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Judicial
Activism

By James L. Huffman



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By James L. Huffman

Most political conservatives believe in the principle of judicial restraint. I share that conviction, but I also believe in judicial activism. My purpose today is to make a case for principled judicial activism. In the process I will argue that the traditional conservative doctrine of judicial restraint poses a serious threat to liberty, and is therefore not consistent with the fundamental objective of the framers of the United States Constitution.

Our Libertarian Constitution. I begin from the premise that the United States Constitution, even in its civic republicanism, is a fundamentally libertarian document. This foundational premise is critical to my argument, because the case for pervasive judicial restraint, of the type practiced by the conservatives on the Supreme Court, is based upon a very different foundational premise. Their premise is that the United States Constitution is founded upon democratic majoritarianism. Their commitment to this view is drawn from the recently rediscovered civic republicanism of the framers. My libertarian understanding of the Constitution does not deny the framers' commitment to civic republicanism. However, I understand that commitment very differently than do the conservatives on our Supreme Court. It should be of no small concern to conservatives that the understanding of civic republicanism upon which the generally accepted doctrine of judicial restraint relies is precisely the understanding of civic republicanism which drives the vast regulatory agenda of the new administration. In a different lecture I might marshal the evidence which supports my libertarian interpretation of the Constitution and its relation to civic republicanism. For the present I will rely upon a concise statement of libertarian, civic republicanism as expressed by the Anti-federalist Republicus, writing in the *Kentucky Gazette* of February 16, 1788:

Thus it appears how civil government becomes a substitute for moral virtue: and that instead of infringing the rightful liberties of mankind, it tends to secure them: and by this criterion may every government be tried: that government which tends not to secure the lives, liberties, and properties of every individual of the community, as far as the law of reason would have done, is unjust and iniquitous and merits not the name of civil government.

The Philosophy of Judicial Restraint. The highest responsibility of every federal judge, affirmed by an oath of office, is to uphold the Constitution. I do not believe that the philosophy of judicial restraint, which dominated federal judicial selection during the Reagan and Bush Administrations, conforms to this high responsibility. I believe that the responsibility of a federal judge, to state it in the language of restraint, is to be restrained in the interpretation of constitutionally enacted legislation and regulations, and to be aggressively activist in the protection of individual liberty. My purpose is to explain how a judge can justify the role I urge.

Much recent Supreme Court case law seems to have had the purpose of withdrawing the federal courts from essentially political matters. This is a good objective, but not when accomplished pursuant to a philosophy of restraint which leads judges to fail in the performance of their responsibilities under the Constitution. In its rush to avoid participation in politics, the Court has abandoned its responsibility

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to uphold the political philosophy of our Constitution. Judicial restraint is not a part of that philosophy; it is not a constitutional end. It is a means which can serve constitutional ends only if we understand how it relates to our fundamental political philosophy.

First, we should ask why conservatives would adhere to a principle of judicial restraint. Many will recall the oft-quoted Tocqueville statement that every political issue in America is sooner or later a judicial issue. If Tocqueville meant that every political contest may raise a judicial question, he was surely correct. If he meant that every political question is ultimately resolved by the courts, he was not describing the 19th century federal courts he was observing. He would have been correct, however, had he been describing the mid- and late 20th century federal courts. Tocqueville, like so many conservatives today, made the mistake of concluding that judicial review is inevitably political. Properly done, judicial review is essential to the implementation of a political philosophy. Improperly done, as it has been for the last half century, it is a political act itself. Advocates of judicial restraint would do well to understand the difference between judicial adherence to a political philosophy and judicial participation in politics.

Why do conservatives advocate judicial restraint? Four traditional conservative arguments for a comprehensive philosophy of judicial restraint come to mind.

First, judicial activism is said to be undemocratic. The federal courts are not democratic institutions. Their role, the Supreme Court seems to say, is to permit the body politic to make its choices.

Second, it might be argued that judicial activism is unconstitutional. It is not the role which the Constitution sets out for the courts, and correctly so because the courts are not competent to engage in public policy-making.

Third, it would be unprincipled for judicial conservatives to be activist in light of their long-standing criticism of the activism of judicial liberals.

Lastly, to take the opportunity to be activist, now that conservatives are in judicial power, would only legitimize activism by liberals when they come back into power, which they will do if ever they manage to meet their own, self-imposed, diversity requirements in making new appointments to the federal bench.

Except for the last, I do not disagree with any of these arguments in the abstract. But I do not believe that they justify the sort of restraint which the conservatives on the federal courts have exercised over the last several years. As to the first three arguments, I will endeavor to explain in some detail how I believe the arguments have been misapplied. With respect to the argument of setting a precedent for future liberal judges, I would suggest that they will require no such precedent. They will take their slice of the pie when the opportunity arises. The hope, if there is any, for influencing future liberals on the court, is to establish a libertarian principle of judicial decision-making which even they will not be able to ignore. Federal courts can insist, in other words, that liberals respect the meaning of the label they proudly wear.

I believe that conservatives have gone astray in part because they have framed the issue of judicial review too narrowly. The issue is not just who decides, but who decides *what*? The fact that we have committed some issues to the democracy, does not mean that we have committed all issues to the democracy. The Constitution recognizes implicitly that state legislatures retain their police powers and explicitly that the federal government has enumerated powers. The Constitution also limits both state and federal legislative powers. The democracy is thus limited and to that extent the judiciary not only does not intrude upon the democracy when it enforces those limits, it is constitutionally required to do so. Those matters which are constitutionally within the power of the federal and state legislatures are not the concern of the judiciary and the Supreme Court is correct in calling for judicial restraint. But this

does not translate into a constitutional doctrine of judicial restraint on every issue which might come before a court.

The federal courts have a responsibility to determine whether or not legislative actions are constitutionally within the power of Congress. John Marshall settled this question in *Marbury*, and, notwithstanding volumes of discussion on the subject in the intervening years, no one seriously questions the principle today. Where does a court look to answer this question? It looks to the power-allocating and rights-protecting provisions of the Constitution. This question is not to be answered without an understanding of the Constitution as an expression of political philosophy.

A central point of the work I am currently doing on federalism is that power allocation is not simply a power struggle between competing governors, although it is inevitably that. Under our Constitution, it is also a careful assignment and division of power for the purpose of assuring that government serves the interests of the people who constitute it. The allocation of power among levels of government is not an issue in which many people take an abstract interest. We are interested in the question only as it affects our individual and group interests. One does not value federal power over state power except to the extent that one will be better served in some sense by federal power than by state power. The same can be said of the separation of powers among the judicial, legislative, and executive branches. No one, other than those who occupy the various positions of power, can have any abstract interest in which branch of government exercises what powers. The structure of government has no end in itself. The framers of the Constitution did not agonize for four months about structure because they cared passionately about the question in the abstract. Rather they cared passionately about the lives of those who would be governed, and they understood that the allocation of power would have great implications for those human lives.

The Presumption for Individual Rights. A court also looks to the rights-protecting provisions of the Constitution to define the legitimate power of government. Because our Constitution contains an enumeration of these rights guarantees, conservative judges, following the thinking of Robert Bork and others, have expressed concern about the judicial creation of rights which are not expressly guaranteed in the Constitution. But why should we interpret a libertarian constitution to be parsimonious on rights? Of course I need to convince you that it is a libertarian constitution, but if I convince you, then you should be persuaded to conclude that perhaps both *Lochner* and *Griswold* got it right. I do not say, therefore, that *Roe* got it right. That is a much more difficult question in my mind, but not because of a tension between the rights of the majority to regulate abortion and the right of a woman to have an abortion, but rather because of the tension among the rights of the woman, the fetus, and the prospective father. *Lochner* and *Griswold* were about the relationship between the individual and the state. *Roe* was about the competing rights claims of individuals. In the former cases, a libertarian constitution requires a presumption in favor of the individual. In the latter case, libertarian values do not establish a clear presumptive favorite.

We all know well the history of the Bill of Rights and of the Ninth Amendment. The Philadelphia framers did not include a Bill of Rights in their proposed constitution. Had their proposal been ratified as proposed, would today's judicial restraintists contend that the only rights individuals have against the federal government are those few expressed in Article I, Section 9? Would the philosophy of judicial restraint require us to conclude that the Constitution proposed by the Philadelphia convention provided no protection against federal intrusions upon free speech, religious freedom, or due process? Of course we do have a Bill of Rights, and it includes the Ninth Amendment. Does it make more sense to say that the Ninth Amendment is a truism or an empty vessel than to say it is filled with the philosophy of libertarianism?

This is not, I would suggest, the position of one who would rewrite the Constitution. I believe I stand firmly on the ground of framer intent. Without reference to framer intent, or to some intent other than that of the immediate decisionmaker, we have no constitution. Constitutional government is by

definition limited government and limited government requires that the constitution have anterior meaning. To accept all Supreme Court interpretation of the Constitution as the meaning of that document is to abandon framer intent in favor of the intent of the last court to decide.

But we should not be so naive as to believe that the framers of the Constitution could somehow have expressed their intent clearly and without doubt in their language. We know a good deal about what the framers valued and sought to accomplish. There is more than sufficient evidence that liberty was a central concern, if not the central concern. I do not deny that the division between individual rights and the power of the state to regulate for the promotion of individual rights is a difficult problem, but it is clear to me what the judicial posture should be with respect to that issue.

Why should the judiciary defer to the democracy, as Justice Scalia would have it? Is the democracy threatened by an occasional overreaching on the rights side? Did *Lochner* or *Griswold* hamstring the democracy so that it could not perform its constitutional functions? If we are to err, we should err on the side of liberty. Who has the power in this business of government? Do claims of individual right threaten the survival of the community? Justice Holmes once suggested that speech might on some occasions present a clear and present danger to the survival of the nation, but those occasions have proven rare indeed. All the evidence we have before us in the form of pervasive federal and state regulation demonstrates that government has no problem aggregating and exercising power. Liberty has always been at risk in every society in the world. If the courts have any role to play in preserving our constitutional system, surely it is to side with liberty and the individual. The executive and legislative branches of government have done quite well on their own.

The Presumption for Democracy. In an odd sort of way, conservative judicial restraintists have joined with John Hart Ely in the belief that judicial review is rooted in the protection of democracy. But why this persistent concern about democracy? No doubt the courts will and should intervene to halt governmental action that violates the democratic principle, but do we do it for the sake of democracy? Is ours centrally a democratic constitution? Is democracy the ultimate goal of our system of government? Can anyone articulate a case for democracy that is not rooted in some more fundamental value? I think not. I think democracy is, and, as Martin Diamond has demonstrated, was in the view of the framers, the least worst form of government. Remember, it is American not to trust government. Not even democratic government. Have we forgotten Madison's warning of the tyranny of the majority? The risks of tyranny are less in a democracy than in other forms of government, but they persist nonetheless. Who is there to guard against such tyranny but the courts? But if the courts adhere to a judicial philosophy the fundamental principle of which is deference to the democracy, the tyrannous democracy will go unchecked. By definition it will not be checked by the people. There is nowhere to turn but the courts, and they, inspired by a simplistic philosophy of judicial restraint, will have abandoned liberty for democracy and community. Ironically, the conservative judges have laid a solid foundation for the communitarian visions of the new administration.

Why is democracy the least worst form of government? Why is it the best form of government? Is there something to be valued in having 50 percent of the population plus one dictate to the other members of society? Is there something mystical about the agreement of a majority which changes the self-interested opinions of individuals into the public good? Or, if you believe that individuals have a dual capacity as self-interested consumers and public spirited citizens, do differing opinions of the public good become the public good simply by the agreement of 50 percent plus one? I believe that the reason democracy is the least worst, or best, form of government is because it comes as close as we can in an extended republic to permitting individuals control on their lives. We value democracy because it is as close as functional government can come to being libertarian. Only unanimity would totally satisfy liberty, but in a society of 280 million we must settle for republican democracy. We settle for it not because it has merit by itself, rather because it serves, as best we know how, liberty.

Deciding the Claims of Liberty. The classic formulation of the problem of liberty is that each individual should have the maximum liberty consistent with the equal liberty of all other individuals. Holmes described this as a shibboleth, but it is not. It is the essential challenge of liberty. When does government regulation promote liberty and when does it interfere with liberty? Consider a D.C. ordinance which prohibits discrimination on the basis of hairstyle or dress. Is this regulation consistent with a libertarian constitution? I do not find this case very difficult. It is quite clear to me that individual liberty is limited rather than promoted by the regulation, notwithstanding that an articulated purpose of the regulation is no doubt to promote liberty.

But we cannot decide every claim of liberty on an ad hoc balancing in particular cases. That would be the rule of man (and woman), not the rule of law. Our solution to this problem is rights. In the case at issue the rights question is whether the employer or landlord has the right to hire or rent to whom they please or the prospective employee or tenant has the right to dress and appear as they please. A positivist judge may conclude that the D.C. ordinance settles the question in favor of the prospective employee or tenant. But there is more positive law to be referenced, namely the Constitution of the United States. Does the police power of the state, or in this case the enumerated and implied powers of Congress, extend to such regulation? Probably so, under established doctrine, but it is just possible that we have it wrong, if liberty is our standard.

But even in cases like this, rights problems are not simple. Courts are often faced with competing claims of right and it is the nature of our system that the judge can seldom cut the baby in half. It is one way or the other. One claimant wins and has the claimed right. The other claimant loses and does not have the claimed right. The definition and protection of liberty requires the drawing of boundaries between people. By deferring to past court decisions which have permitted the democratic or bureaucratic denial of liberty, courts violate their obligation to uphold the Constitution.

Feminist theorists like Catherine MacKinnon would have courts refuse to draw these boundaries in the interest of community and caring, but to do so, even in the name of democracy, is to abandon the liberty of the individual to the whims of the state. Catherine McKinnon's (and I fear Bill and Hillary Clinton's) vision of the Constitution is not the vision of the framers. Perhaps their communitarian vision is the wave of the future, but it is not for the President or the courts to amend the vision of the framers. Until the Constitution is constitutionally amended, it is for the courts to insist that the President and the Congress adhere to the vision of the framers.

Wetlands as Liberty's Battleground. The definition of the judicial role is much simpler where the regulation in question purports to be in the public interest. Section 404 of the Clean Water Act, which says absolutely nothing about wetlands, has been interpreted to be a congressionally mandated requirement that the Corps of Engineers issue a permit before any wetland is filled or otherwise destroyed. Is this within the constitutional power of the Congress? A federal circuit court said no in the *Hoffman Estates* case. It was a bold act by federal judges; so bold that the circuit court, acting en banc, withdrew the opinion. All lawyers learned in law school that Congress can do anything it wants pursuant to the Commerce Clause. Section 404 is a regulation of the navigable waters of the United States, broadly construed. A long line of cases upholding federal regulation of everything from the feeding of homegrown wheat fed to homegrown cows to the regulation of race relations in establishments serving non-resident hamburger should make it clear that the owners of lands with isolated wetlands must comply with Section 404. But a federal circuit panel said no, this makes absolutely no sense. And we all know they were right, even if the opinion has disappeared from the *Federal Reporter* in the name of the rule of law and judicial restraint.

Court of Claims Chief Judge Loren Smith has decided two wetlands takings cases, *Loveladies Harbor* and *Florida Rock*, which are in direct conflict, most would say, with Supreme Court takings jurisprudence as expressed in the *Penn Central* case. Judge Smith is also right. Judge Smith also will probably be overturned, if not in those cases then in some others. But Judge Smith might not be over-

turned, and if he is not he will have served the interests of our libertarian Constitution. He will have had the courage to say that the emperor has no clothes. And while abridging the law as interpreted by prior judges, he will be upholding the rule of law as it must be understood under a libertarian Constitution.

What is the point of the rule of law? It is to avoid the rule of man and woman. Which is to say it is to avoid the rule of the king, the dictator, the arbitrary judge, and the tyrannous majority. The rule of law is about liberty. We value it because we value liberty and the certainty which guaranteed liberty provides to human lives. To be judicially restrained in the name of the rule of law without reference to the reason we value the rule of law is to put form over substance.

Our Conservative Judges. Our Constitution is not just a machine that would go of itself, in the words of Michael Kammen. If a machine, it is one with a purpose. When, while being maintained by the Supreme Court, it goes of itself to produce results for which it was not intended, we need a new maintenance crew which will make the necessary repairs. The conservatives on the Supreme Court are not that crew. They have as much as said (see O'Connor in the abortion cases) that if the court gets it wrong it will have to stay wrong. That is what judicial restraint requires. But that is not what liberty requires. They clearly need some help from below.

Part of the problem is that our conservative judges, like all of our lawyers, are trained in the tradition of Langdellian legal science. All will readily proclaim themselves legal realists, but they will behave as legal scientists, asking only what is the law? It is not for the judge to ask what the law ought to be. That is for legislators. But that is for legislators only within their constitutional domain. The law ought to be what it was intended to be and when we have gotten it wrong we should set it right.

Popular Sovereignty, Not Democracy. Liberty is too important to be sacrificed to an abstract commitment to judicial restraint. Deference to democracy is appropriate where the democracy has the constitutional responsibility. What the courts should ultimately defer to is popular sovereignty, not democracy. There is a difference. Popular sovereignty is about individual people having control, not about the people as some mystical entity having control. We have come to associate the term sovereignty only with states in the general sense of that term. But sovereignty is said to derive from the people. Why? Because each individual is and ought to be an autonomous, sovereign entity. This idea is at the heart of 18th century social contract theory which was so important to the framers of the Constitution.

The Constitution is the creation of popular sovereignty, and it is that to which the courts should defer. The conservative position, as expressed by many federal judges, is not neutral. There are not neutral principles for judges to hide behind. When Holmes said in *Lochner* that the Constitution does not enact any particular philosophy he was wrong. Without a philosophy the Constitution is an empty vessel. The conservative, judicial restraint position serves a particular conception of the Constitution, and I believe it is not a conception the framers intended. The judicial restraint of conservatism is rooted in majoritarianism, not libertarianism. Even if one can make a case of framer intention to create a government which would promote and enforce civic virtue, it cannot be made in the name of majoritarianism.

It strikes me in reading many judicial opinions that one of the problems with our judiciary is that our judges have too much experience with the real world. Judges have served in agencies and in Congress and have worked in law firms. They have learned how to solve immediate problems for their clients and constituents. But we need a little of the vision thing, and not just prospective vision. A little hindsight would be helpful; there is much to be learned and remembered from our past. The ideas debated by Madison and Hamilton and Jefferson and Marshall are relevant to more than isolated legal controversies. They are fundamental to what our society has been and will become.

For Judicial Activism. In sum, my argument is this. The federal courts should be restrained in the review of actions which are constitutionally undertaken by the other branches and levels of government. Indeed once the court concludes that government has acted within its constitutional powers, there is no further role for the court. This means there is no room for judicial utilitarianism, à la Judge Richard Posner, or for judicial communitarianism, à la Justices Douglas, Rehnquist, and Scalia. But in deciding whether or not the government is acting within its constitutional powers, as defined by constitutional definitions and allocations of power and by constitutional guarantees of individual rights, the courts should be unabashedly activist.

To illustrate I will return to the takings cases decided by Judge Loren Smith and now pending before the Federal Circuit. These cases involve challenges to the Corps of Engineers's implementation of Section 404 of the Clean Water Act, what has come to be our wetlands protection statute. A federal judge might be asked to address several questions in such a challenge. 1) It might be asked whether the federal government has the constitutional authority to regulate the lands in question. Assuming that the government does have such power, 2) it might be asked whether the government's regulation of the lands in question is in the public interest in light of the economic uses to which the land might be put. Or 3) it might be asked, assuming again that the government has the power, whether the Corps has properly delineated the lands in question as wetlands. Finally, assuming that the government has the power and has properly delineated the wetlands, 4) it might be asked whether the government action constitutes a taking of private property. On the second and third questions, whether the government has acted in the public interest and whether the Corps has properly delineated the wetlands, I argue for judicial restraint. The courts know nothing of the public interest nor of wetland hydrology and biology. On the first and fourth issues, on the questions of the extent of government power and of the individual rights limits on government power, I argue that the federal courts should be aggressively activist.

To defer to the legislature and the agency on the issues of the extent of and limits on government power, on the grounds of democracy is to abandon the notion of constitutional government in favor of something resembling parliamentary sovereignty. The vast array of balancing tests to which our Supreme Court has reduced constitutional law is the inevitable consequence of such deference. The Warren Court did it selectively; the Reagan Court has set out to do it on principle. The loss of liberty is the price we pay for adherence to this so-called conservative principle.

There is no point in insisting upon the rule of law if that law has no regard for liberty. Rather than adhere to this principled restraint in the vain hope that a future liberal court will do the same—that we will not again go from *Lochner* to *Griswold*—we should recognize that both *Lochner* and *Griswold* had it right. As has been said of free speech, liberty is meaningful only if it has application to those exercises of liberty which we detest. If conservatives embrace the liberties of the left as well as those of the right; if conservatives embrace the rights of free speech and criminal due process with the same enthusiasm as they do economic liberties and the Second Amendment, then they will have set a libertarian precedent which a liberal court will have difficulty ignoring. A reliance on libertarian principle will force liberal judges to recognize the inappropriate activism of their balancing tests and the unacceptability of their distinction between economic and personal liberties.

The most significant accomplishment of the Reagan-Bush Administrations has been the staffing of the federal courts with intelligent judges. My fear is that the Reagan revolution will come to nothing as these judges sit on their hands in the name of a simplistic theory of judicial restraint. It is a theory which accepts majoritarian tyranny as a constitutional requirement. James Madison would be dismayed. The price, as Madison and his contemporaries warned, will be the continued erosion of liberty.