Chapter 3
Judicial Activism and "Reason"

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3.1 Introduction

I discuss in this paper the justifications or rationalizations for judicial activism. You will join with me, I hope, in recognizing that this is an impossible task. In the United States, at least since *Brown v. Board of Education*, 347 U.S. 483 (1954), and especially since the controversial Warren Court decisions of the 1960s, scholars and jurists have been at work devising justifications for judicial activism. (I'll say more about that troublesome term—"judicial activism"—in a moment.) It would not be much of an exaggeration to say that this—namely, the justification of judicial activism, in general or in specific areas—has been *the* principal project of American constitutional theorists for two or three generations. By now these efforts have produced a massive body of sophisticated or at least abstruse work that, depending on your perspective, may be a thing of beauty or, conversely, a sort of intellectual monstrosity.

For today, therefore, I want to make only one main point about only one of the main themes in that beautiful or monstrous body of work: about the theme (presented in various ways) which claims that judicial activism is a good thing because

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the courts are somehow an instrument of "reason" in governance.[1] More specifically, I want to consider how, in the context of "activist" judging, a discourse that aspires to the ideal of "reason" degenerates into the opposite of reason. Some years ago, citing "a substantial number of Supreme Court decisions, involving a range of legal subjects, that condemn public enactments as being expressions of prejudice or irrationality or invidiousness," Robert Nagel argued that "to a remarkable extent our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given a more acceptable, authoritative form" (Nagel 1993). I want to consider the cultural dynamics that produce the sort of *ad hominem* argumentation that Nagel perceived. And I will suggest that the United States Supreme Court's recent decision in *United States v. Windsor,* 133 S. Ct. 1675 (2013), nicely confirms this diagnosis of our situation.

3.2 What is "Judicial Activism"?

Before taking on "reason," though, I should try to clarify the notion of "judicial activism." The term is used often, usually pejoratively, and by proponents of a variety of political and constitutional positions. But what one person condemns as "activism," another praises as statesman-like or Solomonic judicial wisdom. Thus, conservatives complain of "activism" when the courts intrude into governance to strike down traditional marriage laws or abortion restrictions; progressives cry "activism" when the judges intervene to protect the free speech rights of corporations against campaign finance regulations.

These various and conflicting characterizations may lead may lead skeptics to dismiss claims about judicial activism as empty rhetoric, and to conclude that the term "judicial activism" is a purely polemical one that people use to describe judicial decisions that they disagree with in substance. Acknowledging the looseness of the

[1]This theme complements what I view as the other main theme, which we could call the hermeneutical theme. Hermeneutical theory attempts to show that "interpretation"—and everyone agrees that judges are supposed to "interpret" law—is not the straightforward and relatively commonsensical reading of texts and precedents that humble non-lawyers may suppose it to be. Rather, interpretation is a much more complex and creative enterprise. But just by itself, this hermeneutical conclusion could serve to undermine rather than enhance judicial prestige and power. It could be that we are willing to give judges the formidable power to, for example, strike down democratically enacted laws so long as we think the judges are just reading and enforcing what our constitutions objectively permit and forbid; but once we realize that interpretation is actually a much more open and creative adventure than we had supposed, we might not see any good reason to entrust judges with this power. (By "we," here I of course mean something like "we citizens"—not "we members of the legal profession." The latter "we" may be more than happy to expand judges' power—and thus our own.) So the hermeneutic-type arguments operate to justify and *expand* judicial power, I think, mainly when they are explicitly or tacitly accompanied by the claim that judges, in contrast to ordinary politicians and officials, are somehow a voice of "reason".

term, though, I think that we can continue to use it, and that we can understand it in terms of two factors.

The first factor is the revisionary impact—or, as you might say, the meddlesomeness—of a judicial decision. Narrowly crafted decisions invalidating laws or practices that not many people care about will seem less activist than more sweeping decisions—and decisions can be sweeping either in their rationales or in the remedies ordered—striking down laws or practices of widespread public concern.

The second factor is the extent to which a judicial decision cannot be persuasively justified without going beyond conventional legal reasoning. The more a decision seems well supported by obvious or natural readings of the relevant constitutional text, or by well-settled precedent, the less "activist" it will seem—and vice versa.

Both of these factors are obviously matters of degree, and also of judgment, but I think they are meaningful enough to permit our conversation to proceed. And sometimes there will even be agreement in characterizing a decision as "activist." Thus, some Americans revere and others revile the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), but nearly everyone has agreed, first, that the decision has had a powerful impact on American law and politics and, second, that the decision was difficult to justify purely in terms of conventional legal reasoning (e.g., Ely 1973). Brown v. Board of Education, 347 U.S. 483 (1954), is an even starker example. That is precisely why *Roe*, *Brown*, and other analogous decisions have generated a major academic project calculated to supply such justifications. As this example reflects, this understanding also shows that to classify a set of decisions as "activist" is not automatically to condemn such decisions (although, to be sure, critics are more likely to use the label "activist," given its generally pejorative connotations). The question is whether adequate justifications for such activism can be developed.

As I have noticed already, one of the most powerful sets of justifications attempts to defend judicial activism based on the premise that activist courts are an instrument of "reason" in governance. The basic proposition would go something like this: It is a good thing (at least sometimes) for courts to render decisions that have a significant revisionary impact and that cannot be persuasively justified in terms of conventional legal reasoning because this is a way in which "reason" can be given a decisive role in governance.

How persuasive is that proposition? That is the question I want to address in this talk.

3.3 Courts as Institutions of "Reason"?

I should start by acknowledging the appeal of the proposition. Given that ordinary politics is so often messy, and also mercenary, the idea that law might instead be the product of something more pristine and exalted like "reason" can seem almost

irresistible. The aspiration goes back at least to Plato's *Republic*, and probably beyond that. In addition, at least in the abstract, there are grounds for supposing that courts might come closer to approximating this ideal than ordinary politics can. Judges are at least officially non-partisan, the process that they administer involves an orderly presentation of evidence and argument, and the main participants in the process—namely, lawyers and judges—are required to have attained a certain level of education. And the decisions that are rendered are by custom required to be accompanied by an explanation that considers the various arguments that have been offered and seeks to justify the acceptance of some of those arguments and the rejection of others. If reason can be brought to bear on governance, isn't this what it would look like?[2]

If we move from the abstract to the experiential, unfortunately, the results can be disappointing. Some years ago, the prominent constitutional scholar Daniel Farber observed that the opinions of the American Supreme Court are "increasingly arid, formalistic, and lacking in intellectual value." The opinions seem "almost seem designed to wear the reader into submission as much as actually to persuade." (Farber 1994: 157). Farber's former and more exuberant colleague Michael Paulsen made the point in less restrained terms: Supreme Court opinions, Paulsen thought, are "arid, technical, unhelpful, boring, …unintelligible," "formulaic gobbledygook." (Paulsen 1995: 677). These are somewhat dated observations, and it is possible that in the intervening years the opinions have gotten better. But although I devote no more time to reading Supreme Court opinions than duty demands (in part because I share Farber's and Paulsen's judgments), my occasional browsings give me no reason to think the situation has improved.

So then why has the reality fallen so far short of what may have seemed like sensible hopes? One possibility is that, precisely by insisting on standards of propriety and rationality, constitutional discourse has filtered out voices and perspectives that would make for richer, more fully informed, and ultimately wiser conversation and decision-making. If so, the public conversation associated with "politics," though (or because) it is more rambunctious than legal discourse, is also ultimately and in the aggregate more rational than the more staid and limited discourse of the courts (Waldron 1999: 152–62). Another possibility is that however notorious and even celebrated the fact of judicial activism may be, judges still feel constrained to present their decisions as if these were the product of conventional legal reasoning. The consequence may be dissimulation: the judges are guilty, as Ronald Dworkin suggested, of "a costly mendacity." (Dworkin 1996: 37). And mendacity is more or less the opposite of the open honesty we associate with "reason."

Without in any way rejecting these explanations, I want to explore a different kind of explanation—one premised on what we may call the "discursive situation"

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[2]For a classic statement of this view, see Fiss (1979). Cf. Rawls (1996: 235) (asserting that "the court's role is… to give due and continuing effect to public reason by serving as its institutional exemplar… It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone.").

in which contemporary courts operate. The point I want to make is that this discursive situation works to transform decisions that attempt to ground themselves and to present themselves as the product of "reason" into something like the opposite of "reason."

3.4 Unmoored Morality and Ad Hominem Discourse

We should start by noticing one conspicuous and crucial feature of normative discourse today—namely, its radical pluralism.[3] On key questions of public policy—abortion, same-sex marriage, the distribution of wealth and opportunity, the granting of preferences based on race or ethnicity, and so forth—people obviously differ significantly in their conclusions; but beyond the disagreements at this level, people disagree as well in their normative premises and approaches.

One influential diagnosis of this situation was offered a generation or so ago in Alasdair MacIntyre's book *After Virtue*. Reciting common pro and con arguments on issues including just war, abortion, and governmental support for equality, MacIntrye suggested that these various arguments may seem perfectly cogent on their own terms (MacIntyre 1985: 6–7). Paradoxically, though, while the pro and con arguments lead to opposite conclusions, the arguments themselves do not really engage with each other. That is because they proceed from different premises and different conceptions of morality. Consequently, the ostensible adversaries talk past each other, and there is accordingly no way to achieve resolution of the disagreements.[4]

The incommensurability described by MacIntyre need not preclude meaningful moral discussions within communities of like-minded people—of economists, or utilitarians, or Kantians, or Catholic natural law theorists. But as we move into more public discourse, incommensurability becomes problematic. That is because in public discourse it comes to seem important that discussion proceed on *shared* premises. After all, how can people converse and debate profitably if they cannot agree on the fundamental premises or objectives?[5] Meaningful discussion and debate in such a situation is difficult.

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[3]The discussion that follows closely tracks and borrows from Smith (2015).

[4]See MacIntyre (1985: 8):

> Every one of the arguments is logically valid or can easily be expanderd so as to be made so; the conclusions do indeed follow from the premises. But the rival premises are such that we possess no rational way of weighing the claims of one as against another. For each premise employs some quite different normative or evaluative concept from the others, so that the claims made upon us are of quite different kinds.

[5]But see Smith (2010: 220–23) (arguing that discussion is possible even among people with different comprehensive worldviews).

This predicament applies with particular force to courts—once, that is, they stray beyond the comfortable confines of constitutional text and precedent and conventional legal reasoning. If courts have any excuse for wielding authority outside their conventional domain, it is that they are not merely advancing some partisan or sectarian agenda, in the way more openly political actors are, but rather are acting more on the basis of some sort of detached "reason." This makes it all the more imperative that courts act on the basis of some more generally accepted values or premises. But in a radically pluralistic normative world, where are such values or premises to be found?

This problem, I believe, underlies two of the most common but unfortunate forms of normative discourse today. One common practice, which I have discussed at length elsewhere,[6] is to invoke some premise that is widely venerated precisely because it so abstract as to be virtually devoid of any intrinsic substantive content, and then to smuggle one's more substantive commitments into that revered but empty receptacle. Thus, a great deal of contemporary argumentation consists of appeals to and ostensible derivations from the idea of equality. Equality happens to be an ideal that nearly everyone in our society respects; more than that, it is a ideal that no one *can* sensibly reject. That is because, as Peter Westen's famous article in the *Harvard Law Review* explained, the normative ideal of equality merely means that "relevantly like cases should be treated alike"—a virtual tautology. The unfortunate corollary, as Westen also explained, is that equality is substantively "empty." (Westen 1982). Its content has to be imported from sources other than equality. Consequently, although advocates may purport to be deriving conclusions from the ideal of equality, in reality they are often merely engaging in sophisticated question-begging.

Much the same is true of arguments framed in terms of liberty. Liberty is a value that would seem to command widespread support in our society. But the apparent consensus is largely illusory, covering over deep disagreements about what sort of liberty or freedom, and whose freedom, is to be valued. My freedom to live as I want to, or your freedom to live in the sort of neighborhood that is conducive to your preferred lifestyle? One person's freedom to play loud music, or another's freedom to enjoy peace and quiet? Michael Klarman may overstate the matter—but not by much—when he observes that "[f]reedom. … is an empty concept. To say that one favors freedom is really to say nothing at all." (Klarman 2000: 270–71).[7]

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[6]See Smith (2010: 26–38).

[7]In much the same way, arguments framed in terms of the celebrated "harm principle" turn out, upon closer inspection, to be artful exercises in gerrymandering the concept of harm so as to include the sorts of injuries that support regulations one favors, and to exclude—as "hurts" but not "harms", as Joel Feinberg put it, in his massive explication of the harm principle—the sorts of injuries that would support regulations one does not favor. Indeed, as Feinberg also acknowledged, without this sort of a priori disqualification of many real human concerns and grievances from the calculus, the harm principle would turn out to be not so much an instrument of liberty as a license for authoritarianism (Feinberg 1984: 33–34).

Beyond the illusion of agreement about values such as equality and liberty, however, there *is* in fact something approaching universal support for one proposition that is actually substantive, and this proposition leads to a second common form of contemporary normative discourse. More specifically, a proposition that people of virtually all moral positions can endorse is that it is wrong to act from hatred or malevolence or ill-will toward others.

This proposition is the converse or corollary of set of related propositions that can be stated more affirmatively. Thus, Kantians may affirm that we are required to treat all people as *ends*, not *means* (Kant 1959: 46–49). Political liberals may assert that we should treat all people with equal *respect*, or that we must recognize everyone's human *dignity* (see Dworkin 2011: 330; Minow and Singer 2010: 905). Utilitarians maintain that everyone is entitled to be counted equally in the utilitarian calculus (Blackburn 2001: 89). Christians teach that we should *love* everyone, both neighbors and enemies (Matthew 5: 38–48). Devout Jews believe that every person is a child of God, and hence of infinite worth (Steinberg 1947: 75–76). These affirmative propositions are not identical. But however the affirmative value is articulated, a similar prohibition seems to follow: it is wrong to act from hatred or ill-will toward others.

Unfortunately, the effect of this thoroughly sensible counsel on public discourse can be counterproductive. If the one normative proposition that virtually everyone agrees on is that it is wrong to act from hatred or ill-will, then in debates over public issues a potentially effective form of rhetoric will be to argue that your opponents are acting from hatred or ill-will. That is the one kind of argument that can potentially appeal to everyone. By contrast, arguments invoking utility, or universalizability, or religiously-informed conceptions of virtue and goodness will fail to engage the views and premises of large sections of the public audience—even if the arguments are persuasive on their own terms. But practically everyone will concur in rejecting a position or party that is deemed to be motivated by hatred or ill-will towards others.

Should we expect courts to be immune to this sort of demonizing argumentation? I don't see why. On the contrary, courts might be expected to be peculiarly receptive to this kind of *ad hominem* argumentation. After all, courts routinely resolve disputes by convicting an accused party of wrongdoing often involving some sort of guilty mind or *mens rea*. This focus on culpable mindsets or motives is most conspicuous in criminal cases, but it occurs as well in many tort cases and other kinds of cases.

The courts' institutional capacity to ascertain bad motives or purposes would seem easily to exceed their ability to perform other sorts of tasks sometimes assigned to them. Ronald Dworkin sometimes proposed that courts should decide cases by doing moral philosophy, for example. But what reason is there to suppose that judges, trained in law, would be good at that arcane task? Or it is often suggested that courts should "balance" competing interests. But in fact judges and scholars have never even seriously attempted to address the factual and methodological questions that any serious attempt at balancing would immediately present (see Aleinikoff 1987). Although lacking the training, experience, or methodology

that would equip them for philosophizing or balancing, however, courts are well practiced in resolving conflicts by declaring that one or another party has been guilty of acting badly and from a bad motive.

And so it seems fitting and natural that prominent constitutional doctrines not only permit but indeed demand this sort of *ad hominem* argumentation. Under equal protection doctrine, for example, the Supreme Court has ruled that, by itself, disparate impact on the basis of race or sex will not invalidate a law. Rather, in order to obtain a declaration of unconstitutionality, advocates must show that the law was adopted for a discriminatory purpose (Washington v. Davis, 426 U.S. 229 (1976)). The requirement is understandable. If disparate impact alone were enough to invalidate a law, huge numbers of laws might go by the boards: given demographic disparities, numerous laws defining crime or regulating taxation or education are likely to affect different groups differently. Nonetheless, the effect of this doctrine is to force advocates challenging a law to argue that it was adopted for hateful or discriminatory purposes.[8]

3.5 Animus in the Judiciary

The United States Supreme Court's decision last year in *United States v. Windsor,* 133 S. Ct. 1675 (2013), provides a nice, because egregious, illustration of this analysis. In *Windsor*, the Court struck down the section in the federal Defense of Marriage Act, or DOMA, that provided that for purposes of federal law "marriage" would be considered to be a union between a man and a woman. The Court might have tried to justify this conclusion on various grounds, but in fact the primary rationale given was that the law was unconstitutional because it was enacted from "a bare congressional desire to harm a politically unpopular group," or from a "purpose …to demean," "to injure," and "to disparage." (Id. at 2693–95). Justice Kennedy and the Court thereby in essence accused Congress—and, by implication, millions of Americans—of acting from pure malevolence.

The "animus" ascribed to these millions of Americans was of an especially vicious kind. There are of course situations in which a person or political faction, in the pursuit of self-interest, selfishly and unjustly tramples on the rights and interests

[8]As Cass Sunstein and others have argued, even decisions that do not overtly focus on motive or purpose but instead talk in "balancing" terms may in fact reflect a search for or judgments about illicit motivation (Sunstein 1984: 1699). That is because a minimal requirement in such contexts is that the government has acted for a "legitimate" purpose or to secure a "legitimate" interest. But the Constitution nowhere lists which purposes or interests are legitimate and which are not. Nor is there any general cultural consensus regarding such lists: purposes and interests that "progressives" might regard as within government's proper purview may be rejected by libertarians. Once again, though, and for the reasons discussed above, there is one purpose or interest that citizens of all persuasions will view as not legitimate—namely, a purpose of acting from "a bare desire to harm" some disfavored person or group. Not surprisingly, therefore, even "rational interest" balancing decisions can turn on explicit or implicit attributions of malevolent motivation.

of others. A robber kills to get someone's wallet. A political party holds up needed legislation to gain an electoral advantage. Such actions may deserve and receive severe censure, but at least the offending party has acted on some prima facie legitimate and rational interest. By contrast, the Congress that enacted DOMA was not pursuing any legitimate interest at all; it was acting from pure malice—from "the bare desire to harm" or "to injure." Or so charged the Court.

In support of this savage accusation the Court produced no evidence at all. Or, rather, the Court purported to cite some evidence, but the evidence in fact serves to subvert, not support, the Court's accusation. More specifically, the Court cited evidence from the legislative history showing that DOMA was based on judgments (a) approving of traditional marriage and (b) disapproving of homosexual conduct. Both judgments are contestable, obviously, but neither is equivalent to a "bare desire to harm." Though the Court somehow equated these moral or cultural judgments with a desire to harm, this dubious equation remained wholly unexplained.[9]

Of course, the fact that a prosecutor provides no evidence of guilt does not prove that the accused is in fact innocent. At least in the abstract, it is possible that the members of Congress who enacted DOMA and the millions of Americans who have supported this and similar measures have been motivated mostly or entirely by hatred. The standard reasons given for their position—for example, that same-sex marriage will have a corrosive effect on marriage, and thus on the family, and thus on society—might be not only unpersuasive but hypocritical—thin pretexts for more base or hateful motives. Supporters of same-sex marriage often assert as much. But how could the Justices possibly know this to be so with respect to DOMA? Could they somehow look into the minds and hearts of the members of Congress, and of the millions of Americans who claim to believe that marriage should be between a man and woman, and know that all of these people were and are in fact lying or deceiving themselves, and that the various reasons offered in support of their position were and are merely pretextual? Indeed, although the Court's accusation appeals to a widespread commitment to treating all people with "equal respect," it is arguably the Justices who wholly fail to treat those who disagree with them with respect—even with the minimal respect of allowing that those people might actually believe what they say they believe.

3.6 Conclusion

Should we be surprised that five distinguished Justices of the nation's highest court would be prepared to decide a hugely important constitutional issue on the basis of unsupported, disparaging accusations perhaps more suitable for the sort of mean-spirited commentary one finds on various unfiltered political blogs? We should, I think, be disappointed—or perhaps outraged. (I am.) But as I have tried to show,

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[9]I have argued this point at more length elsewhere (Smith 2015).

in a radically pluralistic discursive situation, advocates may have little choice except to smuggle their commitments into question-begging terms like equality or else to accuse their opponents of violating one of the few ethical norms that we can virtually all agree on: namely, that it is wrong to act from hatred or a desire to harm.

And thus judicial discourse, once it is detached from the mundane conventions of reading texts and precedents in accordance with their natural or commonsensical meanings, loftily aspires to be the realization of "reason" but instead ends up degenerating into a discourse of mean-spirited denigration.

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