# Chapter 6
# The Activist Judge—Vanity of Vanities

**James Allan**

> Oh that I were made judge in the land, that every man that hath any suit or cause might come unto me, and I would do him justice! (King James Bible 1769: 2 *Samuel* 15:4).[1]

I, for one, certainly believe that over the last four or five decades the developed democratic world—or, I plead ignorance, perhaps just the common law part of that world—has seen a marked increase in judicial activism. In my latest book, just out in June, 2014, I argue that unelected judges have been eating into the scope for democratic decision-making (Allan 2014). They have done this in various ways including through the adoption of new approaches to constitutional interpretation that impose few (if any) external constraints on what qualifies as the correct or right answer; through how they use and appeal to transnational law; through the ways in which they treat international treaties and international customary law; and through the ways in which (in the United Kingdom and New Zealand, in particular) newly enacted statutory bills of rights are being interpreted.

Of course judges have not done these things in a vacuum. Sometimes the Executive colludes in a display of last-word judicial power as in Canadian-style reference cases to their Supreme Court on gay marriage[2] or Quebec separatism[3] or in the United States when California refuses to defend in court the constitutionality of the law of the jurisdiction, in the knowledge and with the hope that the Courts might strike down the law as a result.[4] Sometimes, okay more than sometimes, plenty of legal academics are there to cheer on these new style 'hero judges' (Gava 2001).[5] And sometimes segments of society that cannot for the moment convince a majority of their fellow citizens of the desirability of some policy or other that they

[1]The reference in the title is to *Ecclesiastes* 1:2.
[2]See *Re Same Sex Marriage* [2004] 3 SCR 698.
[3]See *Reference re Secession of Quebec* [1998] 2 SCR 217.
[4]See *United States v Windsor*, 570 US 12 (2013).
[5]The term is John Gava's.

J. Allan (✉)
C7o TC Beirne School of Law, University of Queensland,
Brisbane St Lucia, QLD 4072, Australia
e-mail: j.allan@law.uq.edu.au



L.P. Coutinho et al. (eds.), *Judicial Activism*,
Ius Gentium: Comparative Perspectives on Law and Justice 44,
DOI 10.1007/978-3-319-18549-1_6

happen to relish are happy to have the top judges execute an end-run around the elected branches—as can be seen in the United States with, say, abortion,[6] gay marriage (in California, not New York State),[7] and possibly in the future euthanasia and (again) capital punishment or in Australia with prisoner voting[8] and other electoral matters,[9] or in Canada with prisoner voting,[10] prostitution[11] and very possibly quite soon euthanasia[12] (to say nothing of the slightly different case of the top judges in Canada rather unbelievably telling the Executive whom it can and cannot appoint to the Supreme Court).[13]

Nor am I in any way at all alone in perceiving this marked increase in judicial activism. Not too dissimilar laments, to take just a few other names, have been made by Grant Huscroft and Bradley Miller in Canada (2011), by John Finnis (2011) and Richard Ekins (2013) in the United Kingdom, by Jeffrey Goldsworthy (2007) and Tom Campbell (2003) in Australia, and by Richard Posner (2006), Robert Bork (2003) and Jeremy Waldron (2006) in the United States.

And there are the political scientists, the Ran Hirschls (2007) and Frederick Mortons and Rainer Knopffs (2000), who note this very same trend from a slightly different vantage.

All that said, it is no doubt true that the charge of 'judicial activism' requires that the term be defined, that the abuse or grievance that it is meant to cover be spelt out in some circumscribed way. I do not propose to spend too much time doing that here, though I do want to claim that the sin of 'judicial activism'—and surely the term is overwhelmingly used as a pejorative one, connoting undesirable conduct—is not one that can be identified in some magical way that is free of the exercise of value judgement. Judicial activism, then, is not something that can be spotted in a purely factual manner, by just looking to see if the Court reached result X rather than Y.

No, the sin of judicial activism, or so it seems to me, is one that depends on *why* the Court reached result X or Y in some particular case. That means that any attempt by someone to create a judicial activism scorecard based solely on when laws are struck down or invalidated by top judges (Ringhand 2007)[14] is misconceived or wrong-headed. You simply cannot equate judicial activism to a willingness to overturn

[6]See *Roe v Wade*, 410 US 113 (1973).

[7]See *In re Marriage Cases*, 43 Cal 4th 757 (2008).

[8]See *Roach v Electoral Commissioner* (2007) 233 CLR 162. And see Allan (2012).

[9]See *Rowe v Electoral Commissioner* (2010) 243 CLR 1. And see Allan (2012).

[10]See *Sauvé v Canada (Attorney General)* [2002] 3 SCR 519.

[11]See *Canada (Attorney General) v Bedford* [2013] SCC 72.

[12]Just before this chapter went to press the Supreme Court of Canada went and did just that, striking down the ban on doctor assisted suicide (though not immediately but in a year from now to give the legislature some time to respond, if it can). See *Carter v Canada (Attorney General)* 2015 SCC 5.

[13]See *Reference re Supreme Court Act 1985* [2014] SCC 21.

[14]Ringhand purports to make the charge of 'judicial activism' a factual or objective one by simply counting how often a judge invalidates a federal law, or state law, or over-rules a past precedent. In effect you get a score by making the number of instances of over-ruling the numerator and then putting that over the number of cases heard, as the denominator. You can then make that a

legislation in some 1:1 sense. The reasons why a law is being struck down matter. Depending upon a particular jurisdiction's constitutional specifics—whether it has a written constitution, whether it be a Westminster or Presidential/republican system, how great its attachment to the Separation of Powers ideal, its particular form of federalism (if any), the content and nature of its bill of rights (if any), the body of past precedents and whether there is a commitment to *stare decisis*, and a whole lot more besides—the correct course of action for top judges can sometimes be to invalidate or strike down a law. And I mean 'correct' here as in 'doing so in this instance is *not* judicial activism'. Or put the other way round, a Court can in certain circumstances be activist when it declines to strike down a law. Just imagine a scenario where the clearly most plausible reading of a federalist written constitution is that this is an area of State law-making into which the national legislature has intruded, and yet the Court decides not to invalidate the national law—thereby in effect rewriting the federalist constitution to be less federalist.[15]

And note that I make that point that activism can be a sin of omission not just of commission as someone who is himself perfectly at home in and largely in favour of a New Zealand-style out-and-out parliamentary sovereignty, unwritten constitution-type set-up where the elected legislature has no legal (but only moral and political) constraints on what laws it can pass.[16] But one's first-order druthers were he to imagine that he was drafting a constitutional order from scratch is not the same thing as what one's proper job is as a top judge appointed to decide cases in an established system where, say, there is a constitutionalized bill of rights and a federalist division of powers.[17]

The take-away point here is that for me the charge of judicial activism really has to be understood as a prescriptive or normative or value-laden one.

In that vein, Black's Law Dictionary defines this sin as occurring when 'judges allow their personal views about public policy, among other factors, to guide their decisions' (Black and Garner 2000). This amounts to a 'wrongful use of power' type definition, which more-or-less gets at the heart of the grievance though the focus on the judge's personal views is problematic.[18] So I prefer what I have

(Footnote 14 continued)
percentage score out of 100, the higher the score the more 'activist' you are according to this sort of thinking.

[15]Just such a scenario has played out in Australia, in my view, over the past eight or nine decades. I make the argument at length in Allan and Aroney (2008).

[16]In other words I would structure my preferred constitutional set-up so that judges overwhelmingly kept their hands off the work of the elected legislature, with the proviso that I am not adverse to federalism-type constraints on the national legislature. See, for example Allan (2010).

[17]I consider what such a judge ought to do in Allan (2008).

[18]For one thing a particular law might enact a vague, amorphous standard, say 'award custody based on the best interests of the child', in which case the law is in effect delegating (or abdicating) decision-making to the point-of-application interpreting judge. For another matter, talk of 'personal views' is ambiguous (or does not specify) between (a) the judge's personal views of what the law means or requires and (b) the judge's personal views of what is the most desirable outcome in this case, all things considered including non-law things. The first of these is inevitable whenever humans are involved in any decision-making procedure.

elsewhere suggested as a working definition of judicial activism, something along these lines:

> [T]he gist of the judicial activism complaint, then, is a complaint about what the unelected top judges are doing — that they are gainsaying or second-guessing or circumscribing or redirecting the elected branches of government *without any legitimate warrant or grounds for doing so*…. Notice, however, that [the judicial activism charge] does not necessarily connote bad faith. The gainsaying, second-guessing and circumscribing can be done not only to achieve what are believed to be good substantive outcomes (which can motivate even bad faith judicial activism), but also in the belief the constitutional materials and jurisdiction's rules of recognition do allow such actions. The latter belief, in other words, can be honestly held by the judges. It is just that disinterested observers may disagree and think such a belief far-fetched in the particular circumstances. (Allan 2012: 744).

So judicial activism, for me, is not limited to charges of bad faith or dishonest judging; it also encompasses judging that relies on implausible and unconvincing reasoning undertaken in good faith. And almost always, as a matter of contingent empirical fact, judicial activism involves increasing—not decreasing—the moral and political input of judges themselves at the point-of-application.

That, then, is my working understanding of the sin of judicial activism. It is a sin, as I said to start, that I think has been on the increase, markedly so, these past four or five decades. Yet from the point-of-view of some particular judge accused of activism there might exist replies that he could give that would take most or all of the sting out of how blameworthy such activist judging is perceived to be. These possible replies can be thought of as partial defences or mitigating factors that might come close to exculpating the activist judge. Or at least that would be so if these replies were considered to be persuasive or well-founded. If so, the sin of judicial activism would not really be that sinful—at most a minor or summary offence, not overly difficult to shrug off or brush aside.

I can think of two such possible replies that might plausibly be pled in mitigation by the judge accused of judicial activism. Considering each in turn will take up the remainder of this paper. I give little away, I suspect, if I indicate upfront that neither exculpatory reply is to my mind attractive or persuasive for those of us lucky enough to be living in the long-established democratic world.

## 6.1 What is the Purpose of Our Written Constitution?

Let me take the less abstract or less theoretical possible reply first. Here we are considering the judge in a certain sort of jurisdiction only. I think it goes almost without saying that the charge of judicial activism only has force or bite in the democratic world. In the authoritarian states of the world, governed by one party or by a theocracy or by a military junta the judiciary is not independent in any meaningful sense. Citizens in such jurisdictions have plenty of things to worry about, but judicial activism is not one of them. So my consideration of judicial activism generally is confined to the democratic world. Yet that is not all. In

considering this first possible rebuttal or plea in mitigation to the charge of judicial activism, I am considering only a sub-section of the democratic world, albeit a very, very large sub-section.

This is the portion of the democratic world whose jurisdictions possess a written constitution. I am here explicitly putting to one side the few parliamentary sovereignties that exist, most obviously New Zealand and somewhat less obviously the United Kingdom (because of its membership in the European Union) and Israel. But in this now slightly circumscribed democratic world one possible defence (or plea in mitigation) to the charge of judicial activism might follow on from how one answers the question 'What is the purpose of our written constitution?'.

To be more precise, I want to consider the two and a half most plausible answers to this question, and then to concede that all but one of those answers to this question significantly undermines or diminishes the charge of judicial activism. These other answers allow the activist judge to shrug off the activist label. So in any discussion of judicial activism it really matters which of those two and a half answers one gives to the question 'What is the purpose of our written constitution?'.

### *6.1.1 Plausible Answer #1*

The answer here is that the purpose of a written constitution is to lock certain things in, say an enumeration of State and Federal powers, or some rules on how the top judges are to be selected and for how long or an amending procedure or a set of citizens' moral entitlements, enunciated in the form of a bill of rights. These things, or others, will be taken off the parliamentary sovereignty or majoritarian table and be made harder than usual to alter or change. They will be locked in, meaning that change will require a super-majoritarian procedure (in some jurisdictions, for some matters, a near on impossible one ever to achieve[19]).

You can think of the motivation for doing this as being in opposition to what motivates New Zealand-style parliamentary sovereignty, namely the desire to leave each generation to decide all important social policy-making issues for itself by simple Act of Parliament or legislative enactment. As Larry Alexander puts it, the locking things in purpose of a written constitution follows on from deciding that 'risking rigidity rather than risking security' (Alexander 1998: 4)[20] is the better bet as regards these matters that have been taken off the majoritarian table.

Or as Justice Antonin Scalia puts it:

> It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights

[19]Take Canada for instance. See *Constitution Act 1982*s 41, for matters that require the unanimous assent of provincial legislatures.

[20]See also, Kay (1998: 16).

> [for instance] is sceptical that 'evolving standards of decency' always 'marks progress,' and that societies always 'mature' as opposed to rot (Scalia 1997: 40–41).

Of course outside of these particular locked-in provisions, there is parliamentary sovereignty. So the purpose of the written constitution is to lock in some few things, but to leave all the rest to the democratic process, to letting-the-numbers-count majoritarianism.

Now it is true that the locking things in understanding of the purpose of a written constitution can in some circumstances be characterised as a form of 'ancestor worship' (Kirby 2000). After all, on this understanding you are taking off the majoritarian table at least some matters that in New Zealand would still be on that table. Indeed, that is the core purpose of the written constitution; that is why you opted to have one.

That said, critics of 'ancestor worship' can no doubt be prone to overstating what is being taken off the democratic table, especially as regards any constitutionalised, locked-in bill of rights. The fact is that these sort of constitutionalized rights provisions are overwhelmingly locked in floors, not ceilings. So if modern understandings of 'cruel and unusual punishment' or 'marriage equality' have evolved, there is nothing in the locked in view of a constitution that prevents the elected legislature from passing a statute to get rid of capital punishment or to extend the scope for who can marry—to widen the scope of what is now seen as rights protections by legislation.

All that means that if you buy the 'locking things in' answer to the purpose of a written constitution, then you are buying an unchanging portion of the democratic pie being taken away. It does not get to be extended over time, at least not without some future constitutional amendment. No, as regards the rest of that pie (the part not originally locked away from the reach of the elected legislature) you just have decision-making by the elected legislature, otherwise known as democracy, or what you have for the whole pie, all the time, in New Zealand.

It will be clear by now, I think, that it is this first 'to lock things in' answer to the question of 'What is the purpose of our written constitution?' that leaves present day judges wide open to the charge of judicial activism should they opt to intrude into (or grab by judicial fiat a further piece of) that portion of the pie that was originally meant to stay on the democratic table. As regards what was locked in we may have ancestor worship, or opting for judicially supervised rigidity to secure us against what we fear might happen in a New Zealand-style legislative sovereignty arrangement. But if the judges step over the line of what was locked in, trespassing into what was not locked in, then that is judicial activism.[21] Yes, we can argue over the historical evidence for what was and was not meant to be locked in. And in some instances it may be wholly unclear and highly debatable what that in fact is. But uncertainties about the historical evidence aside, this *answer #1* gives you a line

[21]Just as it can be judicial activism deliberately to allow the locked in portion of the pie to shrink, though as an empirical matter it seems to me that this is at present not something that often happens or a cause for worry.

of sorts. Or rather it gives you that unless you imagine the weird and extremely unlikely situation of constitutional founders opting to lock in a system that simply abdicates or delegates holus bolus to future judges the power to decide for themselves what important social policy decisions they can and will make.[22] And on this locking things in understanding it is an unchanging line. Crossing it is judicial activism.

Accordingly this *plausible answer #1* offers no defence, no plea in mitigation, to the present day judge accused of judicial activism. She needs some other plausible answer to the 'What is the purpose of our written constitution?' question.

### 6.1.2 Plausible Answer #2

The answer here is that the purpose of a written constitution is to set out 'a statement of our most important values and [be] the vehicle through which these values are created and crystallised' (Schaeur 2004).[23] Hence on this second answer a constitution is *not* about locking anything in, or not mainly about that. No, this answer focuses instead on seeing the purpose of a written constitution as setting out a relatively amorphous, indeterminate list of guidelines and values—a list that will need updating, changing and altering as society 'advances' and grows.

Yes, this second sort of answer presumes a rather Whiggish set of presuppositions about the inevitably of societal progress, which is far from self-evidently correct. And yes, this second sort of answer allows us to evade the charge of Ancestor Worship, but at the cost of Juristocracy or Kritarchy because the irony is that the voters will in the end be locked in anyway, only this time it will be to the moral and political druthers of present day judges rather than to those of some founding ancestors (so that use of the pronoun 'we' as regards who will be doing all this updating and redesigning is more than a little misleading).

But most relevantly here—and of course this is only the case if you find this *answer #2* more convincing than *answer #1* above, which I do not—this second sort of answer basically dissolves away the sin of present day judicial activism. Take the focus away from locking things in when it comes to the point of having a written constitution and instead put it on the articulation of warm, fuzzy aspirations and values and moral abstractions that everyone knows going in will evolve and mutate over time in any instances in which they have to be applied to specific controversies, and it becomes very difficult to see what the fuss about judicial activism is all about.

At the very least this second sort of answer gives any present day judge accused of activism a strong plea in mitigation and maybe even a full defence. What, on this

[22]This 'having your cake and eating it too' position is essentially the line Dickson CJ adopted in Canada in *Hunter v Southam* [1984] 2 SRC 145. See Grant Huscroft's critique in Huscroft (2004).

[23]Summarised, but not endorsed, by Schauer.

second answer, is making any particular judicial decision today an illegitimate one? What are the criteria for saying this opinion or judgment was a wrongful use of the judge's power but that one was not? At any rate what are the criteria as long as the judge remembers to refer in passing to those vague, amorphous values articulated up in the Olympian heights of constitutional abstractions in the course of deciding some case or other down in the quagmire of day-to-day judging on a country's Supreme Court?

I think that this second sort of understanding of the purpose of written constitution allows, or goes a long way in allowing, the judge accused of activism simply to shrug off the charge. I also think that this second sort of understanding is nowhere near as attractive, nowhere near as defensible, as the first sort of understanding. It is not even close. Hence for me, judicial activism is a real threat, one with criteria for when it is taking place and one which carries real blameworthiness and stigma.

But all that requires that you first make the case for *Plausible Answer #1*. For anyone who finds the second sort of answer I have just sketched more attractive, more persuasive, then to that extent the charge of judicial activism will largely dissipate.

### *6.1.3 Plausible Non-Answer #2½*

Thus far when setting out the first two plausible answers I have engaged in the polite fiction that all of us have been lucky enough to be born in a country with a long-standing democratic tradition. And I have pretended that the written constitution whose purpose we are pondering was brought into being by means of some process that today still seems legitimate—not necessarily fastidiously perfect, but good enough. In the common law world I am talking about the Canadas and Australias and United States of the world. (Remember, long-standing democracies with unwritten constitutions have been put aside.)

However that is plainly not the case for many people in many jurisdictions that happen also to have written constitutions. And here we have the situation which I am characterising as giving rise to a non-answer or half-answer to the question 'What is the purpose of our written constitution?'. This relates back to the point made in the last paragraph about the need for some core level sense of legitimacy about the source and binding nature of one's country's written constitution. So if we imagine situations such as those where the departing colonial power leaves in its wake a written constitution, or the Japan-like one where following defeat in war the victors write, and impose, a constitution on the country, then in those sort of situations I think it may prove very difficult indeed to make the charge of judicial activism stick against any present day judge.

Put bluntly, you have to care what the constitution makers thought and wanted and intended as well as thinking that what they produced is legitimate and worthy of fealty to be at all concerned with what they were trying to lock in (assuming you

would otherwise opt for my *answer #1* above over *answer #2*). And in some situations, perhaps the ones I raised above and perhaps others, it is not at all clear to me why you should be. And if you and the preponderance of today's citizens in such a jurisdiction think the written constitution has little or no legitimacy, for whatever reason, then it does not seem to me that charges of judicial activism can ever carry much weight; it does not seem that in such situations blame is easily attached to those judges who stray into territory that was not intended to be theirs (at least not on the ground that they strayed, in and of itself, rather than on the ground that they are somehow out of sync with today's populace).[24]

There then are two and half plausible answers to a question about the purpose of a written constitution in today's democratic world. Only one of those answers, or so it seems to me, grounds the charge of judicial activism. As it happens, it is the answer that I think is the most plausible and persuasive one in all long-standing democracies. *Answer #2* leaves me cold; it is far-fetched. Hence for me, judicial activism is a real threat.

But I concede that if you happen to live in a jurisdiction in which *non-answer 2½* is plausible, then judicial activism for you is a much harder accusation to make stick. It may not be worth the bother even to try.

That finishes my consideration of the first sort of avenue open to a present day judge seeking to evade the charge of judicial activism. I turn now to the other possible reply this judge might try to give as a plea in mitigation.

## 6.2 Can the Case Be Made for Rule Utilitarianism, or for Better Consequences Flowing from Always Following the Rules?

Here we enter deep waters. And these are waters that Larry Alexander some time ago charted and surveyed, insightfully and in depth, in arguing that we can often achieve better overall outcomes by the indirect pursuit of the good rather than by attempting to maximize the good on a case-by-case basis (Alexander 1985). So take what I say next as being in addition to that.

[24]Here is a variant on this possibility. It occurs where a new constitution is introduced, but only after the colonial power has departed. An example is India. At least that is superficially so. Britain imposed no constitution on India before departure. Instead, a constituent assembly devised one for itself over the next three years. Much of this 1950 Constitution is taken word-for-word from the Government of India Act 1935—a piece of Imperial legislation that was considered longer than almost any other enactment in the history of the Westminster Parliament. However, few people today admit this. Put differently, one of the fetters against which the Indians had rebelled was, in large part, freely taken up by them later on. It is also true that the Supreme Court of India is, with the possible exception of Israel's top court, the most activist court in the world. Whether there is any causal connection to how their Constitution was adopted I leave for others. (The points in this footnote were made to me by Dyson Heydon, to whom I am most grateful.)

The basic idea, at least as I learned it, comes out of that branch of moral philosophy known as utilitarianism. In its late eighteenth century Benthamite form (Bentham 1789) the focus is on aiming to achieve the greatest good for the greatest number. And no doubt in terms of giving birth to practical reforming accomplishments, Jeremy Bentham was a man with few, if any, historical peers. His utilitarian writings and lobbying and networking can be linked to expanding the voting franchise in Britain in the First Reform Bill of 1832[25]; to prison reform[26]; to animal welfare[27]; to less harsh but just as effective criminal law penalties[28]; to repeal of the usury laws[29]; and more. This all flows from making human happiness or welfare the sole 'good-in-itself' and then aiming for those likely future good consequences that will maximize that happiness (or that will keep to a minimum unhappiness or pain in situations when only bad things are on the menu).

In effect you treat everyone (meaning everyone's happiness) as equal at the first stage and you then opt for the action that is most likely—given what you know of the world—to produce the best future consequences in terms of overall human welfare. It is a forward-looking moral theory, not a backwards-looking one. And no doubt there is much room for argument about which future consequences will end up producing that happiness.

Of course utilitarian theories are much more sophisticated today, some two centuries after Bentham. True, too, there are many critics of this way of thinking, not least Ronald Dworkin (1978: 232–238, 275–276) and John Rawls (1971). Nevertheless, utilitarianism is still today a vibrant school of thought.

I mention all this only because part of the modern day sophistication of utilitarianism involves the realization that sometimes best consequences are achieved by laying down clear rules, and always following them even though we know going in that all rules will at times produce sub-optimal results, will be over-inclusive and under-inclusive. In other words, we can accept the fact that no rule will ever have a 100 % hit rate, a perfect record of producing good consequences every single time that it is honestly applied. Yet despite that, and the less than 100 % hit rate, it will nevertheless be the case that in some situations opting for a rule will deliver better

[25]Bentham way back then also favoured the vote for women.

[26]Bentham was keen on a Panopticon Prison, a much more humane sort of prison than any then in existence, though with no concession at all to prisoner privacy. And the John Howard League for Prisoners (and all of its off-shoots in the Commonwealth world) can trace its roots to Bentham.

[27]The Royal Society for the Prevention of Cruelty to Animals (and all its off-shoots in the Commonwealth world) can trace its roots to Bentham. Of course for Bentham, the great critic of bills of rights and of the French Declaration of the Rights of Man, this protection is seen in terms of animal welfare, *not* in terms of animal rights.

[28]Bentham spotted what is now widely recognized, that deterrence operates more through the likelihood of being caught than through the severity of the punishment.

[29]Here Bentham was right, and quite unusually Adam Smith was wrong. The arguments for repeal, which did not happen until 1854, were virtually all Bentham's though he had by then been dead for over two decades.

overall consequences (all things considered, on average, over time) than case-by-case decision-making aimed at good consequences in each individual case.

One example sometimes given of this is a 'who can vote?' rule. Let us say a rule lays down something along the lines that 'any citizen 18 years of age and older, not declared mentally unfit by a doctor' can vote. That sort of rule clearly is sub-optimal; it clearly has a less than 100 % hit rate. There will be 17 year olds well-versed in civic education who look far more qualified to vote than scores of 19 or 50 or 60 year olds. Yet such 17 year olds will, sub-optimally, be barred. Obversely, there will be know-nothing, alcoholic 45 year olds who have not read a newspaper in 20 years. Under the rule they can vote.

Yet the point is that such a rule delivers better consequences than any non-rule alternative. To see this, imagine that you tried to decide who can vote by striking committees of people who would interview potential voters and then make decisions on a case-by-case basis. Not only would the costs of such a scheme be huge, the overall hit rate would be lower than that achieved with the rule. No real life human being, or group of human beings, will ever have a 100 % hit rate of opting for the better consequences choice any more than any rule would. Plus there are the various frailties that flow from being a limited biological creature; there is the possibility of succumbing to corruption (say, excluding from voting bunches of those obviously on the other side of politics to you); there is the chance of moral failures (say, opting to exclude blacks from voting); and more.

So Rule Utilitarianism says that sometimes (as with who can vote) you do better by having rules and just applying them. This is not true in all situations, of course. To see this just consider how we decide who can drive—here we go for case-by-case decision-making, despite knowing that that, too, is far from perfect (as you can see by noting all the teenage boys who manage to pass their driving tests).

This has clear ramifications when it comes to the issue of judicial activism. Let us assume that, like me, you accept the argument that society can often—not always, but often—achieve more welfare, better long-term consequences, greater good (articulate it as you please) by the indirect pursuit of that good via laying down rules and always applying them. Accept that and then you have another way of understanding the charge or sin of judicial activism, or rather a branch or sub-set of that sin.

On this understanding an activist judge is any judge who decides *not* to apply a rule when to do so—according to that judge's moral or political sensibilities, or sense of fairness, or case specific utilitarian weighing up of consequences, or nose for what social justice demands, or, well, you get the idea—would be sub-optimal. This judge sees this case as being one of those rare few that falls on the wrong side of the rule's hit rate; he perceives the rule here to be over-inclusive (and so one that captures a case not intended to be caught) or under-inclusive (and so one that fails to capture a case intended to be caught) and hence this judge opts to legislate from the bench. He amends the rule so that it now delivers the same result for this particular case that a direct appeal by him to best consequences (or to social justice or to fairness or to 'the good') would deliver.

Consider, for a moment, the judge who says something to the effect: 'I always apply the rule when its effects are good; it is only in a few hard cases when they are not that I opt for a direct appeal to good consequences, the rule be damned!' And notice that a policy of that sort,[30] of following the rule when it is perceived to deliver the better outcome, but not otherwise, is functionally no different from a policy of deciding each time on a case-by-case basis. The rule does no work, not really.

Here you might draw an analogy with the common law doctrine of *stare decisis*. If the ratios of past cases are going to have bite and influence in deciding this case today, then it must be true that those past rationes—at least sometimes—affect the outcome. They need to lead to a present day decision X that otherwise would have been a not-X decision. The past cases do no work unless they can at times decisively change outcomes away from what would otherwise be produced, absent consideration of those cases.

So what possible reply might this sort of judge make when charged with the sin of activism? What might she plead in mitigation to lessen the blameworthiness of occasionally shunning what the rule dictates in favour of a direct appeal to best consequences in this case?

I think the basic thrust of this judge's reply would be to the effect that it makes no sense to follow a rule when you know in the case before you that its effects are sub-optimal.

Were this judge keen on Shakespeare she might point to *The Merchant of Venice* and the debate between Bassanio and Portia over how to interpret a bond, or contract, calling for a pound of flesh to be taken from the merchant Antonio should he default to the moneylender Shylock, which of course he does. This judge might remind us of Bassanio's plea to the judge to:

> Wrest once the law to your authority:
> To do a great right, do a little wrong,
> And curb this cruel devil of his will.
> (Shakespeare: Act IV, Scene 1, lines 215–17).

Yes, Shakespeare has Portia respond the way a Rule Utilitarian would by saying:

> It must not be. There is no power in Venice
> Can alter a decree established:
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state. It cannot be.
> (Shakespeare: Act IV, Scene 1, lines 218–22).

Nevertheless, our activist judge would be sure to point out that in the end, to please the crowd, Shakespeare has Portia, the judge who mouths the Rule Utilitarian line, find against Shylock. Shakespeare's judge cleverly finds the needed loophole, that the pound of flesh does not include any blood, and then throws

[30]One that to my mind is not dissimilar to Trevor Allan's position that the law is just a provisional guide as to what the judge should do. See Trevor Allan (2001: 216–225). Yuck!

Shylock to the wolves. It may satisfy the crowds, but this is hardly an honest upholding of the rule. And our activist judge would reply, 'it is all the better for it'. It makes no sense to follow the rule, she might say by way of reply to the charge of activism, when utility *in this case* points against doing so.

Or if no fan of Shakespeare our activist judge might offer her plea in mitigation by taking things to a higher philosophical plane and musing aloud about whether Rule Utilitarianism is even a stable concept (Lyons 1965). Is it not likely that Rule Utilitarianism will always collapse into Act Utilitarianism, and that the rule will be discarded when the unique circumstances of the case at hand point strongly in favour of ignoring it?

Take that as my second possible reply that might plausibly be offered as a defence to the charge of judicial activism. Nor is it one that can be dismissed out of hand. The obvious rejoinder to the activist judge taking this line is to claim that shunning the rule in the unusual circumstances of this particular case only looks attractive because the judge has failed to look at the longer term consequences, including the consequences of being seen not to follow the rule. Her judicial gaze has been too circumscribed, in other words.

However I do not think that rejoinder, alone, will suffice. To overcome this judge's reply we need to return to utilitarianism—to consequentialist thinking—and distinguish between (i) a moral theory aimed at guiding one's personal actions and (ii) a political theory aimed at achieving best outcomes for society.

Now Bentham certainly saw utilitarianism as doing both those things, as operating on the personal level as a forward-looking guide to what one ought to do. However Bentham also saw utilitarianism as a guide to the legislature, as offering a theory aimed at achieving best long-term consequences for society. Indeed, the vast bulk or preponderance of Bentham's efforts and thought were focused on that latter task.

This distinction between (i) and (ii) matters because the activist judge who claims that Rule Utilitarianism will ultimately collapse into Act Utilitarianism has a very strong case indeed when we are talking on the personal level, about *you* laying down rules for *you* as to what is best for *you* to do in the future. Why? Well if it happens at some point that you are sure that following a rule that you have made and laid down for yourself will in this instance produce less good results than not following it, then why follow it? True, when someone suggests that you have failed to consider enough of the long-term, or long, long-term, consequences that would show the rule's prescription to be optimal after all, that may be correct. But it is not just unlikely but flat out implausible, unconvincing and wrong to think that this 'just look at more and more of the likely consequences of the rule, further and further into the future' suggestion will every time give you grounds for thinking that the rule produces best outcomes *in this instance*. It will not. And in those instances when it does not, however rare, it does seem to me that the rule should only be treated as a mere guide to action, a rebuttable one.

Hence on the personal level rule consequentialism does appear to me to be prone to collapsing into case-by-case decision-making. Put differently, if we were focused on this personal realm of (i) above then the person seeking to defend herself against

the charge of ignoring the rule in favour of doing what she thinks best *this time* would have a powerful plea in mitigation.

But we are not focused on that level (i). No, when we castigate the activist judge we are very much focused on rules that have been made for all of society, on level (ii). More relevantly still, we are focused on situations where the rule maker (and as I am still only concerned with the democratic world that means an elected legislature) is distinct from the rule applier (at the top level, an unelected judiciary charged with applying those laws). It is precisely that distinction, that unlike in the personal situation the rule maker is a different group of people from the rule applier, that to my mind undercuts the second possible reply to judicial activism that I mooted above. It is here that we see that the 'it makes no sense to follow the rule' reply to the charge of judicial activism falls down and fails to provide much of a defence. Here the long-term consequences of rule following make the charge of judicial activism stick.

Here is why. On level (i) there are no concerns with legitimacy and accountability. If it is legitimate for me to make a rule for my own future conduct, then it is also legitimate for me to decide to ignore that rule in these particular circumstances here and now. The question of legitimacy of the rule-applier opting to over-rule the rule-maker does not arise. Moreover, in such circumstances I am only accountable to myself. Nor is there any issue of relative competence, of whether the rule-maker has on average, over time, a higher hit rate for increasing utility through its rules than does the rule-applier through its determinations of when to ignore or gainsay those rules. (Or at least that is true barring such situations as when the sober me makes a rule and the drunk me over-rides it.)

By contrast, in the world of democratic politics in which those top judges accused of judicial activism are operating, all three concerns—legitimacy, accountability and relative competence—are live issues. To start, the rule-maker is the legislature, a body that is elected. Whatever quibbles one may have with its democratic credentials (perhaps related to the voting system used, or to the scope for gerrymandering, or to the existence or absence of bicameralism or federalism, or to anything else), those credentials will be massively greater than are those of the unelected judiciary. As regards democratic legitimacy, there literally is no comparison. The rule-making legislature wins hands down.[31]

Relatedly, the legislature is accountable to the voters for the rules it enacts. If they over-shoot or under-shoot some desired endpoint, the rule-makers can be replaced at the next election. Nothing like that sort of accountability is true of the point-of-application judge who decides that some rule fails to deliver good consequences (or fairness or social justice etc.) in the case at hand. If the judge errs—and remember, the case-by-case deciding will no more have a 100 % hit rate than the rule dispensing legislature will—he is not accountable to the voters. In fact, he

[31]For an opposing view see Barak (2006), where Barak argues 'there is more to democracy than majoritarianism' and asserts his view is 'substantively' democratic and pooh-poohs mere procedural requirements. Note my response in Allan (2014).

is not accountable to anyone in any tangible, real sense, though he may be quick to tell us how much he struggled with his conscience in deciding whether to over-ride the rule or not. Of course that is nothing like the same sort of accountability as the sort faced by people who might lose their jobs if they are widely seen to be wrong. Nor is it any other externally imposed sort of accountability.

There are even important issues of comparative competence at stake. We might put aside concerns about democratic legitimacy and accountability and still think that large bodies of people drawn from all corners of society are likely to have a better track record in setting down acceptable rules (as regards same sex marriage, euthanasia, abortion, capital punishment, how far the executive can go in protecting national security, how to regulate prostitution, and the list goes on), that they will have a better hit rate, than will committees of ex-lawyers, nine top judges on a Supreme Court. On the sort of issues just listed, though perhaps not on all other sorts of issues, the big group from across society is more competent than the incestuous, single background handful of people.

In that world of democratic politics, therefore, Rule Utilitarianism does not obviously or easily collapse into Act Utilitarianism. In that world the activist judge's second possible reply to the charge of activism, that 'it makes no sense to follow the rule', is far from convincing. Certainly whenever it is the judge's calculation of sub-optimality that is flying in the face of the legislature's opposing calculation (so, leaving aside instances where a rule has unexpected results that the rule-maker also does not want) it will be far from convincing. Long term, the legislature is better placed to get it right because it is accountable and on balance (for the sort of issues overwhelmingly at stake) more competent. Or that is true far more often than not when the two disagree. And the non-activist judge recognizes as much and defers.

So in my opinion this second sort of avenue potentially open to a present day judge seeking to evade the charge of judicial activism, or perhaps just to offer a convincing plea in mitigation, is overwhelmingly a dead end. As with the first mooted possible reply, this second one also fails to provide the hoped-for escape in the sort of democratic jurisdictions I am considering.

Or almost always it fails to do so. You see any discussion of judicial activism of the sort I have been offering needs at some point to admit that although judicial activism is certainly a sin, it is clearly not the worst sin going. Let me be blunt. We can all imagine situations in which a judge thinks the law, honestly interpreted, demands X but that that particular outcome is so morally egregious that she must lie and say the law means not-X. In this paper I have not focused on that sort of judicial lying branch of judicial activism. I have not focused on it because in any long-established democracy, by which I clearly mean to encompass Australia, Canada, the US, the UK, and plenty of other countries as well, as opposed to an apartheid South Africa, say, it will be so very, very rare that judicial lying is warranted and more warranted than resigning in protest too.

Nevertheless it is a possibility. It is a possibility that requires a theory of when judicial disobedience and lying are warranted in a generally well-functioning democracy. Here I simply concede that I doubt that the answer is 'absolutely never'

and repeat that this manifestation of judicial activism is a very marginal one in our long-established democracies.

Accordingly, having noted that small caveat, I think I am now in a position to say that few pleas in mitigation will serve to exculpate the sin of judicial activism. At any rate that is my position on the matter.

**Acknowledgments** An earlier version of this paper was presented at the University of Lisbon's Centre for Research in Public Law and University of San Diego sponsored conference on judicial activism in Lisbon, Portugal held in May, 2014 at the Faculty of Law, University of Lisbon. The author thanks the many participants from across the EU and the US for their comments and criticisms. The author also wishes to thank Dyson Heydon for his comments on a later draft.

## References

Alexander, Larry. 1985. Pursuing the Good – Indirectly. *Ethics* 95: 315.

Alexander, Larry, editor. 1998. *Constitutionalism: Philosophical Foundations.* Cambridge: Cambridge University Press.

Allan, James and Aroney, Nicolas. 2008. An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism. *Sydney Law Review* 30: 245.

Allan, James. 2008. The Travails of Justice Waldron. In *Expounding the Constitution: Essays in Constitutional Theory*, ed. Grant Huscroft, 161. Cambridge: Cambridge University Press.

Allan, James. 2010. Not in for Pound – In for a Penny? Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?. *King's Law Journal* 21: 233–256.

Allan, James. 2012. The Three "R"s of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no) 'Riginalism. *Melbourne University Law Review* 36: 743: 782.

Allan, James. 2014. *Democracy in Decline*. Montreal & Kingston: McGill-Queens University Press.

Allan, Trevor. 2001. *Constitutional Justice: A Liberal Theory of the Rule of Law.* Oxford: Oxford University Press.

Barak, Aharon. 2006. *The Judge in a Democracy*. Princeton: Princeton University Press.

Bentham, Jeremy. 1907. *Introduction to the Principles of Morals and Legislation*. Oxford: Clarendon Press.

Black, Henry C. and Garner, Bryan A. 2000. *Black's Law Dictionary.* St Paul: West Publishing Co.

Bork, Robert. 2003. *Coercing Virtue: The Worldwide Rule of Judges.* Washington D.C: America Enterprise Institute.

Campbell, Tom. Judicial Activism – Justice or Treason?. *Otago Law Review* 10: 307.

Dworkin, Ronald. 1978. *Taking Rights Seriously.* London: Duckworth.

Ekins, Richard. 2003. Judicial Supremacy and the Rule of Law. *Law Quarterly Review* 119: 127.

Ekins, Richard. 2004. Politicians are right to criticize judges. *The New Zealand Herald*, September 13.

Ekins, Richard. 2013. How to be a Free People. *American Journal of Jurisprudence* 58: 163.

Finnis, John. 2011. Invoking the Principle of Legality against the Rule of Law. In *Modern Challenges to the Rule of Law*, ed. Richard Ekins. Wellington: LexisNexis.

Gava, John. 2001. The Rise of the Hero Judge. *University of New South Wales Law Journal* 24: 747.

Goldsworthy, Jeffrey. 2007. Challenging parliamentary sovereignty: Past, present and future. In *Interpreting Constitutions: A Comparative Study*, ed. Jeffrey Goldsworthy. Oxford: Oxford University Press.

Hirschl, Ran. 2007. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge: Harvard University Press.
Huscroft, Grant. 2004. A Constitutional "Work in Progress"? The Charter and the Limits of Progressive Interpretation. In *Constitutionalism in the Charter Era*, ed. Grant Huscroft and Ian Brodie. Markham: LexisNexis Butterworths.
Kay, Richard. 1998. American Constitutionalism. In *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander. Cambridge: Cambridge University Press.
King James Bible. 1769. Cambridge: Cambridge University Press.
Kirby, Michael. 2000. Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?. *Melbourne University Law Review* 24:1.
Lyons, David. 1965. *Forms and Limits of Utilitarianism*. Oxford: Oxford University Press.
Miller, Bradley and Huscroft, Grant, editors. 2011. *The Challenge of Originalism: Theories of Constitutional Interpretation*. Cambridge: Cambridge University Press.
Morton, Frederich and Knopff, Rainer. 2000. *The Charter Revolution and the Court Party.* Toronto: University of Toronto Press.
Posner, Richard. 2007. Enlightened Despot': Review of Aharon Barak, The Judge in a Democracy [2006]. *New Republic*, April 23.
Rawls, John. 1971. *A Theory of Justice*. Cambridge: Harvard University Press.
Ringhand, Lori. 2007. Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist National Court. *Constitutional Commentary* 24: 43.
Scalia, Antonin. 1997. *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press.
Schauer, Fredrich. 2004. Judicial Supremacy and the Modest Constitution. *California Law Review* 92: 1045.
Shakespeare, William. *Merchant of Venice.*Waldron, Jeremy. 2006. The Core of the Case Against Judicial Review. *Yale Law Journal* 116: 1346.