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Taking Lessons from the Left?: Judicial Activism on the Right

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I. INTRODUCTION

At the outset, let me say that I am delighted and honored to participate in this inaugural issue of the *Georgetown Journal of Law & Public Policy*. This Journal responds to a pervasive problem in the legal academy: the underrepresentation of conservative scholarship in many of the leading law reviews. It is therefore essential that journals such as this one exist to provide a needed outlet for conservative thought, which continues to receive only scant, marginalized attention from the top law reviews more than a decade after such ideas reached ascendancy on the Supreme Court of the United States. Needless to say, conservative legal thought is neither infallible nor inevitably correct—no brand of human thought is. If, however, truth and genuine understanding are the aims of scholarship (and they should be), then a necessary condition is an open marketplace of ideas, one in which all sorts of viewpoints have the opportunity to compete and be heard. This journal, in short, is an idea whose time has come, and I am particularly glad that the sometimes (oftentimes?) beleaguered conservative law students at Georgetown University will finally have a forum where their bright ideas and creative energies will find a hospitable reception.

The topic I would like to address in this essay is the subject of conservative judicial activism. Dismayed at the boldness of the Rehnquist Court's conservative majority in areas such as affirmative action and race-based redistricting,[1] federalism,[2] takings law,[3] and my own field of constitutional criminal procedure,[4] critics have accused the Court of being "activist."[5] These attacks have become almost ubiquitous now, to the point that it is increasingly difficult to find any area of the Rehnquist Court's jurisprudence that has *not* been con-

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1. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

2. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); Printz v. United States, 521 U.S. 98 (1997); United States v. Lopez, 514 U.S. 549 (1995).

3. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

4. *See, e.g.*, Portuondo v. Agard, 529 U.S. 61 (2000); Payne v. Tennessee, 501 U.S. 808 (1991); Teague v. Lane, 489 U.S. 288 (1989); McKleskey v. Kemp, 481 U.S. 279 (1987).

5. For two illustrative examples, see Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367 (1996).

demned as activist.[6] Perhaps this is not surprising; the term "activism" packs a powerful rhetorical punch, especially when applied to conservative judges, whose self-image is that of legal technicians interpreting and applying—not "making"—the law. What is surprising, however, is how sharp and often vituperative the accusations of conservative judicial activism usually are.

A case in point is Erwin Chemerinsky's influential Foreword to the 1989 volume of the Harvard Law Review.[7] Just three years into the life of the Rehnquist Court, Professor Chemerinsky proclaimed that, due to the Court's conservative judicial philosophy, the Constitution itself—and, along with it, the cherished civil liberties that are our birthright as Americans—was "vanishing."[8] In his view, the Constitution is becoming a thing of the mind, with the rights of citizens and the scope of governmental authority being controlled, as he puts it in a later piece, by the "right-wing political agenda."[9] Pretty scary stuff, if you ask me. Naturally, this leads one to wonder how this band of enemies domestic ever got on the Supreme Court (or past the character and fitness review of their local bar examiners) in the first place.

I find at least two things striking about these lines of attacks on the current Court. The first is their hypocrisy. Although Professor Chemerinsky and like-minded critics never seem to miss an occasion to bash the Court for activism that tilts to the right, they are all too content to look the other way—and, even more often, affirmatively applaud—activism of the opposite political bent.[10] Take, for example, criminal procedure.

The Warren Court was serially activist or, as another commentator aptly put it, "promiscuous" in its "jurisprudential creativity."[11] It invented unprecedented constitutional rights (such as the right of suspects to warnings of their rights not to submit to police interrogation and to have a lawyer present during questioning).[12] The Warren Court also read into the Fourth Amendment the rule that probative evidence must be excluded at trial if it was illegally obtained.[13] This rule, historically speaking, had been rejected in Anglo-American legal systems

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6. *See, e.g.*, Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 413 n.134 (1997) (describing as "activist" the Rehnquist Court's conservative decisions "on federalism, affirmative action, minority voting rights, campaign finance reform, hate speech regulations, and environmental land use restrictions").

7. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 (1989).

8. *Id.* at 47.

9. Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999) (hereinafter, Chemerinsky, *Oxymoron*); *see also, e.g.*, Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1128 (1991) (describing the Rehnquist Court as "alien and hostile, less devoted to reaffirming and actualizing our national ideals than to protecting the established order").

10. *See* Lino A. Graglia, *Judicial Activism of the Right: A Mistaken and Futile Hope*, *in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 85-86 (E. Paul & H. Dickman eds., 1990) (noting the trend of scholars to "defend judicial activism on the left by declaring left-wing judicial activists American heroes" yet condemn activism of the right as a "judicial usurpation of lawmaking power").

11. Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817, 830 n.49 (1993).

12. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

13. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

in favor of preserving the truth-seeking functions of trials and had been specifically rejected as a constitutional mandate in state court cases.[14] The Warren Court's lawmaking in criminal procedure was so pervasive, and so unconcerned about notions of federalism or deference to majoritarian policy choices, that criminal procedure today stands almost entirely federalized—which is why we now speak of "*constitutional* criminal procedure" instead of simply "criminal procedure."[15]

In the Warren Court's defense, it should be noted that state courts at the time had consistently proven to be remarkably insensitive to certain kinds of gross miscarriages of justice. This insensitivity was nowhere greater than in Southern courts trying black defendants for serious crimes (typically, murder and rape) against whites.[16] In response to the ugly face of racism in the criminal justice system, the Court proceeded to constitutionalize criminal procedure and thereby transferred to the federal courts the ultimate responsibility for deciding the fairness of state criminal trials nationwide. It was only natural—and, I would argue, *justified*—for a Court witnessing Jim Crow-style "justice," in case after case, to intervene. After all, the Fourteenth Amendment explicitly guarantees all citizens the right to "equal protection of the laws," an unquestioned mandate for the federal courts to protect blacks against racist state action in the criminal justice system and elsewhere, and the Due Process Clause invalidates unfair trial procedures that aggravate the risk that factually innocent defendants will be convicted.[17]

Where the Court so grievously erred, in my view, was not in doing something to address racial injustice in criminal trials, but rather in responding in a patently overbroad way to the very real problem of race. The Court apparently viewed itself as having only a binary set of options in responding to state-sponsored racism: either do nothing (and thereby allow racism in state prosecutions to go unchecked) or constitutionalize criminal procedure in its entirety. Clearly, however, if mistreatment of black suspects and black defendants was really the operative concern (as opposed to more generalized doubts concerning the fairness of the criminal justice system generally for all defendants), then

14. *See* Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). In *Weeks v. United States*, the Supreme Court first adopted the concept of the exclusionary rule. *Wolf* held that, although the Fourth Amendment applied against the states, the implied remedy of exclusion did not. In terms of the historical approach to exclusion of illegally seized evidence, "exclusion is not and never has been the British rule" and, in America, there was no endorsement "from the Founding—or even the antebellum or Reconstruction eras—supporting Fourth Amendment exclusion of evidence in a criminal trial." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786, 789 (1994).

15. *See* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1132 (1996).

16. For an interesting survey of the travesties of justice that the Supreme Court encountered in criminal cases coming from the "Jim Crow" South, see Michael Klarman, *The Racial Origins Of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

17. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); Powell v. Alabama, 287 U.S. 45 (1932); Tumey v. Ohio, 273 U.S. 510 (1927); Moore v. Dempsey, 261 U.S. 86 (1923).

there was a third option available to the Court: the adoption of minimalist constitutional rules, grounded on the Equal Protection and Due Process Clauses, that were narrowly tailored to the problem of racism in the criminal justice system.[18]

Had the Court taken this kind of minimalist approach, racial injustice could have been effectively addressed. Of course, the task of policing the states would have been too large for the Court to have performed singlehandedly, but it did not face that daunting prospect because the Court had expanded habeas corpus to allow state prisoners to relitigate in the lower federal courts federal claims of error rejected in the state courts.[19] With the lower federal courts thus available to perform the close, case-specific scrutiny of state prosecutions that the Supreme Court was institutionally unable to perform, there was simply no need for overbroad rulings like *Miranda v. Arizona*. Inaccurate or unfair convictions produced by racism or other improper influences could be reversed for articulable reasons specific to the case in question without disturbing accurate convictions achieved through fair, nonracist means. This approach, though potentially more burdensome for the federal courts, might have made the ultimate decision to overturn the conviction more acceptable to state officials and the public and, in any event, would not have given a windfall to guilty defendants (black or white) who were fairly convicted for their crimes.

At the same time, however, a narrowly tailored, minimalist strategy would have addressed the problem of racism in a way that would not have provoked a

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18. This more incremental and focused response to racism had been the approach taken by prior Courts. For example, discriminatory exclusion of black jurors had been struck down on equal protection grounds, *see, e.g.*, Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880), and criminal trials conducted in a "lynch mob" atmosphere had been condemned as contrary to the fair adjudication required by due process, *see* Moore v. Dempsey, 261 U.S. 86 (1923). What was so distinctive about the Warren Court was its impatience with incremental steps as vehicles for constitutional change and its willingness to issue broad, sweeping rulings such as *Miranda v. Arizona*, 384 U.S. 436 (1966)—rulings more akin to legislative mandates than common law decisionmaking—to effect constitutional reform. *Miranda* is sometimes touted as a superior, more administrable mechanism for protecting the voluntariness of custodial confessions. Now, after sixty Supreme Court decisions and countless lower court rulings fleshing out what we now know as "*Miranda* doctrine," perhaps it is more administrable. The relevant question, however, is whether that considerable judicial manpower would have been better spent, in terms of helping suspects deal with coercive interrogation techniques, on trying to sort out "good" versus "bad" interrogation techniques. One thing that scholars from both ends of the spectrum seem to agree on is that that *Miranda* is a poor substitute for probing judicial inquiry into the voluntariness of confessions. *See* William J. Stuntz , Miranda*'s Mistake*, 99 MICH. L. REV. 975, 992 (2001) (arguing that "*Miranda* doesn't regulate police interrogation at all" but instead "leaves interrogation unregulated for most suspects, and forbidden for a few [i.e., those savvy enough not to talk without a lawyer present]"); Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 746 (1992) (noting that "there is a good deal of evidence that *Miranda* . . . traded the promise of substantial reform implicit in prior doctrine for a political symbol").

19. A habeas corpus case is a proceeding initiated in U.S. District Court in which a state prisoner challenges the legality of his conviction or sentence on federal law grounds. *See* 28 U.S.C. § 2254. Habeas corpus was originally quite limited in scope, but had been broadened by the 1960s to allow full-scale relitigation in federal court. *See* Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

"counterrevolution" by later conservative majorities on the Supreme Court. *Brown v. Board of Education*[20] is instructive. For all of the controversy that surrounded *Brown*'s issuance, the decision has been so enduring because the Court's decision striking down segregation was tied directly to race. Instead of trying to address wealth-driven differences in the quality of neighborhood schools or other inequities in public education, the Court rested on a morally compelling constitutional principle—racial equality—and thereby forced the nation to confront head-on the ugliness of racism in public education. Today, as a result, *de jure* segregation is a thing of the past, societal attitudes about race relations are far more progressive than they were during the 1950s, and *Brown* is "widely regarded as one of the great landmarks in the history of constitutional law."[21]

The story was considerably different, both in terms of judicial strategy and effectiveness, in criminal procedure. In place of the tailored approach that was critical to the long-term success of *Brown*, the Court used racial injustice as a sort of excuse in criminal procedure to "develop[] a series of formally race-neutral rules for constraining police, prosecutors, and the courts."[22] The breadth of the Court's takeover of criminal procedure had at least two perverse, unintended consequences. First, it shifted the focus of the debate away from racism and accuracy of results (where it ought to have been) to sterile rules of procedure often having little if any grounding in the Constitution. It also drove the costs of the Warren Court's new constitutional mandates, measured in terms of interference with legitimate law enforcement and the truth-finding function of criminal trials, to intolerable levels. Seen in this light, the Warren Court sowed the seeds of its own destruction, making the political revolution that swept Richard Nixon into the White House in 1968—and the "Counterrevolution" later waged by Nixon's appointees and those of his Republican successors on the Burger and Rehnquist Courts in criminal procedure—almost inevitable.[23]

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20. 347 U.S. 483 (1954).

21. Seidman, *supra* note 18, at 708. I should note that Professor Seidman's wonderfully thought-provoking article contends that *Brown* was a broad, aggressive decision no different from *Miranda* or other controversial Warren Court criminal procedure decisions. *Id.* at 678-79. In arguing that *Brown* was really a "tactical retreat[]" instead of a radical advance in social progress, *id.* at 680, however, Professor Seidman comes closer to my characterization of *Brown* as a narrowly tailored decision. As he put it, "once white society was willing to make facilities legally nonseparate [as *Brown* required], the demand for equality had been satisfied and blacks no longer had just cause for complaint" even though "many blacks remained poor and disempowered." *Id.* This seems to support my characterization of *Brown* as a decision that was narrowly tailored to the problem of race and public schools.

22. Pamela S. Karlan, *Race, Rights, And Remedies In Criminal Adjudication*, 96 MICH. L. REV. 2001, 2002 (1998).

23. The "Counterrevolution" in criminal procedure refers to the decades-long efforts by the Burger and Rehnquist Courts to roll-back the Warren Court's innovative rulings, and the Warren Court's innovations in criminal procedure are known as the "Revolution." *See* Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996). Legislatures played a leading role in the roll-back as well, as Professor Bill Stuntz has cogently argued: "As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. Severe limits on defense funding are the most obvious

Even the Warren Court's many defenders in the academy do not deny the radical, far-reaching nature of its jurisprudence. To the contrary, they commend the Court for undertaking what one admirer described as "a program of constitutional reform [that was] almost revolutionary in its aspiration and, now and then, in its accomplishments."[24] In taking this "revolutionary" course, the Court tossed aside so many established precedents that "[t]he list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."[25] Defenders of the Warren Court applaud the Court's activism in constitutional criminal procedure, as in other areas, yet now bitterly criticize the Rehnquist Court for being activist, including in the same areas and in the same manner in which the Warren Court had been activist decades earlier.[26]

For example, Professor Chemerinsky describes the Rehnquist Court as an "activist" and, indeed, "disast[rous]" Court because it "shows little deference to the majoritarian branches of government and . . . has little respect for precedent."[27] By this measure, of course, the Warren Court itself could hardly be described as any less "disastrous" than the Rehnquist Court, and may well have been the most "disastrous" Court in history. Without having done a precise study myself, I suspect that the Warren Court overturned far more precedents and, taking into account criminal convictions, disturbed far more exercises of state and federal governmental power than the Rehnquist Court has or ever will. If willingness to overturn precedent and actions of the political branches is the criterion, then, perhaps the Rehnquist Court has been "disastrous"—but, then again, so has the Warren Court and probably every other Court in history. The only way out of this box for defenders of the Warren Court is to contend that liberal judicial activism is permissible whereas conservative judicial activism is not.

As an aside, it is worth remembering that it was not always this way in liberal constitutional law scholarship. During the infamous "*Lochner* era," named after *Lochner v. New York*,[28] the Court's activism tilted to the right, protecting "liberty to contract" from what was perceived to be undue interference by social

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example, but not the only one. Expanded criminal liability makes it easier for the government to induce guilty pleas, as do high mandatory sentences that serve as useful threats against recalcitrant defendants. And guilty pleas avoid most of the potentially costly requirements that criminal procedure imposes." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997).

24. Fiss, *supra* note 9, at 1118.

25. PHILIP B. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 90-91 (1970).

26. Conservatives do not escape the charge of hypocrisy either: they thundered against the liberal activism of the Warren Court, for example, but are all too willing to remain silent as the Rehnquist Court resorts to activism in pursuit of conservative ends. This form of conservative hypocrisy mirrors bold conservative proclamations about the evil of treating people differently on grounds of race in attacking affirmative action, but these same proponents of racial equality somehow see no need to condemn discrimination against minorities—only "reverse discrimination," it would seem, is of concern to them.

27. Chemerinsky, *Oxymoron*, *supra* note 9, at 37.

28. 198 U.S. 45 (1905).

reform-minded state legislatures and Congress by striking down close to two hundred economic regulatory measures.[29] Liberal scholars condemned the Court, but not on the ground that the Court was reaching politically conservative results. Their objection, rather, was more fundamental and more compelling: *Lochner* was wrong because "it involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government."[30]

In any event, the notion that whether activism is proper or not depends entirely on whether the judge is enforcing the "right" values, or reaching the "right" results, strikes me as profoundly hypocritical. If activism is acceptable from the Warren Court, and if activism is a proper means of advancing a liberal vision of law, how can it possibly be objectionable when employed by later courts and judges for purposes different from those that motivated Chief Justice Warren? The Constitution is not a one-way liberal ratchet any more than it is a one-way conservative or libertarian (or anything else) ratchet.[31] To treat the document any differently—that is to say, to treat the Constitution as a "ventriloquist's dummy" and justices as "the puppeteer[s]"[32]—is to denigrate its importance and, indeed, to call into question the very legitimacy of judicial review.[33]

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29. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 739 (1986).

30. Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 874 (1987). It may well be that some of these critiques of *Lochner* were simply pretext for outcome-based disagreement with the Court. Still, the bulk of the then-contemporary liberal critiques of *Lochner* appear to have been genuinely motivated by a conviction that the Court had been engaging in "judicial legislation" in service of its own ideological ends. *See generally* Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218 (Vincent Blasi ed., 1983) (explaining that for liberal scholars during the New Deal, *Lochner* was "a highly personal and often formative experience" that gave rise to their "endlessly [writing] about judicial self-restraint"). We see the opposite phenomenon now: the first brush of leading members of the academy today with activism was with Warren's liberal activism. To fans of Justice Warren's bold initiatives, restraint was an obstacle to progress in the fight against injustice—and, I readily concede, many of the Court's results *were* commendable, as a moral matter, in terms of the racism and other social ills against which the Court took aim. To them, the Warren Court legacy showed the considerable good that an activist court could accomplish if freed from the bounds of precedent and law. With that realization, the ghosts of *Lochner* were exorcised from their collective consciousness, to be reawakened only decades later when the Court fell into unfriendly—that is to say, conservative—hands.

31. For an interesting critique of the "one-way ratchet" approach to constitutional law, described (in the terminology of voting rights law) as "non-retrogression" on rights, see John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211 (1998).

32. Amar, *supra* note 15, at 1130.

33. Once extra-constitutional values and norms are read into the Constitution, and text and structure disregarded in pursuit of worthy but nonetheless indeterminate goals like "fairness" and "justice," then, *regardless* of whether the judge's politics tilt to the left or to the right, politically unaccountable judges will be setting aside popularly enacted measures without warrant in the "fundamental law" that is the Constitution. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 176 (1803). If judges are permitted to strike down laws or criminal convictions based on mere disagreement with legislative policy judgments, self-government will become the exception rather than the rule because, as de Tocqueville wrote, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 Alexis de Tocqueville, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed. & Henry Reeve et al. trans., Vintage Books 1990).

The second striking aspect of recent attacks on the Rehnquist Court's purported activism is the bankruptcy of the attackers' concept of "activism," a problem inherent in many contemporary uses of the term "activism." Once one cuts through the rhetorical underbrush, such uses of the term "activism" are usually revealed as intellectually bankrupt, signifying nothing more than mere disagreement with a decision as an intellectual or policy matter. In the vast majority of cases, the accusation of activism is simply leveled, and readers are left to guess what notion of activism (if any) the accuser has in mind.[34] If, however, what "activism" means is that a result in a particular case is deemed erroneous or unwise as a policy matter, the term serves no useful purpose, except perhaps as a shorthand way of expressing disagreement over judicial outcomes.[35] In that instance, the debate would more profitably be focused on the correctness or wisdom of those outcomes directly instead of on the tangential, and ultimately empty, question of whether those outcomes are "activist"—a position that Professor Mark Tushnet ultimately advocates.[36]

I think this sensible response to current usage of the term "activism" nevertheless should be resisted. Despite current (mis)usage, a commonly held intuition underlying the concept of activism is that a judicial decision can be more than just wrong or unwise but actually improper or illegitimate.[37] As a result, to accuse a judge of "activism" is actually to suggest that the judge has engaged in an illegitimate exercise of judicial power, and it is therefore not surprising that judges dissenting from what they believe to be an activist decision often proclaim that they will not accord the decision the usual precedential force afforded by *stare decisis* rules.[38]

Without at least some common ground on the proper role of judges—as I think can be captured in a careful, ideologically balanced approach to defining "activism"—we run the risk that scholarly discourse will degenerate, as it already has to some extent, into insoluble disputes over methods of constitu-

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34. *See* Bradley C. Cannon, *A Framework for the Analysis of Judicial Activism, in* SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C. Halpern & Charles M. Lamb, eds., 1982) (noting that "conceptions of activism are usually not explicitly noted or articulated").

35. *See* Mark V. Tushnet, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 147, 153 (1987) ("Given an extended discussion of the courts in which the sentence 'This was an activist decision' appears, we can translate the sentence, knowing its context, as 'I approve (or disapprove) of the decision.' Similarly, if the sentence is 'I disapprove of this decision because it exemplifies judicial activism,' we know nothing more after hearing the second half of the sentence than we did after haring [sic] the first half.").

36. *See id.* at 147.

37. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198 (1985) (observing that activism serves as "a premier term of judicial opprobrium").

38. For a recent example, see Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting) ("The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden* v. *Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, and *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.* represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.") (citations omitted).

tional interpretation or policy considerations. In other words, as the last two generations of constitutional law scholarship shows, scholars are hopelessly divided on the proper methods of interpreting the Constitution,[39] and as each presidential election and judicial confirmation battle in the United States Senate reminds us, our society is deeply divided over the wisdom of practices like capital punishment, abortion, and affirmative action. Therefore, the quest for a shared understanding about what constitutes "activism," one that is as distinct as possible from the propriety of particular methods of constitutional interpretation, may be our last, best hope for reaching some degree of consensus concerning what judges may properly do in discharging their important constitutional functions in a democratic society.

The hard part, of course, is coming up with a neutral definition of activism. In the remainder of this essay, I grapple with this difficult issue. Specifically, I discuss various proposed definitions of activism, organized into somewhat arbitrary but nonetheless useful categories of models of activism. I conclude that none of the existing models, standing alone, provides a reliable measuring stick for evaluating the propriety of particular exercises of judicial power, although each does provide insights essential to a realistic understanding of activism. What is needed instead, I believe, is a multi-factored approach drawing on each of the individual models of activism. I close with an effort to distill such an approach. I do so without any pretense to having found the "Rosetta stone" on the issue of judicial activism, but instead in hopes that this inquiry will prompt us at least to take more seriously the task of defining activism and at least nudge the discussion in the right direction.

II. UNDERSTANDING JUDICIAL ACTIVISM

A. THE "CONFLICT" MODEL

One approach to activism emphasizes the degree of conflict between judicial policy, on the one hand, and the policy of politically accountable branches of government. On this view, a court "is activist whenever its policies are in conflict with those of other major decision-makers."[40] This type of conflict was clearly present throughout much of the Warren Court's Revolution in criminal procedure: the Warren Court consistently favored the criminal defendant's side of the balance, whereas legislatures just as consistently favored law enforce-

39. *See* Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 922 (2001).

40. Glendon Schubert, *A Functional Interpretation*, *in* THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 17 (David F. Forte ed., 1972). Posner advances a similar, but not identical, definition of activism under which an activist decision is one that expands the "power of the federal courts vis-à-vis the other organs of government." POSNER, *supra* note 37, at 210-211. This definition of activism is subject to the same analysis as the conflict model because a decision invalidating the acts of other branches of governments also necessarily expands the power of the courts as against those branches.

ment and being "tough on crime."[41] Such conflict has also manifested itself in the Rehnquist Court's "New Federalism" decisions invalidating Acts of Congress as beyond the scope of congressional authority.[42]

Conflict between courts and the political branches is strongly correlated with periods of heightened activism. During the *Lochner* era, for example, the Supreme Court invalidated close to two hundred economic regulatory statutes as contrary to liberty of contract.[43] The fact that so many statutes were overturned is usually taken as proof of activism, which explains why critics of the Rehnquist Court are so quick to compare the current Court to the *Lochner* Court—the comparison obviously is not intended to be flattering.[44] Even so, the conflict model of activism is both overinclusive and underinclusive—overinclusive because, in our system, courts are supposed to strike down (and therefore "conflict" with) unconstitutional action of other branches, and underinclusive because the mere absence of conflict between legislative and judicial policies does not itself establish the absence of judicial activism.

A simple example may help illustrate both points. Imagine that Congress passes a statute allowing magistrates to issue search warrants on some standard lower than probable cause. The statute would be a clear violation of the Fourth Amendment, which specifically prescribes "probable cause" as the minimum standard on which search warrants may be issued.[45] The statute is challenged in court. Given that the statute is irreconcilable with the Fourth Amendment, the Court should declare the statute unconstitutional. Suppose, however, that instead of enforcing the Fourth Amendment, the court ignores it and upholds the statute anyway.[46]

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41. *Compare, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the inherent coerciveness of custodial interrogation warrants exclusion even of voluntary confessions unless preceded by advice of the suspect's rights to counsel and to remain silent), *with* 18 U.S.C. § 3501 (2001) (stating that voluntary confessions are admissible despite pressures inherent in stationhouse interrogation and failure to give *Miranda* warnings). This sort of conflict, usually manifested and most easily seen in the form of judicial invalidation of statutes, was obviously not peculiar to the Warren era.

42. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 98 (1997).

43. *See* STONE ET AL., *supra* note 29, at 739.

44. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (noting a "striking" similarity between the Rehnquist Court's sovereign-immunity decisions and "the *Lochner* era's industrial due process" and predicting that "the Court's late foray into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting").

45. *See* U.S. Const. Amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . .").

46. This example is not as far-fetched as it might initially seem; indeed, it is only barely hypothetical. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court held that warrants were constitutionally required for a particular kind of administrative search, but that warrants could be issued in that context upon a lesser showing than that required by the traditional probable cause standard. *See id.* at 539. A strong argument can be made that the Fourth Amendment does not manifest any preference for search warrants – in other words, that a "reasonable" search and seizure need not be one authorized in advance by a magistrate. *See generally* Amar, *supra* note 14, at 761-81. What is *not* reasonably open to argument, given the text, is that the Fourth Amendment permits warrants to issue upon less than probable cause, yet the *Camara* Court adopted that position anyway in order to allow regulatory searches the Court deemed to be in the public interest.

On the conflict model, the court's ruling would not be considered an activist decision. The court and the legislature have followed the same policy of allowing searches where probable cause is lacking, and without conflict, the argument goes, there is no activism. This conclusion follows, I think, only if one assumes that courts are supposed to be inactive rather than simply restrained. There is, however, a critical distinction between an "activist" court, on the one hand, and an "active" court, on the other. A court faithful to principles of judicial restraint could never be "activist" (at least not in a first-best world) but would nevertheless be quite "active" (and unyielding) in terms of demanding that other branches of government remain within their proper constitutional bounds.[47] It could hardly be otherwise if we accept as a given *Marbury v. Madison*,[48] which held that applying the Constitution in cases or controversies is an essential part of the "judicial Power" vested in the federal courts by Article III. Under *Marbury*, then, federal courts must be active, even on a restraintist view, because they are duty-bound to set aside the policy initiatives of other branches when those initiatives conflict with constitutional norms.[49]

To be sure, a different approach conceivably could have been taken in *Marbury*, and it is possible, with some effort, to imagine a United States of America founded on the British model of legislative supremacy unencumbered by judicial review.[50] The obvious response, it seems to me, is that the British system is emphatically not our system. Once judicially enforceable constitutionalism is accepted as a bedrock principle of American governance, the notion that judges (who, as *Marbury* points out, are oath-bound to uphold the Constitution) would be justified in acting in contravention of plain commands in the Constitution, or in issuing decisions allowing other government actors to do so, can only be viewed as exceedingly strange.

Professor Lino Graglia argues that this result is not as strange as it seems

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47. I limit the claim about judicial restraint precluding activism to the first-best world because, as I argue elsewhere, even a judge who firmly believes in judicial restraint might properly take action deemed activist in a second-best world as a means of counteracting activism (liberal or conservative) by prior members of the Court. In the second-best world, activism in response to activism—what I call "reactivism"—may actually promote judicial restraint in the aggregate as long as the reactivism is not itself foreclosed by the constitutional or statutory text in question. *See generally* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057 (2002).

48. 5 U.S. 137 (1803).

49. *Id.* at 177-78.

50. This is not in any way to question the correctness of *Marbury*, but rather simply to recognize the possibility of having an ordered system of liberty without judicial review. *See, e.g.*, Klarman, *supra* note 6, at 412; Graglia, *supra* note 10, at 82. That said, however, it is noteworthy that emerging democracies, presented with the American and British systems as potential models for their new governments, have consistently opted for the American model of judicially enforced constitutionalism. This track record suggests that our *Marbury*-based system is widely perceived to be the superior method of guaranteeing individual rights and liberties and the rule of law more generally. *See* Steven Calabresi, *Thayer's Clear Mistake*, 88 NW. L. REV. 269, 269 (1993) (observing that the "written, judicially-enforced constitution has become one of the U.S.A.'s best-selling (and least remunerative) exports" whereas its "main competitor, the legislatively-enforced, aspirational constitution, has been abandoned by virtually all civil law and common law countries in the world").

because "permitting the results of the political process to stand," though "inconsistent with constitutionalism," is "not activism."[51] The argument misses at least two important points. The first, stated above, is that ours is a system of a judicially enforceable Constitution. If the Constitution is binding on all other branches of government, both state and federal, it is unthinkable that it would be proper for judges, in effect, to excuse other branches' violations of the document or accomplish the same result by blindly deferring to the presumptive belief of nonjudicial actors in the constitutionality of their own actions.

The second point that Professor Graglia's analysis overlooks is that the Constitution itself is a majoritarian policy choice, albeit, as nonoriginalists would be quick to remind us, one made by people long since dead. As Alexander Hamilton aptly put it, judicial review "supposes that the power of the people is superior to both [the judicial and legislative power]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[52] As a result, unless one rejects the notion of intergenerational fidelity to the Constitution—and Professor Graglia himself does not[53]—there is no principled basis on which courts can give preference to policy choices embodied in statutes over those embodied by the Constitution itself.[54]

Of course, "dead-hand" theorists may well view constitutional fidelity as an unwarranted means of shackling present generations to the outmoded views of the Founding generation. If "dead-hand" control is unacceptable when it comes to questions of intent, a nonoriginalist might ask, why should such control through adherence to a text written hundreds of years ago, in a vastly different world by men whose ideologies were radically different from our own, receive any more fidelity from present society or its judges?[55] Even accepting for present purposes the premise of the syllogism—which strikes me as far from self-evident[56]—the argument proves far too much.

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51. Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996).

52. THE FEDERALIST No. 78, at 229 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

53. Graglia, *supra* note 51, at 296.

54. At the same time, however, Professor Graglia is quite right that there is no principled basis on which courts can prefer their own policy choices to those of the political branches to the extent the judicially preferred policies are not rooted in the Constitution. Unless a judicial decision enjoys some affirmative support in the Constitution, whether in its language or structure, a court can hardly claim that it is enforcing the Constitution instead of its own policy preferences or, in the language of the Founding generation, that it is exercising "judgment" instead of "will." *See* THE FEDERALIST No. 78, at 230 (Alexander Hamilton) (Roy P. Fairfield ed., 1966) (quoted in *infra* note 59).

55. My colleague Professor Michael Klarman has pursued inquiries along these very lines. Klarman, *supra* note 6. His conclusion is that, whether the reference point is constitutional text or intent of the Framers, the Constitution does not "deserve our fidelity" and that society should not "be ruled from the grave." *Id.* at 381.

56. For a thoughtful response to the usual arguments against original intent as a basis for constitutional interpretation, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

If federal judges are not to be bound by any constraint that smacks of "dead-hand" control, then there would seem to be no external limit on the power of the judiciary. True, there are means of political control over the courts that might in theory constrain judges, such as overruling decisions by constitutional amendments, stripping the courts of jurisdiction over certain subjects, and (conceivably) impeaching and removing judges guilty of misconduct. These political checks, however, have failed to constrain even the most pronounced periods of countermajoritarian activism in our history, including the *Lochner* era and the Warren Court Revolution.[57]

If text and political controls do not constrain judicial behavior, then the will and values of the individual judge would seem to be the most readily available bases of adjudication. In that event, it is no exaggeration to say that the federal courts would wield untrammeled judicial power over the lives, liberty, and property of citizens, as well as the prerogatives of the politically accountable branches of government. This result would offend traditional Anglo-American conceptions of the rule of law, which are founded on the proposition that "something other than the mere will of the individuals deputized to exercise government powers must have primacy."[58] To the extent judges are not ruled by law and the rest of society is ruled by judges, then, as the Founders themselves were quite aware, judicial review might well prove to be more of a curse than a blessing.[59]

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57. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 46-48 (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST]. Even the power to appoint and confirm new judges—which, as the demise of the Warren Court Revolution shows, can fundamentally shift the direction of the courts over time—does not work as a real constraint on judicial behavior on the front end, particularly given the difficulty of predicting the behavior of nominees on the bench and the postwar phenomenon of the presidency being in the hands of one party and the Congress in the hands of the other. *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 870-78 (1991). Moreover, short of death or serious physical or mental impairments, judges can, to some extent, counteract the appointments power by strategically timing their own retirements, as Chief Justice Warren attempted to do (to deny Nixon the chance to name his replacement), and as Justice Blackmun did (to allow President Clinton to name a Justice committed to abortion rights). To be sure, the appointment power can bring periods of particularly pronounced activism to an end after they have already taken place, but by then the damage may be irreversible.

58. Ronald A. Cass, THE RULE OF LAW IN AMERICA 3 (2001); *see generally* Richard H. Fallon, Jr., *"The Rule Of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7-8 (1997) (noting that "leading modern accounts" of the rule of law all subscribe to "the supremacy of legal authority" and therefore posit that "law should rule officials, including judges, as well as ordinary citizens"); *cf., e.g.*, Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 287 (1996) (arguing that nonoriginalists "have little respect for law, at least insofar as law might be a genuinely operative constraint on the Court").

59. *See* THE FEDERALIST NO. 78, at 230 (Alexander Hamilton) (Roy P. Fairfield ed., 1966) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body."). As one commentator has stated: "Constitutionalism, as has often been noted, raises the problem of the rule of the living by the dead. Judicial activism raises the very different problem of rule by unelected, life-tenured judges who are very much alive." Graglia, *supra* note 51, at

Discomfort with the sweeping implications of judicial review not bounded by external legal constraints has produced broad consensus among believers in judicially enforceable constitutionalism from all points on the ideological spectrum (even from nonoriginalist quarters) that the Constitution as written is binding on judges. As Professor Tom Grey has declared: "We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt."[60] The breadth of this consensus among believers in judicial review weakens any objection that building textualism into my definition of activism strips it of the ideological neutrality I seek. Even if this point of view requires commitment to a "preconstitutional rule" positing the controlling nature of the Constitution, that rule seems so thoroughly uncontroversial, and is so widely accepted, as to be unproblematic for present purposes.

The point that judges should not stray beyond interpretation into the realm of enforcing their own policy choices at the expense of those of the political branches need not rest on formalism alone, however. Viewed even in functional terms, there is little reason for faith in the institutional competency of courts, as compared to legislative bodies, to make the policy judgments required by what was once called "noninterpretive" review. Indeed, it seems fairly certain that, for all their obvious faults, legislatures would have the comparative advantage in making those sorts of judgments.

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296. Consistent with this view, a number of prominent liberal scholars, convinced that constitutional interpretation can really never be anything more than enforcement of the values of the judge, have advocated abolishing judicial review altogether. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); Klarman, *supra* note 6. By contrast, Professor Seidman argues that judicial review is defensible precisely to the extent that it is informed by the judges' own political commitments. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2002).

60. Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984); *see generally* STONE ET AL., *supra* note 29, at 296 ("Almost all commentators believe that the text of the Constitution is binding."). Interpretivists believe that judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution"; noninterpretivists, on the other hand, contend that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." ELY, DEMOCRACY AND DISTRUST, *supra* note 57, at 1. As the Grey quotation suggests, even proponents of the broadest theories of constitutional adjudication bristle at the suggestion that they favor a noninterpretive role for the courts, and so the terms "interpretivism" and "noninterpretivism" have fallen into disuse lately. What is significant for present purposes, however, is not the terminology but rather what it tells us about textualism. The very fact that constitutional theorists and judges are so unwilling to be viewed as being "against" interpreting the Constitution as written, and are so willing to rely on textual argument when it supports their positions, shows the privileged place that textualism deservedly holds in constitutional theory. As Professor Amar has recently written, "[t]extualism, broadly understood, is woven into the fabric of conventional constitutional interpretation." Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 34 (2000). By "textualism," I mean the usual definition of that approach to constitutional interpretation, which involves discerning the meaning and implications of the words used in the Constitution and deriving meaning from constitutional structure. *See generally id.* at 28-33. This, of course, is not the only possible understanding of textualism. One considerably broader approach would allow judges to abstract generalized principles from the Constitution and then apply those principles (as opposed to the text itself) as the basis for decision. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

After all, legislatures are directly accountable to the electorate (or at least the part of the electorate that goes to the polls) and thus can be expected to reflect the views and values of society as a whole far more reliably than unelected, unaccountable judges.[61] The fact that federal judges do not stand for election means that they are under no compulsion to bridge the cultural divide that separates them and other members of the cultural elite from the rest of society.[62] It is also commonly accepted that legislatures have a substantial informational advantage over courts, which are limited to data adduced by the parties in trial records, or by *amici curiae* in "Brandeis briefs," in resolving the many empirical questions on which sound decisionmaking depends in a complex society. Legislatures also have more flexibility (and hence more room for creativity) in dealing with difficult questions of social choice; the remedial arsenal of the courts, though potent, is fairly limited. Therefore, substantial formalist and functional reasons alike support the notion that it is illegitimate for judges to reach results at odds with the plain meaning of written texts.

Until now, this discussion of the interpretive-fidelity aspect of activism has rested on an implicit assumption that should be laid bare before moving on to other issues. A key principle motivating my attempt to define activism has been that the concept should be more than shorthand for a claim that a decision is legally incorrect. For this reason, I have defined the interpretive-fidelity component of activism solely in terms of a decision's permissibility in light of text and structure, which I regard as ideologically neutral because of the broad consensus that the Constitution itself (and, in statutory cases, the legislation that becomes law) is binding on judges. Where the text being interpreted is plain and unambiguous, of course, this approach dictates only one permissible (i.e., nonactivist) outcome—namely, that required by the language or structure. This much, hopefully, is fairly straightforward. The real question has to do with indeterminacy.

If the constitutional or statutory text is indeterminate, a range of potential interpretive options will be available to a court. Some of those options will be

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61. Public choice theorists have strongly challenged the representativeness of legislatures and their institutional capacity to put the interests of the public ahead of those of powerful special interests. *See generally* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). Those critiques, in my view, establish that legislatures are frequently far from perfect guardians of the public interest. Still, the question remains whether courts are appreciably better than legislatures in this respect. For reasons cogently explained by Professor Einer Elhauge, I believe that, so far at least, public choice theory has not shown that courts would be any better as guardians of the public interest. *See generally* Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31 (1991).

62. *See generally* Michael J. Klarman, *What's so Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189-90 (1998) ("Justices of the United States Supreme Court, indeed of any state or federal appellate court, are overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities. Moreover, unlike legislators who generally share a similar cultural background, federal judges enjoy a relative political insulation which significantly reduces any offsetting obligation to respond to the non-elite political preferences of their constituents."). As a result, Klarman concludes, "judicial review is systematically biased in favor of culturally elite values." *Id.* at 189.

disqualified by text or structure alone, but others will not be. In that case, any choice the court makes among the range of permissible interpretations—that is to say, of the interpretations not disqualified by text or structure—will not be activist in terms of interpretive fidelity, even though the correctness of its choice will certainly be debatable on the merits.[63] In other words, all the interpretive-fidelity definition of activism does is delimit the bounds within which judges have discretion; as long as they do not transgress those bounds, their resulting decisions may or may not be "wrong" but nevertheless will not be "activist" from the standpoint of interpretive fidelity.

Notice, however, that my interpretive-fidelity understanding of activism stops there. It does not try and prescribe a single "correct" outcome and condemn all others as "activist." To do so, in fact, would be inconsistent with the goal of this project, which is to try and define activism in ideologically neutral terms, drawing only on commonly held intuitions about the proper judicial role. Consistent with that goal, the concept of interpretive fidelity simply takes key premises of our system of judicially enforced constitutionalism under *Marbury* and limits permissible judicial action to those premises. To the extent the court is enforcing a written document (and recall that the fact that the Constitution is a written document is an important part of the theoretical foundation for judicial review as conceived in *Marbury*), then its decision must find some support in it and certainly cannot be foreclosed by it. Naturally, this approach leaves room, perhaps even considerable room at times, for judicial discretion, but that is only because of the capacious terms in which much of the Constitution is written and because the goal here is to try to derive a consensus-driven, and ideologically neutral, understanding of judicial activism.

Another potential interpretive-fidelity approach to defining activism would be, in effect, to prescribe a "standard of proof" that must be met before courts can strike down governmental action. An example of this approach is Professor Graglia's claim that activism constitutes "disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly

63. This concept of a range of permissible outcomes has antecedents throughout the law. Under *Teague v. Lane*, 489 U.S. 288 (1989), a habeas court takes the state court's resolution of a constitutional issue and determines whether it was within the range of permissible outcomes under previously established federal caselaw. It is only if the state court's resolution lies outside of that range that habeas relief can be granted under *Teague*. The same basic analytical inquiry is made on qualified immunity issues in suits seeking money damages under section 1983 – did the officer exceed the bounds of permissible state action delineated by prior caselaw clearly? If not, a damages claim under section 1983 fails as a matter of law. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 638-39 (1987). Administrative law provides yet another example: "*Chevron* deference" requires courts to accept an administrative agency's interpretation of a statute committed to its administration as long as it represents a "permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In all these areas, the law recognizes that a constitutional text or a statutory text, while ruling out a number of interpretive options as impermissible, may nevertheless leave open a range of other interpretive options such that the text gives no indication as to which of the open options is the "right" one. For a helpful elaboration of this concept, see Caleb Nelson, *Stare Decisis And Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5-8 (2001).

prohibit."[64] To take this approach would defeat the ideological neutrality that I am trying to achieve and would introduce a principle—that judicial review should not be exercised except to correct unmistakeable constitutional transgressions—that is, to say the least, not apparent from the Constitution or generally accepted as valid. As Professor Gary Lawson has written, "the selection of a standard of proof . . . is a profoundly normative enterprise. As far as I can tell, there is nothing in the nature of interpretation, of originalism, or of the Constitution that can provide the answer."[65]

B. THE "INTERPRETIVE THEORY" MODEL

Another model of activism would build on a preferred method of constitutional interpretation. Under this approach, one would posit the "correct" method of interpreting the Constitution—whether that be originalism, natural law, tradition, or political process theory, to name a few of the leading contenders[66]—and reject all other theories as intrinsically activist. So, for example, nonoriginalists would consider originalist decisions to be activist, and adherents of political process theory would reject broader approaches to constitutional decisionmaking as activist.[67]

The appeal of this approach is readily apparent. The reason judges and scholars adopt a particular method of constitutional interpretation is, presumably, that they believe it will generate "better" results than the alternatives, measured either in terms of legitimacy or normative attractiveness.[68] The flaws, however, are equally plain. Such an approach to defining activism would be a "conversation-stopper"[69] in the sense that those who do not subscribe to a particular interpretive theory would not accept a definition of activism premised on that theory. In that instance, "activism" would be again reduced to an epithet telling us nothing more, so far as interpretive methodology is concerned, than

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64. Graglia, *supra* note 51, at 296.

65. Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 422 (1996); *see generally* Gary Lawson, *Proving The Law*, 86 NW. U. L. REV. 859 (1992). Though often associated with the virtue of judicial restraint, *see, e.g.*, Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 5 NW. U. L. REV. 961, 973 (2001), the "clear and convincing" standard for proving constitutional law may be normatively problematic as well to the extent it would transform Article III courts from restrained but nonetheless "active" institutions of government into inactive ones. As Professor Graglia himself notes on another occasion, "examples of enacted law clearly in violation of the Constitution are extremely difficult to find." Graglia, *supra* note 10, at 67. This is not to deny that there are easy cases under the Constitution, but rather simply to say that those are not the cases that are litigated. Inactivity on the part of the courts would be unfortunate because it is commonly accepted, even by proponents of limited judicial power, that "judges have something unique to contribute to public decisionmaking." ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 46 (1989); *see also* Calbresi, *supra* note 50, at 272-78.

66. For a brief overview, see STONE ET AL., *supra* note 29, at 692-98.

67. By way of example, Raoul Berger has argued that nonoriginalist decisions are activist. *See* Raoul Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 771-72 (1984).

68. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 549-50 (1999).

69. Klarman, *supra* note 62, at 194.

that the maker and the object of the accusation subscribe to different methodologies of interpreting the Constitution. The most that can be said, if there is to be any hope for an ideologically neutral definition of activism, is that interpretive theories are activist to the extent they are employed to produce results that have no support in written texts or are outside the range of permissible interpretations in light of the relevant text.

Some might question the neutrality of this approach, on the view that binding judges to constitutional text is an intrinsically conservative approach to constitutional interpretation. The breath of consensus, on all parts of the ideological divide, that the text is binding on judges negates any such critique.[70] Again, under my definition of activism, nontextualist methods of interpretation may be utilized in choosing among interpretive options that are not themselves ruled out by constitutional text or structure, so there is no intrinsic bias against or in favor of any particular interpretive theories in my account of activism.

C. THE "ASSERTIVENESS" MODEL

Another definition of activism offered in the literature refers to the willingness of a court "to use its authority to engage in judicial review in an assertive manner."[71] Though vaguely stated, the basic idea is that a court is activist if it is too "assertive" in its exercise of the power of judicial review. An example of assertive (and hence activist) review, according to the assertiveness model, is overruling or limiting prior precedents and announcing previously unknown innovations in doctrine.[72] The same would be true if a court were to reach out to decide unnecessary issues in a case or to decide cases in which the legal issues have become moot or the party invoking the court's jurisdiction lacks standing—even if the ultimate decision happens to be correct on the merits, the court simply decided "too much."[73]

Another related component of activism under the assertiveness model would be the extent of the remedy ordered for a constitutional violation, an issue of particular importance in structural reform litigation. Even in remedying a

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70. *See* ELY, DEMOCRACY AND DISTRUST, *supra* note 57, at 1 (noting that it "would be a mistake to suppose that there is any necessary correlation between an interpretivist approach to constitutional interpretation and political conservatism").

71. FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE 7 (1999).

72. *Id.*

73. Professor Bickel argued that the doctrines of standing, mootness, political questions, and ripeness protect passive virtues by preventing unwarranted intervention by the federal courts in disputed issues of the day. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (1962). Related to Professor Bickel's notion of passive virtues are broader notions of "minimalism," which posit that courts should decide as little as possible, resolving only issues essential to a proper disposition of the case. *See, e.g.*, Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996). Both the passive virtues and minimalism (though not Professor Sunstein's strict brand of minimalism) have been mainstays of the federal courts for quite some time. *See generally* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring) (enumerating various aspects of these principles as "rules" for constitutional adjudication).

violation of the Constitution, the model would hold, federal courts have no warrant to impose far-reaching remedies (such as ordering tax increases or taking over public schools) when less intrusive measures would be sufficient to resolve the matter.[74] Courts should also stay their hand when politically accountable institutions of government are both willing and in a better position than the court to devise an effective remedy for an adjudged constitutional violation.[75]

This model of activism focuses solely on the manner in which courts perform their review functions—how "assertive" or aggressive has the court been in deciding a case? This line of inquiry is of obvious relevance on the subject of activism, but, standing alone, it gives an incomplete picture of the phenomenon of activism. As shown above, there is a strong substantive component to activism, one that looks to the propriety of the end result in the case, measured by fidelity to text and structure. This is shown by the bitterness of criticisms of Warren Court decisions like *Miranda v. Arizona* and *Mapp v. Ohio*—what critics found particularly offensive about these rulings was not that the Court "decided too much" or acted without sufficient grounding in past precedents, but rather that the Court "handcuffed" the police with restrictions that simply could not be justified under any proper view of the Constitution. By ignoring the permissibility of end results as a measure of activism, the assertiveness model fails to account for an important aspect of the phenomenon of activism.[76]

Still, the model is useful for emphasizing what might be described as the procedural aspects of activism. To the extent a court is overly aggressive in its resolution of cases, it begins to look more like a legislative body than a court. Unlike a court, a legislature is a self-starting body that sets its own agenda and

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74. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 745 (1972) (holding that relief across school district lines in a desegregation case is not warranted absent proof of an "interdistrict" constitutional violation and segregative effect across district lines).

75. Justice Thomas has been the most forceful proponent of this view on the current Court. In *Lewis v. Casey*, 518 U.S. 343 (1996), for example, he argued that "Article III cannot be understood to authorize the federal judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make." *Id.* at 385 (Thomas, J., concurring); *see also* Missouri v. Jenkins, 515 U.S. 70, 123-38 (1995) (Thomas, J., concurring). My own view is closer to the traditional one. Federalism and separation of powers concerns certainly limit the remedial discretion of the federal courts, and federal courts should always bear in mind their own limitations and the comparative advantages of other branches in running institutions like schools and prisons. Nevertheless, it is precisely because the Constitution is the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2, that, in my view, the federal courts have not only the power, but the *duty* to craft an appropriate and effective remedy for a constitutional violation when a constitutional violator is not willing to cooperate in good faith in correcting its violation. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

76. Indeed, it is potentially misleading, as Posner suggests, to measure a decision based on its aggressiveness without regard to its substantive merits. He argues that it is "wrong to equate activism with boldness" because a bold decision may nevertheless be substantively correct. POSNER, *supra* note 37, at 216. A prime example is *Marbury v. Madison*. By endorsing the power of judicial review, *Marbury* radically expanded the power of the federal courts, yet most would probably agree that the decision was substantively correct. *See, e.g.*, John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998).

exists primarily to announce rules of general applicability governing future conduct or disputes. The source of these rules is the will of the legislature; individual legislators vote based on their policy preferences (or those of their constituents or favorite interest groups), and a consensus is reached or not based on an up-or-down vote or a series of such votes.

A federal court, however, is supposed to act very differently. Article III courts are reactive bodies that can weigh in on a dispute only at the instance of a proper plaintiff and only when essential to resolution of a "case" or "controversy" within its jurisdiction. The courts "make law," but only by the common-law method of deriving the answer to current disputes from the previously decided body of law and the received wisdom of prior judicial treatments of a subject.[77] The law is derived on this account not primarily to make rules for the future, but rather properly to resolve the case before the court.[78] Against the backdrop of these common law paradigms, it is easy to see why scores of overrulings and decisionmaking far beyond the minimum required to dispose of the case would look rather suspect.[79]

To be sure, the Supreme Court occupies a unique position within the federal judicial hierarchy. Given the almost entirely discretionary nature of its docket, the Supreme Court takes cases for institutional reasons—to resolve questions of national importance—rather than to ensure the proper resolution of particular cases. For this reason, it is commonly supposed that the modern institutional

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77. As Justice Scalia has explained, "'[T]he judicial Power of the United States' conferred upon this Court . . . must be deemed to be the judicial power as understood by our common-law tradition. That is the power is 'to say what the law is,' not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment) (citation omitted). For a good overview of the common-law model of decisionmaking, *see* Linda Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 U. CHI. L. REV. 423, 465-76 (1994).

78. Naturally, in a system committed to *stare decisis*, a judge presented with a case would know that today's ruling will become a precedent for the future, and good judges, armed with that knowledge, will craft their opinions with special care. Even so, the focus remains on the case before the court. I should note that the common law approach cannot automatically be applied to state courts, which often are not bound by the kinds of justiciability limitations that apply to federal courts. *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

79. Indeed, attacks on the Warren Court stressed the number of overrulings during Chief Justice Warren's tenure as proof positive that activism was at work. For example, Justice Scalia has criticized the Warren era as a time "marked by a newfound disregard for *stare decisis*," one in which "this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious 'heave-ho.'" Harper v. Va. Dep't of Taxation, 509 U.S. 86, 108-09 (1993). The Rehnquist Court has been something of a paradox on *stare decisis*. On the one hand, the Court has bolstered the force of precedent by holding that prior precedents should be retained unless there is "special justification" for an overruling. *See generally* Amar, *supra* note 60, at 81-82 (documenting this change in *stare decisis* doctrine). On the other hand, the Rehnquist Court has stressed that, even after the Warren era, overrulings have not been exceptional occurrences, noting in Payne v. Tennessee, 501 U.S. 808 (1991), that "the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions." *Id.* at 828.

role of the Supreme Court would be impeded by adherence to the justiciability limitations on the federal courts.[80] This supposition, however, is wrong. When issues of constitutional law are squarely presented in a proper case, both justiciability doctrines and traditional maxims of judicial minimalism permit the Supreme Court to resolve the case in a comprehensive, well-reasoned opinion that, in the course of deciding the case at hand, lays down principles that will serve as precedent for future cases.[81] Particularly given the malleability of justiciability doctrines, there is no reason to think that standing or mootness doctrines, for example, would often pose any serious obstacles to adjudication if the Court were sufficiently convinced of the need to reach the merits in a case.

As the common law account suggests, the doctrine of *stare decisis* serves important policies. Among them are promoting judicial efficiency and enabling members of the public to order their affairs without fear of undue disruption caused by sharp and frequent reversals in precedent.[82] "Rule of law" values also figure prominently here, as the Founding generation understood: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[83] For this reason, the Court itself has held that "[a]dhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'"[84]

That said, the assertiveness model is too blunt in its treatment of fidelity to precedent. The model's suggestion that overrulings are themselves strong, if not conclusive, indicators of activism is difficult to square with established law governing *stare decisis*. The Supreme Court has consistently held that "[*s*]*tare decisis* is not an

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80. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues" – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

81. *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 73, at 235-43. In fact, this is one of the key distinctions between the traditional concept of judicial minimalism and Professor Sunstein's reconceptualization of minimalism. Sunstein's democracy-forcing brand of minimalism requires judicial opinions to be "as incompletely theorized as possible" in order to leave as much as possible for resolution by the politically accountable branches of government. Sunstein, *supra* note 73, at 99. This brand of minimalism would indeed be inconsistent with the modern institutional role of the Supreme Court and, I would gather, intentionally so.

82. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (noting that *stare decisis* ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

83. THE FEDERALIST NO. 78, at 232-33 (Alexander Hamilton) (Roy P. Fairfield ed., 1966); *see also, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'"). This is not to suggest, however, that the doctrine of *stare decisis* is of constitutional dimension. There appears to be a growing consensus that *stare decisis*, though familiar to and specifically contemplated by members of the founding generation, is not constitutionally mandated. *See, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey*, 109 YALE L.J. 1535, 1570-82 (2000); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513-31 (2000); *but see* Richard Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577-85 (2001) (arguing that *stare decisis* is of constitutional dimension).

84. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

inexorable command," and this maxim is "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[85] Given that overrulings are explicitly permitted, in appropriate cases, by *stare decisis*, the fact that decisions are overruled cannot, on its own, constitute proof of activism, even though, as a descriptive matter, it is certainly true that one would expect to see scores of overrulings during periods of heightened judicial activism.

Still, it does not follow from the fact that courts are empowered to overrule their own prior decisions that fidelity to precedent is irrelevant to the proper definition of activism. The reasons advanced for the overruling may be a significant part of the inquiry. *Stare decisis* rules, in their current form at least, emphasize that decisions may not be overruled simply because they are considered to be wrong by a later court; instead, "special justification" is required before a court can properly jettison prior precedent.[86] A decision that overrules prior precedent without sufficient justification under *stare decisis* doctrine is illegitimate in light of the earlier precedent and therefore should be deemed activist.[87]

My colleague Professor Caleb Nelson has argued that the presumption against overruling precedents should not apply (and, descriptively speaking, did not apply historically) to "demonstrably erroneous" precedents.[88] Given my view that it is activist for judges to disregard clear constitutional or statutory text, I agree that *stare decisis* doctrine should be revised to recognize clear or demonstrable error as a valid basis for overruling a prior precedent.[89] That said, however, given the present state of

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85. *Id.* at 828; *see also, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997). The Court has been emphatic that "[o]ur precedents are not sacrosanct," noting that "we have overruled prior decisions where the necessity and propriety of doing so has been established." *Patterson,* 491 U.S. at 172.

86. *Payne*, 501 U.S. at 828; *see also, e.g.*, Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (holding that "any departure from the doctrine of stare decisis demands special justification"); *see* Nelson, *supra* note 63, at 2 (noting that the Court and commentators alike subscribe to the "conventional wisdom" that "a purported demonstration of error is not enough to justify overruling a past decision"). In deciding whether to overrule prior cases, the Court typically looks to several policy considerations, including (1) the "workability" of prior decisional law, (2) the extent of reliance on the prior decision, (3) whether the prior doctrine's theoretical foundations have been undermined by later cases, and (4) whether factual circumstances critical to the prior decision have changed. *Id.* For a good general discussion of these policy factors — which obviously are malleable enough to be manipulated to allow overrulings where desired or to justify adherence to erroneous precedents in other contexts — *see* Paulsen, *supra* note 83, at 1551-64.

87. There is a sense in which it may seem circular to say that court-made *stare decisis* rules should determine the propriety of overrulings, but that is only because neither the Framers not Congress have seen fit to speak to the issue of precedent. Despite their judicial origin, *stare decisis* rules are "authoritative legal rules" that judges cannot casually disregard. *See* Harrison, *supra* note 83, at 505. Similarly, a court's handling of precedent should be considered activist if the court is less than forthright in its treatment of precedent, such as by distinguishing cases on immaterial grounds or misconstruing statements in prior decisions to avoid having to disavow or adhere to the prior decisions. In a common law system of adjudication, later courts are supposed to follow earlier binding precedents unless the facts in the later case are materially different in some respect or the court overrules the prior decision based on a ground recognized as valid under *stare decisis* rules.

88. *See generally* Nelson, *supra* note 63. Professor Amar agrees that, traditionally speaking, a sufficiently persuasive showing of error was regarded as a valid ground for overruling a prior case. *See* Amar, *supra* note 60, at 78-89 & n.28.

89. Here, the standard of proof is significant. A court ought to be more reluctant to overrule a decision that is arguably correct than a decision that is clearly (and therefore demonstrably) incorrect.

stare decisis doctrine and its disapproval of error as a sufficient basis for overrulings, it is proper to regard decisions overruling prior cases based only on a showing of "demonstrable error" as activist, but that type of activism would readily be justified by the Court's overarching duty of fidelity to constitutional or statutory texts.[90]

Some proponents of judicial restraint might object that activism, once identified, is by definition unjustified. This is a principled position, but not one that will actually promote judicial restraint. If one is really interested in promoting judicial restraint, then it may be necessary at times for a court, confronted with prior instances of activism, to respond in kind so that the pendulum might be moved back in the direction of restraint, *e.g.*, of adherence to clear written texts.[91] Otherwise, as Professor Amar has written, "the Constitution might ultimately be wholly eclipsed," with "judicial doctrine . . . eras[ing] its outlines" instead of "simply filling the Constitution's gaps."[92]

III. TOWARD AN INTEGRATED MODEL OF JUDICIAL ACTIVISM

As shown above, each of the competing models of activism offered in the literature contains important insights into the nature of activism, but each one is insufficient, standing alone, to capture common intuitions about activism. A more comprehensive understanding of activism is needed if there is to be any hope of bringing some degree of uniformity to usage of the term "activism." I will now outline my own definition of activism, drawing on the various models of activism previously discussed.

The concept of activism has both substantive and procedural components. A decision is "substantively activist" if the result it reached is contrary to clear constitutional or statutory text or lacks affirmative support in the text being interpreted, or is reached by overruling prior binding precedent without ad-

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In the first instance, there is no inherent reason for confidence that reconsideration would produce a better decision than the first one, and so courts should avoid upsetting the status quo and related reliance interests. Where, however, a court is convinced that a prior ruling was not only wrong but clearly so, the case for reconsideration is compelling, at least short of extraordinarily strong reliance interests counseling adherence to prior law.

90. I may be more cynical than Professor Nelson: in my view, doctrine aside (which is as he describes it), demonstrably erroneous precedents often do *not* in fact receive *stare decisis* effect from the Court. The Court manipulates the malleable "special justification" factors to permit overruling of precedents they view as clearly erroneous and wish to overturn. *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992) (plurality opinion) (arguing that *Plessy v. Ferguson*, 163 U.S. 537 (1896), "was wrong the day it was decided" and that *Brown* was "not only justified but required" to overrule it because "the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954" concerning the stigmatizing effects of segregation laws on blacks). The flip side is true as well: Where, as in *Casey* and *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), the Justices disagree with a prior precedent (even to the point of terming it demonstrably erroneous) but do not want to overrule it for political or other reasons, the manipulation runs in the other direction, and reliance or other policy concerns are exaggerated to save the prior precedent. *See* Paulsen, *supra* note 83, at 1538 & n.6.

91. *See generally* Smith, *supra* note 47. Other than where necessary to correct prior activist decisions, however, judicial activism is unjustified.

92. Amar, *supra* note 60, at 83.

equate justification in light of applicable *stare decisis* rules or by distinguishing or limiting binding precedents on grounds that were not material to the results reached in the prior cases. These are "substantive" aspects of activism because, in each instance, the necessary implication is that the judges overstepped the proper bounds of their authority and rendered a decision they were not entitled to make on the usual common-law model of decisionmaking. Substantive activism often will, but need not, result in "conflict" between the judiciary and the political branches of government, measured in terms of invalidation of action undertaken by other branches (including statutes or criminal convictions).

"Procedural activism," by contrast, is concerned with the method by which a decision is reached instead of the correctness of the end result. A decision is "procedurally activist" if it reaches the merits when justiciability doctrines grounded in Article III would counsel against doing so or if it resolves more issues than are necessary, strictly speaking, to resolve the case. In these instances, the underlying result may or may not be correct, and may or may not be substantively activist, yet the decision has been reached through improper means and therefore should be considered procedurally activist.

It is important to note that both aspects of activism, substantive and procedural, are defined in ideologically neutral terms. This approach recognizes that, contrary to public perception, "activism" is not simply a synonym for politically liberal decisionmaking by judges, as some conservative critics would have us believe, nor is it, as Rehnquist Court critics have suggested, a "blame word" applicable only to decisions retrenching on rights. Conservative judges no less than liberal judges may be guilty of activism depending either on how well the results they reach mesh with authoritative written texts and prior precedent, or on the means by which they reached them. Regardless of whether the Court is "expanding" or "contracting" rights, or whether the decision tilts to the left or the right politically, a unitary definition of activism should be applied uniformly.

In other words, we should stop using activism as an epithet—a form of academic hate speech—and start using the term in a principled, even-handed way. If we do, I think we will find that the Rehnquist Court, like probably every Court before it, has resorted to activism at times. I think we would also find that some of the Supreme Court's most strongly criticized decisions, both during the Revolution and Counterrevolution in criminal procedure and in other areas as well, were not activist at all—contestable, yes; wrong, perhaps; but not activist, at least under a neutral definition of activism that aspires to be more than shorthand for "I disagree." Ultimately, however, the correctness of my definition of activism or of my assessment of the Rehnquist Court's handiwork is not important. What is important, I think, is that we finally drop the hypocrisy of turning a blind eye to activism that produces results we find normatively attractive while condemning activism that produces results we oppose. We should say what we mean when we level charges of activism, and then be prepared to apply that same standard consistently.