

## Chapter 2

# Judicial Activism: Clearing the Air and the Head

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I've never liked the term "judicial activism." It is usually—but not always—a term of opprobrium, a pejorative, a complaint. But the opposite of judicial activism would seem to be judicial passivism—or because passivism, not to be confused with pacifism, is not actually an English word, judicial passivity. But judicial passivity seems equally to be something undesirable, I think we need a better term than judicial activism if it is to capture a valid complaint about judicial behavior.

So let me reframe the discussion of judicial activism this way. Let us begin with I should hope to be a banal, obvious point. Judges should follow and apply the law. That is why we have judges, to do just that. And we will have valid complaints about the judiciary when they fail to do what they are supposed to do, namely, follow and apply the law.

Notice that judges can fail in their duty in two different ways. They can fail to follow the law, and they can fail to apply it. So in place of the vague charge of judicial activism, I recommend the following two different indictments of judicial behavior: judicial usurpation and judicial abdication.

Let me begin with the latter indictment, as we hear less about it than the former one. Judicial abdication occurs when judges refuse to apply the law that governs the case before them. Judicial abdication leaves the party legally entitled to a remedy without one. It leaves the party legally required to provide that remedy free from legal compulsion to do so. Actors legally in the wrong can act with impunity, or at least impunity within the legal system. Actors legally in the right must take their causes elsewhere than the courts—perhaps to other branches of government or to the "court" of public opinion—or else resort to self-help, an always dangerous course and one that may result in their breaching legal duties that *will* be judicially enforced.

So judicial abdication is a serious matter, and judges should be condemned for it. Their job is an extremely important one, and they should do it. Fortunately, however, judges rarely abdicate, and surely not as a general policy. They, of course, make mistakes and believe they are applying the law when they are not. And some

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can be corrupted and take bribes to refrain from applying the law in particular cases, or be cowed by public reaction or by the wrath of powerful parties into refraining from applying particular laws or laws in particular cases. Still, all in all, judicial abdication is not frequent nor an overweening concern.

So let me turn to the other judicial sin, that of usurpation. Usurpation occurs when judges follow, and apply, not the law, but norms of their own making, norms that they are not legally authorized to make and enforce. I suspect that when the term “judicial activism” is used pejoratively, the speaker is usually referring to judicial usurpation.

Now judicial usurpation comes in degrees. Total usurpation occurs when the judges, without legal authorization to do so, just make up a norm and enforce it as law. There are plenty of examples in American constitutional law of judges engaging in total usurpation.

Usurpation, however, can be less than total. Partial usurpation occurs when there is a legal authorization for the judges to fashion a norm, but the judges do so immodestly, asserting more expertise relative to other government actors than they, as judges, can rightly lay claim to.

At this point I believe a short digression on legal norms may be useful. It is commonplace, but nonetheless useful, to divide legal norms into two ideal types—rules and standards. I call them ideal types because all rules will have vague, standard-like margins; and all standards will operate within domains bounded by rules. And most legal norms will have some rule-like features and some standard-like features.

Rules are determinate, algorithmic norms. Everyone, regardless of his or her values, will apply them identically. Once it is ascertained what the rule-maker intended the algorithm to be, the application of the rule will be clear, or at least will be so in the absence of factual uncertainties.

Standards are the mirror opposites of rules. A standard invites those subject to it to apply and act upon first-order practical reasoning within boundaries fixed by rules. If people have differing values, then the verdicts of their practical reasoning will differ and thus so will their application of the same standard. Marxists and monarchist can all agree on what a stop sign requires; they will likely disagree over the meanings of standard-like terms such as “reasonable,” “fair,” and “just.”

When judges apply standards, they must employ first-order practical reasoning in order to give content to the standards they are applying. They must translate the standard either into a set of more determinate rules or at a minimum into a determinate judgment about the specific case before them. That is not judicial usurpation.

The problem comes when judges apply the standard to invalidate the actions of other governmental actors, as when they apply a standard in the Constitution to strike down legislation passed by Congress or by a state legislature. For when judges do so, they are claiming that their first-order practical reasoning is superior to that of the legislators. Yet, judges are not, as a group, selected because of their superior abilities as practical reasoners. Their legal training is neither necessary nor sufficient for superior ability in discerning and applying moral and prudential

norms. Moreover, judges typically do not have the democratic warrant buttressing the verdicts of their practical reasoning that legislators have for theirs; nor do they have the fact-finding resources that legislatures possess, at least with respect to the kinds of facts upon which first-order practical reasoning must rely.

Consider the form of judicial review of governmental action extolled in many quarters, that of proportionality review. In order to execute proportionality review, judges must assess the legitimacy and importance of the governmental interest at stake as well as the legitimacy and importance of the interests of those challenging the government's action. Legitimacy and importance will, of course, themselves be contentious matters about which reasonable people can disagree. Then the judges must ask whether there are other, less restrictive means for accomplishing the government's purposes. I say purposes, plural, because legislation is always furthering a mix of purposes, including administrative convenience. So the judges must ask if there is a Pareto superior government action to the action in question. Finally, the judges must weigh the marginal benefits of the law (relative to alternatives) against the marginal harms to the challengers. The bottom line is that there is little reason to think that judges will on average perform these tasks better than the government officials whose action is being challenged.

One would think, therefore, that judges should be extremely modest with respect to asserting the superiority of their practical reasoning to that of other governmental actors. They should be hesitant to strike down the actions of those government actors under the authority of a vague standard. They should be extremely deferential toward those other governmental actors.

In large domains of American constitutional law, that has been the case. Judges have applied constitutional standards quite deferentially. This is what is called minimal scrutiny or rationality review.<sup>1</sup> Only egregious instances of arbitrary, corrupt, or non-public-interested governmental acts are struck down. Indeed, sometimes the courts label the meaning of a constitutional standard to be a "political question," one not fit for judicial elaboration at all.<sup>2</sup> Deference to other governmental actors is then total. (Some believe "political questions" are a form of judicial abdication; the rationale for "political questions" is, however, that such questions are not really legal ones that are fit for judicial resolution.)

Nonetheless, there are exceptions to this picture of judicial deference, some clear examples of improper judicial immodesty. More about them in a moment.

Judicial deference is not called for when the legal norm is a rule. Judges are quite well-suited to ascertaining the meaning of rules. They are trained in the art of interpreting canonical legal texts. And when the legal text is a rule, applying it does not call for great skill in practical reasoning.

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<sup>1</sup>See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

<sup>2</sup>See, e.g., *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *Nixon v. United States*, 506 U.S. 224 (1993).

When it comes to rules, then, there is no need for judicial modesty. What is required, however, is for the judges to follow the rule and not to convert it into a standard that they can then apply to cases beyond the scope of the rule. For treating a limited rule as if it were a standard is judicial usurpation, pure and simple. Judges are enacting legal standards without the legal authority to do so. Arguably, this has sometimes occurred in American constitutional law. More about this below as well.

The reader may believe that in my inventory of legal norms, I have omitted some that are not either rules or standards. For I have said nothing about “principles,” legal norms that are not rules but are not, as I have described standards, invitations to general first-order practical reasoning. Principles, at least as adumbrated by such theorists as Robert Alexy and Ronald Dworkin, are more specific than standards as I have described standards. They embody specific focal values—for example, freedom of expression, equality, non-cruelty, freedom of religion. And they have weight.<sup>3</sup>

Now I do not deny that there are *moral* principles, and that these may have weight.<sup>4</sup> And whenever a standard was in play, all of these moral principles and their weights would have to be taken into account in applying the standard. For one way to see standards is as injunctions to “do the right thing” within the spaces not covered by rules. And doing the right thing necessarily requires making sure that all moral principles and their weights are taken into account.

The problem with legal principles as conceptualized by people like Alexy and Dworkin is that they may not be identical with moral principles.<sup>5</sup> So if, for example, there is no moral principle of freedom of expression, then any “legal principle” of freedom of expression cannot be referring to such a moral principle.<sup>6</sup> And if “freedom of expression” is not a rule and is not a standard as I have described standards, what kind of norm is it, and how is its “weight” to be derived?

I contend that there are no such norms that can play the role that Alexy and Dworkin would have legal principles play. Legal principles, if they are not rules, standards, or moral principles, do not exist. They have no referent. And weight cannot be enacted. I have written about this elsewhere at length and so shall rest my case here on the skeletal argument I have just given.<sup>7</sup>

I should add, however, that I have the same misgivings about another similar claim that Dworkin makes, namely, that some terms in the constitution refer to “concepts” and not to the constitutional authors’ “conceptions” of those concepts. I am extremely dubious that concepts exist apart from peoples’ conceptions about the meaning of the terms they use.<sup>8</sup>

Let me return then to judicial usurpation. One form it takes is precisely that licensed by Dworkin and Alexy, namely, judges taking a term in a constitution that

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<sup>3</sup>See Alexander (2012).

<sup>4</sup>See Alexander (2013).

<sup>5</sup>See Alexander (2012).

<sup>6</sup>See Alexander (2005).

<sup>7</sup>See Alexander (2012), Alexander and Kress (1995).

<sup>8</sup>See Alexander (2013).

had a particular meaning to its authors and calling the term a “principle” or a “concept” that can then be given a meaning by the judges that is different from the meaning intended by the authors. For when judges say that such and such a concept really means X, or that principle P outweighs some other principle or policy and demands a particular outcome, *there are no truthmakers for such assertions*.<sup>9</sup> The judges are making up legal norms, that is, usurping others’ legal authority.

Let me conclude with some examples of judicial usurpations drawn from American constitutional law.

There are lots of examples of improper judicial immodesty. Take the issue of abortion. The central question in terms of whether laws against abortion violate the Constitution is whether the state has a sufficiently compelling interest in preserving the life of the fetus. That in turn requires asking whether fetal life is morally protectable, a difficult philosophical question. If its answer is “yes,” then clearly states have a compelling interest in preventing abortions. And given the consequences of incorrectly answering the question “no” versus those of incorrectly answering “yes,” surely judges should defer to legislatures that answer the question “yes.” Yet, in *Roe v. Wade*,<sup>10</sup> that is precisely what the U.S. Supreme Court did *not* do. It acted immodestly. It told legislatures that their practical judgment about the protectability of fetal life was, for constitutional purposes at least, erroneous.

A similar point can be made about the courts and same-sex marriage. It surely takes a good deal of judicial immodesty to say that a legislature that adheres to a traditional and widely-held definition of marriage violates the vague and quite contestable standard of “equality.”<sup>11</sup>

Indeed, given Peter Westen’s apt description of “equality” as an empty idea, a vessel that can be filled with a lot of different values but that is not itself one of those values, a lot of constitutional law in the U. S. can be characterized as judicial usurpations, not just as judicial immodesty.<sup>12</sup> For if there is no equality “principle,” and no equality “concept,” then the equal protection clause of the Fourteenth Amendment really has no meaning beyond what its authors believed it would do. And we know what they did *not* believe it would do, including affecting who can vote<sup>13</sup> and eliminating sex discrimination.<sup>14</sup> Yet, the Supreme Court held otherwise.<sup>15</sup> (And if it was not intended to eliminate sex discrimination, could it plausibly have been intended to require same-sex marriage?)

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<sup>9</sup>See Alexander (2012), (2013), Alexander and Kress (1995).

<sup>10</sup>410 U.S. 113 (1973).

<sup>11</sup>See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (N.D. Cal. 2010); *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012).

<sup>12</sup>See Westen (1982).

<sup>13</sup>See, e.g., the dissent of Justice Harlan in *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>14</sup>See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>15</sup>See *Reynolds v. Sims*, 377 U.S. 533 (1964) (voting); *Reed v. Reed*, 404 U.S. 71 (1971) (sex discrimination).

Other examples of what are arguably judicial usurpations in U.S. constitutional law include reading the free speech clause as prohibiting laws other than prior restraints—that is, laws requiring official approval in order to publish<sup>16</sup>; reading the establishment of religion clause to do more than merely deny the federal government the power to outlaw state established religions<sup>17</sup>; and reading the cruel and unusual punishment clause to apply to penalties other than those that are *both* cruel and unusual.<sup>18</sup> In at least the first two of these examples, and arguably with respect to the Equal Protection Clause’s extension beyond racial equality, the Court has illicitly converted a rule into a standard.

So judicial activism is an ambiguous charge. It is not a criticism if it refers to judges enforcing legal rules and not abdicating their responsibility to do so. It is a criticism, however, if it refers to judges acting immodestly under standards or converting rules into standards. Judges are well trained for interpreting but have no advantage in skill when it comes to first-order practical reasoning.

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## References

- Alexander, Larry and Kress, Kenneth. 1995. Against Legal Principles. In *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor. New York: Oxford University Press.
- Alexander, Larry. 2005. *Is There a Right of Freedom of Expression?* Cambridge: Cambridge University Press.
- Alexander, Larry. 2012. Legal Objectivity and the Illusion of Legal Principles. In *Institutionalized Reason: The Jurisprudence of Robert Alexy*, ed. Matthias Klatt. Oxford: Oxford University Press.
- Alexander, Larry. 2013. The Objectivity of Morality, Rules, and Law: A Conceptual Map. *Alabama Law Review* 65:501–517.
- Claus, Laurence. 2004. The Anti-Discrimination Eighth Amendment. *Harvard Journal of Law & Public Policy* 28:119–168.
- Levy, Leonard. 1960. *Legacy of Suppression*. Cambridge: Belknap Press of Harvard University.
- Smith, Steven. 1995. *Foreordained Failure*. New York: Oxford University Press.
- Westen, Peter. 1982. The Empty Idea of Equality. *Harvard Law Review* 95:537–596.

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<sup>16</sup>See, e.g., Levy (1960).

<sup>17</sup>See, e.g., Smith (1995).

<sup>18</sup>See, e.g., Claus (2004).

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