

# THE LOST ARTS OF JUDICIAL RESTRAINT

*J. Harvie Wilkinson III*

IT IS A GREAT PLEASURE to be with the Federalist Society this evening. I appreciate your kindness in extending this recognition. I've always been proud to participate in Federalist Society events and many of my finest law clerks have been student members of the Society.

It is also a pleasure to be with a group that has made such a difference to the legal dialogue. Over the decades, the Society has helped to transform what were sometimes one-sided presentations into robust and vigorous debates. You have joined the issue on the great issues of the day and that is as it should be.

This has not always been easy. It sometimes takes real courage to stand up and voice one's convictions in the face of prevailing sentiment to the contrary. But what is not easy in the short run is over the long term the only way to go. And when long term influence on the legal culture is considered, the Federalist Society will rank at or near the top of the list. So congratulations this evening are due to you, and I happily extend them.

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I want to speak briefly tonight about the virtues of judicial restraint. Of course, people will tell you that restraint is out of fashion. They may be the same folks who proclaimed that cutting spending and reducing deficits was out of date. It was like eating spinach, they said. Conservatives needed something more appetizing on their menu. Tonight, I would like to make the case that judicial restraint is not like eating spinach anymore than fiscal responsibility was. Institutional self-discipline is essential to the health of a democratic system, whether the institutions be political or judicial.

We tend to forget that conservatism has been a philosophy of multiple strains. The tension between libertarian conservatives and traditionalists goes back at least as far as John Stuart Mill and Edmund Burke. Mill's *On Liberty* railed against what he termed "the tyranny of the majority" whereas Burke's *Reflections on the Revolution in France* argued that reliance on tradition, venerable institutions, and time-honored custom was the best way of ensuring human happiness. It is important that these strains remain in balance and that one not crowd out the other.

At present, however, the libertarian view seems to be in the ascendancy among conservatives. Of course, this strain has a valued place, but I fear increasingly that libertarians seek that place at the expense of those who hold to a more traditional and communitarian faith. Today, we speak of *individual* liberty as if the word "individual" were the only adjective that could possibly modify the noun. Indeed, many of our constitutional rights are individual, and those enumerated in our Bill of Rights and elsewhere with some modicum of specificity properly depend on judicial protection. But the Framers of the Constitution endowed us with two forms of liberty, individual and democratic, in the hope that one would not shove out the other.

To see liberty purely in terms of individual rights is too cramped a view. Democratic liberty is no less real for reflecting a collective view. I am dismayed when I see conservatives leap to the vaguest of phrases in our Constitution such as "privileges or immunities," the Contracts Clause, the Ninth Amendment, and the Due Process Clause to establish their own set of textually nebulous bases on



which to overturn enacted law.

This emerging jurisprudence is nothing but a thinly veiled assault upon labor, social welfare, and environmental legislation, the infirmities of which are political, not constitutional in character. This assault further runs the risk of simply mimicking on the right what I always thought gave us greatest pause in the legal arguments of our opponents. If we forsake restraint, what then shall we be left with? We shall be left with two dominant, though different, libertarian visions of the American Constitution, each distrustful of the other and each wary lest its opponents steal a march. Liberals have a vision whose central element often appears to be autonomy in lifestyle choices. Conservatives have a view in which liberty seems to pertain primarily to economic and market freedoms. But why these views are constitutional rather than political in their dimensions has thus far yielded no persuasive answer.

There is a danger to our country in this present state of constitutional affairs. There is a danger that the competing constitutional visions of individual liberty are leaving us bereft of the notion of individual responsibility. In viewing people in isolation with rights that attach to the individual alone, we are neglecting the code of personal responsibility that has long been our source of national strength. We are overlooking the fact that citizens are not simply autonomous individuals, but depend on institutions such as family, church, community, and yes, to some extent, even government to provide them not with success, but with the opportunity to make something constructive and meaningful of their lives.

By voicing these individualistic and increasingly assertive views as constitutional imperatives rather than political aims, liberals and conservatives have served notice to their opponents that they are in a fight to the finish in judicial terms no less than political ones. It no longer seems sufficient to score one's victories at the polls. The new game is to press one's views into our fundamental charter such that our opponents are left with no quarter and are defeated not in the temporary sense of a political ebb and flow, but in the more absolute tones of constitutional condemnation.

It may of course seem tempting to press the advantage when one



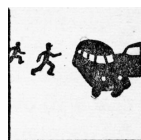
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seemingly has a judicial majority at hand. But this wheel shall turn. Tonight's celebration will become tomorrow's mourning. The only way that conservatives can maintain credibility in repulsing transgressions on our founding document is to maintain the high ground of restraint ourselves. Lasting credibility on an issue such as judicial restraint requires us to practice it, as the old saying goes, when the shoe pinches as well as when it comforts. There are no shortcuts on such an issue in which trust and stature are not easily won.

It is true one must always beware of one-way ratchets. It is fair to ask if conservatives practice restraint and liberals fail to follow suit, will we not end up on the short end of the stick? I do not think so. Far from being judicial spinach, restraint is a populist cry of delectable proportions. The need for restraints on the exercise of unelected power has an ancient pedigree. In the early seventeenth century, the English monarch James I proclaimed the divine right of kings. There is no reason that conservatives in the early twenty-first century should rush to proclaim the divine right of judges.

When did Americans consent to be governed by one profession only? Look at it this way: suppose you as lawyers suddenly found yourself governed exclusively by plumbers or financial analysts or teachers or insurance executives. That state of affairs, I respectfully suggest, would hardly suit you. So why should we believe it is any more palatable to others for lawyers to hand down decrees touching not only upon people's most intimate moral, philosophical, and religious beliefs, but also upon their collective security, economic opportunity, and prosperity as the political order rationally perceives it?

As judges, we have been given life tenure to ensure our independence, impartiality, and commitment to the rule of law. But we should not be tempted by the security provided by Article III to plunge into political controversies on the basis of shallow and highly contestable legal premises. We rightly make our contribution to upholding order and protecting liberty, but if we as judges properly expect the citizens of this country to abide by laws they do not like, might they not expect us in return to uphold laws that we may on some personal or policy level find distasteful?



The threat to restraint is increasingly palpable and real. I have tried to set forth in my recent book how the titans of constitutional interpretation – the cosmic theorists, I call them – are seducing judges to abandon restraint and are providing the most tempting and intellectually respectable paths to reaching politically congenial results. You should not be misled by the fact that from Bork to Brennan to Scalia to Posner to Ely and to others, the theories are so luminous that they light up the constitutional firmament in the most brilliant way. The cosmic theorists, however, are offering us the forbidden fruit by tempting us to wander into the groves of abortion and firearms, same-sex marriage and counterterrorism strategy, “regulatory takings” and millennial presidential elections, and other contemporary subjects so fraught with political controversy that caution flags should most assuredly rise.

The consequences of the abandonment of restraint merit your serious consideration. I pose the risks to you as a series of questions. Do political movements trade their energy for gradual enervation when they embrace court victories as their benchmarks of success? Does judicial activism spread polarization from the political to the judicial realm with uncertain consequences for the one branch of government the Framers designed as a national adhesive and hoped might best put factionalism aside? In abandoning restraint, does the judiciary risk the loss of one of its great founding traditions as embodied by Oliver Wendell Holmes, Louis Brandeis, Learned Hand, Felix Frankfurter, John Harlan, and Lewis Powell? And finally, do we risk with contemporary activism the loss of the robust sense of nationalism embodied by the Framers in our founding document, a nationalism that is manifested in enumerated powers that were thought necessary to supplant the Articles of Confederation and to give a common identity to what were previously disparate economic units?

It is surely legitimate to pose the question: “What, if anything, is government forbidden to do?” But the constitutional prohibitions on government are numerous. It is entirely necessary, in my judgment, for the Bill of Rights to operate as a primary check upon executive and legislative abuses. It was moreover justifiable for the Supreme



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Court to believe that the First Amendment protects political speech against sprawling campaign finance restrictions and that the Fourteenth Amendment protects the dignity of every individual against the raced-based set-asides and preferences the text of that amendment would seem so plainly to forbid. These matters reside at the core of constitutional text and the judiciary's historic obligation to safeguard the marketplace of ideas and the non-discrimination principle.

But it is one thing to defend liberty from the negative prohibitions clearly enunciated in the constitutional text. It is quite another for judges to call their own halt to positively enumerated powers in accordance with their own economic views. The explicit restraints on government do not empower judges to devise long lists of implicit restraints that suit their preferences. So a further response to the question of what does the Constitution forbid government to do must be made by flipping the question. What, if anything, does the Constitution forbid judges, tempted by life tenure and our own certitudes, to get into?

Alexis de Tocqueville once commented, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." But that cannot be entirely right. In the early 1970s, certain Justices sought to embody Great Society principles in the Equal Protection Clause of our Constitution. But whatever the Great Society's political merits or demerits, America did not need a Great Society Constitution. It is also one thing to welcome the Tea Party as a political movement, quite another to embrace a Tea Party Constitution. Political disputation and constitutional debate are simply different things, and it does our democracy no favors to confuse the one with the other.

I appreciate your attention this evening. Perhaps you will say to me what my dear, late colleague Judge Blane Michael often did: "I'd like to agree with you Jay, but then we'd both be wrong." But if judicial restraint is out of fashion among conservatives today, I remain an optimist. Those of you who are members of the Federalist Society represent tomorrow in my eyes, and I hope you understand the high calling a restrained school of constitutional interpretation

*The Lost Arts of Judicial Restraint*



represents. Try it out. You may find that spinach has been given an undeserved bad name. Thank you once again for this nice occasion. I am deeply touched by your recognition and honored in every way to be your guest.

*GB*