The constitutional right to be left alone

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By George F. Will, April 18, 2012

Judge J. Harvie Wilkinson III, a Reagan appointee to the U.S. Court of Appeals for the 4th Circuit, is a courtly Virginian who combines a manner as soft as a Shenandoah breeze with a keen intellect. His disapproval of much current thinking about how the Constitution should be construed is explained in his spirited new book — slender and sharp as a stiletto — "Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance."

A "cosmic theory," Wilkinson says, is any theory purporting to do for constitutional questions what Freud and Einstein tried to do concerning human behavior and the universe, respectively — provide comprehensive and final answers. The three jurisprudential theories Wilkinson criticizes are the "living Constitution," "originalism" and "constitutional pragmatism." Each, he says, abets judicial hubris, leading to judicial "activism."

Those who believe the Constitution is "living" believe, Wilkinson says, that judges should "implement the contemporary values" of society. This leads to "free-wheeling judging." So Wilkinson apparently agrees somewhat with Justice Antonin Scalia, who stresses the "antievolutionary purpose of a constitution," which "is to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away." Future generations *or contemporary majorities*.

Wilkinson is right that judges, comprising an elite and "introverted" profession, are prone to misreading the values of the broader society. But even if judges read those values correctly, judicial restraint can mean giving coercive sweep to the values of contemporary majorities. That a majority considers something desirable is not evidence that it is constitutional.

One problem with originalism, Wilkinson argues, is that historical research concerning the original meaning of the Constitution's text — how it was understood when ratified — often is inconclusive. This leaves judges no Plan B — other than to read their preferences into the historical fog.

Constitutional pragmatists advocate using judicial power to improve the functioning of the democratic process. But this, Wilkinson rightly warns, licenses judges to decide what a well-functioning democracy should look like and gives them vast discretion to engage in activism in defense of, for example, those it decides are "discrete and insular minorities."

Insisting that "the republican virtue of restraint requires no cosmic theory," Wilkinson's recurring refrain is that judges should be disposed to defer to majorities, meaning the desires of political, popularly elected institutions. But because deference to majority rule is for Wilkinson a value that generally trumps others, it becomes a kind of cosmic theory — a solution that answers most vexing constitutional riddles.

Wilkinson's premise is that "self-governance," meaning majority rule, is the "first principle of our constitutional order." But this principle, although important, is insufficient and, in fact, is secondary.

Granted, where politics operates — where collective decisions are made for the polity — majorities should generally have their way. But a vast portion of life should be exempt from control by majorities. And when the political branches do not respect a capacious zone of private sovereignty, courts should police the zone's borders. Otherwise, individuals' self-governance *of themselves* is sacrificed to self-government understood merely as a prerogative of majorities.

The Constitution is a companion of the Declaration of Independence and should be construed as an implementation of the Declaration's premises, which include: Government exists not to confer rights but to "secure" preexisting rights; the fundamental rights concern the liberty of *individuals*,

not the prerogatives of the collectivity — least of all when it acts to the detriment of individual liberty.

Wilkinson cites Justice Oliver Wendell Holmes as a practitioner of admirable judicial modesty. But restraint needs a limiting principle, lest it become abdication. Holmes said: “If my fellow citizens want to go to Hell I will help them. It’s my job.” No, a judge’s job is to judge, which includes deciding whether majorities are misbehaving at the expense of individual liberty.

Justice Felix Frankfurter, whose restraint Wilkinson praises, said that the Constitution is “not a document but a stream of history.” If so, it is not a constitution; it cannot constitute if its meanings are fluid and constantly flowing in the direction of the preferences of contemporary majorities.

The Constitution *is* a document, one understood — as America’s greatest jurist, John Marshall, said — “chiefly from its words.” And those words are to be construed in the bright light cast by the Declaration. Wilkinson worries about judges causing “an ever-increasing displacement of democracy.” Also worrisome, however, is the displacement of liberty by democracy in the form of majorities indifferent or hostile to what the Declaration decrees — a spacious sphere of individual sovereignty.

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