BOOK REVIEW

THE "PURPOSE" DOCTRINE AND CONSERVATIVE JUDICIAL ACTIVISM

With Liberty and Justice for Some, DAVID KAIRYS, The New Press, New York (1993) (246 pages).

*Reviewed by J. Timothy Mc Donald**

In his dissent in *Payne v. Tennessee*,[1] Justice Thurgood Marshall objected strenuously to the majority's partial overruling of two cases of very recent vintage. In *Payne*, a six-member majority held that the Eighth Amendment to the United States Constitution is not a *per se* bar to the admission of victim-impact evidence against a defendant during the sentencing phase of a capital criminal trial.[2] To reach this result, the Court overruled *Booth v. Maryland*[3] in part and *South Carolina v. Gathers*[4] *in toto*. The relevant portion of *Booth* stood for the proposition that the Eighth Amendment prohibited a jury from considering a victim-impact statement in a capital-sentencing hearing and *Gathers* extended the *Booth* rule to prohibit prosecutors from making statements to capital-sentencing juries about the victim's personal qualities.[5]

Justice Marshall did not couch his views in his *Payne* dissent. Instead, he began his dissent sharply: "Power, not reason, is the new currency of this Court's decisionmaking."[6] Criticizing the majority's observation that *Booth* and *Gathers* were suspect because they were written by bare majorities over "spirited dissents,"[7] the second Justice Marshall warned:

> [T]he majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the

* Associate, Crummy, Del Deo, Dolan, Griffinger & Vecchione, P.C. Adjunct Professor, Seton Hall Law School. This review expresses only the view of the author and not of Crummy, Del Deo, Dolan, Griffinger & Vecchione, P.C. or Seton Hall Law School. All errors are attributable to the author. The author expresses thanks to Professor Richard S. Myers and Marcia Ann Miller.

1 111 S. Ct. 2597 (1991).
2 *Id.* at 2609.
3 482 U.S. 496 (1987).
4 490 U.S. 805 (1989).
5 *Id.* at 2604.
6 *Id.* at 2619 (Marshall, J., dissenting).
7 *Id.* at 2611.

> dissenting votes of four justices and with which five or more justices *now* disagree. The implications of this radical new exception to the doctrine of stare decision are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.[8]

Rarely is the law changed so dramatically in such an open fashion as it was in *Payne*. Usually, any change is either incremental or a drastic change that is asserted to be an incremental change or no change at all.

In his recent book, *With Liberty and Justice for Some*, Professor David Kairys critiques the modern conservative legal juggernaut on the Supreme Court of the United States that has effected these more subtle departures for the better part of the last decade. Professor Kairys argues that the conservative majority's "loyalty to supposed legal principles—both substantive principles and principles of decisionmaking—is selective, value laden, and result oriented."[9] While this particular quote refers to both liberal and conservative judicial activism in the narrow context of the book's introduction,[10] in the larger context of his book, this critique is directed toward the activism of the modern conservative majority on the Supreme Court and its use of the new legal theories, including the "purpose" doctrine, to curtail civil-rights protections, especially for minorities. The "purpose" doctrine is Professor Kairys's shorthand for the new majority's willingness to allow certain governmental action or regulation that burdens civil rights if that action or regulation has a neutral purpose other than the violation of civil rights.[11]

While similar charges of liberal judicial activism have come, recently with more frequency, from the other side of the ideological fence,[12] criticisms of conservative judicial activism, other than on a case-by-case or issue-by-issue basis, have been absent. This may only be because of the relative youth of a truly solid modern conservative majority on the Supreme Court. A persuasive case can be made that a benchmark for this change is the elevation of Chief Justice William

---

8 *Id.* at 2619 (Marshall, J., dissenting).

9 DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 11 (The New Press 1993). Professor Kairys's view of judicial decisionmaking is "closely associated with critical legal studies and legal realism." *Id.* at 192, 192 n.6.

10 *Id.*

11 *See infra* Part I B (discussing the "purpose" doctrine generally).

12 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (The Free Press 1990) (providing a critique of liberal judicial activism and the paradigm of conservative judicial restraint).

Rehnquist and the appointment of Justice Antonin Scalia in 1986.[13] Thus, it may only be now that the conservative majority has had enough time to stabilize somewhat and take on its own identity, allowing for a meaningful, broad-based critique of its method. Professor Kairys provides this critique and gives it substance by identifying a fairly consistent theme in this activism and by contrasting it against the liberal paradigm in certain areas.[14]

Professor Kairys begins by outlining his perspective on the problem of judicial activism generally in his introduction.[15] Then he chooses two World War II-era cases as examples of the polar opposites of judicial activism. These cases serve to show what one might call the high-water mark of liberal judicial activism—*West Virginia Board of Education v. Barnette*[16]—and the high-water mark of conservative judicial activism—*Korematsu v. United States*.[17]

Professor Kairys then samples recent decisions which negatively impact upon the civil rights of American citizens. He breaks the book down into the areas of expression,[18] participation in the political process,[19] religion,[20] equality,[21] privacy,[22] and due process.[23] In his conclusion, Professor Kairys summarizes the analyses of the recent conservative decisions as being reflected in the "purpose doctrine," which he describes as excusing and legitimating "all manner of constitutional violations unless a victim can prove that the government has acted maliciously and the government cannot suggest an alternative, plausibly benevolent purpose."[24] After demonstrating that the "purpose" doctrine is a trojan horse for conservative judicial activism, Professor Kairys concludes that the Court itself is not the best vehicle for maintaining civil-rights protections. Starting from the premise that the people are the best vehicle for ensuring these protections, he suggests that we move toward a more direct participatory and representative democracy similar to the parliamentary or proportional-representative systems common in Western Europe.[25]

---

13 *See generally* DAVID G. SAVAGE, TURNING RIGHT (Wiley 1992) (reviewing the Supreme Court from October Term 1986 through October Term 1990).

14 *See, e.g.*, KAIRYS, *supra* note 9, at 73-82.

15 *Id.* at 1-11.

16 319 U.S. 624 (1943).

17 323 U.S. 214 (1944).

18 KAIRYS, *supra* note 9, at 39-82.

19 *Id.* at 83-97.

20 *Id.* at 99-127.

21 *Id.* at 129-45.

22 *Id.* at 147-66.

23 *Id.* at 167-79.

24 *Id.* at 183.

25 *Id.* at 206-07.

This review will set forth Professor Kairys's analysis of *Barnette* and *Korematsu* and his view of the "purpose" doctrine in Parts I A and I B. This gives the reader an understanding of his conception of judicial activism and the "purpose" doctrine. Parts II A through II C examine Professor Kairys's analysis of specific examples of modern conservative judicial activism and the "purpose" doctrine. Part III will examine Professor Kairys's proposal to ensure that civil rights will not be subject to the vagaries of judicial activism. Finally, Part IV sets forth my thoughts concerning the contribution Professor Kairys's book makes to the scholarly debate in this area.

I.

Professor Kairys's critique of the modern conservative majority on the Supreme Court focuses on its opinions that circumscribe civil rights. His cataloging of opinions does not attempt to analyze every case that impacts negatively on civil rights protections. Rather, his general focus is on those cases which depart radically from established precedent.

These cases are compared to two cases that Professor Kairys selects as the outer-bounds of the spectrum of civil rights protection. Both of these decisions do share one common thread, however, in that they are both examples of judicial activism. This is the backdrop against which Professor Kairys analyzes the activism of the current conservative Supreme Court majority. This majority's activist moves have sometimes, though not always, resulted from the application of the "purpose" doctrine. A review of these two points, the key examples of activism and the "purpose" doctrine, is essential to an understanding of Professor Kairys's analysis of the specific decisions he digests throughout his book.

A.

A stark contrast between two Supreme Court decisions that Professor Kairys's sets forth in his first chapter exemplifies judicial activism in defense of and in derogation of civil rights.[26] His analysis of *West Virginia Board of Education v. Barnette* and *Korematsu v. United States* respectively, makes this point.

The *Barnette* plaintiffs sought to enjoin the enforcement of West Virginia's flag-salute law. *Barnette* involved two sisters who were Jehovah's Witnesses. As Jehovah's Witnesses they observed the Book of Exodus' command that "thou shalt not bow down thy-

[26] *Id.* at 13-38.

self to [any graven image], nor serve them."[27] A flag was one example of such an "image."[28] Their belief ran headlong into a West Virginia statute that required school children to salute the American Flag and recite a short pledge.[29]

The Supreme Court invalidated the West Virginia law. The Court rested this decision on the basis of the principle that no government official can compel a particular belief. Writing for the Court, Justice Robert Jackson penned:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[30]

This conclusion follows from the premise stated earlier in the opinion concerning the *Barnette* Court's anti-majoritarian view of the Bill of Rights.

> 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, and 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.[31]

As much as one would like to believe that these principles have

---

27 *Barnette*, 319 U.S. at 629 (quoting Exodus, Chapter 20, verses 4 & 5).

28 *Id.*

29 The familiar pledge was:

> I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.

Id. at 628-29. The Jehovah's Witnesses offered a compromise and agreed to have its adherents recite the following in lieu of the State's pledge:

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
>
> I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
>
> I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.

Id. at 628 n.4. This commentator wonders whether West Virginia still might have been challenged, only by different plaintiffs, had it allowed this accommodation.

30 *Id.* at 642.

31 *Id.* at 638.

been consistently applied throughout our nation's history, Professor Kairys notes that this was actually an exceptional proposition.

> The principle, and [Justice] Jackson's direct and elegant style, may warm our hearts; but it was relatively new, and its source is not clear. No such language appears in the Constitution or the Bill of Rights, and no majority had previously articulated such a broad restraint of government in the name of personal freedom. Further, [Justice] Jackson's "fixed star" has a distinct antimajoritarian aspect: he invalidated a law duly enacted by the representatives of the people of West Virginia.[32]

Professor Kairys does note that it is possible to argue that the structure of the Bill of Rights is a basis for Justice Jackson's far-reaching propositions in *Barnette.* This basis, however, is far from articulated and Justice Jackson's general propositions rely on it in a very subtle manner. Indeed, just having the general flavor of at least what is generally perceived to be the panoply of American constitutional protections, one would not be surprised to learn of the result in *Barnette.* While the result in *Barnette* may have been plainly right, it may have been so easy to get there that the opinion was not crafted as well as one would have hoped.

On a more specific level, the *Barnette* Court can be accused of an activism like that recently employed by the Court in *Payne.* Regardless of what one thinks about the West Virginia State Board of Education's resolution, that the Board had some reason to believe that its resolution was constitutional cannot be questioned. The resolution was passed in 1942 relying on the very same Supreme Court's 1940 decision in *Minersville School District v. Gobitis,*[33] which rejected a claim that adherence to religious beliefs that conflicted with saluting the American Flag was a sufficient basis for seeking an exemption from the flag-salute rule. To the extent that *Barnette* had to overrule *Gobitis* to reach its result, *Barnette* would fall comfortably within the same criticism that Justice Marshall levelled in *Payne.*

Korematsu is, of course, the case which upheld the imprisonment of Japanese residing in the United States in detention camps during World War II. Pursuant to an Executive Order and an Act of Congress, the American military imposed an incrementally more serious set of orders upon persons of Japanese ancestry living on the west coast. Eventually, these orders resulted in the relocation of Japanese-Americans to detention camps.

The Supreme Court, relying on the fact that we were at war with

---

[32] KAIRYS, *supra* note 9, at 16.
[33] 310 U.S. 586 (1940).

Japan, upheld this far-reaching measure even under strict scrutiny analysis.[34] The Court deferred to the military because it found that detentions had a "definite and close relationship to the prevention of espionage and sabotage."[35] In support of this factual premise, the Court relied on the military's final report on the issue.[36]

Korematsu is not exceptional merely on the basis of its deference to military concerns. Instead, it is also exceptional, possibly moreso, because it allowed the government to single out a particular race for imprisonment without any individualized proof of guilt. Even beyond this, the Court deferred to the military despite the fact that German- and Italian-Americans were not similarly detained though we were also at war with them, in the case of the Germans directly off our east coast.[37] To say that this decision is not borne of activism is essentially to say that there comes a point when an action of the Executive Branch is not restricted by any law. Under *Korematsu*, "[w]hen the government asserts interests of the highest Order, like military necessity and national security, its assertions, even if only generally stated, should not be scrutinized."[38] Such absolute deference had no more precedent than did Justice Jackson's anti-majoritarian doctrine in *Barnette.*

B.

In the cases Professor Kairys analyzes after discussing *Barnette* and *Korematsu*, he focuses on each case's impact on civil rights, the departure from precedent or logic in each case, and, in many of the cases, the use of the "purpose" doctrine as a tool for activism. While Professor Kairys first extracts the "purpose" doctrine from particular cases and then discusses it fully in the book's conclusion, I will reverse the order so that the Court's use of the doctrine is more clear in this review of Professor Kairys's analysis.

In Professor Kairys's own words,

---

34 KAIRYS, *supra* note 9, at 33 ("[I]n the race-discrimination cases over the last fifty years in which the strict-scrutiny analysis has been available, the government's action has been sustained in only one case in which strict-scrutiny was applied (*Korematsu*).").

35 *Korematsu*, 323 U.S. at 218.

36 As Professor Kairys and his supporting authorities amply demonstrate, the final report was more a product of hysteria than of logic or reason. *See* KAIRYS, *supra* note 9, at 24, 27-29. It also seems that the government's attorneys who argued the *Korematsu* case had some doubts about the case, if not the final report, but felt that the responsibility for deciding what law to pursue was not theirs, despite the dilemma this presented them. *See* ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE 280 n.63 (West 1992).

37 *See* KAIRYS, *supra* note 9, at 27-28.

38 *Id.* at 33.

> [The] purpose doctrine[ ] excuses and legitimates all manner of constitutional violations unless a victim can prove that the government has acted maliciously and the government can not suggest an alternative, plausible benevolent purpose.[39]

In taking this common strand from a number of recent cases, Professor Kairys uses the word "purpose" instead of the word "intent" even though the Court often characterizes its analysis in terms of intent. Professor Kairys opts for the use of the word "purpose" to emphasize his distinction between the conscious knowing and voluntary aspect of taking an action—"intent"—and the motive or reason why one takes an action—"purpose."[40]

Professor Kairys asserts that this doctrine has been able to gain a foothold without any rationale for its existence. With respect to the "purpose" doctrine, the conservative majority has "not explained *why* we should ignore constitutional violations unless a victim can meet the almost-impossible burden of proving malicious governmental purposes."[41] For example, Professor Kairys would read the First Amendment's command that "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof,"[42] in its plain terms. Under the "purpose" doctrine, Professor Kairys would argue that the amendment is actually changed to effectively read "Congress shall make no law *purposefully* respecting an establishment of religion, or *purposefully* prohibiting the free exercise thereof." Similarly, he would read the Fifth and Fourteenth Amendments' Due Process Clauses "as written." Those amendments, as written, read "[n]o persons shall. . .be deprived of life, liberty or property, without due process of law."[43] Under the "purpose" doctrine, these clauses are changed to read: "No person shall . . . be deprived *purposefully* of life, liberty, or property, without due process of law."

Professor Kairys does not argue that there are no limits on the rights secured in the Bill of Rights. To read each right absolutely would engender endless conflict among individuals and between individuals and government and would cripple any organized governmental structure. Rather, Professor Kairys would endorse the *Barnette* approach which recognizes

> a strong presumption of individual autonomy by generally defining the very limited circumstances in which collective interests are given precedence over individual autonomy in selected ar-

---

39 *Id.* at 183.
40 *Id.* at 184.
41 *Id.* at 184.
42 U.S. CONST. amend. I.
43 U.S. CONST. amend. V; U.S. Const. amend. XIV.

> eas. In the selected areas of autonomy, the government can infringe on or burden individual autonomy only if it is directly, concretely, and specifically necessary to implement a "compelling" interest and if there is no "less restrictive" means.[44]

His difference with the current conservative majority on the Court, then, is not that it has chosen to draw a line, but that it has chosen the "purpose" doctrine as a means of drawing that line.

II.

This section includes a detailed review of Professor Kairys's critique of the application of the "purpose" doctrine in three of the twenty-nine cases that he discusses. Not all of the cases he analyzes are examples of the "purpose" doctrine methodology. Indeed, Professor Kairys notes that this doctrine has not impacted the area of privacy.[45] The selected cases are a representative sample of Professor Kairys's analysis of cases which involve the "purpose" doctrine and the activist nature of those decisions. The examples come from the areas of expression, religion and due process.

A.

Professor Kairys examines the "purpose" doctrine as applied to the realm of expression by analyzing the case of *City of Renton v. Playtime Theatres, Inc.*,[46] a case decided in the early days of the new conservative majority.[47] This case, according to Professor Kairys, represents the first application of the "secondary effects" doctrine. This is the form that the "purpose" doctrine takes in expression cases.[48] The "secondary effects" doctrine determines when a restriction on expression is content-neutral as opposed to content-based. This is important because a content-based restriction is subject to a higher level of scrutiny than one that is content-neutral.[49] A restriction is content-neutral when "the predominant purpose of the measure [is] directed at 'secondary effects' rather than content."[50]

---

44 KAIRYS, *supra* note 9, at 201-02.

45 "The only area emphasized in this book in which [the "purpose" doctrine] has not played a major role is privacy, where the Court has accomplished the same results by reducing the scope of activity that is protected at all rather than focusing on purposes that excuse infringements." *Id.* at 184.

46 475 U.S. 41 (1986).

47 *Renton* was decided before Chief Justice Burger left, and Justice Scalia joined, the Court. *See id.* at 42.

48 *See* KAIRYS, *supra* note 9, at 62-66.

49 *Id.* at 46-47.

50 *Id.* at 63.

Renton involved a challenge to the constitutionality of a municipal ordinance that prohibited the location of any adult movie theater within one-thousand feet of any residence, church or park and within one mile of any school.[51] As the community was not large, it is not surprising to know that this restriction covered ninety-five percent of Renton.[52] The remaining acreage was either occupied or unsuited for a movie theatre. Thus, the ordinance in fact effected a total ban on the placement of adult book stores and movie theaters within the city.[53]

The *Renton* majority began by determining that the ordinance was a time, place, and manner restriction as opposed to an unconstitutional ban on expression. This test allows for the regulation of speech, as to the timing of speech, the place in which the speech is uttered and the manner in which the speech is conveyed, so long as those restrictions are reasonable.[54] Professor Kairys concedes that such a regulation might be a reasonable restriction on place in a large-or-medium size city, but argues that it was unreasonable in view of Renton's small size. The Court was able to avoid this distinction, Professor Kairys notes, by dealing with the time, place and manner restriction in the abstract as opposed to analyzing it in the context of the small town that Renton was. The *Renton* majority merely analogized this ordinance to a similar ordinance upheld by a splintered majority in *Young v. American Mini-Theatres, Inc.*[55] The Court ignored the fact that *American Mini-Theatres* involved the effect of such an ordinance in Detroit, Michigan where it would have much less of an effect.[56] Professor Kairys observes that the restriction was more honestly a "no time, no place, and no manner" regulation.[57]

Still, the heart of Professor Kairys's critique concerns the method in which the Court dealt with the content basis of the ordinance. For even an ordinance which is a reasonable restriction in terms of time, place, and manner is presumptively unconstitu-

---

51 *Renton*, 475 U.S. at 44. The ordinance was modified during the litigation reducing the distance from a school that an adult theatre could be located from one mile to one-thousand feet. *Id.* at 45.

52 *Id.* at 64 (Brennan, J., dissenting); *see* KAIRYS, *supra* note 9, at 63.

53 *Renton*, 475 U.S. at 64-65 (Brennan, J., dissenting).

54 *Id.* at 46-47.

55 427 U.S. 50 (1976).

56 *Renton*, 475 U.S. at 46. Indeed, the *American Mini-Theatres* ordinance was less restrictive geographically as the minimum distance from a residential zone was only 500 feet. *See American Mini-Theatres, Inc.*, 427 U.S. at 72-73 (plurality opinion).

57 KAIRYS, *supra* note 9, at 63.

tional if it is content-based.[58] Professor Kairys argues that since the ordinance is explicitly applicable only to theaters that show "adult motion pictures" (or book stores that carry adult books), as opposed to all movie theaters or all book stores, the ordinance was plainly content-based.[59]

The majority was only able to avoid this conclusion by applying the then-new "secondary effects" doctrine which essentially holds that any restriction on speech is content-neutral so long as the "predominant" purpose of the measure was directed at something other than content. These "other things" are known as secondary effects. The majority relied on the city's concern with preventing crime, maintaining property values and preserving the quality of urban life without any proof that these values were already damaged by the regulated establishments.[60]

Professor Kairys analogizes this "secondary effects" doctrine to the role of intent in discrimination cases. In other words, under the "secondary effects" doctrine, there is no First Amendment violation in this free-speech context unless it is also proved that in addition to the alleged violation, "the government's purpose was to infringe on or burden speech."[61] This removes the focus and the legal analysis from whether or not a given right has actually been burdened or affected and instead focuses on the purpose of the burdening or affecting party's act.

One of the more disturbing strands of this development to Professor Kairys is the Court's apparent willingness to accept in other areas of the law "very generally stated alternate purposes [without] scrutiniz[ing] a good faith or a basis of an asserted alternative purpose."[62] Although it is not clear that the Court will accept such freely-stated alternatives at this point, if this doctrine develops as it has in the establishment of religion and equal-protection cases, where such loosely asserted alternate purposes are accepted,[63] this minimalist analysis will come to pass in expression cases also.

On a factual level, Professor Kairys attacks the reality of these "effects" as being secondary and unrelated to the content basis of the regulation. As he notes:

> [T]he city enacted the regulation to avoid the effects of the con-

---

58 *Renton*, 475 U.S. at 46-47.
59 KAIRYS, *supra* note 9, at 63.
60 *Renton*, 475 U.S. at 47-48.
61 KAIRYS, *supra* note 9, at 64 (emphasis omitted).
62 *Id.* at 64.
63 *Id.* at 64, 99-145.

> tent that the regulation was explicitly aimed at. There is nothing really "secondary" about this at all, and there are no multiple concerns or intentions among which one can be "predominant". What [Justice] Rehnquist calls a "predominant concern . . . with the secondary effects" is simply the purpose and intended results of the regulation and has nothing to do with its content neutrality or lack of content neutrality.[64]

Thus, he argues that in effect, the Court has not applied the content-basis rule differently; rather, it has eradicated it in favor of a rule which says that as long as the asserted purpose of the ordinance is okay, then its in-fact content-based effect is permissible. Professor Kairys analogizes this to the approach taken in *Korematsu* where the imprisonment was upheld on the grounds of national security, even though the regulation was defined by race.[65] As *Korematsu* could be seen as activist in its deference then, *Renton* is similar. The government is no longer subject to the restrictions or regulations that burden expression rights unless it actually acts with a motive to burden those rights. In both cases the Court has abdicated its role as the protector of civil rights despite constitutional provisions devoid of such a limiting rule.[66]

B.

The "secondary effects" doctrine's cousin in the religious-rights area, the "incidental effects" doctrine, joined the "purpose" doctrine family in *Employment Division, Department of Human Resources of Oregon v. Smith.*[67] The "incidental effects" doctrine is another example of the "purpose" doctrine being used to invalidate the rights of minorities.

Alfred Smith was an American Indian who was fired from his job as a counselor in a private drug rehabilitation program because he used peyote.[68] Smith applied for, and was denied, unemployment benefits because he "had been discharged for work-related misconduct."[69]

Smith's use of peyote, however, was only as part of a core sacrament in American Indian religion, a religion which has existed

---

64 *Id.* at 65.

65 *Id.*

66 *See supra* text at Part I B.

67 494 U.S. 872 (1990).

68 *Id.* at 874. The facts of fellow respondent Galen Black's case are essentially identical to Smith's. *See id.*

69 *Id.*

longer than Christianity.[70] Still, that use violated at least the text of Oregon's criminal laws prohibiting the knowing or intentional possession of controlled substances, including peyote.[71] As Professor Kairys notes, "Oregon's prosecutors had customarily declined to prosecute criminal cases involving religious use of peyote by American Indians."[72] Regardless, Smith was faced with the text of a law that clearly banned a practice that was part and parcel of his religious beliefs. Thus, Smith contended that Oregon's denial of his claim for unemployment benefits violated the Free-Exercise Clause.

When reviewed under the "incidental effects" strand of the "purpose" doctrine, this became an easy case for the majority. Given that the rule was a generally applicable and otherwise valid criminal provision (*i.e.*, it had no bad purpose), the fact that it incidentally violated the free-exercise rights of certain persons in its specific application was irrelevant.[73]

Professor Kairys observes that this analysis reduces severely the protection accorded to minority religions under the Free Exercise Clause.[74] Since generally applicable and otherwise valid provisions are passed by a majority rule, it follows that the majority would not pass a law that would criminalize its own religious beliefs, therefore insulating majoritarian religions from any burden as a result of a generally applicable or otherwise valid provision. However, the majority will not necessarily have the same concern for non-majoritarian religions. Thus, to the extent that a non-majoritarian religion engages in a practice that is not shared by a majoritarian religion, the possibility exists that the non-majoritarian practice may be burdened by a generally applicable and otherwise valid law drafted by a legislature constituted predominantly by members of a (the) majoritarian religion(s).

On this point, the *Smith* majority agrees with Professor Kairys that this is the effect of the "incidental effects" doctrine. Justice Scalia, the author of the majority opinion, observed:

> It may fairly be said that leaving accommodations to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable

---

70 *See* KAIRYS, *supra* note 9 at 105.

71 *Smith*, 494 U.S. at 874.

72 KAIRYS, *supra* note 9, at 105.

73 *Smith*, 494 U.S. at 890.

74 "[After *Smith*], nonmajoritarian religions no longer have the freedom to engage in religious practices that conflict with generally applicable laws, no matter how insignificant the law or how important the practice." KAIRYS, *supra* note 9, at 106.

consequence of democratic government . . . .[75]

Professor Kairys does not agree, though, that this is an unavoidable consequence of democratic government.

> [T]his consequence is hardly "unavoidable," and there is no explanation of why this particular conception of democracy is either required or preferable. The Court in this very case overruled a long line of decisions that had avoided this consequence without any known impact on the ability of government to implement its policies and interests effectively. Neither [Justice] Scalia nor any study or scholar has demonstrated any concrete negative impact resulting from occasional exceptions to general laws so that religion may be accommodated. The concrete effects of such accommodations on government's ability to function effectively are surely trivial, and strict scrutiny is not absolute (still allowing for governmental interests that are deemed compelling).
>
> . . .
>
> Some people may make insincere religious claims just to avoid some responsibility; but proof of sincerity has always been required, and being publicized as a religious minority, often depicted as deviant in the media, is usually not pleasant. This is no reason to deny religious freedom to those for whom it is a sincere necessity of life.[76]

In addition to being another example of the "purpose" doctrine and how that doctrine can substantially limit individual rights, Professor Kairys argues that the case is a plain example of judicial activism through revisionist legal history. Professor Kairys observes that even "[a] leading conservative scholar and supporter of the result called [Justice] Scalia's opinion a 'paradigmatic example of judicial overreaching. . . . [in which] use of precedent borders on fiction.'"[77] An example of this is the *Smith* majority's attempt to distinguish *Barnette*[78] and *Wisconsin v. Yoder*[79] as cases that involved more than just one First Amendment right.[80] While that may be a true distinction in fact, *Barnette* involved both free speech and freedom of religion and *Yoder* freedom of religion and the parental right to direct the education of

---

75 *Smith*, 494 U.S. at 890.

76 KAIRYS, *supra* note 9, at 106-07.

77 *Id.* at 107 (quoting William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991)). This author notes that Professor Marshall is also a leading teacher as well as a leading scholar. *See, e.g.*, Federal Courts Class, Case Western Reserve University School of Law, Fall Semester, 1989.

78 *See supra* text at 7-11.

79 406 U.S. 205 (1972).

80 *Smith*, 494 U.S. at 881-82.

children,[81] those distinctions are at best fortunate happenstance as they play no role in the Court's analysis in either *Barnette* or *Yoder*.[82]

C.

The "purpose" doctrine has also worked its way into areas of criminal procedure where no particular regulation is at issue, but specific governmental actions are held up to constitutional scrutiny. For example, in *Arizona v. Youngblood*,[83] the "purpose" doctrine was extended to due process. Larry Youngblood was convicted of repeatedly molesting and raping a 10-year-old boy in a car and a house after abducting the boy from a carnival in Pima County, Arizona. The only evidence against Youngblood was the boy's identification of Youngblood out of a series of pictures nine days after the assault and the police criminologist's conclusion that the boy was sexually assaulted, although the criminologist had no conclusion as to who assaulted the boy.

There was no lack of physical evidence, although who it would implicate was never known. For example, samples were taken from the boy's rectum, mouth and clothing and the police eventually seized Youngblood's car.[84] The preliminary tests based on the semen and blood found were inconclusive. The inconclusive nature of these tests was due in substantial part to the police's failure to timely test and properly preserve the evidence.[85] Further, Youngblood's car was turned over to a wrecking crew without having the victim or defense examine it even though the victim's description of the car involved in the assault differed critically from the description of respondent's car given by respondent and others.[86] Thus, Youngblood never had a chance to have a defense expert analyze meaningfully any of this potentially exculpatory evidence.

Youngblood argued that this conviction was obtained in violation of the Due Process Clause of the Fourteenth Amendment because the aforementioned physical evidence was not properly preserved, thus eliminating his chance to analyze it for his defense. Although previous cases had held that the prosecution had a duty to maintain and provide a defendant with any evidence that may tend to prove his or her innocence, the majority modified this rule

---

81 *Id.*

82 *See* KAIRYS, *supra* note 9, at 108.

83 488 U.S. 51 (1988).

84 *Id.* at 52-55; *id.* at 72 (Blackmun, J. dissenting).

85 *Id.* at 54-55.

86 *Id.* at 72 & n.9.

by carving out of it a "good faith" or "non-purposeful" exception.[87] Thus, unless the purpose of the destruction of the evidence was to violate the defendant's due process rights, the defendant is left without a remedy.[88]

Justice Harry Blackmun pointed out in dissent that "[t]he Constitution requires that criminal defendants be provided with a fair trial, not merely a good faith try at a fair trial."[89] This echoes Professor Kairys's essential dispute with the "purpose" doctrine, that it qualifies the constitutional protections without any reason being given why the qualification is legally or logically required.[90] Besides the departure from precedent that Professor Kairys points out in analyzing these cases, his charge of activism may also be based on the absence of a foundation for the "purpose" doctrine, although he does not make this point explicitly.

III.

Professor Kairys does not believe that the answer to conservative judicial activism is to adopt the liberal (now dissenting) view. Although more attuned to his beliefs, such a result would merely replace liberal judicial activism with conservative judicial activism. He writes, "[t]he role of value choices in a case like *Roe v. Wade* is no different than in environmental, economic-regulation or affirmative-action cases where the conservatives favor judicial activism."[91] Given that each judge will bring a particular set of value choices to the bench, according to Professor Kairys, "what the conservatives are doing now that they dominate the Court, and what the liberals did when they dominated, *is the legal system and the rule of law.*"[92]

Removing the conservative majority and the "purpose" doctrine will only solve half of the problems identified by Professor Kairys. It will not solve the problem that he has with activism and the consequential uncertainty about the status of civil rights, among other things, that activism breeds.

To this end, he concludes that "[t]he best vehicle for implementing and maintaining civil-rights and civil-liberties protections—or for accomplishing anything else in a democracy—is the people, either directly or through broadly participatory or repre-

---

87 *Id.* at 57-58.

88 KAIRYS, *supra* note 9, at 108.

89 *Youngblood*, 488 U.S. at 61 (Blackmun, J. dissenting).

90 *See supra* text at Part I B.

91 KAIRYS, *supra* note 9, at 194.

92 *Id.* at 195.

sentative institutions."[93] He favors the parliamentarian or proportional-representation schemes that populate Western Europe. In these systems, the legislature plays a primary role and with the courts far less powerful than the ones we know.[94] To Professor Kairys this is the way to insure more continuity in the law, especially with respect to civil rights and civil liberties.

IV.

Professor Kairys's book is subtitled: "A Critique Of The Conservative Supreme Court." The book is certainly that. Hopefully, it is one of the first in a trend of scholarly works that both challenge the current conservative methodology and solidify the basis for the liberal methodology. For some time now, liberal literature has focused on the latter leaving an imbalance in the scholarship where recent conservative works have done both. At least for those of us who do not subscribe to the critical legal studies bent, this dialogue between both ends of the spectrum is very, very important.

As a critique of activism, the book is also important. This point is more subtly woven throughout the text. While I would agree with Professor Kairys that activism (both conservative and liberal) is generally bad, it is hard to glean a concrete definition of activism from his analysis. Not knowing his precise definition of activism makes it difficult to assess his point on activism in any quantifiable terms.

Unlike those who merely point out the problems, Professor Kairys provides an answer to the problems he discusses. While he lays out the idea of moving to a more representative government generally, the idea seems somewhat cursory in the context of the book as a whole. This is a more political issue than the legal issues (or legal manifestations of political issues) that he confronts throughout the majority of the book. A detailed development of this idea, how the transformation in American government would occur, what specific role the courts would play and the possibility that minorities might still be "locked out" under a proportional-representation scheme are all specific questions that I am left with, questions that Professor Kairys will hopefully answer in a future work. Although I am a long way from giving up on the present role that the courts play in our society, Professor Kairys's views are worth considering.

---

[93] *Id.* at 203.
[94] *Id.* at 207.