On Judicial Restraint

Orin Kerr at the Volokh Conspiracy wonders whether, in the aftermath of the Supreme Court’s decision upholding Obamacare’s individual mandate, liberals and conservatives are about to swap positions on the proper role of the Supreme Court. For decades, Kerr notes, liberals have tended to view the power of judicial review as an unambiguously positive thing. If the exercise of that power entails striking down statutes, then good: it means that the wayward legislature has strayed from fundamental law, and we are lucky that the wise judges can keep the other branches in check. Judges should try to get it right, based on whatever understanding they have of what the Constitution truly means.

Conservatives, by contrast, typically have argued for judicial restraint. This view sees the power of judicial review as important but also potentially dangerous. We live in a democracy, and statutes represent majority will. Judges often confuse their view of the constitution and their view of sensible policy. This creates a significant danger that courts will overturn legislatures when they dislike the legislation, rather than when the constitution truly demands it. Thus, judges should be modest and wary of exercising their power in ways that trump the will of the people.

Even before the Court decided the Obamacare case, we saw evidence that liberals were flipping from the first view to the second. President Obama went so far as to declare that it would be wrong for the “unelected” Supreme Court to take the “unprecedented and extraordinary” decision, to strike down his signature health care legislation, when it was passed by an elected Congress. Obama backtracked a bit, but it’s clear enough that the left is prepared to abandon its traditional position on judicial review in the interest of promoting a leftist policy agenda. The will to power is paramount for the modern American left.

But some conservatives seem equally prepared to flip. Judicial restraint, they say, is so 1970s. The concept is an historical accident – an overreaction on the part of a battered conservative movement to the excesses of the Warren court. With that court 50 years in the rearview mirror, it’s time for today’s self-confident conservatives to stop worrying about legislating from the bench, and get on with defending the Constitution.

My view is that these conservatives go too far. We still live in a democracy where, in theory at least, statutes reflect the will of people, just as, in theory at least, they did during the 1970s. Judges are still unelected and still quite fallible, both in their policy preferences and in their judgments about what the Constitution means. And, perhaps even more so than during the 1970s, judges are prone to allow their policy preferences to influence their judgments concerning the Constitution.

Accordingly, judges have as much as ever to be modest about. And with such modesty should come restraint, no matter whose ox is being gored.

But modesty is an attitude not a philosophy. Although judges should judge modestly, it is not their function to be modest; their function is to decide cases, including constitutional cases, correctly. Thus, while modesty should
inform constitutional adjudication, it should not become a judge’s overriding concern. One cannot build a sensible core judicial philosophy around modesty and restraint.

The law being the law, judges have developed a doctrine that purports to help judges balance the competing concerns of modesty/restraint and enforcing the Constitution. This is the “avoidance” doctrine that Chief Justice Roberts invoked in upholding the individual mandate. It holds that if a court can give statutory language a “fairly possible” meaning under which a statute should be upheld under the Constitution, then they should give it that meaning and uphold the statute.

The problem with this doctrine, of course, is that the concept of “fairly possible” is extraordinarily malleable and indeterminate in most cases. It’s a little like the notion that, in boxing, the champion should not lose his belt unless the challenger clearly defeats him. In practice, we know this means that the champion keeps his belt in the event of a tie. We also understand that the champion shouldn’t keep his belt simply by making it to the end of the fight. But there’s plenty of gray area in between these two extremes.

So too with the phrase “fairly possible” as used in the “avoidance” doctrine of constitutional adjudication. And this means that the concept doesn’t really provide much help when it comes to alleviating the concerns that favor judicial restraint – judicial fallibility and political bias. Indeed, given its malleability, the avoidance doctrine can serve as an invitation for “activist” judges to advance an extraneous agenda, be it upholding a statute one agrees with from a policy standpoint or acting to protect/enhance the image of the Supreme Court.

In sum, conservatives should not discard the concept of judicial restraint as a relic. But conservatives should also recognize that restraint is an attitude, not an overriding judicial philosophy. And they should understand that doctrines that purport to reflect judicial modesty can easily serve as a vehicle for highly immodest judicial activism.