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'Judicial Activism' to Be Thankful For

By Colbert I. King

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The celebration of Rosa Parks's extraordinary contribution to America presents an excellent opportunity for me to summon all the strength at my command so that I may shout at the top of my lungs: "Thank God Almighty for liberal judicial activism." I suppose this makes me a heretic in a town where radical right dogma reigns supreme, especially after the trashing of White House counsel and now-withdrawn Supreme Court nominee Harriet Miers. But I'll still pay tribute to activist judges. After all, it was a default by elected leaders that led an "activist" Supreme Court to decide in 1956 that it was unconstitutional to require that Rosa Parks and other black passengers in Montgomery, Ala., sit at the back of buses solely because of their race.

This celebration of Parks's life is also a chance to set the record straight. The culprits in Parks's case weren't limited to the white bus driver who told her to give up her seat to a white man or the white police officer who arrested her. The folks who really degraded Parks and other black bus riders were the Alabamans who put and kept Jim Crow laws on the books. Had it been left up to them, the arrests of Rosa Parks and other African Americans would have continued. And of course we can't leave out Alabama's white majority, which either liked or was indifferent to segregation.

When the Montgomery Improvement Association, led by a 26-year-old preacher, Dr. Martin Luther King Jr., tried to negotiate a bus desegregation plan with the city commission and the bus company, all it got in return was resistance -- oh, yes, and a stick of dynamite thrown into King's home. Thus the lawsuit.

Alabama argued then, as do conservatives today, that courts have no business second-guessing decisions of states and cities that are acting within their own laws. But the Supreme Court, looking at the Constitution, saw something else. True, there was not one word in the Constitution about the operation of bus companies or the seating of passengers. But "activist" high court justices, bless their souls, examining the due process and equal protection clauses of the 14th Amendment, found violations of the rights of black passengers that Alabama was either too blind or too unrepentant to see.

It wasn't the first time.

The year before Rosa Parks took her stand by keeping her seat, the Supreme Court reviewed the legal precedent established decades earlier in *Plessy v. Ferguson*, which blessed the "separate but equal" doctrine. Settled law though *Plessy* may have been, the "liberal" Supreme Court under Chief Justice Earl Warren ruled in *Brown v. Board of Education* that school segregation "solely on the basis of race" violated the equal protection clause of the 14th Amendment.

Make no mistake: It was within the power of state legislatures and Congress to put a halt to racial discrimination in public education. Had they wanted to or had they been commanded by a popular majority to bring about equal access to educational opportunity, legislators could have done so. Instead they allowed that abomination called *Plessy* to stand, leaving it up to nonviolent protests and judicial tests to challenge racial discrimination in public education.

So on the occasion of Rosa Parks's death, I also pay tribute to "activist" justices such as Warren, William O.

Douglas, William Brennan and Thurgood Marshall, NAACP lawyer and later a justice. They are and will always be among my heroes.

(I'll pause here to allow my conservative colleagues to get hold of themselves.)

To continue . Were it not for "liberal, activist" courts, who knows how long it would have been before:

Rosa Parks could have sat anywhere she wanted on a bus?

Miscegenation laws would have been invalidated?

Illegally obtained evidence would have been deemed inadmissible in court?

Citizens accused of a crime would have been provided a lawyer if they couldn't afford one?

Citizens would have to be informed of their rights, including the right to remain silent and the right to counsel, before being questioned by police?

Public school boards would have been stopped from writing and adopting prayers for students to recite?

All citizens would have been guaranteed a constitutional "right to privacy"?

Who are the opponents of "liberal judicial activism"? There's no one-size-fits-all description. But some of the loudest voices belong to those who never liked the civil rights movement or the series of landmark cases that expanded rights under the Warren Court. They never saw a court-ordered desegregation remedy they could stand or a states' rights doctrine that didn't trump the rights of racial minorities.

They are the sort of folks who believed Arkansas Gov. Orville Faubus had a point when he used state troopers to block nine black students from entering Little Rock's Central High School even though it was under a federal court's desegregation order. They tend to disparage any and all decisions they don't like as the personal preferences of high-handed judges exceeding their jurisdiction. To them, anyone who spends time knocking down barriers faced by folks who are not white and male is automatically suspect.

Which explains why I knew Harriet Miers was doomed with conservatives. Last Sunday The Post published a story by Jo Becker and Sylvia Moreno that said that as president of the State Bar of Texas, Miers vowed to make the bar "inclusive of women and minorities." Miers, according to the story, "championed the cause of increasing the number of female and minority lawyers in the bar's own leadership ranks and in law firms across the state, writing that 'we are strongest capitalizing on the benefits of our diversity.' " To the right wing, them's fightin' words.

The mere idea that Miers supported a bar resolution that encouraged Texas law firms to hire more minority lawyers and that set aside a specific number of seats on the bar's board of directors for women and minorities was enough to make conservatives do back flips. Too much like the thinking of a "liberal activist judge."

In my book, however, Harriet Miers's determination to tear down racial and sexual barriers in Texas legal circles is a mark in her favor. Who knows? It might even have made Rosa Parks smile.

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