ISSUES FACING THE JUDICIARY

JUDICIAL ACTIVISM, JUDGES’ SPEECH, AND MERIT SELECTION: CONVENTIONAL WISDOM AND NONSENSE

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OPENING REMARKS

Thank you very much Ms. Noelle Lagueux-Alvarez, this year’s Symposium Editor for the Albany Law Review. It is an honor to be the Faculty Advisor to the Law Review. As many of you already know, this Law Review is ranked within the top five percent of all the law journals in the country.¹ In a recent comprehensive study of over 900 legal publications nationwide, the Albany Law Review was ranked number thirty-four. That ranking puts this Law Review in the class with Harvard’s, Yale’s, Stanford’s, and the law review’s of other schools that are almost as good as Albany Law School.

The reason for that ranking is that the Albany Law Review is apparently one of the most cited and relied upon law journals in the country. In turn, the primary reason for that, of course, is that the students on the Albany Law Review are an extraordinary group.

Among the things that the law review students do each year is to organize and publish a symposium. Noelle already mentioned the one last year on the meaning and use of torture;² we had one two years ago on “manufactured humanity”;³ in prior years we had one

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¹ Washington & Lee Law School, Most Cited Legal Periodicals U.S. and Selected Non-U.S., available at http://law.wlu.edu/library/research/lawrevs/mostcited.asp (last visited May 19, 2005). The ranking cited by the author was from the 2004 study; in 2005, the Albany Law Review was ranked forty-two out of more than 1000 publications.


on the concept of violence in international law, and another one on gay, lesbian and transgender rights. The Albany Law Review has consistently produced symposia addressing issues that are extraordinarily important, provocative, and at the forefront of current legal, social, and political developments.

Today, the symposium topic is Issues Facing the Judiciary. Well, of course, that’s the world. We have narrowed the topic to three specific areas of focus: judicial activism, the First Amendment rights of judges, and judicial selection. Judge Richard C. Wesley of the Second Circuit had to cancel his appearance as one of our panelists. To compensate for his absence, I have been asked to expand my remarks a bit. I would say that I will try to fill in for Judge Wesley, except that what I say today is not likely to be what he would say if he were here. In any event, welcome to all of you.

**APPEALING PROPOSITIONS**

Presumably, when we speak of judicial activism, we mean something as opposed to restraint exercised by courts and judges—whether that restraint be deference to the other more democratic and political branches; whether it be standing by precedent; or whether it be narrowly or strictly construing statutory and constitutional provisions. When we speak of the First Amendment rights of judges, we are referring to the speech and expressive activities which traditionally have been forbidden to judges. When we speak of judicial selection, we are talking about the questions regarding the right and wrong ways, the better and worse ways, of selecting individuals for the judicial role.

The common wisdom—and the “company line”—with regard to the first topic, judicial activism, is that it is illegitimate, that it is an abuse of judicial power, and that a strict self-restraint is much more
appropriate for the judicial role in a constitutional democracy. With regard to the second topic, judges’ speech, the common view is that judges and judicial candidates should avoid any political and legal expression and expressive activities, particularly about the issues of the day; those holding judicial office must preserve the appearance of neutrality, impartiality, and objectivity. With regard to the third topic, selection, the widely accepted notion is that judges are better selected by some merit system of appointment, rather than by popular election. This is necessary in order to reduce partisan politics and to enhance the quality of the bench; moreover, the people do not really understand the role played by judges anyway.

All of these propositions are clear, unambiguous, and appealing. Unfortunately, they are all much more apparent than actually true. These presumptions—which seem somewhat nauseatingly repeated—are, at best, superficial and misleading. At worst—especially when they are ritualistically recited and forcefully asserted by some in public office, and even on the bench—these propositions are deliberately deceptive and politically motivated. Let us examine them in reverse order.

**MERIT SELECTION**

First, are judges better selected by a merit system of appointment? Of course, the first question that arises is, what is merit? If that is the aim of the merit systems, then what is it? The necessary implication of such systems is that some prospective judges are more meritorious than others. But is there some formula for making such a determination? Or is determining merit more of an art than an exact science? If it is an art, then perhaps the

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11 See, e.g., Stephen P. Younger & Frederick B. Warder, Merit-Based Appointment of Court of Appeals Judges in New York, 3 N.Y. St. B.A. Gov’t, L. & Pol’y J. 24 (Fall 2001); Anthony M. Champagne & Kyle D. Cheek, Texas Judicial Selection: Bar Politics, Political Parties, Interest Groups and Money, 3 N.Y. St. B.A. Gov’t, L. & Pol’y J. 51, 55 (Fall 2001).

criteria for merit are nothing more than indicia of minimum qualifications. If they are even that, are the criteria to be weighed in any particular order? Who is to do the weighing of the criteria or the comparing of the prospective judicial candidates to determine merit? If we do not trust the voters—i.e., the people—because elections are too political, should we trust public officials who secured office through partisan political elections?

Are we deluding ourselves into embracing so-called merit appointment systems? Do we honestly believe that they take the partisan politics out of selection? If they do not actually do that, if they do not take partisan politics out of selection, then what is the merit of so-called merit systems?

Do we really believe that a conservative Republican governor is going to appoint a liberal Democratic judge to the state’s highest court? Or do we fully expect that governor to favor a conservative Republican judge—even one possessing substantially inferior merit?13 Or is the political affiliation and philosophy of a prospective judge a legitimate measure of merit?14 We know that, in fact, political affiliation and philosophy are often, if not virtually always, a primary consideration in judicial selection.15 Since it is, why should the voters not make that political choice?

Perhaps merit systems actually serve different interests and purposes—different than actually enhancing merit. Perhaps the dignity of the process, more than merit, is the virtue promoted. Perhaps it is the independence of judges and the independence of their selection—i.e., independence from the popular will—that is promoted. But none of those characteristics or qualities are coterminous with merit. Instead, they are just as likely to conceal from public scrutiny the very political nature of the resulting selection process as they are to ensure that the resulting selections are indeed merit-based.

None of this is to suggest that merit appointment systems should necessarily be opposed. But these are questions that must be acknowledged and answered, especially by those advocating that such systems replace popular elections.

JUDGES’ SPEECH

Let us now consider the notion of judges and judicial candidates avoiding expressive activity about political and legal issues of the day. Judges, of course, are political actors.\(^\text{16}\) They are sometimes political in terms of crass partisanship; but always in the Aristotelian sense. Their decisions affect the body politic. Their decision making always entails rights and responsibilities, powers and limitations, freedom and authority, government and the individual, society’s rules, the requirement for compliance, and the consequences of noncompliance. Judges render judgment, exercise discretion, choose between competing interests and values, make policy and—yes—make law too.\(^\text{17}\)

Ideological compatibility is usually viewed as a pre-requisite for selection by an appointing president or governor. Presidents George Washington and John Adams appointed partisan Federalists; FDR appointed justices who were sympathetic to the social welfare legislation of the New Deal.\(^\text{18}\) President George W. Bush is not likely to appoint activist civil libertarians to the judiciary; a President John Kerry almost certainly would have. Here in New York State, Governor George Pataki, much like President Richard Nixon before him at the national level, made clear his intention to change the composition—and thus the ideological and jurisprudential direction—of what he deemed, and Nixon before him had deemed, a criminal coddling high court.\(^\text{19}\)

\(^\text{16}\) See C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947, at xii–xiii (1948) (stating that the Supreme Court is faced with the task of “act[ing] in a political context” similar to the legislature, but must fulfill this role without actually being in politics); Lee Epstein & Jack Knight, The Choices Justices Make 22–55 (1998); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 1–31 (2002).


\(^\text{19}\) See Bonventre, Streams of Tendency, supra note 13, at 71–72, 193 (discussing Pataki’s intentions); Vincent Martin Bonventre & Judi A. DeMarco, Court Bashing and Reality: A Comparative Examination of Criminal Dispositions at the New York Court of
Where judicial selection is by election, political parties typically select nominees from among their own faithful ranks. The state or local Republican Party is not likely to choose or support a partisan Democrat who is hostile to its positions and priorities. Even where selection is by non-partisan election, judicial candidates—like all other human beings, not excluding already-sitting judges—have their own political, philosophical, and moral views. Indeed, all judicial nominees, whether their selection be by appointment or election, continue to possess political, philosophical and moral views. A judicial robe is not an ideological lobotomy.

We all know that. If we are politically liberal, we generally want liberal justices and judges. If politically conservative, we prefer justices and judges whose ideological leanings are conservative. Moreover, when Justice Antonin Scalia delivers an extrajudicial speech, we are not at all surprised that he sounds politically conservative—anymore than we are surprised by his judicial votes and opinions that promote politically conservative values. We are similarly not surprised when Justice Ruth Bader Ginsberg delivers a liberal sounding speech—anymore than by her politically liberal leaning votes and opinions.

The point of all this is simply that prohibitions on political speech and expressive activity by judges and judicial candidates may help to conceal their ideological leanings; but such prohibitions certainly do not eliminate them. If a judge or judicial candidate has political, philosophical, and moral beliefs, that can hardly be a surprise, let alone necessarily a bad thing to be avoided. Rather, what is to be avoided is the prejudgment of an issue that is before a judge, or an issue that may come before that judge or judicial candidate. What is to be avoided is a mind already closed, a decision already made, prior to a full hearing and an honest and open consideration of the merits.

Appeals and Neighboring High Courts, 36 Judges’ J. 9, 9–10 (1997) (examining Pataki’s “relentless verbal abuse against the . . . Court of Appeals”). Cf. ABRAHAM, JUSTICES, supra note 15, at 9–16, 251–56 (describing Nixon’s struggles to get Senate confirmation of his nominees to the Court); TRIBE, supra note 15, at 70–74.

See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 146–56 (1949).


See, e.g., Gaylord Shaw, Death Appeal Turns on Possible Conflict, NEWSDAY, Nov. 6, 2001, at A18.

Republican Party of Minn. v. White, 536 U.S. 765, 766 (2002) (stating “it is virtually impossible, and hardly desirable, to find a judge who does not have preconceptions about the law”).

See Vincent Martin Bonventre, A Right to Talk: Has Justice Scalia Compromised His
The prohibitions on expressive activities by judges and judicial candidates—and the free speech limits on such prohibitions—reflect competing realities. On the one hand, judges are neutral, impartial magistrates divorced from personal views; on the other, judges are thinking, opinionated human beings in a free society. A reconciliation of these competing realities is not so simple. The tension between an impartial judiciary and expressive freedom for judges and judicial candidates will not satisfactorily be resolved by rigid bright-line rules. It will likely succumb only to the delicate, values-sensitive balancing of the interests.

**JUDICIAL ACTIVISM**

Third, and last, we turn to the question of judicial activism. Judges and judicial nominees typically shun the label of activist.\(^{25}\) They, the politicians, and much of the legal community extol the virtues of restraint. The judicial activist, at least according to current orthodoxy, is a sort of outlaw. The activist is one who abuses judicial power by straying beyond the bounds of the legitimate, much more passive and impersonal role of simply applying ascertainable law to the facts of the case.\(^{26}\) But, of course, such conventional wisdom is difficult, indeed impossible, to reconcile with the American experience of judicial decision-making.\(^{27}\)

Delving into the depths of the jurisprudence on activism and restraint would certainly consume a host of symposia, let alone

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\(^{25}\) A century ago, Holmes noted the “aversion” of judges to acknowledge that they make policy as opposed to simply applying law to the facts of a case. Holmes, supra note 17, at 999. Recently, more than one hundred years later, Richard Posner repeated Holmes' observation cum complaint and he himself derided the continuing orthodoxy that judges do not or should not make policy:

There is a lot of needlessly solemn and obfuscatory moralistic and traditionary blather in judicial decisionmaking and legal thought generally, and it is extremely helpful in dealing with legal issues always to try to peel away the conventional verbiage in which the issues come wrapped and look concretely at the interests at stake, the purposes of the participants, the policies behind the precedents, and the consequences of alternative decisions.


\(^{26}\) For an historical perspective on charges of judicial activism and judicial “legislating” by the Supreme Court, see Abraham, Judicial Process, supra note 6, at 346–84.

these general observations and the discussions that follow. For the purpose here, however, it suffices to recall just a few familiar decisions that represent milestones—or set backs, as the case might be—in American constitutional development. These decisions are heralded—or discredited—today, through the lens of somewhat distant, detached, and disinterested evaluation, as among the very best—or worst—of federal constitutional case law. Significantly, that delineation, of best or worst, corresponds not one wit to whether the decision was an exercise of restraint or activism. Activism—whether it be expansive interpretation, or the rejection of legislative or executive action, or the overruling of longstanding precedent, has certainly produced some of America’s most cherished landmarks. On the other hand, restraint—whether it be narrow construction, or deference to the other, more democratic branches or to the states, or following precedent—has, in turn, produced some of our most regrettable judicial disasters. And, of course, vice versa.28

Consider the landmark case of Brown v. Board of Education.29 The Supreme Court’s 1954 decision in that case is, perhaps, the classic example of now-heralded, even hallowed, judicial activism. The Court in Brown adopted a non-originalist approach to the Fourteenth Amendment equal protection guarantee; it gave a broad interpretation to the equality promised in that Civil War Amendment, which was not originally intended to prohibit segregated schools; it overruled a long series of precedents; and it rejected the long held view of constitutionally guaranteed equal protection that had found expression in the “separate but equal” doctrine. The Supreme Court in Brown put to rest that narrow understanding of equal protection, abandoned its former jurisprudence, and repudiated state legislative judgments around the country which had chosen racial segregation in public schools.

There are not many today who would claim that Brown v. Board of Education was a mistake because the Court had engaged in judicial activism. With the fiftieth anniversary of the Brown decision upon us, there is, to be accurate, a small but growing body of scholarship questioning whether Brown was necessary.30 But ask

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28 In preparing the following section, I consulted frequently with three venerable works of Henry J. Abraham, my doctoral mentor: H ENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT (7th ed. 1998) [hereinafter A BRAHAM, FREEDOM]; A BRAHAM, JUDICIAL PROCESS, supra note 6; ABRAHAM, JUSTICES, supra note 15.
that question to the National Guard and federal troops sent in the ensuing years by Presidents Dwight Eisenhower and John Kennedy to enforce that ruling in Kansas, Mississippi, Alabama and elsewhere.31

Brown v. Board of Education was the beginning of the “liberal” activist Warren era at the United States Supreme Court, but it was certainly not the beginning of judicial activism. Indeed, early in the history of the Republic and the Court, Chief Justice John Marshall presided over an era of activist judicial interpretation whose impact cannot be overstated. The very decision establishing the Court’s power of judicial review, Marbury v. Madison,32 rendered within the first few years of Marshall’s thirty-four year tenure, was a bold stroke of activism that roiled President Thomas Jefferson.33 Certainly, there is nothing explicit in the federal Constitution giving the United States Supreme Court—let alone other courts—the power of judicial review, i.e., the power to reject what the Congress, the President, or the States have done. But John Marshall cobbled together some “penumbra” and “emanations” from the Article VI Supremacy Clause and the Article III Powers of the Judiciary to create judicial review—not entirely out of whole cloth, but imaginative creation nonetheless.34 And yet, as with Brown v. Board of Education, there are very few who would seriously argue that, as an exercise of judicial activism, the Republic would be better off without the Marbury decision.

Nor is it likely that many would want to turn the clock back on other exercises of judicial activism by the Marshall Court where the Chief Justice employed the power of judicial review in the service of forging the new nation.35 In McCulloch v. Maryland, Marshall extended the power of Congress and, hence, the federal government vis-à-vis the states, by finding a grant of implied powers in Article I of the Constitution.36 He gave an expansive reading to the Necessary and Proper Clause, eschewed a contrary narrow one, and thus ensured that the national government would not be limited to

American Constitution (1996)).

31 See Abraham, Freedom, supra note 28, at 353–56; see also O’Brien, supra note 12, at 322–37.
32 5 U.S. (1 Cranch) 137 (1803).
33 See Abraham, Judicial Process, supra note 6, at 348–49; Rehnquist, Supreme Court, supra note 15, at 21–35.
34 See Abraham, Judicial Process, supra note 6, at 335–45.
its specifically enumerated powers.\textsuperscript{37} Similarly, in \textit{Gibbons v. Ogden}, he broadly construed the Interstate Commerce Clause power of Congress, rejecting a stricter construction which, in his view, would unwisely “cripple the [federal] government.”\textsuperscript{38} As Benjamin Cardozo noted, Marshall “gave to the constitution of the United States the impress of his own mind.”\textsuperscript{39}

Fast forward a century and a half, returning to the Court under Chief Justice Earl Warren in the late 1950s through the 1960s—the civil rights and liberties revolution.\textsuperscript{40} So much that we cherish when we say, “we love being American because we are free,” is the result of the judicial activism that characterized this period in Supreme Court history. It is always surprising, when discussing in class the Warren era and the much criticized “liberal” activism of the Court at the time, how few students realize how recent are the Constitutional developments attributable to the Warren Court. For example, the concept that most of what is reflected in the Bill of Rights was not applicable to state and local governments under the federal Constitution prior to the 1960s seems near-heresy to subsequent generations of law students (and probably to most Americans) until or unless they study the activist decisions of the Warren era. And again, how many Americans would really want to undo the Court’s nationalization of fundamental rights and liberties? How many wish the Court had refrained from doing so and, instead, had been more restrained?

Out of a host of landmark decisions in the Warren era, a couple will more than suffice to make the point. The Court’s 1963 decision in \textit{Gideon v. Wainwright} imposed the Sixth Amendment right to counsel upon the states.\textsuperscript{41} There, the Fourteenth Amendment Due Process Clause was interpreted to mean that the assistance of an attorney is constitutionally guaranteed to all criminal defendants in any non-petty prosecution in every state.\textsuperscript{42} The Fourteenth Amendment does not say that; more than a little creative activism was needed to reach that seemingly highly desirable result. The Court’s 1968 ruling in \textit{Duncan v. Louisiana} did the same thing for

\textsuperscript{37} Id. at 411–12, 419–21.
\textsuperscript{38} 22 U.S. (9 Wheat.) 1, 188, 196–97 (1824) (holding that the power of Congress to regulate interstate commerce extends even to waterways within a state).
\textsuperscript{39} CARDOZO, \textit{NATURE}, supra note 17, at 169.
\textsuperscript{41} 372 U.S. 335, 344 (1963).
\textsuperscript{42} Id. (reasoning that the right to counsel is a fundamental right essential to fair trials).
the Sixth Amendment right to a trial by jury.43 Not only were Gideon and Duncan—and so many other Warren era decisions44—the result of creative interpretation and broad construction of the Fourteenth Amendment, but they also represented the overruling of countless precedents.45 Some of those overruled precedents were authored by venerable justices such as Benjamin Cardozo in his still seminal majority opinion in Palko v. Connecticut.46 Yet again, few would want to turn back the clock.

Even in the more conservative era of Chief Justice Warren Burger that followed, landmarks of judicial activism were produced that very few today would want undone. The Burger Court’s 1971 decision in Reed v. Reed47 is a prime example of such a landmark, as well as another striking example of a judicial development whose recency is surprising to most. It was not until 1971, in the Reed decision, that the United States Supreme Court finally read the Equal Protection Clause of the Fourteenth Amendment to guarantee equality for women and, in doing so, for the first time invalidated a state law that discriminated on the basis of gender.48

This activist ruling strayed from the original intent of the Fourteenth Amendment, which was to protect the freed black slaves,49 and certainly not to extend equality to women. The Fourteenth Amendment would surely never have been enacted if equality for women was presented in the ratification conventions. Indeed, even a century later, a proposed Equal Rights Amendment which would have guaranteed exactly that equality failed to be ratified.50 Additionally, nothing on the face of the Fourteenth Amendment suggests that women and men are equals who are to be treated the same. More than that, Reed contravened a long series of

43 391 U.S. 145, 149–50 (1968) (holding that the Fourteenth Amendment guarantees a right to a jury trial in a criminal case because it is “fundamental to the American scheme of justice”).
45 See ABRAHAM, FREEDOM, supra note 28, at 58–83 (discussing the landmark Warren era decisions and the precedents they overruled).
46 302 U.S. 319 (1937) (rejecting the nationalization or “incorporation” of the Fifth Amendment’s prohibition of double jeopardy, and explaining the line between fundamental rights contained within Fourteenth Amendment due process and non-fundamental rights which are not).
48 See id. at 76–77 (holding that the sex of the applicant was not rationally related to the state’s objective).
49 See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (limiting the Fourteenth Amendment to its “pervading purpose” of protecting the “newly emancipated negroes”).
50 See ABRAHAM, FREEDOM, supra note 28, at 413–14.
cases, beginning just a few years following the ratification of the Fourteenth Amendment, in which the Court repeatedly rejected challenges to unequal treatment of the sexes. 51

It was not until 1971, more than one hundred years after the ratification of the Fourteenth Amendment, that the United States Supreme Court broke with those precedents and broke with a strict originalist meaning of the Equal Protection Clause. 52 In doing so, the Court broadly construed the Fourteenth Amendment and proceeded to invalidate both state and federal laws on the basis of gender discrimination. 53 The Reed decision—the first such decision which, ironically, was authored by Chief Justice Burger, the first appointee of strict-construction advocate President Nixon—struck an Idaho Statute that preferred men to women as administrators of intestate estates. 54 Other decisions soon followed which reinforced the judicially adopted prohibition on the arbitrarily disparate treatment of women. 55

Another landmark case from the Burger era, United States v. Nixon, 56 should not go unmentioned. There, the United States Supreme Court, again speaking through Nixon’s own appointed Chief Justice, refused to defer to the president. The Court rejected the president’s claim of executive privilege and, instead, demanded that the commander-in-chief surrender the recordings of his White House conversations, the so-called Watergate tapes. 57

Would this country really be better off if the Supreme Court had decided to restrain itself in these foregoing landmark cases and in so many others like them? Would the Republic have been better served if the Court had actually heeded the now conventional condemnation of judicial activism? Or is it not clear, at least with

51 See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 137, 139 (1872) (stating that the States' power to deny admission to the Bar based on gender is unaffected by the Fourteenth Amendment); see also Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (holding that a woman's right to suffrage does not exist in the federal Constitution, and state laws prohibiting women's suffrage are not unconstitutional).

52 See Reed, 404 U.S. at 77 (finding a violation of the Equal Protection Clause where similarly situated men and women were treated differently).

53 Id.

54 Id. at 75.

55 See, e.g., Frontiero v. Richardson, 411 U.S. 677, 678–79, 690–91 (1973) (holding a federal law that required different proof to illustrate the “dependent” status of a spouse based on whether the member of the armed services was male or female to be unconstitutional); Taylor v. Louisiana, 419 U.S. 522, 523, 538 (1975) (invalidating a Louisiana state law that prevented women from serving as jurors absent “a written declaration of her desire to be subject to jury service”).


57 Id. at 713–16.
the passage of time, that the nation would have been less strong
and less free and less democratic if the Court had failed to take the
actions that it did?

By the same token, while activism has produced cherished
landmarks, has helped forge the nation and has protected our most
precious liberties, the judicial exercise of restraint has oftentimes
resulted in the most unfortunate, even disastrous decisions. Again,
a few illustrations make the point.

In the very early years of the Republic, there were the infamous
sedition cases. In repeated decisions, Federalist judges rejected free
speech claims, adopted a narrow interpretation of First Amendment
protections, and upheld and enforced the Sedition Act of 1798.58
Following the Civil War and the ratification of the Thirteenth,
Fourteenth, and Fifteenth Amendments, the Supreme Court
exercised restraint to abysmal effect in the Slaughter-House Cases
of 1873.59 In those cases, the Court gave a cramped reading to the
rights guaranteed against state infringement by the Fourteenth
Amendment, paid deference to the sovereignty of states, and upheld
the Louisiana monopoly law at issue.60 The Court’s stingy
interpretation of the Fourteenth Amendment guarantees of
privileges and immunities and of due process rendered those
provisions virtual nullities.61

In that same year—just five years after the ratification of the
Civil War Amendments—the Supreme Court rejected a claim that
women were entitled to practice law.62 In its decision in Bradwell v.
Illinois, the Court again construed the Privileges and Immunities
Clause of the Fourteenth Amendment narrowly and deferred to the
judgment of the states in regulating admission to the legal
profession.63 Likewise, two years later in Minor v. Happersett, the

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58 See United States v. Callender, 25 F. Cas. 239, 257 (C.C.D. Va. 1800) (No. 14,709);
United States v. Cooper, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800) (No. 14,865), aff’d, 4 U.S. (4
Dall.) 341 (1800).
59 83 U.S. (16 Wall.) 36, 75–78 (1872) (holding that the privileges and immunities whose
protection is guaranteed by the very language of the Fourteenth Amendment did not provide
federal constitutional protection of any such federal rights against state violation).
60 Id. at 79–83.
61 See ABRAHAM, FREEDOM, supra note 28, at 42–47; see also Loren Beth, The Slaughter-
House Cases Revisited, 23 La. L. Rev. 487 (1963); MICHAEL KENT CURTIS, NO STATE SHALL
ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 175 (1986). Notably,
Justice Samuel Miller, the author of the majority opinion in the Slaughter-House Cases, is
one of the foremost apostles of judicial restraint in the Court’s history. See Kevin Christopher
Newsom, Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases,
63 Id. at 138–39.
Court refused to recognize an equal right of women to vote and, instead, deferred to the authority of the states to decide who could participate in their elections.64

Two classic examples of restraintist disasters involved race. In its 1896 decision in *Plessy v. Ferguson*, the Court continued to embrace a narrow view of the Fourteenth Amendment’s guarantees and held that “separate but equal” satisfied all that equal protection required.65 Mere separation of the races was not unconstitutionally discriminatory, the Court ruled, and the states were left free to classify and segregate on the basis of color, as long the “political equality” of the races was insured.66 A half century later, in its 1944 decision in *Korematsu v. United States*,67 the Supreme Court again chose a restrained approach. It deferred to the executive branch, it rejected the argument for a more protective interpretation of due process and equal protection rights, and it upheld the military order interning Japanese-Americans on a wholesale basis.68

Finally—and no more recent decision will be addressed here—there is the modern Supreme Court embarrassment *cum abomination*, *Bowers v. Hardwick*.69 It is enough to recall that the court in *Bowers* deferred to the legislative judgments of the states, insisted on a narrow reading of equal protection and due process, and thus upheld laws criminalizing same-sex intimacy—doing so on the preposterous ground that the Fourteenth Amendment neither explicitly nor implicitly provides that homosexual sodomy is a fundamental right.70

Of course, the Court overruled *Bowers* two years ago.71 The Court has, in fact, either explicitly or effectively overruled virtually all of the foregoing lamentable exercises of restraint. This is but a very small, partial list. But the point should be more than clear. Judicial restraint hardly guarantees laudable decisions.

On the other hand, it is also undoubtedly true that judicial activism does not guarantee a time-honored landmark, and judicial restraint hardly insures a disaster. For example, it was an exercise of judicial activism that produced *Dred Scott v. Sanford*.72 In that

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64 88 U.S. (21 Wall.) 162, 170–73 (1874).
66 *Id.* at 544.
70 *Id.* at 191, 194–95.
72 60 U.S. (19 How.) 393 (1856).
case, the Supreme Court refused to defer to the judgment of Congress.\textsuperscript{73} Instead, in one of the most damnable uses of its power of judicial review, the Court invalidated the Missouri Compromise and somehow read into the federal Constitution the proposition that, once a slave always a slave.\textsuperscript{74}

Once again, in the aftermath of the Civil War and the ratification of the Civil War amendments, the Supreme Court refused, with ill effect, to defer to Congress in \textit{The Civil Rights Cases of 1883}.\textsuperscript{75} In another act of judicial activism, the Court invalidated the Civil Rights Act of 1875, which criminalized racial discrimination in public accommodations.\textsuperscript{76} The Court vigorously enforced its own view of the Fourteenth Amendment that Congress was granted absolutely no power to enforce equal treatment by private businesses, even those operating common carriers and accommodations otherwise open to the public.\textsuperscript{77}

Of course, there are the numerous \textit{Lochner} era cases. They include \textit{Lochner v. New York},\textsuperscript{78} \textit{Schechter Poultry}\textsuperscript{79} (the “sick chicken case”), and so many now-discredited others in which the Supreme Court insisted on its own entrepreneurial-libertarian view of the Constitution, promoting that view through its laissez-faire jurisprudence, its strict limits on federal commerce power, and its near-paralyzing restrictions on the congressional delegation of authority to administrative agencies. During this period, the Court repeatedly overruled the efforts of the states and the federal government to protect workers and children, to set standards for agriculture and food products, to promote industrial safety and public health, and on and on and on.\textsuperscript{80}

At the same time, while activism has surely resulted in some regrettable decisions, restraint has indeed produced its share of

\textsuperscript{73} \textit{Id} at 432, 437, 449–51.
\textsuperscript{74} \textit{Id} at 451–52.
\textsuperscript{75} 109 U.S. 3, 12–13 (1883) (holding that the Fourteenth Amendment applies only to “state laws and acts done under state authority” and, therefore, that Congress had no power under the Fourteenth Amendment to prohibit private acts of discrimination).
\textsuperscript{76} \textit{Id} at 24–26.
\textsuperscript{77} \textit{Id}.
\textsuperscript{78} 198 U.S. 45, 52, 64 (1905) (holding that a state law limiting hours employees can work in a bakery violated the liberty guaranteed against state deprivation by the Due Process Clause of the Fourteenth Amendment).
\textsuperscript{79} A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (holding that the congressional attempt to regulate hours and wages of employees through the Live Poultry Code “was not a valid exercise of federal power”).
\textsuperscript{80} See generally ALFRED H. KELLY ET AL., \textit{THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT} 397–418 (6th ed. 1983) (arguing that these regulatory efforts were overruled in order to protect the Court’s view of entrepreneurial freedom and laissez-faire capitalism).
landmarks. A pair of 1937 decisions are representative. In West Coast Hotel Co. v. Parrish, the Supreme Court upheld a Washington State minimum wage law.\footnote{300 U.S. 379, 386, 399 (1937).} After several decades of activism in the Lochner era in the cause of laissez-faire capitalism and economic due process, the Court deferred to a state’s legislative judgment regarding regulation of the work place.\footnote{Id. at 399.} This was the famous “switch-in-time-that-saved-nine,” the case in which Justice Owen Roberts abandoned his practice of opposing social welfare legislation, began to vote with the Court’s restraintist liberals to save such laws, and obviated FDR’s attempt to pack the Court.\footnote{See ABRAHAM, JUDICIAL PROCESS, supra note 6, at 228; O’BRIEN, supra note 12, at 56; REHNQUIST, SUPREME COURT, supra note 15, at 128–29.}

In National Labor Relations Board v. Jones & Laughlin Steel Corp., decided several weeks later, the Supreme Court, in another act of restraint, deferred to the judgment of Congress and upheld the National Labor Relations Act of 1935.\footnote{301 U.S. 1, 46–47, 49 (1937).} The Court rejected the argument that the interstate commerce power had been exceeded and, instead, it sustained the federal protection of labor unions and workers.\footnote{Id. at 6, 49.}

Similarly, in the civil rights cases of 1964—unlike those disastrous cases of 1883—the Supreme Court deferred to Congress, bowed to the legislative determination to eliminate racial discrimination in public accommodations, and upheld the Civil Rights Acts of 1964.\footnote{Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 242, 261–62 (1964); Katzenbach v. McClung, 379 U.S. 294, 304 (1964).} In those cases, Heart of Atlanta Motel and Katzenbach, the Court accepted the government’s proffered argument—albeit one demanding a rather strained application of the Interstate Commerce Clause and tortured reading of precedents—to justify the exercise of federal authority over private enterprises engaged in primarily local business.\footnote{Heart of Atlanta Motel, 379 U.S. at 242, 261–62 (holding the Civil Rights Act of 1964 to be constitutional because the law’s prohibition against racial discrimination in public accommodations, such as the motel in question, fit within Congress’s power to regulate conduct affecting interstate commerce); Katzenbach, 379 U.S. at 304 (concluding that racial discrimination by restaurant owners obstructs interstate commerce and restricts travel; therefore, Congress can validly exercise its power to regulate commerce).}

Finally, there is Palko v. Connecticut—perhaps the Supreme Court case that best reflects American constitutional development. In his opinion for the Court, Benjamin Cardozo rejected an
expansive, all encompassing view of the Fourteenth Amendment Privileges and Immunities and Due Process Clauses.\(^8\) He rejected
the claim that all the rights enumerated in the Bill of Rights were rendered applicable to the states through the Fourteenth
Amendment.\(^9\) Instead, Cardozo prescribed a general deference to
the judgment of the states in criminal justice matters, and he
specifically declined to nationalize or “incorporate”—and thus to
protect as a matter of federal constitutional mandate—the Fifth
Amendment guarantee against double jeopardy.\(^1\) He also
reaffirmed the Court’s earlier refusals to nationalize the right to a
jury trial in criminal cases, the right against compulsory self
incrimination, and the right to a grand jury.\(^2\)

What is so commendable about that decision? About that
subsequently overruled exercise of judicial restraint, of apparent
judicial timidity and short-sightedness? \textit{Palko} set the standard,
planted the seed, and even foretold what was to come decades later.
Cardozo defined the criteria by which the United States Supreme
Court would henceforth adjudge what is fundamental in the
American Republic.

In rejecting the wholesale—and some individual—nationalization
or incorporation of rights contained in the Bill of Rights, Cardozo, in
\textit{Palko}, set forth the proposition that the United States Constitution
guarantees against all governments, not anything that happens to
be mentioned in the Bill of Rights, but only, and all, those rights
which are implicit in the American “scheme of ordered liberty.”\(^3\)
These are the freedoms, like thought and speech, which form the
“matrix” for the others, those rights which form the “very essence”
of our free society, those “principles of liberty and justice” upon
which our “civil and political institutions” rest, those principles that
are deeply “rooted in the traditions and conscience of our people.”\(^4\)
These are the “fundamental” rights and liberties which the
Constitution, as construed and applied by the Court, would
henceforth be safeguarded against encroachment by any
government, whether federal, state, or local.

The Cardozo-authored decision in \textit{Palko} was quite restrained in
its limited specific holding. But Cardozo’s opinion has proved to be

\(^8\) Id. at 329.
\(^9\) Id. at 323.
\(^1\) Id. at 328.
\(^2\) Id. at 325.
\(^3\) Id.
\(^4\) Id. at 325–28.
among the most seminal judicial landmarks, laying the groundwork for the recognition, interpretation, and enforcement of basic human rights in America. When the nation was ready, when the Supreme Court was ready, Cardozo’s *Palko* decision was there. In the landmark cases of the ensuing decades in which the Supreme Court recognized as fundamental many of the rights reflected in the Bill of Rights—whether explicit, implicit or presumed—the Court returned to Cardozo in *Palko*. In the “incorporation” decisions of the 1960s, in the decisions then and since, protecting liberties ultimately viewed as fundamental, whether grounded in the Bill of Rights or not, the Court has applied the now-established constitutional jurisprudence originally articulated by Cardozo in *Palko*.

What does all of this mean? At the very least, it means that when we talk about decisions, when we talk about judges, activism and restraint are not meaningful yardsticks. Judicial activism is not an unmitigated vice; restraint is not an unqualified virtue. To deny that bold exercises of judicial activism have produced some of our proudest and wisest landmarks, and that steadfast restraint has produced some of our most foolish and shameful blunders—as well as vice versa—is either blind ideology, woeful ignorance, or some other specie of nonsense. The American experience with judicial review emphatically demonstrates that activism and restraint are not helpful as dividing lines between good and bad judges, worthy and flawed decisions.

Instead, when we talk about judges, when we talk about decisions, the qualities that count are wisdom, foresight, discretion, a sense of history, an appreciation of the possible, pragmatism, fairness to the parties, promotion of the common good, and dedication to the fundamental principles of the American constitutional republic. That, of course, is what judging is all about; those are the kinds of qualities that make a good judge and a worthy decision.

**CONCLUSION**

Whatever may be said about judicial activism, judges’ speech and merit selection, the guiding principles should be based upon the unavoidable truth that judges cannot escape judging. Notwithstanding the maxims that judges should apply law not

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95 See ABRAHAM, FREEDOM, *supra* note 28, at 55–58 (discussing the doctrine spelled out by Cardozo in *Palko* which would thereafter be the basis for all the Court’s “incorporation” decisions).
make it, that judges should eschew personal opinions and beliefs, and that judges should be chosen on merit not politics, the reality, of course, is far different. Except, perhaps, at the lowest levels and in the most routine cases, judges necessarily engage in lawmaking, their own convictions and philosophical outlooks necessarily influence their decisions, and their politics are in fact exceedingly important to those interested in the cases and issues they decide.

In much of the perennial debates over judicial activism versus restraint, judges’ expressive activities versus the appearance of neutrality, and the politics versus the merit of selections, what is too often lost in the clamor—and sometimes rancor—is the actual nature of the judicial role, the actual nature of judging. We would do well to keep mindful of Holmes’ more than century old warning about the “fail[ure] adequately to recognize [the judges’] duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.

Several years after Holmes, his future successor on the Supreme Court expressed similar sentiments about the “unavowed and inarticulate and subconscious” influence on the decision-making of judges. Cardozo’s own analysis of judging amplified Holmes’s concern and similarly serves to underscore the reality of the judicial process that should inform any discussion about judging and judges. Indeed, there is no better way to conclude then by giving Cardozo

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96 See CARDOZO, NATURE, supra note 17, at 10 (stating that “I take judge-made law as one of the existing realities of life”); S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (proclaiming that “I recognize without hesitation that judges do and must legislate. . .

97 See CARDOZO, NATURE, supra note 17, at 12. Justice Cardozo argued that:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not. . . . Judges cannot escape that current any more than other mortals. . . . [I]nherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. . .which, when reasons are nicely balanced, must determine where choice shall fall.

Id.; Holmes, supra note 17, at 466 (explaining that “[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding”).

98 See REHNQUIST, SUPREME COURT, supra note 15, at 209 (arguing that “a president who sets out to pack the Court does nothing more than seek to appoint people to the Court who are sympathetic to his political or philosophical principles. There is no reason in the world why a president should not do this”); ABRAHAM, JUSTICES, supra note 15, at 49 (stating that “[w]hatever the merits of the other criteria. . .what must be of overriding concern to any nominator is his perception of the candidate’s real politics. . .with the nominee’s likely future voting pattern”) (emphasis in original).

99 Holmes, supra note 17, at 467.
the last word:

[T]he whole subject matter of jurisprudence is more plastic, more malleable, the moulds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us... have been accustomed to believe.... So also the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.\(^\text{100}\)

\(^{100}\) Cardozo, Nature, supra note 17, at 161–62.