge it. (Cato's 1984 conference on "Economic Liberties and the Judiciary" is but one example.) As Barnett wrote recently at the Volokh Conspiracy, comparing academic and media commentary on Obamacare:

The "mainstream" media coverage of the ACA lawsuits has been remarkably fair and balanced throughout. Not only have they been reporting what both sides say, and accurately conveying the color and substance of oral arguments below, but the reporters seem to have a more sophisticated grasp of the legal arguments — and their relative merits — than is evinced by some law professors.

This reluctance to grapple with the substance — casting opponents as "activists" pursuing a political agenda — comes starkly to the fore as Rosen draws his piece to a conclusion. "If the Roberts Court strikes down health care reform by a 5-4 vote," he writes, the Court would be "resurrecting the pre-New Deal era of economic judicial activism with a vengeance" and returning us to "a time when crusading judges struck down progressive economic regulations in the name of hotly conservative economic doctrines that a majority of the country didn't favor."

There you have it. Echoing Justice Oliver Wendell Holmes's infamous *Lochner dissent*, Rosen invites us to believe that the old, pre-New Deal Court was invoking *economic, not legal doctrines*, that the Constitution is neutral on the question of economic arrangements, and that transient majorities can determine those arrangements as they wish, even to the point of cartelizing much of the economy, as progressives have done, and all of that free from any constitutional constraints. That's politics trumping law with a vengeance, and it undermines the very point of a written constitution.

Roger Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.

Read more: http://dailycaller.com/2012/05/18/when-all-is-politics-nothing-is-law/#ixzz1vVgrmLgV