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## *MADISON LECTURE*

### WHEN JUDGES AND JUSTICES THROW OUT TOOLS: JUDICIAL ACTIVISM IN *RUCHO V. COMMON CAUSE*

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#### INTRODUCTION

*“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spas-*

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*modic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy[,] disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains."*

—Benjamin Cardozo, 1921<sup>1</sup>

To help me find a topic of appropriate merit for this esteemed lecture series, I reviewed the lectures given by several of my judicial colleagues on the appellate bench. At least one theme emerged—that the questions of legal and jurisprudential theory that stand at the center of my colleagues' contributions to this lecture series are intimately attached to the elusive concept commonly referred to as “judicial activism.” For instance, my colleague on the Fourth Circuit, Judge Wilkinson, argued that “law should consciously aspire to promote a stronger sense of national cohesion and unity.”<sup>2</sup> According to Judge Wilkinson, judicial activism materially frustrates that goal; it is, in his words, “deeply divisive” because “unelected judges serving for life should not lightly displace the will of the people’s chosen representatives,” particularly because judges “are drawn from the ranks of one profession only” and “the elite reaches of that profession to boot.”<sup>3</sup> Likewise, Judge Tatel devoted his Madison Lecture to an examination of judicial activism through the lens of two school desegregation cases decided by the Rehnquist Court.<sup>4</sup>

I have served as a judge for more than thirty years—and as an *elected* judge for nearly twenty years—so I am quite familiar with the political sway that the term “judicial activism” holds with the public and the impact it has on those who select judges.<sup>5</sup> Indeed, opposition to judicial activism has become a political rallying cry, and an avowal

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<sup>1</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921) (footnote omitted).

<sup>2</sup> J. Harvie Wilkinson III, *Madison Lecture: Toward One America: A Vision in Law*, 83 N.Y.U. L. REV. 323, 324 (2008) [hereinafter Wilkinson, *Toward One America*].

<sup>3</sup> *Id.* at 326; *see also id.* at 332 (“National unity requires that courts counteract both partisanship and polarization in the body politic. The judiciary fulfills this mission not only through allegiance to principles of law that transcend political division, but in its demeanor and approach, which should consciously lower volume as political discourse raises it.”).

<sup>4</sup> David S. Tatel, *Madison Lecture: Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1105–33 (2004) (discussing *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991), and *Missouri v. Jenkins*, 515 U.S. 70 (1995)).

<sup>5</sup> North Carolina appellate judges are selected by statewide elections. From 1990 until confirmed in 2010 by the Senate for the U.S. Court of Appeals for the Fourth Circuit, I served on the North Carolina Court of Appeals and briefly on the Supreme Court of North Carolina. During that time period, I ran in six statewide elections.

not to engage in judicial activism is a rite of passage for judicial nominees and candidates.<sup>6</sup>

But while the term “judicial activism” is widely used, generally as an epithet, Judge Easterbrook has rightly noted that its meaning is “notoriously slippery.”<sup>7</sup> Often it is merely applied as “a term of opprobrium”—devoid of content or meaning—that simply refers to “Judges Behaving Badly.”<sup>8</sup> And, as I discuss below, even those who try to give the term meaning cannot agree on a definition.<sup>9</sup> Nonetheless, because the term “judicial activism” has proven so influential with the public—and therefore in the selection of judges and in the act of judging—I believe that we must endeavor to give it meaning, rather than allow it to remain an empty epithet.

In this Lecture, I offer my own definition of judicial activism: In deciding a case, a court or judge engages in judicial activism when the court or judge eschews the use of a judicial decisional tool traditionally employed to adjudicate that type of case. In other words, judicial activism involves throwing a long-recognized decisional tool—or, in Justice Marshall’s words, “mediating principle[.]”<sup>10</sup>—out of the judicial toolkit. Under my definition, for example, the Supreme Court would engage in judicial activism if it refused without explanation to apply the doctrine of stare decisis, given that stare decisis stands at the center of the common-law tradition we inherited from England and has been applied since the earliest days of the republic.

Why does such behavior amount to judicial activism? Because refusing to apply a long-recognized mediating principle eliminates a constraint on a court’s exercise of its decisional discretion. When judges refuse to apply a long-standing interpretive tool, they necessarily expand the universe of situations in which they, in Judge Posner’s

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<sup>6</sup> See Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, 246–52 (presenting empirical data to show the increasing prevalence of questions regarding judicial activism being asked of nominees during confirmation hearings).

<sup>7</sup> Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002); see also Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 533 (2012) [hereinafter Posner, *Rise and Fall*] (describing the term “judicial activism” as “a vague, all-purpose pejorative”).

<sup>8</sup> Easterbrook, *supra* note 7, at 1401; see also Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275–76 (2002) (“[The] term [‘activism,]’ while clearly pejorative, is generally empty.”).

<sup>9</sup> See *infra* Part I.

<sup>10</sup> *Payne v. Tennessee*, 501 U.S. 808, 853 n.3 (1991) (Marshall, J., dissenting) (“The text of the Constitution is rarely so plain as to be self-executing; invariably, this Court must develop mediating principles and doctrines in order to bring the text of constitutional provisions to bear on particular facts.”).

words, “bring [*their*] *own* policy preferences to bear in order to decide the case at hand.”<sup>11</sup>

To be sure, there necessarily are times when judges must rely on their own policy preferences to decide a case.<sup>12</sup> But, from my perspective, simply ignoring without comment a well-established mediating principle generally applicable in the type of case at issue—or justifying the act of discarding a fundamental principle by relying on a legal or policy argument as to the undesirability of that principle—is a fundamentally activist enterprise.

My Lecture will proceed as follows. First, I survey the origin of the term “judicial activism” and the various ways it has been defined by judges and scholars. Those definitions generally fall into two categories: those focused on outcomes and those focused on the process a judge applies in reaching an outcome. Second, I set forth my own definition of judicial activism—which falls into the process category—and explain why I believe that definition gives meaning to the principal concern animating accusations of judicial activism: that the judiciary is stepping outside of its proper role and unjustifiably deciding cases based on its own policy preferences. Third, I explain some means by which activism (as I define it) enters judicial decisionmaking. Finally, I apply my definition to demonstrate why the judicial interpretive methodology of textualism and the recent Supreme Court partisan gerrymandering decision, *Rucho v. Common Cause*, are stark examples of judicial activist behavior.

## I

### DEFINITIONS OF JUDICIAL ACTIVISM

Historian Arthur Schlesinger, Jr. coined the term “judicial activism” in a 1947 article in *Fortune Magazine*.<sup>13</sup> Of course, even before the term existed, charges of what would today be labeled judicial activism were levied against courts—for example, by liberals in the early twentieth century concerned with “[c]onservative [Supreme

<sup>11</sup> Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 *IND. L.J.* 1, 9 (1983) [hereinafter Posner, *Meaning*] (second emphasis added).

<sup>12</sup> For example, federal district court judges are often faced with discretionary decisions, such as which criminal sentence to impose. Certainly, their discretion is limited by numerous factors (including those listed at 18 U.S.C. § 3553 and any statutorily required mandatory maximums or minimums). Ultimately, however, the precise sentence they impose is almost always a matter of discretion.

<sup>13</sup> See Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, *FORTUNE*, Jan. 1947, at 73, 74–76; see also Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism,”* 92 *CALIF. L. REV.* 1441, 1445 n.21 (2004) (noting that “[s]ubstantial research by the author has failed to produce any earlier references to ‘judicial activism’” than Schlesinger’s 1947 article).

Court] majorities . . . legislat[ing] in the interests of the business community.”<sup>14</sup> Since my goal is not to provide a complete history of the term, however, I will begin with Schlesinger’s definition.

Schlesinger divided the Justices then serving on the Supreme Court into camps of “judicial activists” and “[c]hampions of self-restraint.”<sup>15</sup> The 1947 Court provided a good case study because nearly all the Justices shared similar political views; their disagreement was, instead, “over the role the Court [wa]s to play in bringing about the kind of society they all want[ed].”<sup>16</sup>

According to Schlesinger, Justices falling into the activist camp—chiefly, in his opinion, Justices Black and Douglas—were primarily “concerned with the employment of the judicial power for their own conception of the social good.”<sup>17</sup> Schlesinger argued that activist judges find ample legal space to bring their personal policy preferences to bear in deciding cases because they believe that “[t]he resources of legal artifice, the ambiguity of precedents, [and] the range of applicable doctrine[] are all so extensive that in most cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic.”<sup>18</sup> On the other hand, those he deemed “champions of self-restraint”—most notably Justices Jackson and Frankfurter—sought to “expand[] the range of allowable judgment for legislatures, even if it mean[t] upholding conclusions they privately condemn[ed],” thereby “pre-

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<sup>14</sup> Schlesinger, *supra* note 13, at 202; see Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709, 716 (2009) (“Progressives in the early 1900’s and New Dealers in the 1930’s repeatedly criticized the Court for exceeding constitutional boundaries by invalidating state and federal economic legislation.”). Professor Jane Schacter provides a compelling account tracing the usage of different terminology to convey a similar idea, related to judicial overreach, from Thomas Jefferson to the present. See Schacter, *supra* note 6, at 215–17 (discussing the phrases “judicial oligarchy,” “judicial activism,” and “legislating from the bench”); see also Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1200 (2009) (“[T]he concept of judicial activism . . . has older foundations.”); *id.* at 1209–16 (canvassing prior periods when the judiciary played a controversial role, including the *Lochner* era, the decades after the Civil War, the *Dred Scott* decision, and the Marshall Court). *But cf. id.* at 1233–41, 1243 (reviewing historical developments in conceptions of appropriate judicial roles and concluding that early judging differed fundamentally from modern ideas of proper judging).

<sup>15</sup> Schlesinger, *supra* note 13, at 74, 76.

<sup>16</sup> *Id.* at 208; see also *id.* (“The debate between self-denial and activism can continue endlessly. But one point should be made: it is not a debate between conservatives and liberals. On their substantive views the entire Court, except for Burton, is made up of New Dealers.”).

<sup>17</sup> *Id.* at 201.

<sup>18</sup> *Id.*

serving the judiciary in its established but limited place in the American system.”<sup>19</sup>

Schlesinger ultimately endorsed the position he characterized as “self-restraint.”<sup>20</sup> However, he did not flatly condemn what he deemed “judicial activism.” Rather, Schlesinger acknowledged that judicial activism is grounded in the commendable concern that, while courts wait for the political branches to correct encroachments on individual rights, “defenseless persons” will be harmed, possibly irreparably.<sup>21</sup> Indeed, for this reason, Schlesinger endorsed some degree of judicial activism in civil liberties cases, particularly cases involving “the fundamental rights of political agitation”—presumably referring to free speech and voting rights.<sup>22</sup> After all, as the Supreme Court later recognized, voting rights are the mechanism through which the public secures all other rights.<sup>23</sup>

Although Schlesinger’s article brought the term “judicial activism” into public parlance—and identified several features of judicial activism and restraint that courts and commentators have subsequently embraced in their attempts to define the term more rigorously—the article failed to provide a viable framework for determining whether a decision is activist.<sup>24</sup>

Nevertheless, over the ensuing decades, use of the term became widespread—by politicians, the public, scholars, and, in some cases, judges themselves<sup>25</sup>—and the term took on its current pejorative connotation. For example, Richard Nixon campaigned for president in 1968 on a commitment to “reverse the rule of ‘activist judges’ and roll

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 208; *see also id.* (“The larger interests of democracy in the U.S. require that the Court contract rather than expand its power, and that basic decisions on all questions save the fundamental rights of political agitation be entrusted as completely as possible to institutions directly responsive to popular control.”).

<sup>21</sup> *Id.* at 206.

<sup>22</sup> *Id.* at 208.

<sup>23</sup> *See* *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”); *see also* *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part) (“[T]he franchise provides most citizens their only voice in the legislative process.”).

<sup>24</sup> *See* Green, *supra* note 14, at 1203 (“[E]ven as Schlesinger noted that the issues separating these two groups ‘may be described in several ways,’ his essay offered no comprehensive definition of activism or restraint.”); Kmiec, *supra* note 13, at 1449–50 (describing the difficulty in determining which decisions reflect judicial activism under Schlesinger’s analysis); *see also* Green, *supra* note 14, at 1203 (“Schlesinger’s preoccupation with the sitting Justices of 1947 undercut his analysis of broader judicial principles at every turn.”).

<sup>25</sup> *See* Green, *supra* note 14, at 1207 & n.41 (collecting examples of usage in the late 1940s and 1950s).

back ‘crime in the streets,’” the latter of which he suggested was a consequence of the Warren Court’s decisions expanding the rights of criminal defendants.<sup>26</sup> By 1996, opposition to “activis[t]” “liberal” judges had become a critical feature of the Republican Party platform and has remained so to the present.<sup>27</sup> For instance, the 2008 Republican platform stated that “[j]udicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public.”<sup>28</sup> As the term became more prevalent—and its meaning became more politically charged—concerns over judicial activism took a leading role in the selection of judges.<sup>29</sup>

The proliferation of the use of the term “judicial activism”—and the increasing power of that term with the public—has also led commentators to propose more precise definitions, which generally fall into two camps. The first camp focuses on the outcomes of judicial decisions, whereas the second camp focuses on the processes judges or courts follow in deciding cases.

### A. Outcome-Focused Definitions

“Most academics and politicians who accuse the Supreme Court of judicial activism focus on specific results to support their arguments.”<sup>30</sup> In other words, a charge of “judicial activism” is often simply a stand-in for the speaker’s disagreement with the result of a case. Such an attack, of course, tells us little about the court, and instead simply reveals the speaker’s own policy preferences.<sup>31</sup> Accordingly, outcome-focused definitions are of limited descriptive use,

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<sup>26</sup> Schacter, *supra* note 6, at 222; *see also* Segall, *supra* note 14, at 715 (discussing the campaign rhetoric used by Nixon and others).

<sup>27</sup> *See* Schacter, *supra* note 6, at 242; *see also* Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 215, 230 (2012) (discussing the history of conservative political efforts to oppose what they view as judicial activism). Professor Schacter has canvassed the rhetoric of judicial activism and argued persuasively that, while the Republican Party and political conservatives have been the primary users of the term “judicial activism” in recent decades, Democrats and liberals have launched similar attacks on the courts’ legitimacy but have framed them using different language (such as accusations that judges have abdicated their role to protect constitutional rights). *See* Schacter, *supra* note 6, at 270–71.

<sup>28</sup> 2008 Republican Party Platform, AM. PRESIDENCY PROJECT (Sept. 1, 2008), <https://www.presidency.ucsb.edu/documents/2008-republican-party-platform>.

<sup>29</sup> *See* Schacter, *supra* note 6, at 246 (noting that questioning around judicial activism in confirmation hearings for Supreme Court nominees “ha[d] an upward trajectory over time, such that by the late 1960s, multiple senators regularly pursue[d] it”).

<sup>30</sup> Segall, *supra* note 14, at 709.

<sup>31</sup> *See, e.g., id.* at 716 (“[B]oth liberal and conservative politicians throw out accusations of judicial activism whenever the Court decides cases with which they disagree.”).

although, as I discuss below, they can provide helpful benchmarks for empirical comparisons between judges or across time.

The most widely endorsed outcome-focused definition classifies a judicial decision as activist if it strikes down actions taken by the other branches of government.<sup>32</sup> According to those who subscribe to this definition, holding actions of the executive and legislative branches to be unconstitutional involves judicial activism because it is counter-majoritarian—it involves (often unelected) judges striking down the policy decisions of popularly elected bodies.<sup>33</sup> Additionally, advocates of this definition emphasize that when a court strikes down legislative or executive actions, it aggrandizes its power relative to other governmental actors.<sup>34</sup>

Scholars find this definition of judicial activism particularly attractive because they believe it offers a way to quantify the frequency of judicial activism exhibited by particular courts or judges. They reason that if a court strikes down statutes at a higher rate than earlier courts, then that court is more “activist” than the earlier courts.<sup>35</sup>

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<sup>32</sup> Thus, Judge Posner “suggests that a basic element of judicial activism is a court’s willingness to act ‘contrary to the will of the other branches of government,’ as in striking down a statute.” Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1759 (2007) [hereinafter Cross & Lindquist, *Scientific Study*] (quoting RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 320 (1996)). Similarly, Professor Cass Sunstein “contends that ‘it is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government, especially those of Congress.’” *Id.* (quoting CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 42–43 (2005)); see also J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1386 (2002) [hereinafter Wilkinson, *Distinctive Conservative Jurisprudence*] (“All manifestations of activism involve by definition judicial intervention into the democratic process.”).

<sup>33</sup> E.g., William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1223 (2002) (discussing activism in counter-majoritarian terms); see also Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1287–88 (1982) (observing that a series of dissents from Justices Holmes, Brandeis, and Stone “emphasized the simple fact that the Court was thwarting majoritarian mechanisms of social choice. . . . Thus, they attacked the exercise of judicial review with the blunt instrument that has become known as the ‘counter-majoritarian difficulty’”).

<sup>34</sup> See Posner, *Meaning*, *supra* note 11, at 14 (asserting that when a court “act[s] contrary to the will of the other branches of government” it is engaging in activism because it is “enlarging its power at the expense of . . . [an]other government institution”).

<sup>35</sup> See, e.g., Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1701–02 (2006) [hereinafter Cross & Lindquist, *Decisional Significance*]; Easterbrook, *supra* note 7, at 1406 (arguing that a “benefit of [this] definition is that it enables us to go out and count activist decisions”); Wilkinson, *Distinctive Conservative Jurisprudence*, *supra* note 32, at 1398 (“[T]he Rehnquist Court has invalidated a rather large number of legislative enactments—at least twenty-four acts of



Such analysis can provide interesting insights in the world of scholarship. For example, scholars can compare the Supreme Court's willingness to strike down federal statutes across time.<sup>36</sup> That empirical data grounds comparisons between different Court makeups in fact rather than speculation (or knee-jerk denunciation), "thus helping to move our larger debate . . . about the Supreme Court . . . toward a more factually grounded examination of the role that Court actually plays in our legal and political system."<sup>37</sup>

I do not mean to suggest that such efforts are without value; far from it. My criticism, such as it is, is solely a definitional one. But I do not believe that whether, and with what frequency, a court or judge strikes down legislative or executive actions constitutes a helpful definition of judicial activism for those seeking to understand the forces driving judicial decisionmaking in particular cases.<sup>38</sup>

Importantly, the authority of the courts to engage in judicial review has been well established for more than two hundred years.<sup>39</sup> Passing on the constitutionality of legislation and executive action is a function constitutionally assigned to the judiciary, so striking down a statute or executive action is not necessarily activist—at least not in the sense of the judiciary aggrandizing its power relative to other gov-

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Congress have been struck down in a recent six year span. This is a significant figure. It serves to underscore the danger that activism may get out of hand." (footnote omitted)).

<sup>36</sup> See Cross & Lindquist, *Decisional Significance*, *supra* note 35, at 1702–04; see also Cross & Lindquist, *Scientific Study*, *supra* note 32, at 1774 ("[T]he simplest measure of activism involves the frequency with which Justices vote to strike statutes. While incomplete, it provides relevant and valuable information." (footnote omitted)); *id.* at 1773–83 (presenting the results of a fascinating study seeking to incorporate several outcome-oriented aspects of "activism" to measure the activism of Justices serving between 1969 and 2004); Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES (July 6, 2005), <https://www.nytimes.com/2005/07/06/opinion/so-who-are-the-activists.html> (comparing the then-sitting Justices' records of voting in favor of striking down congressional legislation); Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033 (2007) (comparing the Warren, Burger, and Rehnquist Courts' records of invalidating federal statutes, invalidating state statutes, and overturning precedent).

<sup>37</sup> Ringhand, *supra* note 36, at 1052.

<sup>38</sup> See Green, *supra* note 14, at 1219 ("[E]mpirical 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."); Segall, *supra* note 14, at 723 (arguing that if the Court overturning an act of Congress is defined as judicial activism, "then we are not saying very much at all but just describing what the Court did").

<sup>39</sup> Moreover, the Constitution itself manifestly seeks to protect minorities from the tyranny of the majority, for example, in the First Amendment's protections of free speech, the free press, and free exercise of religion, and in the Fourteenth Amendment's guarantee of equal protection. In other words, to reflexively label anything that is *counter-majoritarian* as (pejoratively) *activist* is to deny the nature of the constitutional design.

ernmental bodies.<sup>40</sup> Importantly, the Supreme Court's decisions in the *Slaughter-House Cases*,<sup>41</sup> *Plessy v. Ferguson*,<sup>42</sup> and *Korematsu v. United States*<sup>43</sup> might be reasonably characterized as "activist" decisions because of the law that they created—notwithstanding that, in each case, the Supreme Court upheld, rather than struck down, actions taken by the political branches.<sup>44</sup>

Recognizing this problem, commentators have tried to refine this definition by treating as activist only those decisions that hold unconstitutional legislative or executive actions that do not *plainly* violate the Constitution.<sup>45</sup> For instance, Judge Wilkinson has argued that "judges should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it."<sup>46</sup> Thus, in his view, the Supreme Court engages in judi-

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<sup>40</sup> Cross & Lindquist, *Scientific Study*, *supra* note 32, at 1760 ("A standard of judicial activism that focuses solely on statutory invalidation . . . fails to account for the possibility that the exercise of judicial review is justified on legal grounds."); see also Barnett, *supra* note 8, at 1277 ("[I]t would be activist to do nothing in the face of legislation that runs afoul of the written Constitution."); Posner, *Meaning*, *supra* note 11, at 14 ("If the courts are too miserly in using their powers to check the other branches of government, they might as well not be a part of the system of checks and balances, though the Constitution meant them to be."); Segall, *supra* note 14, at 711 (noting that, assuming "our constitutionally based representative democracy requires the Court to invalidate unconstitutional laws in some circumstances," an "erroneous decision" not to do so "may be just as activist as overturning those laws . . . that are not unconstitutional").

<sup>41</sup> 83 U.S. (16 Wall.) 36 (1873) (greatly limiting the reach of the Fourteenth Amendment's Privileges or Immunities Clause).

<sup>42</sup> 163 U.S. 537 (1896) (greatly limiting the reach of the Fourteenth Amendment's Equal Protection Clause by establishing the "separate but equal" doctrine), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>43</sup> 323 U.S. 214 (1944) (concluding that the government had satisfied strict scrutiny despite obvious racial discrimination), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>44</sup> See, e.g., Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137, 139 (1991) (discussing *Plessy* and the *Slaughter-House Cases* and noting that "[w]e talk so often of judicial activism that creates rights out of thin air, but these two cases illustrate vividly the even more pernicious judicial activism that reads precious liberties out of the Constitution"); Cross & Lindquist, *Scientific Study*, *supra* note 32, at 1753 n.12 ("An argument can be made that *Korematsu* itself was an activist decision since, while it represented a deferential stance toward the executive branch, it failed to invalidate executive action that was clearly unconstitutional.").

<sup>45</sup> This view, or some version of it, has a lengthy pedigree. See Posner, *Rise and Fall*, *supra* note 7, at 522 (noting that "[t]he best-known and best-developed version of" the theory of constitutional restraint "begins with an 1893 article by Harvard law professor James Bradley Thayer in which he argued that a statute should be invalidated only if its unconstitutionality is 'so clear that it is not open to rational question'" (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893))).

<sup>46</sup> J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 255 (2009) [hereinafter Wilkinson, *Unraveling Rule of Law*].

cial activism when it overturns legislation in cases in which “the constitutional text did not clearly mandate the result.”<sup>47</sup> But that refinement serves only to muddy the definition because whether the Constitution is *plainly* violated is, itself, often subject to reasonable dispute. As Judge Posner has bluntly put it, “the parts of the Constitution that generate litigation at the Supreme Court level are too old and general to be directive.”<sup>48</sup> And Professor Ian Bartrum has persuasively argued that “even science—that practice we hold out as the most objective of our endeavors—relies to some degree on individual value judgments, and constitutional interpretation inevitably (and legitimately) should do the same.”<sup>49</sup>

Consider also that the frequency with which a court or judge strikes down legislative or executive actions does not provide a good measure of whether the court or judge is activist because that frequency may simply be a function of the cases the court or judge is called on to decide.<sup>50</sup> If, for example, a legislature enacts a statute that directly contradicts the plain language of the Constitution, then under this metric, the court would be deemed activist for striking down that legislation—notwithstanding that the court would simply be performing its constitutionally mandated function. From my perspective, however, any definition of judicial activism should turn on the conduct of the judge or court, not on the conduct of the other political branches.

Finally, defining activism only in terms of striking down a legislative or executive decision elides significant alternative methods of judicial overreach. Put differently, if the concern underlying accusations of judicial activism is usurpation by the judicial branch of powers

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<sup>47</sup> *Id.*; see *id.* at 267 (“[A] court that decides to strike down legislation based on an interpretation of the Constitution that is only plausible and not incontrovertible will appear to the public to be exercising discretion.”); see also Cross & Lindquist, *Scientific Study*, *supra* note 32, at 1761 (“Sunstein’s approach contends that the Court should defer to legislative judgment when statutes fall within [a] zone of uncertainty. The proper judicial role, in this view, is limited to striking down *clearly* unconstitutional statutes.” (citing Cass R. Sunstein, *Taking Over the Courts*, N.Y. TIMES, Nov. 9, 2002, at A19)).

<sup>48</sup> Posner, *Rise and Fall*, *supra* note 7, at 553–54.

<sup>49</sup> Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259, 272 (2013).

<sup>50</sup> Of course, that is less true for the Supreme Court, which largely dictates its own docket. Thus, for example, Professors Frank Cross and Stefanie Lindquist have noted that “[t]he Rehnquist Court [took] certiorari on very few challenges [to federal statutes’ constitutionality], save for cases in which it str[uck] down the statute, in contrast to the Burger Court, which took many more challenges and issued fewer invalidations.” Cross & Lindquist, *Decisional Significance*, *supra* note 35, at 1703. Even so, however, variables beyond the control of the Court impact the cases before it—the legislation passed by Congress and signed by the President, what lower courts make of that legislation, and whether litigants have the means to pursue their cases to the Supreme Court.

legitimately resting with the political branches, focusing solely on the complete nullification of that political power by striking down political actions discounts the numerous more subtle ways judges can exert influence. “For example, activism might be found in the mere interpretation of statutes,” which “might be more egregious than striking a statute” because “instead of leaving a blank legislative slate . . . [,] such a misinterpretation leaves in place a statute that now reflects the policy preferences of the judges rather than the legislature.”<sup>51</sup> Similarly, a court bent on obtaining a certain outcome could disregard clear procedural limitations or commands—actions that should surely be viewed as activist, but which are not captured by a definition that focuses on striking down political-branch action. For that matter, *no* judicial expansion of power—whether into spheres properly occupied by the other branches, or into spheres of private life—is captured by the striking-down-legislation definition except for, well, striking down legislation.<sup>52</sup>

Another outcome-focused definition of judicial activism defines a decision as activist if it overturns precedent.<sup>53</sup> Like definitions of judicial activism that focus on whether, and with what frequency, a court or judge invalidates legislative or executive actions, this conception of judicial activism is grounded in a concern that the court is aggrandizing its power. But whereas invalidation of legislative or executive action poses a risk that a court is aggrandizing its power relative to its coordinate branches and state governments, rejecting precedent involves a court aggrandizing its power relative to its predecessors.<sup>54</sup> Additionally, overturning precedent is viewed as activist because it entails the court treating similarly situated people—namely, those liti-

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<sup>51</sup> Cross & Lindquist, *Scientific Study*, *supra* note 32, at 1763–64.

<sup>52</sup> For example, *Roe v. Wade*, 410 U.S. 113 (1973), is frequently decried as an activist decision. *E.g.*, Segall, *supra* note 14, at 716–17 (“[P]erhaps the one decision that escalated the controversy over judicial activism more than any other was the Burger Court’s decision in *Roe v. Wade*.”). Yet, criticisms of *Roe* as activist are generally not grounded in an objection to the mere fact that *Roe* overturned state legislation. *See* Wilkinson, *Toward One America*, *supra* note 2, at 325 (noting that *Roe* “transported substantive due process from the economic to the personal realm”); Wilkinson, *Unraveling Rule of Law*, *supra* note 46, at 262–63 & nn.34–40 (collecting sources criticizing the purportedly “shaky legal foundation of the Court’s judgment” in *Roe*).

<sup>53</sup> *See, e.g.*, Marshall, *supra* note 33, at 1232–36 (discussing “[p]recedential [a]ctivism” by conservative jurists); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1149–51 (2002) (“Courts may also be criticized as activist when they depart from the authority of judicial precedents.”).

<sup>54</sup> *See* Young, *supra* note 53, at 1150–51 (“Here, rather than choosing not to defer to the political branches or the framers of the Constitution, the court refuses to defer to *prior courts* which have considered the same issue.”).

gants subject to the prior rule and those litigants subject to the new rule—differently.<sup>55</sup>

As with definitions of activism focused on setting aside legislative or executive action, defining judicial activism as overturning precedent has several flaws. If a line of precedent has proven unworkable or is plainly wrong, it is unfair to condemn as activist a decision overturning that errant line of precedent. That is especially true when the line of precedent itself can be reasonably characterized as activist—such as *Plessy* and *Lochner v. New York*.<sup>56</sup> In such cases, one could argue that any decision affirming those decisions—i.e., any decision *following* rather than *overturning* precedent—would amount to judicial activism. But in any event, to the extent “activism” is a pejorative term, it seems pointless to define it solely by reference to something that, as Justice Kavanaugh noted in April 2020, all Justices then on the Supreme Court “agree[d] . . . is sometimes appropriate for the Court to” do—“overrule erroneous decisions.”<sup>57</sup>

A third outcome-focused definition of judicial activism deems “activist” all those decisions that amount to a court or judge “legislating from the bench.”<sup>58</sup> This definition is grounded in the notion that

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<sup>55</sup> See Segall, *supra* note 14, at 731 (“The idea that the Court is bound to some degree to respect its prior cases is a fundamental aspect of its duty to make sure that the Court treats similarly situated people similarly, absent good reason for a change in the law.”).

<sup>56</sup> 198 U.S. 45 (1905). Many judges and commentators have characterized *Lochner* as an activist decision. *E.g.*, *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 890 (4th Cir. 1999) (Wilkinson, C.J., concurring) (characterizing *Lochner* as the beginning of the first general stage of judicial activism in the twentieth century), *aff’d sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>57</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part).

<sup>58</sup> Schacter, *supra* note 6, at 217; *see, e.g.*, *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting in part and concurring in part) (“[D]eciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. . . . would be ‘judicial activism’ at its worst.”); *Pub. Inv. Ltd. v. Bandeirante Corp.*, 740 F.2d 1222, 1240 (D.C. Cir. 1984) (Mikva, J., concurring in part and dissenting in part) (“It is the epitome of improper judicial activism for the majority to modernize the D.C. statute by judicial fiat. However preferable the ‘modern policy,’ the change must be made legislatively, as it was in all the other jurisdictions.”); Cross & Lindquist, *Scientific Study*, *supra* note 32, at 1753 (“Critics of judicial activism . . . claim that activist judges simply impose their policy preferences on society, without electoral accountability or fidelity to the Constitution.”). This conception of judicial activism played a central role in the so-called “Southern Manifesto” of 1956, which southern legislators drafted in reaction to *Brown v. Board of Education*. *See* Schacter, *supra* note 6, at 222 (noting that the members of Congress who issued the Southern Manifesto stated that *Brown* was “bearing the fruit always produced when men substitute naked power for established law,” and argued that the decision ‘climaxes a trend in the federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people’”); *cf.* Tatel, *supra* note 4, at 1097–99 (describing President Nixon’s attempts to nominate Justices who would curb the Court’s desegregationist tendencies, including through opposition to busing).

the political branches—not the judiciary—are constitutionally responsible for making policy. Individuals who subscribe to this definition emphasize that because judges—at least those who are appointed, rather than elected—are not accountable to the electorate, they should not be in the business of establishing policy or rewriting legislation or the Constitution.<sup>59</sup> That judges have a singular form of training and tend to be drawn from those who “have been educated at the most exclusive colleges and law schools, have spent their careers in the upper ethers of legal practice or academia, and have served in the upper echelons of state and national government” renders courts all the more ill-suited to engage in policymaking because “judges are as a class bereft of acquaintance with the variegated and pluralistic country that we serve.”<sup>60</sup> And, at a more abstract level, if our federal and state constitutions are to be regarded as “document[s] of inclusion that welcome[] all citizens into the American fold,” then judges (and all citizens) should “be sparing in what we seek to constitutionalize” because “[t]o constitutionalize our differences is to up the ante gravely,” and neither our constitutions nor our courts should be beholden to “[i]nterest-group politics.”<sup>61</sup>

I agree with much of the sentiment that underlies this definition of judicial activism—that judging fulfills a different constitutional role and constitutes a fundamentally different exercise than legislating.<sup>62</sup> As Judge Posner has explained, “[w]hat can fairly be inferred from the constitutional scheme is that the judges are not to exercise the same free-wheeling legislative discretion as the elected representatives.”<sup>63</sup> Because of that, numerous formal and informal constraints—that the judiciary may only decide “cases” and “controversies,”<sup>64</sup> that lower courts must follow controlling precedent, that courts must give effect

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<sup>59</sup> See Wilkinson, *Toward One America*, *supra* note 2, at 326 (“[A]ll forms of activism gild the scepter of judicial power. . . . [U]nelected judges serving for life should not lightly displace the will of the people’s chosen representatives.”); see also Green, *supra* note 14, at 1250 (describing Justice Scalia’s criticisms of activism, defined as judges “resolv[ing] cases by reference to a singularly inappropriate question: ‘What is the most desirable resolution of [a case], and how can any impediments to the achievement of that result be evaded?’” (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 13 (Amy Gutmann ed., Princeton Univ. Press rev. ed. 2018) (1997))).

<sup>60</sup> Wilkinson, *Toward One America*, *supra* note 2, at 326–27.

<sup>61</sup> *Id.* at 327–28.

<sup>62</sup> Cf. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 *Nw. U. L. REV.* 1239, 1294–1309 (2002) (reviewing various explanations for why judicial decisionmaking differs from political decisionmaking).

<sup>63</sup> Posner, *Meaning*, *supra* note 11, at 16.

<sup>64</sup> See U.S. CONST. art. III, § 2, cl. 1.

to the meaning of the plain and unambiguous language of a statute or regulation, and that courts should treat similarly situated parties the same way, to name only a few examples—circumscribe judicial discretion.

But, as Judge Posner also recognized, there are times when the guidance, binding or persuasive, provided by these formal and informal constraints “run[s] dry.”<sup>65</sup> In those situations, a court cannot fulfill its obligation to decide the case before it without exercising something akin to the policymaking discretion the Constitution typically reserves to the political branches. Thus, it is the *unjustified* exercise of policymaking discretion, not the exercise of such discretion itself, that renders judicial policymaking “activist.”

As should be apparent, I do not subscribe to any of the outcome-focused definitions of judicial activism. Rather, I agree with Judge Tatel that “whether a decision is a legitimate act of judging turns on far more than its outcome. It turns primarily on whether its outcome evolved from those principles of judicial methodology that distinguish judging from policymaking.”<sup>66</sup> That being the case, I now turn to review several process-oriented definitions of judicial activism.

### B. *Process-Oriented Definitions*

As my colleague Judge Wilkinson has astutely observed, “[a] democracy . . . lives by process.”<sup>67</sup> While process can at times “fall[] victim to impatience,” and is “a particular nuisance to authoritarian temperaments, a reproach to their theory that the end justifies the means,” process—“a mutual respect for the rules of the game”—is part of the glue that holds together democracies like our own.<sup>68</sup> And crucially, one role of judges is to protect that process: judges are expected to enforce the rules, but also to play by them themselves. It is thus deeply disturbing—to the interests of the parties, to the legitimacy of the courts, and to the very fabric of democracy—when judges disrespect process.

In my view, then, any account of judicial activism must be grounded in process. Yet I think existing process-focused definitions of judicial activism fail to account for the full scope of harm judges can cause when shirking their duties as guardians of process. I first survey

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<sup>65</sup> Posner, *Meaning*, *supra* note 11, at 9.

<sup>66</sup> Tatel, *supra* note 4, at 1074; *see also id.* at 1133 (“[L]egitimate acts of judging—decisions that follow rules of stare decisis and that are fully and openly explained—do not lose their legitimacy just because they may coincide with the policy views of the judges or their appointing presidents.”).

<sup>67</sup> Wilkinson, *Toward One America*, *supra* note 2, at 334.

<sup>68</sup> *Id.*

a few common procedural definitions of judicial activism before turning to my own definition.

One widely recognized form of procedural activism involves a court “reaching out” to decide an issue not before the court because, for example, the issue was not raised by the parties or not squarely presented in the case. This process-focused definition of judicial activism is bound up with the notion that, absent exceptional circumstances, courts are supposed to resolve only those issues presented by the parties.<sup>69</sup>

This definition of activism is no doubt correct in some sense—the Constitution’s case and controversy requirement, and the adversarial legal system it contemplates, do not endow courts with freewheeling authority to encroach on litigants’ responsibility to define the universe of issues for judicial resolution. But the definition is also incomplete. As the various proposed definitions I have already surveyed illustrate, the concept of judicial activism rests, at least in part, on the notion that a court or judge is acting outside its proper sphere. To be sure, a court that reaches out to decide an issue not properly presented is acting outside its proper sphere—it is becoming a litigant rather than a disinterested arbiter. But it takes little imagination to identify other ways in which a court would be acting outside its proper sphere, such as ignoring critical facts or failing to follow formal rules of procedure.<sup>70</sup>

A similar procedural definition of judicial activism treats as activist those decisions that are not “minimalist.” Minimalist judges “tend to favor decisions that are narrow, in the sense that they do not want to resolve issues not before the Court.”<sup>71</sup> But judicial minimalists do not just seek to limit their decisions to the issues squarely before

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<sup>69</sup> See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 398 (2010) (Stevens, J., concurring in part and dissenting in part) (“Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”); see also *New Jersey v. T.L.O.*, 468 U.S. 1214, 1215–16 (1984) (Stevens, J., dissenting from order setting case for reargument) (noting that the only question presented to the Court had already been briefed and argued, and dissenting from the Court’s decision to “order[] reargument directed to the questions that [the petitioner] decided not to bring here,” arguing that “the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review”); *United States v. Moore*, 110 F.3d 99, 102 (D.C. Cir. 1997) (Silberman, J., dissenting from denial of rehearing en banc) (“[I]t is an indicia of judicial overreaching (if not judicial activism) for any court to decide issues not properly presented.”); Tatel, *supra* note 4, at 1118 (criticizing the majority in *Missouri v. Jenkins*, 515 U.S. 70 (1995), for “address[ing] issues not fully framed by the parties”).

<sup>70</sup> See, e.g., Segall, *supra* note 14, at 725 (“[W]hen the Court fabricates facts or ignores or distorts material arguments, it is not acting like a Court . . .”).

<sup>71</sup> Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2242 (2006).



the court; they also prefer to use procedural and jurisdictional tools to avoid complex or contentious issues<sup>72</sup> and to issue decisions that are “shallow, in the sense that they avoid the largest theoretical controversies and can attract support from those with diverse perspectives on the most contentious questions.”<sup>73</sup> On the other hand, “maximalist” opinions feature “sweeping rules” or address questions that “could have been avoided.”<sup>74</sup>

Maximalist opinions are often characterized as activist because they can increase a court’s power relative both to other branches of government (by invalidating another branch’s decision, even when doing so is not required to resolve a case) and to future courts (by deciding an unsettled question of law before it is necessary to do so).<sup>75</sup> But the conclusion that maximalist opinions are inherently activist is, on closer inspection, questionable. For example, suppose a court confronted with a constitutional challenge to an immigration policy held that constitutional challenges to *all* immigration policies are *categorically* non-justiciable because authority over immigration is textually committed to the political branches. Such an opinion would be maximalist in the sense that the court resolved issues that it did not need to resolve to dispose of the case—namely, whether challenges to *other* immigration policies are justiciable. But such an opinion would not be activist under one of the most common conceptions of that term (albeit one to which I do not fully subscribe) because it would be narrowing, rather than expanding, the universe of situations in which courts can overrule decisions of the political branches.

Additionally, some commentators instead view *minimalist* appellate decisions as activist because such decisions leave future courts with greater freedom to exercise discretion. As Justice Scalia explained, when an appellate court “adopt[s] a *general* rule” rather than limiting its decision to the facts of the case, the court “not only constrain[s] lower courts, [it] constrain[s] [it]self as well” because “[i]f the next case should have such different facts that [the court’s] political or policy preferences regarding the outcome are quite the opposite, [the court] will be unable to indulge those preferences; [it will]

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<sup>72</sup> See Young, *supra* note 53, at 1151 (“[A] minimalist judge may seek to forestall decision altogether through a variety of avoidance techniques . . .”).

<sup>73</sup> Sunstein, *supra* note 71, at 2242; see also Posner, *Rise and Fall*, *supra* note 7, at 521 (“Minimalists advocate narrow decisions and the avoidance of ambitious theorizing, and thus are a school of self-declared judicial restraint.”).

<sup>74</sup> Young, *supra* note 53, at 1152.

<sup>75</sup> See *id.* at 1152–53 (“A[n activist] court . . . will tend to increase the occasions for invalidation of political-branch decisions. . . . [and] is refusing to defer to *future* courts . . .”).

have committed [it]self to the governing principle.”<sup>76</sup> Thus, defining opinions as activist simply because they are maximalist poses several problems.

A final process-focused definition of judicial activism treats as activist any judicial decision that fails to follow a preferred interpretive method, such as textualism or originalism. But, as one commentator has explained, elevating one interpretive approach above all others effectively “collapses the ‘activism’ debate into longstanding debates about interpretive method,”<sup>77</sup> depriving the term “judicial activism” of any independent meaning.<sup>78</sup> And focusing on one interpretive approach to the exclusion of all others leads to many of the same concerns that animate other definitions of judicial activism, such as that the judiciary is encroaching on the roles of its coordinate branches or legislating from the bench. That is particularly true when, as has virtually always proven to be the case and as I will discuss further below, the exalted interpretive method cannot offer a definitive resolution in a meaningful swath of cases. When the chosen interpretive method fails—and because adherents to that interpretive method have ruled out all other methods—then judges are left with unbounded discretion to decide the case in accordance with their policy preferences.

## II

### JUDICIAL ACTIVISM AS THROWING OUT TOOLS

Having surveyed the most common definitions of judicial activism—and having found each of them wanting—I now offer my own definition of judicial activism, which falls into the process category. I propose that judicial activism occurs when a court or judge deliberately avoids the use of a decisional tool that has been tradition-

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<sup>76</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (emphasis added).

<sup>77</sup> Young, *supra* note 53, at 1148; *see also id.* at 1149 (criticizing Professor Barnett’s approach on similar grounds).

<sup>78</sup> A separate, but intriguing, critique of textualism and originalism in the context of judicial activism is that those who espouse textualist and originalist *substantive* views nevertheless do not justify those views in a textualist or originalist view of appropriate judicial *methods*. That is, textualists and originalists cannot justify textualism in the text of the Constitution or originalism in the views of the Founders. *See* Green, *supra* note 14, at 1251–52 & nn. 241–44 (pointing to this discrepancy in the published works of Justice Scalia since his academic writing and jurisprudence “proffer[] no Framing-era evidence” to explain his theory of judicial restraint which would have been “alien to eighteenth-century judges”); *see also id.* at 1233 (“[T]here are no originalists on topics of judicial role and judicial activism.”).

ally used to adjudicate that type of case.<sup>79</sup> Decisional tools are the lenses through which judges reach decisions and include broad tools like deference to precedent as well as tools applicable in only some circumstances, such as the rule of lenity in criminal cases.

Suppose, for example, that in deciding a particular legal question, it is well established that courts traditionally consider judicial interpretive tools *A*, *B*, *C*, and *D*. Then, under my definition, if a judge refuses to apply interpretive tool *D* in deciding such a case—not because tool *D* was not relevant in the particular case, but instead because of the judge’s own policy-based opposition to the use of interpretive tool *D* at all in such cases or because express consideration of *D* would contravene the judge’s preferred outcome—then that judge is engaging in judicial activism.<sup>80</sup>

Rejecting *D* as a mediating principle amounts to judicial activism because it necessarily increases the circumstances in which it is permissible for the judge to decide cases based on his or her own policy preferences, rather than based on the rules—formal or developed through the common law—that have traditionally cabined the universe of situations in which judges must bring their policy preferences to bear. Because “[i]t is only when the springs of authoritative guidance run dry”—when well-established interpretive tools fail to provide an answer—“that the judge enters the area of legitimate judicial discretion,”<sup>81</sup> a judge who discards an interpretive tool—a “spring[] of authoritative guidance”—expands the universe of situations where he or she can exercise judicial discretion. Put differently, absent the (legal or policy) decision to refuse to consider mediating principle *D*, any judgment the judge or court rendered had to account for *A*, *B*, *C*,

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<sup>79</sup> To be sure, I am not the first person to suggest a “failure to use the ‘tools’ of the trade appropriately—or not at all” as a potential brand of judicial activism. Kmiec, *supra* note 13, at 1473; see also Segall, *supra* note 14, at 711–12 (arguing that “[t]he Court ought to write its decisions consistently with professional standards, adhere to basic rule of law principles, and, perhaps, engage in principled decision making while reaching results the public can at least tolerate” and that “instead of constantly focusing on whether the Court has reached the right results, we should begin asking whether the Court is properly acting as a court consistent with our judicial traditions”). Indeed, in his Madison Lecture, Judge Tatel proposed a similar definition of judicial activism when he criticized two Supreme Court opinions as “flawed . . . acts of judging.” Tatel, *supra* note 4, at 1133. My contribution is to expand upon this view of judicial activism definitionally and to apply it to a form of interpretation (textualism) and a recent case (*Rucho*) that are popularly thought of as (and themselves claim to be) exercises of judicial *restraint*.

<sup>80</sup> Certainly, it could be the case that considering *D* could justify an *additional* disposition option not available if the judge were only to consider *A*, *B*, and *C*. But if *D* is a usual interpretive tool for this type of legal question, a judge is not activist, under my definition, by considering *D*, even if doing so expands the possible available outcomes. In fact, the judge *should* consider *D*.

<sup>81</sup> Posner, *Meaning*, *supra* note 11, at 9.

and *D*. But, due to the rejection of *D*, the judgment constitutes a legally permissible exercise of the court's discretion so long as it accounts for principles *A*, *B*, and *C*.

My main concern—which I believe also underlies many, if not all, of the outcome- and procedure-focused definitions of judicial activism I outlined above—is that judges should not act outside of their proper sphere by *unnecessarily* exercising the type of policymaking authority that the Constitution reserves to the political branches. Even recognizing—as I do, and as any honest judge does—that judges must bring their personal policy or moral preferences to bear in resolving at least some cases, there are limitations on when such discretion is appropriate.<sup>82</sup> Judges who rely on “[t]he resources of legal artifice”<sup>83</sup>—using legal arguments to circumvent longstanding constraints guiding judicial decisionmaking—to frame their opinions in order to expand the universe of situations when they can decide cases based on their personal policy preferences are, in my view, engaging in judicial activism.

My definition also keeps faith with other concerns underlying the various definitions of judicial activism judges and commentators have previously proposed. To begin, eschewing a well-established decisional tool or mediating principle “tends to increase the importance and freedom of action of the court making the present decision vis-à-vis the political branches, the Framers and ratifiers of the Constitution, and both past and future courts.”<sup>84</sup> Suppose, for example, that—despite the existence of a traditional and well-established decisional tool requiring courts evaluating motions for summary judgment to view the evidence in the light most favorable to the non-movant<sup>85</sup>—a judge or court disregards this elementary requirement by resolving a key factual dispute in the movant's favor.<sup>86</sup> That judge or court would then

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<sup>82</sup> See Geyh, *supra* note 27, at 225, 242 (explaining that the effort to eliminate extralegal influences on judicial decisionmaking is arguably a “fool's errand” and that “necessity” sometimes requires judges to bring “other considerations to bear”).

<sup>83</sup> Schlesinger, *supra* note 13, at 201.

<sup>84</sup> Young, *supra* note 53, at 1161. Professor Young's article makes a point similar to, though not precisely the same as, my argument here. Professor Young cites “six broad categories of judicial behavior that probably strike most of us as ‘activist’ in some ways”—overturning political judgments through judicial review; departing from text or history; departing from precedent; issuing maximalist holdings; exercising broad remedial powers; and rendering partisan decisions. *Id.* at 1144. Professor Young argues that such judicial behaviors “all involve a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its own independent judgment about the correct legal outcome.” *Id.* at 1145. It is in the context of discussing these six “behaviors” that Professor Young makes the statement quoted in the body of this Lecture.

<sup>85</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); see also *Scott v. Harris*, 550 U.S. 372, 378 (2007).

<sup>86</sup> See, e.g., *Tolan v. Cotton*, 572 U.S. 650, 657–60 (2014) (vacating the grant of summary judgment where the lower court improperly resolved disputed issues in favor of

have greater “freedom of action” to grant summary judgment in pursuit of a preferred outcome, relative to courts that faithfully apply the summary judgment standard. Or, suppose that a judge or court disregards the “absolute” obligation to follow a higher court’s on-point precedential decision—also known as “vertical *stare decisis*.”<sup>87</sup> Then that judge’s or court’s “freedom” relative to other courts would necessarily expand because binding decisions of a higher court would no longer constrain the judge’s or court’s adjudicatory discretion. Or suppose, in a case concerning the constitutionality of an important federal statute, a judge or court refused to give due consideration and deference to Congress’s extensive fact-finding that undergirded the enactment of the law at issue.<sup>88</sup> Such a refusal would expand the judge’s or court’s “freedom of action” relative to the political branches. The judge or court would not be constrained by the factual findings that, in the political branches’ judgment, necessitated the passage of the challenged legislation.

Additionally, when a judge refuses to apply a well-established decisional tool, he or she effectively overrules the precedential effect of all previous decisions in which courts have treated that decisional tool as a critical feature of judicial decisionmaking. As Justice Marshall explained, “Justices who would discard the mediating principles embodied in precedent . . . must explain why they are entitled to substitute *their* mediating principles for those that are already settled in the law.”<sup>89</sup> Moreover, Justice Marshall clarified, “such an explanation will be sufficient to legitimize the departure from precedent *only if* it measures up to the extraordinary standard necessary to justify overruling one of this Court’s precedents.”<sup>90</sup> Indeed, because these

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the movant); *Harris v. Pittman*, 927 F.3d 266, 270–75 (4th Cir. 2019) (same); *see also* *Calloway v. Lokey*, 948 F.3d 194, 207–10 (4th Cir. 2020) (Wynn, J., dissenting) (criticizing the majority’s failure to adhere to the summary judgment standard).

<sup>87</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (“[In contrast to horizontal *stare decisis*,] vertical *stare decisis* is absolute, as it must be in a hierarchical system with ‘one supreme Court.’”); *see also* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112–13 (2020) (plurality opinion) (reversing the Fifth Circuit’s decision upholding a Louisiana abortion law that was “almost word-for-word identical” to a Texas law previously struck down by the Supreme Court as unconstitutional).

<sup>88</sup> *See, e.g., Shelby Cnty. v. Holder*, 570 U.S. 529, 580 (2013) (Ginsburg, J., dissenting) (criticizing the majority for making “no genuine attempt to engage with the massive legislative record that Congress assembled” before deciding to reauthorize the Voting Rights Act in 2006); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 400 (2010) (Stevens, J., concurring in part and dissenting in part) (criticizing the majority for disregarding the “mountain of research” on the corruptive effects of corporate campaign financing compiled by Congress prior to enacting the Bipartisan Campaign Reform Act of 2002).

<sup>89</sup> *Payne v. Tennessee*, 501 U.S. 808, 853 n.3 (1991) (Marshall, J., dissenting).

<sup>90</sup> *Id.* (emphasis added).

mediating principles are repeatedly applied, they are akin to “super precedents” that courts should be particularly wary to reject.<sup>91</sup> In essence, by rejecting a long-applied decisional tool, a judge departs from the wisdom of his or her predecessors—in stark tension with the common-law system adopted by the Framers and practiced by the judiciary since its inception.

Not using well-established decisional tools also strains the constitutional balance and separation of powers. For example, where courts have long interpreted statutes according to a certain methodology, Congress is likely to have relied on that procedure.<sup>92</sup> To abandon that principle, then, is to engage in a “[b]ait-and-switch” maneuver, which “is an unfair con game in general, and when the victim of the con game is Congress it may be unconstitutional as well.”<sup>93</sup> In the same vein, “[a] Court that overrules too many precedents . . . signals permission for other branches to view its decisions with the same lack of respect with which it views them,” threatening harm to the constitutional order.<sup>94</sup>

Another benefit of my view of judicial activism is that these decisional tools have emerged from a lengthy process of reviewing and resolving cases, conducted by judges across time and across the ideological spectrum. That is, these tools are not only beneficial because they are widely accepted; they also ground judicial decisionmaking in rules that have been developed in contexts that lack the bitterness of partisan bickering. The same cannot be said of definitions of judicial activism that rely on, for example, substantive views about proper constitutional interpretation.

Yet I must emphasize that a judge’s or court’s failure to treat any given mediating principle as decisive in a specific case *generally does not* amount to judicial activism under my definition. Some decisional

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<sup>91</sup> See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006) (“Super precedents are the constitutional decisions whose correctness is no longer a viable issue for courts to decide; it is no longer a matter on which courts will expend their limited resources.”); see also *id.* at 1208–12 (providing examples of principles established by such super precedents, such as judicial review (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), Supreme Court review of state-court judgments relating to interpretations of federal law (*Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816)), incorporation doctrine (e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961)), and—relevant to this Lecture—political question doctrine (*Baker v. Carr*, 369 U.S. 186 (1962))).

<sup>92</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 683 (1990) [hereinafter Eskridge, *The New Textualism*] (“Congress enacts a statute against certain well-established background assumptions, many of which the Court created for it.”).

<sup>93</sup> *Id.* at 683–84 (footnote omitted); cf. Gerhardt, *supra* note 91, at 1207 (noting that super-precedential decisions, such as *Marbury v. Madison*, “create and maintain particular modes of operation or particular practices that become indispensable to the functioning of our government”).

<sup>94</sup> Gerhardt, *supra* note 91, at 1228.

tools, by their terms, do not and should not come into play in every case. For instance, the rule of lenity—which holds that ambiguities in a criminal statute should be read in a defendant’s favor—applies “only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.”<sup>95</sup> Accordingly, a court tasked with interpreting a criminal statute does not automatically render an activist decision by failing to consider the rule of lenity. Rather, under my definition, the failure to consider the rule of lenity is activist only if the condition precedent to applying the rule—that the statute is ambiguous, even after considering the statute’s plain language and applying traditional canons of statutory interpretation—has been satisfied.

Likewise, under my definition, a court generally does not engage in judicial activism if it determines that a decisional tool does not warrant decisive weight in a specific case. In many cases, well-established decisional tools may point in different directions, requiring a court to exercise its judgment in determining which decisional tool to follow. For example, a court tasked with interpreting a statute may find that two well-established canons of construction point to conflicting interpretations of the statutory language at issue.<sup>96</sup> And in other cases, a well-established mediating principle may provide little guidance, meaning that the court is left to look to other interpretive principles.

But in my view, when a court declines to give weight to a particular well-established decisional tool or reaches a result contrary to the outcome a particular decisional tool supports, it is critical that the court refer to that tool *and* explain why it is declining to follow it.<sup>97</sup> As Professor H. Jefferson Powell eloquently put it, “Because the Constitution is not a crossword puzzle with only one right answer . . . playing the constitutional-law game fairly demands that the players be clear about why they give the answers they do. Candor is indispensable if the system is to retain its moral dignity.”<sup>98</sup>

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<sup>95</sup> *United States v. Shabani*, 513 U.S. 10, 17 (1994).

<sup>96</sup> *E.g.*, *King v. Burwell*, 576 U.S. 473, 487 (2015) (noting that the whole-text and consistent-use canons offered competing resolutions to a dispute over an ambiguous portion of the Affordable Care Act).

<sup>97</sup> *Cf.* *Tatel*, *supra* note 4, at 1129–31 (noting that in *Brown*, “the Supreme Court at least left no doubt about what it had done: The Court expressly acknowledged that *Brown*’s conclusion contradicted *Plessy*’s holding and declared that ‘any language in *Plessy v. Ferguson* [to the] contrary . . . is rejected’”; whereas “in *Dowell* and *Jenkins* the powerful desegregation principles of *Green* and *Swann* . . . simply vanished. Neither distinguished nor overruled, they were just overwhelmed by the new mandate to restore local control” (footnotes omitted)). *But cf.* *Posner, Rise and Fall*, *supra* note 7, at 542, 546–47 (arguing that *Brown* was, in fact, vague about its rationale—but for good reason, rendering it “a rare exception to the duty of candor”).

<sup>98</sup> H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE* 90 (2008).

Such transparency, which is “an important rule of law value,”<sup>99</sup> serves several purposes.<sup>100</sup> For one, it helps the public and other courts understand and critique a court’s decision not to treat the interpretive tool as decisive. That is, as Judge Tatel has observed, “[w]hen courts expressly overrule precedent, even on debatable grounds, we at least know that the law has changed and have a basis for evaluating the court’s reasoning.”<sup>101</sup>

Similarly, transparency aids the political branches in understanding how courts will analyze the constitutionality or legality of their policy decisions.<sup>102</sup> And it rebuts claims that the court is engaging in the sort of result-oriented decisionmaking that is often viewed as activist because, as one scholar explained, “[i]t is when decisive underlying judgments remain obscure that critics can most credibly read illegitimate motivations into a decision.”<sup>103</sup>

Transparency also resolves what I expect to be the chief criticism of my definition of judicial activism: that “divergences of opinion over what constitutes an appropriate interpretative tool make it difficult to distinguish principled but unorthodox methodologies from ‘activist’ interpretation.”<sup>104</sup> In areas of law for which the interpretive tools are

<sup>99</sup> Segall, *supra* note 14, at 712. The need for transparency to promote the rule of law is perhaps heightened in the context of the American federal judiciary, where judges receive lifetime appointments but little centralized training. See Green, *supra* note 14, at 1225 (“Unlike many civil law countries, the United States lacks a professionalized ‘judges’ school’ . . . . [J]udges learn their professional role in the same eclectic, experimental way that lawyers learn what they should expect from courts.” (footnotes omitted)).

<sup>100</sup> See generally Bartrum, *supra* note 49, at 297–302 (arguing that the plurality approach in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), epitomizes the value of transparency regarding judges’ choices of interpretive theories).

<sup>101</sup> Tatel, *supra* note 4, at 1131; see also Bartrum, *supra* note 49, at 296 (“[U]nexplained and unjustified interpretive theory choices obscure . . . underlying value judgments and so sweep potentially constructive constitutional discussions aside to preserve the ideological pretension that constitutional interpretation is as ‘objective’ a practice as calling balls and strikes.”).

<sup>102</sup> See Molot, *supra* note 62, at 1310–13.

<sup>103</sup> Bartrum, *supra* note 49, at 297; see also Tatel, *supra* note 4, at 1077 (“[While] the Supreme Court faces far more issues [than the lower federal courts] for which precedent provides little . . . guidance. . . ., this simply means . . . the requirement to provide rational explanations for [its] holdings . . . [is] even more critical to ensuring that the . . . Court is not perceived as a policymaking institution.”).

<sup>104</sup> Kmiec, *supra* note 13, at 1473–74; see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring) (“Reasonable minds have disagreed over time—and continue to disagree—about the best mode of constitutional interpretation. That the plurality in *Apodaca* used different interpretive tools from the majority here is not a reason on its own to discard precedent.”). Another possible critique of my definition is that “adjudicative flaws are too diverse and idiosyncratic to merit a generalized heading like ‘activism,’” particularly considering that “[s]ome mistakes result from judicial incompetence.” Green, *supra* note 14, at 1217–18. Certainly, judges sometimes make mistakes. But in my experience, to dismiss an error as a mistake generally requires viewing



unsettled, judges should explain why they are using one tool over others. In such a case, transparency serves all the purposes elaborated above *and* meaningfully contributes to the discussion about appropriate interpretive tools to use in similar cases. If a judge is employing a “principled but unorthodox methodology” when other, more traditional interpretive tools are generally accepted, that judge may in fact be behaving in an activist manner by my definition.<sup>105</sup> But the bottom line is that being transparent allows the judge to demonstrate principled reasons for employing an unconventional approach, rather than leaving the public, other courts, and later judges to guess what the judge was thinking.

In light of the importance of transparency, from my perspective, a court that conceals its decision not to follow a well-recognized mediating principle in a specific case in which that principle generally applies is no less activist than a court that categorically eschews a well-recognized decisional tool. In either situation, the court is excluding from the deliberative process a well-recognized constraint on the circumstances in which it can exercise policymaking discretion and doing so in a manner that evades a forthright assessment of the decisional tool’s import as to the scope of the court’s discretion in the specific case.

### III

#### TWO EXAMPLES OF JUDICIAL ACTIVISM

Having set forth my definition of judicial activism—and why I believe that definition gives effect to the principal concerns animating the widespread condemnation of judicial activism—I now offer two examples. I will first explain why, under my definition, the judicial interpretive method called “textualism” is no more than an exercise of judicial activism. Then I will explain why the Supreme Court’s recent opinion in *Rucho v. Common Cause* is a blatantly activist opinion because it unabashedly expands the reach of the Justices’ judicial discretion by eschewing traditional decisional tools.<sup>106</sup>

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it as a peripheral issue. In my view, where an issue is central to a case, judges may rightfully be criticized for fundamental errors, regardless of the cause of the error.

<sup>105</sup> See *supra* note 104 and accompanying text.

<sup>106</sup> Of course, unfortunately, other examples abound—even if we confine our review to the last half-century of Supreme Court decisions alone. Professor Eric Segall has persuasively catalogued several examples, including the Court mischaracterizing precedent in *Younger v. Harris*, 401 U.S. 37 (1971) and *Rogers v. Tennessee*, 532 U.S. 451 (2001); erroneously describing the history of a line of cases in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); disregarding pertinent facts in *Printz v. United States*, 521 U.S. 898 (1997) and *Roper v. Simmons*, 543 U.S. 551 (2005); misstating a lower court’s holding in *Romer v. Evans*, 517 U.S. 620 (1996); and distinguishing precedent on absurd grounds in

### A. *Textualism as Activism*

The first example involves an area of law well-trod in this lecture series—statutory construction.<sup>107</sup> Some judges and commentators maintain that a court tasked with interpreting a statute engages in judicial activism if it applies any “non-textual” approach to statutory construction. Although this “new textualism”—which began to take hold in the 1980s<sup>108</sup>—comes in a variety of flavors, textualists generally “maintain[] that statutory text is the alpha and the omega of statutory interpretation, and legislative history should almost never be consulted.”<sup>109</sup> As a consequence, textualists reject the use of legislative history as an authoritative tool for statutory construction.<sup>110</sup> This

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*Allen v. Wright*, 468 U.S. 737 (1984). See Segall, *supra* note 14, at 725–47; see also Barry Sullivan, *Democratic Conditions*, 51 LOY. U. CHI. L.J. 555, 609–10, 611–12 (2019) (arguing that *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), involved the Court reaching beyond the arguments made by the parties in order “to overrule prior case law that *Citizens United* had not challenged,” and noting Justice Stevens’s argument in dissent that the majority was ignoring Congress’s factual findings (citing *Citizens United*, 558 U.S. at 463 (Stevens, J., concurring in part and dissenting in part))). The Court recently suggested that *Apodaca v. Oregon*, 406 U.S. 404 (1972) provides yet another example, as it flouted precedent. See *Ramos*, 140 S. Ct. at 1398–99 (describing *Apodaca*’s rationale as reliant on a “mutated and diminished form” of the Court’s then-existing Sixth and Fourteenth Amendment precedents).

<sup>107</sup> See, e.g., Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 641 (2012) (“[Q]uestions of statutory construction are of fundamental importance because the methodology of interpretation can affect the outcome in a case and thus whether the law has been construed consistently with Congress’s meaning . . .”); Marsha S. Berzon, *Madison Lecture: Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 697–700 (2009) (examining the Court’s jurisprudence related to finding implied causes of action in federal statutes); Wilkinson, *Toward One America*, *supra* note 2, at 332 (“[N]ew statutes on controversial subjects . . . have brought an unprecedented level of interest-group participation in cases as well as confirmations.”); Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 249 (2002) (“Virtually all judges, when interpreting . . . a statute, refer at one time or another to language, to history, to tradition, to precedent, to purpose, and to consequences.”).

<sup>108</sup> See Eskridge, *The New Textualism*, *supra* note 92, at 624 (describing the “new textualism” as the “most interesting” jurisprudential development of the 1980s).

<sup>109</sup> William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 563 (2000) [hereinafter Eskridge, *Circumstances of Politics*] (reviewing JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999)).

<sup>110</sup> See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (“[T]extualists reject the interpretive authority of legislative history.”); see also Scalia, *supra* note 59, at 29–30 (“[L]egislative history should not be used as an authoritative indication of a statute’s meaning.”); cf. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 38 (2006) (describing the question of whether to consider legislative history as “a real difference between textualists and purposivists,” though minimizing the import of that difference).

form of textualism continues to maintain faithful adherents on the Supreme Court.<sup>111</sup>

Textualists raise legal and policy objections to using legislative history to interpret statutes. As a legal matter, textualists say that Congress enacted the statutory language, not the statute's legislative history, and therefore that reliance on legislative history in statutory interpretation impermissibly gives weight to materials that did not comply with the Constitution's bicameralism and presentment requirements.<sup>112</sup> Textualists also say that relying on legislative history is improper because it amounts to an impermissible *self-delegation* of legislative power by the subset of legislators (or, more likely, their staff members) who draft committee reports and materials for the legislative record.<sup>113</sup> As a policy matter, textualists point to the difficulty (in some textualists' opinion, impossibility) of ascertaining the "intent" of a diverse collective body like Congress from records prepared by a subset of legislators or from the statements of individual legislators.<sup>114</sup>

But by refusing to consider legislative history in construing statutes, textualists reject the well-established and traditional decisional tool used for statutory construction during most of the last century,

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<sup>111</sup> See, e.g., *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring in part and concurring in the judgment) (rejecting, along with Justices Alito and Gorsuch, the majority's reliance on a "single Senate Report").

<sup>112</sup> See Manning, *supra* note 110, at 697 ("Neither committee reports nor sponsors' statements comply with the 'fairly precise' requirements set by the Constitution for the enactment of legislation. And so a court cannot treat those materials as authoritative sources of statutory meaning without offending the bicameralism and presentment requirements prescribed by Article I, Section 7."); see also *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (citation omitted)); Eskridge, *The New Textualism*, *supra* note 92, at 649 ("[T]he formalist critics argue that judicial reliance on legislative history is inconsistent with the specific structures for legislation in the Constitution."). The response to this argument, as Professor William Eskridge has explained, is that while these constitutional requirements mean that "the Court should not consider legislative background materials to have the force of law," textualists go too far in asserting that they are *irrelevant* to statutory interpretation. *Id.* at 671–72 (emphasis added). Rather, consulting such materials "does not violate bicameralism or presentment any more than would consulting a dictionary." *Id.* at 672.

<sup>113</sup> See Manning, *supra* note 110, at 707 ("[A]s an exercise of delegated law elaboration authority, [legislative history] violates an important prophylactic safeguard of bicameralism and presentment . . .").

<sup>114</sup> See Molot, *supra* note 110, at 28 ("When judges search for underlying purposes based on anything other than statutory text, textualists argue[], judges elevate not only their own policy preferences, but also the preferences of one legislator over another."); Manning, *supra* note 110, at 675 ("[T]extualist judges argue that a 535-member legislature has no 'genuine' collective intent with respect to matters left ambiguous by the statute itself.").

commonly referred to as “purposivism.”<sup>115</sup> In his Madison Lecture dealing with what federal courts can learn from how Congress interprets its own statutes, Judge Katzmman explained that purposivism is “premised on the view that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose.”<sup>116</sup> That is, Judge Katzmman said, “[t]he task of the judge is to make sense of legislation in a way that is faithful to Congress’s purposes.”<sup>117</sup> Judges who, in construing a statute, seek to be “faithful to Congress’s purposes” rely on numerous “tools” to ascertain a statutory provision’s meaning: the text, statutory structure, canons of construction, analogous statutory provisions, common-law usages, and agency interpretations, to name only a few.<sup>118</sup>

Purposivists, unlike textualists, believe that legislative history—particularly “authoritative legislative history” like conference and committee reports<sup>119</sup>—can also serve as a useful tool in understanding the meaning and application of a statutory provision, especially when the statutory provision is “silent or unclear” on an issue.<sup>120</sup> Courts that consider legislative history recognize that, for a variety of reasons—including the increasing complexity of the problems legislation must address and the mounting time pressures facing legislators who must engage with constituents, raise money, and campaign<sup>121</sup>—legislators themselves use such extratextual sources. As Judge Katzmman explained, legislators “rely on the work of colleagues on other com-

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<sup>115</sup> See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1147 (2011) (noting that while “[f]or much of the twentieth century, courts agreed that they should interpret statutes by looking for congressional intent,” the new textualist school rejected that view); Eskridge, *The New Textualism*, *supra* note 92, at 624 n.12, 628 (emphasizing that the Court has relied on legislative history for decades, often explicitly displacing plain meaning); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195–97 (1983) (noting that, between 1938 and 1982, the Supreme Court increasingly relied on legislative history in interpreting statutes to the point that, during the 1981–82 Term, “[n]ot once” did the Court construe a statute without considering legislative history).

<sup>116</sup> Katzmman, *supra* note 107, at 663–64.

<sup>117</sup> *Id.* at 664.

<sup>118</sup> *Id.* at 668.

<sup>119</sup> *Id.* at 670; see also *id.* at 654–55, 682 (noting that conference committee reports and committee reports are the most reliable forms of legislative history, presumably because they “provide guidance to legislators in the enactment process” and “represent the views of legislators from both chambers who are charged with reconciling bills that have passed both” houses of Congress).

<sup>120</sup> *Id.* at 669.

<sup>121</sup> See *id.* at 652 (“Congressional life is marked by incredible pressure—such as the pressures of the permanent campaign for reelection, raising funds, balancing work in Washington and time in the district, [and] balancing committee and floor work in [a polarized] environment . . . .” (citation omitted)).

mittees” and “become educated about the bill by reading the materials produced by the committees and conference committees from which the proposed legislation emanates.”<sup>122</sup>

The “work product” on which legislators rely includes “committee reports, conference committee reports, and the joint statements of conferees who drafted the final bill,” all of which “provide guidance to legislators in the enactment process” and serve as “helpful post-enactment . . . direction to agencies as to how to interpret and implement legislation.”<sup>123</sup> Accordingly, courts treat authoritative legislative history as a useful interpretive tool because legislators themselves rely on those materials in deciding whether to support or oppose the legislation—and intend for courts to do the same when interpreting it.<sup>124</sup> Thus, “[w]hen courts construe statutes in ways that respect what legislators consider their work product, the judiciary promotes comity with the first branch of government.”<sup>125</sup>

Under my definition of judicial activism, textualism—not purposivism—is a fundamentally activist approach to judicial decisionmaking because textualists categorically reject a long-recognized tool for statutory construction: legislative history.<sup>126</sup> That categorical rejection expands the universe of situations in which a court can rest a

<sup>122</sup> *Id.* at 653; *see also id.* (“Committee reports accompanying bills have long been important means of informing the whole chamber about proposed legislation; they are often the principal means by which staffs brief their principals before voting on a bill.”).

<sup>123</sup> *Id.* at 653, 655.

<sup>124</sup> *See id.* at 655 (“Lawmaking, as legislators and staffs understand it, involves not just the text of legislation, but also legislative history—such as the reports and debates associated with the legislative text. In the view of legislators and staffs, legislative history is an essential part of Congress’s work product.”); Eskridge, *Circumstances of Politics*, *supra* note 109, at 574 (“[R]eliable committee reports and sponsor statements are . . . glosses on the text—the sort of interpretive aids that legislators . . . [and] citizens would expect to ‘come with’ the enacted text.”).

<sup>125</sup> Katzmann, *supra* note 107, at 670; *see also id.* at 660 (arguing that the textualism-purposivism debate “has taken place in a vacuum, largely removed from the reality of how Congress actually functions,” but that “courts, when interpreting statutes, should respect legislators’ sense of their own work product”); *id.* at 666–67 (“[I]f courts are faithful to the statute’s objectives, Congress will view the third branch as a cooperating partner—a perspective that can only promote the fair and effective administration of justice.”).

<sup>126</sup> Others, applying various definitions of activism, have also recognized this problem with the textualist enterprise. *E.g.*, Nourse, *supra* note 115, at 1124 (“[T]he least risk to representation and the separation of powers comes from the unusual marriage of ordinary meaning textualism with legislative history. . . . [T]his approach is likely to reduce judicial activism, checking the tendency of a judge to impose his or her preferred policy position rather than that of the [legislature.]”); Eskridge, *Circumstances of Politics*, *supra* note 109, at 566 (arguing that consideration of legislative intent “can . . . constrain the interpreter”); *cf.* Molot, *supra* note 110, at 48 (“Aggressive textualists are guilty of the same mistakes as aggressive purposivists. They tend to ignore, rather than cabin, the leeway inherent in the interpretive enterprise. And they tend to aggrandize, rather than minimize, the judicial role in the constitutional structure.”).

decision on its own policy preferences, without even addressing whether those policy preferences are consistent with the statute's legislative history. Whereas any textualist decision must account only for a statute's plain language, context, canons of construction, and precedent, a purposivist decision must account for those same elements—but must also consider a statute's legislative history.<sup>127</sup>

My conclusion that textualism—or at least, its rejection of legislative history—amounts to an exercise in judicial activism stands in stark contrast to the claims of proponents of textualism, who view textualism as the only *non*-activist approach to statutory interpretation. According to Justice Scalia, a committed textualist, the use of legislative history “has facilitated rather than deterred decisions that are based upon the courts’ policy preferences, rather than neutral principles of law.”<sup>128</sup> In other words, textualists believe that consideration of legislative history is activist for precisely the same reasons I conclude that textualists’ *rejection* of legislative history is activist—because it expands the universe of situations in which a court can decide a case based on its policy preferences.<sup>129</sup>

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<sup>127</sup> See Katzmann, *supra* note 107, at 675–76 (“[T]extualists seek to understand language in context, looking to dictionary definitions, colloquial meanings, . . . technical definitions . . . , and background conventions . . . . [I]t is not at all clear why legislative history—in its reliable forms—should be excluded.”).

<sup>128</sup> Scalia, *supra* note 59, at 35; *see also* Harris v. Garner, 216 F.3d 970, 999 n.13 (11th Cir. 2000) (Tjoflat, J., concurring in part and dissenting in part) (“Ever since the Legal Realist movement of the early 20th Century, scholars have criticized the whole concept of a legislative ‘intent’ or ‘purpose’ as undiscoverable at best, and at worst, a facade used by activist judges that can be endlessly manipulated in the service of a judge’s personal policy preferences.”); Eskridge, *The New Textualism*, *supra* note 92, at 674 (“According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion. . . . A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress.”); Molot, *supra* note 110, at 25–26 (noting that textualists “reject the purposivist claim that statutes have a single, true, underlying purpose” and argue that “courts purport[ing] to find such a true underlying purpose . . . are simply passing off their own preferred policies for those of Congress”; instead, textualists argue, “elevat[ing] statutory text over statutory purposes and legislative history . . . narrow[s] judicial leeway and minimize[s] judicial creativity” (footnote omitted)).

<sup>129</sup> See Eskridge, *The New Textualism*, *supra* note 92, at 674–75 (questioning whether Justice Scalia’s textualist method produces “more constrained judicial discretion” because it is “mildly counterintuitive” that judges who “consider materials generated by the legislative process, in addition to statutory text (also generated by the legislative process), canons of construction (generated by the judicial process), and statutory precedents (also generated by the judicial process)” would not be *more* constrained than new textualist judges who consider only “the latter three sources”). Interestingly, as Professor Eskridge has noted, some textualists fear that the use of legislative history will also lead to *legislative* usurpation of the *judicial* function. *See id.* at 648 (“Any effort by Congress or its Members to control the interpretation of its statutes after their enactment is, according to some of the formalist critics, an invalid legislative usurpation of duties left by the Constitution

There are at least two reasons why textualists and I reach divergent conclusions as to whether looking beyond a statute's text to legislative history expands or contracts judicial discretion. First, textualists' conclusion that focusing on the text alone will constrain courts' exercise of policymaking discretion rests on the implicit assumption that the meaning of statutory text is, in the vast majority of cases, sufficiently determinate that a court will not need to exercise policymaking discretion to interpret it. Second, textualists wrongly assert that the wide diversity of legislative history materials gives courts the freedom to selectively rely only on those materials that support their preferred policy results. I will address each reason in turn.

First, textualists' claim that because statutory text is usually determinate, a court does not need to exercise policymaking discretion, runs contrary to my thirty years of experience as a judge. During that time, I have heard numerous cases involving statutes that were ambiguous or silent as to the issue at hand. Judge Katzmann indicated the same in his Madison Lecture.<sup>130</sup> And our experiences are not aberrations. James Madison himself recognized long ago in the *Federalist Papers* that

[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. . . . [N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.<sup>131</sup>

Also, the circumstances in which a statute applies change over time. In fact, judges are often required to apply statutes to factual scenarios that the authoring legislators could not have imagined, much less addressed.<sup>132</sup> That reality only increases the number of situations in

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exclusively with the courts."); *see also id.* at 654 ("Justice Scalia was apparently concerned that Congress not try to control the judicial function through directive legislative history.").

<sup>130</sup> *See, e.g.,* Katzmann, *supra* note 107, at 640–41 (collecting examples of ambiguous statutes Judge Katzmann has been called on to interpret).

<sup>131</sup> THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

<sup>132</sup> *See* Eskridge, *Circumstances of Politics*, *supra* note 109, at 566 ("[Statutory ambiguity] is usually the consequence of the fact that legislators are not omniscient; they cannot anticipate all the factual circumstances to which their statutes will be applied.").

which the narrower universe of interpretive tools relied on by textualists will prove indeterminate. I recently served on a panel in which the Fourth Circuit was called on to determine how a provision in an electronic communications privacy statute, the Stored Communications Act of 1986, applied to web-based email services—which did not exist until more than a decade after the statute’s enactment.<sup>133</sup> And, of course, the Stored Communications Act is of relatively recent vintage when compared to other statutes that courts are regularly called on to construe and apply, like the Sherman Antitrust Act of 1890 and the Fair Labor Standards Act of 1938. The essential difficulty of using words to convey ideas and the impossibility of foreseeing all possible applications of a statute lead to a broad array of situations in which the text of a statute will not be dispositive, offering textualists ample opportunity to bring their own policy preferences to bear.<sup>134</sup> The inherent limitations of language—coupled with complex and changing factual circumstances—render text-based tools insufficiently determinate to “bear the weight” textualists place on them.<sup>135</sup>

Because the text-based interpretive tools relied on by textualists can, and often do, prove indeterminate, the appropriate use of legislative history is a meaningful additional constraint on judicial discretion. If the tools of statutory construction do not decisively answer a particular question, then a court that considers legislative history remains constrained by the congressional guidance provided in authoritative legislative history.<sup>136</sup> In the end, by restricting the use of decisional

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<sup>133</sup> *Hately v. Watts*, 917 F.3d 770, 782 (4th Cir. 2019).

<sup>134</sup> See Katzmann, *supra* note 107, at 681 (“[W]hen a statute is ambiguous, barring legislative history leaves a judge only with words that could be interpreted in a variety of ways without contextual guidance as to what legislators may have thought. . . . [This] increases the probability . . . a law [will be construed] in a manner that . . . legislators did not intend.”). Judge Wilkinson has raised a similar critique of the Supreme Court’s single-minded focus on textualism’s ideological sibling, originalism, in the Court’s landmark interpretation of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Wilkinson, *Unraveling Rule of Law*, *supra* note 46, at 256–57 (arguing that, “[w]hereas once legal conservatism demanded that judges justify decisions by reference to a number of restraining principles, *Heller* requires that they only make originalist arguments supporting their preferred view,” which is a problem because “originalism cannot bear the weight that the *Heller* majority would place upon it. Originalism, though important, is not determinate enough to constrain judges’ discretion to decide cases based on outcomes they prefer”); see also Posner, *Rise and Fall*, *supra* note 7, at 536 (“[O]riginalism . . . emboldened Justice Scalia and his colleagues to render the notably activist decision in . . . *Heller*.”).

<sup>135</sup> Wilkinson, *Unraveling Rule of Law*, *supra* note 46, at 257.

<sup>136</sup> Cf. Nourse, *supra* note 115, at 1124–25, 1125 n.10, 1142–47 (arguing that legislative history can provide a meaningful source of “popular, prototypical meaning” for statutory terms, and that textualists often *expand* judicial discretion by expanding possible meanings to include technical legalist meanings, rather than narrowly focusing on the ordinary meaning supplied by, say, legislative history).



tools available to judges and claiming wrongly that such restrictions *constrain* judicial discretion, textualists simply shut their eyes to the power textualism confers on judges.<sup>137</sup>

The Court's three competing opinions in *Bostock v. Clayton County*<sup>138</sup> demonstrate the breadth of interpretations of statutory language that textualism can support. *Bostock* asked whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation or gender identity. Writing for the majority, Justice Gorsuch held that the plain language of Title VII bans all discrimination where sex is a but-for cause, including sexual orientation or gender identity discrimination, regardless of Congress's intent.<sup>139</sup> The language of the statute, he argued, is determinative.<sup>140</sup> It is irrelevant whether its application to sexual orientation or gender identity is "beyond what many in Congress or elsewhere expected."<sup>141</sup>

Justice Gorsuch's opinion received significant criticism from the other self-proclaimed textualists on the Court. Justice Alito, joined by Justice Thomas, described the majority opinion as "a pirate ship" that "sails under a textualist flag," but really updates Title VII to match "current values of society."<sup>142</sup> Justice Alito argued that Title VII's language is not determinate, calling Justice Gorsuch's insistence to the contrary "arrogant" and "wrong."<sup>143</sup> To settle ambiguity in the text, Justice Alito would have looked not to legislative history, but to the prevailing cultural opinions held by members of Congress and the public at the time the Civil Rights Act became law (an arguably even more indeterminate source of authority for judicial decision-making).<sup>144</sup> Justice Kavanaugh similarly would have looked to social and linguistic factors to determine the "ordinary"—as opposed to, he argued, the "literal"—meaning of Title VII's "phrase 'discrimination because of sex.'"<sup>145</sup>

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<sup>137</sup> See Posner, *Meaning*, *supra* note 11, at 20 ("The activist judge has need for such concealment. He is trying to enlarge the power of his court at the expense of other institutions of government, and some of them may resist the encroachment.").

<sup>138</sup> 140 S. Ct. 1731 (2020).

<sup>139</sup> *Id.* at 1741 ("[I]f changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.").

<sup>140</sup> *Id.* at 1743 ("At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.").

<sup>141</sup> *Id.* at 1754.

<sup>142</sup> *Id.* at 1755–56 (Alito, J., dissenting).

<sup>143</sup> *Id.* at 1758.

<sup>144</sup> *Id.* at 1767–68 ("In 1964, the concept of prohibiting discrimination 'because of sex' was no novelty. It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.").

<sup>145</sup> *Id.* at 1828 (Kavanaugh, J., dissenting).

Critics of the *Bostock* opinion have, like Justice Alito, complained that Justice Gorsuch's sole reliance on Title VII's text opens the door to "unleashed . . . and unbound" judicial activism.<sup>146</sup> Others charge that Justice Gorsuch's textual inquiry did not go far enough, arguing that his reliance on precedent to discern the plain meaning of Title VII—rather than on more conventional textualist resources like contemporary dictionaries—led him astray.<sup>147</sup> Defenders of the majority opinion counter that Justice Gorsuch is the true textualist, and that the dissenters used atextual factors to impose external limits on the statute's plain meaning.<sup>148</sup>

I posit that the true dispute in *Bostock* was not over which Justice applied the purest form of textualism, but over the non-textualist tools each Justice applied. Justice Gorsuch relied, in part, on precedent to determine the plain meaning of Title VII, while the reasoning provided by Justice Alito and Justice Kavanaugh would have controverted precedent.<sup>149</sup> The dissenters looked to social and cultural factors to glean what a reasonable person in 1964 may have understood the phrase "discrimination because of sex" to mean.<sup>150</sup> In short, textualists disagree over when a statute's text is determinate, and which interpretive tools to employ when it is not. This confusion confers even greater power on textualists to selectively support decisions with interpretive methods without being constrained by methods that contradict their conclusions.

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<sup>146</sup> See Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC'Y REV. 158, 163 (2020).

<sup>147</sup> See Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM), <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/> ("[Justice Gorsuch's] analysis relies on precedents that did not take the text seriously."); Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, ATLANTIC (July 24, 2020), <https://theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/> ("Justice Gorsuch insisted he was sticking to the text, the whole text, and nothing but the text. Alas, he wasn't. His interpretation was shaded by the work of justices who had not been so careful about text.").

<sup>148</sup> See Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3 (2020) ("Each . . . [critique of Justice Gorsuch's approach] reaches outside the statute, placing the language in some larger cultural context in order to defeat the law's literal command.").

<sup>149</sup> See *Bostock*, 140 S. Ct. at 1739 (majority opinion) (first citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013); and then citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)); see also William Baude, *Conservatives, Don't Give up on Your Principles or the Supreme Court*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/supreme-court-originalism-conservatism.html> ("What made Justice Gorsuch's opinion most persuasive was not its textualist analysis but its use of precedents interpreting the Civil Rights Act, which the dissent's logic would have had to repudiate.").

<sup>150</sup> See *Bostock*, 140 S. Ct. at 1767–68 (Alito, J., dissenting); *id.* at 1828 (Kavanaugh, J., dissenting).

Moving on to the second point about why textualists and I differ in our conclusions as to the impact of legislative history on judicial discretion, I do not agree with textualists' argument that judges who faithfully apply well-established decisional tools nevertheless will be able to selectively rely on one piece of available legislative history or another to support their preferred result. Justice Scalia put this textualist critique as follows:

Legislative history provides . . . a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.<sup>151</sup>

Certainly, for a meaningful number of statutes, the universe of legislative records related to enactment may include evidence that would support multiple interpretations. But textualists' reliance on that fact to discard *all* legislative history fails to account for the existence of well-established decisional tools regarding how a court or judge should *use* legislative history.

For instance, it is a well-established decisional tool that courts generally should give greater interpretive weight to committee and conference reports than statements of individual legislators because reports are more likely to reflect the considered judgment of the legislators responsible for drafting the legislation and are widely relied on by legislators in deciding whether to support the bill.<sup>152</sup> Likewise, it is a well-established decisional tool that courts should not treat as decisive legislative history that is ambiguous or contradicts the plain text of the statute.<sup>153</sup> And another well-established decisional tool is that courts should treat legislative history as only one component of a larger inquiry into the proper construction of a statute, using the other well-established interpretive tools as well.

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<sup>151</sup> Scalia, *supra* note 59, at 36; *see also* Eskridge, *The New Textualism*, *supra* note 92, at 648 (citing Wald, *supra* note 115, at 214).

<sup>152</sup> *See* Katzmann, *supra* note 107, at 682 (“Conference committee reports and committee reports should sit at the top [of the list of authoritative sources], followed by statements of the bill’s managers, with ersatz statements of legislators on the floor—who had heretofore not been involved in consideration of the bill—at the bottom of reliable authority.”); *see also id.* (noting that Chief Justice Roberts has made the same point).

<sup>153</sup> *See, e.g.*, RCI Tech. Corp. v. Sunterra Corp. (*In re Sunterra Corp.*), 361 F.3d 257, 270 (4th Cir. 2004) (“[L]egislative history suggesting an interpretation contrary to a statute’s plain meaning is not necessarily sufficient to override the Plain Meaning Rule.”); Katzmann, *supra* note 107, at 661 (suggesting that an inquiry into the meaning of a statute will generally end with an examination of the words of the statute if the “statute[] [is] unambiguous”).

Courts that faithfully follow these decisional tools do not cherry pick stray pieces of legislative history to construe a statute in a manner that conforms to their policy preferences. Instead, those courts are constrained by the weight of the interpretive tools at their disposal. If a court appropriately uses legislative history, it is no freer to reach its preferred policy result than if it did not consult the legislative history. In fact, the court is *less* free to use its discretion because its chosen interpretation of the statute must not only reflect careful consideration of the interpretive tools relied on by textualists but also any additional guidance provided by legislative history.<sup>154</sup>

The Stored Communications Act case I mentioned earlier provides a helpful illustration of these points. The question in that case was whether “previously opened and delivered emails stored by a web-based email service” are in “electronic storage” for purposes of the statute.<sup>155</sup> The text of the provision strongly suggested that the answer was “yes.”<sup>156</sup> Nonetheless, because web-based email did not exist at the time Congress enacted the statute in 1986—and because some of the relevant statutory terms were commonly defined in more than one way—the plain language of the statute was not free of ambiguity.<sup>157</sup>

Specifically, the Act defines “electronic storage,” in relevant part, as the storage of a wire or electronic communication “by an electronic communication service for purposes of backup protection of such communication.”<sup>158</sup> So, to decide the case, we had to determine the meaning of the term “backup” in the statute.

The opinion began by considering various dictionary definitions of “backup.”<sup>159</sup> Contemporaneous dictionaries did not include computer- or data-specific definitions of the term.<sup>160</sup> Some modern dictionaries define “backup” in a variety of ways, including as “a copy of computer data”<sup>161</sup> and, more generally, as a “substitute” or “support.”<sup>162</sup> Still other modern dictionaries define “backup” as “an extra copy of information on a computer that is stored separately,”<sup>163</sup> a

<sup>154</sup> See Katzmann, *supra* note 107, at 667, 681.

<sup>155</sup> *Hately v. Watts*, 917 F.3d 770, 784 (4th Cir. 2019) (citing 18 U.S.C. § 2701(a)(1)).

<sup>156</sup> See *id.* at 786–88, 790–91 (citing 18 U.S.C. § 2510(17)(B)).

<sup>157</sup> See *id.* at 791–97.

<sup>158</sup> 18 U.S.C. § 2510(17)(B).

<sup>159</sup> *Hately*, 917 F.3d at 791.

<sup>160</sup> See, e.g., *Backup*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 160 (1961).

<sup>161</sup> *Hately*, 917 F.3d at 791 (emphasis omitted) (quoting *Backup*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/backup> (last visited Feb. 18, 2021)).

<sup>162</sup> *Id.* (quoting *Backup*, MERRIAM-WEBSTER, *supra* note 161; *Backup*, THE AMERICAN HERITAGE DICTIONARY 132 (4th ed. 2000)).

<sup>163</sup> *Backup*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/backup> (last visited Jan. 17, 2021).

“device . . . held in reserve as a substitute if needed,” or a thing that “perform[s] a secondary or supporting function.”<sup>164</sup> And some dictionary definitions distinguish a “backup” from an “original”—a point of potential significance in the case, because the defendant argued that the emails in question were “originals” and therefore could not be “backups.”<sup>165</sup>

Surveying these definitions, one judge confronted with the same question in an earlier case correctly noted that “[t]he exact definition of ‘backup’ varies from dictionary to dictionary.”<sup>166</sup> Because the statute did not define the term “backup” and because dictionaries defined the term in a variety of potentially applicable ways, a result-oriented court could have cherry picked from this diverse group of definitions the definition of “backup” that allowed it to reach its preferred policy result, just as a result-oriented court may allegedly “pick out” its “friends” in a statute’s legislative history to support its preferred result.<sup>167</sup>

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<sup>164</sup> *Backup*, DICTIONARY.COM, <https://www.dictionary.com/browse/backup?s=t> (last visited Jan. 17, 2021).

<sup>165</sup> *Hately*, 917 F.3d at 795–96.

<sup>166</sup> *Jennings v. Jennings*, 736 S.E.2d 242, 246 (S.C. 2012) (Toal, C.J., concurring in result).

<sup>167</sup> Scalia, *supra* note 59, at 36 (quoting Judge Leventhal). For this reason, it is hard to comprehend why textualists should consider looking to some outside sources—like dictionaries—to be appropriate, while “reliable forms” of legislative history are to be excluded. Katzmann, *supra* note 107, at 676. One textualist response is that reliance on (at least some forms of) legislative history opens the door for unconstitutional “legislative self-delegation”—legislators slipping interpretations into the legislative history in order to bypass the constitutional requirements of bicameralism and presentment. Manning, *supra* note 110, at 673. The constitutional considerations raised by Professor Manning have been addressed by others and are beyond the scope of this Lecture. See, e.g., Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 342–45 (2014) (defending legislative history as an appropriate exercise of Congress’s power under Article I, Section 5); Nourse, *supra* note 115, at 1141 n.103 (same); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1479–80 (2000) (arguing that, to the extent legislative history predates enactment of a statute, Congress can lawfully incorporate it by reference without raising nondelegation issues); cf. Molot, *supra* note 110, at 56 (noting that the judiciary has a constitutional duty not only to “protect[] the constitutionally prescribed lawmaking procedures” but also to respect “the separation of powers”). Such concerns may have some validity—that is, it is possible that individual legislators could, at times, seek to steer judicial review by inserting their preferred interpretations into the legislative history. But these fears are likely overblown, given Congress’s limited understanding of how courts are likely to interpret even the plain language of the statute, the ability of opposing legislators also to insert their views into the legislative history, and the piecemeal and unpredictable nature of litigation. See, e.g., Katzmann, *supra* note 107, at 655; Eskridge, *The New Textualism*, *supra* note 92, at 679–80 & n.229 (calling into question the extent to which Congress legislates with an eye towards judicial interpretation). In any event, in my view, refusing to consult legislative history based on *potential* abuses in *some* cases represents an instance of throwing the baby out with the bathwater.

But a consideration of the legislative history contained in the House and Senate committee reports put to rest any uncertainty. Those reports established that Congress intended for electronic storage to be defined functionally, rather than with respect to any specific type or era of electronic communications technology.<sup>168</sup> The Senate report also demonstrated that modern web-based email is functionally equivalent to the email technology in existence when Congress passed the statute, which Congress expressly intended to fall within the meaning of “electronic storage.”<sup>169</sup> The Stored Communications Act’s legislative history, coupled with its plain language and an understanding of the technology at issue, counseled against defining a “backup” relative to an “original”—thus *constraining*, rather than *expanding*, the court’s discretion in defining the term.<sup>170</sup> Had the panel ignored this legislative history, we would have had greater discretion to pick among the various definitions and render a decision potentially unfaithful to the statute’s objective.

At the end of the day, textualists believe that courts cannot be *trusted* to consider legislative history because, if allowed to do so, they will improperly use legislative history to support decisions that conform to their policy preferences rather than to the best reading of the statutory provision at issue. But on this point, I agree with Professor Eskridge that, “[f]rankly, a result-oriented jurist will refuse to be constrained under any approach.”<sup>171</sup>

For that reason, I do not believe that legal rules—like categorically barring courts from considering legislative history—can serve as the solution to the concerns regarding “judicial activism.” Rather than erecting legal barriers—which often expand judicial power, as my discussion of textualism illustrates, and are therefore counterproductive—concerns over judicial activism are best met by electing and appointing judges who are committed to rigorously, faithfully, and conscientiously applying *all* tools at their disposal, and doing so in a manner that is transparent so as to allow courts, lawmakers, and the public to understand, apply, and critique their reasoning.

### B. *Rucho as an Activist Decision*

So far, I have applied my understanding of judicial activism in the context of *classes* of cases, such as cases requiring a court to construe

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<sup>168</sup> See *Hately*, 917 F.3d at 786, 797–98.

<sup>169</sup> See *id.* at 792–94 & n.7 (deemphasizing the importance of slight technological differences between modern web-based email systems and Congress’s exemplar email system).

<sup>170</sup> *Id.* at 796–97 & n.8.

<sup>171</sup> Eskridge, *The New Textualism*, *supra* note 92, at 675.

statutory language. I have contended that a court engages in judicial activism if it rejects the use of a decisional tool long recognized as relevant in deciding that *particular type of case*. But, as my background discussion on various proposed definitions of judicial activism revealed, there are also certain foundational methodological and procedural rules and mediating principles that judges must apply in *all* cases.

In an article seeking to “reconceptualiz[e]” judicial activism as “judicial responsibility,” Professor Eric Segall identified several of these foundational mediating principles.<sup>172</sup> They range from garden-variety anticorruption requirements—including not accepting bribes and not deciding cases based on partisan preferences or a personal relationship with an attorney arguing the case—to “commonly agreed upon baselines” regarding the manner in which a court should decide a case.<sup>173</sup> For example, a court’s decision should “not blatantly mischaracterize or ignore prior relevant decisions, distort the factual record in the case before it, or make false statements about the past.”<sup>174</sup> Additionally, courts should faithfully follow controlling precedent; decide only those issues that are raised by the parties;<sup>175</sup> and treat similarly situated parties the same way.

There are also particular decisional tools that appellate courts must employ. Appellate review is typically limited to the issues and factual record that were developed before the trial court. And appellate courts generally must defer to the fact-finding of trial judges, who are in a better position to weigh evidence and assess credibility.

As Judge Tatel explained in his Madison Lecture, “[b]y following these and other rules of judging, . . . life-tenured judges from across the political spectrum maximize the extent to which their decisions are driven not by personal policy agendas, but by the application of law to established fact.”<sup>176</sup> Chief Justice Roberts has made the same point, writing that “charges of judicial activism are most effectively rebutted when courts can fairly argue they are following normal practices.”<sup>177</sup>

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<sup>172</sup> Segall, *supra* note 14, at 712–13.

<sup>173</sup> *Id.* at 712.

<sup>174</sup> *Id.*

<sup>175</sup> *E.g.*, United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579–81 (2020).

<sup>176</sup> Tatel, *supra* note 4, at 1074.

<sup>177</sup> Boumediene v. Bush, 553 U.S. 723, 806 (2008) (Roberts, C.J., dissenting). Moreover, following the rules of the game is important in any truth-seeking endeavor. As journalist Jonathan Rauch has powerfully argued, we have shared rules of determining truth to thank for modern society, in which freedom of thought is permitted (and encouraged)—but in which ideas are tested for objective truth, winnowing the great range of ideas down to those that survive rigorous examination. Through this process, it is now true that “[e]very day, probably before breakfast, [we] add[] more to the canon of knowledge than was accumulated in the 200,000 years of human history prior to Galileo’s time.” Jonathan

Just as discarding a well-established decisional tool used to decide a particular type of case amounts to judicial activism, so too would a court or judge engage in judicial activism, from my perspective, if it categorically refused to follow or, in a particular case, rejected *sub silentio* these foundational mediating principles applicable in all cases. That brings me to the Supreme Court's 2019 decision in *Rucho v. Common Cause*, in which the Court held that partisan gerrymandering claims are categorically nonjusticiable under the United States Constitution.<sup>178</sup> I chose this case to round out my Lecture because, in addition to providing a recent stark example of judicial activism clothed in the language of judicial restraint, it is one with which I am intimately familiar: I sat by designation on the three-judge trial court that reviewed the case, and I authored the trial court opinion that the Supreme Court overturned.<sup>179</sup>

Despite the *Rucho* majority's claim of judicial restraint,<sup>180</sup> when viewed through the lens I have proposed—that a decision is activist if it rejects well-established decisional tools—*Rucho* in fact constitutes a decidedly activist opinion.

### 1. Background

*Rucho*'s factual and procedural history began in February 2016, when a three-judge district court panel invalidated two districts in North Carolina's 2011 congressional redistricting plan as racial gerrymanders.<sup>181</sup> In response, the Republican-controlled North Carolina General Assembly immediately set about to enact a remedial congressional districting plan.<sup>182</sup>

Disclaiming any reliance on race, the General Assembly's redistricting committee—chaired by Representative David Lewis and Senator Robert Rucho—adopted redistricting criteria.<sup>183</sup> While the committee adopted several neutral criteria unanimously, certain partisan criteria were approved only on party-line votes. One such partisan criterion required the legislators—and the Republican

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Rauch, *The Constitution of Knowledge*, NAT'L AFFS., Fall 2018, at 125, 129, <https://www.nationalaffairs.com/publications/detail/the-constitution-of-knowledge>. What this means, however, is that the manipulation of facts—by judges or anyone else with power—begins us down a slippery slope away from playing by the rules that have enabled humanity's spectacular achievements over the past few centuries.

<sup>178</sup> 139 S. Ct. 2484 (2019).

<sup>179</sup> *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded for dismissal*, 139 S. Ct. 2484.

<sup>180</sup> See *Rucho*, 139 S. Ct. at 2507.

<sup>181</sup> *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

<sup>182</sup> *Common Cause*, 318 F. Supp. 3d at 805.

<sup>183</sup> *Id.* at 807–08.



redistricting consultant they hired, Dr. Thomas Hofeller—to rely on “political data” to draw a districting plan that would create a “partisan advantage” for the Republican Party by ensuring that Republican candidates would prevail in ten of North Carolina’s thirteen congressional districts.<sup>184</sup> The “political data” consisted of precinct-level voting data specifying whether, and to what extent, each precinct had favored Republican or Democratic candidates in previous statewide elections. Representative Lewis explained the rationale behind the “partisan advantage” criterion as follows: “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.”<sup>185</sup> He further stated that he drew “the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.”<sup>186</sup> The General Assembly adopted the remedial maps on party-line votes.<sup>187</sup>

The maps worked exactly as the General Assembly’s Republican majority intended. In the November 2016 congressional election, Republican candidates prevailed in ten of the state’s thirteen congressional districts—the exact ten districts in which the map-drawers intended for Republican candidates to prevail—notwithstanding that Republican candidates received only slightly more than half of the statewide vote.<sup>188</sup> In sum, there is no reasonable dispute that the challenged districting plan was drawn to, and did in fact, maximize the interests of the Republican Party at the expense of non-Republican voters.

Several North Carolina voters and organizations filed complaints alleging that the districting plan’s express partisan favoritism violated Sections 2 and 4 of Article I; the First Amendment; and the Equal Protection Clause. The plaintiffs introduced at trial a variety of expert analyses showing that the plans were predominantly intended to, and did, discriminate against non-Republican voters, and that the plans’ discriminatory effects were not attributable to a legitimate, non-partisan districting objective.<sup>189</sup>

Two expert witnesses compared the enacted plan to thousands of simulated districting plans drawn by computers using the General Assembly’s non-partisan districting criteria and other traditional districting principles. The simulated maps were based on precinct-level

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<sup>184</sup> *Id.* at 805–08.

<sup>185</sup> *Id.* at 809.

<sup>186</sup> *Id.* at 808.

<sup>187</sup> *Id.* at 809.

<sup>188</sup> *Id.* at 810.

<sup>189</sup> *Id.* at 870–80, 885–94, 897–99.

voting data from prior elections, which was the same data the General Assembly's map-drawers used to draw the challenged plans. The two experts found that, relative to all simulated plans, the enacted plan was an "extreme statistical outlier" regarding the number of Republican candidates likely to prevail.<sup>190</sup> Likewise, using the results of the 2016 election, a third expert reviewed three measures of "partisan symmetry"—which analyzes whether a districting plan allows supporters of the two major parties to translate their votes into seats with equal ease—and again concluded that the enacted plan was an extreme statistical outlier as to its pro-Republican bias.<sup>191</sup>

The legislative defendants did not meaningfully challenge the plaintiffs' empirical evidence. Instead, they principally argued that the plaintiffs lacked standing and that the claims amounted to nonjusticiable political questions because the plaintiffs had failed to identify a "judicially manageable standard" for adjudicating their claims.<sup>192</sup>

In a largely unanimous opinion, the trial court first rejected the legislative defendants' standing and justiciability arguments. Regarding justiciability, we noted that under the Supreme Court's controlling opinion in *Davis v. Bandemer*, partisan gerrymandering claims were justiciable<sup>193</sup>—and that the Supreme Court had never held, as the legislative defendants proposed, a claim nonjusticiable *solely* due to a purported lack of judicially manageable standards.<sup>194</sup> Then, for each claim, the trial court used Supreme Court precedent to set forth a legal standard<sup>195</sup>—standards that other trial courts adjudicating partisan gerrymandering claims subsequently agreed were judicially manageable.<sup>196</sup> Weighing the plaintiffs' evidence against those

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<sup>190</sup> *Id.* at 876; *see id.* at 870–80, 893–94.

<sup>191</sup> *Id.* at 885–93.

<sup>192</sup> *Id.* at 813, 843.

<sup>193</sup> *Id.* at 837–38 (citing *Davis v. Bandemer*, 478 U.S. 109, 113 (1986)).

<sup>194</sup> *Id.* at 842 n.19. In fact, the idea of justiciability was so well-established that in 2006, Professor Michael Gerhardt characterized *Baker v. Carr* as a "super precedent" in part because it "recognized the justiciability of constitutional challenges to gerrymandering." Gerhardt, *supra* note 91, at 1212.

<sup>195</sup> *See Common Cause*, 318 F. Supp. 3d at 861–69, 927–37.

<sup>196</sup> *See, e.g., League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 911–12 (E.D. Mich.) (agreeing that "judicially-manageable standards exist" to adjudicate partisan gerrymandering claims), *vacated and remanded sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1081–82 (S.D. Ohio) (acknowledging the difficulty of deciding how much partisanship is too much but nonetheless adopting standards used in *Common Cause* and *Benson*), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *see also Harper v. Lewis*, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122, at \*10, \*16–18, \*22 (N.C. Super. Ct. Oct. 28, 2019) (applying the same equal protection standard as the federal trial court and enjoining the State of North Carolina from using the

standards, the trial court concluded that the plaintiffs were entitled to prevail on each of their claims.<sup>197</sup>

As noted, other trial courts were considering similar challenges around the same time. One such case was *Benisek v. Lamone*.<sup>198</sup> *Benisek* involved a challenge by Republican voters against Maryland's congressional districting plan, which they alleged was biased in favor of the Democratic Party.<sup>199</sup> As in the North Carolina case in *Rucho*, the trial court in *Benisek* found that the Maryland map was unconstitutional.<sup>200</sup>

The Supreme Court granted certiorari in *Rucho* and *Benisek* and reversed, concluding that partisan gerrymandering claims are nonjusticiable under *any* constitutional provision. The Court thus effectively (though not explicitly) overruled *Bandemer*.<sup>201</sup> In reaching that conclusion, Chief Justice Roberts's majority opinion recognized that the plaintiffs' evidence established that "[t]he districting plans at issue" were "highly partisan, by any measure" and were "blatant examples of partisanship driving districting decisions."<sup>202</sup> Nevertheless, the Court held that the plaintiffs were not entitled to relief because no judicially manageable standard existed, or could ever exist, for determining whether a partisan gerrymander violates the Federal Constitution.

In reaching that conclusion, Chief Justice Roberts's majority opinion went out of its way to characterize its decision as an exercise in judicial restraint. The Court stated,

We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected

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2016 plan, concluding it was likely unconstitutional under the North Carolina Constitution).

<sup>197</sup> *Common Cause*, 318 F. Supp. 3d at 801. There was "one narrow exception": We held that "Plaintiffs failed to adduce sufficient evidence to support their partisan vote dilution challenge under the Equal Protection Clause to District 5." *Id.* at 801 & n.2.

<sup>198</sup> 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded sub nom.* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>199</sup> *See id.* at 502.

<sup>200</sup> *Id.* at 498.

<sup>201</sup> *See Rucho*, 139 S. Ct. at 2506–07 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

<sup>202</sup> *Id.* at 2491, 2505.

and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.<sup>203</sup>

## 2. *Activism in Rucho: Throwing Out Tools*

Recall that, under my definition of judicial activism, even when a decision does not categorically reject a well-established decisional tool, the decision nonetheless is deemed activist if it fails to consider or follow a well-recognized decisional tool and does so in a non-transparent fashion. Because, as I will discuss, *Rucho* disregarded *sub silentio* several well-established decisional tools that were materially relevant to the disposition of the case, *Rucho* is a decidedly activist opinion.

First, the *Rucho* Court failed to adhere to the well-established decisional tool that courts must fairly characterize parties' arguments and prior decisions.<sup>204</sup> The obligation that courts not "misstat[e]" parties' arguments or the holdings of prior decisions is intimately bound up with the concerns underlying the condemnation of judicial activism—that, as Judge Posner has said, "too great a lack of candor will make an opinion unprincipled" and open the door to unjustified judicial policymaking.<sup>205</sup> Restricting courts to consideration of those arguments actually raised by the parties ensures that courts do not issue advisory opinions by resolving questions or relying on arguments not developed through the adversarial process. And the requirement that courts not mischaracterize prior decisions ensures that they remain constrained by precedent and the legal questions decided by prior courts, thereby limiting freewheeling judicial policymaking.

As Justice Kagan noted in her withering dissenting opinion, which was joined by three other Justices, the majority in *Rucho* failed to abide by these principles. To begin, the majority mischaracterized the legal theory proposed by the plaintiffs and analyzed in the trial court opinion.<sup>206</sup> The *Rucho* majority asserted that the plaintiffs' claims—and the legal standard the trial panel applied to adjudicate those claims—"sound[ed] in a desire for proportional representation," which the Constitution does not demand.<sup>207</sup> With proportional representation excluded as a constitutional baseline, the Court determined

<sup>203</sup> *Id.* at 2507.

<sup>204</sup> *See, e.g., Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 310–11 (4th Cir. 2004).

<sup>205</sup> Posner, *Meaning*, *supra* note 11, at 23; *see also id.* ("The self-disciplined judge *tries* to decide a case without bringing in such [personal policy] preferences. He does not try to evade the controlling decision of a higher court by misstating that decision or distorting the facts of his case.").

<sup>206</sup> *Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting) ("The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below.").

<sup>207</sup> *Id.* at 2499 (majority opinion).

that no judicially manageable standard existed to adjudicate partisan gerrymandering claims “because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.”<sup>208</sup>

Characterizing the plaintiffs’ legal theory and the trial court’s decision as sounding in proportional representation was crucial to the majority’s resolution of the case because prior Supreme Court opinions had rejected proportional representation as a constitutional baseline.<sup>209</sup> It also allowed the Court to devote several pages to denouncing “fairness” as a standard before ever turning to the plaintiffs’ actual arguments.<sup>210</sup>

Yet the plaintiffs’ briefing and argument to the Court expressly disclaimed any reliance on proportional representation as a constitutional baseline, asserted that proportional representation does not constitute a proper constitutional standard because in certain states “the natural geography of the state doesn’t lend itself to proportional representation,”<sup>211</sup> and explained why the simulated maps upon which they relied “do not in any way ‘measure deviations from proportional representation.’”<sup>212</sup>

The majority’s assertion that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation”<sup>213</sup> likewise fails to account for the analysis in the trial panel opinion, which expressly rejected proportional representation as a constitutional standard<sup>214</sup> and denied standing to those plaintiffs whose only claimed

<sup>208</sup> *Id.* at 2501.

<sup>209</sup> *See id.*

<sup>210</sup> *Id.* at 2499–2502.

<sup>211</sup> Transcript of Oral Argument at 66, *Rucho*, 139 S. Ct. 2484 (No. 18-422).

<sup>212</sup> Brief for *Common Cause* Appellees at 50, *Rucho*, 139 S. Ct. 2484 (No. 18-422) (quoting Brief for Appellants at 50, *Rucho*, 139 S. Ct. 2484 (No. 18-422)); *see also id.* at 50–53; Brief for Appellees League of Women Voters of North Carolina, *et al.* at 57 & n.16, *Rucho*, 139 S. Ct. 2484 (No. 18-422); Transcript of Oral Argument, *supra* note 211, at 45–46, 62–63, 65–66; Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 *GEO. L.J. ONLINE* 50, 56 (2020) (explaining that the plaintiffs’ claims in *Rucho* were not about proportional representation, and that Chief Justice Roberts ignored that fact and chose to “fram[e] [the merits of the partisan gerrymandering claim] as a choice between adopting proportional representation by judicial fiat or holding these cases simply out of the competence of the federal courts”).

<sup>213</sup> *Rucho*, 139 S. Ct. at 2499.

<sup>214</sup> *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 889 (M.D.N.C. 2018) (“[T]he Constitution does not entitle supporters of a particular party to representation in a state’s congressional delegation in proportion to their statewide vote share.”); *see also id.* at 820 n.10 (noting that “selecting the modal outcome in a randomly generated sample, which outcome happens to not favor either party, does not amount to imposing a proportionality requirement”; instead, “it simply amounts to selecting a plan with a congressional delegation that most commonly occurs as a result of a state’s political geography and non-partisan districting objectives”).

injury was an alleged absence of proportional representation.<sup>215</sup> Justice Kagan's dissent further clearly explained why the plaintiffs' claims were not based on proportional representation.<sup>216</sup>

I recognize that when I raise this criticism, the response might be, "Well, of course Judge Wynn thinks that—he wrote the trial court opinion finding that the claims were *not* based on proportional representation!" Fair enough. But my criticism is not grounded solely in my disagreement with the Supreme Court's conclusion on this point. Reasonable minds can disagree; that is precisely the issue. Supreme Court Justices, not to mention other judges and commentators, have been debating for decades whether partisan gerrymandering claims *necessarily* are grounded in a desire for proportional representation.<sup>217</sup> But the *Rucho* majority brushed aside those significant disagreements with a simple conclusory statement, failing to contend with the actual arguments before it.

Similarly, the Court criticized the three-part test adopted by the trial court for Equal Protection claims, which required a showing of discriminatory intent, a showing of discriminatory effect, and an analysis of whether the plan can be justified through a neutral explanation. Specifically, the Court held that the third prong was duplicative of the first.<sup>218</sup> But in so doing, the Court failed to fully grapple with the cogent arguments raised by the plaintiffs, who explained that expert analysis could show in some states that the average alternative plan would be just as skewed as the enacted plan—due, for example, to the natural political geography of the state—meaning that "bias [would be] justified and [the plan would be] exempt from liability."<sup>219</sup> In other words, the plaintiffs clearly articulated how the third stage of the analysis is not duplicative of the first: Those who drew the map might have had a discriminatory purpose, and the map might have discriminated in effect, but if the map fell within the norm for maps

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<sup>215</sup> *Id.* at 827–28.

<sup>216</sup> *Rucho*, 139 S. Ct. at 2520–21 (Kagan, J., dissenting).

<sup>217</sup> *See, e.g.,* *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in the judgment) (arguing that the plurality opinion's test for partisan gerrymandering claims "ultimately rests on a political preference for proportionality").

<sup>218</sup> *Rucho*, 139 S. Ct. at 2504 (concluding that "[i]t is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a 'legitimate redistricting objective'—adds to the inquiry" because "[t]he first prong already requires the plaintiff to prove that partisan advantage predominates," so "[a]sking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question" (citation omitted)).

<sup>219</sup> Brief for Appellees League of Women Voters of North Carolina, *et al.*, *supra* note 212, at 61.

for that state, the lawsuit would nevertheless fail.<sup>220</sup> But the Court ignored this explanation.

Additionally, as for the plaintiffs' claim under Article I, Section 2, the majority's full analysis of the claim was that it "seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4," which the Court has previously held "does not provide the basis for a justiciable claim."<sup>221</sup> The Court failed to engage meaningfully with the plaintiffs' actual argument, which was that Article I, Section 2—the provision requiring members of the House to be "chosen every second Year by the People"—requires ensuring that the *people*, not their map-drawing representatives, choose who represents them.<sup>222</sup>

Second, the *Rucho* majority disregarded the well-established decisional tool, codified in Federal Rule of Civil Procedure 52(a)(6), that an appellate court must accept a district court's findings of fact "unless clearly erroneous."<sup>223</sup> Appellate courts defer to a trial court's factual findings in recognition that, "as the trier of fact, that court was in a better position than [the appellate court is] to evaluate the credibility of witnesses, take into account circumstances, and make reasonable inferences."<sup>224</sup> The requirement that appellate courts defer to a trial court's factual findings absent clear error constitutes a meaningful constraint on appellate judicial discretion because it generally restricts appellate courts to the factual record developed in the trial court.

But the *Rucho* majority rendered several factual determinations conflicting with those reached by the trial court—without finding that the trial court's factual findings were clearly erroneous.<sup>225</sup> For example, the trial court found that neither the expert simulation analyses nor the partisan symmetry analyses were grounded in or imposed proportional representation.<sup>226</sup> Yet, the *Rucho* majority

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<sup>220</sup> *Id.* at 62 ("Even if [plaintiffs] show both discriminatory intent and discriminatory effect, they still lose if the dilutive impact can be justified—which it often can be.").

<sup>221</sup> *Rucho*, 139 S. Ct. at 2506.

<sup>222</sup> U.S. CONST. art. I, § 2, cl. 1; see Brief for *Common Cause* Appellees, *supra* note 212, at 59–60.

<sup>223</sup> *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous.").

<sup>224</sup> *United States v. Bishop*, 740 F.3d 927, 935 (4th Cir. 2014).

<sup>225</sup> This is not the first time a Supreme Court majority or plurality has made this error in a political gerrymandering case. Justice Powell leveled the same criticism at the *Bandemer* plurality. *Davis v. Bandemer*, 478 U.S. 109, 163–66, 169–70, 174, 184 (1986) (Powell, J., concurring in part and dissenting in part).

<sup>226</sup> See *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 820 n.10 (M.D.N.C. 2018); *id.* at 889 ("[T]he efficiency gap, like other measures of partisan asymmetry, does not dictate strict proportional representation.").

nowhere referred to those factual findings. Nor did it assert that, much less explain why, the trial court's findings on those points were clearly erroneous.<sup>227</sup>

The *Rucho* majority also found that it is impossible for “judges to predict how a particular districting map will perform in future elections” because “[v]oters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates’ campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations.”<sup>228</sup> Yet the trial court made extensive factual findings that, *in that particular case*, the plaintiffs’ evidence proved that prior election results reliably predicted how the challenged districting map would perform in future elections.<sup>229</sup> The trial court opinion identified several pieces of evidence supporting that factual finding, including that: (1) the legislative map-drawers, and the districting expert they employed, used past election data to predict how the challenged map would perform in future elections and believed those predictions were reliable; (2) using the past election data upon which the legislative map-drawers relied, the plaintiffs’ expert witnesses used a variety of empirical methods and sensitivity analyses to predict how the maps would perform, all of which yielded essentially the same result; and (3) in a subsequent election, the map performed *exactly* as the map-drawers and the plaintiffs’ experts predicted.<sup>230</sup> But the *Rucho* majority failed to even address these factual findings, much less explain why they were clearly erroneous.

Third, the Supreme Court did not account for several lines of relevant precedent, thereby skirting another meaningful constraint on judicial discretion.<sup>231</sup> The precedential system developed in pre-revolutionary England and embraced by the Founders fosters, in former Chief Justice Rehnquist’s words, “the evenhanded, predictable, and consistent development of legal principles”<sup>232</sup> by precluding

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<sup>227</sup> Tellingly, elsewhere Chief Justice Roberts has derided the efficiency gap measure—one measure of partisan asymmetry—as “sociological gobbledygook.” Michael Gentithes, *Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering*, 105 IOWA L. REV. 1081, 1088 (2020) (quoting Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161)).

<sup>228</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019).

<sup>229</sup> See *Common Cause*, 318 F. Supp. 3d at 877–79.

<sup>230</sup> *Id.* at 804, 891, 894–95.

<sup>231</sup> See Segall, *supra* note 14, at 712 (stating that courts “should not blatantly mischaracterize or ignore prior relevant decisions”).

<sup>232</sup> *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).



lower court judges from deviating from controlling precedent and, at least in theory, constraining the Supreme Court's authority to overturn precedent to only those situations in which its exacting test for overruling a prior decision is met.<sup>233</sup> It also ensures that, over time, similarly situated parties are treated equally—that a legal principle applied in the case of a litigant or class of litigants favored by a judge on personal, policy, or political grounds is generally applicable to litigants or classes of litigants disfavored by that judge as well.<sup>234</sup>

But in *Rucho*, the Supreme Court failed to consider prior relevant decisions, most notably in the Court's brief discussion of the plaintiffs' claims under Article I, Sections 2 and 4 (the latter of which is commonly referred to as the Elections Clause). In holding that invidious partisan gerrymandering violates the Elections Clause, the trial court relied upon the Supreme Court's opinion in *Cook v. Gralike*, which held that the "States' authority under the Elections clause extends *only* to 'neutral provisions as to the time, place, and manner of elections.'" <sup>235</sup> Therefore, the trial court found, in accordance with the Supreme Court's opinion in *U.S. Term Limits v. Thornton*, that "the Elections Clause does not serve 'as a source of power [for States] to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" <sup>236</sup> Before the Supreme Court, the plaintiffs again pressed their Elections Clause arguments under both *Cook* and *Thornton*, explaining why their claims were materially indistinguishable from those in *Cook*, in particular.<sup>237</sup>

Yet the *Rucho* majority nowhere referenced any of the Supreme Court's prior Elections Clause opinions, including *Cook* or *Thornton*. In fact, it did not include *any* analysis explaining why the Elections Clause claim failed, except to label it "novel."<sup>238</sup> And as noted, the

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<sup>233</sup> Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (stressing the "necessity" of following precedent but outlining the considerations which would move the Court to overrule a prior case); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1412–15 (2020) (Kavanaugh, J., concurring in part) (describing the exacting bar for overruling precedent as "high," "unusual," and "special").

<sup>234</sup> See Scalia, *supra* note 76, at 1179; see also *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 786–87 (1986) (White, J., dissenting) (explaining that the doctrine of stare decisis is necessary "if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results"), *overruled by Casey*, 505 U.S. 833.

<sup>235</sup> *Common Cause*, 318 F. Supp. 3d at 937 (quoting *Cook v. Gralike*, 531 U.S. 510, 527 (2001) (Kennedy, J., concurring)).

<sup>236</sup> *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995)).

<sup>237</sup> Brief for *Common Cause* Appellees, *supra* note 212, at 59–62.

<sup>238</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

Court also failed to explain why it dismissed the plaintiffs' Article I, Section 2 claim—despite Supreme Court precedent suggesting that Article I, Section 2 was relevant to the question of partisan gerrymandering.<sup>239</sup>

Likewise, the *Rucho* majority did not account for significant precedent in analyzing the plaintiffs' claim under the First Amendment. For instance, the Supreme Court nowhere explained how its holding was consistent with precedent establishing that the government may not impose election regulations that “restrict the speech of some elements of our society *in order to enhance the relative voice of others*,”<sup>240</sup> or otherwise “decid[e] which ideas should prevail” in the marketplace of ideas.<sup>241</sup> The majority also did not explain how its decision—that a state legislature's partisan majority may enact a districting plan designed to ensure that its candidates will prevail in the majority, or even vast majority, of congressional districts—was consistent with the Supreme Court's prior holding that when the law affords the government authority to make discretionary decisions, it may not exercise such discretion “in a narrowly partisan or political manner.”<sup>242</sup> Nor did the majority opinion explain how its holding aligned with its prior admonition that “those who govern should be the *last* people to help decide who *should* govern.”<sup>243</sup>

Fourth, one might view the *Rucho* opinion as an example of a court reaching out to decide cases not before it. That is, by adopting a blanket rule of nonjusticiability, the Court arguably had in mind the full panoply of possible cases—not merely the controversy before it. In fairness, such considerations may well be inevitable when a federal court is contemplating the limits of its Article III power, although, as I will discuss shortly, it is debatable how much Article III was really implicated here. In any event, this critique was raised by numerous concurring and dissenting Justices in *Vieth v. Jubelirer* and *Rucho*<sup>244</sup> and falls under my general definition of activism, so I include it here.

<sup>239</sup> See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015).

<sup>240</sup> *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (emphasis added), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

<sup>241</sup> *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018).

<sup>242</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion); see also *id.* at 907 (Rehnquist, C.J., dissenting) (“cheerfully conced[ing]” this point).

<sup>243</sup> *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (plurality opinion); see also Brief for Appellees League of Women Voters of North Carolina, *et al.*, *supra* note 212, at 5.

<sup>244</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring in the judgment) (“If suitable standards with which to measure the burden a gerrymander imposes on the representational rights did emerge, hindsight would show that the Court prematurely abandoned the field. That is a risk the Court should not take. Instead, we should adjudicate

Finally, the *Rucho* majority discarded the well-established decisional tool of transparency.<sup>245</sup> I am not only referring to the transparency-avoiding maneuvers already discussed, including mischaracterizing precedent and the parties' arguments. Rather, I raise another aspect of the *Rucho* opinion that commentators have criticized: its lack of transparency about *its own rationale*.

The political question doctrine comes in two flavors: "classical," which emphasizes constitutional mandates; and "prudential," which emphasizes judicial discretion.<sup>246</sup> In one view, "[t]he *Rucho* Court framed its holding as a constitutional mandate derived from Article III, evoking a classical approach."<sup>247</sup> Indeed, the *Rucho* majority cited Article III and discussed its own jurisdictional limitations, suggesting that the problem was one of Article III jurisdiction. It also looked to the text of the Constitution and noted that "[t]he only provision in the Constitution that specifically addresses the matter assigns it to the political branches."<sup>248</sup> The majority concluded that there was "no

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only what is in the papers before us."); *id.* at 317 (Stevens, J., dissenting) (noting that five Justices "share the view that, even if these appellants are not entitled to prevail, it would be contrary to precedent and profoundly unwise to foreclose all judicial review of similar claims that might be advanced in the future"); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2522 (2019) (Kagan, J., dissenting) ("If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these."); *cf.* Brief for *Common Cause* Appellees, *supra* note 212, at 24 ("[The legislative defendants] argue that this case presents a political question because there is a 'lack of judicially discoverable and manageable standards for resolving it.' But whatever may be true in other cases, the claims in *this* case could not be simpler or more 'manageable.'" (citation omitted)); Brief for Appellees League of Women Voters of North Carolina, *et al.*, *supra* note 212, at 28 ("*This* map is . . . unlawful even if the status of other plans remains unresolved.").

<sup>245</sup> See Molot, *supra* note 62, at 1312–13 (explaining the importance of judicial transparency for "promot[ing] legislative authority and the rule of law"); Segall, *supra* note 14, at 712 (describing judicial transparency as "an important rule of law value").

<sup>246</sup> *Article III—Justiciability—Political Question Doctrine—Rucho v. Common Cause*, 133 HARV. L. REV. 252, 257 (2019) [hereinafter *Article III*]; Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253 (2002) ("Unlike the classical strand of the [political question] doctrine, the prudential political question doctrine is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches.").

<sup>247</sup> *Article III*, *supra* note 246, at 257; see also *id.* at 258 (noting that under Article III, federal courts may decide "only cases and controversies 'capable of resolution through the judicial process'—so judicial review must be conducted 'according to legal principles.' Thus, the Court thought that adjudicating partisan gerrymandering claims in the absence of judicially manageable standards would be outside the judicial function conferred by Article III" (footnotes omitted) (quoting *Rucho*, 139 S. Ct. at 2494)).

<sup>248</sup> *Rucho*, 139 S. Ct. at 2506 (citing U.S. CONST. art. I, § 4, cl. 1).

plausible grant of authority in the Constitution” for federal courts to intervene in districting decisions.<sup>249</sup>

Additionally, while the Court explicitly rejected the legislative defendants’ invitation to interpret the Elections Clause as rendering “electoral issues” to be “questions that only Congress can resolve,” the Court nevertheless framed its opinion through the lens of the Elections Clause, arguing that “[a]t no point [in the drafting of the Constitution] was there a suggestion that the federal courts had a role to play [in disputes over gerrymandering].”<sup>250</sup> Through this constitutional patina, the Court suggested that it “had no choice but to abdicate jurisdiction.”<sup>251</sup>

Yet there are very good reasons to doubt this framing.<sup>252</sup> The *Rucho* majority opinion itself emphasized prudential considerations, including concerns regarding the predictability of voters’ choices; the difficulty of line-drawing between acceptable and unacceptable forms of gerrymandering; a desire to avoid injecting courts into heated partisan disagreements; and the fact that *some* members of Congress and *some* states had shown a willingness to engage on the issue of gerrymandering, rendering it unnecessary, in the majority’s view, for federal courts to be involved.<sup>253</sup> Crucially, in citing the discussion of the political question doctrine in *Baker v. Carr*, the majority quoted only *Baker*’s “prudential” category of cases (those that “lack . . . judicially discoverable and manageable standards for resolving [them]”)—not *Baker*’s “classical” category (those involving “a textually demonstrable constitutional commitment of the issue to a coordinate polit-

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<sup>249</sup> *Id.* at 2507.

<sup>250</sup> *Id.* at 2495–96; *see also id.* at 2506 (“The only provision in the Constitution that specifically addresses the matter assigns it to the political branches.”); *id.* at 2508 (“[T]he Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. . . . [T]he avenue for reform established by the Framers, and used by Congress in the past, remains open.”).

<sup>251</sup> *Article III*, *supra* note 246, at 258; *see Rucho*, 139 S. Ct. at 2507 (“Federal judges have *no license* to reallocate political power between the two major political parties, with *no plausible grant of authority in the Constitution*, and no legal standards to limit and direct their decisions.” (emphasis added)).

<sup>252</sup> *See* Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 990 (2020) (arguing that *Rucho* and other gerrymandering cases represent instances in which “mere normative preferences of the Justices have been presented by the Court as if they were actual constitutional mandates”).

<sup>253</sup> *See Article III*, *supra* note 246, at 259–60 (describing the *Rucho* Court’s consideration of practical issues); *see also* McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court’s Conflict with Itself*, 69 HASTINGS L.J. 1509, 1528 (2018) (“Standing alone, the manageable standard requirement is prudential. It is not imposed by law, but by the Court itself. It is more guideline than mandate, and consequently the Court can choose to disregard it without legal infraction.” (footnotes omitted)).

ical department”).<sup>254</sup> And finally, commentators have pointed to analytical flaws in the majority’s reasoning if it indeed purports to rest on a constitutional mandate.<sup>255</sup>

This lack of transparency allowed the *Rucho* majority to have its cake and eat it too. By framing its decision in classical, mandatory terms, the majority could throw up its hands and suggest that its decision was simply the constitutionally required solution. In other words, the majority could make a baseless claim of judicial restraint and avoid charges of judicial activism.

But given the actual prudential considerations underlying its decision, the majority should have been transparent and acknowledged that it was exercising discretion. At least then the conversation around the opinion would have been more honest.

I would be remiss if I did not mention an additional point raised by Justice Kagan in her dissent: that “[t]he majority’s abdication c[ame] just when courts across the country . . . ha[d] coalesced around manageable judicial standards to resolve partisan gerrymandering claims.”<sup>256</sup> The majority failed to account for the significant developments that had taken place even in the limited time since the Court’s 2004 opinion in *Vieth v. Jubelirer*—developments that may well have resolved the very concerns it presented as dispositive. And indeed, after the Court’s decision in *Rucho*, a state court in North Carolina enjoined the use of the very maps at issue in *Rucho*.<sup>257</sup> Though that court relied on the state, not federal, constitution, it employed the same test for the equal protection claim and relied on the same evidence that the trial court had used in *Rucho*. This suggests that the test was, in fact, judicially manageable.<sup>258</sup>

The *Rucho* majority’s *sub silentio* rejection of these well-established judicial decisional tools—tools that serve to circumscribe the situations

<sup>254</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962); see *Rucho*, 139 S. Ct. at 2494.

<sup>255</sup> See Spann, *supra* note 252, at 991 n.57 (noting that, to the extent *Rucho* purported to issue any substantive holding, it could not have done so if Article III jurisdiction was lacking); *Article III*, *supra* note 246, at 258–59 (arguing that the “classical framing of the Court’s decision sits uncomfortably” because “the Article III justification leads to a doctrinal oddity” in that, because “[s]tate courts are not bound by federal jurisdictional devices, . . . a state court could technically adjudicate a federal partisan gerrymandering claim, thereby exerting more control over federal constitutional law than a federal court”; and moreover, “the Court’s interpretation of Article III might not control its ability to hear equal protection claims” since “[a]mendments to the Constitution could displace the presumption that, pursuant to Article III, issues lacking judicially manageable standards should be left to the political process” (footnotes omitted)).

<sup>256</sup> *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

<sup>257</sup> *Harper v. Lewis*, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122, at \*22 (N.C. Super. Ct. Oct. 28, 2019).

<sup>258</sup> See *id.* at \*10, \*16–18.

in which a court can exercise the type of policymaking discretion typically reserved for the political branches—renders *Rucho* an activist opinion.

To be clear, it is not the Supreme Court's *disagreements* with the parties' characterization of their claims, with the trial court's factual findings, or with the applicability of its precedent to the plaintiffs' claims that renders *Rucho* activist. It is entirely within the Supreme Court's purview to conclude that a party is not fairly characterizing its own position; to determine that a trial court's factual finding was clearly erroneous; or to conclude that the Court's precedent is inapplicable. But when the Court refuses to engage with the actual claims presented by the parties, the factual findings made by the trial court, and the precedent cited by the trial court, the plaintiffs, and the dissent, the opinion can only be interpreted as silently rejecting these well-established judicial decisional tools and, thus, engaging in judicial activism.

### 3. *Activism in Rucho: Other Definitions*

Although the Court's silent rejection of these mediating principles by itself renders *Rucho* activist under my definition, I note that *Rucho* can be viewed as activist under other definitions as well. Notably, *Rucho* exercised a doctrine—the political question doctrine—which the Supreme Court has very rarely invoked,<sup>259</sup> and which judges and commentators long have recognized as, “in effect, a brand of judicial activism that abdicates the courts' constitutional responsibility to pass upon constitutional questions”—at least in its prudential form.<sup>260</sup>

<sup>259</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment) (“The political question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed. The Court has relied on the doctrine only twice in the last 50 years.” (footnote omitted) (citing *Nixon v. United States*, 506 U.S. 224 (1993); *Gilligan v. Morgan*, 413 U.S. 1 (1973))).

<sup>260</sup> *Igartúa v. United States*, 626 F.3d 592, 633 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (first quoting THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 4–5 (1992) (“[T]he ‘political-question doctrine’ is not only not required by[,] but is wholly incompatible with American constitutional theory[.]”); then quoting Barkow, *supra* note 246, at 334 (“Because the prudential doctrine allows the Court to avoid deciding a case without a textual analysis of the Constitution, it is this aspect of the political question doctrine that seems to be an unjustified dereliction of the Court's duty to ‘say what the law is.’”); then quoting Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 815 (1989) (“In modern American society, the[] justifications for judicial abstention [under the political question doctrine] seem increasingly to be calls for judicial abdication.”); and then quoting Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 601 (1976) (“The cases which are supposed to have established the political question doctrine required no such extra-

Such a critique may strike some as counterintuitive. After all, *Rucho* renders a certain class of challenges immune from federal judicial review—thus decreasing opportunities for judicial exercises of power, and (in one view) increasing judicial restraint.<sup>261</sup>

The response from those inclined to view the prudential political question doctrine as activist is that there are forms of judicial restraint that are appropriate to a constitutional vision of the judicial role—such as not passing on issues that are not properly before the court, per Article III’s “cases” or “controversies” requirement—and forms that are not.<sup>262</sup> That is, we may directly infer from the Constitution certain constraints on judicial decisionmaking. Some of those constraints—those that assign to other branches the interpretive duty—fall under the classical form of the political question doctrine. As a (seemingly) straightforward example, given the Constitution’s mandate that “[t]he Senate shall have the sole Power to try all Impeachments,”<sup>263</sup> federal courts may not usurp that function, as a majority of the Court concluded in *Nixon v. United States*.<sup>264</sup> Remarkably, though, even with text as clear as the Impeachment Trial Clause, two Justices concluded that the clause *was* justiciable, while a third concurred with the majority but emphasized prudential concerns over textual ones<sup>265</sup>—potentially raising questions about the long-term vitality of even the classical strain of the doctrine.

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ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain.”); cf. Spann, *supra* note 252, at 982–83 (arguing that the Supreme Court’s gerrymandering jurisprudence allows it to characterize claims as partisan (non-justiciable) or racial (justiciable) based on “whichever characterization advances its agenda in particular cases”); Gentithes, *supra* note 227, at 1083–84 (arguing that, properly understood, the political question doctrine would not allow the Court to “sidestep[] an issue” based solely on a perceived lack of “manageability”).

<sup>261</sup> *But see* Gentithes, *supra* note 227, at 1121–22 (arguing that “[r]efusing to address partisan gerrymandering might avoid the short-term appearance of politicization. But over time, it will preserve a stagnated legislative branch that forces judges to act more and more like legislators,” since stagnation means that “litigants often ask courts to make fine-grained policy choices better left in the hands of legislators. . . . This broad threat to the separation of powers actually justifies intervention.”); *see also* Spann, *supra* note 252, at 1001 n.117 (“[F]or those who favor judicial review despite the countermajoritarian dangers that it creates, the judicial enforcement of structural safeguards that are designed to promote democratic self-governance would seem to have a relatively strong claim to judicial legitimacy.”).

<sup>262</sup> *See, e.g.,* Barkow, *supra* note 246, at 319–35 (defending the classical political question doctrine while criticizing the prudential political question doctrine); cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).

<sup>263</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>264</sup> *Nixon*, 506 U.S. at 226; *see also* Barkow, *supra* note 246, at 271–73, 273 n.191.

<sup>265</sup> *Compare Nixon*, 506 U.S. at 226 (majority opinion), *and id.* at 252 (Souter, J., concurring in the judgment), *with id.* at 239 (White, J., concurring in the judgment).

In any event, where the Court's reasoning rests not on constitutional mandate, but rather on prudential concerns, critics of the political question doctrine see the Court's invocation of that doctrine as an activist enterprise.<sup>266</sup> That is, "once the political question doctrine is unleashed entirely from the Constitution . . . , what keeps a judge's use of the doctrine in check?"<sup>267</sup> The answer can only be the judge's own discretion—opening the prudential political question doctrine up to the usual outcome-oriented accusation of activism that arises in instances when a judge has discretion to impose his or her own policy preferences on constitutional decisionmaking.

As discussed, the *Rucho* majority could have—but did not—justify its invocation of the political question doctrine based on the idea that the Court was *constitutionally prohibited* in a direct sense from resolving disputes related to gerrymandering.<sup>268</sup> Instead, the *Rucho* majority rested its argument on prudential concerns regarding manageability.<sup>269</sup> Because the opinion apparently invoked the prudential strain of the political question doctrine, therefore, it is activist under some interpretations.

The Supreme Court's abdication of its reviewing function in *Rucho* is particularly troubling given that commentators have long recognized that "operating alone, the political system is incapable of reestablishing an equilibrium of power, and the courts *must* step in to restore it."<sup>270</sup> As constitutional scholar John Hart Ely once put it, judges are "conspicuously well suited to fill" the role of "representation-reinforcing"

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<sup>266</sup> See, e.g., Barkow, *supra* note 246, at 332 ("The difference between the classical and the prudential strains is the difference between a federal court not taking jurisdiction if it should not and improperly refusing to take jurisdiction when it should." (internal quotation marks and alterations omitted)); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959) ("[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.").

<sup>267</sup> Barkow, *supra* note 246, at 263.

<sup>268</sup> Compare Wechsler, *supra* note 266, at 8–9 (arguing that, "though there are arguments the other way," it "may be reasonable to conclude" that gerrymandering is a political question on which the courts could not pass, because the Elections Clause reserved judgments on district boundaries to Congress and the states), *with* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019) ("[The legislative defendants] suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree." (citation omitted)).

<sup>269</sup> *Rucho*, 139 S. Ct. at 2494, 2498.

<sup>270</sup> Glennon, *supra* note 260, at 820 (emphasis added); see also Cunningham, *supra* note 253, at 1513–14 (arguing—prior to the Supreme Court's decision in *Rucho*—that the Supreme Court's emphasis on a lack of manageable standards is a mask for concerns about preserving judicial legitimacy, and that the Court should discard that mask in order to fulfill its role to protect democratic functioning from extreme partisan gerrymanders).



protectors of democracy.<sup>271</sup> That is, judges should intervene not when they disagree substantively with the results of the political process, but when “the political market[] is systematically malfunctioning,” which “occurs when the *process* is undeserving of trust,” such as when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”<sup>272</sup> But, since judges “are comparative outsiders in our governmental system,” Professor Ely argued that they were in a good “position objectively to assess claims . . . that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.”<sup>273</sup>

In a similar vein, Justice Powell once noted that, due to the “difficult[y] [of] develop[ing] and apply[ing] standards that will identify the unconstitutional gerrymander, courts may seek to avoid their responsibility to enforce the Equal Protection Clause by finding that a claim of gerrymandering is nonjusticiable.”<sup>274</sup> But, according to Justice Powell, “such a course is mistaken”; rather, “appropriate judicial standards can and should be developed.”<sup>275</sup> Justice Kagan put the point bluntly by opening her *Rucho* dissent with the memorable line, “For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”<sup>276</sup>

Even more troubling is that while such concerns about judicial abdication in the realm of partisan gerrymandering have long been raised, we are now in a particularly aggressive era of partisan gerrymandering<sup>277</sup>—fueled by a combination of hyperpartisanship in politics and increasingly sophisticated technology.<sup>278</sup> A recent study by Professor Michael Kang found a sharp increase in partisan bias in districting as a result of gerrymandering from 2002 to 2012.<sup>279</sup> As a

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<sup>271</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102 (1980).

<sup>272</sup> *Id.* at 103; *see also* Sullivan, *supra* note 106, at 595–96 (“Politicians are primarily responsible for maintaining our electoral machinery, and their primary interest is not the fairness of elections. . . . [S]tructural constraints make it virtually impossible for the people to prevent electoral unfairness without judicial intervention.”).

<sup>273</sup> ELY, *supra* note 271, at 103.

<sup>274</sup> *Davis v. Bandemer*, 478 U.S. 109, 165 (1986) (Powell, J., concurring in part and dissenting in part), *abrogated by Rucho*, 139 S. Ct. 2484.

<sup>275</sup> *Id.*

<sup>276</sup> *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

<sup>277</sup> *See* Cunningham, *supra* note 253, at 1516.

<sup>278</sup> Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1435, 1441–43 (2020).

<sup>279</sup> *Id.* at 1422 (citing ANTHONY J. MCGANN, CHARLES ANTHONY SMITH, MICHAEL LATNER & ALEX KEENA, *GERRYMANDERING IN AMERICA: THE HOUSE OF*

historical matter, the current situation of extreme partisanship and severe gerrymandering is more the norm than the relative calm of the preceding decades was—suggesting these trends are likely here to stay, at least for a while.<sup>280</sup> At the same time, “several polls show that Americans do not want legislators drawing electoral maps.”<sup>281</sup> But of course, gerrymandering—at least, gerrymandering of the durable variety so common today—makes it harder for Americans to resolve that issue at the ballot box.<sup>282</sup> And yet it is precisely at this moment of accelerated partisan gerrymandering—that is, when the political branches are increasingly adopting policies harmful to democracy for which an unhappy electorate has little recourse—that the Supreme Court has chosen to throw up its hands and exit the scene.<sup>283</sup>

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<sup>280</sup> See *id.* at 1382–83 (“[T]he process of legislative redistricting, for most of American history, was just as intensely partisan as the rest of American politics. . . . [I]t is actually *today’s* hyperpartisanship, and hyperpartisan gerrymandering, that are closer to the historical norm. The bipartisanship of the Cold War era is the exception.”); *id.* at 1385 (“[T]oday’s hyperpartisanship and hyperpartisan gerrymandering are likely to be enduring features of American politics that courts regulating the political process must assume as regular and permanent conditions.”); see also *id.* at 1406 (presenting, in chart form, one measure of polarization in Congress from 1878 to 2006, demonstrating a clear low point in the mid-twentieth century).

<sup>281</sup> Cunningham, *supra* note 253, at 1516; see also Brief for Appellees League of Women Voters of North Carolina, *et al.*, *supra* note 212, at 46 (citing poll suggesting that “Americans are eager for gerrymandering to be judicially curbed”).

<sup>282</sup> See Cunningham, *supra* note 253, at 1516 (“If the electorate disfavors gerrymandering, why haven’t elected officials responded by outlawing it? The question illustrates gerrymandering’s central dilemma: The elected officials responsible for resisting it are those who most directly benefit from it.”); see also Kang, *supra* note 278, at 1435 (arguing that, while it may once have been true that “an aggressive gerrymander expose[d] ‘its own incumbents to greater risks of defeat,’” any such “tradeoff between electoral security and legislative seats in gerrymandering appears to be far less today than even a decade ago. . . . [G]errymanders today are far more durable and lasting in their partisan bias than they once were” (quoting *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O’Connor, J., concurring in the judgment), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019))).

<sup>283</sup> As Professor Michael Kang points out, election law as an area of judicial intervention arose during the Cold War era, a time when, in his telling, the American public was in a uniquely bipartisan mood (and partisan gerrymandering was at an unusually low level). Kang, *supra* note 278, at 1383. This means that the “law of redistricting has thus grown up during an era of unusual bipartisanship and has been shaped by judges and lawyers of the same experience, when partisanship and gerrymandering were the least prevalent in American history.” *Id.* at 1384. But unfortunately, that means that “the law of gerrymandering is . . . badly unsuited to the intense hyperpartisanship and polarization” that now dominate American political life. *Id.* Professor Kang has therefore argued that both Justice Scalia’s plurality opinion in *Vieth v. Jubelirer* and Chief Justice Roberts’s majority opinion in *Rucho* exhibit Cold War-era sensibilities about voting behavior and irresponsibly ignore the modern realities that have been demonstrated by political scientists. *Id.* at 1384–85, 1416, 1426–27, 1432–45; see *id.* at 1385 (noting that “[p]artisanship is not nearly as fluid or unstable as courts seem to

The lasting effects of *Rucho* remain to be seen, but I note that it is likely that *Rucho* will cause more damage than just the loss of the federal courts as an avenue of relief for disgruntled plaintiffs. The American public often interprets Supreme Court opinions as tacitly endorsing a practice, even when the decision is made on technical grounds.<sup>284</sup> Moreover, as Professor Martin Redish has argued, dismissing a case on nonjusticiability grounds maintains the status quo—leaving the country “in a constitutional state of nature, in which the constitutional position that prevails is the one that is the politically or physically most powerful.”<sup>285</sup> In other words, rather than the mere *absence* of a decision on the merits, *Rucho* might exacerbate the problem of partisan gerrymandering by suggesting *affirmative support* of the practice from the nation’s highest court.<sup>286</sup>

In sum, the *Rucho* majority’s reliance on the prudential political question doctrine is activist, even under definitions other than the one I advance in this Lecture, because (1) the prudential political question doctrine rests on judicial discretion; (2) the Court exercised that discretion to abdicate its role in an area where courts are likely the only possible solution; and (3) it did so at precisely the moment when the political branches are becoming *less* likely to make any changes in how they approach the issue of partisan gerrymandering.

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imagine, which means gerrymandering is far more effective and durable today than it has ever been,” and that this is an “uncontroversial conclusion” that is “deeply substantiated by sophisticated social science, even if Chief Justice Roberts has breezily tried to dismiss this empirical consensus as ‘sociological gobbledygook’”). The *Rucho* majority did so even though the plaintiffs’ briefing cited evidence of the rise in partisanship (and the attendant increase in predictability of voter behavior). Brief for Appellees League of Women Voters of North Carolina, *et al.*, *supra* note 212, at 25–26.

<sup>284</sup> See, e.g., David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1346 (2020) (“By dismissing a constitutional challenge to . . . legislation or executive action, courts are often interpreted by the broader public to be affirming the legitimacy of those laws.”); Hasen, *supra* note 212, at 59–60 (arguing that the *Rucho* majority “blessed a sympathetic view of extreme partisan actions” by “describing extreme partisan conduct as constitutionally and politically acceptable”); cf. Cunningham, *supra* note 253, at 1543 (predicting, before *Rucho*, that “[i]f the Court abstains [from ruling on the merits] in future [partisan gerrymandering] cases, partisan gerrymandering will likely intensify”).

<sup>285</sup> Martin H. Redish, *Judicial Review and the “Political Question,”* 79 Nw. U. L. REV. 1031, 1050 (1985).

<sup>286</sup> Indeed, Representative Lewis labeled the Supreme Court’s ruling “a complete vindication.” Will Doran, *The Supreme Court Won’t Overtake NC’s Congressional Maps. Will Lawmakers Act?*, NEWS & OBSERVER (June 27, 2019, 2:22 PM), <https://www.newsobserver.com/news/politics-government/article231403213.html> (quoting Representative Lewis). What’s more, the decision came shortly before the round of redistricting that is to take place beginning later this year—which promises to involve significant partisan gerrymandering, now that the Democratic Party has geared up its own response to the Republican Party’s highly successful project of partisan gerrymandering during the 2011–12 redistricting cycle. See Kang, *supra* note 278, at 1424–26.

In fairness, given the lengthy (though admittedly tenuous) pedigree of the prudential political question doctrine,<sup>287</sup> the doctrine may well be a “tool” that a court faced with a potentially political question ought to consider (transparently, and balanced against the other tools available to the court).<sup>288</sup> Nonetheless, I find it notable that—contrary to the majority’s claim that it was exercising judicial restraint—*Rucho* amounts to an activist opinion under a variety of different tests.

### CONCLUSION

Judicial activism has long been, and remains, a loaded but ill-defined term. I have sought to provide a judge’s perspective on a more useful definition—one focused on the proper role of the judge based on what courts actually do and how they explain what they’re doing, rather than on the resulting outcomes. My definition thus incorporates a focus on judicial tradition (which tools are available), transparency (which tools the judge will use), and judgment (discerning which tools are available and which to use).

I have sought to demonstrate why both textualism’s categorical rejection of legislative history and the Supreme Court’s recent decision in *Rucho* are examples of judicial activism rather than, in my view, ideal visions of judging. Textualism casts aside judicial tradition

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<sup>287</sup> See Barkow, *supra* note 246, at 253–73 (outlining the history of the prudential strain of the political question doctrine). In Professor Barkow’s telling, the prudential aspect of the doctrine first arose in the nineteenth century, when the Court “anchored” its holdings “in the text and structure of the Constitution,” but might “color[] the . . . application of the classical political question doctrine” with “prudential factors.” *Id.* at 257. Beginning in the early twentieth century, the Court reached some decisions based on prudential factors alone. *Id.* at 258–60. But with its 1962 decision in *Baker v. Carr*, “the Court began to cut back on the political question doctrine.” *Id.* at 263; *see id.* at 267 (“Although *Baker* gave us a new test for political questions that seemed quite flexible, the case actually signaled the beginning of the end of the prudential political question doctrine.”). Writing in 2002, Professor Barkow noted the infrequent invocation of the political question doctrine in the four decades following *Baker* and suggested that the doctrine as a whole—and the prudential strain in particular—were falling out of favor. *Id.* at 267–73, 301–03, 318–19. In particular, she argued that the 2000 presidential election cases suggested the doctrine had run its course. *Id.* at 277 (noting that “if either the classical or the prudential versions of the political question doctrine still survive, the Supreme Court should not have vacated the Florida Supreme Court’s opinion in *Bush I* [Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000)],” and that “[s]imilarly, in the follow-up case of *Bush II* [Bush v. Gore, 531 U.S. 98 (2000)], the concurring Justices improperly relied on Article II as a separate basis for their votes” (footnote omitted)). Of course, *Rucho* has proven that prediction to be wrong.

<sup>288</sup> There was no need for the *Rucho* trial court to do so, however, given the binding precedent established by *Bandemer*. *See Common Cause v. Rucho*, 318 F. Supp. 3d 777, 837 (M.D.N.C. 2018) (citing *Davis v. Bandemer*, 478 U.S. 109 (1986), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)).

and takes a dim view of courts' judgment. *Rucho* failed to utilize many traditional tools or to be transparent about its rationale.

As judges, we must strive for transparency and honesty when we choose not to use well-established decisional tools developed over generations. But most importantly, we must maintain our integrity and independence as, in Chief Justice Roberts's words, "an extraordinary group of dedicated judges doing [our] level best to do equal right to those appearing before [us]."<sup>289</sup> That is our privilege; but more so, it is our duty.

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<sup>289</sup> Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge.'* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> (quoting Chief Justice Roberts).