JUDICIAL ACTIVISTS – MYTHICAL MONSTERS?

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I INTRODUCTION – VIEWS OF NORMALITY

As we all know, views about what is normal or proper behaviour vary. That variation is largely a matter of perspective. Forty or so years ago I had a university vacation job as a ward orderly in a mental hospital in Perth. I had a conversation with a man who had been a resident there for about 20 years, a little less than the time I have been a judge. As he was instructing me in the finer points of the game of billiards, I remarked upon his apparent lack of troublesome symptoms and asked why he was still there. He told me that he had a significant drinking problem:

'*I used to drink a lot*', he said.

'*And I got the voices*.'

'*Was that bad*?' I asked

'*They kept at you and at you*', he said.

'*It was enough to drive you around the bend*.'

His view of normality, as you will observe, incorporated the voices.

I have been a judge for 21 years. The voices have kept at me and at me. Mellifluous, strident, sad, cool, persuasive, angry – voices demanding justice – voices insisting upon the law – some voices wanting both.

Sir Owen Dixon was once warned that if he stayed long enough on the bench he would go mad. He stayed there more than 35 years and history marks him as one of the great judges of the common law world. As I remarked on being welcomed to the bench in 1986 and

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looking forward to 31 years of judicial service – weighing my own talents in the balance against his – I confidently expected to avoid madness. So far I think I have, in spite of the voices, but it may just be that my concept of normality has shifted.

The slippery concept of normality is part of what the present debate is about. Expressions of concern about judicial activism must rest on some assumptions about what is the normal and proper function of a judge. The term 'activist' must then be taken to refer to some departure from that norm in a way that gives useful meaning to the adjective. Given the normative colour of judgments about the normal judicial function this is no trivial task.

II THE JUDICIAL FUNCTION AND THE MIRAGE OF PRECISION

It is necessary to begin by asking what it is that the judicial function requires of judges. There have been many formulations. The central function was stated by the High Court in 1983: 'the quelling of … controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.'[1]

That statement supports a simple model of judicial decision making:

1. The judge identifies a rule of law applicable to a class of fact situation.
2. The judge determines the facts of the case.
3. The judge applies the rule of law to the facts of the case to yield a conclusion in terms of the rights and liabilities of parties before the Court.

The rules of law may be constitutional or statutory or the judge-made rules of the common law. Much of the debate about judicial activism concerns the interpretation of legal rules and the extent to which they have a single clear meaning or offer a range of possible meanings. The point is made, in the context of constitutional

1 *Fencott v Muller* (1983) 152 CLR 590, 608.

interpretation, in a 2006 book *The Myth of Judicial Activism* by Kermit Roosevelt from the University of Pennsylvania Law School:

> Activism is more than error, and the next step is thus to argue that the error is so blatant that it cannot be a good faith mistake; it must be the deliberate imposition of the judge's own preferences in defiance of the Constitution. The plausibility of the charge of activism thus depends at least implicitly on the idea that there is a clearly correct answer (frequently called 'the plain meaning of the Constitution') that judges are disregarding. And the basic reason that the term 'activism' has no place in a serious discussion is that relatively few significant or controversial cases possess clear right answers.[2]

The same holds true for the rules of the common law and statute law. The theory of the common law as a set of pre-existing rigid and precise rules to be declared, ascertained and applied goes back to Blackstone and Salmond but has not come forward very far into the last 100 or so years.

Many common law rules use language such as 'reasonable' or 'unconscionable' or 'foreseeable' or 'remote' or 'good faith'. The use of words like these is not a new phenomenon. The large term 'public benefit' which now appears in the authorisation provisions of the *Trade Practices Act 1974* (Cth) was used in 19th century England, as a defence to nuisance actions, invoked by riparian landowners partly obstructing publicly navigable rivers by erecting mooring posts or jetties. There was contention about its scope.[3] There was contention too about the scope of the 'reasonableness' that would protect a covenant in restraint of trade from invalidation, a concept no doubt sharpened by the requirement that such reasonableness had to be in 'the public interest'.[4] Such terms leave

2 K Roosevelt III, *The Myth of Judicial Activism* (2006) 16.

3 *R v Russell* (1827) 6 B & C 566; *Attorney General v Terry* (1874) LR Ch App 423, 427.

4 *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565 (Lord Macnaghten); and see generally *Chitty on Contracts*, vol 1, General Principles (2004) 16–075.

so much to judicial evaluation in their application that it is difficult to say that they have a single useful meaning.

The same phenomenon is found in statutes in which broad terms are used which are capable of application to a wide range of fact situations. It is left to the courts to work out the appropriate application case by case. That task must involve the development of subrules of application. So a new common law grows, derived from case by case interpretation of a broadly expressed legal rule. A good example is the term 'misleading or deceptive conduct' which entered our legal lexicon in 1974 through s 52 of the *Trade Practices Act 1974* (Cth) and was replicated in its 1987 equivalents in the *Fair Trading Acts* of the States. A substantial body of judge-made law has developed around the section through the process of case by case decision-making. It has been applied to consumer transactions, advertising, promotional statements, pre-contractual negotiations, statements in prospectuses, professional opinions and advices, logos, trade marks, trade names and get-up. The judge-made law has been subjected to parliamentary intervention on one occasion when s 65A was enacted to exclude media from the scope of the prohibition.

The prohibition on misleading or deceptive conduct states a legal rule which has been developed for the most part by logical reasoning. There are, however, wide statutory words which define what Julius Stone called 'legal standards' rather than legal rules. These require normative decisions in their application. As Stone said:

> When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, just cause or excuse, sufficient cause, due care, adequacy or hardship, then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed, as to many equitable standards, and also as to such notorious common law standards as 'reasonableness'. They are predicated on fact-value complexes, not on mere facts.[5]

5 J Stone, *Legal System and Lawyers' Reasonings* (1968) 263–4.

Some quantitative indication of the use of these kinds of terms in statutes appears from the number of Commonwealth Acts in which they appear. On my associate's count the term 'good faith', appears in 169 separate Commonwealth Acts. The word 'reasonable' appears in 143, 'interests of justice' in 50, 'unconscionable' in 12 (which is quite sufficient), 'just cause' in seven and 'just excuse' in one. This does not take account of their use in more than one provision of the same Act. Their interpretation and application case by case involves not only the development of a principled approach based on logic but one necessarily informed by value judgments. Additionally, terms such as 'in relation to' and 'in connection with' particularly found in taxing statutes, require judicial consideration of their general range and evaluative judgments about their application in particular cases. The word 'association' raised similar issues in the *Haneef* case.[6] Competition provisions of the *Trade Practices Act 1974* (Cth) require judicial exposition of the economic metaphor of 'the market' and the concept of 'substantial lessening of competition' which lie at the heart of important provisions of that Act.

The entrusting by the legislature to the judiciary of responsibility for developing the law within broadly stated guidelines is commonplace and has become more so over recent decades. It reflects the complexity of our society and the infinite variety of individual circumstances.

III HUMAN RIGHTS – A CHARTER FOR ACTIVISTS?

It is clear that both the common law and the statute law abound with legal rules and standards which judges are empowered to apply and develop case by case in a principled way. The rules of decision that govern their application emerge from an accumulation of individual judgments. A similar exercise is involved in the application of statutory charters of human rights. Yet there is often sharp debate about the nature of the function which such charters confer upon judges. A statutory charter of human rights may affect the interpretation of statutes and define boundaries for the lawfulness of

6 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

official action. It may even affect private legal relations depending on its terms. The rights it defines are generally subject to broadly stated qualifications such as 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom…'.[7]

Obviously the verbal formulae of human rights charters leave much room to move in terms of judicial choices about what constitute reasonable limits on human rights. Nevertheless courts applying such statutes carry out familiar and well established judicial functions. Through their decisions a common law of human rights can be developed. Australian courts coming to the task for the first time may draw upon, without being bound by, the substantial jurisprudence of the United Kingdom, Canada, New Zealand and the United States. And they are subject ultimately to the legislature which may amend or repeal the statute or pass legislation inconsistent with it. Whatever the rights and wrongs of the debate about human rights laws and the adequacy of the existing institutional mix together with the common law for their protection, the interpretive function that such statutes confer upon the judiciary does not seem qualitatively different from that which it already discharges across a wide range of jurisdictions.[8] Whether or not such charters mandate judicial activism depends upon the definition of that term. If it be limited by some notion of impropriety, then it is hardly improper for the judge to do what the legislature has asked in interpreting and applying such a charter. In any event, as will be seen later, the definition of 'judicial activism' is elusive. The statutory charter initiates a common law process within limits defined by the legislature and subject to amendment by it.

The case of a constitutional Bill of Rights, which sets boundaries upon legislative power, raises additional fundamental considerations about the ultimate role of the legislature in maintaining the balance between communal and individual rights and obligations.

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7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

8 That is to say nothing about the constitutional questions which have been raised about the interaction between such charters and the judicial power of the Commonwealth.

IV STATUTORY INTERPRETATION

Overshadowing the judicial duty, already discussed, to apply broadly expressed legal rules or standards is the large question of statutory interpretation. It does not require a descent into the depths of deconstruction to observe that statutory language, unlike algebra, usually presents choices about its meaning. Precision of expression is illusory. The more detailed the linguistic formulae which are used, the more scope there is for argument about their boundaries. A good example is the *Migration Act 1958* (Cth). Its predecessor the *Immigration Restriction Act 1901* (Cth) comprised 19 sections when enacted. By 1950 that Act had expanded to 64 sections. The *Migration Act 1958*, as first enacted, contained 67 sections. Between 1958 and 2002, the Act had been subject to over 100 amending Acts and had expanded to 760 sections, supported by hundreds of regulations set out in two volumes.[9] More amendments have occurred since that time. Underlying some of the amendments, particularly the detailed prescriptions of conditions attaching to the grant or cancellation of visas, seems to have been a desire to reduce ministerial discretion and replace it with conditional obligations. But the more conditions, the more room there is for debate about their proper construction.

Issues of statutory interpretation arise acutely in a litigious setting. At the administrative level or between private parties, a statute may work well for all practical purposes. But when a statute comes to court it is usually accompanied by an argument about what it means. There are well recognised rules for the interpretation of statutes which begin with the meaning of their words according to ordinary grammar and usage. But anyone who has read a dictionary knows that most words have more than one definition. The applicable meaning of statutory words must be identified by reference to their context and legislative purpose. Sometimes statutory objectives appear in the Act itself, but are expressed at such a level of generality as to be of limited assistance in solving specific interpretational problems. Sometimes the court may have to have regard to other materials such as the Second Reading Speech, the

9 See *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 123 FCR 298.

Explanatory Memorandum and Law Reform Commission Reports to ascertain purpose.

Some say that the normal and proper judicial function is to construe an Act in accordance with the intention of the legislature. But the concept of legislative intention is a construct. It has been called a fiction on the basis that neither individual members of Parliament nor even the government necessarily mean the same thing by voting on a Bill or in some cases, as Justice Dawson once remarked, 'anything at all'.[10] If the term 'legislative intention' is meant to designate a collective mental state of the body of individuals who make up the Parliament, then it is a fiction which has no useful purpose.[11] One way of looking at it is to treat it as an attributed intention based upon legislative purpose formulated by the usual processes of statutory interpretation.[12] That attribution is made by the court interpreting the statute. It works in effect as a declaration of legitimacy, that the interpretation adopted is proper in a representative democracy characterised by parliamentary supremacy and the rule of law. It says that the court has used criteria of construction which are generally accepted. Those criteria permit and require reference to matters which were before the Parliament when the law was enacted. Prime among them were the words of the statutes and their ordinary meanings. The rules of construction are known and understood by parliamentary drafters and are properly to be regarded as understood by Parliament. They are partly judge-made and partly statutory. They do not always yield a single unique answer.

Much room is left for judges in the interpretation process to determine what the law is. In a sense it is trivially true to say, as one academic writer observed: 'It is the court's construction of legislative words and not the words themselves that is law.'[13]

10 *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J).

11 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 345–6.

12 *Mills v Meeking* (1990) 169 CLR 214, 226.

13 A C Hutchison, 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 *Modern Law Review* 293, 305.

But if that is a complaint, then it is misplaced. The meaning of legislative words are not like rocks lying around on the ground waiting to be picked up. They are products of interpretation. That interpretation is legitimate when it is principled and invokes criteria which, whether developed by courts or decreed by statute or both, are broadly understood by the legislature, the executive and the judiciary. And to that extent they represent another example of a necessary, legitimate and generally accepted authority to the judges to determine what the law is by determining what it means.

V THE MANY MEANINGS OF 'ACTIVISM'

Against this plethora of choice-rich decision-making conferred upon the judges as a necessary part of their judicial function, the question arises – what is there left for so called activist judges to do that defines them as activists? It is hard to know because there are so many definitions of judicial activism. And coming to grips with them is like coming to grips with blancmange.

A threshold question to be asked is what is the ordinary meaning of the word 'activism'. The *Oxford English Dictionary* (2nd ed) has only two definitions. One is the name of a philosophical theory, not presently relevant. The other is: 'A doctrine or policy of advocating energetic action'.

So a judge who believes in regular physical exercise is a judicial activist. Closer to the present debate is the *Macquarie Dictionary* definition of 'activist' as: 'a zealous worker for a cause, especially a political cause…'.

But the hardworking judge who is committed uncontroversially to the rule of law and the discharge of his or her oath of office would conform to that description. In debate about judicial activism, the word 'activism' is used in some other sense. But what other sense?

The term 'judicial activist' used as a forensic label is much younger than the debate in which it appears which goes back to Bentham and beyond. Its first reported use was by Arthur M Schlesinger Jnr in an article on the Supreme Court of the United States in the January 1947 edition of *Fortune* magazine. This was Roosevelt's Supreme Court. The term 'judicial activists' appeared on the second page of

the article referring to Justices Black, Douglas, Murphy and Rutledge. They were contrasted with 'Champions of Self Restraint' – Frankfurter, Jackson and Reed, although Reed appears next to a photograph of Chief Justice Vinson above the title 'Balance of Power'.

No definition of 'judicial activist' was offered in the article. However, Schlesinger sought to characterise the conflict he perceived between the two groups in a way that gave content to his coined term. The activist group, as he saw them, believed the Supreme Court could play an affirmative role in promoting the social welfare. The 'Champions' advocated a policy of judicial self restraint. Where one group saw the Court as an instrument to achieve desired social results, the second saw it as an instrument to permit the other branches of government to achieve the results the people want for better or for worse. In so characterising the conflict, Schlesinger acknowledged the legal realism underpinning the Black/Douglas view which derived from ideas particularly dominant at Yale Law School. The Yale thesis, as he outlined it, was that judging is a matter of reverse engineering from result to reasons. On that theory: 'A wise judge knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results.'[14]

While the Supreme Court of the day had generally tended not to invalidate laws of Congress, it was, Schlesinger said, 'still inescapably vested with political power through its obligation to pronounce on the meaning of laws.'[15]

Much of his discussion of activism versus restraint was in the context of the exercise by the Supreme Court of its constitutional power, asserted in *Marbury v Madison*, 5 US 137 in 1803, to strike down legislation. However, relevant to the earlier discussion in this article of the wider judicial function in relation to statutory interpretation, he observed:

14 A M Schlesinger, 'The Supreme Court: 1947' (January 1947) *Fortune* Vol XXXV, No 1, 201.

15 Ibid.

> The most carefully drawn statute has its silences and ambiguities; it cannot provide for every concrete case. As the wisest American judge, Learned Hand, once put it, the words a judge must construe are 'empty vessels into which he can pour nearly anything he will.[16]

Since Schlesinger's adoption of the term 'judicial activism', its definitions have sprouted like weeds. One defines it as a judge serving a function other than what is necessary for the decision of a particular dispute between the parties.[17] Another says that it denotes a willingness to write opinions brimming with dicta.[18] A third view offers 'six dimensions' of activism which may be summarised thus:

1. The degree to which policies adopted through democratic processes are judicially negated.
2. The degree to which earlier court decisions, doctrines or interpretations are altered.
3. The degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used.
4. The degree to which judicial decisions make substantive policy rather than effect the preservation of democratic political processes.
5. The degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals.
6. The degree to which a judicial decision supersedes serious consideration of the same problem by other government agencies.[19]

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16 Ibid.

17 Justice D Heydon,'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9.

18 J D Grano, 'Delimiting the Concept of Judicial Activism: Flag Desecration and Abortion' (1989) 6 *Cooley Law Review* 439, 441.

19 B Canon, 'Defining the Dimensions of Judicial Activism' (1983) 66 *Judicature* 237, 239.

Keenan Kmiec, a former law clerk to Justice Samuel Alito offers 'five core meanings' of 'judicial activism':

1. Invalidation of the arguably constitutional actions of other branches.
2. Failure to adhere to precedent.
3. Judicial 'legislation'.
4. Departures from accepted interpretive methodology.
5. Result oriented judging.[20]

Interestingly, he notes that during the 1990s the terms 'judicial activism' and 'judicial activist' appeared in 3,815 journal and law review articles and up to the end of 2004 appeared in another 1,817 articles, an average of more than 450 per year. He observes:

> Ironically, as the term has become more commonplace, its meaning has become increasingly unclear. This is so because 'judicial activism' is defined in a number of disparate, even contradictory, ways; scholars and judges recognise this problem, yet persist in speaking about the concept without defining it. Thus, the problem continues unabated: people talk past one another, using the same language to convey very different concepts.[21]

Professor Craven has offered three definitions which are really one, relating respectively to the common law, the statute law and to the Constitution.[22] Judicial activism in his view involves the conscious development of the common law according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy. It exists in relation to statute law where a court

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20 K Kmiec, 'The Origins and Current Meanings of "Judicial Activism"' (2004) 92 *California Law Review* 1441.

21 Ibid 1443.

22 G Craven, 'Reflections on Judicial Activism: More in Sorrow than in Anger' (1997) Samuel Griffith Society <http://www.samuelgriffith.org.au/papers/html/volume9/v9chap9.htm> at 17 December 2007.

consciously adopts an interpretation of statutory language which goes well beyond the ordinary import of the words because the court believes that an extended interpretation is necessary to give effect to the true legislative intention or because it wishes to frustrate an unpalatable legislative intention. In connection with constitutional interpretation he appears to equate activism with 'progressivism'. This he describes as an approach to constitutional interpretation which requires continual updating of the Constitution in line with the perceived community and social expectations rather than according to its tenor or conformity with the intentions of those who wrote it.

Judicial review of executive action tends to attract debate about judicial activism in Australia. The Australian Constitution and various public law statutes empower and require Australian courts to pass upon the constitutionality of legislation and the validity and lawfulness of executive acts. Section 75(v) of the Constitution confers authority on the High Court to review unlawful executive action in applications for prohibition, mandamus or injunction against officers of the Commonwealth. The like jurisdiction is replicated in statutory form for the Federal and State courts by ss 39 and 39B of the *Judiciary Act 1903* (Cth). *The Administrative Decisions (Judicial Review) Act 1977* (Cth) and various State equivalents seek to simplify and make judicial review more accessible than through the processes of the constitutional writs. From some perspectives the very exercise of such jurisdiction is judicial activism. A distinguished Australian political scientist, Professor Brian Galligan wrote, in 1991:

> Judicial review is by its very nature an activist function since it involves the judiciary in performing a number of key functions that directly affect the institutional shape and powers of the branches and levels of government.[23]

Professor Galligan defined 'judicial activism' as 'control or influence by the judiciary over political or administrative institutions'. Such a definition of course encompasses the

23 B Galligan, 'Judicial Activism in Australia' in K Holland (ed), *Judicial Activism in Comparative Perspective* (1991) 71.

uncontroversial discharge of the judicial review function conferred upon courts by the Constitution or by Parliament.

Some have sought to distinguish between 'proper' and 'improper' judicial activism. In the context of constitutional review, proper judicial activism polices the boundaries of power between government entities and improper activism is rooted in the belief that law is only policy and that the judge should concentrate on building the good society according to the judge's own vision.[24] This just shifts the definitional problem to the boundary between proper and improper.

In his recent book *Inside the Mason Court Revolution*, Jason Pierce said that in the mid 1980s to the mid 1990s a group of High Court judges 'embarked on a concerted effort to redefine substantively their institution's role within the political system'.[25] He described the Court as having shifted its institutional focus from simply resolving legal disputes to making policy that addressed some of the country's most controversial issues. So fairness rather than certainty became the Court's objective. It was said to have employed 'new, controversial modes of legal reasoning'. He wrote:

> To an unprecedented extent, these High Court judges viewed their decision making powers as a mechanism to address shortcomings and stalemates in the political system and their institution as a legitimate source for reforms. The cumulative result was a more activist, more controversial and much more politicised High Court.[26]

No clear definition of activism emerges from that context. Indeed, Pierce refers to the panoply of typologies that describe different judicial role conceptions in the literature from the 1960s to the 1980s. Terms such as 'activists', 'restraintists', 'law interpreters'

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24 G Jones, 'Proper Judicial Activism' (2002) 14 *Regent University Law Review* 141, 143 citing A Cox 'The Role of the Supreme Court: Judicial Activism or Self Restraint' (1987) 47 *Maryland Law Review* 118, 121–2.

25 J Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006) 3.

26 Ibid 4.

and 'law makers', 'ritualists', 'adjudicators', 'policy makers', 'administrators', 'law appliers', 'law extenders' and 'mediators' were all cited from the literature in Jason Pierce's book. He himself eschewed simply labeling the attitudes of individual judges. As he put it, his mode of analysis was the High Court as an institution.[27]

VI CONCLUSION

Much discussion of 'judicial activism' is really a discussion about separation of legislative, executive and judicial power and the reciprocal restraints that accompany that separation. In the Australian context, it will recognise that separation is not defined by bright lines and that the restraint involved is in part conventional, particularly in the States where the local constitutions do not mandate separation of powers. Such discussion is undoubtedly necessary and useful and should be ongoing. It is always meaningful to ask whether a judge has exceeded his or her proper function by laying down legislative rules beyond that permitted interstitial law-making which is necessary to dispose of the matter before the court. The question may properly be asked in the context of judicial review of executive action, whether a judge or a court has entered upon the rather ill-defined territory of 'merits review' and sat in the seat of the executive to substitute its own view of the correct or preferable decision rather than stay within the boundaries of review of process and lawfulness. The question may also be asked whether the judge or a court has applied to the task of constitutional or statutory interpretation the principles generally regarded as accepted or legitimate and, if not, why they have been departed from. Each of these questions raises a different kind of legitimate concern. Their sharpness is lost and the seriousness of the debate about the judicial function which they raise is compromised if they are swept up under the almost meaningless rubric of 'judicial activism'. We then get into taxonomical debates of the kind that have raged about conditions like dyslexia, RSI and ADHD and whether they constitute identifiable diseases.

27 Ibid 8.

There is much concern expressed by protagonists in the activism debate about judges taking over the functions of the legislature and the executive. It is useful to return to a key passage in Montesquieu's *The Spirit of Laws* about separation of powers, where he said:

> Again, there is no liberty, if the power of judgment be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.
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> Miserable indeed would be the case, where the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.[28]

The debate about judicial activism contemplates judges assuming legislative or executive functions. But the judges are the least powerful of the three branches of government. Montesquieu's concern as expressed in the passage quoted was not limited to judges exercising executive or legislative functions. It extended to the combination of those functions. What then of intrusion by the legislature and the executive into the judicial function? Perhaps that is a topic for another day.

28 C Montesquieu, *The Spirit of Laws* (Legal Classics Library, 1984).