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ECONOMIC FREEDOMS AND THE CONSTITUTION

By Jeffrey Rosen

I would like to defend the traditional conservative view that judges should not second-guess political debates in the name of amorphous rights that do not appear in the text or history of the Constitution.¹ Indeed, that promise was precisely what attracted me to the Federalist Society in law school when I was a bipartisan renegade who, trying to evade the glances of my professors, would sneak into Federalist Society meetings. I received with relish the Federalist claims that liberal justices were short-circuiting all of our most important political debates by making up rights that do not appear in the text of the Constitution (like the right to privacy in *Griswold v. Connecticut* and, as a result, that those justices were not interpreting the law but instead making it.

I was surprised, therefore, to discover in recent years a libertarian movement that has called into question those Federalist Society axioms.³ Some libertarians now argue that *Lochner* is defensible and that a great number of laws and regulations might be struck down in the name of unenumerated rights that have the most tenuous roots in the text or history of the Constitution.⁴ Not all conservatives, however, are sympathetic to this invitation to economic judicial activism. There have actually been three separate strains of legal conservatism over the past 30 years: libertarian conservatives, tea party conservatives, and pro-executive power conservatives.⁵

There are significant tensions among these three strands of legal conservatism. When it was founded in the 1980s, the Federalist Society was initially successful at persuading conservatives to paper over those tensions by converging around a common rhetoric of "original understanding" and "judicial restraint."⁶ But that spirit of unity did not last long. As conservatives began to receive appointments to the federal appellate courts during the Reagan administration, divisions among the three strands began to emerge.⁷

Perhaps the most striking division was the one between libertarians and conservatives who tended to back executive power. This conflict was on display in a debate between then Judge Scalia and Professor Richard Epstein.⁸ It was held at the **CATO Institute** in 1984.⁹ Judge Scalia addressed a standing-room-only crowd and defended the view that judges should restrain themselves from overturning laws in the name of rights or liberties not clearly and expressly enumerated in the Constitution.¹⁰ The "reversal of a half-century of judicial restraint in the economic realm," he said, "posed a threat to constitutional democracy."¹¹ Judge Scalia argued that conservatives who had criticized the Warren Court for liberal judicial activism now faced a "moment of truth": They had to show the courage to reject conservative judicial activism in the economic arena as well.¹²

When Professor Epstein heard what Judge Scalia had to say, he delivered a spontaneous attack on Scalia's position. Freely admitting he was questioning the conservative conventional wisdom, he said judges should be much more aggressive in protecting economic liberty.¹³ There are many blatantly inappropriate statutes that call out for a quick and easy kill, he said, citing price controls and other legislative regulation of the economy.¹⁴ He excoriated the Supreme Court for refusing to strike those laws down.¹⁵

That debate established a clear distinction between pro-executive power conservatives like Justice Scalia, who are suspicious of economic judicial activism, and libertarians like Professor Epstein and Professor Randy Barnett, who support aggressive enforcement of unenumerated rights, such as the liberty of contract. They both, for example, favor striking down the Patient Protection and Affordable Care Act of 2010 (PPACA).¹⁶ Their avatar on the

Supreme Court is not Justice Scalia but Justice Kennedy, who is the libertarian justice most sympathetic to their views.¹⁷

Since 1984, a third strand of legal conservatism has developed: tea party conservatism.¹⁸ Tea party conservatives share with the libertarians a suspicion of broad federal power.¹⁹ They part company with the libertarian conservatives on social issues, however, and they oppose abortion rights and gay marriage.²⁰ On the Supreme Court, the avatar of Tea Party conservatism is Justice Thomas, who is principled in his devotion both to social conservatism and to states' rights.

Remaining true to the Federalist Society tradition of judicial restraint requires following Justice Scalia's example and rejecting the activism of both the libertarian wing and the tea party wing of the conservative legal movement. How many federal statutes would have to be struck down if this activist vision were taken seriously? In 2005, I wrote an article for the New York Times Magazine that talked about the resurgence of a libertarian movement that some associated with the phrase the "Constitution in Exile," which Judge Douglas Ginsburg had used to identify legal doctrines that established firm limitations on state and federal power.²¹

The movement, critics argued, had no shortage of targets. Cass Sunstein predicted that as the movement succeeded, many decisions of the FCC, EPA, OSHA, and possibly SEC and NLRB would be declared unconstitutional.²² The Social Security Act would be under constitutional stress.²³ Some applications of the Endangered Species Act and the Clean Water Act also could be struck down.²⁴ And in an extreme nightmare scenario, the right of individuals to freedom of contract would be so vigorously interpreted that minimum-wage and maximum-hour laws would also be jeopardized.²⁵

These possibilities for a libertarian movement that questioned the constitutionality of the post-New Deal regulatory state were criticized as scaremongering.²⁶ Surely, critics argued, conservative activists would not truly press all of these points. But as it turned out, they did. Tea party conservatives now openly question the constitutionality of the FCC, the EPA, and, of course, the Federal Reserve.²⁷

In his book, *The Five Thousand Year Leap*, the constitutional bible of the Tea Party Movement, W. Cleon Skousen posed 101 constitutional questions to federal candidates²⁸ and called for striking down many federal agencies, as well as Social Security and the Welfare State.²⁹ Presidential candidates Rick Perry and Michele Bachmann have embraced many of the same views. In the courts, federal judges are questioning the Endangered Species Act.³⁰ There is nothing unprincipled about this position. It is an effort to carry to logical conclusions the principles that Professor Barnett, Professor Epstein, and others embrace. But the scope of judicial invalidation and the aggressiveness of the use of the courts to short circuit contested economic and political debates can no longer be doubted.

And what about judicial restraint? What about the Federalist Society pledge that courts should strike down laws only on the basis of rights that are clearly rooted in the text and history of the Constitution?³¹

This requires us to think about *Lochner*.³² What was the problem of *Lochnerism*? Why is it that pro-executive power conservatives like Chief Justice Roberts and Justices Scalia and Alito view it as the root of all constitutional evil?³³ There are several ways of stating the problem of *Lochnerism*, and they are found in different forms in the two dissents by Justice Holmes³⁴ and Justice Harlan.³⁵ For Holmes, the problem of *Lochnerism* was a problem of text.³⁶ The Constitution does not speak of freedom of contract, as the Court later echoed in *West Coast Hotel Co. v. Parrish*,³⁷ and judges should not strike down laws on the basis of unenumerated rights because that makes them democratically vulnerable.³⁸ The textualist objection says that judges are most in danger of imposing their own political preferences on the country when they enforce amorphous ideas of reasonableness without a textual peg.

Conservatives like Justice Scalia have argued powerfully that textualism is important.³⁹ The conservative criticisms of *Roe*,⁴⁰ for example, and opposition to a judicially discovered right of gay marriage, would be on far weaker grounds if social conservatives embrace activism based on unenumerated rights in the economic arena.

But the problem of *Lochner* is not only a problem of text. Justice Scalia also criticizes *Lochner* for its failure to defer to the political branches in the face of uncertainty and contestability.⁴¹ This was Justice Harlan's point in his less rhetorically memorable, but in some ways more legally plausible, dissent.⁴² Justice Harlan said that reasonable people can disagree about whether or not maximum-hour laws are necessary to protect bakers' health; judges should defer to legislatures in the face of that uncertainty.⁴³

Professor Barnett's policy arguments against minimum-wage laws in *Lochner* and elsewhere are similarly plausible. Many conservatives doubt these laws on policy grounds. David Bernstein has just written a book, *Rehabilitating Lochner*, arguing that the minimum-wage laws were ways of favoring unionized workers over their nonunionized competitors.⁴⁴ Justice Harlan's point, however, was that through their legislatures, majorities of citizens across the land during the Progressive Era disagreed with that economic analysis, and judges have no special competence to enforce contested economic rights in the face of widespread disagreement.⁴⁵

Professor Barnett gave a disquisition on the intention of the Framers of the Fourteenth Amendment about economic rights, but the history is far more complicated than he suggests.⁴⁶ It is true that the Framers of the Fourteenth Amendment had a suspicion of class legislation, namely legislation that took property away from A and gave it to B, and they thought that legislatures could only pass economic regulations that served the public interest.⁴⁷

But there are two problems with translating or applying this class legislation prohibition in the twenty-first century. First, for the Framers, the prohibition on class legislation applied not to all state action but only to a very small category of rights; they called these civil rights or privileges and immunities.⁴⁸ These rights were uniform from state to state.⁴⁹ They were available, not as a matter of discretion, but one of right.⁵⁰ But they did not cover most of the business that the government did. They did not cover welfare state activities because, of course, there was no welfare state.⁵¹ Beyond that narrow scope of civil rights, the government was free to discriminate against or in favor of people on the basis of race or on the basis of economic favoritism or on any basis it pleased.⁵²

How is it possible to translate this idea of limited absolute equality into a world where the government monopolizes highway contracts and provides healthcare? That is a question the Fourteenth Amendment's Framers could not have answered because they had no significant welfare state.⁵³ To suggest, as Barnett does, that the Framers' narrow notion of class legislation in the libertarian marketplace should be expanded across the entire scope of what the federal government does is a historical leap of imagination. It is not justified by what the Framers anticipated.

Professor Barnett also is wrong to suggest that, for the Framers, economic rights were to be enforced by the courts rather than Congress. As Professor McConnell has argued, the most important section of the Fourteenth Amendment was Section 5, which authorized Congress to pass the Civil Rights Act.⁵⁴ The Framers would have been surprised and appalled by the notion that courts had primary responsibility for enforcing these economic rights in the face of contrary judgments from Congress.⁵⁵

Of course, the third problem with translating the *Lochnerian* prohibition on class legislation into the post-New Deal world is that the very notion of what sort of regulation is in the public interest, which was once uncontested, became contested. When *Lochner* was decided in 1905, judges thought they could agree about what regulations were in the public interest and which industries could be regulated as quasi-monopolies.⁵⁶ They were applying formalistic categories. But when the economic reality of the Depression dislodged the idea that intervention on behalf of one group of workers would harm society- when indeed intervention on behalf of some came to be seen as necessary to avoid a burden on all as the welfare state got up and running- it was no longer possible for judges confidently to enforce these nineteenth-century categories.

To equate these common law categories dating back to the age of Thomas Cooley with the intentions of the Framers and ratifiers of the Fourteenth Amendment is too simplistic. And, once consensus about what was in the public interest and what was not disappeared, judges appeared to be political when they were enforcing these contested categories.⁵⁷

That is why Justice Jackson, a pillar of judicial restraint during the New Deal, argued that the Court should get out of the business of second-guessing Congress's economic judgments.⁵⁸ He tried to write an opinion enforcing the old categories but found that it would not write. He discovered that he had no special competence to make economic judgments about what was reasonable.⁵⁹ For that reason, he said that judges should get out of the business entirely.⁶⁰

It is perhaps possible that the Court went too far in advocating judicial abstinence in economic cases. For example, the Court in *Williamson v. Lee Optical* was making up fake reasons for upholding the requirement that everyone had to go to an optometrist rather than an optician to get a new prescription.⁶¹ Obviously, the real reason was to favor optometrists who felt threatened by a new group of economic competitors. The Court fabricated the justification that people's eyes would be infected and they might need to get eye exams from a professional.⁶²

So I could imagine a few cases concerning naked rent seeking, clear giveaways from one group of economic competitors to another. Total deference might have gone too far. But a strong presumption of deference, rather than the presumption of liberty that Professor Barnett advocates in his book *Restoring the Lost Constitution*[^] is the only thing that can prevent judges once again from entangling themselves in this contested economic arena.

The cost of embracing Professor Barnett's vision of economic judicial activism would be high: It would require one to embrace judicial activism in areas like personal autonomy and sexual autonomy, from abortion to gay marriage.⁶⁴ Justice Thomas seems most likely to strike down PPACA in the name of a narrow version of the Commerce Clause that says that Congress can regulate trade or exchange but not manufacture.

Based on his constitutional vision, the second most likely Justice to strike down PPACA, though, might well be Justice Kennedy. He could strike it down not on the basis of the Commerce Clause but also on the basis of an unenumerated right not to be forced to buy what one does not want to buy. This, Charles Fried said in his Senate testimony, is really *Lochner* resurrected.⁶⁵ The claim that one cannot be forced to buy health insurance or broccoli or asparagus or gym memberships, as the Attorney General of Virginia has so memorably argued,⁶⁶ is not an argument about the Commerce Clause or the rights of states. It is an argument that there is a free-floating right of personal autonomy that states or the federal government cannot infringe and that should prevent the government from forcing people to buy anything they do not want to buy.

That is the same right that Justice Kennedy might embrace in recognizing a right to gay marriage. If "[p]ersonal liberty presumes an autonomy of self" as Kennedy said in *Lawrence v. Texas*,⁶⁷ that autonomy of self might not only prevent people from being forced to buy unwanted gym memberships; it might also guarantee their right to marry the person they love, regardless of his or her gender. It would be hard for Justice Kennedy to use text to distinguish the right to contract from the right to autonomy or to say that that free-floating autonomy right at the heart of liberty (that Justice Scalia called the "sweet-mystery-of-life" right)⁶⁸ should apply in the healthcare arena but not in the gay marriage arena. Indeed, in one of the healthcare law suits, Phil Bryant, the governor-elect of Mississippi, challenges the healthcare mandate by invoking both the unenumerated right of freedom of contract recognized in *Lochner* and the unenumerated privacy right recognized in *Roe*.⁶⁹

It is doubtful there are five votes on behalf of striking down healthcare in the name of a *Lochnerian* right of personal autonomy. There is a strong argument that the pro-executive Justices, Chief Justice Roberts and Justice Alito, are suspicious of creating unenumerated rights without clear textual limit and that they are too respectful of precedent to overturn *Wickard v. Filburn*⁷⁰ and to return to a pre-New Deal understanding of the Commerce Clause.

Between 2006 and 2009, the Roberts Court struck down six federal laws.⁷¹ The Justice most likely to strike down those laws was Justice Kennedy, who voted with the majority in five of the cases.⁷² Chief Justice Roberts was next with four.⁷³ Justices Thomas and Scalia voted to strike down three;⁷⁴ Justice Alito struck down only two.⁷⁵ Justice Alito almost never votes against the federal government in criminal or in statutory cases, and the idea that he would lightly strike down an act of Congress on the basis of elusive unenumerated rights seems unconvincing. Indeed, I hope that a majority of the conservatives on the Roberts Court will follow the inspiring examples of Judges Lawrence Silberman and Jeffrey Sutton, two principled defenders of judicial restraint, both of whom voted to uphold the healthcare mandate as part of bipartisan majorities.⁷⁶ If so, Chief Justice Roberts

would deserve as much respect for his bipartisan rejection of the libertarian challenges as Judges Silberman and Sutton.

Regardless of what the Court does with healthcare, Federalist Society members should think hard before succumbing to the seductive siren calls of Barnett. Many conservatives have policy preferences that coincide with his. The Federalist Society, however, teaches that the highest achievement in constitutional interpretation is to separate one's policy preferences from one's legal conclusions; to be scrupulous about only second-guessing democratic decisions when one's arguments are clearly rooted in text and history and when people on both sides of the political spectrum can embrace them.

Judge Wilkinson, for example, has been a model of this bipartisan tradition of judicial restraint. He has criticized the Court's Second Amendment decision in *Heller*.⁷⁷ He has criticized *Roe v. Wade*.⁷⁸ He has upheld an application of the Endangered Species Act in a case attempting to limit the scope of regulations based on it.⁷⁹ His policy preferences often diverge from his constitutional conclusions because he recognizes that not only economic liberty, but also democratic liberty, is at stake. That liberty permits democratic majorities to debate hotly contested policy issues, to reach contrary conclusions, and to settle their disputes, in areas ranging from abortion to gay marriage, politically rather than judicially.

I commend Judge Wilkinson's restrained example to you, and for those who were thinking of straying from his traditionally conservative vision of judicial restraint, I look forward to welcoming you back to the fold.

FOOTNOTE

1. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction OF THE LAW* 351-55 (1990).

2. 381 U.S. 479 (1965).

3. See Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2003-04).

4. See, e.g., Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J.L. & Pub. Pol'y 5 (2012); see also David B. Bernstein, *Rehabilitating LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011) (contending that the critics of *Lochner v. New York*, 198 U.S. 45 (1905), are misguided); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & PUB. POL'Y 283 (2012) (arguing for robust protections of economic rights based on substantive due process).

FOOTNOTE

5. See Jeffrey Rosen, *Disorder in the Court: Ugal Conservatism Goes to War With Itself*, *New Republic*, July 14, 2011, at 7.

6. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141-42 (2002); see also George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 Harv. J.L. & PUB. POL'Y 623, 646-54 (2006) (describing the rise of the Federalist Society).

7. See Young, *supra* note 6, at 1142.

8. See Antonin ScALiA & Richard A. Epstein, *Scalia v. Epstein: Two Views on Judicial activism* (1985).

9.1d.

10. See Antonin Scalia, *Economic Affairs as Human Affairs*, in SCALIA & EPSTEIN, *supra* note 8, at 1, 1-2.

11. *Id.* at 4.

12. *Id.* at 5.

FOOTNOTE

13. See Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in Scalia & Epstein, *supra* note 8, at 9, 10.

14. See *id.* at 14.

15. See *id.* at 15.

16. Pub. L. No. 111-148, 124 Stat. 119 (2010).

17. See, e.g., Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO Sup. Ct. Rev. 21 (2003). But see Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 Harv. J.L. & PUB. POL'Y 333 (2009) (reviewing HELEN J. KNOWLES, *The Tea Party GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* (2009)).

18. See Scott Clement & John C. Green, *Pew Research Ctr., The Tea Party, RELIGION AND SOCIAL ISSUES* (2011), available at <http://pewresearch.org/pubs/1903/tea-party-movement-religion-social-issues-conservative-christian>.

19. *Id.*

20. *Id.*

FOOTNOTE

21. Jeffrey Rosen, *The Unregulated Offensive*, N. Y. TIMES Mag., Apr. 17, 2005, <http://www.nytimes.com/2005/04/17/magazine/17CONSTmjnON.html>.

22. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS are Wrong for America* 200-01, 245 (2005) [hereinafter Sunstein, *Radicals*].

23. See *id.* at 7, 243.

24. *Id.* at 217.

25. *Id.* at 31.

26. See, e.g., Randy E. Barnett, Restoring the Lost Constitution, Not the Constitution in Exile, 75 *FORDHAM L. REV.* 669, 669 (2006) ("Libertarians and conservatives do not talk about a 'Constitution in exile.' Indeed, nobody did until Cass Sunstein and Jeffrey Rosen published their 'exposés' of this alleged movement - ").

27. See Andrew Romano, America's Holy Writ, *NEWSWEEK*, Oct. 17, 2010, at 33.

28. See W. Cleon Skousen, 101 Constitutional Questions to Ask Candidates, *LATTER-DAY Conservative*, <http://www.latterdayconservative.com/articles/101constitutional-questions-to-ask-candidates/> (last visited Nov. 14, 2011).

FOOTNOTE

29. See generally W. CLEON SKOUSEN, *THE FIVE THOUSAND YEAR LEAP: 28 Great Ideas that Changed the World* (1981).

30. See, e.g., *GDF Realty Invs. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of petition to rehear en banc) (arguing that ESA could not constitutionally apply to the taking of a one-eighth inch long cave bug that had no commercial application).

31. About Us, The Federalist Society, <http://www.fed-soc.org/aboutus/> (last visited Nov. 5, 2011) ("[I]t is emphatically the province and duty of the judiciary to say what the law is, not what it should be.").

32. *Lochner v. New York*, 198 U.S. 45 (1905).

33. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl Prot.*, 130 S. Ct. 2592, 2606 (2010). Justice Scalia's opinion was joined by Chief Justice Roberts and Justices Thomas and Alito. *Id.* at 2597.

34. *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting).

35. *Id.* at 76 (Harlan, J., dissenting).

36. *W.* at 74-76 (Holmes, J., dissenting).

37. 300 U.S. 379 (1937).

38. See *Lochner*, 198 U.S. at 75 (Holmes,), dissenting).

FOOTNOTE

39. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutman ed., 1997).

40. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia,], concurring in part and dissenting in part).

41. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999) (Scalia, J.).

42. *Lochner*, 198 U.S. at 69-70 (Harlan, J., dissenting).

43.W.

44. BERNSTEIN, *supra* note 4, at 26.

45. *Lochner*, 198 U.S. at 69-70 (Harlan,), dissenting).

46. See *Barnett*, *supra* note 4, at 5.

FOOTNOTE

47.W.

48. Jeffery Rosen, *Translating the Privileges or Immunities Clause*, 66 *GEO. WASH. L. REV.* 1241, 1263 (1998).

49. See *id.*

50. See *id.*

51. Cf. *id.*

52. Cf. id. at 1089.

53. See Richard M. Ebeling, National Health Insurance and the Welfare State, Part 1, FUTURE OF FREEDOM FOUND., (Jan. 1999), <http://www.fff.org/freedom/0194b.asp> (describing the growth of the welfare state as stemming from Germany in the 1880s).

FOOTNOTE

54. Michael W. McConnell Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 991 (1995).

55. Cf. id. at 997-98.

56. See, e.g., *Tyson kftroAJriited Theatre Ticket Offices v. Banton*, 273 U.S. 418 (1926).

57. See, e.g., *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955).

58. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

59. Id. at 124.

60. Id.

FOOTNOTE

61. *Lee Optical*, 348 U.S. at 490.

62. See id.

63. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 89-153 (2004).

64. Cf. id. at 253-73.

65. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary, 112th Cong.* (2011) (Statement of Charles Fried, Beneficial Professor of Law, Harvard Law School).

66. See Ryan J. Reilly, Ken Cuccinelli: Gov't Could Force You to Buy Gym Membership, TPM MUCKRAKER (Nov. 19, 2010, 12:46 PM), http://tpmmuckraker.talkingpointsmemo.com/2010/11/19/ken_cuccinelli_govt_could_force_you_to_buy_gym_mem.php.

FOOTNOTE

67. 539 U.S. 558, 562 (2003).

68. *Id.* at 558 (Scalia, J., dissenting).

69. K. Douglas Lee, *Liberty in Action: First Private Lawsuit Challenging ObamaCare Filed in Mississippi*, *BiG GOVERNMENT* (Apr. 2, 2010, 2:39 PM), <http://fliggovrunent.com/kdleeA010/04/02fliberty^challenging-obamacare-filed-in-mississippi/>.

70. 317 U.S. 111(1942).

71. Data on Supreme Court cases is available at the Supreme Court Database, <http://scdb.wustl.edu/index.php>.

FOOTNOTE

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See *Seven-Sky v. Holder*, No. 11-5047, 2011 WL 5378319 (D.C. Cir. Nov. 8, 2011) (Silberman, J.); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011) (Sutton, J., concurring).

77. J. Harvie Wilkinson ??, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *Va. L. REV.* 253, 254 (2009) (criticizing the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

78. *Id.* at 254-57.

FOOTNOTE

79. *E.g.*, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

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