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Articles

FLEXING JUDICIAL MUSCLE: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM IN THE FEDERAL COURTS

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INTRODUCTION

Immediately following President Obama's nomination of then-Judge Sonia Sotomayor to replace Justice Souter on the U.S. Supreme Court, critics branded her a "judicial activist"[1] who would work without regard to the "rule of law."[2] Former House Majority Leader Tom DeLay contended that President Obama "couldn't have appointed a more activist judge" and that Sotomayor's activism made her unqualified for a seat on the Court.[3] Karl Rove said the Republicans could win the battle against Sotomayor by "making a clear case against the judicial activism she represents."[4] On the first day of Sotomayor's confirmation hearings, Senator Jeff Sessions, the ranking Republican on the Senate Judiciary Committee, proclaimed her to be an "activist judge that threatens the traditional foundation of the U.S. legal system."[5] As has been typical in most political discussions about judges, the evidence supporting these assertions was notably lacking.[6]

The debates about then-Judge Sotomayor and other nominees to the U.S. Supreme Court beg the question: how can it be said with any confidence that a judge is or is not a judicial activist? Unfortunately, empirical legal scholarship has been unable to offer a meaningful, statistically valid answer for judges on the U.S. courts of appeals.[7] The study presented in this Article offers the first systematic attempt to determine the relative judicial activism levels of Sotomayor and the other judges who served on the federal courts of appeals in 2008. This study did so by measuring the latent trait underlying judicial activism: the propensity to privilege judgment. When a federal judge elevated his or her judgment above that of another constitutionally significant actor (e.g., Congress, the President, other Article III courts), then he or she was engaging in activity indicative of judicial activism, regardless of the particular definition used. Whether judicial activism was defined as failing to adhere to precedent, striking down legislation, or deviating from an accepted interpretative method, the activism involved

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[1] Between May 26, 2009, the day then-Judge Sotomayor was nominated to join the Court, and May 29, 2009, LexisNexis indicates there were 309 items using the term "judicial activism" or variations thereof in articles about then-Judge Sotomayor. The relevant search used the "News, All (English, Full Text)" database and the terms "Sotomayor and judicial activis!".

[2] *See* Robert Barnes, *Battle Lines Are Drawn on Sotomayor Nomination*, WASH. TIMES, May 28, 2009, at A1.

[3] *White House Responds as GOP Continues Sotomayor Attacks*, CNN (May 29, 2009, 9:13 AM), http://www.cnn.com/2009/POLITICS/05/29/sotomayor.white.house/index.html.

[4] Karl Rove, *"Empathy" Is Code for Judicial Activism*, WALL ST. J., May 28, 2009, at A13.

[5] *Sotomayor Pledges "Fidelity to the Law,"* CNN (July 13, 2009, 5:57 PM), http://www.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html. Not content with pedestrian labels, Curt Levey, the Executive Director of the Committee for Justice, called then-Judge Sotomayor a "wild-eyed judicial activist" even while he admitted that her record on the bench probably would not support that contention. Barnes, *supra* note 2.

[6] *See infra* notes 29–31 and accompanying text.

[7] For details on the rough analyses of Justice Sotomayor's "judicial activism" that were performed in the wake of her nomination, see *infra* note 176.

was premised on a judge putting his or her judgment in the place of others'. Instead of continuing the possibly endless debate about the meaning of judicial activism, the study outlined in this Article simply measured the trait that has been associated with the various forms of activism by examining the rate at which judges privileged their own views over those of others.

The measure examined situations in which one might have expected an appellate judge to be more deferential to another constitutionally significant actor (in this case, a federal district court) as well as situations in which an appellate judge was less likely to defer. By examining how individual judges respected both deferential and nondeferential standards of review in the aggregate, the study was able to determine the rate, relative to other judges, at which a judge substituted her judgment for that of a district court judge. This study diverged from previous empirical accounts of the concept that have been applied to other court levels in three significant respects.

First, while almost all major empirical work on judicial activism has focused on the Justices of the U.S. Supreme Court, this study targeted the judges on the federal courts of appeals. Although the actions of the Supreme Court are higher profile,[8] studying the courts of appeals for activism has been substantially more informative about judges and the judiciary.[9] Professors Frank Cross and Stefanie Lindquist succinctly stated the need to prioritize the study of the courts of appeals: "[T]he circuit court judiciary is probably the single most important level of the federal judiciary in light of its extensive caseload and policy making authority."[10] Further, in an era where the common path for someone to become a Supreme Court Justice involves first serving on the courts of appeals—as every current Justice except Elena Kagan has done—studying that level can yield important objective information for the nomination process.[11]

Second, by focusing on the common trait underlying most definitions of judicial activism, this empirical study used a broader measure to gauge activism, one that was not limited to instances of interbranch and intergov-

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[8] *See* ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 1 (2001) ("The Courts of Appeals are virtually invisible to most Americans. . . . They receive little media coverage because their decisions are often less dramatic than the pronouncements of the Supreme Court . . . .").

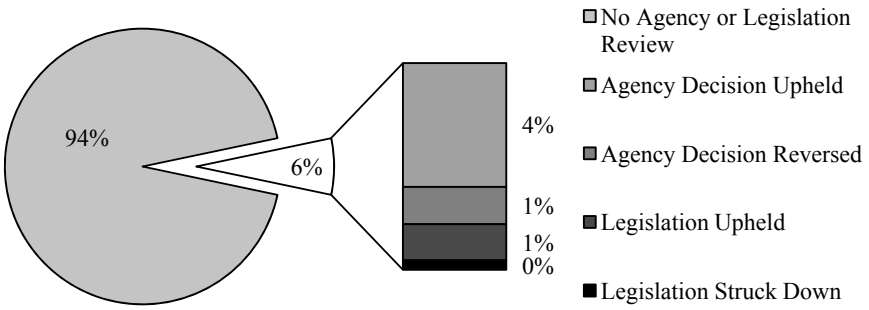
[9] Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1904 (2009) (explaining that, among the federal courts, the courts of appeals are better to study because "[t]he courts of appeals . . . hear far more cases each year than does the Supreme Court, have only very limited control over their dockets, and normally sit in panels of three (not en banc)").

[10] Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1385 (2009); *see also* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 1–2 (2007) ("[T]he circuit courts are much more important [than the U.S. Supreme Court] in setting and enforcing the law of the United States."); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 4 (2002) ("The truth, well known but often overlooked in the media and even in serious scholarship, is that lower court judges play a major role in the development of legal doctrine.").

[11] *See infra* note 96 and accompanying text.

ernmental relations. Most scholars have sought to measure activism through judicial review of federal legislation,[12] executive agency decisions,[13] and state and local laws.[14] Those measures only account for a very small portion of judicial decisions, particularly from federal courts below the Supreme Court. Indeed, as Figure 1 illustrates, there were very few instances when a federal appellate judge struck down legislation or reversed an agency decision in the 2008 cases studied.

FIGURE 1: INTERBRANCH REVIEW IN DATASET



As the above figure indicates, based upon the data studied in this Article, only 0.3% of federal appellate panels (31 of 10,242) voted to strike down federal legislation. While reversals of agency decisions were more common (representing 1.2% of the studied cases), a large majority of those instances were not in areas of law normally associated with judicial activism. Indeed, of the 122 times that a federal appellate court reversed an executive agency determination, 67 (54.9%) were Social Security cases. In more politically charged areas, only 5 of the 122 reversals (4.1%) involved labor relations, 4 (3.3%) were related to environmental protection, and 3 (2.5%) were civil rights cases. Consequently, most of the judges studied neither

[12] STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 47–64 (2009); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 66 (2007) ("'Judicial activism' is, and is likely to remain, a deeply contested term. This paper has attempted to give the term some quantifiable meaning by defining it in three objectively verifiable ways: a justice's willingness to invalidate federal legislation, to invalidate state legislation, and to overturn precedent.").

[13] LINDQUIST & CROSS, *supra* note 12, at 85–103.

[14] *Id*. at 65–83.

voted to strike down federal legislation nor reversed an executive agency decision in a coded area commonly connected with judicial activism. The great body of decisionmaking by the courts of appeals has been derived from review of lower courts, with little or no regard to the other branches of government. Thus, to better understand activism and activism's antithesis, restraint,[15] at the federal appellate level, it was much more informative to evaluate the cases that compose the full range of judicial opinions.[16]

Third, this study was concerned with identifying the overall behavior of judges and did not focus on individual instances of judicial activism. Rather than determining whether particular decisions were examples of judicial activism, this study attempted to locate the aggregate of behaviors associated with activism. Whereas existing studies have used individual judicial votes as the unit of measure,[17] which requires labeling each vote as "activist" or "restrained," this study did not require such subjective and controversial coding. Instead, the behavior of activism was measured in the aggregate using individual judges as the unit of measure.

Using the measure articulated herein, this Article empirically studied whether activism was correlated with the political party of the President, the identity of the appointing President, the ideology of the judge, the political composition of the Senate, and the scenario of the President and the Senate majority being of the same party at the time of judicial appointment. Ultimately, this Article concludes that there is no evidence of a statistically significant correlation between the activism of judges and their ideology (regardless of how activism was measured). However, the study did find that the courts of appeals vary substantially in their levels of judicial activism in a statistically significant manner. Further, in discussing the validity of the study, this Article provides insight into the judicial activism measures of four notable judges: Frank Easterbrook, Richard Posner, Justice Sonia

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[15] Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1753 (2007) ("Activism was often juxtaposed against a policy of 'judicial restraint'. . . ."); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) ("[Judicial activism] began life as the antithesis of 'judicial restraint' . . . ."); Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 194 (2008) ("Wherever the concept of judicial activism lurks, the complementary idea of judicial restraint is also hiding. These concepts are two sides of the same proverbial coin."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 179 (1987) (noting that "judicial activism" is the opposite of "judicial self-restraint"); J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 1 (1981) ("The opposite of judicial activism, judicial restraint has sometimes been referred to as 'strict constructionism' or 'interpretivism.'"), *reprinted in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 174 (David M. O'Brien ed., 3d ed. 2009).

[16] The population studied includes cases involving reviews of legislation and agency decisions because the courts of appeals in those cases must consider the district courts' review of the statutes and agency actions.

[17] *See, e.g.*, Cross & Lindquist, *supra* note 15, at 1773–74; Ringhand, *supra* note 12, at 44.

Sotomayor (during her time on the Second Circuit Court of Appeals), and J. Harvie Wilkinson III.

Part I of this Article focuses on differing theoretical conceptions of judicial activism. Part II reviews existing empirical studies of judicial activism and introduces in detail the measure used in this study. Part III applies this measure to a newly created dataset of 2008 opinions by eleven courts of appeals and analyzes the results based upon that application. Part IV considers the reliability, validity, and limitations of the study while discussing the application of the measure to four notable judges on the courts of appeals. The Article concludes with some thoughts about judicial activism and new directions for research. Consistent with the mission of making empirical legal studies more accessible and understandable to a larger audience,[18] this Article avoids empirical research jargon whenever possible and utilizes graphical representation[19] of key measures throughout. The technical details traditionally found in empirical legal studies are largely located in the footnotes and in the Appendices at the end of the Article.

I. WHAT IS "JUDICIAL ACTIVISM"?

The term "judicial activist" first appeared in print in a 1947 article in *Fortune* by Arthur Schlesinger Jr. about Justices on the Supreme Court.[20] Schlesinger targeted Justices Douglas and Black as being especially activist.[21] In his extensive discussion of "activism" and "restraint," Schlesinger offered no clear definition of either concept.[22] Despite its ambiguity, once

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[18] *See* Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1814 (2006) ("Most crucially, it seems nearly incontrovertible that moving towards more appropriate and accessible presentations of data will heighten the impact of empirical legal scholarship on its intended audience—be that audience other academics, students, policy makers, lawyers, or judges—not to mention raise the level of intellectual discourse among scholars themselves."); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 135–36 (2009) ("[I]t is incumbent upon those of us who investigate judicial ideology to employ concepts and methods that are both clear and appropriate. The fact that much of the audience is not methodologically sophisticated makes it all the more crucial that we do so. As a research community, we must cultivate and convey a better understanding of methods for measuring judicial ideology if we are to succeed in convincing others of the validity of our work.").

[19] *Cf.* Lee Epstein, Andrew D. Martin & Christina L. Boyd, *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801, 804–05 (2007) ("[R]esearchers should almost always graph their data and results. . . . Unless the author has a very compelling reason to provide precise numbers to readers, a well-designed graph is a superior choice to a table.").

[20] Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73, 74–76. The article also labeled Justices Murphy and Rutledge as "activist." *Id*. at 75–76. For an extensive and helpful discussion of Schlesinger's role in coining the term and the arguments he made, see Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1200–09 (2009). Notably, even before the term was first used, the idea of an activist judge had been understood in principle in debates about the judiciary throughout American history. *See* LINDQUIST & CROSS, *supra* note 12, at 1–2.

[21] Green, *supra* note 20, at 1203.

[22] *See id.*

the term "judicial activism" had been coined, it joined the lexicon of public and scholarly debates about the role of the judiciary.[23]

From that time forward, the label "judicial activism" was used in a variety of ways, often losing meaning with each new deployment.[24] Judge Joseph C. Hutcheson Jr. first used the phrase in a 1959 judicial opinion.[25] Since then, it has become increasingly common in opinions criticizing other judges.[26] Although some scholars have defended activism by judges in a general sense,[27] the term normally has been overwhelmingly loaded with negative connotations.[28] Whereas judicial activism was historically a label hurled at liberal judges, it has more recently been an equal-opportunity epithet launched at conservatives.[29] The term "activism" has been so ubiquitous in legal debates that its utterance has become an important part of the inevitable ritual of attacking a judge or a judicial decision.[30] Notably, critics of nominees have offered nothing even resembling empirical evidence to support the use of the label "activist."[31]

The responses to the nomination of Justice Sotomayor discussed in the Introduction are representative of arguments about the judiciary from all

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[23] *See id*. at 1207 ("History is as history does, however; and despite activism's spare introduction, the term sprang to immediate use at the highest levels of legal debate.").

[24] *See* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1443 (2004) ("[A]s the term has become more commonplace, its meaning has become increasingly unclear.").

[25] *See* Theriot v. Mercer, 262 F.2d 754, 760 n.5 (5th Cir. 1959); Kmiec, *supra* note 24, at 1455–56 (noting that this was the first use of the term in an opinion).

[26] *See* Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 579 (2007); Kmiec, *supra* note 24, at 1442–43.

[27] *See, e.g.*, STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE (2d ed. 1996); FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE (1999).

[28] *See* Kmiec, *supra* note 24, at 1444.

[29] LINDQUIST & CROSS, *supra* note 12, at 8 ("With the ascent of a conservative Supreme Court, accusations that conservatives are the 'real judicial activists' have become frequent . . . ." (citation omitted)); Cross & Lindquist, *supra* note 15, at 1757 ("In today's world, however, the tables have turned as '[a]ccusations that conservatives on the Rehnquist Court are the real judicial activists have become commonplace.'" (quoting Orin S. Kerr, *Upholding the Law*, LEGAL AFF., Mar./Apr. 2003, at 31, 31)); J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1383–84 (2002) (discussing this shift and cataloging instances in which the Rehnquist Court was labeled as "activist"); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2387 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("The odd thing is that—unlike any earlier time in American history—*both* sides of the political spectrum proclaim themselves unhappy with the courts. Charges of judicial 'activism,' once a staple of conservative critiques of the courts, now are heard as often from liberals and progressives.").

[30] *See* William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 1–2 (1992) ("In most cases, the mindless incantation of [judicial activism] amounts to a political ritual, which touches the congregation of voters on an emotional level without provoking any reasoned discourse among them.").

[31] *Id.*

portions of the political spectrum. Calling a nominee a "judicial activist" usually has meant no more than that the speaker opposes the appointment of that judge,[32] and labeling a particular court ruling "activist" has most often been code for merely disliking the decision.[33] Because of the difficulties involved in defining it, Chief Judge Frank Easterbrook referred to "judicial activism" as "that notoriously slippery term."[34] Further, the ambiguity and overuse of the term has ensured that the concept has not been effectively measured and studied throughout the federal court system.[35]

Despite the wide modern use of the pejorative label "activist," its contours are rarely defined by those deploying it.[36] The use and abuse of the label extend beyond pundits and talking heads, as judges increasingly accuse their colleagues of activism.[37] Upon examining the conventional use

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[32] LINDQUIST & CROSS, *supra* note 12, at 14–17.

[33] *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 3 (2006) ("[I]n practice 'activist' turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with."); Cross & Lindquist, *supra* note 15, at 1755 ("In many cases, complaints about judicial activism only reflect an amorphous lament about disfavored Court decisions."); David R. Dow, Cassandra Jeu & Anthony C. Coveny, *Judicial Activism on the Rehnquist Court: An Empirical Assessment*, 23 ST. JOHN'S J. LEGAL COMMENT. 35, 37 (2008) ("Rather than describing a particular *mode* of judicial analysis, the term 'judicial activism' refers to a judicial outcome to which someone (namely the person using the term) generally objects."); Justice, *supra* note 30, at 1 ("'Judicial activism' is, more often than not, a code word used to induce public disapproval of a court action that a politician opposes, but is powerless to overturn."); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217 (2002) ("Judicial activism means a decision one does not like."); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002) ("[P]articipants in both academic and political debates generally use 'judicial activism' as a convenient shorthand for judicial decisions they do not like."); *see also* Kermit Roosevelt III & Richard W. Garnett, Debate, *Judicial Activism and Its Critics*, 155 U. PA. L. REV. PENNUMBRA 112, 112 (2007), http://www.pennumbra.com/debates/pdfs/Roosevelt_Garnett.pdf (Roosevelt, Opening Statement) ("The negative argument . . . is that 'judicial activism,' as the phrase is typically used, is essentially empty of content; it is simply an inflammatory way of registering disapproval of a decision.").

[34] Easterbrook, *supra* note 15, at 1401.

[35] *See infra* notes 59–63 and accompanying text.

[36] The failure to offer any meaningful definition of "judicial activist" while branding a judge with the label is a common phenomenon in public debate. *See, e.g.*, Justice, *supra* note 30, at 2 ("Even within the legal profession, defenders and decriers of 'judicial activism' sometimes fail to see the need to explain just what it is they are debating."); Young, *supra* note 33, at 1143 ("Debates about the law frequently involve charges of 'judicial activism,' but those charges are rarely accompanied by an attempt to define the term with any sort of precision."); Kmiec, *supra* note 24, at 1443 ("'[J]udicial activism' is defined in a number of disparate, even contradictory, ways; scholars and judges recognize this problem, yet persist in speaking about the concept without defining it.").

[37] Roberts, *supra* note 26, at 579 ("The phrase appears often in dissenting opinions, and in some cases is used to arouse intrigue or accusation, as it is often used by the media."); Kmiec, *supra* note 24, at 1442–43 ("Judges today are far more likely to accuse their colleagues of judicial activism than they were in prior decades.").

of the term, one might conclude that it is "empty"[38] and unworthy of further inquiry.[39] However, this Article contends that judicial activism is an idea worth salvaging in order to better understand judicial behavior[40] and to debate the merits of particular judicial nominees.[41]

As Ernest Young explained, "'Activism' is a helpful category in that it focuses attention on the judiciary's institutional role rather than the merits of particular decisions."[42] Activism goes to essential questions about the role of the judge in our democratic order.[43] Confirmation hearings, public debates about judicial decisions, and scholarly discussions of the institutional role of members of the judiciary all present situations in which the concept of activism will and must be discussed.[44] While "activism" has become trivialized by overuse, it still describes judges who are more apt to elevate their judgment above others'. Understanding which judges more regularly exhibit the fundamental trait underlying activism can lend tre-

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[38] Roosevelt & Garnett, *supra* note 33, at 3–4 (Roosevelt, Opening Argument); *see* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275–76 (2002); Easterbrook, *supra* note 15, at 1401.

[39] Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 493 (2007) (contending that the term "activism" is essentially meaningless); Dow, Jeu & Coveny, *supra* note 33, at 38 ("Because the phrase 'judicial activism' means nothing, it cannot be coherently described, and because it cannot be coherently described, it cannot be measured empirically."); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1716 (2007) ("The phrase 'judicial activism' is . . . meaningless because it offers little more than reflexive criticism and convenient sound bites."); Charlie Savage, *Uncertain Evidence for "Activist" Label on Sotomayor*, N.Y. TIMES, June 20, 2009, at A10 (quoting Professor Richard Epstein as saying, "'Judicial activism' tells you nothing . . . . The term ought to be scrapped. In today's world it's just a synonym for bad decisions. O.K., I'm against bad decisions, too. But you always have to explain why, and there's no shortcut for doing that.").

[40] *See* LINDQUIST & CROSS, *supra* note 12, at 29 ("Yet claims of judicial activism need not be meaningless. One can clearly imagine relatively more or less activist judiciaries that play a greater or lesser role in national governance."); Green, *supra* note 20, at 1198 ("When understood properly, debates over judicial activism are a vital part of public life, and they also represent the legal academy's highest calling."); Young, *supra* note 33, at 1216 ("[B]y being more precise about both 'conservatism' and 'judicial activism,' we can recover meanings that helpfully advance our present constitutional debates.").

[41] Young, *supra* note 33, at 1140.

[42] *Id.* at 1141.

[43] *See* LINDQUIST & CROSS, *supra* note 12, at 30 ("Nevertheless, the simple fact that a term is misused or only used vaguely does not mean that it lacks intrinsic meaning or value. 'Judicial activism' captures an important aspect of modern governance."); *see also* Green, *supra* note 20, at 1225 (stressing the value of discussions about judicial activism in causing otherwise unchecked judges to be aware of their own "judicial usurpation").

[44] *See, e.g.*, LINDQUIST & CROSS, *supra* note 12, at 14–17; *see also* Green, *supra* note 20, at 1261–62 ("The extent to which judicial standards should derive from public attitudes, rather than those of legal experts, may be debatable. But to ignore social attitudes over mere issues of rhetoric seems unsound. In a democracy with public confirmation hearings, it may be important for scholars to understand and perhaps even reform the language of 'activism' if their views are to carry full weight." (footnote omitted)).

mendous insight into judicial behavior in general.[45] Further, the concept's public descent into meaninglessness will not simply cause it to disappear.[46] Rather, it will continue to be part of essential rhetoric surrounding every discussion about the judiciary. Therefore, identifying useful and effective measures to gauge activism may at least add a modicum of clarity to the confusion concerning the topic.

Scholars have offered an incredible list of possible components and definitions of judicial activism. Rather than discussing each of the possible definitions or aspects in detail, it is more practical to simply list the essential elements of these various perspectives. From those perspectives and definitions, the following elements emerge as signs of judicial activism: overruling actions by other federal branches or state governments, failing to follow textual meaning, departing from history or tradition, issuing maximalist and not minimalist holdings, using broad remedial powers, basing decisions upon partisan preferences, failing to follow an originalist view of the Constitution, issuing an opinion inconsistent with prior precedent, exercising power beyond a court's jurisdiction, creating new rights or theories, altering prior doctrines or interpretations, establishing substantive policy, and failing to use an accepted interpretative methodology.[47]

Perhaps the clearest conclusion one can draw from the various attempts to understand and define judicial activism is that the concept of judicial activism is "multidimensional."[48] As such, it makes little sense to define "activism" and "restraint" as part of a binary construction. Instead, the terms are best understood as endpoints on a continuum describing one aspect of judicial behavior.[49] Of particular importance to this Article is the realization that activism does not have to be inherently good or bad; it can simply be a

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[45] *Cf.* Green, *supra* note 20, at 1221 ("[A]ctivism debates are indispensable, and this conceptual point remains true regardless of whether one prefers 'judicial legislation,' 'aggressive judging,' or some other rhetorical creature. The concept of judicial activism underlies them all." (footnote omitted)).

[46] *Cf. id*. at 1220 ("On the other hand, an academic choice to decry or ignore activism-talk will not make the term disappear.").

[47] *See, e.g.*, LINDQUIST & CROSS, *supra* note 12, at 32; Cross & Lindquist, *supra* note 15, at 1762–63 (paraphrasing Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 239 (1983)); Green, *supra* note 20, at 1217; Marshall, *supra* note 33, at 1220; Young, *supra* note 33, at 1144; Kmiec, *supra* note 24, at 1463–76.

Notably, the authors of the various lists of signs readily concede that the different definitions or indices are often in tension with each other. *E.g.*, Marshall, *supra* note 33, at 1220 (noting that the indices offered are "not always consistent with each other"); Young, *supra* note 33, at 1164 ("Given the variety of forms that activism may take, it is not surprising that these definitions of activism will quickly come into conflict in particular cases."); *see also* Kmiec, *supra* note 24, at 1443 (noting that "'judicial activism' is defined in a number of disparate, even contradictory, ways").

[48] *See* Cross & Lindquist, *supra* note 15, at 1763. However, some scholars and judges have rejected "multidimensional" definitions in favor of a narrow definition focused entirely on interbranch actions. *See infra* Part II.A.

[49] LINDQUIST & CROSS, *supra* note 12, at 31 ("Thus activism is best conceptualized in terms of a continuum between activism and restraint, with justices or courts compared in terms of gradations along that continuum.").

descriptive term for a certain type of judicial activity.[50] Indeed, many outcomes that were widely considered to be the product of judicial activism, such as the Supreme Court's decision in *Brown v. Board of Education*,[51] have been treated kindly by commentators.[52] Labeling a judge an "activist," then, should not be construed as a pejorative but rather as an identification of a trait possessed by that judge. Similarly, "judicial restraint" should be understood as a value-free term for identifying judicial activity that is more deferential.[53] While "restraint" has been often used as a compliment, there are many historical instances, such as the Supreme Court's decision in *Korematsu v. United States*,[54] in which the Court's restraint is now viewed with disdain.[55] There will certainly be instances where one can argue credibly that a particular judge was too activist or too restrained,[56] but in order to have a meaningful discussion of the concepts, one must minimize the pejorative connotations.[57] Otherwise, scholarly debate about the subject will simply spiral into the same morass exhibited in public discussion.[58]

The core of these varied concepts of judicial activism has been the idea that judges are activist when they substitute their judgment in place of that

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[50] *See* Lipkin, *supra* note 15, at 203 ("Nothing in this distinction suggests that either form of judicial activism is good or bad. It is a distinction that should be used as a filter through which to evaluate different proposals for defining judicial activism." (footnote omitted)).

[51] 347 U.S. 483 (1954).

[52] *See, e.g.*, Cross & Lindquist, *supra* note 15, at 1753.

[53] *See* Wallace, *supra* note 15, at 14 (arguing that judicial restraint requires a judge to "give proper deference").

[54] 323 U.S. 214 (1944).

[55] *See, e.g.*, Cross & Lindquist, *supra* note 15, at 1753.

[56] *See* Young, *supra* note 33, at 1163 ("Movement in a particular direction carries no normative weight unless we can explain why that movement has gone too far.").

[57] *See* Easterbrook, *supra* note 15, at 1405 (defending a redefinition of the concept that is "value-free"); Young, *supra* note 33, at 1144 ("[J]udicial 'activism' is not just an epithet—or at least . . . it does not *have* to be. Properly used, 'activism' and 'restraint' focus us on the institutional aspects of judicial decisions, apart from the merits, and this focus will be useful from time to time.").

[58] This is not to say that healthy debate about the concept has not occurred. Indeed, Professor Craig Green recently offered a simple definition of activism in response to the numerous alternatives that have been proposed: activism occurs when a judge "violate[s] cultural norms of judicial role." Green, *supra* note 20, at 1255. Notably, in contrast to the author of this Article, Green considers activism to be a net negative characteristic for a judge, *see id.* at 1222, even as he acknowledges that activism could be used for positive ends, *see id*. at 1220–21. Professor Ernest Young theorized perhaps the most complete definition of the concept for purposes of empirical study and effectively synthesized the various perspectives about the term:

> "[A]ctivist" [behaviors] in legal debates share a common thread, that is, the assertion of broad judicial decision making autonomy in relation to other actors in the system. These actors may include the federal political branches, state governments, the framers and ratifiers of the Constitution, or other courts that have decided similar issues in the past or that may be called upon to do so in the future.

Young, *supra* note 33, at 1143. As Young himself noted, his definition avoided the "normative content" of the term "activism" except as part of a larger debate about the institutional role of the judiciary. *Id.* Young's and Green's efforts together provide a solid starting point for redefining the concept with a particular eye toward empirical study.

of other significant actors. When judges do not follow prior precedent, they are placing their judgment above that of prior courts. When judges strike down legislation, they are similarly placing their judgment above that of legislators. And when judges seek to achieve certain policy results regardless of doctrine, they put their judgment about what is "right" above what various other actors believe the law to be. Each of the common perspectives on activism can be understood as relying on specific examples of judges placing their judgment above that of others.

However, every instance in which a judge places his or her judgment above another's is not necessarily indicative of activism. For example, when judges grant defense motions to suppress evidence in criminal cases, they place their judgment above that of a police officer. However, because a police officer has never been a constitutionally significant actor, these judicial decisions have not been construed as "activist." Similarly, courts' judgments often supplant those of litigants and their lawyers, but these decisions have not been classified as "activist" or "restrained." In order to measure activism and the trait underlying it, it is only necessary to focus on the primary constitutionally significant actors: Congress, the Executive, state governments, and other courts.

II. MEASURING THE ACTIVISM AND RESTRAINT OF JUDGES

Despite the incredibly wide use of the term "judicial activism," there has been very little empirical examination of the concept.[59] In part because of the difficulty in measuring ideas like "results-oriented judging," there have been few attempts. Perhaps the most significant difficulty in studying judicial activism has been that there often is no identifiable baseline to explain what a restrained judge would have done in a particular case. Judge Diarmuid O'Scannlain explained: "[A researcher] must establish a noncontroversial benchmark by which to evaluate how far from the 'correct' decision the supposedly activist judge has strayed."[60] If every reversal of a lower court decision or striking down of a statute were considered "activist," the term would lose relevance and meaning. Even a restrained judge would be expected to have placed her judgment above others in many situations.

Nonetheless, there have been certain aspects of judicial activism that have been measured by social scientists and legal scholars.[61] Stefanie Lindquist and Frank Cross recently completed a very important study of the U.S. Supreme Court that was the first to combine five of the most common

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[59] *See, e.g.*, Cross & Lindquist, *supra* note 15, at 1770 ("To date, the empirical research exploring judicial activism has only scratched the surface.").

[60] Diarmuid F. O'Scannlain, *On Judicial Activism*, OPEN SPACES Q., Mar. 2000, at 20, 23, *available at* http://www.open-spaces.com/article-v3n1-oscannlain.php.

[61] *See, e.g.*, LINDQUIST & CROSS, *supra* note 12, at 44–45.

measures of activism.[62] The typical measures they combined examined when courts (1) struck down federal legislation, (2) struck down state and local laws, (3) reversed executive agency actions, (4) overruled prior precedent, and (5) expanded the jurisdiction of courts through justiciability decisions.[63] However, as discussed in the Introduction, it has been difficult to apply a similar methodology to the lower courts because of the infrequency of those occurrences at those levels.

A. Judicial Activism as Interbranch and Intergovernmental Action by the U.S. Supreme Court

Many judges and scholars, consistent with existing empirical studies, have argued that focusing on actions against elected branches and governments should be the only way to measure judicial activism. Judge J. Harvie Wilkinson III wrote: "All manifestations of activism involve by definition judicial intervention into the democratic process."[64] Judge Richard Posner noted a similar limitation: "[U]nless [a] court is acting contrary to the will of the other branches of government, it is not being 'activist' in the sense [that] should . . . become canonical."[65] Cass Sunstein argued that "it is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government."[66] There are many shortcomings to measuring judicial activism so narrowly.

First, such a measure would only apply to a small slice of the definitions of activism. Most of the scholarly, lay, media, political, and judicial conceptions of judicial activism have not required intergovernmental or interbranch actions. For example, the various popular views of judicial activism include failing to follow textual meaning, departing from history or tradition, issuing maximalist and not minimalist holdings, using broad remedial powers, basing decisions upon partisan preferences, failing to follow an originalist view of the Constitution, issuing an opinion inconsistent with prior precedent, exercising power beyond a court's jurisdiction, creating new rights or theories, altering prior doctrines or interpretations, establish-

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[62] *See id.*

[63] *See id*. (comprehensively reviewing such measures).

[64] Wilkinson, *supra* note 29, at 1386.

[65] RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 320 (1996).

[66] CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42–43 (2005); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 45 (1990) (noting that courts decide on a case-by-case basis whether the Legislature or the courts will govern); Easterbrook, *supra* note 15, at 1403–04 ("[U]nless the application of the Constitution or statute is so clear that it has the traditional qualities of *law* rather than political or moral philosophy, a judge should let democracy prevail."); Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 143 (2002) ("[J]udicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation.").

ing substantive policy, and failing to use an accepted interpretative methodology.[67]

Hypothetical interbranch and intergovernmental measures would discount the public and scholarly debate over decisions frequently labeled as "activist." The Supreme Court's decision in *Miranda v. Arizona*[68] has been criticized as embodying the judicial activism of the Warren Court.[69] However, this archetypal decision in the judicial activism debate was attacked as activist because of the Court's reasoning and not because the Court was reviewing legislation. Even when judicial review of legislation has been involved, the "activism" label has often been applied for reasons that have nothing to do with the interbranch aspect of the case. For example, when the Ninth Circuit, which has become a favorite target for critics of judicial activism,[70] held that the inclusion of the phrase "under God" in the Pledge of Allegiance represented an unconstitutional establishment of religion,[71] the decision was not branded as "activist" because it struck down legislation or an executive action. Instead, as critics like Senator Orrin Hatch pointed out, the Ninth Circuit's results-driven decisionmaking and disregard for precedent were the basis for the "activism" label, even though the case involved judicial review of legislation.[72]

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[67] *See supra* note 47 and accompanying text.

[68] 384 U.S. 436 (1966).

[69] *See* John H. Blume, Sheri Lynn Johnson & Ross Feldmann, *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 344 (2005) ("The parallels between *Brown* and *Miranda*—and *Furman*, too—demonstrate both the bold judicial activism of the Warren Court era, as well as its ultimate failure to bring about real change in key areas of our society."); Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1161–62 (2000) ("As might be expected, the Court faced considerable heat from legal scholars of all political bents. Joseph Grano, for one, criticized *Miranda* as an ultimate form of judicial activism without constitutional mandate . . . ." (footnote omitted)); Edwin Meese III, *Challenges Facing Our System of Justice*, 3 AVE MARIA L. REV. 303, 312 (2005) ("In the area of criminal prosecution, the *Mapp* and *Miranda* cases changed entirely the requirements imposed on the states to conform to a federal standard of criminal procedure that was not at the time required by the Constitution. Indeed in the *Miranda* case, we have this judicial activism compounded by subsequent judicial 'boot-strapping.'" (footnotes omitted)); Book Note, *The Eyes of the Law*, 103 HARV. L. REV. 1390, 1390 (1990) (reviewing H. RICHARD UVILLER, TEMPERED ZEAL (1988)) ("In addition to galvanizing academic opposition to judicial activism, *Miranda* roused popular criticism of the Court."); Kmiec, *supra* note 24, at 1473 (explaining that *Miranda* has been seen as an example of judicial activism).

[70] *See, e.g.*, 149 CONG. REC. 4986 (2003) (statement of Sen. Lisa Murkowski) ("The recent history of the 9th Circuit suggests a judicial activism that is close to the fringe of legal reasoning."); 144 CONG. REC. 24457 (1998) (statement of Sen. John Ashcroft) (calling the Ninth Circuit "the epicenter of judicial activism in this country"); Press Report, Representative Trent Franks, Franks Denounces Ninth Circuit Ruling Against Parental Rights (Nov. 4, 2005) ("This is just the latest outrage to come from the Ninth Circuit, which has become the poster child for judicial activism."), *available at* http://www.house.gov/apps/list/press/az02_franks/110405_ParentalRights.html.

[71] *See* Newdow v. U.S. Cong., 292 F.3d 597, 612 (9th Cir. 2002).

[72] *See* Orrin G. Hatch, Op-Ed., *A Circuitous Court—Pledge Decision Is Judicial Activism*, WASH. TIMES, July 2, 2002, at A17 ("[The *Newdow* decision] is . . . flatly inconsistent with a unanimous, decade-old ruling of the Seventh Circuit, *Sherman vs. Community Consolidated School District*, where the

There also have been many instances in which judges have usurped the roles of other branches of government without striking down legislation or other governmental acts. For example, courts have created brand-new doctrine (an "activist" approach under modern conceptions of the term) to uphold a democratic action.[73] Most often this has occurred when the Court has created a new doctrine that limits a constitutional right and thus allows legislation to survive scrutiny. Examples of this so-called activist judicial restraint[74] might include *Plessy v. Ferguson*[75] and the *Slaughter-House Cases*.[76] In such instances, it would be very difficult for a study to classify such actions as "activist" or "restrained." Applying a measure that only counted interbranch reversals would, at a minimum, fail to measure these events and might also falsely signal restraint when a new doctrine upheld democratic action. Further, the idea of a judge acting like a one-person legislature is interwoven with the concept of judicial activism.[77] A judge, or panel of judges, can act as a legislature by establishing new policy. An activism measure focused on interbranch relations thus would omit as nonactivist some of the cases most commonly called "activist."

Second, a definition of "activism" based only on interbranch activity is overinclusive. There have been numerous occasions on which a judge has used judicial review to strike down legislation or overrule an agency that do not reflect any of the essential characteristics of the term "activist."[78] Indeed, judicial review of the other branches has been and continues to be an

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court held that 'schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate.' This is truly a remarkable feat of judicial activism . . . .").

[73] Cross & Lindquist, *supra* note 15, at 1760 ("Moreover, activism is not limited solely to incidents in which the judiciary invalidates a statute; as Randy Barnett argues, 'it is activist for courts to adopt doctrines that contradict the text of the Constitution *either* to uphold or nullify a law.'" (quoting Barnett, *supra* note 38, at 1276)).

[74] *See* Lipkin, *supra* note 15, at 213–14 ("Constitutional history supports the claim that maintaining the status quo, through judicial restraints can be just as activist as striking down legislation. Three examples clearly illustrate the dangerous effect of 'activist judicial restraint:' the *Slaughter-House Cases*, *Plessy v. Ferguson*, and *Korematsu v. United States*. In the *Slaughter-House Cases*, the Court dealt a virtual death blow to the Fourteenth Amendment's Privileges or Immunities Clause. By giving it quite a remarkable interpretation, the Court rewrote the text of the Fourteenth Amendment. In its decidedly narrow interpretation of the Due Process Clause and the Equal Protection Clause, the Court postponed for decades these constitutional provisions from assuming their rightful place in the American pantheon of individual rights." (footnotes omitted)).

[75] 163 U.S. 537, 548–52 (1896).

[76] 83 U.S. (16 Wall.) 36 (1872).

[77] *See* Cross & Lindquist, *supra* note 15, at 1756.

[78] *Id.* at 1760 ("Exercise of the power of judicial review might be called 'activist,' but the mere exercise of the power alone is not what animates critics of activist decisions. Should a state ignore the Thirteenth Amendment and reinstitute slavery, few would criticize the Court for striking down such legislation, nor would such a ruling be deemed 'activist.'" (footnote omitted)); Kmiec, *supra* note 24, at 1463–64 ("Invalidation alone . . . reveals little about the propriety of individual decisions. The mere fact that the Court has struck down more laws in recent years does not automatically render the individual decisions suspect.").

essential function of modern courts.[79] Not all (and possibly not even most) invalidations of laws or executive actions have been "activist" even by the standards of those who espouse intergovernmental and interbranch definitions. Notably, Justice Antonin Scalia, a well-noted voice against judicial activism,[80] has remarked that striking down legislation is not inherently indicative of activism in an era when "Congress is increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution."[81] This problem makes identifying an adequate baseline for restraint using hypothetical interbranch measures all the more difficult.

Third, such a limited view of activism necessarily relies on a subjective view of the proper role of courts. All scholars and judges have agreed that the courts must strike down legislation on constitutional grounds in certain instances—the debate is largely about the degree to which that is desirable.[82] Any attempt to delineate instances of activism and restraint will invariably focus on subjective notions of the proper role of the judiciary. Consequently, the definitions of "activism" really obscure the subtextual fact that some rebukes of democratic institutions by the courts have not been activist. The ability to differentiate between activist and restrained decisions continues to sit at the heart of the definitional debate, yet the distinction would be overlooked by the focus on intergovernmental and interbranch actions in an empirical study of the courts of appeals. Further, in order to exercise their proper constitutional role, courts must be willing to exercise judicial review of legislative or executive actions for constitutionality.

Fourth, even if such a measure of intergovernmental- and interbranch-related decisions makes sense in regards to the Supreme Court, it has little applicability to the courts of appeals. These courts have very rarely overruled other branches. As noted above, just a fraction of one percent of the

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[79] Craig Green has effectively explained this problem for existing studies:

> [T]he definition of "judicial activism" as any decision invalidating a statute is popular among quantitative empiricists, largely because such activity is easy to count. . . . But there are two problems. First, a focus on examples of judicial *review* fails to condemn judicial *activism*, because a key function of post-*Marbury* courts is to invalidate unconstitutional acts. . . . Second, even empiricists know that not every statutory invalidation is activist. Yet without a more nuanced definition, no one can determine whether a few, many, or most judicial decisions striking down statutes are truly activist.
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> An example will illustrate both points: If Congress banned political sedition, or authorized the race-based punishment of American citizens, courts would not be "activist" in annulling such statutes. And although quantitative studies often recognize this problem, they nonetheless accept statutory invalidation as an impressionistic proxy for activism. In so doing, empirical accounts implicitly exchange all plausible definitions of judicial activism for a solid data set. Although the quantitative study of judicial decisions invalidating statutes may be worthwhile in its own right, such analysis holds no adequate definition of activism.

Green, *supra* note 20, at 1218–19 (footnotes omitted).

[80] *See id*. at 1249–50.

[81] Stuart Taylor Jr., *The Tipping Point*, NAT'L J., June 10, 2000, at 1810, 1811 (quoting Justice Scalia).

[82] *See* Kmiec, *supra* note 24, at 1465–66.

cases in this study involved a court of appeals judge voting to strike down legislation.[83] A narrow measure of activism based upon judicial review of legislation ultimately would suggest that a judge on a court of appeals was not an activist in 99.7% of her decisions. Not only would this conclusion contradict many common understandings of the concept,[84] but it would render the measure meaningless in understanding activism at the federal appellate level.

Because of those shortcomings, it may be surprising that so many scholars have construed judicial activism so narrowly. However, intergovernmental and interbranch measures have been, in some ways, easier to use than some hypothetical ideal measures that identify the "restrained" outcome in a case, so there is good reason for such a limited focus. Further, at the U.S. Supreme Court level, at which existing studies have primarily aimed, the percentage of the docket that includes interbranch and intergovernmental actions is far higher, so studies of those cases have yielded insight into the overall performance of Justices.[85]

Notably, though, the exclusive focus upon the Supreme Court at the federal level has skewed the picture of activism. There are many aspects of the modern Supreme Court that make it atypical in terms of judicial activism.[86] Primarily because of the ever-shrinking Supreme Court docket, it has been a less-than-ideal institution to study empirically. Because the Court only reviews approximately seventy-five cases per year,[87] the population sizes are very small (particularly using existing measures),[88] coverage of different areas of law is minimal,[89] and the self-selected docket does not necessarily provide a random sample of litigation in the United States. The samples are even more complicated given the selection effects of the litigants involved in Supreme Court litigation.[90] Further, actions by Supreme

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[83] *See supra* Figure 1.

[84] *See supra* note 47 and accompanying text.

[85] *See* LINDQUIST & CROSS, *supra* note 12, at 50–51.

[86] *Cf.* Edwards & Livermore, *supra* note 9, at 1904 ("There are many empirical studies devoted to the decisions of the Supreme Court. However, because of the Court's unique status and operating procedures, it is difficult to draw broad conclusions about decisionmaking in the federal courts of appeals from studies of the Supreme Court.").

[87] CROSS, *supra* note 10, at 2.

[88] *See id.*

[89] *See id.*; Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1273 (2005) ("[T]he Supreme Court reviews only a minute percentage . . . of court of appeals decisions. Entire fields of law are left mainly to the courts of appeals to shape.").

[90] *See, e.g.*, Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 824 (1993) (explaining that "given the existing indeterminacy and moral reference of so much of the constitutional text, . . . the selection effect concentrates in the Supreme Court cases for which the narrowly legal materials do not generate an answer"); *see also* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1058 n.162 (2007) ("The drawing of conclusions based on this collection of Supreme Court cases is obviously fraught with peril, since the sample is heavily influenced by selection effects. Only certain types of cases reach the Supreme Court (or are even litigated in the

Court Justices are essentially unconstrained: Justices are free to vote in any manner based on any rationale, with very limited repercussions.[91] It is, thus, very hard to construct a baseline of "restraint" against which to measure "activism" by Justices. Also of significance is that when a person is appointed to the Court, she receives life tenure with almost no possibility of impeachment based upon judicial performance[92] and has no chance of additional promotion to incentivize, and therefore constrain, her behavior. That means that any information about a Justice's activism cannot be used to effect change in the performance of the Court. In contrast, the courts of appeals continue to review an enormous number of cases from varied areas of law;[93] are constrained by the Supreme Court, en banc review, and other panel decisions;[94] and can be evaluated based upon performance before being elevated to the Supreme Court.[95] This last characteristic of courts of appeals judges is particularly notable given the increasing trend of selecting Supreme Court Justices from the federal appellate ranks (with the notable exception of Solicitor General Elena Kagan's nomination).[96]

B. Measuring the Substitution of Judgment

The complexity of creating a viable measure of judicial activism is perhaps most typified by the baseline problem. The lack of a baseline of judicial restraint against which to measure activism has made the creation of a measure of judicial activism for the courts of appeals judges nearly impossible. Without a definitive foundation for comparison, attempts to measure judicial activism in a systematic manner have failed thus far.

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first place), and unquestionably ambiguous and unambiguous statutes are likely filtered out at lower levels of the process."); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 173–74 & n.25 (2002) ("[C]ase-selection effects create difficulties for the design of empirical studies that seek to determine whether the votes of judges are influenced by their ideologies.").

[91] *Cf.* Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1054 (2006) ("The Supreme Court is of course not a typical American court. The federal courts of appeals . . . have a more diverse and less political docket and are constrained by threat of reversal . . . .").

[92] *See, e.g.*, Philip D. Oliver, S*ystematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 (1986) (explaining that, under the Constitution, Justices enjoy life tenure and can only be removed by impeachment proceedings and pointing out that no Justice has ever been successfully impeached).

[93] *See* CROSS, *supra* note 10, at 2 ("[T]he circuit courts resolve more than fifty thousand cases a year.").

[94] *See* Posner, *supra* note 91, at 1054; *see also* Savage, *supra* note 39 (paraphrasing M. Edward Whelan III as saying that "Supreme Court justices have a freer hand than appeals court judges").

[95] *See* Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299, 303 (2004) (noting the "role that politics plays in both the initial process of selecting a candidate and the often highly political Senate confirmation proceedings").

[96] *See id.* ("The norm today appears to be that a candidate for the Supreme Court must first sit on a federal circuit court of appeals before she may be considered for a seat on the Court."); Timothy P. O'Neill, *"The Stepford Justices": The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 702 (2007) (pointing out that in 2007, "[f]or the first time in history[,] every justice had been a judge on the U.S. Court of Appeals at the time of appointment to the Supreme Court").

Regardless of a person's particular conception of legal interpretation, formalism has provided a baseline for an empirical study through its strict application of the law.[97] The formal model of law can be best understood in relation to the major competing theories describing judicial behavior: the attitudinal and strategic models.[98] The attitudinal model, in its strongest form, contends that legal outcomes are determined by the policy preferences of judges.[99] The strategic model describes judicial outcomes as driven by the institutional and personal goals of judges, such as appointment to the Supreme Court.[100] Under both of those models, law itself is not a significant constraining force on judicial actions.

In contrast, legal formalists have understood law as "a determinate set of rules distinct from political and social factors" that is applied by neutral judges.[101] Formal application of the law is a value that judges believe determines their decisions in many cases. Interviews with federal appellate judges,[102] as well as prior empirical studies,[103] support this understanding of the formal model. If it could effectively be gauged in an empirical study, the formal model could provide a neutral benchmark against which activism might be measured. The degree to which a judge deviates from a formal model could help measure that judge's activism level, at least in relation to other judges. Thus, the essence of activism as it can be measured with an adequate formalism baseline may be defined as follows:

> *Judges exhibit activism when they privilege their judgment over that of constitutionally significant actors when the formal model would predict that they would defer to those actors.*

Standards of review might provide a means to measure what a formal model of the law would predict in the aggregate. Standards of review are formal rules used by appellate courts to determine the degree of deference that they should give to lower court or executive agency judgments.[104] Judges regularly use these standards in cases and normally identify them in their opinions.[105] Standards of review do not directly dictate the outcome in

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[97] *See* Posner, *supra* note 91, at 1051.

[98] The attitudinal and strategic models are derived primarily from the works of Frank Cross. *See generally* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1461–90 (2003) (explaining the two models). Cross also presents another theory of decisionmaking, the litigant-driven theory, *see id.* at 1490, but the litigant-driven theory has not been widely studied, and evidence that litigants drive decisionmaking in the courts of appeals is quite thin, *id.* at 1514 ("The data do not provide strong support for the economic litigant-driven hypothesis regarding judicial decisionmaking.").

[99] *Id.* at 1461.

[100] *See id.* at 1482–83.

[101] Edwards & Livermore, *supra* note 9, at 1915.

[102] KLEIN, *supra* note 10, at 21.

[103] Cross, *supra* note 98, at 1467–71 (referring to the formal model as the "legal model").

[104] *Id.* at 1502.

[105] *Id.*

a case. Judges are free to reverse a district court judgment when using a deferential standard and to affirm a district court using nondeferential review. In the context of past decisions, these standards could be used to predict when a judge was more or less likely to elevate his or her judgment above that of other constitutionally significant actors (in this case, federal district courts). The measure of activism used herein identified judges who deferred less regularly than might have been expected under a formal model of the law, given the standards of review involved.

Existing empirical scholarship supports the notion that standards of review have created meaningful differences in reversal rates of district court decisions. Previous research at the federal appellate court level has relied primarily upon the United States Courts of Appeals Database (the Songer Database), which includes more than 18,000 opinions from 1925 to 1996.[106] A prior study by Frank Cross using the Songer Database—one unrelated to judicial activism—found that standards of review are correlated with a change in reversal rates.[107] However, because the Songer Database only coded standards of review in cases involving executive-agency decisions (868 cases),[108] until now it has remained unclear whether the results would extend to general application of such standards.

The study presented in this Article used a new dataset, and there is a strong correlation between the level of deference in a standard of review and the rate of reversal.[109] Figure 2 below illustrates the reversal rates with the three most commonly applied standards of review. The only nondeferential standard in Figure 2 is de novo review. The other two standards afford deference to the judgments of district courts. If standards of review were functioning as expected, and not acting as mere window dressing on opinions, it would be expected that reversal rates when using nondeferential standards would be higher than reversal rates when using deferential standards.[110] Indeed, the results described in Figure 2[111] support that hypothesis.

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[106] *See* KUERSTEN & SONGER, *supra* note 8, at 241.

[107] Cross, *supra* note 98, at 1502–03.

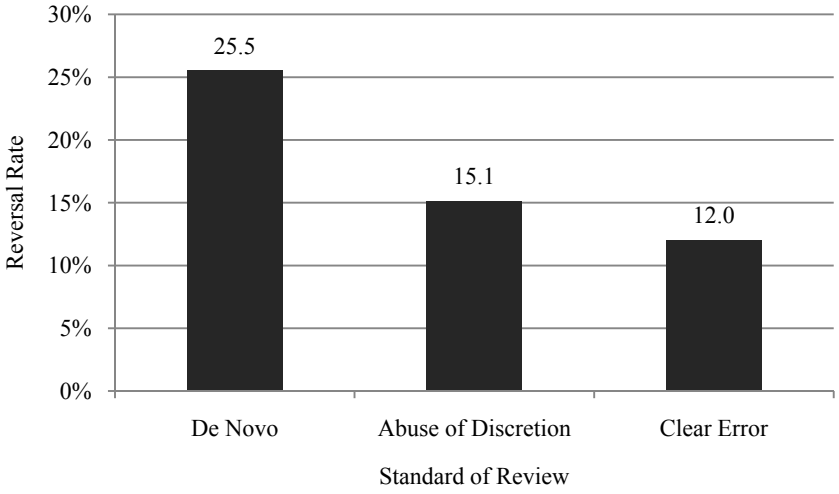
[108] *Id.*

[109] $p < 0.001$. Conventionally, the *p*-value, which reflects the possibility that findings are the product of mere chance, indicates a statistically significant relationship if it is less than 0.050. *See, e.g.*, Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 497–98 n.58 (2005). The *p*-value here was based upon a chi-square analysis. Chi-square with one degree of freedom was 360.5456.

[110] However, if there were perfect knowledge and rational decisionmaking among the litigants, at least in private actions, there would be no observable difference in reversal rates since the parties would appeal, rather than settle, only where there was an equal chance of affirmance and reversal. *See infra* notes 190–96 and accompanying text.

[111] A previous version of this graph appeared in Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1161 (2010).

FIGURE 2: REVERSAL RATE BY STANDARD OF REVIEW
($p < 0.001$)



Given the significant difference in reversal rates between the nondeferential and deferential standards, there was good reason to think that studying reversal rates of different judges using deferential standards would provide a way to capture the elusive baseline associated with judicial activism. By focusing on the situations where a judge was expected to defer more frequently to other constitutional actors, a measure was created to determine a judge's relative activism level in the aggregate.

However, such a measure by itself was incomplete. After all, if ideology is an important predictor of judicial decisionmaking, as previous studies have indicated,[112] then merely counting instances when a particular judge failed to defer would be insufficient. A reversal might only indicate an ideological disagreement with a lower court, not one based upon a judge's activism. If, for example, a very liberal federal appellate judge served in a circuit with very conservative district judges, the appellate judge would be expected to vote for reversal at a high rate relative to a similarly situated conservative judge, even using deferential standards of review. If the same judge was moved to a circuit with very liberal district court judges, that judge would suddenly become "restrained" using a measure that only counts instances where a deferential standard was used. This would create the illusion of judicial activism without any basis in fact.

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[112] *See* CROSS, *supra* note 10, at 38; *see also* Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 890 (2008) (reviewing CROSS, *supra* note 10) ("That ideology plays *any* role in judicial decision making is an important and substantive finding, even with the qualifying understanding that the effect is constrained.").

To address this problem, there was a need for a baseline that would remove cases decided only by ideology or other factors separate from the concept of activism. Fortunately, in this instance, such a baseline was available: reversal rates in nondeferential (de novo) cases. Thus, the raw measure of an "Activism Differential" for an individual judge adopted in this study was:

> *Activism Differential = Reversal rate using deferential standards – Reversal rate using de novo standard*

By focusing on the difference between reversal rates,[113] the measure addressed the problem created by a mismatch in ideology between the district court judge and the appellate court judge. Since a circuit judge received cases with different standards of review from the same pool of district court judges, a mismatched ideology would have been expected to increase reversal rates in cases using either deferential or nondeferential standards. However, the difference between those reversal rates would reflect the trait underlying activism.

C. Advantages of a Trait-Focused Measure

The activism measure described above has many advantages over existing measures and addresses the concerns of many critics of empirical measures of judicial decisionmaking. One of the most significant considerations in measuring judicial activism has been not focusing on singular opinions, but rather looking for a pattern among many judicial actions.[114]

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[113] With respect to the Activism Differential used in this Article, the deferential standards were grouped together. This was done for a few reasons. First, although there were some minor differences between the reversal rates using such standards, the differences were small when compared to the gap between the deferential and nondeferential standards. Second, as Judge Posner has remarked, the only meaningful distinction between standards of review is between deferential and nondeferential standards:

> We are not fetishistic about standards of appellate review. We acknowledge that there are more verbal formulas for the scope of appellate review (plenary or de novo, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct, and maybe others) than there are distinctions actually capable of being drawn in the practice of appellate review. But even if, as we have sometimes heretically suggested, there are operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential, *that* distinction at least is a feasible, intelligible, and important one.

United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995) (citations omitted). Third, at least for the correlations discussed herein, the distribution of the use of the various standards was not an important factor with the variables analyzed. Because clear error and abuse of discretion accounted for 78% of the votes where a deferential standard was applied, those were the majority of the standards used among the various judges in the sample. Since those standards had similar reversal rates in the sample, they were grouped together in the statistical analysis.

[114] *See* Marshall, *supra* note 33, at 1221 ("As some might argue, one case alone does not make an activist court and more cases are needed to establish a pattern."). A significant question in measuring judicial activism is whether to use a singular indicator or multiple indicators of activism. Lindquist and Cross recently made a persuasive case for using multiple measures in analyzing the Supreme Court: "Measuring judicial activism systematically across multiple cases and indicators would clearly represent a methodological advance over anecdotal discussion of individual cases or even over quantitative meas-

Indeed, discussions of activism in particular decisions have been almost certain to devolve into political debates about the proper way to understand and interpret law and about which outcome was "right."[115] By looking at a large number of decisions of judges in different areas of law using an objective measure, pictures of judges' respective activism propensities emerged.[116] Because standards of review are commonplace, the measure used here allowed for adequate sample sizes and removed the focus from isolated judicial outcomes.

Looking at patterns based upon large amounts of data also helped to address certain objections to quantitative analysis of judicial decisionmaking. Judge Harry Edwards, a noted critic of such analysis,[117] has argued that "[r]egression analysis does not do well in capturing the nuances of human personalities and relationships, so empirical studies on judicial decision making that rely solely on this tool are inherently flawed."[118] Judge Edwards recently offered a variation on this objection in an article co-authored with Michael Livermore. Edwards and Livermore argued that scholars have failed to measure the intricacies of judicial decisionmaking because they lack access to the deliberative process.[119] While this objection might carry substantial weight when analyzing small sample sizes, the greater the data pool, the more likely that the "nuances of human personalities and rela-

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ures that reflect only one dimension or characteristic behavior associated with the concept." Cross & Lindquist, *supra* note 15, at 1773.

Nonetheless, the rationale for multiple indicators does not apply as forcefully, at least for the indicators reviewed by Lindquist and Cross, to studies of federal appellate courts. As a percentage of the federal litigation docket, courts of appeals only review constitutional challenges to a small number of federal laws, state laws, and executive actions. *See supra* Figure 1. The measure used in this study includes cases where the federal appellate court reviewed actions by other branches and sovereigns since those reviews almost always follow a district court decision. Therefore, although a study with multiple indicators might generally be preferable, because this Article analyzes a large percentage of the federal appellate docket—including cases where alternate measures might apply—there is no strong rationale for using more than one measure. Even if more dimensions were added to the Activism Scores, it is unclear how they should be weighted. If each dimension were weighted by frequency, then the results herein would not differ much because of the rarity of interbranch review. If, however, interbranch review were given a higher weight, it would render less valid the final scores because of the very small samples of interbranch review for each judge in the dataset.

[115] *See* Kerr, *supra* note 29, at 32.

[116] *Cf.* Cross & Lindquist, *supra* note 15, at 1773 ("[E]ven if it is difficult to argue that a specific decision is or is not activist, we believe that some systematic tendencies of activist decision making can be studied.").

[117] *See, e.g.*, Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001, 1004 (2005).

[118] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003).

[119] Edwards & Livermore, *supra* note 9, at 1903 ("[T]he deliberative process pursuant to which case inputs are transformed into a judicial decision cannot be observed by outsiders; nor is there a transcript of judges' deliberations leading to a decision. As a result, scholars and other interested parties have no access to the actual process of appellate decisionmaking.").

tionships"[120] will surface in some measurable form (insofar as they affect the decisions of judges). By looking at the full range of case types reviewed by the courts of appeals judges in 2008, this study diminished the force of Judge Edwards's argument. Further, by focusing on a standard of review, the measure used in this Article relied on part of the hidden deliberative process as the judges reported it in their opinions.

The singular examination of outcomes has also been the basis for significant critique of empirical studies of judicial decisionmaking.[121] Since the disposition alone gives almost no information about the underlying decisionmaking of the judge, it is often a poor tool for understanding the process of judging.[122] As a result, some scholars, such as Jack Knight, have called for an increased focus on the reasoning of judicial opinions when studying decisionmaking.[123] This study partially answered that call by applying a measure based upon the standard of review portion of a judicial opinion.

Robert Justin Lipkin has argued that it is impossible to measure judicial activism without making normative judgments about the underlying activity of the judge.[124] Lipkin contends that because existing measures rely upon the underlying constitutionality of a particular law or action, any empirical measure is inseparable from a normative valuation. However, in this study, relying on an apolitical rule (a standard of review) and measuring in the aggregate ensured that the empirical measures did not succumb to this value judgment. A reader of this study is free to regard any particular opinion or judge as embodying or fulfilling the proper role of the judiciary. The scores in this study simply provide a measure of the judges in relation to one another. The normative assessment of the ideal judge is left to each individual reader.

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[120] Edwards, *supra* note 118, at 1656.

[121] *See* Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1532 (2009) ("[Professor Lee Epstein and I] argued that empirical studies of judicial decisionmaking had focused too narrowly on the disposition of the case, on the final vote on the merits . . . .").

[122] *See id.* at 1549 ("[A]nswering questions about the effects of *X* on either the substantive content of the law or on the justification of the decision involves an explicit analysis of the form and content of the judicial opinion.").

[123] *See id*. at 1546 ("[S]ome empiricists have begun to push research in the direction of taking the substance of judicial opinion seriously.").

[124] Lipkin, *supra* note 15, at 212 ("Indeed, any definition of judicial activism purporting to have relevance to constitutional discourse requires a normative argument. A judge's reason for striking down legislation or reversing a judicial precedent must be that the law or judicial precedent is unconstitutional; concluding that a judicial decision is unconstitutional is a normative conclusion. Consequently, there is no escaping the normative dimension even in conducting empirical inquiries into judicial behavior." (footnote omitted)).

III. MEASURING JUDICIAL ACTIVISM THROUGH REVERSAL RATES WITH DIFFERENT STANDARDS OF REVIEW

Applying the measure outlined above necessitated collection of a large amount of data. Since activism is primarily about the activities of individual judges (and not whole circuits), adequate sample sizes of opinions of judges on the U.S. courts of appeals were needed. Further, because several of the correlative examinations described below ultimately relied on judges, rather than opinions, as the unit of measure, the study required a large number of judges, each with a sufficient sample size of opinions.

A. Study Design and Methodology

The author has used this dataset in another recent study,[125] so the description of it here is limited. Data were gathered from published and unpublished 2008 opinions issued by the First through Eleventh Circuits. The analyzed dataset, the "Case Database," from those circuits included 30,726 judicial votes from panel decisions. The Case Database included opinions that used a standard of review,[126] excluding immigration[127] and habeas corpus[128] cases, which contain unique standard of review issues. Among other variables, cases were coded for: judges on the panel, whether individual judges were sitting by designation, appellate disposition, type of case (e.g., criminal or environmental), prevailing party, circuit, district court judge, district court, whether the case involved review of legislation for constitutionality, whether the case involved review of an executive agency decision, and standard of review used. In analyzing each case, the vote of each judge on the panel was coded separately, and thus a dissent by a judge in a case was coded as though that judge had controlling authority. This allowed for each judge's activism level to be determined independently, even when he or she dissented in a case.

In addition to the Case Database, a "Judge Database" was constructed that included biographical and other data about individual judges. In the Judge Database, judges were coded for, among other variables: appointing President, presidential party, American Bar Association rating, age at the

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[125] *See* Yung, *supra* note 111.

[126] For each of the courts of appeals databases in LexisNexis, the following search was executed and all of the results were downloaded and coded: "date aft 1/1/2008 and date bef 1/1/2009 and ("De Novo" or Clear! Erro! or (Arbitrar! w/3 Capricious!) or (Abus! w/3 Discretion) or ("Substantial Evidence" or "Standard of Review")) and not immigration and not habeas."

[127] *See* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 474 (2006) (discussing how large portions of immigration case review—those by the Board of Immigration Appeals—are based upon a collateral review model, which affords a very high level of deference because "[t]he regulations . . . revise the standard of review to require greater deference to an immigration judge's findings of fact").

[128] *See* Brandon Scott, *When Child Abuse Becomes Child Homicide: The Case of* Gilson v. Sirmons, 34 OKLA. CITY U. L. REV. 281, 293–94, 305 (2009) (discussing the "unique" standard of review in federal habeas cases due to the Antiterrorism and Effective Death Penalty Act).

time of appointment, age in 2008, composition of the Senate at the time of appointment, gender, race, law school attended, prior work experience, whether the President and majority of the Senate were of the same party at the time of appointment, and whether the judge took senior status during or before 2008. The Judge Database included data for all federal appellate judges that served on panels included in the Case Database.

For each judge, a raw Activism Differential was computed based upon the formula described in Part II.B. However, there were several adjustments made to the raw Activism Differentials in order to allow for valid intercircuit comparisons between judges and comparisons between circuits. The four types of alterations that were considered in determining the final "Activism Scores" addressed the case mixes of judges, panel effects, and circuit differences, and sought to provide a meaningful scale.[129]

1. Case-Mix Adjustment.—The courts of appeals studied here reviewed different sets of cases from different sets of district judges based upon geography.[130] As a result, there were important considerations in comparing results among the judges serving on those circuits. In creating the Activism Scores, it was necessary to create an adjustment based on differences in judges' dockets in order to lessen the risk that there might be unobserved variables affecting the results.[131] For example, compared with the other circuits studied, the Fourth Circuit judges had a very different ratio of civil to criminal matters. Individual judges in every circuit had civil/criminal mixes with notable differences. These variations were significant because there was a much higher rate of reversals in civil cases than in criminal cases, which would have an effect on the computation of the Activism Scores. As a result, the Activism Scores for individual judges were determined by weighting a judge's Activism Differential in criminal and civil matters based upon the overall distribution of criminal and civil cases. Similarly, the reversal rates in the circuits studied were measured as "Adjusted Reversal Rates," which were determined by weighting reversals in criminal and civil cases according to the average ratio in the dataset.

2. Panel Effects Adjustment.—Prior research on the courts of appeals has identified "panel effects" that have challenged the assumption that

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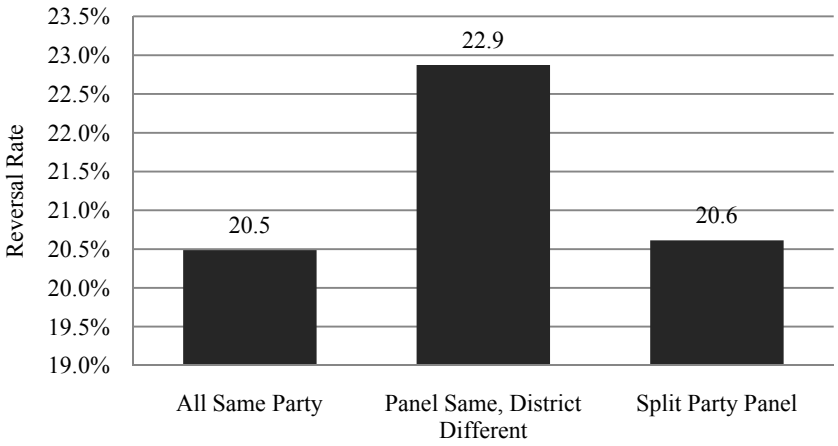
[129] For a detailed explanation of the calculations as applied to a specific judge (Diane Wood of the Seventh Circuit), see *infra* Appendix 1.

[130] With the exception of the Federal Circuit, which is not included in this study, the circuit courts have geographic and not subject-matter based jurisdiction. Paul R. Michel, *Foreword: Assuring Consistency and Uniformity of Precedent and Legal Doctrine in the Areas of Subject Matter Jurisdiction Entrusted Exclusively to the U.S. Court of Appeals for the Federal Circuit: A View from the Top*, 58 AM. U. L. REV. 699, 702 (2009).

[131] *See* David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. 1415, 1433–34 (2005) (discussing, in the context of the Choi and Gulati study, the need to account for differences in circuit caseloads when creating empirical measures).

judges make their votes independently.[132] Panel effects occur when the overall ideological makeup of a panel of appellate judges in some way determines the individual votes of judges on those panels. In this study, it was not immediately apparent why panel effects would be relevant to a measure which is primarily focused on votes to affirm or reverse district court judgments. However, a study related to this one found that differences between the ideological composition of the panel and the ideology of the district court judge alter appellate judge voting patterns in the aggregate.[133] Figure 3[134] below illustrates the differences in reversal rates for the three alignments described above.

FIGURE 3: REVERSAL RATE BY APPOINTING PRESIDENT'S PARTY OF COPANELISTS AND DISTRICT JUDGE



If a judge sat with two copanelists of the same political party as each other but of a different party than the district judge (based on appointing Presidents), then the studied judge was approximately 11% more likely to reverse the judgment of the district judge than in situations where the copanelists were ideologically split or where the copanelists were of the same party as the district judge. However, because Activism Scores are derived from differential reversal rates using deferential and nondeferential rather than total reversal rates, the panel effects adjustment made in the prior study was not directly applicable to the one in this Article. Because the prior

[132] *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168–75 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1751–56 (1997).

[133] *See* Yung, *supra* note 111, at 1166.

[134] A previous version of this figure appeared in Yung, *supra* note 111, at 1167.

study was inconclusive as to whether panel effects disproportionately altered reversal rates using deferential and nondeferential standards of review, no panel effects adjustment was made to the final Activism Scores here.

3. Circuit Adjustment.—In addition to the case mixes discussed earlier, circuits confront varied substantive and procedural law and diverse cultures and norms. In light of these variables, and the possibility of numerous other unobserved variables that might account for at least some of the variation in the results, the computation of the Activism Scores included a circuit adjustment.

The circuits are not wholly isolated from each other because many judges who take senior status then travel between them.[135] These judges' votes served as the basis for adjustments made to individual Activism Scores of the judges in all of the circuits. It was assumed that a judge traveling between circuits maintained her underlying activism trait and that any variations in that judge's observed activism were best explained by factors unique to the different circuits on which she sat. In this dataset, there were 2472 votes by twenty-six judges that sat on panels in more than one circuit.[136] In every instance where one of the twenty-six judges voted, his or her Activism Score was computed for the circuit in which the vote was registered. The differences between the traveling judges' Activism Scores and the broader Activism Scores in each circuit were used to determine the degree to which each circuit changed the traveling judges' activism levels. Although the differences in the effect of each circuit on the traveling judges were very slight, adjustments based on the changes in voting patterns of the traveling judges were made to the Activism Scores of every judge in the studied circuits.[137]

4. Scaling Adjustment.—At the outset of this study, the raw Activism Differentials were not on a clear scale, and it was not obvious to potential readers what the high and low values in the dataset were. Consequently, to offer greater clarity about each judge's relative activism, the Activism Differentials with the above-described adjustments were scaled to a range of 0

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[135] *See* 28 U.S.C. § 294(d) (2006); Kelly Baker, Note, *Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interest Maximizers?*, 16 J.L. & POL. 139, 150 (2000) ("Senior judges may travel among circuits and districts to provide services as necessary." (citing 28 U.S.C. § 294(d) (2000))).

[136] The traveling judges were Judges Arthur L. Alarcon, Ruggero J. Aldisert, Bobby R. Baldock, Clarence A. Beam, Pasco M. Bowman II, Myron H. Bright, Robert E. Cowen, Richard D. Cudahy, David M. Ebel, Joseph J. Farris, William L. Garwood, John R. Gibson, Neil M. Gorsuch, David R. Hansen, Paul J. Kelly Jr., Robert B. King, Gilbert S. Merritt Jr., Roger J. Miner, Karen N. Moore, Jon O. Newman, Jane R. Roth, Eugene E. Siler Jr., Walter K. Stapleton, Atsushi W. Tashima, John M. Walker Jr., and J. Clifford Wallace.

[137] The following adjustments were subtracted from the raw Activism Differentials for judges in each circuit: First Circuit, 0.00284167; Second Circuit, 0.002109021; Third Circuit, 0.002571733; Fourth Circuit, -0.001492098; Fifth Circuit, 0.000584711; Sixth Circuit, 0.001492867; Seventh Circuit, 0.000660725; Eighth Circuit, -0.000983729; Ninth Circuit, -0.000192968; Tenth Circuit, -0.00230491; and Eleventh Circuit, -0.002069065.

to 100, creating the Activism Scores. This was achieved by determining the highest and lowest Activism Differentials for judges with at least 200 interactions with other judges—177 judges in total. The judge with the highest score in that group was assigned an Activism Score of 100 and the judge with the lowest score was assigned a 0. All other judges were scaled linearly in relation to the high and low values. The new value was the final Activism Score. For the regressions described below, the raw Activism Differential value was used to ensure that the process of scaling the scores from 0 to 100 did not create any statistical artifacts. The Activism Score is used here to discuss the results because it more clearly communicates the scale involved and the differences between judges.

B. Results and Discussion

Several significant results related to judicial activism and reversal rates emerged from the data. First, although the various courts of appeals reversed judgments of district courts at similar rates, the circuits exhibited very different levels of activism. Second, the politics and identity of the President did not correlate with activism. Third, even when the President and Senate were of the same party, there was no observed statistically significant increase in activism. Fourth, the ideology of individual judges, as measured by Common Space scores,[138] did not correlate with judicial activism. Each of these results is discussed below.

While the dataset included data from over 1400 judges who served on the U.S. courts of appeals, sat by designation on those courts, or had their decisions reviewed by those courts, many of these judges issued votes in only a limited number of cases. This was particularly true for judges who had taken senior status before or during 2008 as well as district court judges who sat on appellate panels by designation.[139] Because the smaller sample sizes of votes for these judges might yield unacceptable error rates, the following analyses examined only the 177 judges who had at least 200 interactions with other judges.[140] Figure 4 illustrates the distribution of these Activism Scores.

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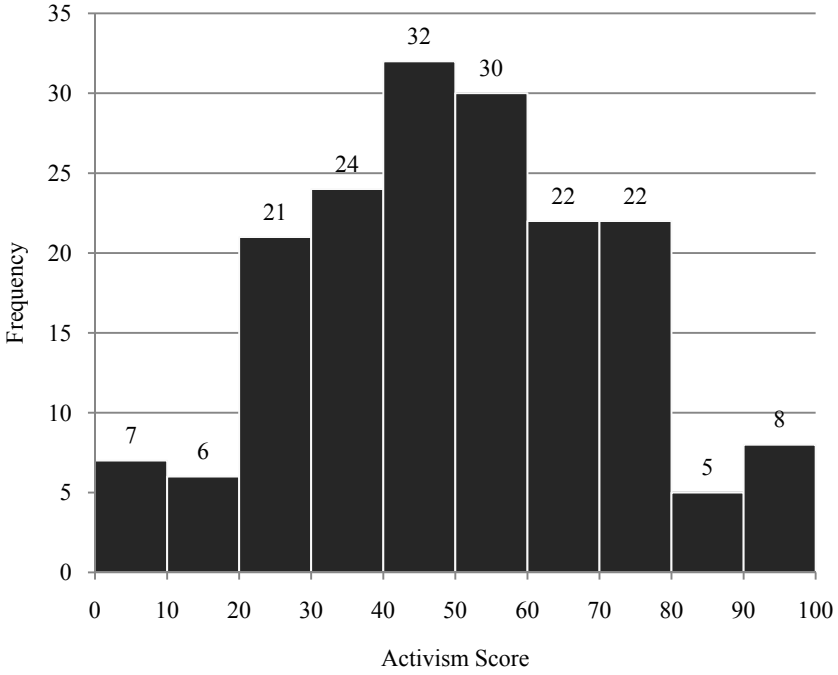
[138] For a brief discussion of Common Space scores and their potential weaknesses as a measure, see Lee Epstein and Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 95–96 (2002).

[139] In all, the dataset included 2472 judicial votes by judges sitting by designation.

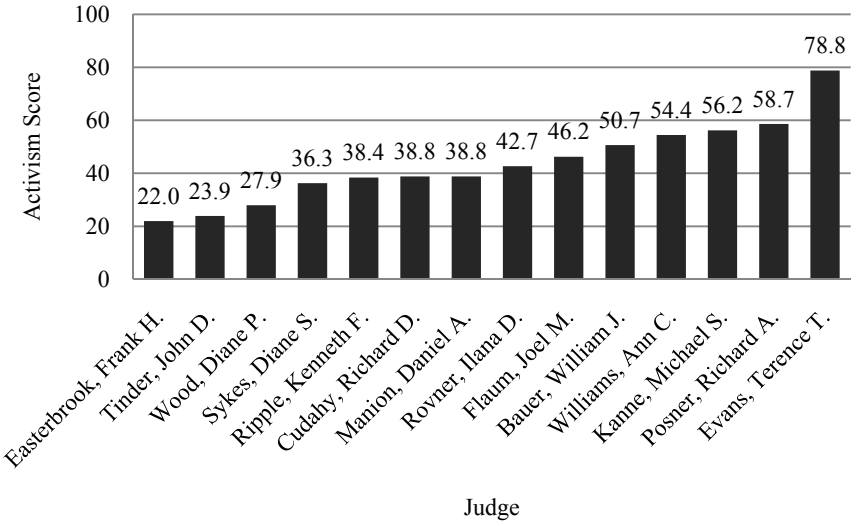
[140] The threshold was conservatively based upon the computation of standard error in the dataset.

FIGURE 4: DISTRIBUTION OF ACTIVISM SCORES
(AVERAGE = 50.2, STANDARD DEVIATION = 21.3)



Notably, as indicated in Figure 4, the mean Activism Score was 50.2 and one standard deviation was 21.3 points. The distribution, although largely normal, exhibited some small groupings of judges at both the high and low ends of the scale. The Activism Scores of individual judges from the Seventh Circuit, as exhibited in Figure 5 below, illustrate the variation between individual judges who used the same controlling procedural and substantive law.

FIGURE 5: ACTIVISM SCORES OF SEVENTH CIRCUIT JUDGES



Other circuits had a similarly wide range of values. The Appendices at the end of this Article include Activism Scores for all judges with at least 300 interactions with other judges.

1. Judicial Activism Between Circuits.—Within each circuit studied, total values were determined for the reversal rates[141] and the Activism Scores in those circuits.[142] The raw reversal rates were adjusted based on case mixes and panel effects in a manner identical to that used to create Adjusted Reversal Rates for individual judges. A review of the data on a circuit-by-circuit basis revealed a remarkable trend. The circuits showed relatively clustered overall Adjusted Reversal Rates, meaning that they treated judgments from the district courts in relatively similar manners. The Eighth Circuit was the least likely to reverse with an Adjusted Reversal Rate of 16.0%. The Ninth Circuit was the most likely to reverse, with an Adjusted Reversal Rate of 26.1%. As shown in Figure 6,[143] the eleven circuits thus were grouped into a consistent and very narrow range of reversal rates, once they were adjusted for the criminal/civil case mix. However, when standards of review were factored in to create the Activism Scores, the circuits diverged to a greater extent, as illustrated in Figure 7.

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[141] For purposes of the study, reversals included all situations in which the judge sought to reverse any portion of the district court's judgment.

[142] "Total values" refers to computations based on all of the votes by all of the judges in the circuit.

[143] A previous version of this figure appeared in Yung, *supra* note 111, at 1164.

FIGURE 6: ADJUSTED REVERSAL RATES BY CIRCUIT

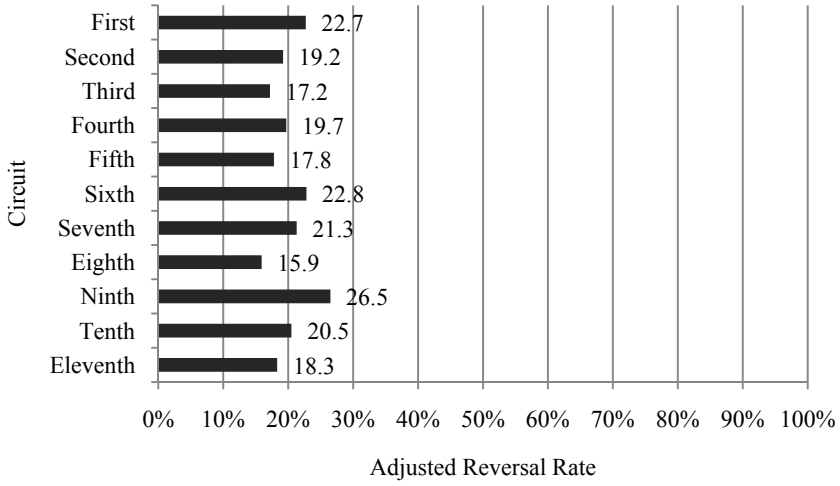
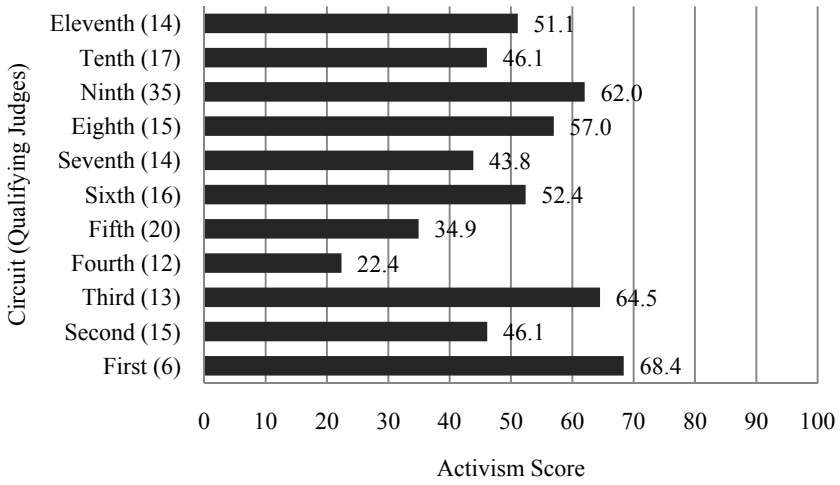


FIGURE 7: AVERAGE ACTIVISM SCORE BY CIRCUIT ($p < 0.001$)



The variation in Activism Scores but not Adjusted Reversal Rates means that the judges on the studied circuits were behaving differently with *both* deferential and nondeferential standards of review. If, for example, judges on a particular circuit had altered their behavior only in cases using a deferential standard, that would have affected the overall Adjusted Reversal Rate. In order for the Adjusted Reversal Rates to be relatively consistent while the Activism Scores varied, the judges had to employ different approaches in cases with deferential and nondeferential standards of review.

At the most activist end of the scale, the First Circuit had an Activism Score of 68.4. The least activist circuit was the Fourth, which had an Activism Score of only 22.4. Notably, even the limited variation in Adjusted Reversal Rates seems disconnected from any similar variation in Activism Scores. The Eighth Circuit, for example, had by far the lowest Adjusted Reversal Rate, but exhibited an activism level above the mean with an Activism Score of 57.0. Further, linear regressions were performed for the Activism Scores and Adjusted Reversal Rates against the circuit number for the studied judges. Whereas the circuit number had a statistically significant correlation with the average Activism Score, no such relationship existed between the circuit number and the Adjusted Reversal Rate. This provided further evidence that the variation in Activism Scores among the circuits was indicative of actual differences in the activism of the judges on those circuits and that that variation was not merely due to factors which would be expected to alter the reversal rates as well.

2. The Appointing President and Judicial Activism.—As noted at the opening of this Article, the concept of judicial activism has become so politicized that it has become part of virtually every major discussion concerning the judiciary and individual judges. Among the various concerns about activism is whether individual Presidents or political parties have been responsible for appointing more activist judges to the U.S. courts of appeals. Traditionally, judges appointed by Democratic Presidents have been labeled as "activists" who push social agendas on an unwilling public.[144] As noted earlier, however, increasingly there are attacks on Republican appointees for "right-wing judicial activism."[145]

The data did not support either hypothesis. As demonstrated in Figure 8 below, for judges who issued opinions in 2008, the data did not indicate that the appointing President had a statistically significant correlation with a judge's activism.

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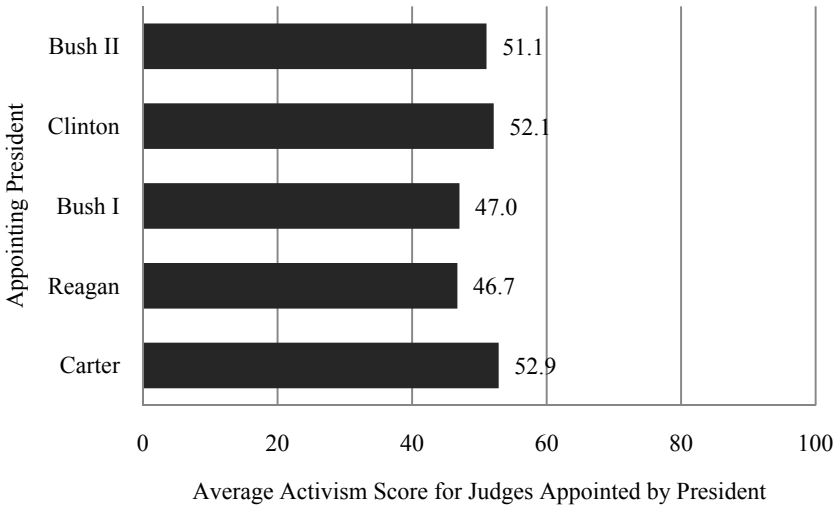
[144] *See supra* notes 20–31 and accompanying text.

[145] *See supra* note 29 and accompanying text.

FIGURE 8: ACTIVISM SCORES BY APPOINTING PRESIDENT
($p = 0.789$)

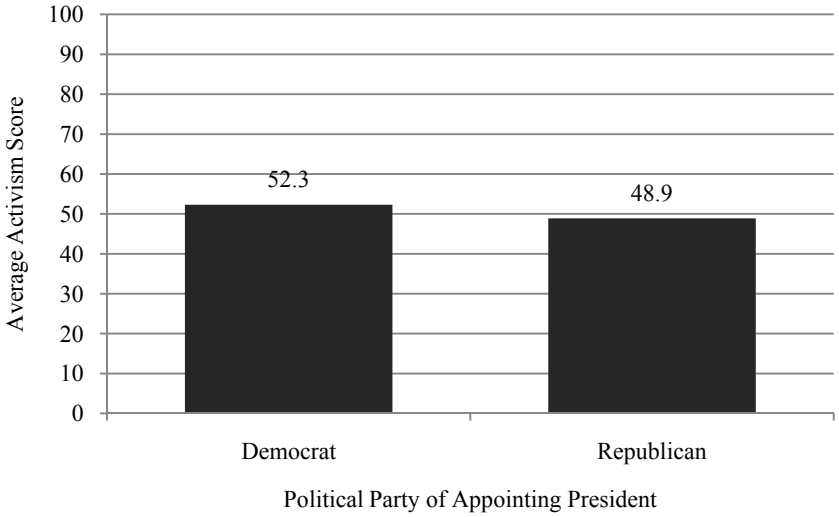


The Activism Scores of judges appointed by Presidents Carter, Reagan, George H.W. Bush (Bush I), Clinton, and George W. Bush (Bush II) varied by a mere 6.2 points, which linear regression determined was not statistically significant.[146]

Looking solely at the political party of the appointing President also did not yield results that would support either hypothesis. Figure 9 below illustrates that Republican and Democratic appointees had similar Activism Scores in the aggregate.

[146] $p = 0.789$.

FIGURE 9: ACTIVISM SCORES BY PARTY OF APPOINTING PRESIDENT ($p = 0.305$)



Overall, the appointees of Democratic Presidents exhibited a slightly higher average Activism Score (52.3 versus 48.9), but this difference was not statistically significant based on a linear regression of the Activism Scores and the political party of the appointing President.[147] As a result, the study results provided neither a reason to believe that particular Presidents appoint more or less activist judges nor that the political party of the appointing President is related to the activism of judges.

3. Unified Government and Judicial Activism.—One might contend that the limited difference in activism based on the appointing President's party was due to an ideological split between the Senate and President during the time period when most of the 2008 judges were appointed.[148] As a corollary, one might expect a higher rate of activism among judges when the President and Senate were of the same party, since the President would be freer to appoint judges that would more actively support his ideology. Thus, the hypothesis would be that unity between the Senate and the President at the time of appointment would produce more activist judges. However, as Figure 10 indicates, the data did not support this hypothesis.

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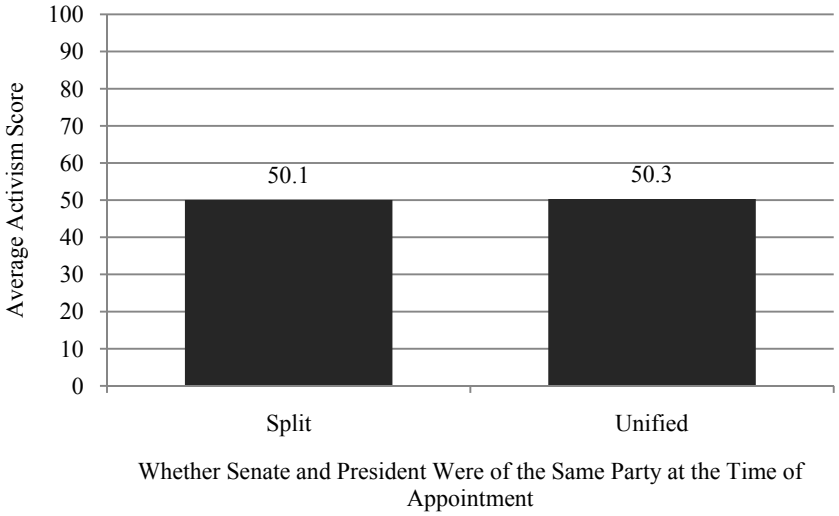
[147] $p = 0.305$.

[148] John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 2 (2003) ("From 1969 through 2002, the same political party had controlled the White House and both houses of Congress for only six out of twenty-four years. The same party controlled both the Senate and the White House for only twelve of those twenty-four. Although divided government has been the norm since World War II, unified government had been the norm before that." (footnotes omitted)).

FIGURE 10: ACTIVISM SCORES BY UNIFIED SENATE AND PRESIDENT ($p = 0.941$)

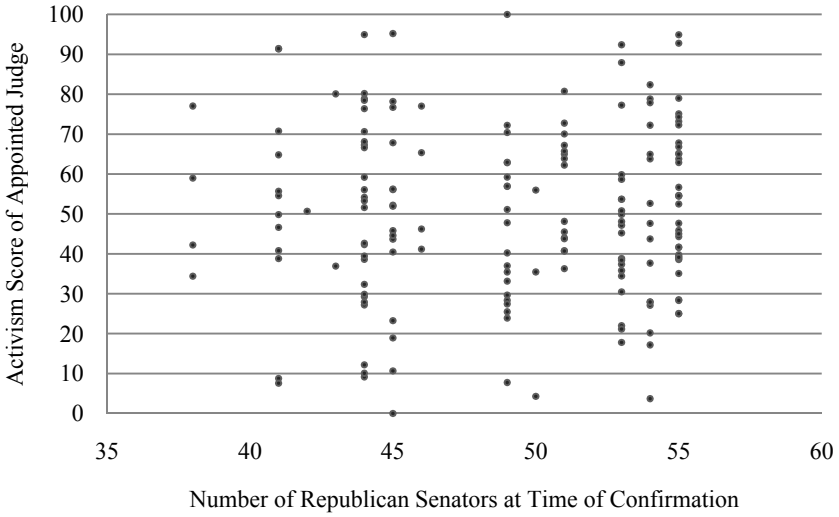


The data indicated that the party alignment of the Senate and President did not cause a substantial change in the activism of the appointed judge. Again, a linear regression found that the data did not support a statistically significant correlation between a judge's activism and whether the President and Senate were from the same party at the time of confirmation.[149]

4. Senate Composition and Activism.—It might also have been possible, even likely, that the President took into account the composition of the Senate before nominating a judge for the courts of appeals. A President might therefore have nominated judges that were closer to the partisan makeup of the Senate in order to ensure confirmation. A hypothesis would thus contend that the political makeup of the Senate at the time of confirmation would be correlated with the Activism Scores of nominees. Figure 11 below illustrates the distribution of Activism Scores based upon the number of Republican Senators at the time of the nomination.

[149] $p = 0.941$.

FIGURE 11: ACTIVISM SCORES BY NUMBER OF REPUBLICAN SENATORS ($p = 0.959$)



As is exhibited in Figure 11, there was no apparent connection between the composition of the Senate at the time of appointment and the judge's activism. A linear regression confirmed that the data did not exhibit a statistically significant correlation between the political composition of the Senate at the time of confirmation and a judge's activism.[150]

5. Ideology of Judge and Judicial Activism.—Unlike with Supreme Court Justices, there have been very few measures of the ideology of individual judges on the courts of appeals.[151] Nonetheless, existing research has indicated that ideology is a factor in predicting judicial outcomes at the federal level.[152] The most basic measure for judicial ideology has been to use the party of the appointing President,[153] which was reviewed in Part III.B.2.

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[150] $p = 0.959$. Because of the rarity of supermajorities in the Senate, no analysis was performed to determine if a filibuster-proof majority was correlated with activism of confirmed judges.

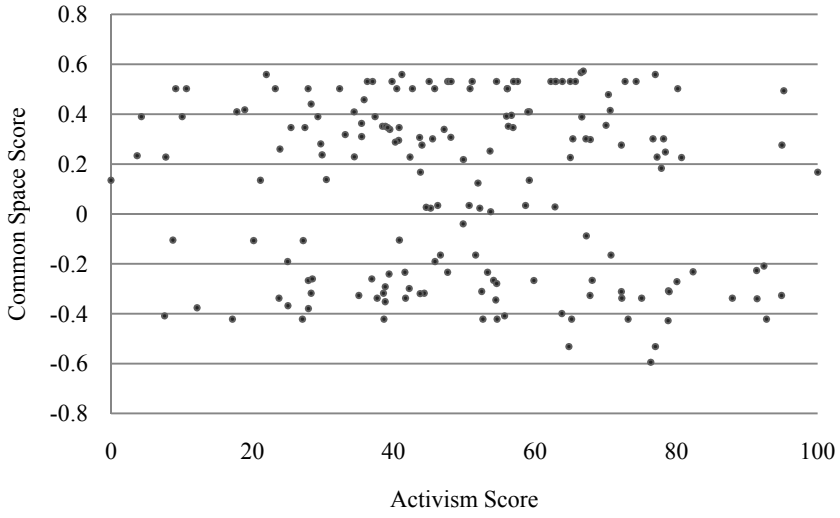
[151] *See* Fischman & Law, *supra* note 18, at 152 (noting that, for example, the one-dimensional model of ideology has been studied at the Supreme Court level but that "[v]ery little is known about the dimensionality of ideology on other courts").

[152] *See* CROSS, *supra* note 10, at 18. However, the effect of ideology is far less significant at the circuit court level than at the Supreme Court. *See id.* Furthermore, because of the limited research about the courts of appeals, there is still "great uncertainty" about the magnitude of the ideological effect at that level. *Id.* The Cross study using the Songer Database indicated that ideology did not "matter[] a great deal" in decisionmaking by courts of appeals judges. *Id.* at 25. Insofar as ideology might be an important variable in explaining the results in this study, the focus on the Activism Differential should have helped to account for mismatching ideology between federal appellate and trial courts.

[153] Fischman & Law, *supra* note 18, at 167–68 ("The enduring popularity of this measure most likely derives from a combination of two factors. First, the party affiliation of the President or other elected official responsible for appointing a particular judge is easy both to observe and to interpret. Second,

A refinement on the appointing-President measure incorporated data about the Senators from the state of the nominated judge. Lee Epstein, Andrew Martin, Jeffrey Segal, and Chad Westerland calculated, based upon the prior work of other scholars,[154] "Common Space scores" for individual active judges to measure their ideology.[155] The Common Space scores mapped the ideology of judges on the courts of appeals on a continuum of the political spectrum instead of using the binary construction required when looking to the party of the appointing President.[156] A hypothesis would posit that the ideology of the judge would correlate with activism. However, as Figure 12 illustrates, there was no obvious connection between judicial ideology as measured by Common Space scores and activism.

FIGURE 12: ACTIVISM SCORES BY COMMON SPACE SCORES
($p = 0.188$)



the correlation between party of appointing official and judicial ideology has long been observed over a variety of courts, time periods, and issue areas: Democratic appointees are typically more liberal on a variety of issues than Republican appointees.").

[154] *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997) (measuring the ideology of senators based upon roll call votes); Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 629–32 (2001) (applying the scores of senators with the party of the appointing President to create scores for individual judges).

[155] Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007). The scores were updated after publication of the article and are currently available at http://epstein.law.northwestern.edu/research/JCS.html.

[156] While Common Space scores might be an evolutionary improvement over party of the appointing President, there is reason to believe that such an improvement is nominal at best. *See* Fischman & Law, *supra* note 18, at 196 (finding that Common Space scores offered only a modest improvement in predicting outcomes in Ninth Circuit asylum cases).

Regression analysis did not reveal a statistically significant relationship between Common Space scores and activism.[157] Therefore, even when ideology was computed using the leading measure of the concept, there was no observed connection between judicial ideology and activism.

IV. DATA ANALYSIS

Based upon the data, there is no measured support for the proposition that the President's politics, the Senate's politics, or the judge's ideology have statistically significant effects on judges' activism. This runs contrary to partisans on different ends of the political spectrum who often have accused judges appointed by opposing Presidents of activism. However, there are reasons to be cautious about such broad conclusions. As with any empirical study, it is helpful to examine reliability, validity, and potential limitations of the data. Each of those areas of concern is discussed below.

A. Reliability

Reliability is the degree to which the measurement would yield the same results when applied by others.[158] Because this study is the first to systematically analyze judicial activism of judges serving on the courts of appeals, reliability cannot be determined by comparison to other empirical studies. Instead, reliability is evaluated by the quality of the coding and analysis. Since this is not the first study using this dataset,[159] some of the discussion here is abbreviated.

Case data were acquired from LexisNexis for each of the circuits studied. Some of the objective data (e.g., party names, citation, and opinion date) were harvested directly from downloads of cases using a proprietary computer software program.[160] The remaining data were coded by law students and a library research assistant. Then a second coding of those variables was performed on random samples of the data by persons other than those who did the original coding, yielding acceptable inter-coder reliability levels for the tested variables. In addition, a variety of checks were per-

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[157] $p = 0.188$.

[158] Epstein & King, *supra* note 138, at 83 ("Reliability is the extent to which it is possible to replicate a measurement, reproducing the same value (regardless of whether it is the right one) on the same standard for the same subject at the same time.").

[159] *See* Yung, *supra* note 111.

[160] For examples of similar methods, see David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1711 (2009); and David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 239 (2008).

formed to ensure internal consistency of variables that were necessarily interconnected.[161]

B. Validity

Validity is the degree to which the measurement used in an empirical study reflects the concept measured.[162] Assessing the study for validity is more complex than assessing it for reliability. Generally, validity can be understood along a variety of axes. For example, Professors Lee Epstein and Gary King, in their call for improved empirical legal scholarship, identified three possible ways to view validity: "facial validity, unbiasedness, and efficiency."[163] Establishing each of these categories is unnecessary,[164] but it is helpful to keep them all in mind in reviewing a study that tries to measure a complex and controversial concept like judicial activism. Each of these categories is discussed below, but initially, it is important to return to the discussion of what exactly this study is measuring.

1. Concept Measured.—The focus on review of district courts in this study may be a better measure in terms of validity than a focus on interbranch and intergovernmental relations. These latter methodologies have inherent coding problems because a judge may have struck down legislation for a variety of reasons.[165] To effectively capture the concept of activism using a measure that codes whether individual opinions are in fact activist, there must be a means of distinguishing such decisions from restraint. If there is no objective, consistent method of coding, then the concept cannot be validly measured. In contrast, standards of review were easy to code and, in the aggregate, provided a baseline that created a valid measure.

A more nuanced, and potentially more problematic, version of this objection could be that this study does not measure the type of activism that is most important in our constitutional system. The argument would contend that judicial activism is only important insofar as it implicates the democratic will of the population. Since federal district judges, like federal appellate judges, are not elected, interactions between those bodies arguably would be less significant than greater questions of democracy.

There are at least two reasons why this objection should not call into question this study's validity. First, the view that judicial activism must

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[161] For example, the party labels in the coding include "criminal defendant." Such a party label precluded "civil plaintiff" and "civil defendant" from appearing in the outcome variable. Many cross-checks were employed to ensure quality and correct errors within the dataset.

[162] Epstein & King, *supra* note 138, at 87.

[163] *Id.* at 89.

[164] *Id.* ("[N]o one of these is always necessary, and together they are not always sufficient, even though together they are often helpful in understanding when a measure is more or less valid.").

[165] Possible reasons include (1) unconstitutionality according to the consensus view of the legislation, *see* Green, *supra* note 20, at 1219; (2) pure judicial ideology; (3) strategic institutional maneuvering, for example to increase reputation; or (4) some combination of the above factors.

diminish the will of the people would return the idea of activism to the wholly pejorative conception that scholars studying the term have resisted.[166] Depending upon an individual's beliefs about the institutional role of the federal courts, the preference for restraint or activism may vary substantially.[167] Constructing judicial activism in opposition to democracy would revive the pejorative aspects of the term that are in tension with any attempt to study the concept.

Second, even if the objection was given its full weight, the study herein could serve as a proxy for measuring intergovernmental and interbranch activism. Because judicial activism is a trait that at its core involves the substitution of judgment, measuring a judge's adherence to standards of review could predict a judge's willingness to overrule democratic branches.[168] Notably, in the discussion of the four judges in Part IV.B.2, three of the judges (Posner, Easterbrook, and Wilkinson) have defended definitions of activism that limit the concept to intergovernmental and interbranch actions.[169] Nonetheless, each of the three judges scored as expected while using the standard of review measure (which was not focused on interbranch and intergovernment actions). Thus, even with the nuanced version of the objection, this study has offered a measure inextricably connected to judicial activism regardless of how it has been defined.

2. Facial Validity.—As Epstein and King noted, "*A measure is facially valid if it is consistent with prior evidence*, including all quantitative, qualitative, and even informal impressionistic evidence."[170] Because there has been no systematic quantitative evidence to evaluate this study, it was necessary to focus primarily on qualitative and impressionistic evidence.

The dataset included four judges who had either written extensively about judging or whose judging style had been written about by numerous commentators: Frank Easterbrook, Richard Posner, Sonia Sotomayor, and J. Harvie Wilkinson III. Because of the volume of scholarship about and by these four judges, the results of the measurement used in this Article can be evaluated in comparison to such scholarship. The Activism Scores for these four appellate judges are listed in Figure 13, in addition to Activism Scores for other notable judges from most liberal (at the top) to most conservative (at the bottom).[171]

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[166] *See supra* notes 50–57 and accompanying text.

[167] *See supra* notes 50–57 and accompanying text.

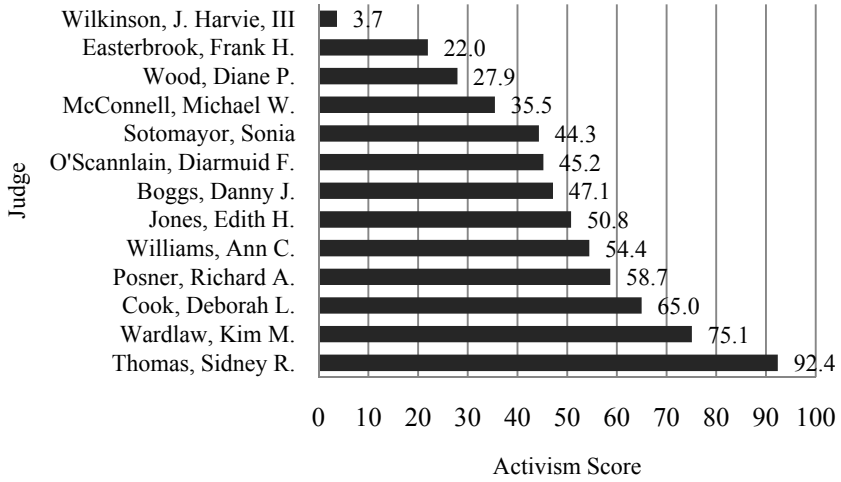
[168] Professor Kermit Roosevelt made a similar argument in the context of constitutional law. *See* Roosevelt & Garnett, supra note 33, at 121 (Roosevelt, Closing Argument) ("The concept of deference is central to my analysis—the extent to which a Justice is deferential in different circumstances will tell us a lot about that Justice's approach to constitutional decisions, and it might even help us in deciding whether the Justice is displaying an inconsistency suggestive of bad faith.").

[169] *See infra* notes 172–82 and accompanying text.

[170] Epstein & King, *supra* note 138, at 89.

[171] The ideology scores in Figure 13 were determined in a related study. Yung, *supra* note 111.

FIGURE 13: ACTIVISM SCORES OF NOTABLE JUDGES



Judge Posner arguably has been the most prolific scholarly judge in the country. Among his many writings are commentaries on judicial activism[172] and the process of judging.[173] Consequently, he was an excellent candidate to use for purposes of testing validity. As illustrated in Figure 13, among the 177 judges with adequate sample sizes, Judge Posner had an Activism Score (58.7), higher than the mean judge but within one standard deviation of the mean. Based upon Judge Posner's writings about how he has approached judging, his style might be crudely described as "If it's broke, fix it." In other words, there are reasons to think that Judge Posner, under his model of pragmatist judging, would be less likely to defer to other constitutionally significant actors on the basis of some formal rule.[174] Thus, his Activism Score being above the mean in this study appears appropriate.

Justice Sotomayor's judging style was thrust into the spotlight by her nomination to the Supreme Court. As a result, there has been a wealth of writing about her "activism." Unfortunately, as noted at the outset of this Article, the partisan rhetoric has clouded whether she was truly an activist during her service on the Second Circuit.[175] According to the data, then-Judge Sotomayor was slightly below the mean based upon her Activism Score (44.3). A few scholars and commentators engaged in some crude analyses of Judge Sotomayor's activism that offered a test of validity for

[172] *See, e.g.*, Richard A. Posner, *The Meaning of Judicial Self-restraint*, 59 IND. L.J. 1 (1983).

[173] *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK (2008).

[174] *See* Posner, *supra* note 91, at 1053 ("Pragmatism includes formalism as a special case because when the conventional legal materials point strongly to a particular outcome (statutory text is clear, precedents numerous, recent, and 'on point,' etc.) there will usually be compelling pragmatic reasons to choose that outcome.").

[175] *See supra* notes 1–7 and accompanying text.

her score. Based on those studies, there has been wide agreement that Judge Sotomayor appeared to be in the mainstream regarding judicial activism.[176] Again, the results of the study here were consistent with the limited other data on the subject.

Chief Judge Easterbrook, in his scholarly activities, has been a critic of judicial activism.[177] In a speech he gave at a symposium on the subject, he attempted to find "value-free" meanings of "activism" and "restraint" before ultimately concluding that his definition described all of the Justices at the time as activist.[178] Nonetheless, Chief Judge Easterbrook's characterization of the concepts indicated a hesitancy to put his judgment in place of certain other constitutionally significant actors.[179] As Figure 13 indicates, Judge Easterbrook was more than one standard deviation below the mean judge with an Activism Score of 22.0, which was consistent with his stated views about judging.

The last notable judge who has written about judicial activism is Judge J. Harvie Wilkinson III. Of the four, Judge Wilkinson has been the most

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[176] *See, e.g.*, Marcia Coyle, *Is Sotomayor a Judicial Activist? New Studies May Shed Some Light*, NAT'L L.J. (June 8, 2009), http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202431272514 (mentioning Lindquist and Cross's work on Justice Sotomayor's opinions and Cross's impression that they "[did not] look activist"); Marcia Coyle, *Sotomayor Is No Activist Judge, Says Author*, NAT'L L.J. (June 8, 2009), http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202431275733 (quoting Stefanie Lindquist as describing Justice Sotomayor's circuit court opinions as "unremarkable"); Daphne Eviatar, *Another Study of Her Opinions Finds Sotomayor Is No Activist*, WASH. INDEP. (June 26, 2009), http://washingtonindependent.com/48772/sotomayor-congressional-research-service-report-ed-meese-gop-affirmative-action ("The Congressional Research Service has issued a report analyzing the opinions of Judge Sonia Sotomayor and concluded, just as previous studies of her opinions have, that she is anything but a judicial activist."); Savage, *supra* note 39 (noting that, according to traditional measurements of activism, Justice Sotomayor is a "mainstream jurist"); *From Sotomayor Rulings, a Wealth of Data*, N.Y. TIMES, THE CAUCUS (July 8, 2009, 6:09 PM), http://thecaucus.blogs.nytimes.com/2009/07/08/from-sotomayor-rulings-a-wealth-of-data/?scp=8&sq=judicial%20activism&st=cse (citing the Brennan Center for Justice's extensive study of the courts of appeals, which noted in a draft report that then-Judge Sotomayor had only a "slightly higher rate of striking down governmental actions" than her colleagues and that her colleagues nearly always agreed with her rulings).

[177] *See, e.g.*, Easterbrook, *supra* note 15, at 1405, 1409–10.

[178] *Id.* at 1409–10 ("By my standard, *all nine* [Justices] *are activist*. That all nine subscribe to in principle, and use in practice, the noxious canon of constitutional doubt is proof enough of this. Each of the nine declared more federal statutes unconstitutional in each Term I examined than John Marshall did in a 34-year career. And there does not appear to be any significant difference on the 'activism' scale between liberals and conservatives.").

[179] *See id*. at 1403 ("[One] could vote 'correctly' for many reasons, not all of which are principled. Adherence to *stare decisis* is one. Respect for democracy (coupled with the absence of any clause in the Constitution expressly authorizing judges to have the last word on constitutional meaning, plus the ambiguity of many clauses) is another. Intellectual modesty (often deserved) is a third, and timidity a fourth. Yet a fifth reason is fear that 'activist' decisions will breed litigation, which the judge does not want to shoulder; laziness as a reason to deny justified claims of right is a shameful reason for decision, yet it produces 'restraint.' Still a sixth is Wexler's conservation-of-judicial-capital approach, shared with Bickel and others, in which [the] judge picks favored rights and throws other litigants to the winds in order to fortify the Court's status.").

vocal critic of activism by judges.[180] Most notably, after the U.S. Supreme Court issued its opinion in *District of Columbia v. Heller*,[181] Judge Wilkinson decried the decision as "represent[ing] a form of judicial activism" and called it "the worst of missed opportunities" to embrace a principle of judicial restraint.[182] The harsh words for the Court were significant because Judge Wilkinson's political ideology seemingly matched the outcome in the case. Nonetheless, Judge Wilkinson found the decision sorely lacking because the majority had failed to defer to another constitutionally significant actor, the government of the District of Columbia. Consequently, Judge Wilkinson's writings seemed to make him one of the most principled opponents of judicial activism among the judges in the dataset. Of the 177 judges with adequate population sizes, Judge Wilkinson had the second lowest Activism Score. His Activism Score of 3.7, over two standard deviations below the mean, was entirely consistent with his public positions about the proper behavior of judges.

3. Unbiasedness.—The next Epstein and King validity test concerns bias: "A measurement procedure is unbiased if it produces measures that are right on average across repeated applications . . . ."[183] Because this study relied on "revealed preferences" in the form of case outcomes combined with a formal rule, the standard of review, the risk of bias in measurement seems low.[184] Moreover, this formal rule was almost never in dispute. The standard of review was often briefed by both parties, and in a random sample of the briefs in one hundred cases in the Case Database, there were no instances where the parties disputed the applicable standard(s) of review. The measure appears to avoid previously identified problems of biased coding of case outcomes based on political preferences of the judges.[185]

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[180] *See, e.g.*, Wilkinson, *supra* note 29, at 1398 ("Judicial activism can be heady wine. The act of instructing coordinate branches on their constitutional obligations can become the all too exhilarating exercise of those who occupy the bench. The abiding premise of America is democratic. The limitation on the Court remains its lack of popular accountability. Prior eras of judicial intervention into the affairs of the political branches have met with significant historical disfavor."); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 791 (1989) ("A real danger of judicial activism is that these imperfect checks will be exercised more frequently, and that the constitutional position of the judiciary will be undermined.").

[181] 554 U.S. 570 (2008).

[182] J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 274, 322 (2009).

[183] Epstein & King, *supra* note 138, at 92 (emphasis omitted).

[184] *See id.* at 94 ("So, instead of (or sometimes in addition to) asking respondents to answer research questions directly, it is usually better to look for *revealed preferences*, which are consequences of theories of motive that are directly observable in real behavior.").

[185] *See* Edwards & Livermore, *supra* note 9, at 1924–25 ("Some studies seek to code case outcome according to topical or political criteria. . . . Perhaps the most common metric used in empirical studies is a simple 'left/right' or 'liberal/conservative' binary. These topical or political measures used to de-

4. Efficiency.—The last Epstein and King test for validity is efficiency, which "helps us choose among several unbiased measures, with the basic idea being to choose the one with the minimum variance."[186] As noted earlier, the other measures that have been offered to measure activism by judges (based upon review of other branches or governments) have a high potential for variance because of the small populations of these types of cases presented in the federal appellate courts.[187] While no study has applied those measures to the courts of appeals, it is likely that the measure applied here, based upon a standard of review, has reduced the potential for variance because of the large sample sizes, relatively noncontroversial coding, and adjusted homogeneity of the types of cases analyzed by judges.

C. Limitations of the Data

There are several limitations to the data utilized in this study. Consequently, as with any empirical study, it is important to articulate those limitations so that only the proper inferences are drawn from the data. Because this is only the second study using this newly created dataset, the need to carefully analyze the confines of the data is even more important.

1. Time Limitations.—All the data studied in this Article were from 2008 opinions. This has several implications. First, the judges studied might not have had the same activism levels over time. Similarly, going forward, the judges may drift in their activism levels.[188] Second, while the results reflected no statistically significant relationship between the appointing President and the activism of the appointees, that conclusion does not mean that there would have been no such relationship if all appointees of the studied Presidents had been examined. Particularly for the Presidents that served decades ago, the remaining appointees who were still issuing opinions in 2008 may not be representative of the overall population of judges appointed by those Presidents.

2. Data-Gathering Limitations.—The study also excluded opinions that did not use language relevant to a standard of review because of the way the LexisNexis searches were executed.[189] That omission means that a portion of opinions by judges were not considered in this study. If the sample used herein was a random sample of the overall opinion population, the omission would not be a statistical problem. However, it is possible that, in the excluded cases, had the judges included a standard of review, there

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scribe cases will necessarily simplify a court's holding and reduce what may be a complex and nuanced decision into an often uninformative binary." (footnote omitted)).

[186] Epstein & King, *supra* note 138, at 95.

[187] *See supra* Figure 1.

[188] *See* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (finding that an ideological drift among Supreme Court Justices occurred over time).

[189] *See supra* note 126 and accompanying text.

might have been different results that could have altered conclusions derived from the data of this study.

Another limitation of the data concerns the degree to which certain mixes of case types might distort the results. The various regressions that were run controlled for the case mix between criminal and civil cases. However, it is possible that finer distinctions in the compositions of caseloads per circuit and per judge could account for some of the variation in Activism Scores. Without more data, it is impossible to assess the significance of this limitation.

3. Selection Effects.—As with any project that has studied a sample of court cases based upon the actions of third parties (i.e., litigants), there is a concern about selection effects.[190] A selection effect is "a causal relationship between the distribution of disputes and other variables of litigation."[191] There were many points during litigation when a selection effect could have occurred for cases in the dataset, including pre-filing, pretrial, during trial, pre-verdict, postverdict, pre-appeal, during appeal, and postappeal. If a selection effect distorted the case mix in a way important to the study, it would call the study's validity into question.

Because this study was exclusively focused on the behavior of judges on the courts of appeals, the need to account for certain selection effects was limited. Selection effects would only be significant for this study if they distorted the case mixes of individual judges or circuits relative to other judges or circuits. Otherwise, as long as the selection effects were *consistent* among the units of measure, they should not have implicated the validity of the Activism Scores.

At the most basic level, selection effects rely on theoretical conceptions of the judicial process regarding the incentives of litigants. Under the Priest–Klein hypothesis, one would expect appellate outcomes to split evenly (50%) between affirmances and reversals since the parties would settle as needed to avoid other outcomes.[192] However, in the dataset in this study, and consistent with prior examinations of the Priest–Klein hypothesis, the results did not support the hypothesis in its broadest form since affirmances

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[190] Several scholars have discussed selection effects. *E.g.*, Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 271 (noting the centrality of selection effects in any conclusions one might draw).

[191] Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 19 n.55 (1990).

[192] Priest & Klein, *supra* note 190, at 4–5. A variety of studies have examined whether empirical evidence supports the Priest–Klein hypothesis. *See, e.g.*, Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Randall S. Thomas & Kenneth J. Martin, *Litigating Challenges to Executive Pay: An Exercise in Futility?*, 79 WASH. U. L.Q. 569, 590–91 (2001); Robert E. Thomas, *The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence*, 24 J. LEGAL STUD. 209, 222–26 (1995).

occur at a much higher rate than 50% regardless of the standard of review used. Importantly, in criminal cases, the settlement structure (pleas) creates different incentives such that a 50% split was unlikely to occur. However, even in the noncriminal cases within the sample, the affirmance rate was far higher than the expected equilibrium rate.

The explanation for the difference between the observed rates and the Priest–Klein hypothesis also addresses the issues raised by selection effects more broadly. In the appellate environment, in many instances, the marginal cost of an appeal is low compared to that of a trial.[193] Further, there is typically significant uncertainty in predicting appellate outcomes. Beyond the fact that the legal issues are usually close,[194] the parties do not know which judges will sit on the panels until shortly before the oral argument.[195] By that time, the briefing has been completed,[196] and any settlement is unrealistic. The data indicated that, looking solely at the effects of standards of review, the composition of the panel could have radically changed the predicted outcome. Indeed, for example, in the Ninth Circuit, even excluding potential judges sitting by designation, one panel could be composed of judges with Activism Scores of 94.9, 92.4, and 91.4 or 35.1, 23.8, and 7.6. Consequently, the parties involved in the case would have had little information to rely upon in predicting the outcome of the appeal based upon the standards of review applied. The variation in judge activism observed in this study presents strong evidence that, because parties faced such great uncertainty in predicting appellate outcomes, certain types of selection effects should not have been problematic in many empirical studies.

CONCLUSION

Judicial activism is a concept that has been used, abused, abandoned, studied, and debated. It has become an important and permanent fixture in discussions about American judges and the judiciary. To give greater coherence and cogency to future debates about such subjects, it is helpful to have empirical data about the concepts of judicial activism and restraint.

Judicial activism is seen most clearly when judges elevate their own judgment over that of other constitutionally significant actors in circumstances where a formal model of law would predict otherwise. This rubric

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[193] *See* Meehan Rasch, *Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 ARK. L. REV. 249, 264 (2009).

[194] Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 748 (2009) ("As the authors acknowledge, the subset of cases that are actually appealed following trial are more likely to have 'a degree of indeterminacy in the law.'" (quoting CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 16 n.20 (2006))).

[195] Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 688 (2000) ("With one exception, the United States Courts of Appeals announce the composition of their panels only shortly before the oral argument, typically after all the briefs have been filed.").

[196] *See id.*

for measurement incorporates the spectrum of actions that many have placed under the umbrella of judicial activism. The empirical study herein expands the debate about judicial activism beyond the Supreme Court to the courts of appeals, which are the key determiners of most federal law in the modern judicial system. The study also includes a new measure based upon adherence to standards of review that allows for the examination of larger amounts of data over a much broader selection of legal issues.

The results of this study provide more evidence that the formal model of law explains many outcomes at the federal appellate level. Furthermore, standards of review are important predictors of the final disposition of cases before the courts of appeals. Notably, however, the various circuits that were studied demonstrated very different levels of adherence to such standards of review. These various rates of adherence indicated measurably different activism among judges and circuits.

Further, there is no evidence of any statistically significant connection between judicial activism and political party, which undermines the pejorative use of the term "activism" that has been leveled at both parties. The results indicated no such evidence of a relationship to the appointing President, the appointing President's party, or the commonality of party between the President and the majority of the Senate. The similarities between the activism levels of appointees from different Presidents and political parties poignantly illustrate the degree to which partisan attacks using the activist label are unsupported by the data that have been studied.

There is still much work to be done in understanding judicial decisionmaking, particularly at the federal appellate level. The potential for measuring and understanding the federal judiciary has only begun to be tapped. This Article has sought to expand the discussion about the types of measures and issues that can and should be examined.

APPENDIX 1

An example applying the calculations performed in Part III.A.1–4: Judge Diane Wood

To illustrate how the raw score was determined and subsequent adjustments were made, it is helpful to review an example set of calculations. While this section contains more computation than a math-averse person might like, I have attempted to make it as accessible as possible for even those with a limited background in mathematics.

Judge Diane Wood of the Seventh Circuit Court of Appeals had a final Activism Score of 27.9. It was determined as follows.

The raw Activism Differential for a judge was computed with the following expression:

> *Reversal rate using deferential standards – Reversal rate using de novo standard*[197]

Judge Wood reversed 4 cases out of 53 using a deferential standard and 13 cases out of 49 using a de novo standard. Thus her raw Activism Differential was (13/49) – (4/53), or 0.18983.

The next step required a case-mix adjustment.[198] Because criminal and civil cases have very different reversal rates, it was necessary to adjust Judge Wood's score to account for the mix of civil and criminal cases she heard. First, separate scores were computed for her criminal and civil cases. This was the expression used for criminal cases[199]:

> *[(Avg. judge's % criminal case affirmances (deferential) × Wood's criminal case affirmances (deferential)) / (Avg. judge's % criminal cases × Wood's total votes (deferential))] – [(Avg. judge's % criminal case affirmances (nondeferential) × Wood's criminal case affirmances (nondeferential)) / (Avg. judge's % criminal cases (nondeferential) × Wood's total votes (nondeferential)]*

Judge Wood's criminal score was [(0.618481 × 4) / (0.584124 × 53)] – [(0.381519 × 13) / (0.415876 × 49), or -0.16348. A similar expression was used to compute her civil case score: [(0.221077 × 4) / (0.209147 × 53)] – [(0.778923 × 13) / (0.790853 × 49)], or -0.18153. Combining the two scores to provide a case-mix adjusted score was done using the average ratios of criminal to civil cases among all judges, as illustrated in the following expression:

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[197] *See supra* Part II.B.

[198] *See supra* Part III.A.1.

[199] The method used in this Article extrapolated likely case and standard-of-review-type splits based upon the judges' overall reversal rates. This was done to ensure that sample-size effects for some judges (effects related to having too few cases of a particular type, such as civil cases with a deferential standard of review) would not distort the resultant scores. With more data, the ideal method would presumably be to use the judges' actual case and standard mixes.

(Avg. judge's % criminal cases × Wood's criminal score) + (Avg. judge's % civil cases × Wood's civil score)

Judge Wood's adjusted total score was (0.44487 × -0.16348) + (0.55513 × -0.18153), or -0.17350.

Because Judge Wood sits on the Seventh Circuit Court of Appeals, a circuit adjustment was made to her score based upon how the aggregate activism behavior of her circuit differed from other circuits based upon the votes of traveling judges.[200] In order to determine the value of the adjustment, the case-mix-adjusted Activism Scores for the traveling judges in the circuit were aggregated based upon the number of votes they entered in the traveled-to circuit. These aggregate scores were then compared with the scores they would be expected to have in other circuits as represented by their overall Activism Scores. The difference between the actual and expected values indicated the degree to which a particular circuit differed in activism behavior. The following expression was used for each circuit:

(Scores of traveling judges in circuit – Expected scores of traveling judges) / (2 × Total number of judges in the circuit)

In the Seventh Circuit, the adjustment figure was [(-0.10707) – (-0.12454)] / (2 × 16), or 0.00055. Subtracting that figure from the case-adjusted score yields a score of -0.17405.

The last remaining adjustment was to scale the scores from 0 to 100 to clarify the relationships between judges' Activism Scores.[201] The lowest Activism Score of the 177 judges with at least 200 interactions was 0.29977, which was added to each score.[202] A multiplier (222.18168) was then applied so that the top score would be equal to 100. In the case of Judge Wood, the final fully adjusted activism score was 27.9.

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[200] *See supra* Part III.A.2.

[201] *See supra* Part III.A.4.

[202] Appendices 2 and 3 provide activism scores for judges with at least 300 interactions, a subset of the group of judges with at least 200 interactions.

APPENDIX 2

Judge Activism Scores from highest to lowest for judges that had at least 300 interactions with other judges[203]

Rank	*Judge (Total Interactions)*	*Circuit*	*Raw Activism Differential*	*Activism Score*
1	Smith, D. Brooks (375)	3	13.8%	100.0
2	Ebel, David M. (381)	10	9.8%	95.2
3	Gould, Ronald M. (329)	9	8.8%	94.9
4	Rendell, Marjorie O. (336)	3	9.7%	92.8
5	Thomas, Sidney R. (517)	9	9.3%	92.4
6	Fletcher, Betty B. (389)	9	8.2%	91.4
7	Martin, Boyce F., Jr. (339)	6	9.0%	91.4
8	Tashima, Atsushi W. (417)	9	6.3%	87.9
9	Sutton, Jeffrey S. (308)	6	4.8%	80.7
10	Daughtrey, Martha C. (314)	6	3.3%	80.1
11	Fuentes, Julio M. (363)	3	4.7%	79.0
12	McKee, Theodore A. (336)	3	3.6%	78.9
13	Evans, Terence T. (489)	7	3.1%	78.8
14	Baldock, Bobby R. (336)	10	1.8%	77.3
15	McKay, Monroe G. (318)	10	1.8%	77.0
16	Torruella, Juan R. (343)	1	2.5%	77.0
17	Murphy, Diana E. (699)	8	3.3%	76.4
18	Wardlaw, Kim M. (387)	9	0.2%	75.1
19	Shepherd, Bobby E. (618)	8	1.8%	74.3
20	Gilman, Ronald L. (414)	6	0.6%	73.2
21	Callahan, Consuelo M. (339)	9	0.4%	72.7
22	Paez, Richard A. (416)	9	-1.2%	72.3
23	Barry, Maryanne T. (386)	3	1.3%	72.2
24	Melloy, Michael J. (453)	8	0.7%	72.2

[203] In a previous study using this same dataset, there were 143 judges listed as meeting the cutoff of 300 judicial interactions. *See* Yung, *supra* note 111, at 1205. However, in this study only 142 judges had at least 300 interactions. This discrepancy is due to the judicial votes of Judge Thomas G. Nelson of the Ninth Circuit mistakenly being assigned to Judge Dorothy W. Nelson of the Ninth Circuit. That error has been corrected in the dataset, and the results in this Article are based upon that correction.

25	Canby, William C., Jr. (320)	9	0.4%	70.8
26	Howard, Jeffrey R. (346)	1	-0.2%	70.4
27	Tymkovich, Timothy M. (528)	10	-0.4%	70.0
28	Cabranes, José A. (474)	2	-1.4%	68.1
29	Benton, William D. (681)	8	-1.7%	67.2
30	Holmes, Jerome A. (453)	10	-1.9%	66.8
31	Black, Susan H. (1042)	11	-1.5%	66.6
32	Wesley, Richard C. (424)	2	-1.9%	65.7
33	Lipez, Kermit V. (311)	1	-2.8%	65.2
34	Ikuta, Sandra S. (329)	9	-3.4%	65.0
35	Sloviter, Dolores K. (360)	3	-2.4%	64.8
36	Bybee, Jay S. (352)	9	-4.2%	63.9
37	Lynch, Sandra L. (356)	1	-3.6%	63.8
38	Pooler, Rosemary S. (357)	2	-3.4%	63.8
39	Livingston, Debra A. (421)	2	-3.2%	62.9
40	Jordan, Kent A. (461)	3	-3.1%	62.9
41	Hardiman, Thomas M. (374)	3	-2.7%	62.8
42	Bea, Carlos T. (356)	9	-4.0%	62.2
43	Cole, R. Guy, Jr. (417)	6	-5.4%	59.8
44	Jacobs, Dennis G. (336)	2	-4.2%	59.2
45	Tjoflat, Gerald B. (883)	11	-4.9%	59.0
46	Posner, Richard A. (384)	7	-5.2%	58.7
47	Smith, Milan D., Jr. (333)	9	-7.4%	57.5
48	Parker, Barrington D., Jr. (371)	2	-5.7%	57.0
49	Elrod, Jennifer W. (534)	5	-5.8%	56.9
50	Pryor, William H., Jr. (991)	11	-6.0%	56.7
51	Kanne, Michael S. (420)	7	-7.1%	56.2
52	Dubina, Joel F. (1020)	11	-6.6%	56.1
53	Carnes, Edward E. (1028)	11	-6.3%	56.1
54	Rogers, John M. (366)	6	-6.8%	56.0
55	Silverman, Barry G. (338)	9	-7.0%	54.6
56	Anderson, R. Lanier, III (1004)	11	-6.8%	54.6
57	Chagares, Michael A. (375)	3	-7.1%	54.5
58	Williams, Ann C. (384)	7	-8.0%	54.4

59	Jolly, E. Grady (693)	5	-7.6%	53.6
60	Barkett, Rosemary (949)	11	-7.6%	53.3
61	Lucero, Carlos F. (447)	10	-8.2%	52.6
62	Ambro, Thomas L. (402)	3	-7.9%	52.5
63	Loken, James B. (354)	8	-8.6%	51.9
64	Hawkins, Michael D. (346)	9	-9.9%	51.6
65	Clifton, Richard R. (304)	9	-9.2%	51.1
66	Jones, Edith H. (438)	5	-9.4%	50.8
67	Bauer, William J. (390)	7	-9.1%	50.7
68	Wollman, Roger L. (686)	8	-8.8%	49.9
69	Kravitch, Phyllis A. (382)	11	-9.3%	49.8
70	Hall, Peter W. (443)	2	-9.9%	48.1
71	Edmondson, J.L. (379)	11	-10.4%	48.1
72	Clement, Edith B. (691)	5	-10.0%	47.8
73	Gorsuch, Neil M. (438)	10	-10.8%	47.6
74	Wilson, Charles R. (1112)	11	-10.4%	47.6
75	Flaum, Joel M. (477)	7	-11.5%	46.2
76	Hull, Frank M. (1052)	11	-11.3%	45.8
77	Birch, Stanley F., Jr. (1004)	11	-11.5%	45.8
78	Gruender, Raymond W. (602)	8	-11.0%	45.5
79	O'Scannlain, Diarmuid F. (417)	9	-11.6%	45.2
80	Griffin, Richard A. (421)	6	-11.0%	45.0
81	Sotomayor, Sonia (360)	2	-12.0%	44.3
82	Colloton, Steven M. (624)	8	-11.4%	44.0
83	Fisher, D. Michael (462)	3	-11.9%	43.8
84	Katzmann, Robert A. (351)	2	-12.0%	43.7
85	Barksdale, Rhesa H. (675)	5	-11.9%	43.7
86	Rovner, Ilana D. (426)	7	-13.3%	42.7
87	Kelly, Paul J., Jr. (501)	10	-12.3%	42.3
88	Marcus, Stanley (1028)	11	-12.9%	41.6
89	Davis, W. Eugene (665)	5	-13.3%	41.2
90	King, Carolyn D. (695)	5	-13.9%	40.8
91	Prado, Edward C. (738)	5	-13.5%	40.8

92	Duncan, Allyson K. (633)	4	-13.9%	40.7
93	Wiener, Jacques L., Jr. (739)	5	-13.5%	40.4
94	Riley, William J. (573)	8	-13.3%	40.2
95	McKeague, David W. (386)	6	-13.8%	39.8
96	Siler, Eugene E., Jr. (325)	6	-14.4%	39.4
97	Bye, Kermit E. (576)	8	-14.3%	39.4
98	Owen, Priscilla R. (662)	5	-13.6%	39.1
99	Manion, Daniel A. (444)	7	-14.9%	38.8
100	Graber, Susan (356)	9	-15.8%	38.8
101	Benavides, Fortunato P. (720)	5	-14.2%	38.6
102	Sack, Robert D. (377)	2	-14.1%	38.6
103	Ripple, Kenneth F. (414)	7	-15.1%	38.4
104	Fisher, Raymond C. (305)	9	-17.3%	37.7
105	Wilkins, William W. (423)	4	-15.3%	37.4
106	Raggi, Reena (446)	2	-14.4%	37.0
107	Michael, M. Blane (647)	4	-15.4%	36.9
108	Sykes, Diane S. (387)	7	-15.5%	36.3
109	Higginbotham, Patrick E. (618)	5	-16.1%	35.8
110	McConnell, Michael W. (453)	10	-17.1%	35.5
111	Smith, Lavenski R. (635)	8	-15.6%	35.5
112	McKeown, M. Margaret (351)	9	-15.7%	35.1
113	Tacha, Deanell R. (390)	10	-16.8%	34.4
114	Fay, Peter T. (408)	11	-16.9%	34.4
115	Gibbons, Julia S. (368)	6	-16.4%	33.2
116	Batchelder, Alice M. (308)	6	-17.5%	32.4
117	Gibson, John R. (318)	8	-17.1%	30.5
118	Roth, Jane R. (390)	3	-18.5%	29.9
119	Gregory, Roger L. (665)	4	-18.4%	29.7
120	King, Robert B. (735)	4	-19.1%	28.5
121	O'Brien, Terrence L. (345)	10	-18.7%	28.3
122	Wood, Diane P. (423)	7	-19.0%	27.9
123	Moore, Karen N. (465)	6	-20.4%	27.9
124	Garza, Emilio M. (672)	5	-18.8%	27.9
125	Southwick, Leslie (657)	5	-19.2%	27.4

126	Stewart, Carl E. (758)	5	-19.2%	27.2
127	Murphy, Michael R. (471)	10	-19.9%	27.1
128	Haynes, Catharina (339)	5	-20.3%	25.5
129	Clay, Eric L. (387)	6	-21.4%	25.0
130	Traxler, William B., Jr. (714)	4	-20.9%	25.0
131	Smith, Jerry E. (681)	5	-20.8%	23.3
132	Easterbrook, Frank H. (366)	7	-22.1%	22.0
133	Dennis, James L. (697)	5	-22.7%	20.2
134	Anderson, Stephen H. (333)	10	-23.3%	17.8
135	Briscoe, Mary B. (504)	10	-24.7%	17.2
136	Motz, Diana G. (567)	4	-26.8%	12.2
137	Niemeyer, Paul V. (674)	4	-27.5%	10.7
138	Hamilton, Clyde H. (494)	4	-27.5%	10.1
139	Reavley, Thomas M. (513)	5	-27.4%	8.8
140	Hartz, Harris L. (456)	10	-29.1%	7.8
141	Shedd, Dennis W. (631)	4	-30.2%	4.3
142	Wilkinson, J. Harvie, III (474)	4	-30.6%	3.7

APPENDIX 3

Judge Activism Scores by circuit for judges that had at least 300 interactions with other judges

Judge (Total Interactions)	*Circuit*	*Raw Activism Differential*	*Activism Score*
Howard, Jeffrey R. (346)	1	-0.2%	70.4
Lipez, Kermit V. (311)	1	-2.8%	65.2
Lynch, Sandra L. (356)	1	-3.6%	63.8
Torruella, Juan R. (343)	1	2.5%	77.0
Cabranes, José A. (474)	2	-1.4%	68.1
Hall, Peter W. (443)	2	-9.9%	48.1
Jacobs, Dennis G. (336)	2	-4.2%	59.2
Katzmann, Robert A. (351)	2	-12.0%	43.7
Livingston, Debra A. (421)	2	-3.2%	62.9
Parker, Barrington D., Jr. (371)	2	-5.7%	57.0
Pooler, Rosemary S. (357)	2	-3.4%	63.8
Raggi, Reena (446)	2	-14.4%	37.0
Sack, Robert D. (377)	2	-14.1%	38.6
Sotomayor, Sonia (360)	2	-12.0%	44.3
Wesley, Richard C. (424)	2	-1.9%	65.7
Ambro, Thomas L. (402)	3	-7.9%	52.5
Barry, Maryanne T. (386)	3	1.3%	72.2
Chagares, Michael A. (375)	3	-7.1%	54.5
Fisher, D. Michael (462)	3	-11.9%	43.8
Fuentes, Julio M. (363)	3	4.7%	79.0
Hardiman, Thomas M. (374)	3	-2.7%	62.8
Jordan, Kent A. (461)	3	-3.1%	62.9
McKee, Theodore A. (336)	3	3.6%	78.9
Rendell, Marjorie O. (336)	3	9.7%	92.8
Roth, Jane R. (390)	3	-18.5%	29.9
Sloviter, Dolores K. (360)	3	-2.4%	64.8
Smith, D. Brooks (375)	3	13.8%	100.0
Duncan, Allyson K. (633)	4	-13.9%	40.7
Gregory, Roger L. (665)	4	-18.4%	29.7

Hamilton, Clyde H. (494)	4	-27.5%	10.1
King, Robert B. (735)	4	-19.1%	28.5
Michael, M. Blane (647)	4	-15.4%	36.9
Motz, Diana G. (567)	4	-26.8%	12.2
Niemeyer, Paul V. (674)	4	-27.5%	10.7
Shedd, Dennis W. (631)	4	-30.2%	4.3
Traxler, William B., Jr. (714)	4	-20.9%	25.0
Wilkins, William W. (423)	4	-15.3%	37.4
Wilkinson, J. Harvie, III (474)	4	-30.6%	3.7
Barksdale, Rhesa H. (675)	5	-11.9%	43.7
Benavides, Fortunato P. (720)	5	-14.2%	38.6
Clement, Edith B. (691)	5	-10.0%	47.8
Davis, W. Eugene (665)	5	-13.3%	41.2
Dennis, James L. (697)	5	-22.7%	20.2
Elrod, Jennifer W. (534)	5	-5.8%	56.9
Garza, Emilio M. (672)	5	-18.8%	27.9
Haynes, Catharina (339)	5	-20.3%	25.5
Higginbotham, Patrick E. (618)	5	-16.1%	35.8
Jolly, E. Grady (693)	5	-7.6%	53.6
Jones, Edith H. (438)	5	-9.4%	50.8
King, Carolyn D. (695)	5	-13.9%	40.8
Owen, Priscilla R. (662)	5	-13.6%	39.1
Prado, Edward C. (738)	5	-13.5%	40.8
Reavley, Thomas M. (513)	5	-27.4%	8.8
Smith, Jerry E. (681)	5	-20.8%	23.3
Southwick, Leslie (657)	5	-19.2%	27.4
Stewart, Carl E. (758)	5	-19.2%	27.2
Wiener, Jacques L., Jr. (739)	5	-13.5%	40.4
Batchelder, Alice M. (308)	6	-17.5%	32.4
Clay, Eric L. (387)	6	-21.4%	25.0
Cole, R. Guy, Jr. (417)	6	-5.4%	59.8
Daughtrey, Martha C. (314)	6	3.3%	80.1
Gibbons, Julia S. (368)	6	-16.4%	33.2
Gilman, Ronald L. (414)	6	0.6%	73.2
Griffin, Richard A. (421)	6	-11.0%	45.0

Martin, Boyce F., Jr. (339)	6	9.0%	91.4
McKeague, David W. (386)	6	-13.8%	39.8
Moore, Karen N. (465)	6	-20.4%	27.9
Rogers, John M. (366)	6	-6.8%	56.0
Siler, Eugene E., Jr. (325)	6	-14.4%	39.4
Sutton, Jeffrey S. (308)	6	4.8%	80.7
Bauer, William J. (390)	7	-9.1%	50.7
Easterbrook, Frank H. (366)	7	-22.1%	22.0
Evans, Terence T. (489)	7	3.1%	78.8
Flaum, Joel M. (477)	7	-11.5%	46.2
Kanne, Michael S. (420)	7	-7.1%	56.2
Manion, Daniel A. (444)	7	-14.9%	38.8
Posner, Richard A. (384)	7	-5.2%	58.7
Ripple, Kenneth F. (414)	7	-15.1%	38.4
Rovner, Ilana D. (426)	7	-13.3%	42.7
Sykes, Diane S. (387)	7	-15.5%	36.3
Williams, Ann C. (384)	7	-8.0%	54.4
Wood, Diane P. (423)	7	-19.0%	27.9
Benton, William D. (681)	8	-1.7%	67.2
Bye, Kermit E. (576)	8	-14.3%	39.4
Colloton, Steven M. (624)	8	-11.4%	44.0
Gibson, John R. (318)	8	-17.1%	30.5
Gruender, Raymond W. (602)	8	-11.0%	45.5
Loken, James B. (354)	8	-8.6%	51.9
Melloy, Michael J. (453)	8	0.7%	72.2
Murphy, Diana E. (699)	8	3.3%	76.4
Riley, William J. (573)	8	-13.3%	40.2
Shepherd, Bobby E. (618)	8	1.8%	74.3
Smith, Lavenski R. (635)	8	-15.6%	35.5
Wollman, Roger L. (686)	8	-8.8%	49.9
Bea, Carlos T. (356)	9	-4.0%	62.2
Bybee, Jay S. (352)	9	-4.2%	63.9
Callahan, Consuelo M. (339)	9	0.4%	72.7
Canby, William C., Jr. (320)	9	0.4%	70.8
Clifton, Richard R. (304)	9	-9.2%	51.1

Fisher, Raymond C. (305)	9	-17.3%	37.7
Fletcher, Betty B. (389)	9	8.2%	91.4
Gould, Ronald M. (329)	9	8.8%	94.9
Graber, Susan (356)	9	-15.8%	38.8
Hawkins, Michael D. (346)	9	-9.9%	51.6
Ikuta, Sandra S. (329)	9	-3.4%	65.0
McKeown, M. Margaret (351)	9	-15.7%	35.1
O'Scannlain, Diarmuid F. (417)	9	-11.6%	45.2
Paez, Richard A. (416)	9	-1.2%	72.3
Silverman, Barry G. (338)	9	-7.0%	54.6
Smith, Milan D., Jr. (333)	9	-7.4%	57.5
Tashima, Atsushi W. (417)	9	6.3%	87.9
Thomas, Sidney R. (517)	9	9.3%	92.4
Wardlaw, Kim M. (387)	9	0.2%	75.1
Anderson, Stephen H. (333)	10	-23.3%	17.8
Baldock, Bobby R. (336)	10	1.8%	77.3
Briscoe, Mary B. (504)	10	-24.7%	17.2
Ebel, David M. (381)	10	9.8%	95.2
Gorsuch, Neil M. (438)	10	-10.8%	47.6
Hartz, Harris L. (456)	10	-29.1%	7.8
Holmes, Jerome A. (453)	10	-1.9%	66.8
Kelly, Paul J., Jr. (501)	10	-12.3%	42.3
Lucero, Carlos F. (447)	10	-8.2%	52.6
McConnell, Michael W. (453)	10	-17.1%	35.5
McKay, Monroe G. (318)	10	1.8%	77.0
Murphy, Michael R. (471)	10	-19.9%	27.1
O'Brien, Terrence L. (345)	10	-18.7%	28.3
Tacha, Deanell R. (390)	10	-16.8%	34.4
Tymkovich, Timothy M. (528)	10	-0.4%	70.0
Anderson, R. Lanier, III (1004)	11	-6.8%	54.6
Barkett, Rosemary (949)	11	-7.6%	53.3
Birch, Stanley F., Jr. (1004)	11	-11.5%	45.8
Black, Susan H. (1042)	11	-1.5%	66.6
Carnes, Edward E. (1028)	11	-6.3%	56.1
Dubina, Joel F. (1020)	11	-6.6%	56.1

Edmondson, J.L. (379)	11	-10.4%	48.1
Fay, Peter T. (408)	11	-16.9%	34.4
Hull, Frank M. (1052)	11	-11.3%	45.8
Kravitch, Phyllis A. (382)	11	-9.3%	49.8
Marcus, Stanley (1028)	11	-12.9%	41.6
Pryor, William H., Jr. (991)	11	-6.0%	56.7
Tjoflat, Gerald B. (883)	11	-4.9%	59.0
Wilson, Charles R. (1112)	11	-10.4%	47.6