

Fall 1988

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Recommended Citation

Peter Irons, *Making Law: The Case for Judicial Activism*, 23 Val. U. L. Rev. 35 (1988).

Available at: <https://scholar.valpo.edu/vulr/vol23/iss1/2>

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ARTICLES

MAKING LAW: THE CASE FOR JUDICIAL ACTIVISM*

PETER IRONS**

As the title implies, I will attempt in this essay to make a case for judicial activism on behalf of civil rights and liberties. I am deliberately using the argumentative mode of discourse, as opposed to the “analytic” approach to issues of jurisprudence that most academics profess (in many cases, I might add, donned as a thin disguise for their hidden political agenda: wolves in sheepskin, to coin a phrase). But my major point is that *all* discourse on judicial review, whether it professes judicial activism, judicial restraint, or the Olympian detachment of “neutral principles,” is in fact political, in the broad sense of that term. Further, I argue that every approach to judicial review is activist; even those who counsel “restraint” in judging the constitutionality of legislation act in furtherance of a political agenda, often concealed behind a smokescreen of jurisprudential mumbo-jumbo (“interpretivism” and “noninterpretivism” are currently trendy terms). With few exceptions, the political positions of protagonists on both sides can be revealed by applying the “who wins-who loses” equation to the cases they decide or discuss. It is a rare judge (and even more rare law professor) who is truly dispassionate in cases that provoke passions over divisive issues of rights and liberties, issues like race and religion, protest and privacy.

Before I defend these heresies, it is a good idea to define terms and

* This essay is a slightly revised and updated version, with citations added, of a lecture I delivered on March 21, 1989, as Distinguished Scholar-in-Residence at Valparaiso University School of Law. I want to thank Dean Ivan Bodensteiner for the invitation, Paul and Susan Brietzke for their hospitality, and the law school faculty for helpful comments on the lecture. The essay is part of the framework for a forthcoming book, with the same title, to be published by The Free Press.

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positions. Let me do this in the words of two judges who have become identified with the polar extremes of the activist-restraint debate, Justice William J. Brennan of the United States Supreme Court and former Judge Robert Bork of the United States Court of Appeals for the District of Columbia. I will ask the reader to decide (without peeking at the footnotes) which judge made this "activist" argument:

A desire for some legitimate form of judicial activism is inherent in a tradition that runs strong and deep in our culture. . . . We continue to believe there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. . . . Legitimate activism requires, first of all, a warrant for the Court to move beyond the limited range of substantive rights that can be derived from traditional sources of constitutional law.

The judge then found "[t]he case for locating this warrant in the long-ignored Ninth Amendment. . . ."¹ Just to remind those readers who do not, like Hugo Black, carry around a copy of the Constitution, the Ninth Amendment to the United States Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

You can imagine how tempting this invitation to construct new rights would be to judicial activists. The judge who made this argument continued with the blunt statement that "the idea of deriving new rights from old is valid and valuable" and that the Ninth Amendment "has revolutionary implications for the practice of judicial review, extending the range of individual freedoms far beyond the text of the Constitution." Putting flesh on this concept, he defines the "new concept of rights" as "something roughly describable as a presumption in favor of human autonomy."² With this presumption as a tool, Justice Brennan has voted to support the right to abortion, the right to possess books and films considered obscene, and the right of gays to practice consensual sodomy.³

At the other end of the judicial spectrum, the judge who counsels "restraint" reminds his colleague that "[w]hen Justices interpret the Constitution they speak for their community, not for themselves alone."⁴ Quoting one of the Founding Fathers of judicial restraint, Alexander Bickel, the judge cites the "counter-majoritarian difficulty" with judicial activism; that

1. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, 138, 168-69.

2. *Id.* at 170, 174.

3. *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

4. Brennan, *Interpreting the Constitution*, SOC. POL'Y, Summer 1987, at 24.

is, the principle that elected representatives, implementing majority sentiment in enacting laws that establish public policy, better reflect that sentiment than unelected judges and justices. "Our commitment to self-governance in a representative democracy," the judge continues, "must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law."⁶ His conclusion is simple: "Faith in the majoritarian process counsels restraint."⁶ Following this counsel, Judge Bork has supported the power of states to outlaw abortion, defended the power of local communities to ban "obscene" materials, and voted on the bench against any asserted "right" to engage in homosexual sodomy.⁷

Knowing what we do about Justice Brennan and Judge Bork, and the political agendas we associate with their jurisprudential positions, most of us (who have not peeked at the footnotes) would guess that Justice Brennan spoke first in this debate. But the "activist" argument came from the pen of Judge Bork and the "counsel of restraint" from that of Justice Brennan. My point in this academic shell game is that what we perceive as fundamental and irreconcilable differences between advocates of judicial activism and judicial restraint are in fact merely rhetorical devices, designed to shield one's "outcome-oriented" approach to judging from the strict scrutiny of political reality.⁸ What is said in these debates is largely bromidic and uncontroversial: of course judges, at least on the federal bench, are not elected; of course the constitutional text is open-ended on important issues; of course we believe in both majority rule and minority rights. The pinch comes in concrete cases, such as abortion, obscenity, and sodomy. Here the bromides break down and controversy reigns.

If the combatants in this jurisprudential battle can wear the uniform of the other side without being detected, then is this a real battle? I suggest that it is, that behind the smokescreen of the debate over judicial activism and restraint there is a real battle in which people have suffered, have been injured, and have even died as a result of the outcome of Supreme Court decisions that were based on judicial deference to legislative acts. In this

5. *Id.*

6. *Id.* at 25.

7. In 1981, as Solicitor General, Bork testified that he considered *Roe v. Wade* "an unconstitutional decision, a serious and wholly unjustifiable usurpation of State legislative authority. . . ." *Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 97th Cong., 1st Sess. 310 (1981); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1, 20 (1971); *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

8. For empirical evidence of the high correlation (at least .80) between the political ideology and votes in civil liberties cases of U.S. Supreme Court members (from Earl Warren to Anthony Kennedy), see Segal & Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *AM. POL. SCI. REV.* 557 (June 1989).

real battle, as opposed to the rhetorical battle of judges and law professors, we need the weapon of judicial activism in order to protect members of "discrete and insular" minorities from the tyranny of the majority.

In making the case for judicial activism, I employ the tools of empirical study and analysis, the tools of political science and history rather than those of classical jurisprudence. This enterprise is based on a close and critical examination of what I call "the majoritarian myth." This myth, of enduring strength in American history and law, rests on the premise that the process of law-making reflects the translation of majority will into public policy by representative legislative bodies. We have had little real debate over this premise. Even the mainstream defenders of judicial activism accept this premise without any searching scrutiny or skepticism. Their defense of judicial activism is thus apologetic and defensive, a search for exceptions to the general rule of legislative deference.

Let me give you two authoritative examples of this myth. John Hart Ely, the dean of Stanford Law School and the author of *Democracy and Distrust: A Theory of Judicial Review*, first asserts that "most of the important policy decisions are made by our elected representatives (or by people accountable to them)" and follows this with a confession that judicial activism "seems especially vulnerable to a charge of inconsistency with democratic theory."⁹ Jesse Choper, dean of the University of California, Berkeley, Law School, argues in his book, *Judicial Review and the National Political Process*, that "American history has shown, certainly at the national level and generally at the state and local levels as well, that with relatively few exceptions. . .the political process has not tyrannized minorities."¹⁰ Despite what Choper dismisses as "surface blemishes" on the record of civil rights and liberties, he finds "an underlying and unshrinking core of popular responsibility. . .not pure majority rule, but rule by government broadly accountable to the majority."¹¹

It is this assumption that majority rule accurately reflects American political reality that underlies and justifies the argument for judicial restraint and its corollary principle of legislative deference. This principle was stated most forcefully in 1827 by Justice Bushrod Washington in *Ogden v. Saunders*: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."¹² Whatever legislative body Justice Washington had in mind as an exemplar of wisdom, integrity, and patriotism, I

9. J. ELY, *DEMOCRACY AND DISTRUST*, 4, 9 (1980).

10. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS*, 8 (1980).

11. *Id.* at 48.

12. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 268 (1827).

think few of them—whether federal, state, or local—can satisfy the majoritarian principle or can be entrusted to safeguard the constitutional rights of minorities against the hostility and prejudice of majorities.

The major argument of those who profess to oppose judicial activism is that, in a system based on majority rule, unelected judges should not displace the decisions of elected representatives. However attractive in principle, the majoritarian myth has two serious flaws, one structural and the other functional. First, as Justice Thurgood Marshall reminded us during the Bicentennial hoopla of our lily-white Constitution, the document we are raised to revere is explicitly based on anti-majoritarian principles.¹³ Slaves were not counted as full persons, could not vote, were not even citizens. Women, a majority of the population, could not vote. Most states retained colonial property qualifications for voting that excluded poor white males. And one branch of Congress, the Senate, was not chosen by popular election. Even the President was elected indirectly. During most of the 19th century, as little as ten percent of the adult population could vote for state and federal legislators.

The Majoritarian Myth at the Polls

Let me now give a taste of the empirical data that will make up a major argument of the book this essay will become. What my study has discovered thus far about functional flaws in the political system leads me to argue that judicial activism is an essential antidote to some of the toxins that have poisoned that system.

The fact that the Fifteenth, Seventeenth, and Nineteenth Amendments and the Voting Rights Act of 1965 have greatly broadened the franchise in the past century hardly salvages the majoritarian myth. Let us look for a moment at recent history. The last year in which a majority of the eligible electorate cast ballots for our national legislators—a bare majority of 50.7%—was 1972. In leaving this legacy of cynicism about the efficacy of voting, Richard Nixon poisoned the well of politics in more ways than one. In the congressional elections after his 1974 resignation, barely a third of the electorate, 35.9%, bothered to trudge to the polls with the stench of Watergate still in their nostrils. It is the younger voters—the next generation in American politics—and the less well-educated, disproportionately black and Hispanic, who have been turned off from voting. In 1974, only twenty-three percent of those under twenty-five, only thirty-four percent of those who did not finish high school, and only twenty-nine percent of the unemployed bothered to vote.¹⁴

13. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

14. Data compiled from U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF

The situation has not improved in the past fifteen years. Turnout in congressional elections is always highest in largely rural, largely white districts. But in the 1988 election in Indiana's 5th district (in which Valparaiso University is located), with a 97% white electorate, turnout declined even during a presidential year, and barely 50% of the eligible voters cast ballots in a tight congressional race between Jim Jontz and Jim Butcher. This turnout was lower, in fact, than for any post-Watergate election with the exception of 1978, in which the outcome was boringly predictable. Things are even worse in Indiana's 1st district, centered in Gary, with a population that is almost one-third black and Hispanic. Turnout last year in that district was barely thirty-five percent in congressional voting.¹⁶ Do these depressing statistics make the case for judicial activism? Not by themselves, of course. But coupled with what we know about the operation of the legislative process, they certainly undermine the argument for judicial deference to elected officials. To the extent that poor people, blacks, and other minorities have abandoned the polls (whether as a rational choice or because of obstacles to voting), legislation that disadvantages or discriminates against them can hardly be considered the product of a supposedly "pluralist" system that welcomes and incorporates all groups in the electorate.

The Majoritarian Myth at the Grassroots

On the local and state level the majoritarian myth is even more clearly exposed. Voting turnout in local elections often declines to a handful of the eligible electorate.¹⁶ Decisions made by local and state legislators, officials, and employees more often impact—generally in negative ways—the rights of citizens than decisions of Congress or officials of the federal executive branch. These local officials are considerably less likely than members of Congress to have any familiarity with constitutional law and the Bill of Rights. Even those entrusted with legislative training in this field are likely to reflect small-town parochial values.

For example, the chair of Indiana's Senate Judiciary Committee, Edward Pease, is a lawyer from Brazil, Indiana, which has a population of 7,852; his firm's clients include the First Bank and Trust of Brazil and the Summit Lawn Cemetery Association. The House judiciary chair, John Donaldson, is a lawyer from the metropolis of Lebanon, population 11,456,

THE UNITED STATES 1988, 249, 250 (Tables No. 418 and 419).

15. Data extracted from M. BARONE & G. UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1988, 398-400, 406-408.

16. Two recent examples are chilling. Only 18% of the eligible voters took part in the April 1988 Los Angeles municipal elections. *L. A. Times*, April 12, 1989, § I, at 20. In New York City, only 6% of those eligible voted in the May 1989 school board elections. *N.Y. Times*, May 6, 1989, at 31.

whose firm's clients include the Indiana Sheriff's Association and the telephone company. Let me single out another state, not known as a bastion of civil rights and liberties. The Senate judiciary chair in Mississippi, Martin T. Smith, is a probate and bank lawyer from Poplarville, population 2,562. The Mississippi House judiciary chair, Terrell Stubbs, comes from an even smaller town; his committee does not even have a professional staff.¹⁷

I do not mean by these examples to disparage small-town lawyers as a suspect class; big-city legislators vote for blatantly unconstitutional laws. What I do mean to suggest is, first, that rural legislators may be less tolerant of "deviants" of various kinds than their urban colleagues, and second, that local and state legislative bodies are far less likely than Congress to have the expertise, the staff, or the legal competence to operate the legislative process than the majoritarian myth presumes. Jesse Choper, who takes the Panglossian view that congressional enactments "generally illustrate the national political process operating at their majoritarian best," admits that he made "[n]o detailed examination" of local and state lawmaking bodies; he nonetheless claims "that laws finally enacted by state[s] and municipalities most likely have staunch popular backing within their political units. . . ."¹⁸ Choper in fact provides no evidence of *any* examination of government at the lower levels. And John Hart Ely, who asserts without evidence that we have "increasing popular control of our government," does not even include Congress in his book's index.¹⁹

This is an important point in my case for judicial activism. To the extent that legislative bodies, at all levels of government, are unrepresentative in composition, undemocratic in operation, and unconcerned with constitutional rights, the case against judicial activism, based on the unexamined assumptions of the majoritarian myth, is seriously attenuated. Let me provide some case-study data at this point of my argument.

The Legislative Process and the Supreme Court

My seminar students recently completed a census of all Supreme Court decisions since 1940 that involved the following issues: First Amendment cases; claims of discrimination based on race, religion, national origin, gender, age, or poverty; and privacy claims that dealt with contraception, abortion, or gay and lesbian sexual preference. My students noted for each case what particular governmental body was involved as a party and what body had enacted the law, ordinance, or regulation in question. I have selected data for this essay from the Supreme Court terms of 1940-41, 1950-

17. Data compiled from THE COUNCIL OF STATE GOVERNMENTS, STATE ELECTIVE OFFICIALS & THE LEGISLATURES, 1985-86, 37-39, 71-73.

18. CHOPER, *supra* note 10, at 28.

19. ELY, *supra* note 9, at 7.

51, and so forth up to 1980-81. Of the 110 civil rights and liberties cases decided in those terms, an average of eighty-two percent—more than four out of five—involved state and local laws; the lowest numbers, sixty-seven percent in 1950-51 and seventy-eight percent in 1960-61, reflect the rash of federal Smith Act cases against alleged or actual Communist party members from the outbreak of McCarthyism to the end of that infection of the body politic. In other words, at least two-thirds of all civil rights and liberties cases decided by the Supreme Court were challenges to state and local laws. These figures should not surprise anyone who follows the Supreme Court, but they do erode Choper's claim, shared by most critics of judicial activism, that we only need to look at Congress as our majoritarian legislative model.

Let us move now to the legislative process in action, examined through ten Supreme Court decisions, spread across the years from 1940 to 1986. I chose these particular cases because they raise a range of civil rights and liberties issues; six are discussed in my book, *The Courage of Their Convictions*,²⁰ but I could easily have selected scores or even hundreds of similar cases. Each case involves members of some "discrete and insular minority," historically subject to prejudice and hostility. The question to keep in mind for each case is this: does the operation of the legislative process counsel judicial restraint and deference to that process, or does it argue for an active judicial role in protection of minorities and dissenters from legislative hostility?

Jehovah's Witnesses and the Flag

My first case²¹ began in 1935 in a small Pennsylvania mining town, and it became an issue in the most recent presidential election. The public schools in Minersville began each day with the Pledge of Allegiance and flag-salute ceremony; students faced the flag with the raised palm salute that had also been adopted by the German Nazi regime. Twelve-year-old Lillian Gobitis and her younger brother William decided to stop saluting the flag because of German persecution of Jehovah's Witnesses, the Gobitis family's church. Lillian and William took their unpopular stand in solidarity with German Witnesses who were thrown into concentration camps for refusing to salute the swastika flag and emblem.

Let me tell this story in Lillian's words:

I loved school, and I was actually kind of popular. I was class president in the seventh grade, and I had good grades. And I felt that, oh, if I stop saluting the flag, I will blow all this! And I

20. P. IRONS, *THE COURAGE OF THEIR CONVICTIONS* (1988).

21. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

did. I sat down and the whole room was aghast. After that, when I came to school, they would throw a hail of pebbles and yell things like, "Here comes Jehovah!"²²

The school superintendent could not convince Lillian's father, Walter, to order his children to stand up and put their palms out. The superintendent also knew that neither state nor local law required participation in the flag salute or punished refusal to take part.

A month later, the Minersville school board met to deal with the issue. Walter Gobitis and the mother of another Witness objector, Edmund Waslewski, explained their positions to the hostile board members. "We are not desecrating the American flag," Gobitis said. "We show no disrespect for the flag, but we cannot salute it. The Bible tells us this, and we must obey." The board promptly passed a regulation making refusal to salute the flag "an act of insubordination", and the superintendent immediately announced the expulsion of the three Witness children for insubordination.²³

This drum-head hearing and tribunal was hardly a model of the legislative process, although it was typical of the way many local laws were adopted to harass Jehovah's Witnesses and other unpopular minorities. But the Supreme Court, reversing the decisions of two lower federal courts,²⁴ adopted a position of total deference to the Minersville school board. Felix Frankfurter, writing for the Court in 1940, with war clouds moving toward our shores over two oceans, accepted the majoritarian myth. "The case before us," he wrote, "must be viewed as though the legislature of Pennsylvania itself had formally directed the flag-salute for the children of Minersville."²⁵ Frankfurter then mouthed the platitudes of judicial restraint. "Judicial review," he wrote, "itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to the courts is committed the guardianship of deeply-cherished liberties."²⁶ He ended with a judicial sermon directed at Walter Gobitis and his children: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."²⁷

The contest between the Gobitis family and the Minersville school board was hardly a fair fight. And the forum of public opinion soon became

22. IRONS, *supra* note 20, at 27.

23. *Id.* at 17-18.

24. *Minersville School Dist. v. Gobitis*, 108 F.2d 683 (3rd Cir. 1939); *Gobitis v. Minersville School Dist.*, 24 F. Supp. 271 (E.D. Pa. 1938).

25. 310 U.S. at 597.

26. *Id.* at 600.

27. *Id.*

a riotous free-for-all. Frankfurter had unleashed the pent-up hostility of small-town bigots toward Witnesses. Within two weeks of the Court's opinion, two federal officials later wrote, "hundreds of attacks upon the Witnesses were reported to the Department of Justice."²⁸ In Kennebunk, Maine, now the summer home of a president who believes in compulsory patriotism, the Kingdom Hall was burned to the ground. The police chief in Richwood, West Virginia, forced a group of Witnesses to drink large doses of castor oil and dragged them out of the town behind a police car, tied together with rope. In Nebraska, a Witness was kidnapped, beaten, and castrated.²⁹ Federal officials traced these terrorist acts directly to Frankfurter's opinion. "In the two years following the decision," they reported, "the files of the Department of Justice reflect an uninterrupted record of violence and persecution of the Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts."³⁰

Most of us believe that this sad story had a happy ending. Three years later, with two new members and three justices who had repented, the Court reversed the *Gobitis* decision.³¹ But at least two thousand Witness children were expelled from school, and others were terrorized and brutalized. This case is hardly a glowing advertisement for judicial restraint.

Guilty by Reason of Race

My second case³² also involves wartime fears and passions. The legislative villain this time is Congress, not a small town school board. In 1942, two months after the Japanese attack on Pearl Harbor, President Franklin Roosevelt signed an executive order that authorized the expulsion of "any or all persons" from military zones that encompassed hundreds of thousands of square miles.³³ Roosevelt did not spend more than an hour in considering the order drafted by military officials. General John L. DeWitt, the West Coast commander who pushed for the order, did not conceal his racist animus toward Americans of Japanese ancestry. "A Jap is a Jap," he told a congressional committee. "There isn't such a thing as a loyal Japanese." Regardless of American birth, DeWitt claimed, they belonged to an "enemy race" and were presumed to be disloyal.³⁴

28. Rotnem & Folsom, *Recent Restrictions Upon Religious Liberty*, 36 AM. POL. SCI. REV. 1061 (1942).

29. IRONS, *supra* note 20, at 23.

30. Rotnem & Folsom, *supra* note 28, at 1062.

31. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

32. Hirabayashi v. United States, 320 U.S. 81 (1943).

33. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

34. P. IRONS, JUSTICE AT WAR 46, 58 (1983); P. IRONS, JUSTICE DELAYED 308 (1989).

At General DeWitt's order, 120,000 Americans of Japanese ancestry were subjected to curfew and exclusion orders that paved the roads to concentration camps in deserts and swamps from Death Valley to Arkansas. Congress promptly passed a law to make violation of DeWitt's orders a federal criminal offense. Not a single witness appeared against the bill in brief hearings, and not a single member of Congress voted against the law in floor debate that took no more than ten minutes. Only "Mr. Republican," Ohio Senator Robert Taft, raised a skeptical voice: "I think this is probably the sloppiest criminal law I have ever read or seen anywhere," he said, although he joined the unanimous vote.³⁵

Three young Americans of Japanese ancestry—Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu—challenged the curfew and exclusion orders and were convicted in perfunctory trials. In 1943, Chief Justice Harlan Fiske Stone wrote for a unanimous Court in upholding the curfew convictions of Hirabayashi and Yasui.³⁶ Again, the Court displayed an abject deference to legislative and executive action. The Court based its opinion on "social, economic and political conditions" that drove Japanese Americans to "solidarity" and blocked "their assimilation as an integral part of the white population." "Congress and the Executive," Stone continued, "could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions."³⁷ Let me ask whether readers really believe that Congress and the President acted reasonably in sending an entire ethnic group to concentration camps without the slightest bow to the demands of due process?

Again, we think this story has a happy ending. Based on clear evidence that government lawyers had lied to the Supreme Court about the loyalty of Japanese Americans, federal judges have recently vacated the criminal convictions of Hirabayashi, Yasui, and Korematsu.³⁸ And Congress voted in 1988 to provide compensation of \$20,000 to each camp survivor.³⁹ But

35. 88 CONG. REC. 2726 (1942).

36. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

37. *Hirabayashi*, 320 U.S. at 96, 98.

38. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); *Yasui v. United States* (D. Or. 1984) (unreported decision of U.S. Dist. Judge Robert C. Belloni); *Hirabayashi v. United States*, 828 F.2d 591, 608 (9th Cir. 1987). See generally JUSTICE DELAYED *supra* note 34 (includes an account of reopening cases and all court opinions).

39. Act of Aug. 10, 1988, Pub. L. No. 100-383, 102 Stat. 903-04. Congress stated in the law's preamble that "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II" and that the internment was "motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." See also COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

again, the price of judicial restraint was high: more than 300,000 collective years of imprisonment—after ten minutes of congressional debate—and the lasting stigma of genetic disloyalty.

Congress Fights the Red Menace

My third case⁴⁰ involves probably the most feared and least popular group in American history: the Communist Party. The legislative campaign against the party began the year it was formed, in 1919, and led to state sedition laws, red flag laws, and similar efforts to stamp out the Red Menace. But the campaign became more serious in 1940, again as war approached our shores and opponents of “preparedness” became objects of hostility. Congress passed in that year the Smith Act, officially called the Alien Registration Act.⁴¹ This law was actually a classic bill of attainder, directed against one man, Harry Bridges. No person in our history has been subjected to a longer campaign of persecution than Harry Bridges, who headed the West Coast longshoremen’s union for many years and who was widely considered to be a communist. Federal officials tried for more than two decades to deport Bridges to his native Australia as a communist, despite his continuing denials of party membership.

The sponsors of the Smith Act made no bones about their aim: “It is my joy to announce,” said the bill’s House manager, Rep. Sam Hobbs (D., Ala.), “that . . . in a perfectly legal and constitutional manner . . . [t]his bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of similar ilk.”⁴² Congressman Hobbs’ joy was premature; the Supreme Court finally ruled in 1945 that Bridges was entitled to American citizenship.⁴³ More to the point, the Smith Act included a provision making it a crime to advocate the violent overthrow of the United States government.⁴⁴ The entire debate on this provision consisted of the following colloquy between Congressman Hobbs and John W. McCormack, a future House Speaker:

40. *Dennis v. United States*, 341 U.S. 494 (1951).

41. 18 U.S.C. § 11, 54 Stat. 671 (1946) (current version at 18 U.S.C. § 2385 (1970)).

42. 86 CONG. REC. 9031 (June 22, 1940). See also Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 711-15 (1984).

43. *Bridges v. Wixon*, 326 U.S. 135 (1945). The concurring opinion of Justice Frank Murphy bears quotation: “The record in this case will stand forever as a monument to man’s intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution.” *Id.* at 157.

44. 18 U.S.C. § 2385 (1970): “Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence is guilty of a felony.”

Mr. McCormack: "Is this the Smith bill?"

Mr. Hobbs: "Yes, sir, the conference report thereon."

Mr. McCormack: "The gentleman will remember that I offered an amendment which the House adopted, making it a crime to knowingly and willfully advocate the overthrow of the Government by force and violence. Is that written into the bill?"

Mr. Hobbs: "Of course it is, in substance."⁴⁵

That was the entire debate over a provision that produced hundreds of criminal prosecutions, sent scores of alleged or actual Reds to prison, and convulsed our political system for two decades with charges that "card-carrying" communists were conspiring to destroy the American Way of Life.

Once again, the Supreme Court spoke as if Congress had deliberated like the Greek solons. "Primary responsibility" in dealing with subversion, Justice Felix Frankfurter pontificated, "belongs to the Congress. . . . [W]e must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us." "[T]here is ample justification," Frankfurter added, "for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security."⁴⁶ The legislative judgment to which Frankfurter referred and deferred took roughly twenty seconds to make, from start to finish.

I have discussed these first three cases at some length because they raise fundamental issues of religion, race, and political expression. In each case, I think, Justice Washington's admonition of judicial deference and restraint has serious limitations and runs into the reality of legislative hostility to minorities and dissenters. I will discuss each of my final seven cases more briefly, but they make the same point.

From Segregation to Sodomy

In October 1957, the city council of Little Rock, Arkansas, met to consider an ordinance designed to force the state NAACP to turn over its membership records for public inspection and publication. The measure was drafted by the state's attorney-general, Bruce Bennett, who appeared before the council and admitted his purpose: "One of the troubles with the South," Bennett complained, "is that we have been letting the Negroes run to federal courts while we don't use the state courts to attack them." Bennett's target was Daisy Bates, the young president of the Arkansas NAACP and the shepherd who guided nine scared black students through the howling mobs that surrounded Central High School. The NAACP was "scared of

45. 86 CONG. REC. 9032 (June 22, 1940). The final House vote on the bill was 382 to four. *Id.* at 9036.

46. *Dennis v. United States*, 341 U.S. 494, 525, 526, 542 (1951).

losing its followers" if their names became public, Bennett told the council. "Daisy Bates admits this in the NAACP suit in federal court," Bennett added. Alderman Bill Hood could not restrain his eagerness to send Daisy Bates and other black leaders to jail. "Let's pop 'em!" Hood demanded.⁴⁷ Fortunately, the Supreme Court refused to defer to Hood and his hooded compatriots and ruled unanimously that the First Amendment protected the NAACP records from disclosure.⁴⁸ But Daisy Bates had to endure death threats and dynamite bombs for her courageous stand for integration.

Another courageous woman, Barbara Elfbrandt of Tucson, Arizona, had to push through a mob of screaming pickets to witness the legislative debate in 1960 over Arizona's effort to keep Communists out of classrooms. The pickets outside the state capitol in Phoenix had been inflamed by leaders of the Christian Anti-Communist Crusade, who claimed that the address of communism in the United States "is the White House." Legislators were forced by picketers to sign pledges to vote for the Communist Control Act as the price of admission to their legislative chambers. When she returned to her junior high classroom in Tucson, Barbara Elfbrandt decided to resist the anti-communist loyalty oath that the legislature had adopted.⁴⁹ Although the Supreme Court later invalidated the oath by a one-vote margin,⁵⁰ Barbara and her husband, who were Quakers and not Communists, spent five years without pay as the price for their objections to compelled loyalty.

My next case moves from the Cold War period to the hot war of Vietnam. Popular opposition to that war produced thousands of acts of civil disobedience, including the public burning of draft cards. Congress responded with a law that made destruction or mutilation of draft cards a federal crime. Senator Strom Thurmond of South Carolina called these acts "treason in time of war."⁵¹ Only two House members spoke on the floor about the bill. Congressman Bray of Indiana denounced the "filthy, sleazy beatnik gang" that he said "would destroy American freedom."⁵² Congressman Rivers of South Carolina added that those who "thumb their noses at their own Government" should be "sent to prison" for burning draft cards.⁵³ The House promptly approved the bill by a vote of 393 to one.

David O'Brien and two other young men later burned their draft cards in Boston for which they were beaten by a mob the police did nothing to restrain. Writing for the Supreme Court, Chief Justice Earl Warren de-

47. IRONS, *supra* note 20, at 108.

48. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

49. IRONS, *supra* note 20, at 181-83.

50. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

51. 111 CONG. REC. 20,433 (1965).

52. *Id.* at 19,871.

53. *Id.*

fended the law as an effort to ensure "the smooth functioning of the Selective Service System."⁵⁴ Warren took pains to prop up another shaky support of judicial restraint, judicial refusal to examine legislative motive for evidence of hostility toward minorities or dissenters like O'Brien. Admitting that "there was little floor debate on this legislation in either House," Warren avoided any "hazardous" inquiry into legislative motive and simply cast O'Brien's act outside the First Amendment's protective fence as a "noncommunicative" statement.⁵⁵

My next case also stems from the war at home over the war in Vietnam. Just before Christmas in 1965, Mary Beth Tinker went to her eighth grade class at Warren Harding Junior High in Des Moines, Iowa, wearing a black armband to protest American bombing of Vietnam and to support calls for a Christmas truce. The day before, having learned of Mary's plans, school officials had banned the wearing of armbands. The school board president, Ora Niffenegger, explained that "[o]ur country's leaders have decided on a course of action and we should support them." Following the suspension of Mary Tinker and four other students, the Des Moines school board endorsed the school's hastily adopted policy.⁵⁶

Mary Tinker can tell you what happened after she wore her black armband to school:

People threw red paint at our house, and we got lots of calls. We got all kinds of threats to our family, even death threats. They even threatened my little brothers and sisters, which was *really* sick. People called our house on Christmas Eve and said the house would be blown up by morning. . . . I was leaving for school one morning. . . and the phone rang and I picked it up. This woman said, "Is this Mary Tinker?" And I said, "yes." And she said, "I'm going to *kill* you!"⁵⁷

The Supreme Court rescued Mary Tinker from further death threats⁵⁸ over the dissent of Justice Hugo Black, who saw in her act of symbolic dissent "the beginning of a new revolutionary era of permissiveness" that would end with "rioting, property seizures, and destruction."⁵⁹ Mary Tinker still hesitates before picking up her phone.

Justice Black wrote for the Court in my next case, in which the city council of Jackson, Mississippi, responded to a court order requiring racial integration of the city's municipal swimming pools by closing four of the

54. *United States v. O'Brien*, 391 U.S. 367, 386 (1968).

55. *Id.* at 382, 383, 385.

56. IRONS, *supra* note 20, at 233-34.

57. *Id.* at 248.

58. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

59. *Id.* at 518, 525.

five public pools and leasing one to the Y.M.C.A. This "Christian" organization reopened the pool on a "whites-only" basis, a form of American apartheid. Once again, Black put on his judicial blinders and refused to look at the city's racist motives.⁶⁰ Black addressed the claim that "the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record," he confessed, "appears to support this argument." But Black retreated to the *O'Brien* case for protection. The Court should not strike down legislation, Black wrote, "because of the bad motives of its supporters." In the Jackson case, he claimed, "the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city."⁶¹ It would be hard to find a more striking case of judicial failure to confront the ugly reality of racism.

My ninth case is so notorious that I will tell you only one fact about it. The Texas criminal abortion statute that the Court struck down on privacy grounds in *Roe v. Wade*⁶² was enacted by the Texas legislature in 1854. Let me remind you that in 1854 women could not vote in Texas—neither could blacks or many other people—and that the legislature had no medical opinion before it. The Texas solons simply adopted without question the abortion statute that they had inherited from the common law of Blackstone's era. But I suggest that the state of the franchise at the time a challenged statute was adopted is a legitimate judicial concern.

This principle of "suspect antiquity" also affects my final case study, the Supreme Court's 1986 decision upholding by one vote Georgia's criminal sodomy law against a challenge on privacy grounds that were rooted in the *Roe* case.⁶³ Michael Hardwick was a gay bartender in Atlanta who was arrested in his own bedroom for an act of consensual sodomy behind closed doors. He was arrested by a police officer who had singled him out for harassment. Michael and his friend were thrown into the local drunk tank by cops who invited other inmates to brutalize them.⁶⁴

My point in the Hardwick case is that Georgia's criminal sodomy statute was enacted in 1816, when the electorate excluded all blacks, all women, and all white males who failed a property test. Again, the statute simply codified the common law of Blackstone's era. Even if we assume that subsequent Georgia legislatures ratified this statute by failing to repeal it, there was certainly no evidence in the legislative record of the social necessity for this law. But the Supreme Court looked to a different legislature for

60. *Palmer v. Thompson*, 403 U.S. 217 (1971).

61. *Id.* at 224-25.

62. *Roe v. Wade*, 410 U.S. 113 (1973).

63. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

64. IRONS, *supra* note 20, at 395-96.

guidance, the Judeo-Christian legislature of antiquity. Justice Byron White, writing for the majority, cited the "ancient roots" of proscriptions against sodomy.⁶⁵ Chief Justice Warren Burger, in concurrence, cited "Judeo-Christian moral and ethical standards" and "millennia of moral teaching" that sodomy is sinful.⁶⁶ This seems to me to be judicial deference carried to an extreme. Consider the possibilities of this form of precedent. Why can the Court not cite the Eskimo practice of infanticide in "Baby Doe" cases or Aztec traditions of ritual killing in homicide cases? To push the issue further, why are we limited to the Judeo-Christian tradition for precedent? More than one million Americans profess the Muslim religion. Why can we not cite millennia of Islamic tradition to uphold death by stoning as punishment for adultery?

Conclusion: Legislators of Last Resort

If readers think I have descended to absurdity in this argument, think for a moment about the underlying premises of the ideology of judicial deference to legislative will based upon the majoritarian myth. The case for judicial activism depends in the final analysis on political and historical reality. For more than two centuries, popular and legislative majorities have subjected minorities and dissenters to official opprobrium and obloquy. Black Americans have suffered more than any other group, from Jim Crow laws passed by legislatures and lynch laws passed by mobs. A recent example, the racial murder of Yusuf Hawkins in the Bensonhurst neighborhood of Brooklyn, New York, in August 1989, "is but the most searing example of what sociologists and civil rights groups say is a renewed and rising tide of racial intolerance among teenagers and young adults across the country," reported THE NEW YORK TIMES.⁶⁷ Other groups have suffered as well in recent years from the decline in tolerance: members of Hare Krishna and other non-Christian religious minorities; Hispanics, Indo-Chinese refugees, and Arab Americans; supporters of Palestinian and Central American liberation movements; women, the majority that is treated like a minority; and

65. 478 U.S. at 192.

66. *Id.* at 196-97.

67. *A New Generation of Racism is Seen*, N. Y. Times, Aug. 27, 1989, at 20, col. 3 (Nat. edition). This article noted the opinion of experts that such incidents followed "years in which the Reagan Administration questioned the value of racial quotas and affirmative action [and thus] made speaking out against such programs acceptable. This . . . made it easier for racists to openly express their attitudes." *Id.* Hostility to civil rights at the highest levels of government certainly feeds hostility to individual blacks and other minorities at the neighborhood level. The Supreme Court is implicated as well in this process. Speaking in September 1989, Justice Thurgood Marshall scored the Reagan majority's recent civil rights rulings: "It is difficult to characterize last term's decisions as the product of anything other than a deliberate retrenching of the civil rights agenda." *Marshall Says Court's Rulings Imperil Rights*, N. Y. Times, Sept. 9, 1989, at 6, col. 3.

gays and lesbians, once subject to the death penalty for sodomy and now to the death penalty for AIDS.

How does judicial activism enter into the constitutional equation, into the balancing of individual rights and government powers? Judges, I suggest, should not shrink from their duty to act as Legislators of Last Resort in cases of legislative malfeasance. They have no warrant, of course, to act as "roving commissioners" when the political system is open to all, when legislation is not tainted with prejudice, and when "discrete and insular minorities" are not unduly burdened or disabled. But they have an affirmative duty to act when the channels of change are blocked and when laws "proceed from enmity or prejudice, from partisan zeal or animosity," to quote the Supreme Court in an opinion that is often cited but rarely followed.⁶⁸ That judges "make" law rather than "discover" it can no longer be disputed. The question is not whether judges make law, but in whose interests, for what purposes, and in pursuit of what policies? A recent comment, in the context of "right-to-die" cases and similar biomedical issues, is revealing: Iowa Supreme Court Justice Linda K. Newman defended "judge-made law" as inevitable and useful. "You don't have to be an activist judge to be concerned with social policy; it comes with the territory," she said at a judicial conference.⁶⁹

In defending judicial activism in support of minorities and dissenters, let me retreat from 1989 to 1943. Justice Robert Jackson, who could not rescue Lillian Gobitis from stone-throwers but who protected other Witnesses from castor oil and castration, stated the principle of judicial activism in classic words:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁷⁰

I rest my case.

68. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

69. *Judges Anguish Over Medical Issues*, N. Y. Times, Sept. 11, 1989, at 9, col. 4.

70. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).