

## Article

# The Scientific Study of Judicial Activism

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Criticism of the U.S. Supreme Court often centers on allegations that the Court's decisions reflect inappropriate "judicial activism." Hundreds of law review articles every year address the issue,<sup>1</sup> while the popular press also commonly critiques so-called activist decisions.<sup>2</sup> Even hundreds of judicial decisions have decried judicial activism.<sup>3</sup> While there is no intrinsic reason why an activist judiciary is inevitably or inherently problematic, the phrase typically carries a very negative connotation—at least in modern discourse.<sup>4</sup>

The attack on the Court for activism took hold during the Warren Court era, known for its numerous controversial rulings on issues such as defendants' rights.<sup>5</sup> An activist Justice

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1. See Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1442 (2004) (noting that the term had been discussed in over five thousand articles since 1990).

2. See *id.* at 1443 n.8 ("In the past decade (from 1994 to August 2004), 'judicial activism' and its cognates have appeared 163 times in the *Washington Post* and another 135 times in the *New York Times*.").

3. *Id.* at 1459 n.105.

4. See CASS R. SUNSTEIN, RADICALS IN ROBES 42 (2005) (observing that for some the "word 'activist' isn't merely a description" but is "always an insult"). *But see* Kmiec, *supra* note 1, at 1451 ("In its early days, the term 'judicial activist' sometimes had a positive connotation . . .").

5. Although the *Lochner* era arguably was the true "heyday" of judicial activism, the term was not then used in critiques of the Court. See Kmiec, *supra* note 1, at 1445. The earliest identified use was in 1947. *Id.* at 1446. There is now a "commonly held view that the Warren Court was, in fact, too activist." Ronald J. Krotoszynski, *A Remembrance of Things Past? Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055,

believed “that the Supreme Court can play an affirmative role in promoting the social welfare.”<sup>6</sup> Activism was often juxtaposed against a policy of “judicial restraint” advocated most often by conservatives who opposed the Warren Court’s policy outcomes.<sup>7</sup> As the Court became more conservative, however, liberals also took up the assault on judicial activism, particularly in connection with the Rehnquist Court’s federalism decisions.<sup>8</sup>

Not all forms of judicial activism are universally condemned. Some of the decisions for which the Supreme Court is generally applauded, such as *Brown v. Board of Education*,<sup>9</sup> were in some respect activist decisions.<sup>10</sup> Decisions now lamented, such as *Korematsu v. United States*,<sup>11</sup> arguably reflected an orientation of judicial restraint.<sup>12</sup> Ronald Dworkin has extolled the virtues of an activist judiciary in the protection of constitutional rights.<sup>13</sup> Judicial activism is arguably “a way for a Court to live up to its obligation to serve as citadel of the public justice.”<sup>14</sup> While this defense of activism certainly resonates, it presumes that Justices embrace a certain honest sincerity regarding constitutional interpretation, as opposed to a more result-oriented, ideological approach.

Critics of judicial activism challenge this sincerity and claim that activist judges simply impose their policy preferences on society, without electoral accountability or fidelity to the Constitution.<sup>15</sup> As calls to rein in the activist judiciary have

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1072 (2002).

6. Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73, 201, quoted in Kmiec, *supra* note 1, at 1446.

7. See *infra* notes 22–25 and accompanying text.

8. See *infra* notes 29–34 and accompanying text.

9. 347 U.S. 483 (1954).

10. See KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 14 (2006).

11. 323 U.S. 214 (1944).

12. An argument can be made that *Korematsu* itself was an activist decision since, while it represented a deferential stance toward the executive branch, it failed to invalidate executive action that was clearly unconstitutional. See *infra* notes 50–51 and accompanying text (explaining that exercising judicial restraint can sometimes be characterized as “activist”).

13. See, e.g., Stanley C. Brubaker, *Reconsidering Dworkin’s Case for Judicial Activism*, 46 J. POL. 503, 503 (1984).

14. Rebecca L. Brown, *Activism Is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1273 (2002).

15. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1245–53 (2002) (describing how partisan activism occurs when a partisan agenda motivates judicial review).

entered popular discourse, however, the term “activism” has become devoid of meaningful content as it often reflects nothing more than an ideological harangue.<sup>16</sup> Nevertheless, the underlying concern—that activist judges may act improperly—is legitimate in light of our commitment to democratic values.<sup>17</sup> Yet to evaluate this concern, we need both a precise definition of judicial activism and more rigor in its testing. This Article constitutes an effort to produce a social scientific measure of judicial activism that allows comparisons across courts and across Justices.

In order to create such a measure, we must first define the concept of judicial activism carefully. The first part of this Article analyzes definitions of judicial activism and reviews the frequent criticism of the practice. We also review the limited empirical research extant on activism. In the second part, we design an empirical measure that reflects, insofar as possible, what we consider the most defensible definition of judicial activism: actions that are more clearly grounded in a Justice’s ideology than in legitimate legal sources.

Construction of this measure first involves a simple comparison of the likelihood with which individual Justices vote to invalidate state or federal statutes, the factor commonly associated with activist decision making. Because this metric fails to distinguish between “legitimate” and “illegitimate” statutory invalidations, we examine the extent to which a Justice’s votes to strike statutes are ideologically skewed, as well as the legal “strength” of the decision as reflected in both the average size of the vote coalition behind the Justices’ positions and the extent to which the Justices’ votes are consistent with the position of the Solicitor General. While this remains an imperfect measure of activism, it represents an initial effort to create a more nuanced measure that allows us to compare the Justices over time.

This more nuanced measure produces some shifts in the “ordering” of individual Justices in terms of their activist behavior. When we consider the percentage of votes to invalidate alone for Justices sitting on the Court between 1969 and 2004, some of the Justices appear fairly restraintist on the whole,

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16. See *infra* notes 35–41 and accompanying text.

17. For an extensive discussion of the theoretical underpinnings of this “countermajoritarian difficulty,” see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

such as Justice Thomas, or fairly activist, such as Justice Kennedy. But when we add the additional dimensions to our measure, the results are reversed: Justice Thomas appears far more activist than Justice Kennedy. On the other hand, some of the Justices' rankings remain constant. Justices Burger and White clearly emerge as the most restraintist Justices on the Court in the last thirty-five years, while Justices Marshall, Brennan, and Douglas are consistently the most activist. For some Justices who profess restraint, the evidence suggests that in some cases their jurisprudence accurately mirrored their rhetoric (Justice Rehnquist). However, for others (Justices Scalia and Thomas), the evidence does not support their rhetorical positions on judicial activism; these Justices do not demonstrate a consistently restraintist approach. Indeed, in more recent years (1994–2004), we find that several of the conservative Justices' voting behavior reflects a relatively activist orientation, though to a lesser degree than the Warren Court liberals.

#### I. THE CONCEPT OF JUDICIAL ACTIVISM

Although criticism of judicial activism is rampant, those calling for the appointment of less activist judges seldom define the term. Indeed, activism has been labeled a “notoriously slippery” concept.<sup>18</sup> As one scholar remarked, although activism is “defined in a number of disparate, even contradictory, ways,” writers “persist in speaking about the concept without defining it.”<sup>19</sup>

In many cases, complaints about judicial activism only reflect an amorphous lament about disfavored Court decisions. Our discussion begins with these complaints because they frame the term “judicial activism.” We then turn to a more disciplined analysis of judicial activism, beginning with the conventional standard of social science: the extent to which judges overturn statutes. This measure, which reflects the extent to which the judiciary overturns the product of democratically elected bodies, fails to accommodate an important nuance: from a legal perspective, such actions may be appropriate given our system of checks and balances, especially when broad consensus exists that a statute is plainly unconstitutional. Moreover,

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18. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002).

19. Kmiec, *supra* note 1, at 1443.

a wide variety of other judicial actions—such as overturning precedent—may also be considered objectionably “activist.”

At the core of the criticisms of judicial activism lies a concern that the judiciary is acting outside its proper judicial role. Some complain that the activist judiciary is acting “like a legislature” instead of a court.<sup>20</sup> Exactly what it means for a court to “act like a legislature” is less clear. Sometimes, the criticism seems to mean little more than an observation that the Court is deciding a controversial issue, but at its heart the criticism suggests the Court is creating law rather than applying it. Indeed, the key objection is that an activist Court somehow acts non-judicially. As Justice Black noted in objection to a right to counsel ruling, “we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it.”<sup>21</sup> Such “non-judicial” behavior is the form of action that must be reflected in a social scientific measure of judicial activism.

#### A. THE POPULAR LAMENT AND THE MEANING OF ACTIVISM

As noted above, complaints about judicial activism are common in popular discourse. In the Warren Court era, conservatives complained loudly, even calling for the impeachment of Supreme Court Justices.<sup>22</sup> Conservatives called for “judicial restraint” or “strict constructionism” in place of liberal judicial activism, contending that “when liberal Courts overturn democratically enacted laws in favor of liberal, activist constitutionalism, they destroy[] citizens’ rights to democratic participation and self government.”<sup>23</sup> Judge J. Harvie Wilkinson noted that “[m]any of us came of age concerned about the excessive activism of the Warren and Burger Courts.”<sup>24</sup> During this time,

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20. See *id.* at 1471 (“Judges are labeled judicial activists when they ‘legislate from the bench.’”).

21. *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting in part and concurring in part).

22. See Robert L. Brown, *From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK. LITTLE ROCK L. REV. 1, 2–6 (2005) (discussing proposals to impeach Chief Justice Earl Warren).

23. Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RES. Q. 131, 132 (2004).

24. J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1383 (2002); see also John H. Blume et al., *Education and Interrogation: Comparing Brown and Miranda*, 90 CORNELL L. REV. 321, 344 (2005) (referring to the “bold judicial activism of the Warren

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a “judicial liberal believed that the enlightened approach of the courts was the answer to many social problems while a judicial conservative placed faith in traditional democratic processes.”<sup>25</sup> Perhaps the standard complaint of the era was about “liberal, activist judges” substituting their “personal preferences” for the “will of the people.”<sup>26</sup> This connection between activism and liberalism has taken such a firm hold on public perceptions that “whenever a politician uses the term ‘activist judge,’ the word liberal is sure to follow.”<sup>27</sup> Even after the Warren Court ended, one still sees claims about liberal judicial activism. In his recent campaigns, President George W. Bush emphasized the need to prevent liberal judicial activism.<sup>28</sup>

In today’s world, however, the tables have turned as “[a]ccusations that conservatives on the Rehnquist Court are the real judicial activists have become commonplace.”<sup>29</sup> The National Director of the American Civil Liberties Union declared that the Rehnquist Court was a “conservative court that has also become one of the most activist courts in American history.”<sup>30</sup> Many prominent law professors agree. According to Cass Sunstein, for example, the Rehnquist Court reflected “a remarkable period of right-wing judicial activism.”<sup>31</sup> Erwin Chemerinsky criticizes conservative judges for engaging in “aggressive conservative judicial activism.”<sup>32</sup> Jack Balkin and Sandy Levinson similarly argue that the Warren Court’s “judicial activism has been replaced with one much harsher and

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Court era”); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 929 (2005) (“People who came of age during or after the Warren Court era tend to associate judicial activism with liberal causes.”).

25. Wilkinson, *supra* note 24, at 1383. Both critics and admirers of the Warren Court accept the claim that it was an activist Court. See Kmiec, *supra* note 1, at 1473.

26. Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. (forthcoming 2007) (manuscript at 1), available at <http://ssrn.com/abstract=765445>.

27. Healy, *supra* note 24, at 929.

28. See Ringhand, *supra* note 26 (manuscript at 1 n.2). President Reagan did likewise. *Id.*

29. Orin S. Kerr, *Upholding the Law*, LEGAL AFF., Mar./Apr. 2003, at 31, 31.

30. See Edward Walsh, *An Activist Court Mixes Its High-Profile Messages*, WASH. POST, July 2, 2000, at A6.

31. Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23.

32. Erwin Chemerinsky, *Perspective on Justice: And Federal Law Got Narrower, Narrower*, L.A. TIMES, May 18, 2000, at B11.

more conservative.”<sup>33</sup> While much of the criticism centers on the Rehnquist Court’s exercise of judicial review to invalidate federal enactments, the Court’s conservatives are also criticized for rendering decisions that are “unrestrained by precedent.”<sup>34</sup>

From this experience, “judicial activism” apparently is an effective rhetorical tool in ideological argument, but no consensus exists regarding its specific meaning.<sup>35</sup> Instead, the phrase is used as an epithet “to bludgeon legal and political opponents.”<sup>36</sup> As Judge Diarmuid F. O’Scannlain observes, “[j]udicial activism is not always easily detected, because the critical elements of judicial activism either are subjective or defy clear and concrete definition.”<sup>37</sup> Judge Frank H. Easterbrook suggests that the term is “empty” and simply a “mask” for the critic’s own substantive position on the Court.<sup>38</sup> Randy Barnett likewise declares that the criticism was generally an “empty” one,<sup>39</sup> while Justice Scalia has characterized criticisms of judicial activism as “nothing but fluff.”<sup>40</sup> At her confirmation hearings, Justice Ginsburg suggested that judicial activism was “a label too often pressed into service by critics of court results rather than the legitimacy of court decisions.”<sup>41</sup>

These comments emphasize that many contemporary invocations of judicial activism are either meaningless or simply ideological rhetoric. Yet we argue that the common misuse of the term does not lead to the inevitable conclusion that a concept of activism cannot be more carefully defined and ultimately measured.<sup>42</sup> This section addresses the ability to pro-

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33. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092 (2001).

34. See Marshall, *supra* note 15, at 1233.

35. See *id.* at 1217 (observing that, for some, judicial activism simply “means a decision one does not like”).

36. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 408 (2002).

37. Diarmuid F. O’Scannlain, *On Judicial Activism: Judges and the Constitution Today*, OPEN SPACES Q., Mar. 2000, at 20, 23, available at <http://www.open-spaces.com/article-v3n1-oscannlain.php>.

38. See Easterbrook, *supra* note 18, at 1401.

39. Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276 (2002).

40. See Charles Lane, *No Unanimity on Holding on to High Esteem*, WASH. POST, Apr. 1, 2002, at A13.

41. Rorie Sherman et al., *Clinton’s Stand on NEA Remains a Puzzle*, NAT’L L.J., July 19, 1993, at 5, 29, quoted in Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1367–68 (1996).

42. See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73

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duce such a determination with the precision required for quantitative analysis.

#### B. THE CONVENTIONAL STANDARD

The most common standard for evaluating judicial activism is the extent to which judges invalidate legislative enactments. Judge Richard A. Posner suggests that a basic element of judicial activism is a court's willingness to act "contrary to the will of the other branches of government," as in striking down a statute.<sup>43</sup> Sunstein contends that "it is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government, especially those of Congress."<sup>44</sup> Judicial activism is in fact "most often associated with judicial invalidation of decisions by elected representatives."<sup>45</sup>

Political scientists generally contend that "the most dramatic instances of a lack of judicial restraint—or, conversely, the manifestation of judicial activism—are decisions that declare acts of Congress and, to a lesser extent, those of state and local governments unconstitutional."<sup>46</sup> This standard is commonly invoked and probably the most common measure for judicial activism.<sup>47</sup> Yet it has not gone unchallenged, as discussed in the following section.

#### C. CRITICISMS AND REFINEMENTS OF THE CONVENTIONAL STANDARD

While empirical research on judicial activism commonly employs the conventional standard, the standard suffers some theoretical shortcomings. In short, political and legal elites, as

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U. COLO. L. REV. 1139, 1141 (2002) (arguing that the term is not "inherently empty" and that it can be a "helpful category in that it focuses attention on the judiciary's institutional role rather than the merits of particular decisions").

43. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 320 (1996).

44. SUNSTEIN, *supra* note 4, at 42–43.

45. Marshall, *supra* note 15, at 1223.

46. SEGAL & SPAETH, *supra* note 36, at 413; *see also* Howard & Segal, *supra* note 23, at 131 (using this proxy for judicial activism).

47. *See, e.g.*, Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 434 (1997) ("[C]harges of judicial activism are often leveled when a court strikes down a democratically enacted statute; this indeed is the most frequent target of Judge Bork's criticism."); Rorie Spill Solberg & Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986–2000*, 3 J. EMPIRICAL LEGAL STUD. 237, 238–39 (2006).

well as the general public, accept that the judiciary's institutional responsibilities sometimes involve the invalidation of unconstitutional statutes. Exercise of the power of judicial review might be called "activist," but the mere exercise of the power alone is not what animates critics of activist decisions.<sup>48</sup> Should a state ignore the Thirteenth Amendment and reinstitute slavery, few would criticize the Court for striking down such legislation, nor would such a ruling be deemed "activist."<sup>49</sup> Moreover, activism is not limited solely to incidents in which the judiciary invalidates a statute; as Randy Barnett argues, "it is activist for courts to adopt doctrines that contradict the text of the Constitution *either* to uphold or nullify a law."<sup>50</sup> Indeed, Michael Stokes Paulsen coined the phrase "activist judicial restraint" for decisions in which the Court improperly fails to strike down an unconstitutional statute or fails to reverse an illegitimate judicial precedent.<sup>51</sup> This approach seems illogically to conflate "bad" with "activist," but a correct finding that a statute is constitutionally invalid is not inappropriate activism.

A standard of judicial activism that focuses solely on statutory invalidation thus fails to account for the possibility that the exercise of judicial review is justified on legal grounds. Yet modifying the standard to account for this nuance makes determination of judicial activism contingent on the commentator's view of what the Constitution requires. There is no reason to privilege an evaluator's conclusion about what is "truly constitutional" over that of the Supreme Court. Indeed, this view typically masks the evaluator's ideological bias. Conservatives believe liberal Justices are activist (or vice versa) simply because they disagree with the case outcome on ideological grounds. This approach provides no basis for a non-ideological test of judicial activism.

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48. See Marshall, *supra* note 15, at 1224 ("Even a 'non-activist' Court would (and should) strike down a law if the enacting Congress did not have the appropriate regard for constitutional limitations.").

49. See, e.g., Kerr, *supra* note 29, at 33–34 ("Consider the *Dickerson* case that upheld *Miranda*. The Supreme Court's decision not to overrule *Miranda* required it to strike down a 1968 federal law Congress had passed to thumb its nose at the Warren Court. It's hard to see *Dickerson* as an activist decision: The court adhered to precedent and confirmed that a law long thought to be unconstitutional was in fact invalid.").

50. Barnett, *supra* note 39, at 1276.

51. The concept is discussed in Young, *supra* note 42, at 1174–81.

Sunstein has sought to rescue this approach to defining judicial activism by extending it to cases in which the Court overturns legislation that is arguably constitutional.<sup>52</sup> This approach recognizes a certain zone of uncertainty about the constitutionality of legislation. Sunstein's approach contends that the Court should defer to legislative judgment when statutes fall within that zone of uncertainty.<sup>53</sup> The proper judicial role, in this view, is limited to striking down *clearly* unconstitutional statutes.<sup>54</sup> Judge Easterbrook adopted a similar standard, defining activism as the invalidation of a statute "unless the application of the Constitution or statute is so clear that it has the traditional qualities of *law* rather than political or moral philosophy."<sup>55</sup>

Easterbrook's and Sunstein's approaches mirror that of James Bradley Thayer, who argued that the Court should only strike statutes that are clearly unconstitutional.<sup>56</sup> Thayer argued that constitutional language is inevitably indeterminate, and therefore that reasonable minds could differ over whether a statute comports with the Constitution's provisions.<sup>57</sup> When such reasonable disagreement exists, Thayer suggested that courts uphold whatever laws are rationally within the Constitution and strike only those whose unconstitutionality is clear beyond a reasonable doubt.<sup>58</sup> For much of our history, the Thayerian standard prevailed, with the Court according a significant presumption of constitutionality to federal statutes.<sup>59</sup> Multiple justifications for this standard exist, ranging from the

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52. See Cass R. Sunstein, *Taking Over the Courts*, N.Y. TIMES, Nov. 9, 2002, at A19.

53. See *id.*

54. See *id.*

55. Easterbrook, *supra* note 18, at 1404.

56. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that a court should invalidate a law only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question").

57. *Id.*

58. See *id.* at 144–45.

59. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003). Caminker suggests that the recent frequency of invalidation of federal statutes is "historically anomalous," *id.* at 74, and reports that at the nation's beginning, "it was widely understood that to the extent federal courts had authority to declare void acts of Congress, they could properly do so only when the constitutional violation was quite clear," *id.* at 80.

need to defer to a co-equal branch to respect for a more democratic or populist constitutional interpretation.<sup>60</sup> The latter justification resonates strongly today in the presence of realist beliefs that Supreme Court Justices' decisions are ideological and grounded in individual policy preferences rather than the law.

However, the Thayerian approach arguably does little to ameliorate the ideological bias associated with claims of judicial activism. Rather, the approach merely shifts the impact of ideology from the analysis of the case outcome to the analysis of the zone of rational uncertainty. Thus, a conventional standard modified by a Thayerian assessment would fail to defuse accusations that charges of activism are driven by ideological considerations. Under this rule, a finding that an unconstitutional statute was unconstitutional might be labeled activist on the basis that the statute's unconstitutionality was not sufficiently certain.<sup>61</sup> Indeed, the notion of uncertainty in practice may itself be so amorphous and malleable that it facilitates—rather than reduces—the potential impact of ideology in the evaluation of judicial activism.<sup>62</sup> Nevertheless, the Thayerian standard remains relevant to contemporary analyses.<sup>63</sup>

Discussions of judicial activism that focus solely on the exercise of judicial review also fail to account for other actions that are arguably “activist.” According to one scholar, judicial activism can be defined along six dimensions:

- (1) Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated.
- (2) Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered.
- (3) Interpretive Fidelity—the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used.

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60. *See id.* at 83–84.

61. *See, e.g.*, Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 275 (1993) (arguing that courts are responsible for correcting unconstitutional statutes, even in the absence of clarity).

62. Every decision is to some degree uncertain. If it were not, it would not reach a trial court, much less the Supreme Court. The zone of uncertainty cannot be quantified in terms of a percentage of uncertainty. For Sunstein, the question is whether “reasonable” minds may differ over a statute's unconstitutionality. *See* Sunstein, *supra* note 52. But this focus simply shifts the decision rule to the still more amorphous definition of “reasonable.” In attempting to pin down judicial activism, this approach simply makes the concept more vague.

63. *See, e.g.*, Caminker, *supra* note 59, at 86 (reviewing a number of more contemporary arguments for the Thayerian standard).

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(4) Substance/Democratic Process Distinction—the degree to which judicial decisions make substantive policy rather than affect the preservation of democratic processes.

(5) Specificity of Policy—the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other [governmental actors].

(6) Availability of an Alternate Policymaker—the degree to which a judicial decision supersedes serious consideration of the same problems by other [political actors].<sup>64</sup>

Ernie Young more recently has produced an alternative list with a broader focus, suggesting that activism may entail:

(1) second-guessing the federal political branches or state governments;

(2) departing from text and/or history;

(3) departing from judicial precedent;

(4) issuing broad or “maximalist” holdings rather than narrow or “minimalist” ones;

(5) exercising broad remedial powers; and

(6) deciding cases according to the partisan political preferences of the judges.<sup>65</sup>

Both lists incorporate or reflect the central concern over countermajoritarianism that is often associated with charges of judicial activism, as well as the broader critique that activist judges usurp the legislative function. The following section describes these alternative dimensions of judicial activism.

#### D. OTHER FORMS OF ACTIVISM

Although much of the discussion and study of judicial activism focuses on decisions overturning statutes, the dimensions of activism set forth in the section above make clear that the concept is multidimensional. For example, activism might be found in the mere interpretation of statutes. A Justice might interpret a statute in a manner contrary to what the legislature meant or wrote as its text. In some ways, this form of activism might be more egregious than striking a statute; instead of leaving a blank legislative slate—as in the case of invalidating a law—such a misinterpretation leaves in place a statute that now reflects the policy preferences of the judges rather than the

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64. Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 *JUDICATURE* 236, 239 (1983).

65. Young, *supra* note 42, at 1144. William Marshall presented a similar list during the symposium at which Young produced his list. See Marshall, *supra* note 15, at 1220.

legislature. This form of activism is moderated, however, by the ability of the legislature to rewrite the statute<sup>66</sup> and by the fact that judicial language is not self-enforcing.<sup>67</sup>

Overturing or ignoring applicable precedent may also constitute a form of judicial activism.<sup>68</sup> When Justices overturn precedent they more clearly trammel the actions of their predecessors than the privileges of the coordinate branches, but these decisions are often challenged as activist, given the general standard of judicial fealty to precedent. The framers of the Constitution considered precedent to “derive from the nature of judicial power, and intended that [it] would limit the judicial power delegated to the courts by Article III of the Constitution.”<sup>69</sup> Regularly overruling or distinguishing away precedent might therefore be considered inappropriate judicial activism. Critics have charged the Rehnquist Court with this form of conservative judicial activism,<sup>70</sup> and the Justices have themselves occasionally criticized their brethren for judicial activism in ignoring the Court’s precedents.<sup>71</sup>

Just as invalidating a statute is not necessarily inappropriate judicial activism, neither is reversing a precedent. If consensus exists that the initial precedent was “wrongly” decided, its reversal is appropriate. The theory is: “If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitu-

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66. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 344 tbl.4 (1991) (reporting that Congress rewrote statutes to override 121 Supreme Court decisions between 1967 and 1991). The effectiveness of these overrides is uncertain, however, because the Court also interprets the new statutory language. See Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1451–57 (2001) (discussing the Court’s ability to limit the effect of the override through interpretation).

67. See Cross & Nelson, *supra* note 66, at 1470–71 (discussing how the effect of Supreme Court decisions is limited by implementation decisions of the other branches).

68. See Kmiec, *supra* note 1, at 1466 (“Judges regularly admonish their colleagues for judicial activism when they contravene precedent . . .”).

69. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

70. See, e.g., Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81, 123 (1994) (“The current Court’s dismantling of the federal habeas corpus remedy for state prisoners is as fine an example of unrestrained judicial activism and lack of candor as anything the Warren Court ever did.”).

71. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98–99 (2000) (Stevens, J., dissenting); *Engle v. Isaac*, 456 U.S. 107, 137 (1982) (Brennan, J., dissenting).

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tion.”<sup>72</sup> Indeed, perhaps the original precedent was an instance of “judicial activism,” such that its reversal would constitute an effort to reorient the legal doctrine to defer more appropriately to the elected branches.<sup>73</sup> Moreover, a court may confront a circumstance where it will either have to strike down a statute or have to overrule one of its precedents.<sup>74</sup> The “activist” criticism is not meaningful when the Court must essentially choose between two arguably activist outcomes.

Another form of judicial activism involves not the decision but the opinion or remedy. Writing an unnecessarily broad opinion with applicability beyond the unique circumstances of the case before the Court might be considered activist. Alternatively, the nature of the relief ordered might appear to have an “activist” dimension. In some cases, courts have involved themselves in the “day-to-day running of public institutions” or demanded public “expenditures amounting to millions of dollars.”<sup>75</sup> These are seemingly activist judicial measures, regardless of whether the underlying decision invalidated a statute or overturned a precedent. They certainly assume powers generally reserved for other governmental institutions.

The discussion above does not yield a clear definition of judicial activism, but it elicits some core principles important to such a definition. Activism is characterized by the Court’s failure to act “like a judiciary.”<sup>76</sup> Although no precise definition articulates the proper judicial role, we may identify some parameters to such action. First, a judiciary should use “accepted interpretive methodology”:<sup>77</sup> it should interpret governing texts

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72. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 27–28 (1994). However, for precedent to have meaning it must be given some deference even when a Justice believes it may have been mistaken. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987) (“[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.”).

73. See, e.g., Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 577–78 (2005) (“The Warren and Burger Courts casually overruled a great many criminal-procedure precedents . . . . Should the current Court respect the Warren and Burger Court precedents, or should those decisions be treated in the same cavalier fashion as the older decisions they overruled?”).

74. This was the circumstance encountered in *Dickerson*. See Kerr, *supra* note 29, at 33–34.

75. Young, *supra* note 42, at 1154.

76. See *supra* text accompanying notes 20–21.

77. See Kmiec, *supra* note 1, at 1473.

using approved canons of interpretation and other appropriate “tools of the trade” and not distort the meaning of those texts simply to further judges’ personal policy preferences.<sup>78</sup> The accepted judicial methodology also involves some fealty to precedent and consistency with past decisions.<sup>79</sup> While this legal model of judging is difficult to capture simply, it requires decisions according to tenets of the law, rather than the personal preferences of the judge.

Thus, judges fail to act within their proper role when they engage in “result-oriented judging,” whereby their decisions are driven by their ideological preferences concerning substantive case outcomes (e.g., liberal Justices preferring liberal policy outcomes and conservative Justices preferring conservative outcomes).<sup>80</sup> As a result, based on ideological predispositions, a liberal Justice would rule in favor of criminal defendants’ rights, whereas a conservative Justice would oppose such rights. Such ideological judging has been called “the essence of judicial activism.”<sup>81</sup> For example, a critic of the current Court argues that the “conservatives’ record reflects a jurisprudence of judicial results, not of judicial method—nothing more and nothing less.”<sup>82</sup>

There is considerable empirical support for claims that the Supreme Court has engaged in result-oriented judging. While this legal realist view has a long pedigree, the empirical case has been advanced most prominently by Jeffrey Segal and Harold Spaeth in connection with the “attitudinal model” of judicial decision making.<sup>83</sup> The authors carefully analyzed each Justice’s votes over different periods of the Court’s history, finding a high correlation between the Justices’ values and their votes.<sup>84</sup> Considerable additional research has confirmed these findings.<sup>85</sup> The empirical evidence mustered in these studies

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78. *See id.*

79. *See id.* at 1466–71.

80. *See id.* at 1475–76.

81. O’Scannlain, *supra* note 37, at 23 (“When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully.”).

82. *See* Marshall, *supra* note 15, at 1255.

83. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

84. *Id.* at 228–29.

85. Much of this research and its implications are summarized in Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265–79 (1997).

supports the commonplace belief that certain Justices are “conservative” or “liberal” and systematically reach decisions that conform to those ideological preferences.<sup>86</sup> The vigorous political debate over Supreme Court nominations is ample testimony to the effect of judicial ideology in the decision-making process.

“Result-oriented judging” is something of an epithet, but its pejorative nature may unfairly presume intentionality on the Justices’ part to circumvent the law in order to reach a certain result. Judge O’Scannlain thus emphasizes that for judicial activism, “a critical consideration is the state of mind of the allegedly activist judge.”<sup>87</sup> Others embrace such a “scienter” standard for discerning judicial activism.<sup>88</sup> Given the impossibility of reading judges’ minds, this standard makes diagnosis of judicial activism impossible. Whether the ideological effect is a conscious or subconscious one, however, the results are the same.

Even a sincere judge might prove to be result-oriented due to the concept grounded in psychological research known as motivated reasoning.<sup>89</sup> Motivated reasoning involves the subconscious desire to reach a particular outcome—a desire which influences cognitive processes in a “biased” manner<sup>90</sup> and can explain ideological patterns in judicial decision making.<sup>91</sup> According to this account, the process of judicial interpretation may occur “so quickly that the judge never consciously considers the reasons for the choice and therefore believes that the decision was compelled by objective, external sources.”<sup>92</sup> The foremost scholars of the attitudinal model of judicial decision making observe that motivated reasoning could explain their findings.<sup>93</sup> Indeed, the inevitable presence of such motivated

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86. *Id.* at 277.

87. O’Scannlain, *supra* note 37, at 23.

88. See Kmiec, *supra* note 1, at 1476 (finding the “scienter” element useful because it particularly “limits the universe of ‘activist’ decisions”).

89. See, e.g., Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482–83 (1990) (suggesting that “people motivated to arrive at a particular conclusion attempt to be rational and to construct a justification for their desired conclusion” but only reach the desired conclusion if they can support it with evidence).

90. See Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 352–53 (2001).

91. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1477–78 (2003).

92. Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 407 (1989).

93. See SEGAL & SPAETH, *supra* note 36, at 433.

reasoning might be considered a justification for a Thayerian rule of statutory invalidation.<sup>94</sup>

The practical concern, however, involves judicial outcomes, not judicial motivations. Consequently, activist Court decisions that are the product of “innocent” motivated reasoning are, from a practical standpoint, no different than identical decisions that are the product of intentional political motivations. Striking down a statute on grounds that it violates the Constitution has the same pragmatic effect regardless of the Justices’ intentions. Hence, we need not read judicial minds, but instead can examine outcomes for evidence of judicial activism.

#### E. EXISTING EMPIRICAL RESEARCH ON JUDICIAL ACTIVISM

The best known empirical review of Supreme Court judicial activism is arguably found in a newspaper editorial, rather than in formal research. In 2005, the *New York Times* published an editorial by Paul Gewirtz and Chad Golder which analyzed decisions since 1994 that invalidated federal laws as unconstitutional.<sup>95</sup> The authors found that conservative Justices were far more likely to strike down federal laws than more liberal Justices and thus were arguably more “activist.”<sup>96</sup> While the Gewirtz and Golder editorial is cited by liberals critical of the new conservative judicial activism, it considered federal statutes only. Critics claimed that this failure to consider activism with respect to state laws biased the conclusions against the Rehnquist Court conservatives.<sup>97</sup>

Jeffrey Segal and Harold Spaeth also reviewed Supreme Court declarations of unconstitutionality, examining votes in 170 cases between 1986 and 1998 in which the Court found a law unconstitutional. The vast majority of the Justices displayed a significant ideological effect—liberal Justices voted to strike conservative laws and uphold liberal ones, while conservatives on the Court ruled the opposite.<sup>98</sup> According to the evi-

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94. See Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1524 (1998) (suggesting that motivated reasoning is “particularly likely when people face ambiguity rather than informational clarity”).

95. See Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19.

96. *Id.*

97. See Kerr, *supra* note 29, at 34 (“[T]he focus on decisions striking down federal laws unfairly stacks the deck against the Rehnquist Court.”).

98. SEGAL & SPAETH, *supra* note 36, at 415–16; see also SEGAL & SPAETH, *supra* note 83, at 320–22 (discussing the votes of twenty-five Justices who

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dence presented, judicial activism was neither liberal nor conservative, but nearly universal.<sup>99</sup> Segal and Robert Howard followed up this finding with a more detailed analysis.<sup>100</sup> They examined 248 cases from the 1985 to the 1994 Supreme Court terms in which one of the parties argued that a state or federal law was invalid.<sup>101</sup> Segal and Howard then evaluated the frequency with which individual Justices supported a finding of unconstitutionality, depending on whether the request was made by liberals or conservatives.<sup>102</sup> After examining other potential determinants of the outcome, the authors concluded that “ideological considerations predominate in the decision to strike legislation.”<sup>103</sup>

In a more recent publication in the *Journal of Empirical Legal Studies*, Rorie Spill Solberg and Stefanie Lindquist analyzed Justices’ votes to invalidate state and federal legislation for the period from 1986 to 2000.<sup>104</sup> This study focused on whether the conservative Justices’ expressed desire to protect states’ rights via an enhanced federalism doctrine actually structured their exercise of judicial review, or whether their votes to invalidate state and federal legislation were better explained in terms of the ideological direction of the statute at issue.<sup>105</sup> The authors found that the Justices’ preference for certain substantive policies trumped their professed concern for deference to state law and legislative policy.<sup>106</sup>

In another recent study, Lori Ringhand conducted an analysis of the data summarized in Gewirtz and Golder’s *New York Times* editorial.<sup>107</sup> She confirmed their finding that the conservative Justices of the Rehnquist Court were distinctly more likely to invalidate federal legislation and overturn precedent than the liberal Justices.<sup>108</sup> In addition, Ringhand

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voted in cases where the Court declared statutes unconstitutional between 1953 and 1989).

99. SEGAL & SPAETH, *supra* note 36, at 415.

100. See Howard & Segal, *supra* note 23, at 131.

101. See *id.* at 134.

102. See *id.* at 136.

103. *Id.* at 138. For example, Justice Brennan was fifty percent more likely to strike down a conservative law than a liberal law. See *id.*

104. Solberg & Lindquist, *supra* note 47, at 239.

105. See *id.* at 237.

106. See *id.*

107. See Ringhand, *supra* note 26 (manuscript at 2).

108. See *id.* (manuscript at 7–8, 27). This difference was largely due to federalism cases in which the conservatives were far more likely to strike down

expanded on the limited editorial to find that the Court's liberal Justices were more likely to invalidate state legislation.<sup>109</sup> However, she concluded that the conservatives would overturn state legislation to advance conservative ends (such as in Takings Clause cases)<sup>110</sup> and even did so in the most legally contestable cases.<sup>111</sup> Thus, Ringhand confirmed the basic findings of the editorial.

To date, the empirical research exploring judicial activism has only scratched the surface. This research is limited in part because it focuses primarily on one dimension of judicial activism involving the invalidation of legislative enactments. In the next section, we seek to extend this empirical research by creating a more expansive measure of activism that accounts for additional factors. We then use that measure to evaluate the relative activism of the Justices on the Court since 1968.

## II. OPERATIONALIZING JUDICIAL ACTIVISM

As noted above, in this section we create a measure of judicial activism that is based on the Justices' propensity to invalidate legislation, but which also attempts to account for the strength of the legal case in favor of a statute's constitutionality. We begin with a discussion of the Justices' differential responses to state and federal legislation.

### A. REVIEWING THE RECORD OF JUDICIAL ACTIVISM: STATE AND FEDERAL

Evidence of some measures of judicial activism is readily available. One can simply count the number of times that each Justice voted to invalidate or uphold a federal law. This was the approach taken by Gewirtz and Golder in identifying conservative Justices as activist.<sup>112</sup> While this method provides useful insight into activism with respect to congressional en-

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federal statutes. There was relatively little difference in other case categories. *Id.* (manuscript at 9–10).

109. *See id.* (manuscript at 17). This difference was largely due to criminal procedure decisions. *See id.* (manuscript at 18–19).

110. *See id.* (manuscript at 23).

111. Ringhand found that conservatives were more likely to strike down federal statutes in close decisions (e.g., five-to-four minimum winning coalitions) than in easier cases (e.g., unanimous decisions). *See id.* (manuscript at 15). The same was true for decisions to invalidate state statutes. *Id.* (manuscript at 22–23).

112. *See* Gewirtz & Golder, *supra* note 95.

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actments, it is not comprehensive because it does not consider the invalidation of state statutes. Finding a state law unconstitutional also replaces an elected legislature's policy determination with a judicial decision, thus affecting the dynamics of federalism.

We acknowledge that striking down state laws is not necessarily comparable to invalidating federal laws. Judge Easterbrook argues that invalidating federal laws is more activist, contending that "it is more presumptuous for tenured federal officials to upset decisions of the political branches of the national government, than it is for the national government (of which judges are just agents) to impose its will on the states."<sup>113</sup> Thayer himself adopted this differential standard.<sup>114</sup> Striking down a federal law changes policy for an entire nation, at least theoretically, while invalidating a state law may affect the policy of only a single state. Thus, the invalidation of a federal law might be considered more significant and activist than the invalidation of a state law.

On the other hand, the invalidation of state laws can have important pragmatic implications. Arguably, the significance of such a decision is grounded more in the policy of the legislature's action than in the nature of the legislature itself. Certainly, many of the most dramatic and allegedly activist Supreme Court decisions, such as those involving substantive due process privacy interests,<sup>115</sup> typically involve the invalidation of state, rather than federal, laws. Moreover, striking down a single state's law may functionally implicate the laws of many other states and may even make unconstitutional a related federal law. Certainly, the principles enunciated in *Roe v. Wade*,<sup>116</sup> though they directly affected Texas law only, had a substantial impact on the laws of other states and even of the federal government.<sup>117</sup> Furthermore, legislators at any level of government

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113. Easterbrook, *supra* note 18, at 1404.

114. See Thayer, *supra* note 56, at 154–55 (arguing that "national courts" should grant great deference to the enactments of a "co-ordinate department" of the federal government).

115. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (declaring unconstitutional a Texas law prohibiting sexual relations between persons of the same sex).

116. 410 U.S. 113, 166 (1973) (finding a Texas abortion statute unconstitutional).

117. See Lynn D. Wardle, *The Quandry of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 863 (1999) ("*Roe* radically changed the substance of abortion law . . .").

will likely feel constrained by the Court's constitutional precedents, regardless of whether those precedents involve state or federal law.<sup>118</sup> Thus, the significance of precedents that invalidate state laws clearly extends far beyond the particular law challenged before the Court.

By contrast, the invalidation of a federal law on federalism grounds may not be practically very significant. For example, the *United States v. Lopez* decision, striking down the federal law banning guns in schools on federalism grounds,<sup>119</sup> may be of little practical significance if states, localities, or even the schools enforce a similar ban.<sup>120</sup> Indeed, a decision striking down a federal law on federalism grounds may have much less practical effect than a decision striking down a state law on First Amendment grounds, because the former, at most, precludes only federal government action and not similar regulation by the states, while the latter can bar action by all levels of government. A federalism-based decision to strike a federal law may not even constrain the federal government significantly. The Supreme Court may permit much the same result through reliance on a different federal government power or through allowing legislation to overcome the Court's constitutional objection.<sup>121</sup> Neal Devins argues that the Rehnquist Court's decisions invalidating federal laws on federalism grounds—although much criticized by academics—do not impose onerous burdens or constraints on Congress in the law-making process.<sup>122</sup> Many of these decisions have given “Congress an opportunity to revisit the issue by making use of another source of

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118. See Laura Langer & Paul Brace, *The Preemptive Power of State Supreme Courts: Adoption of Abortion and Death Penalty Legislation*, 33 POLY STUD. J. 317, 317 (2005) (finding that state courts exert considerable preemptive power on the adoption of state legislation on abortion and the death penalty).

119. 514 U.S. 549, 549 (1995).

120. See Kerr, *supra* note 29, at 33 (observing that “*Lopez* resulted in very little change in substantive law” and left “state legislatures free to regulate guns in school zones”). Indeed, even the federal government could so regulate, with an amended law that had an interstate commerce condition, a law that was upheld. *Id.*

121. For example, after *Lopez* Congress reenacted the Gun-Free School Zones Act with a specific reference to interstate commerce. See Seth J. Safra, Note, *The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains*, 50 DUKE L.J. 637, 637–38 (2000).

122. Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making but Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1311–14 (2002).

federal power,” but Congress has not done so.<sup>123</sup> Thus, decisions invalidating federal legislation are not necessarily more politically intrusive and judicially activist than decisions invalidating state legislation.

Nonetheless, the two types of decisions are not strictly comparable, if only because scholars cannot agree on whether, according to the principles of federalism, invalidating a federal law is more legally valid and hence less activist than invalidating a state law, or vice versa. We maintain neutrality on the proper role of federalism, however, and do not ascribe greater or lesser activism to either type of statutory invalidation.

#### B. CREATING AN EMPIRICAL MEASURE OF ACTIVISM

Measuring judicial activism systematically across multiple cases and indicators would clearly represent a methodological advance over anecdotal discussion of individual cases or even over quantitative measures that reflect only one dimension or characteristic behavior associated with the concept. The absence of a precise definition of judicial activism complicates such a test but does not render the project impossible. Judge O’Scannlain argues that to identify activism, one “must establish a non-controversial benchmark by which to evaluate how far from the ‘correct’ decision the supposedly activist judge has strayed.”<sup>124</sup> This standard probably necessitates unreliable second-guessing of the Court’s legal judgments and is not amenable to empirical testing.<sup>125</sup> Moreover, Judge O’Scannlain’s standard is useful only when assessing individual decisions. However, even if it is difficult to argue that a specific decision is or is not activist, we believe that some systematic tendencies of activist decision making can be studied. The following section sets forth such an approach.

##### 1. Voting Behavior in Judicial Review Cases

For purposes of constructing a more systematic measure of judicial activism, we begin with the conventional measure re-

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123. *Id.* at 1316.

124. O’Scannlain, *supra* note 37, at 23.

125. Orin Kerr notes that “reasonable people can disagree on many legal questions” and that the evaluators’ “experiences, biases, and policy preferences” color their views, so that reliable identification of judicial activism is difficult. Kerr, *supra* note 29, at 32. William Marshall undertakes an excellent review of the Rehnquist Court’s alleged judicial activism on this case correctness standard. *See* Marshall, *supra* note 15, at 1220.

flecting the Justices' propensity to invalidate legislative enactments. As noted above, the simplest measure of activism involves the frequency with which Justices vote to strike statutes.<sup>126</sup> While incomplete, it provides relevant and valuable information. Above and beyond the prior research, it is important to consider not just the absolute number of statutes invalidated but the proportion invalidated in response to a challenge. In addition, it is also important to distinguish between federal and state statutes.

To gather data on the Justices' votes in cases involving judicial review of federal and state enactments, we began with the Original United States Supreme Court Judicial Database and the United States Supreme Court Justice-Centered Databases compiled by Harold J. Spaeth and Sara C. Benesh.<sup>127</sup> These databases include the "authdec" variables, variables that enable the researcher to identify cases in which a constitutional provision was cited in support of a particular decision.<sup>128</sup> We then read each such decision to determine whether a constitutional challenge was brought to a federal or state statute as opposed to an administrative or other type of action. Because our database incorporates all cases in which the Justices were presented with the opportunity to invalidate a challenged statute, we were able to consider not only the Justices' votes to invalidate statutes, but also their votes to uphold them. We then reviewed concurring and dissenting opinions in these cases to ensure that these Justices actually passed on the statute's constitutionality. We also read each decision to code for the presence or absence of other factors, including the participation of the Solicitor General.

Table 1 reports the percentage of votes to invalidate a statute given the presence of a constitutional challenge, distinguishing between federal and state laws in the Rehnquist Court (1986–2004). Several findings are immediately obvious from these data. First, there is a clear discrepancy in the Justices' responses to state and federal challenges. Justice Black-

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126. See *supra* Part I.B.

127. The S. Sidney Ulmer Project: U.S. Supreme Court Databases, <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm> (last visited Apr. 22, 2007).

128. See, e.g., HOWARD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE: 1953–2005 TERMS 39, [http://www.as.uky.edu/polisci/ulmerproject/allcourt\\_codebook.pdf](http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf) (“[The authdec] variables specify the bases on which the Supreme Court rested its decision with regard to each legal provision that the Court considered in the case . . .”).

mun, for example, was far more likely to strike a state law than a federal law. This trend was not universal, however, as Justices O'Connor and Kennedy voted to strike down state and federal laws at roughly the same ratio. Second, there are superficially obvious differences in the Justices' willingness to invalidate statutes. Justice Brennan, for example, was more likely to strike both state and federal statutes than were other Justices. In contrast, Justices White and Powell were far less likely to vote to invalidate either state or federal enactments when compared to their brethren.

**Table 1: Statutory Invalidation in the Rehnquist Court**

<b>Justice</b>	<b>Federal</b>	<b>State</b>
Marshall	41%	64%
Brennan	54%	65%
Blackmun	35%	62%
Breyer	36%	51%
Ginsburg	37%	54%
Kennedy	49%	48%
O'Connor	43%	44%
Powell	28%	33%
Rehnquist	36%	24%
Scalia	46%	39%
Souter	43%	59%
Stevens	31%	65%
Thomas	54%	37%
White	9%	39%

The same analysis was conducted for Justices of the Burger Court (1969–1985), and the results are reported in table 2. The Burger Court statistics demonstrate greater disparities among the Justices in terms of their willingness to invalidate statutes. Justice Douglas, for example, voted to invalidate federal enactments in 80% of the cases in which such a statute was challenged, and a remarkable 84% of cases in which a state statute was challenged. In contrast, Justice Rehnquist stands out among his fellow Justices in terms of his clearly restraint-oriented jurisprudence, voting to strike state and federal statutes in only about 20% of cases in which a constitutional challenge was brought.

**Table 2: Statutory Invalidation in the Burger Court**

<b>Justice</b>	<b>Federal</b>	<b>State</b>
Marshall	51%	75%
Brennan	50%	74%
White	26%	46%
Blackmun	21%	51%
Powell	22%	49%
Rehnquist	19%	20%
Stevens	29%	61%
O'Connor	35%	30%
Stewart	33%	52%
Burger	20%	38%
Douglas	80%	84%
Black	62%	59%
Harlan	38%	58%

These frequency distributions provide some basis upon which to compare the Justices' activism in these two recent Courts. Yet used alone, this simple measure of activism is incomplete to the extent that some votes to invalidate legislation are arguably more "legally legitimate" than others. In the next section, we modify this initial measure of activism by incorporating additional considerations into a total measure of activism, including the extent to which the Justices appear to be driven by their ideological preferences in connection with the exercise of judicial review, and the degree of consensus behind the decision to invalidate or uphold enactments.

## 2. Additional Considerations: Ideology and Consensus

As noted above, one major concern animating critics of judicial activism is that activist Justices "legislate from the bench" by voting to invalidate or uphold statutes based on their personal policy preferences rather than on legal principles. Thus, one indicator of such "inappropriate" result-oriented activism would be the extent to which the Justices vote to invalidate legislation based on that legislation's substantive or policy content. A Justice who exercises the power of judicial review without regard for the ideological direction of the statute at issue is arguably less activist than one whose votes appear driven by his or her attitudinal reaction to the substantive policy embodied in the enactment. To control for variation in the Justices' ideological orientations toward judicial review, we calculated the relationship between each Justice's votes to invali-

date legislation and the substantive policy content of the challenged enactment.<sup>129</sup> We constructed a simple two-by-two table to reflect the relationship between (1) the number of votes to uphold or strike legislation and (2) the ideological direction of the statutory policy at issue. We then performed a chi-square test to determine if the statutes' ideological direction relates to the Justices' votes to strike.<sup>130</sup> This test provided us with a chi-square test statistic for each Justice reflecting the strength of the relationship between these two variables. Because these values were highly skewed, for purposes of constructing our measure we took the natural log of each Justice's chi-square statistic.

In addition, we created two variables to reflect the Justices' willingness to vote to invalidate enactments in situations where less consensus existed regarding the statutes' constitutionality. As noted above, there is no sound way to measure the strength of a case or the correct outcome, but there are measures that may serve as proxies for case strength. One such proxy is the Solicitor General's position on behalf of the United States. In our database of all cases involving judicial review of federal or state legislation, the Solicitor General participated often as either a party or an amicus. While the position of the Solicitor General is influenced to some degree by the ideological orientation of the executive branch, the Solicitor is regarded as a fair broker in these cases and sometimes is called the "Tenth Justice."<sup>131</sup> Observers claim that he has historically been com-

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129. The statute's coding was based on the Spaeth Database codes reflecting the ideological direction of the case outcome. If the decision to strike the statute was coded as liberal, the statute was deemed conservative. Thus, if a Supreme Court decision struck down a statute limiting the right to obtain an abortion (coded liberal), the underlying statute restricting the right to obtain an abortion was deemed conservative. See The S. Sidney Ulmer Project, The U.S. Courts of Appeals Database, <http://www.as.uky.edu/polisci/ulmerproject/apcdata.htm> (last visited Apr. 22, 2007) (describing the overall methodology for ideological coding).

130. As expected, most of the Justices showed an ideological determinant in their decision to strike a statute. These ranged from Justice Powell, who showed no statistically significant ideological determinant, to Justice Blackmun, who showed the highest ideological effect.

131. See, e.g., Drew S. Days, III, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 509-10 (2001) (describing the President's occasional influence on the Solicitor General, but highlighting the broad tradition of independence); David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2085 (1994) ("[B]y and large, Solicitors General have been free to formulate positions and make

mitted to the “rule of law” rather than to a partisan agenda.<sup>132</sup> Indeed, the Supreme Court sometimes requests the Solicitor’s views on a legal dispute, as the office commands a “unique respect” at the Court.<sup>133</sup> Invalidating statutes defended by the Solicitor is thus arguably more activist to the extent the Solicitor’s position indicates something about the strength of legal arguments in support of a statute’s constitutionality, while invalidating a statute that the Solicitor opposed might not be considered an activist decision at all.<sup>134</sup> Indeed, the Solicitor is used in other research as control variable for decisions on unconstitutionality.<sup>135</sup> We recognize the ideological bias that is possible in connection with this measure, as the Solicitor’s office does often represent the President’s position. But we think this possibility does not render the measure invalid as a reflection on the legal strength of the Solicitor’s position given the nature of the Solicitor’s role. Moreover, the variable also measures the Justices’ overall level of deference to a coordinate branch. Thus, even if it does not perfectly measure the legal strength of a particular position, it does measure a Justice’s willingness to defy a coequal institution within the federal government, an important consideration in connection with the evaluation of judicial activism. While the Solicitor General’s position may not precisely capture legal accuracy, therefore, it

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arguments before the Supreme Court without undue interference from other elements of the executive branch.”). Some empirical research indicates that the executive branch ideologically influences the Solicitor, but the Solicitor best advances his client’s goals by respecting the institutional limits placed on the Court. See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 104–05, 174–75 (1992).

132. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 3, 33–50, 277 (1987). Lincoln Caplan however notes that during the Reagan Administration the Solicitor General became a partisan advocate for the administration. *Id.* at 268–77.

133. See David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 *LAW & CONTEMP. PROBS.* 165, 172–73 (1998) (discussing the Solicitor’s reputation at the Court); Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 *STAN. L. REV.* 1115, 1117–18 (2001) (discussing the Solicitor General’s substantive and procedural influences on the Supreme Court).

134. See Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 *SMU L. REV.* 73, 79 (1995) (“Because of the respect to which the Congress is entitled as a coordinate branch of the government, Solicitors General traditionally have recognized a general duty to defend congressional statutes against constitutional challenges.”).

135. See SEGAL & SPAETH, *supra* note 83, at 313; Howard & Segal, *supra* note 23, at 138.

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nonetheless may contribute useful information to a measure of judicial activism.<sup>136</sup>

To incorporate the Solicitor's position in our activism scale, we created a measure reflecting the degree to which the individual Justices voted in conformity with or in opposition to the Solicitor's position in all cases in which the Solicitor took a position on the statute at issue as either a party representative or an amicus. Again, we used the chi-square measure to reflect the strength of the relationship between the Solicitor's position and the Justices' vote in support of or in opposition to an enactment's constitutionality. We regarded a ruling that is contrary to the Solicitor's position as more activist. Because this variable was highly skewed, we transformed it by taking its natural log.

In addition to a Justice's overall level of agreement with the Solicitor, we also developed a measure reflecting the general level of consensus behind his or her votes in these judicial review cases. Our rationale for this factor rests on the notion that a decision appears more result-oriented if it is the product of a narrow coalition of ideologically like-minded Justices.<sup>137</sup> By contrast, a unanimous opinion or decision in which liberals and conservatives combine to invalidate or uphold a statute appears less ideological and more likely to be grounded in "legitimate" constitutional principles. For these reasons, we developed a measure of the average size of the coalition joined by each Justice in cases in which the Justice voted to invalidate an enactment. For the nineteen Justices in our sample,<sup>138</sup> this variable ranged from a low mean coalition size of 5.45 Justices to a high of 8.25 Justices. This measure contains some possible bias because it discriminates against the minority ideological coalition on the Court. Thus, if most of the Justices were conservative and voted ideologically, liberal Justices might falsely appear

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136. See Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 *LAW & SOC'Y REV.* 135, 155 (2006) (noting that the Court might adopt the Solicitor General's position because it reflects the "legally stronger position," but the position might appeal to the Justices regardless, because of their preference for deferring to the executive).

137. Those who argue that a statute may be invalidated only by a supermajority of the Court advocate for the use of this standard. See generally Caminker, *supra* note 59, at 94–101 (describing the mechanics of a supermajority voting protocol as applied to the Supreme Court).

138. We pooled the Rehnquist and Burger Courts to provide data for all Justices who served between 1969 and 2004.

more activist, when in fact the conservative majority was the group acting ideologically. For this reason, we constructed our composite measure of activism with and without this variable, as discussed below.

### 3. Deriving a Composite Measure of Activism

Our research objective was to create a measure of judicial activism that moves beyond simple voting frequencies to incorporate other factors related to activism and restraint, including the Justices' ideological orientations and the legal strength of their choices to invalidate legislation. To do so, we began by calculating vote frequencies (decisions to strike or uphold laws) separately for state and federal statutes for each of the nineteen Justices in our database. For this purpose, we did not distinguish between the Burger and Rehnquist Courts, but simply pooled the Justices in our sample to construct a measure comparing the Justices across the entire time period. We then factor analyzed these vote frequencies per Justice with three other variables: (1) the Justice's ideological consistency, as measured by the chi-square statistic reflecting the relationship between ideology and the Justices' votes to strike; (2) the consistency with which the Justice agreed with the Solicitor, also measured by a chi-square statistic; and (3) the average coalition size supporting the Justice's voting positions.

Factor analysis is a useful statistical technique in our study for the purpose of data reduction. In particular, factor analysis identifies patterns of variation among subjects' characteristics by taking correlated measures and reducing them to a single underlying dimension.<sup>139</sup> It is also a useful method for creating a scale that reflects the subjects' relative rating or ranking on the characteristics of interest, in this case judicial activism. For our purposes, we used the technique to construct a scale that enabled us to score the individual Justices in terms of their levels of activism, taking into account the variables described above.

We factor analyzed the variables using principle factor analysis, with varimax orthogonal rotation. The procedure produced one factor with an eigenvalue substantially greater than

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139. See generally RAYMOND B. CATTELL, *THE SCIENTIFIC USE OF FACTOR ANALYSIS IN BEHAVIORAL AND LIFE SCIENCES* 493–537 (1978) (describing how to conduct factor analytic research); ALLEN YATES, *MULTIVARIATE EXPLORATORY DATA ANALYSIS: A PERSPECTIVE ON EXPLORATORY FACTOR ANALYSIS* 9–27 (1987) (discussing the mechanics of the factor analysis model).

one; we thus retained that one factor for purposes of constructing the factor score reflecting levels of judicial activism.<sup>140</sup> The factor scores are standardized in that they are scaled with a mean of zero and with about two-thirds of the values falling between +1.00 and -1.00. For that reason, scores that are greater than +1.00 or less than -1.00 constitute outliers.<sup>141</sup> The factor scores, along with the vote frequencies in judicial review cases, are presented in table 3. Positive values are associated with greater activism.

**Table 3: Judicial Activism Scores, 1969–2004**

<b>Justice</b>	<b>Statutory Invalidation Federal and State (rank)</b>	<b>Overall Activism Factor Score (rank)</b>	<b>Factor Score Without Coalition Size (rank)</b>
Marshall	67.32 (3)	1.548 (3)	1.215 (3)
Brennan	67.34 (2)	1.932 (1)	1.706 (2)
Douglas	83.23 (1)	1.846 (2)	1.965 (1)
Stevens	53.45 (5)	.224 (6)	-.279 (10)
Blackmun	47.01 (9)	-.427 (13)	-.656 (15)
Thomas	43.93 (13)	.582 (4)	.244 (5)
Rehnquist	23.54 (19)	-.508 (15)	-.867 (17)
Souter	52.75 (6)	.193 (7)	-.023 (7)
Scalia	41.58 (14)	-.041 (9)	-.384 (13)
Ginsburg	46.85 (11)	.168 (8)	-.136 (8)
O'Connor	40.05 (16)	-.409 (12)	-.440 (14)
Stewart	47.73 (10)	-.406 (11)	-.221 (9)
Black	59.52 (4)	.319 (5)	1.120 (4)
White	39.60 (17)	-1.003 (17)	-1.020 (18)
Kennedy	48.13 (8)	-.436 (14)	-.295 (11)
Breyer	44.19 (12)	-.139 (10)	-.308 (12)
Powell	41.39 (15)	-.853 (16)	-.681 (16)
Burger	33.85 (18)	-1.281 (18)	-1.057 (19)
Harlan*	51.28 (7)	-1.306 (19)	.120 (6)

\* Harlan's scores are based on a limited number of votes; his scores are thus not reliable estimates.

The most activist Justices for the full era are clearly the liberal Warren Court holdovers, including Justices Marshall, Brennan, and Douglas. In contrast, the least activist Justices

140. Use of principal component analysis produced substantially similar activism scores for the Justices. The factor loadings for our variables were: (1) Average Coalition Size: -.724; (2) Frequency of State Statute Invalidation: .650; (3) Frequency of Federal Statute Invalidation: .708; (4) Solicitor Support (Logged): -.683; and (5) Ideological Consistency (Logged): .690.

141. See R.J. RUMMEL, *APPLIED FACTOR ANALYSIS* 278–79 (1970) (discussing a technique for determining an outlier).

include Justices Burger and White. In addition, over the course of his career on the Court, Justice Rehnquist was also among the least activist Justices. Other Justices, including some who advocate a more restraintist orientation rhetorically, did not generate particularly low activism scores. For example, although Justices Thomas and Scalia often claim that Justices should not undermine democratic processes through the exercise of judicial review, they nevertheless ranked fourth and ninth, respectively, among the nineteen Justices we evaluated.

As noted above, we also calculated the activism scores without the coalition variable, on grounds that the average coalition size supporting a Justice's position may be biased by the ideological balance on the Court. Although the scores with and without the coalition size variable are substantially the same, some Justices, such as Justices Blackmun, Rehnquist and Stevens, appear less activist when coalition size is eliminated from consideration. Conversely, others, such as Justice Kennedy, see an increase in their activism scores.

One limitation to this scaling method involves the comparability of cases considered by the various Justices in our sample. Justice Brennan ruled on entirely different challenges than did Justice Breyer, who took Justice Brennan's position on the Court, and this fact inevitably limits direct comparisons of their activism. The truest comparison of relative activism would necessarily involve Justices hearing exactly the same cases. To overcome the "different case" problem, we created a cumulative score for the most recent natural court, beginning with Justice Breyer's appointment to Justice Brennan's position on the bench.

Unfortunately, nine Justices are too few to permit a valid factor analysis, so we constructed an activism score for these Justices using a different method. First, we standardized the component variables (ideology chi-square, Solicitor chi-square and average coalition size) as z-scores because they are measured on different metrics.<sup>142</sup> We then created a cumulative scale of these scores after switching signs where appropriate. Table 4 reports these cumulative activism scores for the common cases heard by the Rehnquist Natural Court (1994–2004).

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142. In the original factor analysis, this standardization was not necessary because the method of factor analysis standardized the constituent variables.

**Table 4: Judicial Activism Scores, Rehnquist Natural Court, 1994–2004**

Justice	Cumulative Activism Scale (rank)
Rehnquist	-1.781 (7)
Thomas	2.809 (2)
Scalia	1.946 (3)
Souter	1.640 (4)
Ginsburg	.323 (5)
Stevens	2.966 (1)
Kennedy	-.123 (6)
O'Connor	-4.151 (9)
Breyer	-3.630 (8)

In considering these scores, it is important to recognize that they are useful as a metric for internal comparisons of the Justices on the Rehnquist Court only, as they rely on a different scaling technique than the scores generated in table 3. The results of this analysis confirm recent observations that Justices Scalia and Thomas were relatively more activist in the last eleven years of the Rehnquist Court, although Justice Stevens was likewise activist, and that the Justices generally considered to be centrist were the least activist. The activism of the current Justices, however, pales next to the historic activism of Justices Marshall, Brennan, and Douglas, as evidenced in table 3.

The accuracy of our activism scale depends on the validity of its components. The Justices varied significantly across the three variables we created measuring ideological consistency, deference to the Solicitor, and average supporting coalition size. More finely grained analyses of activism might be instructive. For example, one might study the relative activism of Justices for different categories of constitutional challenges or different categories of underlying statutes. A more refined measure of activism would also take into account deference to existing precedent. Yet the measures we created reflect an initial effort to assess the Justices' relative activism while taking into account considerations beyond their votes to invalidate legislative enactments. And while in most cases our measure confirms existing portrayals of the individual Justices, it does suggest that alternative considerations can affect our assessments of the Justices' relative positions as activist or restraintist jurists.

## CONCLUSION

As noted above, our approach to measuring judicial activism attempts to move beyond current measurement techniques to incorporate other relevant considerations into an assessment of activism and restraint. As it represents an initial effort to consider these alternative factors, it remains incomplete. Our legal qualifying variables do not entirely capture the legal validity of the constitutional challenge, and each has its own imperfections. Future researchers may design new metrics to capture the “legal validity” of the Court’s decision to strike or uphold a given statute.

Furthermore, our objective in this Article was to present a purely descriptive measure of judicial activism. We do not presume that judicial activism is a good or bad thing, and one could make a strong theoretical argument that a given Justice was too deferential and insufficiently activist (e.g., Justice White in review of federal statutes). Our baseline for activism is essentially a Thayerian one, characterizing as activist those statutory invalidations where unconstitutionality is not perfectly clear as a legal matter.

The scaling of activism does demonstrate that recent complaints about the unusually aggressive conservative judicial activism find only modest support. While conservative Justices such as Scalia and Thomas were relatively activist in the context of the Rehnquist Court, their relative degree of activism was substantially less than the activism of the liberal Warren Court holdovers on the Burger Court. And while the later years of the Rehnquist Court witnessed a period of conservative activism, this activism was fairly modest when viewed in historic context.