COMPARATIVE JUDICIAL ACTIVISM: CONCEPTUAL AND MEASUREMENT CHALLENGES

NUNO GAROUPA*
GEORGE MASON UNIVERSITY ANTONIN SCALIA LAW SCHOOL

I. INTRODUCTION

The traditional concern that there were few empirical studies on constitutional and other top courts in Western Europe is by now outdated.[1] Over the years, a solid, though not overly extensive, body of empirical literature has emerged, focusing on civil-law Western European constitutional courts. This growing body of research has significantly advanced our understanding of judicial behavior on these courts.[2]

A broader review of this literature reveals that much of it remains concentrated on the specific local dynamics of individual Western European countries, rather than offering a more generalized comparative assessment across the region.[3] The research often focuses on identifying the influence of ideology or

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1. *See* TANYA BAGASHKA & NUNO GAROUPA, *Constitutional Courts in Europe: Quantitative Approaches*, *in* HIGH COURTS IN GLOBAL PERSPECTIVE: EVIDENCE, METHODOLOGIES, AND FINDINGS 128 (Nuno Garoupa, Rebecca D. Gill & Lydia B. Tiede eds., University of Virginia Press 2021).

2. *See generally* BRITTA REHDER, *Judicial Politics in Europe: Constitutional Courts in Comparative Perspective*, *in* ROUTLEDGE HANDBOOK OF EUROPEAN POLITICS (José Magone ed., Routledge 2014).

3. *See* BAGASHKA & GAROUPA, *Constitutional Courts in Europe: Quantitative Approaches*, *supra* note 1.

politics within particular courts or examining the unique characteristics of certain judicial actors.[4] For example, the veto `player role of constitutional courts in Western Europe has been substantiated through various studies.[5]

Questions such as whether the U.S. Supreme Court is more or less "activist" than the German Constitutional Court, or whether the Italian or Portuguese Constitutional Courts are the most "activist" within the European Union, remain largely open.

To address these questions, rigorous data collection and the development of appropriate comparative metrics are essential. Such efforts would enable empirical research to provide meaningful answers to these enduring inquiries. However, the challenge extends beyond merely collecting data or synthesizing existing empirical analyses. Even with ample data, we may still be unable to provide answers due to conceptual ambiguities and measurement limitations. The term "judicial activism," though widely used, is inherently nebulous and lacks a universally accepted definition.[6] This lack of clarity complicates efforts to measure and compare judicial behavior across different courts and legal systems, even though high-quality data is available by now. The varying interpretations of what constitutes judicial activism, coupled with the subjective nature of its assessment, make it difficult to establish consistent and reliable metrics. As a result, any analysis of judicial activism risks being influenced by the specific conceptual frameworks and methodological choices employed by researchers.

First introduced by Arthur Schlesinger in a 1940s magazine article,[7] the phrase "judicial activism" has since been employed to convey a wide range of meanings. Legal scholars, commentators, lawyers, politicians, and judges have all used the term in various contexts, often with differing interpretations.

While legal scholarship has elevated the discussion of "judicial activism," adding layers of complexity, general commentators often

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4. *Id.*

5. *See, e.g.,* Sylvain Brouard, *The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition*, 32 W. EUR. POL. 384 (2009); Sylvain Brouard & Christophe Hönnige, *Constitutional Courts as Veto Players: Lessons from the United States, France and Germany*, 56 EUR. J. OF POL. RESEARCH 529 (2017).

6. *See* THEUNIS ROBERT ROUX, *Judicial Activism in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan M. Smits, Jaako Husa, Catherine Valcke, & Madalena Narciso eds., Edward Elgar 2023).

7. *See* Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CAL. L. REV. 1445-50 (2004); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1958 (2009). Arthur Schlesinger, a liberal public intellectual, used the expression in a Fortune article in January 1947. However, both Kmiec and Green find pre-Schlesinger concerns about "activism" under different forms. Controversial judicial behavior, of course, has existed in many cases before the 1940s including *Marbury* (on judicial review), *McCulloch* (on congressional authority), or *Dred Scott* (striking down the Missouri Compromise).

use the term loosely, typically to criticize court decisions they find unfavorable. Despite its imprecision, "judicial activism" generally carries a negative connotation, frequently associated with the idea that courts are overstepping their bounds—essentially, judges behaving in ways that they should not, as noted by a legal scholar.[8]

Recently, the concept of "comparative judicial activism" has emerged in the academic literature as a tool for analyzing judicial decision-making across different countries.[9] This approach seeks to develop methodologies for comparing how courts in various jurisdictions exercise their powers and engage in activism. By examining patterns and trends in judicial behavior on a global scale, scholars aim to gain insights into the broader implications of judicial activism. These comparative studies can deepen our understanding of how courts influence political and social outcomes in diverse legal systems. Notwithstanding, the concept of "comparative judicial activism" raises additional critical questions about what it truly means to "compare" judicial behavior across different courts.

Using the case of civil-law Western Europe, I illustrate the conceptual and statistical challenges inherent in the notion of "comparative judicial activism." There are two primary reasons for focusing my analysis on civil-law Western Europe. First, empirical legal studies in common-law countries like the United Kingdom and Ireland are often part of a broader scholarly tradition that includes legal academia in other English-speaking nations such as the United States, Canada, and Australia.[10] This interconnected body of research has developed its own distinct methodologies and focus areas, which differ significantly from those found in civil-law jurisdictions. Second, my choice reflects my own familiarity with the judiciaries of Western Europe, making this focus both a practical consideration and a reflection of the author's expertise and

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8. *See* Kmiec, *supra* note 7, at 1477.

9. *See* KENNETH M. HOLLAND, JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Springer 1991); LORI HAUSEGGER & RAUL URRIBARRI, JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Peter Lang 2024).

10. *See, e.g.,* Joshua Fischman, *The US Supreme Court and Other Federal Courts*; Lori Hausegger, *Examining the Empirical Study of the Supreme Court of Canada*; Russell Smyth, *Empirical Studies of Judicial Behavior and Decision-Making in Australian and New Zealand Courts*; CHRIS HANRETTY, *Empirical Studies of Judicial Behavior in the United Kingdom*, *all chapters in* HIGH COURTS IN GLOBAL PERSPECTIVE: EVIDENCE, METHODOLOGIES, AND FINDINGS, (Nuno Garoupa, Rebecca D. Gill & Lydia B. Tiede eds., University of Virginia Press 2021*); see also* S. P. Sathe, *Judicial Activism: The India Experience*, 6 WASH. U. J. OF L. & POL'Y 29 (2001); Margit Cohn & Mordechai Kremnitzer, *Judicial Activism: A Multidimensional Model*, 18 CAN. J. OF L. & JURIS. 333-56 (2005); BRICE DICKSON, JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (Oxford University Press 2008); David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, 64 POL. RESEARCH Q. 335 (2010); Sofia Amaral Garcia, Lucia Dalla Pellegrina & Nuno Garoupa, *Consensus and Ideology in Courts: An Application to the Judicial Committee of the Privy Council*, 19 REV. OF L. & ECON.151-84 (2023).

preference. By concentrating on civil-law Western Europe, I can provide a more nuanced and informed analysis that draws on a deep understanding of the specific legal traditions and judicial behaviors in this region.[11]

The article goes as follows. In Part II of the article, I review the current empirical evidence on civil-law Western European courts. On Part III, I focus on conceptual limitations and problems. In Part IV, I address the practical issues confronting "comparative judicial activism." Part V concludes the article.

II. EVIDENCE ON WESTERN EUROPEAN COURTS

European quantitative studies on constitutional and supreme courts can be broadly categorized by their focus and methodological approaches.[12] One primary area of investigation is the exploration of dissent variations to identify potential political alignments and underlying dynamics.[13] This line of inquiry is particularly prevalent in jurisdictions where dissenting opinions are permitted, such as

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11. For an introduction to empirical studies on Central and Eastern Europe judiciaries, I recommend my own chapter BAGASHKA & GAROUPA, *Constitutional Courts in Europe: Quantitative Approaches*, *supra* note 1. Another good source is SONJA GROVER, JUDICIAL ACTIVISM IN AN AGE OF POPULISM (Routledge 2023).

12. *See*, *e.g.,* Pedro C. Magalhães, Jon K. Skiple, Miguel M. Pereira, Sveinung Arnesen, & Henrik L. Bentsen, *Beyond the Myth of Legality? Framing Effects and Public Reactions to High Court Decisions in Europe*, 56 COMPAR. POL. STUD., 1537-66 (2023) (comparing Norway and Portugal in terms of public support to Supreme Court decisions).

13. On a general theory of separate opinions, *see* NUNO GAROUPA & CATARINA SANTOS BOTELHO, *Judicial Dissent in Collegial Courts: Theory and Evidence*, *in* THE OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (William R. Thompson ed., Oxford University Press 2022).

Germany,[14] Spain,[15] Portugal,[16] and Switzerland.[17] These studies consistently reveal that constitutional judges are not entirely insulated from the political environment, with political ideology—

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14. *See*, *e.g.,* GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (Cambridge University Press 2005); Christoph Hönnige*, The Electoral Connection: How the Pivotal Judge affects Oppositional Success at European Constitutional Courts*, 35 W. EUR. POL., 963-84 (2009); Jay N. Krehbiel, *The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court*, 60 AM. J. OF POL. SCI., 990-1005 (2016); Sebastian Jäckle, *Pathways to Karlsruhe: A Sequence Analysis of the Careers of German Federal Constitutional Court Judges*, 25 GER. POL. 25-53 (2016); Thomas Gschwend, Sebastian Sternberg and Steffen Zittlau, *Are Judges Political Animals after All? Quasi-Experimental Evidence from the German Constitutional Court* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738512; Caroline E. Wittig, *The Occurrence of Separate Opinions at the Federal Constitutional Court. An Analysis with a Novel Database*, BERLIN: LOGOS VERLAG (2016); Hanjo Hamann, *The German Federal Courts Dataset 1950–2018: From Paper Archives to Linked Open Data*, 16 J. OF EMPIRICAL LEGAL STUD. 671–88 (2019); Werner Reutter, *Subnational constitutional courts and judicialization in Germany*, 20 EUR. POL. SCI. 648–65 (2021); BENJAMIN G. ENGST, THE TWO FACES OF JUDICIAL POWER: DYNAMICS OF JUDICIAL-POLITICAL BARGAINING (Palgrave McMillan 2021); Tilko Swalve, *Does group familiarity improve deliberations in judicial teams? Evidence from the German Federal Court of Justice,* 19 J. OF EMPIRICAL LEGAL STUD. 223-49 (2022); Christoph Engel, *Lucky you: Your case is heard by a seasoned panel; panel effects in the German constitutional court*, 19 J. OF EMPIRICAL LEGAL STUD.1179–221 (2022); Christoph Engel, *The German Constitutional Court – activist, but not partisan?*, BONN: MAX PLANCK INSTITUTE FOR RESEARCH ON COLLECTIVE GOODS, DISCUSSION PAPER (2024).

15. *See*, *e.g.,* Nuno Garoupa, Marian Gili Saldaña & Fernando Gómez-Pomar, *Political Influence and Career Judiciary: An Empirical Analysis of Administrative Review by the Spanish Supreme Court*, 9 J. OF EMPIRICAL LEGAL STUD. 795-826 (2012); Nuno Garoupa, Fernando Gómez-Pomar & Veronica Grembi, *Judging Politically: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*, 29 J. OF L., ECON. & ORG. 513-534 (2013); Lucia Dalla Pellegrina, Nuno Garoupa & Fernando Gómez-Pomar, *Estimating Judicial Ideal Points in the Spanish Supreme Court: The Case of Administrative Review*, 52 INT'L. REV. OF L. & ECON. 16-28 (2017); Lucia Dalla Pellegrina, Nuno Garoupa & Marian Gili Saldaña, *Estimating Judicial Ideal Points in Bidimensional Courts: Evidence from Catalonia*, 17 J. OF EMPIRICAL LEGAL STUD.383-415 (2020); Nuno Garoupa, Marian Gili Saldaña & Fernando Gómez-Pomar, *Mixed Judicial Selection and Constitutional Review: Evidence from Spain*, 17 EUR. CONST. L. REV. 287-313 (2021); Nuno Garoupa, Marian Gili Saldaña and Fernando Gómez-Pomar, *Loyalty to the Party or Loyalty to the Party Leader: Evidence from the Spanish Constitutional Court*, 67 INT'L. REV. OF L. & ECON.(2021); Nuno Garoupa, Laura Salamero-Teixidó & Adrian Segura, *Disagreeing in Private or Dissenting in Public: An Empirical Exploration of Possible Motivations,* 53 EUR. J. OF L. & ECON. 147-73 (2022); Nuno Garoupa, Fernando Gómez-Pomar and Adrian Segura, *Ideology and Career Judges: Reviewing Labor Law in the Spanish Supreme Court*, 178 J. OF INST. & THEORETICAL ECON., 170-90 (2022); Nuno Garoupa, Fernando Gómez-Pomar, Adrian Segura & Sheila Canudas, *Punishing Terrorists in the Spanish Supreme Court: Has Ideology Played Any Role?,* 56 EUR. J. OF L. & ECON.1-21 (2023); Julio López-Laborda, Fernando Rodrigo, Eduardo Sanz-Arcega, *No War of Courts in the protection of fundamental rights: The case of amparo appeals in Spain*, 79 INT'L. REV. OF L. & ECON (2024); Jean-Baptiste Harguindéguy, *The Constitutional Court and the judicialization of Spanish politics*, 25 EUR. POL. & SOC'Y 501-17 (2024).

16. *See*, *e.g.,* Sofia Amaral Garcia, Nuno Garoupa & Veronica Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*, 6 J. OF EMPIRICAL LEGAL STUD. 383-404 (2009); Susana Coroado, Nuno Garoupa & Pedro C. Magalhães, *An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2015,* 5 J. OF L. & COURTS 289-311 (2017).

17. *See* Micol Ferrario, *Switzerland: A Migration of Constitutional Ideas? An Empirical Study of the Use of Foreign Precedents by the Swiss Federal Tribunal*, *in* JUDICIAL BRICOLAGE; THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES IN THE 21ST CENTURY (Tania Groppi, Marie-Claire Ponthoreau, & Irene Spigno eds., Bloomsbury 2024).

often measured by variables like the appointing authority or other contextual political factors—playing a significant role in judicial decision-making. However, the extent to which politics influences judicial behavior varies across different jurisdictions, thus requiring a nuanced understanding of each country's specific legal and political context.

In contrast, in countries where dissenting opinions are not allowed (or not made public), such as France,[18] Italy,[19] Belgium,[20] and Austria,[21] the focus shifts to analyzing *per curiam* decisions. Since individual judicial behavior in these systems is less directly observable, empirical studies often examine the composition of judicial panels to uncover relevant political dimensions. Recent advancements in methodology have significantly enhanced the ability to study these countries' courts, allowing for more precise assessments of how panel composition may reflect broader political trends.

While comparative studies in this field remain limited, those that do exist tend to either draw on geographical or cultural proximities—such as comparisons between Spain and Portugal—or

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18. *See, e.g.,* Raphaël Franck, *Judicial Independence under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959-2006*, 25 J. OF L., ECON. & ORG. 262-284 (2009); Raphaël Franck, *Judicial Independence and the Validity of Controverted Elections*, 12 AM. L. & ECON. REV.394-422 (2010); Romain Espinosa, *Constitutional Judicial Behavior: Exploring the Determinants of the Decisions of the French Constitutional Council*, 13 REV. OF L. AND ECON. 13 (2017), https://doi.org/10.1515/rle-2015-0034; Raphaël Franck, *Judicial Impartiality in Politically Charged Cases*, 29 CONST. POL. ECON. 193-229 (2018).

19. *See*, *e.g.,* MARY L. VOLCANSEK, CONSTITUTIONAL POLITICS IN ITALY (Palgrave Macmillan Press 2000); Mary L. Volcansek, *Constitutional Courts as Veto Players: Divorce and Decrees in Italy*, 39 EUR. J. OF POL. RESEARCH 347-72 (2001); Albert Breton & Angela Fraschini, *The Independence of the Italian Constitutional Court*, 14 CONST. POL. ECON. 319-33 (2003); Michele Santoni & Francesco Zucchini, *Legislative Output and the Constitutional Court in Italy*, 17 CONST. POL. ECON. 165-87 (2003); Michele Antoni & Francesco Zucchini. *Does Policy Stability Increase the Constitutional Court's Independence? The Case of Italy During the First Republic (1956–1992)*, 120 PUBLIC CHOICE 401–439 (2004); Nadia Fiorino, Fabio Padovano & Grazia Sgarra, *The Determinants of Judicial Independence: Evidence from the Italian Constitutional Court (1956-2002)*, 163 J. OF INST. & THEORETICAL ECON. 683-705 (2007); Fabio Padovano, *The Time-Varying Independence of Italian Peak Judicial Institutions*, 20 CONST. POL. ECON. 230-50 (2009); Nadia Fiorino, Nicolas Gavoille & Fabio Padovano, *Rewarding Judicial Independence: Evidence from the Italian Constitutional Court*, 43 INT'L. REV. OF L. & ECON. 56-66 (2015); Nuno Garoupa & Veronica Grembi, *Judicial Review and Political Partisanship: Moving from Consensual to Majoritarian Democracy*, 43 INT'L. REV. OF L. & ECON. 32-45 (2015); Luigi Rullo, *The Road to Palazzo della Consulta: Profiles and Careers of Italian Constitutional Judges*, 17 ITALIAN POL. SCI., (2022), https://www.italianpoliticalscience.com/index.php/ips/article/view/200.

20. *See* Lucia Dalla Pellegrina, Jef De Mot, Michael Faure & Nuno Garoupa, *Litigating Federalism: An Empirical Analysis of the Belgian Constitutional Court Decisions*, 13 EUR. J. OF CONST. L. 305-46 (2017); Josephine De Jaegere, *The Deliberative Performance of the Belgian Constitutional Court in a Consociational System: An Empirical Analysis*, PHD DISSERTATION, U. OF ANTWERP (2017).

21. *See* Sarah Jasmin König & Tilko Swalve, *Do Populist Parties in Government Produce Unconstitutional Policies? Evidence from Austria, 1980-2021*, 62 EUR. J. OF POL. RESEARCH 806-29 (2023).

on the availability of specific data, such as dissenting opinions or the identity of petitioners.[22] These studies underscore how procedural or contextual differences can explain particular judicial behaviors, though they often face criticism regarding the quality of their data, particularly the reliance on salient cases or semi-comparable decisions, which raises concerns about the robustness of statistical sampling and the generalizability of their findings.[23] As an illustration, one significant set of studies has revealed both similarities and differences among key Scandinavian courts, including Norway[24] and Denmark.[25] These findings highlight the unique judicial practices within each court while also underscoring shared legal principles across the region.

One recurring theme in this literature is the constitutional litigation of federalism, particularly in countries like Italy,[26]

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22. *See*, *e.g.,* Chris Hanretty, *Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals*, 51 EUR. J. OF POL. RESEARCH 671-92 (2012); Lucia Dalla Pellegrina, Nuno Garoupa & Peter Grajzl, *Judges, Out-Of-Court Rewards, and In-Court Behavior: Evidence from an Italian Legal Reform*, 1 EUR. J. OF EMPIRICAL LEGAL STUD. 105-28 (2024).

23. For example, on a more comparative perspective, *see* Michael Hein & Stefan Ewert, *How do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts? A Comparative Study of Germany, Bulgaria, and Portugal*, 9 EUR. J. OF LEGAL STUD. 62-102 (2016).

24. *See*, *e.g.,* Jorn Oyrehagen Sunde, *Dissenting Votes in the Norwegian Supreme Court, 1965-2009: A Legal Culture Analysis*, 1 RECHTSKULTUR 59-73 (2011); GUNNAR GRENDSTAD, WILLIAM R. SHAFFER & ERIC N. WALTENBURG, POLICY MAKING IN AN INDEPENDENT JUDICIARY: THE NORWEGIAN SUPREME COURT *(*ECPR PRESS 2015); Jon K. Skiple, Gunnar Grendstad, William R. Shaffer, & Eric N. Waltenburg, *Supreme Court Justices' Economic Behavior: A Multilevel Model Analysis*, 39 SCANDINAVIAN POL. STUD. 73-94 (2015); William R. Shaffer, Gunnar Grendstad & Eric N. Waltenburg, *Is Diversity Just for Show? Diversity and Appointment to the Norwegian Supreme Court, 1945-2011*, 38 RETFAERD 18-42 (2015); Henrik L. Bentsen, *Court Leadership, Agenda Transformation, and Judicial Dissent: A European Case of a "Mysterious Demise of Consensual Norms"*, 6 J. OF L. & COURTS 189-213 (2018); Jon K. Skiple, Henrik L. Bentsen, & Chris Hanretty, *The Government Deference Dimension of Judicial Decision Making: Evidence from the Supreme Court of Norway*, 43 SCANDINAVIAN POL. STUD. 264-85 (2020); Nie, M., Grendstad, G., Shaffer, W. R., & Waltenburg, E. N., *The Impact of Female Leadership in Collegial Courts on Time to Render Merits Decisions: Evidence from the Norwegian Supreme Court,* 43 JUST. SYS. J. 353–72 (2022); Henrik L. Bentsen, *Dissent, Legitimacy, and Public Support for Court Decisions: Evidence from a Survey-Based Experiment*, 53 L. & SOC'Y REV. 588-610 (2024).

25. *See* Henrik L. Bentsen, Mark J. McKenzie, & Jon K. Skiple, *Explaining Dissent Rates on a Consensual Danish Supreme Court*, OPEN POL. (2021), https://open.oregonstate.education/open-judicial-politics/chapter/explaining-dissent-rates/; Jon K. Skiple , Henrik L. Bentsen & Mark J. McKenzie, *How Docket Control Shapes Judicial Behavior: A Comparative Analysis of the Norwegian and Danish Supreme Courts*, 9 J. OF L. & COURTS 111-16 (2022).

26. *See* Lucia Dalla Pellegrina & Nuno Garoupa, *Choosing between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions*, 52 EUR. J. OF POL. RESEARCH 431-80 (2013).

Spain,[27] and Belgium.[28] These studies often highlight the significant politicization of constitutional review, especially when disputes arise over the allocation of powers between central governments and regional entities. The patterns of politicization identified in these cases vary considerably across different countries and over time, sometimes challenging established theoretical hypotheses. For example, while one might expect consistent behavior aligned with theories such as those proposed by Martin Shapiro,[29] the empirical findings often reveal a more complex and sometimes contradictory reality. Constitutional courts do not side with central governments as frequently as hypothesized by Martin Shapiro.[30]

Another specific line of research is inquiring the role of foreign judges in constitutional adjudication as made possible by the case of Andorra.[31] The conclusion seems to be that there is limited empirical evidence to support the optimistic view that foreign judges play a significant role in explaining court outcomes.

The empirical literature on Western European constitutional and supreme courts has primarily been published in political science journals or law and economics outlets, reflecting the interdisciplinary nature of the field.[32] Initially, these works developed in isolation, with scholars from different disciplines rarely citing each other's research. This lack of cross-disciplinary engagement created a fragmented body of literature, where political science and law studies progressed independently, often without acknowledging each other's findings. However, in the last decade, there has been a noticeable shift towards more frequent cross-discipline citation.[33] A dialogue between the disciplines is beginning to take shape, signaling a move towards greater integration and mutual recognition of research efforts. Although the dialogue is still in its early stages and has not yet led to fully productive

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27. *See* Julio López-Laborda, Fernando Rodrigo & Eduardo Sanz-Arcega, *Is the Spanish Constitutional Court an Instrument of the Central Government against the Autonomous Communities?*, 29 CONST. POL. ECON. 317-337 (2018).

28. *See* Patricia Popelier & Samantha Bielen, *How Courts Decide Federalism: The Revaluation of Legal Merit in the Jurisprudence of the Belgian Constitutional Court*, 49 PUBLIUS: THE J. OF FEDERALISM 587-616 (2019).

29. *See* Martin Shapiro, *Judicial review in developed democracies*, 10 DEMOCRATIZATION 7–26 (2003). *See also* earlier work by Martin Shapiro & Alec Stone Sweet, *The New Constitutional Politics of Europe*, 26 COMPAR. POL. STUD. 397-420 (1994).

30. *Id.*

31. *See* Nuno Garoupa, *Does Being a Foreigner Shape Judicial Behavior? Evidence from the Constitutional Court of Andorra, 1993-2016*, 14 J. OF INST. ECON. 181-95 (2018).

32. *See* BAGASHKA & GAROUPA, *Constitutional Courts in Europe: Quantitative Approaches*, *supra* note 1; *see also* Dyevre, Arthur, Wessel Wijtvliet, & Nicolas Lampach, *The Future of European Legal Scholarship: Empirical Jurisprudence*, 26 MAASTRICHT J. OF EUR. & COMPAR. L. 348–71 (2019).

33. *Id.*

communication between these disciplines, the trend is promising and marks a positive development in the field.[34]

Despite these advances, there remain significant gaps in the empirical literature on constitutional courts across several European countries. Notably, there are no comprehensive English-language empirical studies for countries such as Finland, Iceland, Greece, Luxembourg, or the Netherlands. The absence of studies in these countries presents a significant gap in the overall understanding of constitutional review in Western Europe. While it is possible that empirical research exists in the native languages of these countries, the broader empirical picture of constitutional review is heavily influenced by a few, more frequently studied European nations such as Germany, Italy, and Spain.[35] This concentration on certain countries has shaped the overall understanding of constitutional review in the region, limiting the generalizability of findings and potentially overlooking important dynamics in less-studied jurisdictions.

Furthermore, most quantitative studies are based on individual and country-specific datasets collected by the authors. Therefore, a few problems arise. Immediately, replication is not easy. Also, comparability is almost impossible. Unfortunately, the European judicial authorities have made little effort to promote data analysis.[36]

As we have recognized, most earlier studies, in the 1990s and initial 2000s, were largely "empirical analysis of dissents" or identification of determinants of *per curiam* rulings. Later, two areas expanded in the literature – estimation of judicial ideal points (reflecting recent empirical techniques that acknowledge the empirical value of separate opinions in light of Martin-Quinn scores[37] and Fischman's estimation of dissent suppression[38]) and

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34. *See* broad discussion by Lydia Tiede, *The Role of Political Science in Comparative Law*, 69 AM. J. OF COMPAR. L. 720-47 (2021).

35. *See* BAGASHKA & GAROUPA, *Constitutional Courts in Europe: Quantitative Approaches*, *supra* note 1.

36. The only consistent effort is CEPEJ, mostly on nonconstitutional matters, and with significant methodological drawbacks. CEPEJ, https://www.coe.int/en/web/cepej/home/.

37. *See* Andrew D. Martin and Kevin M. Quinn, K.M., *Dynamic ideal point estimation via Markov chain Monte Carlo for the US Supreme Court, 1953–1999.* 10 POL. ANALYSIS 134-53 (2002). For recent applications to courts outsider of the United States, *see* Damares Medina, Lucia Dalla Pellegrina & Nuno Garoupa, *Unfolding Judicial Ideology: A Data-Generating Priors Approach with an Application to the Brazilian Supreme Court*, 18 REV. OF L. & ECON. 1-54 (2022); Garcia, Pellegrina & Garoupa, *Consensus and Ideology in Courts: An Application to the Judicial Committee of the Privy Council*, *supra* note 10, at 151-84.

38. Joshua B. Fischman, , *Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels*, WORKING PAPER (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912299; Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J. OF L. AND ECON. 781-809 (2011); Joshua B. Fischman, *Interpreting Circuit Court Voting Patterns: A Social Interactions Framework*, 31 J. OF L., ECON. & ORG. 808-42 (2013).

measurement of how potentially different procedural questions impact outcomes.[39] Broadly speaking, with few exceptions, we do not have a good understanding of how to compare constitutional courts empirically in Europe. There are a few small n studies in relation to specific or localized questions.[40] However, more comprehensive empirical work addressing the prevailing ideas based on comparative constitutional law is yet to be expanded.[41]

Summing-up, these different empirical approaches suggest that while there is a growing body of research, the field still holds much potential for further exploration, particularly in developing a more cohesive and comparative understanding of constitutional and supreme courts across Western Europe.

III. CONCEPTUAL CHALLENGES[42]

A. Understanding Judicial Activism

Schlesinger originally used the term "judicial activism" to describe Justices Black, Douglas, Murphy, and Rutledge, contrasting them with Justices Frankfurter, Jackson, and Burton, whom he labeled as "champions of self-restraint."[43] While Schlesinger praised the more activist wing of the Court, he cautioned that excessive judicial activism could undermine the democratic functions of other branches of government. He therefore advocated for "judicial activism" to be confined to cases involving civil liberties.[44] Although Schlesinger's article leaves room for debate on whether "judicial activism" constitutes a misuse of judicial authority, later reinterpretations have increasingly

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39. Consider, for example, Benjamin Bricker, *Breaking the Principle of Secrecy: An Examination of Judicial Dissent in the European Constitutional Courts*, 39 L. & POL'Y 170-91 (2017).

40. *See, e.g.,* Benjamin Bricker & Jakub Wondreys, *Public Opinion and Opposition Party Success: Evidence from the European Constitutional Courts*, JUST. SYS. J. (2018).

41. *See e.g.,* Nuno Garoupa & Catarina Santos Botelho, *Measuring Procedural and Substantial Amendment Rules: An Empirical Exploration*, 22 GER. L. J. 216-37 (2021).

42. Many of the ideas explored in this section rely on my earlier work, Nuno Garoupa, *Comparing Judicial Activism: Can We Say that the US Supreme Court is More Activist than the German Constitutional Court?*, 72 REVISTA PORTUGUESA DE FILOSOFIA 1089-1106 (2016).

43. *See* Kmiec, *supra* note 7, at 1446. The 1946 composition of the Supreme Court discussed by Schlesinger included Fred Vinson (Chief Justice, appointed by President Truman and confirmed in early 1946), Hugo Black (appointed by President Roosevelt in 1937, he was a strong supporter of the New Deal), Felix Frankfurter (appointed by President Roosevelt in 1939, he advocated for judicial restraint), Wiley Rutledge (appointed by President Roosevelt in 1943), William Douglas (appointed by President Roosevelt in 1939), Frank Murphy (appointed by President Roosevelt in 1940), Stanley Reed (appointed by President Roosevelt in 1938, after serving as Solicitor General), Harold Burton (although appointed by President Truman in 1945, he was a Republican) and Robert Jackson (appointed by President Roosevelt in 1941).

44. *Id.* at 1449.

emphasized its negative connotation.[45] The use of the term in judicial opinions has further complicated its meaning, contributing to both conceptual ambiguity and criticism of certain judicial behaviors.[46]

"Judicial activism" has increasingly permeated political discourse as courts have gained greater relevance. Politicians often accuse the judiciary of activism when court rulings go against their interests or beliefs.[47] While the term was initially associated primarily with liberal judges, in recent decades it has also been applied to conservative judges, presumably as a consequence of both sides flipping positions on the merits of deferent judicial review.[48] There appears to be a consensus across political parties that "activism" is undesirable, as it is seen to undermine democratic institutions by allowing unelected and unaccountable courts to wield excessive influence.[49]

Despite the apparent consensus that "activism" is a negative attribute of judicial behavior, the meaning of "judicial activism" as presupposed by most commentators remains ambiguous. The term is often used to characterize judicial behavior in courts with powers of constitutional review, yet its application raises questions about its appropriateness. "Judicial activism" may be less a precise descriptor of judicial conduct and more a form of critique employed by groups dissatisfied with the outcomes of constitutional review. This suggests that the term often reflects subjective discontent rather than an objective analysis of judicial behavior.

The meaning of "judicial activism" began attracting the attention of legal scholars as early as the 1950s.[50] However, until recently, the discussion has been hampered by the lack of a systematic framework capable of providing a comprehensive approach. Some legal academics have oversimplified the concept, equating "judicial activism" with the act of striking down constitutional legislation.[51] This understanding is problematic, as it

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45. *Id.* at 1451.

46. *Id.* at 1456; *see also* Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007); Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010).

47. *See* discussion by Robert Justin Lipkin, *We are All Judicial Activists Now*, 77 U. OF CIN. L. REV. 181 (2008).

48. *See* considerations by Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. OF COLO. L. REV. 1139 (2002); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. OF COLO. L. REV. 1401 (2002); Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEXAS L. REV. 215 (2019).

49. *See* Lipkin, *supra* note 47, at 182-83.

50. See Kmiec, *supra* note 7, at 1452.

51. *Id.* at 1463; Green, *supra* note 7, at 1219. Both authors recognize the obvious limitations of this approach. *See also* Frank B. Cross & Stefanie A. Lindquist, *The Scientific*

relies on an objective assertion of what is constitutional, which, in turn, depends on contentious notions about the nature of constitutional review.[52]

Constitutional review is inherently subject to debate, as interpretation itself is a matter of intrinsic disagreement. Without such debate, the need for constitutional review would be minimal or easily satisfied. Naturally, "judicial activism" can be merely part of this reasonable disagreement.[53] Furthermore, labeling courts as "activist" when they engage in contested interpretations risks creating a tautology. Constitutional review exists precisely because of the inherent imprecision and openness of legal texts.[54] If we consider courts "activist" simply for making judgments that address these imprecisions in a non-consensual manner, then "judicial activism" becomes inevitable—and it cannot merely be synonymous with judicial review.[55]

Another interpretation of "judicial activism" is to view it as a serious judicial error. [56] However, not all errors necessarily qualify as activism, as they may result from other determinants rather than intentional overreach. Moreover, identifying an error presupposes a consensus about the correct judgment, which is rarely present in the context of constitutional review. Indeed, the primary function of constitutional review is to invalidate unconstitutional legislation, and it would be misguided to label this fundamental process as "activism."[57]

Yet another possible interpretation of "judicial activism" is the deviation from the culturally accepted role of the courts or established methods of statutory interpretation.[58] However, this understanding also relies on a presumed consensus about how courts should address textual vagueness and indeterminacy.[59] If we consider that ongoing debates over proper constitutional interpretation define the culturally accepted role of the courts, then very few, if any, decisions would qualify as "activist." Without a

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Study of Judicial Activism, 91 MINN. L. REV. 1171 (2007). These authors also recognize the problem (discussing invalidation of federal laws versus invalidation of state laws).

52. Kmiec, *supra* note 7, at 1463.

53. Lipkin, *supra* note 47, at 185.

54. *Id.* at 189-190, relates "judicial activism" to the rise of judicial supremacy. If the "final word in resolving constitutional conflicts" was not a prerogative of the courts, it is highly likely that "judicial activism" would be a moot issue.

55. *Id.* at 191, concludes that "in a constitutional regime without judicial supremacy, judicial activism's bite is considerably less severe." Presumably we should think of the UK (where parliamentary sovereignty prevails) or the PRC.

56. See considerations by Green, *An Intellectual History of Judicial Activism*, *supra* note 7, at 1217.

57. *Id.* at 1219.

58. *Id.* at 1221; Roberts, *supra* note 46, at 570, observes that there is a significant division in the US legal academia and courts on the appropriate role of the judiciary.

59. *See* Green, *supra* note 7, at 1231-33.

more precise definition of what constitutes the accepted role of the courts, the concept of "judicial activism" risks becoming meaningless.

The Colby-Solum paradigm offers a stimulating and promising approach to understanding judicial activism.[60] It distinguishes between two key concepts—constraint and restraint—that help clarify the often ambiguous term "judicial activism." Courts are constrained by the law, particularly by the communicative content of legal texts, which imposes limits on judicial interpretation. Simultaneously, judges may exercise restraint by deferring to democratic institutions, especially legislatures. This deference to other political bodies or external actors is not a constraint but a form of restraint.

The definitional challenge lies in the fact that "judicial activism" is often used in opposition to both constraint and restraint, leading to intrinsic ambiguity when analyzing judicial behavior. However, by distinguishing "judicial activism" as the opposite of constraint and restraint separately, we can achieve distinct and clarified meanings.

Within the Colby-Solum paradigm, "judicial activism" can be identified in various ways with specific content, making it easier to measure and compare. However, easier measurement and comparability do not equate to unproblematic measurement and unambiguous comparability, as we shall explore further.

B. Lack of Deference

The opposite of the Colby-Solum concept of restraint is a lack of deference to democratic institutions. In this context, "judicial activism" is understood as the judicial act of overturning democratically enacted laws. This activism is heightened when courts strike down legislation that has garnered bipartisan approval, as such laws presumably reflect broad societal consensus. Restraint, on the other hand, implies that judges exercise deference to the legislature, even when they personally disagree with the content of the legislation. This deference is rooted in the recognition of the legislature's role as the primary representative of the people's will. Under the principle of restraint, courts intervene only when absolutely necessary, correcting legislation only in cases where it clearly conflicts with constitutional principles or fundamental

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60. *See* Tom Colby, *The Sacrifice of the New Originalism*, 99 GEORGETOWN L. J. 714 (2011); Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

rights.[61] This nuanced understanding of restraint emphasizes judicial humility and a respect for the separation of powers, acknowledging that the judiciary should not usurp the role of elected representatives except in the most compelling circumstances. In contrast, judicial activism, particularly in its more aggressive forms, can be seen as a challenge to the legitimacy of legislative decisions and, by extension, to the democratic process itself.

The main challenge posed by this approach is the risk that courts may exhibit deference to the legislature even when the legislation in question is unconstitutional. This undermines the fundamental purpose of constitutional review, which is to cleanse the legal system of unconstitutional laws. This scenario can be described as "judicial denialism."[62] In an extreme case, judges might consistently defer to the legislature, operating under the belief that only the legislature has the authority to create or amend laws. In such a scenario, courts would refrain from correcting unconstitutional legislation, effectively prioritizing the legitimacy of democratic processes over the essential function of judicial review.[63] This dynamic illustrates how the Colby-Solum paradigm introduces four distinct and possible outcomes, as outlined in Table 1.

Table 1: Outcomes under the Colby-Solum Paradigm

	Legislation is constitutional	Legislation is not constitutional
Court accepts legislation	Deference	Denialism
Court overturns legislation	Activism	Deference (since correcting legislation when is absolutely necessary)

61. *See* different positions on this matter by Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012); *see also* Lee Epstein & William Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CAL. L. REV. 557 (2012); Aziz Z. Huq, *When was Judicial Self-Restraint?*, 100 CAL. L. REV. 579 (2012); *see* Also Lipkin, *supra* note 47, at 194, "judges should defer to the elected branches except when the elected branches act unconstitutionally."

62. *See generally* Solum, *supra* note 60; Ethan J. Ranis, *Loose Constraints: The Bare Minimum for Solum's Originalism,* 93 TEXAS L. REV. 765 (2014).

63. As Lipkin, *supra* note 47, at 196, raises the question of whether it is possible for judges to interpret and apply the law without effectively making it. If we accept the premise that interpretation inherently involves lawmaking and that judges should refrain from such activities, the logical conclusion is that courts should always defer to the legislature.

The Colby-Solum concept of restraint illustrates two interrelated phenomena: "judicial activism" and "judicial denialism." Judicial activism occurs when courts overturn legislation that is, in fact, constitutional, driven by a lack of deference to democratic institutions. In contrast, judicial denialism happens when courts fail to overturn unconstitutional legislation due to excessive deference, thereby neglecting their fundamental role of expunging unconstitutional laws from the legal system.[64]

Under the presumption that legislation is constitutional, the meaning of "judicial activism" becomes clear. For instance, as previously noted, when courts strike down legislation enacted by a large majority, this action can be identified as judicial activism. The presumption of constitutionality also mitigates the problem of judicial denialism. If it is assumed that the legislature generally does not enact unconstitutional laws—perhaps under a principle of absolute parliamentary sovereignty—the risk of deference to unconstitutional legislation is effectively neutralized.

The Colby-Solum paradigm offers a straightforward approach to measuring and comparing judicial activism: by observing the number of laws struck down by a court.[65] The higher the number, the more activist the court appears. However, this assessment must account for various contextual factors. For example, suppose Court A requires only a simple majority to strike down a law, while Court B demands a qualified majority. Even if both courts are equally activist, Court A would likely overturn more laws due to the lower threshold for action. Similarly, if Court A allows only a few political bodies to file petitions, while Court B permits a much larger group of potential petitioners, Court A might strike down fewer laws, not because it is less activist, but because the cases brought before it are more egregious in their unconstitutionality.

However, this interpretation hinges critically on the presumption of legislation's constitutionality. If this presumption fails, comparing the frequency of overturned laws becomes misleading, as it conflates judicial activism with judicial deference. The rate at which unconstitutional legislation is produced varies across jurisdictions—due in part to the significant differences in constitutional law content. Consequently, we risk misclassifying a

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64. *Id.* at 212-213, goes as far as saying "upholding an unconstitutional law is no less activist than striking down one that is constitutional", and later "constitutional history supports the claim that maintaining the status quo, through judicial restraints can just be as activist as striking down legislation."

65. *See also* Carey Rayburn Young, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1 (2011); TOM KECK, JUDICIAL POLITICS IN POLARIZED TIMES (Chicago University Press 2014).

deferential court as more activist than a genuinely activist court, leading to inaccurate conclusions about judicial behavior.

C. Policy Preferences Prevail

When we shift to the Colby-Solum paradigm, a new understanding of "judicial activism" comes into focus. Under this framework, judicial activism is defined as actions by the courts that go against the commands of legal texts. Specifically, it occurs when courts overstep their bounds by taking on the legislative role—such as creating laws that should be made by the legislature, misusing judicial authority, or violating constitutional law[66]—or when they base constitutional interpretations on policy outcomes rather than legal principles. Essentially, judicial activism under this paradigm is marked by decisions that are not only influenced by criteria beyond the law but also by criteria that violate the foundational principles of the legal system.

According to the Colby-Solum paradigm, judicial decision-making that adheres strictly to legal principles, without regard to the policy consequences of a decision, is considered appropriate and within the bounds of judicial responsibility. Conversely, when judges base their decisions solely on policy implications or use their position to advance personal agendas, this is viewed as judicial activism and a violation of the Colby-Solum paradigm. In such cases, the courts are seen as deciding cases incorrectly, as their decisions are not grounded in legal reasoning but in external considerations that conflict with the law's general principles.[67]

However, both of these definitions of judicial activism are not without their challenges.[68] Conceptually, they can be difficult to apply consistently. Moreover, measuring whether a court's decision truly violates the Colby-Solum paradigm can be complex. The subjective nature of what constitutes an appropriate legal interpretation versus an activist one means that even within this framework, there are gray areas and potential for disagreement.

The usurpation of the legislative function by the courts can sometimes be an inevitable consequence of constitutional law, particularly when legislative action is incomplete or ambiguous, requiring the judiciary to step in and effectively create law.[69] Similarly, when courts identify new rights or limit the power of

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66. *See* Colby, *supra* note 60, at 714; Solum, *supra* note 60, at 455.

67. *See* discussion by Lipkin, *supra* note 47, at 204.

68. *See* further discussion by Benjamin Woodson, *Politicization and the Two Modes of Evaluating Judicial Decisions*, 3 J. OF L. & COURTS 193 (2015).

69. For example, consider the Miranda rights. *See* discussion by Colby, *supra* note 60; Solum, *supra* note 60; Ranis, *supra* note 62.

political branches to interfere with individual freedoms, these actions might stem from constitutional interpretations that are grounded in policy considerations but are nonetheless supported by the constitution itself.[70] In both cases, distinguishing between "judicial activism" and the court's role in appropriately reinterpreting or amending constraints becomes highly subjective.

D. Measuring Activism

The Colby-Solum paradigm does not provide a straightforward measure of "judicial activism" because it necessitates an objective understanding of legal constraints.[71] As discussed earlier, a significant level of subjectivity is involved in determining whether a court's decision aligns with the law or strays into the realm of policy preference. To assess whether judicial decisions adhere to the Colby-Solum paradigm, one would need to establish a "correct" interpretation of the law, which is often contested and varies depending on one's legal perspective.

Without a clear and universally accepted "correct" interpretation of the law, it becomes challenging to directly measure judicial activism under the Colby-Solum paradigm. The subjective nature of legal interpretation means that what one observer views as judicial activism might be seen by another as a legitimate and necessary judicial intervention. This ambiguity complicates the task of assessing whether courts are overstepping their bounds or appropriately fulfilling their constitutional role.

In our view, there are four possible approaches to approximating "judicial activism" under the Colby-Solum paradigm.[72] One method is to measure the frequency with which courts depart from horizontal precedent.[73] The underlying assumption is that a higher rate of departure might indicate judicial activism.[74] However, this approach has significant limitations. An absence of departures from

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70. *Id.*

71. Cross & Lindquist, *supra* note 51, at 1778, suggest the Solicitor General's position as an indirect way to capture legal accuracy concerning constitutional adjudication in the US Supreme Court, or at least providing a baseline for identifying the Colby-Solum paradigm. Still, the authors do identify a set of limitations with such approach.

72. *See* discussion by Keren Weinshall, *Reconceptualizing Judicial Activism: Interventionist versus Involvement in the Israeli Supreme Court*, 1 J. OF L. & EMPIRICAL ANALYSIS, https://doi.org/10.1177/2755323X241272140 (summarizing different ways of measuring judicial activism and providing an application to the case of the Israeli Supreme Court).

73. See Kmiec, *supra* note 7, at 1466; for discussion and Rayburn Young, *supra* note 65, at 18, for methodology.

74. For example, in the context of the European Union, judicial activism could be construed as deviations from horizontal precedents to expand the role of the courts. See discussion by MARK DAWSON, BRUNO DE WITTE, & ELISE MUIR, JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE: CAUSES, RESPONSES AND SOLUTIONS (Edward Elgar 2013).

precedent could lead to the ossification of the law and prevent the correction of erroneous interpretations, meaning that even a non-activist court must occasionally depart from precedent. The challenge is in determining when such departures are justified, as judicial activism might be said to occur when courts deviate from precedent without sufficient grounds for rejecting stare decisis.[75]

This definition, however, introduces another layer of complexity: it requires a consensus on what constitutes "sufficient grounds" for departing from precedent. Without such consensus, measuring departures from horizontal precedent risks overstating instances of judicial activism. The difficulty lies in distinguishing between legitimate legal evolution and activism, as the line between them is often subjective and context-dependent. Thus, while measuring departures from precedent offers one possible metric, it does not provide a definitive or objective standard for identifying judicial activism.

At the same time, there are various ways to undermine a precedent without formally departing from it.[76] Courts may choose to ignore precedent, subtly dishonor it, or distinguish cases in a manner that effectively weakens its authority without an outright rejection.[77] Accounting for these informal methods of departing from horizontal precedent can be a complex task, as they are often nuanced and context-dependent. Additionally, the role of horizontal precedent varies significantly across jurisdictions, influenced by differing legal traditions and cultures. Nonetheless, it can be argued that courts with a higher frequency of both formal and informal departures from precedent are likely to exhibit more activist tendencies.

A second approach to approximating "judicial activism" is to analyze dissent rates within judicial decisions. The rationale here is that a "correct" interpretation of the law, being more straightforward or aligned with legal constraints, is less likely to provoke dissent. Consequently, higher dissent rates could be indicative of judicial activism. However, this method has its challenges. For one, dissent rates might reflect political differences rather than a violation of legal constraints as defined by the Colby-Solum framework.[78] The inherent ambiguity of constitutional law often permits multiple interpretations, which can be influenced by political preferences.[79] Additionally, dissent rates might be driven

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75. *See* Roberts, *supra* note 46, at 578.
76. *See* Cross & Lindquist, *supra* note 51, at 1764.
77. *See* Roberts, *supra* note 46, at 578.
78. *See*, *e.g.,* Hein & Ewert, *supra* note 23, at 62.
79. *See* NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE STUDY (University of Chicago Press 2015).

by factors beyond mere policy disagreements or result-oriented judging.[80] Procedural variations also complicate comparative analysis; for example, in some jurisdictions, dissent may be discouraged or difficult to formally express.[81] Despite these challenges, a strong correlation between dissent and ideological preferences could suggest a more activist judiciary.[82]

A third possibility is to examine how courts expand their jurisdiction through justiciability decisions.[83] Courts that actively broaden their power and influence could be seen as engaging in judicial activism. However, this approach faces the significant challenge of controlling for baseline differences across legal systems. The powers allocated to courts vary widely, meaning that opportunities for judicial expansion are not uniform across jurisdictions. For example, justiciability decisions have likely played a more significant role in European jurisdictions, where judicial influence was historically more constrained, compared to the U.S. Supreme Court, which has long held substantial authority. Nonetheless, tracking how courts extend their reach through justiciability can provide valuable insights into the degree of judicial activism present in a given legal system.

Finally, a fourth possible empirical approach is to consider different ad-hoc indicators to provide a comprehensive multidimensional assessment of judicial activism.[84] The immediate objection is the possible degree of subjectivity underlying such indicators, not always based on court outcomes but perceptions of different legal and political actors, for example valuing content of judicial opinions or reliance on specific rhetoric.[85]

IV. COMPARATIVE JUDICIAL ACTIVISM

The term "judicial activism" has been applied beyond the United States, often used to critique the behavior of courts in various

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80. *Id.*

81. *See* Cross & Lindquist, *supra* note 51, at 1766.

82. *Id.* at 1777, suggesting a chi-square test to "determine if the statute's ideological direction relates to the Justices' votes to strike."

83. *See* Rayburn Young, *supra* note 65, at 13. It is accepted that this method seems more appropriate for longitudinal analysis within a jurisdiction than cross-country studies.

84. *See* Margit Cohn & Mordechai Kremnitzer, *Judicial Activism: A Multidimensional Model*, 18 CAN. J. OF L. & JURIS. 333 (2005)

85. *See* empirical implementation by Melanie Murchison, *Making Numbers Count: An Empirical Analysis of "Judicial Activism" in Canada*, 40 MANITOBA L. J. 425 (2017); A different example is Riris Ardhanariswari et al., *Upholding Judicial Independence through the Practice of Judicial Activism in Constitutional Review: A Study by Constitutional Judges*, 6 VOLKSGEIST 183 (2023), https://ejournal.uinsaizu.ac.id/index.php/volksgeist/article/download/9565/3635, on the case of the Indonesian Constitutional Court.

jurisdictions, including the European Union's description of certain Member-State courts.[86] This comparative context introduces a second level of complexity, as it necessitates a definition of "judicial activism" that is comparable across different legal systems. For instance, how can we assert that the U.S. Supreme Court engages in "judicial activism" more frequently than the Spanish Constitutional Court or the Italian Constitutional Court? To answer this, we need a precise and unambiguous definition of "judicial activism," along with a theory of measurement that allows for direct comparison across distinct courts in different countries.[87]

A. General Challenges

The previous section highlighted the challenges of defining, understanding and measuring "judicial activism." Now, we turn our attention to the term "comparative," specifically in the context of "comparative judicial activism." At its core, "comparative judicial activism" refers to the study of judicial activism from a comparative perspective.[88] This term finds its place within the broader disciplines of comparative judicial politics[89] and empirical comparative law[90], both of which offer the appropriate frameworks to facilitate an informed discussion on the subject.[91]

At a more theoretical level, understanding "comparative judicial activism" requires more than just applying concerns from one jurisdiction to another. It demands a conceptual delimitation of constitutional functionalities. This approach involves identifying

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86. *See* the case of Portugal discussed by Coroado, Garoupa, & Magalhães, *Judicial Behavior Under Austerity: An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016*, *supra* note 16.

87. A few scholars such as Lipkin, *supra* note 47, at 221, would argue that such measurement is unfeasible, hence comparative judicial activism cannot be quantified – we cannot say whether or not the US Supreme Court is more activist than the Spanish Constitutional Court. The reason is that "judicial activism" is a function of "normatively-embedded terms of constitutional discourse" which cannot be reduced to a quantifiable measure.

88. Excellent sources are: HOLLAND, *supra* note 9; HAUSEGGER & URRIBARRI, *supra* note 9.

89. *See* LEE EPSTEIN, URŠKA ŠADL, GUNNAR GRENDSTAD, & KEREN WEINSHALL, THE OXFORD HANDBOOK OF COMPARATIVE JUDICIAL BEHAVIOUR (Oxford University Press 2024); *see also* Arthur Dyevre, *Unifying the field of comparative judicial politics: towards a general theory of judicial* behaviour, 2 EUR. POL. SCI. REV. 297–327 (2010); Arthur Dyevre, Arthur Wessel Wijtvliet, & Nicolas Lampach, *The Future of European Legal Scholarship: Empirical Jurisprudence*, 26 MAASTRICHT J. OF EUR. & COMPAR. L. 348–71 (2019).

90. *See generally* Holger Spamann, *Empirical Comparative Law*, 11 ANNUAL REV. OF L. & SOC. SCI. 131 (2015).

91. For a "comparative judicial activism" in the context of American states, *see* Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 (2000); Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61 (2017).

and distinguishing the roles and powers of constitutional courts in various contexts rather than simply transferring concepts wholesale across jurisdictions.[92] Theories of judicial activism must be adapted to consider the unique constitutional arrangements, legal cultures, and historical contexts of the countries under study.

Furthermore, when delving into "comparative judicial activism," it is essential to recognize and explain the theoretical models that underpin such analysis. The process of transplantation—adapting legal concepts and practices from one jurisdiction to another—presents significant challenges. These challenges arise due to differences in legal traditions, political systems, and societal values, which can impact the interpretation and application of judicial activism in different contexts. A theoretical framework that accounts for these challenges is crucial for a meaningful comparison.[93]

Methodologically, "comparative judicial activism" can be explored through various approaches. One approach involves a qualitative comparison of case law and judicial decisions across jurisdictions. This method allows for an in-depth understanding of how judicial activism manifests in different legal systems.[94] In the same vein, small-n quantitative research can be employed to compare a limited number of cases or countries, providing insights into patterns and trends in judicial behavior. These methods are particularly useful for identifying the causal mechanisms that drive similarities and differences in judicial activism across jurisdictions.

In addition to qualitative and small-n quantitative approaches, process tracing offers another valuable method for studying "comparative judicial activism." Process tracing involves a detailed examination of the decision-making processes within courts, focusing on how judicial decisions are shaped by legal, political, and social factors. By identifying causal mechanisms, researchers can explain why certain outcomes occur in specific contexts and how these outcomes compare across different jurisdictions. [95]

However, when engaging with larger empirical projects, "comparative judicial activism" becomes more challenging to analyze. The "comparative" aspect of these studies often encounters

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92. Christoph Hönnige, *Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts*, 10 EUR. POL. SCI. 346–58 (2011).

93. For example, in some countries, legalism is emphasized, in other countries, attitudinalism and strategic behavior are more debated. *See* Zoe Robinson, *Comparative Judicial Attitudinalism: A Preliminary Study of Judicial Choices in Westminster Legal Systems*, 2011 U. CHI. LEGAL F. 209 (2011).

94. *See, e.g.,* FABIAN SCHUSSER, JUDICIAL ACTIVISM IN A COMPARATIVE PERSPECTIVE: THE SUPREME COURT OF INDIA VS. THE BUNDESVERFASSUNGSGERICHT, (Series Vol. 7 1st Edn. 2019).

95. *See* HOLLAND, *supra* note 9; HAUSEGGER & URRIBARRI, *supra* note 9.

difficulties due to contextual determinants that may not be fully accounted for in broader conceptualizations. Larger studies must carefully balance the need for generalizability with the recognition of unique contextual factors that influence judicial activism in different settings. Without this balance, the comparative element risks losing its analytical rigor.

B. Engaging in Empirical Comparative Judicial Activism

Consider the different scenarios presented in Table 2. At first glance, Court A appears to be more "activist" than Court B based on its higher rate of striking down legislation (Table 2A), frequency of imposed policies on the legislative branch (Table 2B), or number of precedents changed in the last decade (Table 2C). However, this initial impression can be misleading. The true nature of judicial activism is more complex, and in reality, Court B may be more activist despite its lower overturn rate, frequency of policy impositions, or number of legal precedents changed. In Table 2A, this discrepancy arises because the sheer number of laws struck down is not a sufficient measure of judicial activism; it fails to account for the quality and context of the legislation being reviewed. The inclination of the legislature to pass unconstitutional laws—an underlying political variable—is a significant factor that complicates the assessment of judicial behavior.

The quantitative problem is that this political inclination is notoriously difficult to control or measure. Legislatures vary widely in their tendency to pass laws that might be deemed unconstitutional, depending on factors such as the political climate, the balance of power, and the legal culture of the jurisdiction.[96] In a system where the legislature frequently enacts unconstitutional laws, even a relatively deferential court may appear activist simply because it must strike down more legislation to maintain constitutional integrity. Conversely, in a system with a highly cautious and constitutionally mindful legislature, a truly activist court might strike down fewer laws because there are fewer unconstitutional laws to challenge. Therefore, without accurately accounting for the political nature of the legislature, comparisons between courts based solely on overturn rates can be misleading and fail to reflect the courts' true levels of activism.

One potential solution to address this issue is to calculate the correlation between the frequency of legislation being struck down

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96. *See e.g.*, Lindquist, *supra* note 91 (ordering states concerning state court invalidation of state statutes).

and the size of the supporting legislative majority. This approach examines the relationship between the invalidation of statutes and the parliamentary majority that enacted them. The underlying assumption is that in a system with minimal judicial activism, the correlation should be significantly negative. In other words, courts should be more likely to strike down laws that lack broad legislative support, reflecting a cautious approach where judicial intervention occurs primarily in response to legislation with narrower bases of political legitimacy.

Conversely, a more positive correlation would suggest a higher likelihood of judicial activism, indicating that courts are willing to overturn even those statutes that enjoy broad bipartisan or supermajority support. This method offers a more nuanced measure of judicial behavior by accounting for the political context within which legislation is enacted. While we cannot entirely eliminate the influence of institutional differences between courts or legal systems, the correlation between invalidation rates and legislative majorities provides a more reliable indicator of judicial activism. It allows for a deeper understanding of how courts interact with the democratic process, revealing the extent to which they are willing to challenge the decisions of a broadly representative legislature.

Table 2A: Comparing Jurisdictions: Invalidating Statutes

	Country A	Country B
Frequency of outrageously unconstitutional legislation	80%	0%
Constitutional review mode	DEFERENT COURT Striking down outrageously unconstitutional law only	ACTIVIST COURT Striking down according to judicial preferences
Rate of striking down legislation (assuming all is challenged)	80%	50% (assuming random distribution of preferences)
Measurement of activism	ACTIVIST COURT	DEFERENT COURT

In Table 2B, the constitutional frameworks under consideration exhibit distinct characteristics that significantly influence the courts' ability to impose policy shifts on the political branches. These

differences are rooted in specific constitutional principles, which create varying degrees of flexibility or rigidity within the constitutional mandate. Courts operating within a framework of textual flexibility are more likely to engage in policy setting, as the open-ended nature of their mandate allows them to interpret and adapt constitutional provisions to address contemporary issues. This contrasts with courts constrained by textual rigidity, where the scope for judicial intervention in policy matters is more limited. Consequently, any comparative analysis of the frequency with which courts impose policy changes—such as in the realms of human rights or the enforcement of social and environmental rights—must account for these foundational differences.

However, the process of comparing judicial activism across different constitutional contexts is further complicated by the need to control for the distinct constitutional mandates. This demands a nuanced textual analysis that goes beyond mere legal interpretation to encompass broader questions related to language, translation, and legal culture. The challenge lies in accurately quantifying the frontier of possibilities or opportunities available to courts within their respective legal systems while recognizing that the language of the constitution, the process of its interpretation, and the cultural context in which it is applied all play critical roles in shaping judicial behavior. Thus, any attempt to draw meaningful comparisons must carefully consider these variables to ensure that the analysis reflects the true extent of judicial discretion and the impact of constitutional design on policymaking by the judiciary.

Table 2B: Comparing Jurisdictions: Imposing Policy Changes

	Country A	Country B
Constitutional review mandate	Flexible and open	Rigid and limited
Opportunity to impose policy alterations	80%	10%
Constitutional review mode	DEFERENT COURT Rarely imposing policy changes	ACTIVIST COURT Frequently imposing policy changes
Rate of court decisions imposing policy alterations	20%	10%
Measurement of activism	ACTIVIST COURT (although 20% out of 80%)	DEFERENT COURT (although 10% out of 10%)

In Table 2C, the role and abundance of relevant constitutional precedents play a critical role in shaping the stability and predictability of judicial review. The extent to which precedents fluctuate or remain consistent is closely tied to the legal culture and traditions of a given jurisdiction. In legal systems where adherence to precedent is highly valued, judicial decisions are more likely to remain stable over time, while in systems that allow for greater flexibility, precedents may be more frequently overturned or modified. The significance of overturning precedents, therefore, cannot be fully understood without considering the broader context of legal traditions, which dictate how precedents are viewed and the extent to which they bind future judicial decisions.

Addressing the potential mischaracterization in Table 2C requires a more refined approach to analyzing shifts in constitutional precedents. One possible solution is to measure these shifts in terms of percentages or ratios, providing a relative metric that accounts for the differences in the volume and nature of precedents across jurisdictions.[97] However, this approach presents significant challenges, particularly in the context of comparative analysis. Counting, categorizing, and cataloging precedents across different legal systems—especially within the civil-law family, where written codes often play a more prominent role than judicial decisions—can be an arduous and complex task. The diversity of legal systems, the varying weight of precedents, and the distinct methodologies for interpreting them all contribute to the difficulty of establishing a consistent framework for comparison. Therefore, any attempt to compare constitutional precedents across jurisdictions must be undertaken with a deep understanding of these challenges and a commitment to rigorous, context-sensitive analysis.

Table 2C: Comparing Jurisdictions: Overturning Precedents

	Country A	Country B
Absolute number of constitutional precedents	100	1
Constitutional review mode	DEFERENT COURT Rarely changing precedents	ACTIVIST COURT Frequently changing precedent

97. *See e.g., id.* (ordering states concerning number of decisions overruling existing precedent).

Absolute number of changes in constitutional precedents in the last decade	10	1
Measurement of activism	ACTIVIST COURT (although only 10% were changed)	DEFERENT COURT (although 100% were changed)

C. Using Examples from Current Empirical Evidence

Judicial behavior must be understood within the specific context of the institutions and processes that shape it. This means that the concept of "judicial activism" cannot be separated from the legal and political opportunities available within a given system. For instance, in countries where constitutional review is absent or limited, such as the Netherlands, the potential for judicial activism is naturally constrained.[98] In contrast, in countries where constitutional review is more extensive and far-reaching, such as Spain and Portugal, the judiciary has a greater opportunity to engage in activism.[99] In these contexts, constitutional adjudication becomes a legal process heavily influenced by policy considerations, where politically sensitive and controversial issues are often decided by the courts. Consequently, the degree of judicial activism in any jurisdiction is closely linked to the frequency and scope of constitutional adjudication. In systems where constitutional review is frequently used as a tool to challenge or undermine political opponents, the judiciary is more likely to exhibit activist tendencies.

However, this relationship between judicial activism and constitutional adjudication is complicated by what can be described as a selection effect. Because the incentives and institutional frameworks vary significantly between jurisdictions, courts end up with different dockets, produce varied case law, and adjudicate in ways that are not uniform. For example, a court in one country might regularly hear cases that involve fundamental constitutional questions, while a court in another country might primarily deal with less politically charged issues. This divergence means that judicial activism can manifest differently depending on the nature of the cases being brought before the court and the broader political

98. No large studies are available in English for the case of the Netherlands.
99. *See* discussion in Part II.

environment in which the court operates. As a result, comparisons of judicial activism across different legal systems must account for these institutional and contextual differences, as they significantly influence how and when courts engage in activism.

In addition to the role of institutions and processes, procedural rules and access to the courts are also crucial in shaping opportunities for judicial activism. The ease with which cases can be brought before a court, the procedural hurdles that must be cleared, and the mechanisms for appeal all play a role in determining the likelihood and extent of judicial activism. In jurisdictions where procedural rules are more permissive and access to the courts is relatively easy, there is a greater chance for courts to engage in activism, particularly when dealing with contentious or high-stakes issues. Conversely, in systems with more restrictive procedural rules and limited access to the judiciary, the potential for judicial activism is reduced. Understanding the complex interplay between these factors is essential for a nuanced analysis of judicial behavior and the conditions under which judicial activism is likely to occur.

Not surprisingly, we have a selection effect shortcoming. Since incentives and institutions are quite different, courts have different dockets, and consequently, produce different case law and adjudicate in manners that are not uniform.

Procedure and access to court are similarly relevant to explain the opportunity for "judicial activism." An important study found the following suggestive numbers concerning dissent rates as summarized in Table 3.[100]

Table 3: Dissent Rates in Germany, Bulgaria, and Portugal

	Ban of political parties	Abstract review (petitioned by political actors not asserting an individual concrete violation of a constitutional right)	Concrete review (generally petitioned by natural or legal persons)
Germany	29%	8%	2%
Bulgaria	40%	18%	8%
Portugal	n/r	19%	2%

n/r: not reported

100. *See* Hein & Ewert, *supra* note 23, at 62.

Judicial behavior within constitutional review processes exhibits consistent trends across different types of reviews, particularly evident in three culturally distinct European countries: Portugal, Germany, and Bulgaria. In these nations, abstract constitutional review—the assessment of laws or actions without reference to specific cases—demonstrates significantly higher dissent rates compared to concrete review, which evaluates constitutionality within the context of particular cases. Specifically, the ratio of dissenting to non-dissenting decisions in abstract reviews can be as high as ten to one in Portugal, four to one in Germany, and two to one in Bulgaria. This pattern persists despite the cultural differences among these countries, indicating that certain underlying factors contribute to the propensity for higher dissent in abstract reviews.

Several reasons account for the elevated dissent rates observed in abstract reviews. Firstly, abstract reviews are often more politically salient than concrete reviews because they deal with broad constitutional principles and can have wide-ranging implications.[101] This heightened political significance can lead judges to express dissent more readily when they perceive that fundamental constitutional issues are at stake. Additionally, the sheer volume of concrete review cases typically exceeds that of abstract reviews, resulting in greater workloads for concrete cases. This increased workload can make dissenting in concrete reviews more costly in terms of time and professional effort, thereby discouraging dissent. In contrast, the fewer abstract review cases provide judges with opportunities to influence legal doctrines and engage deeply with constitutional principles, making the benefits of dissent more pronounced in these contexts. Moreover, judges might use abstract reviews as a platform to address and rectify perceived deficiencies in the legal framework, further incentivizing dissent in these cases.

The interplay between abstract and concrete reviews also suggests that judges may engage in balancing behaviors to navigate political and institutional pressures. For instance, judges who frequently dissent in the politically charged environment of abstract reviews might adopt a more conformist approach in the routine and less politically exposed context of concrete reviews. This balancing act adds a layer of complexity to the empirical study of judicial activism, as it introduces variability based on the type of review being conducted. Consequently, comparing judicial activism across jurisdictions requires a nuanced understanding of the specific contexts in which judges operate, including the nature of the

101. *See* GAROUPA & GINSBURG, *supra* note 79.

reviews and the institutional frameworks that guide them. To illustrate the significant challenges faced in comparative empirical studies of judicial behavior, we present statistics from several published articles in Table 4. These statistics underscore the complexities and variances that researchers must contend with when attempting to draw comprehensive conclusions about judicial activism across different legal systems and types of constitutional review.

Table 4: Invalidation of Statutes and Dissent across Western European Constitutional Courts

	Invalidation of Statutes	Dissent (at least one dissenting vote)	Dataset
Belgium[102]	70%	n/a	Conflicts of federal powers, 1985-2012
Spain[103] (CC)	60%	35%	Abstract review, 1980-2006
Italy[104]	55%	n/a	Conflicts of federal powers, 1998-2008
Spain[105] (CC)	46%	35%	Abstract review, 1980-2018
Germany[106]	41%	n/r	All available decisions, 1945-2019
Portugal[107]	41%	n/r	Abstract review, 2002-2016

102. Pellegrina, De Mot, Faure & Garoupa, *supra* note 20.

103. Garoupa, Gómez-Pomar & Grembi, *supra* note 15.

104. Pellegrina & Garoupa, *Choosing between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions*, *supra* note 26.

105. Garoupa, Gili & Gómez-Pomar, *Mixed Judicial Selection and Constitutional Review: Evidence from Spain*, *supra* note 15.

106. Engel, *Lucky you: Your case is heard by a seasoned panel; panel effects in the German constitutional court*, *supra* note 14.

107. Coroado, Garoupa & Magalhães, *An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2015*, *supra* note 16.

Portugal[108]	40%	69%	Abstract review, 1985-2007
Germany[109]	39%	n/r	All available decisions, 1998-2022
Italy[110]	36%	n/a	Sample, 1985-2005
Spain[111] (CE)	32%	42%	Sample of legal opinions, 2002-2018
Catalonia[112]	n/r	10%	Catalan law abstract review, 2009-2015
Germany[113]	n/r	about 5%	All decisions, 1972-2010

n/a: not available, n/r: not reported, CC: Constitutional Court, CE: *Consejo de Estado*.

The first observation to be made is that the rates of invalidation and dissent across constitutional courts vary significantly across different countries. For instance, the invalidation rate—a measure of how often laws or actions are struck down—ranges from 36% in Italy (32% in the case of the Spanish *Consejo de Estado*) to 70% in Belgium. Similarly, dissent rates, which indicate the frequency with which judges disagree with the majority opinion, vary widely, from as low as about 5% in Germany to as high as 69% in Portugal. However, these figures are not deterministic even within individual countries.

The next observation highlights the challenge of drawing inferences about "judicial activism" based solely on these indicators. If we were to judge activism by invalidation rates alone, we might conclude that the Spanish constitutional court is more activist than its Portuguese counterpart, given that a higher invalidation rate

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108. Amaral Garcia, Garoupa & Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*, *supra* note 16.

109. Engel, *The German Constitutional Court – activist, but not partisan?*, *supra* note 14.

110. Garoupa & Grembi, *Judicial Review and Political Partisanship: Consensual vs. Majoritarian Democracy*, *supra* note 19.

111. Garoupa, Salamero-Teixidó & Segura, *Disagreeing in Private or Dissenting in Public: An Empirical Exploration of Possible Motivations*, *supra* note 15.

112. Pellegrina, Garoupa & Gili, *Estimating Judicial Ideal Points in Bidimensional Courts: Evidence from Catalonia*, *supra* note 15.

113. Wittig, *supra* note 14, at calculation from Figure 5.2.

typically suggests a more interventionist stance. However, when we turn to dissent rates, the opposite conclusion might be drawn: the Portuguese court, with its higher dissent rate, could be seen as more prone to judicial activism.

In Table 5, we provide a second exemplification by comparing three different specialized sections of the Spanish Supreme Court.

Table 5: Pro-Plaintiff Outcomes and Dissent across Spanish Supreme Court Specialized Sections

	Pro-Plaintiff Outcome	Dissent (at least one dissenting vote)	Dataset
Spain[114] (SAC)	69%	5%	Administrative law appeals, 2000-2008
Spain[115] (SPC)	58%	12%	Criminal law appeals (terrorism), 2010-2021
Spain[116] (SLC)	39%	9%	Labor law appeals, 2010-2020

SAC: Supreme Court, Administrative Section (*Sala Tercera*), SPC: Supreme Court, Criminal Section (*Sala Primera*), SLC: Supreme Court, Labor Section (*Sala Cuarta*).

In Spain, dissent rates in the Supreme Court, which handles appeals on points of law (not de novo appeals on facts) in infraconstitutional litigation, vary significantly across different areas. For example, dissent occurs in 5% of administrative law appeals and 12% of criminal law appeals. This variation across indicators is also seen in the outcomes of specific case types: in administrative law appeals, judges frequently rule in favor of plaintiffs (against the government), while in labor law appeals, they tend to favor defendants. These discrepancies may reflect underlying legal values or social perceptions of these different areas of law, but they might also result from distinct plaintiff appeal strategies. Therefore, the differences across these categories could have multiple explanations. However, when focusing on dissent rates, judicial activism seems particularly pronounced in criminal law appeals. This suggests that even within the same institution,

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114. Garoupa, Gili & Gómez-Pomar, *Political Influence and Career Judiciary: An Empirical Analysis of Administrative Review by the Spanish Supreme Court*, *supra* note 15.

115. Garoupa, Gómez-Pomar, Segura & Canudas, *Punishing Terrorists in the Spanish Supreme Court: Has Ideology Played Any Role*?, *supra* note 15.

116. Garoupa, Gómez-Pomar & Segura, *Ideology and Career Judges: Reviewing Labor Law in the Spanish Supreme Court*, *supra* note 15.

specialized panels may exhibit different patterns of judicial behavior. Quantitative data alone can be misleading without a more refined analysis that accounts for the specific legal and political contexts in which these decisions occur.

The challenges of interpreting and comparing these metrics become even more evident when analyzing them across different jurisdictions. Not only do these figures vary widely, but they often provide conflicting interpretations. For example, the lack of a strong correlation between invalidation rates and dissent rates suggests that these indicators do not consistently align to produce a clear or uniform understanding of judicial activism. Consequently, direct comparisons between different courts based solely on these figures can lead to misleading conclusions. These inconsistencies underscore the need for a more nuanced approach to analyzing judicial behavior—one that recognizes the complex interplay of various factors and avoids relying too heavily on any single metric to assess activism.

V. FINAL REMARKS

This article opens with a conventional question in comparative judicial politics by exploring whether the U.S. Supreme Court can be considered more "activist" than any Western European Constitutional Court. Two significant issues are raised: the precise definition of "judicial activism" and the challenge of comparing this concept across different courts and jurisdictions. The inquiry necessitates a careful examination of how "judicial activism" is understood and measured, and whether such comparisons are valid or meaningful in diverse legal contexts. While data is increasingly available, comparative measurement of “judicial activism” is largely unresolved.

"Judicial activism" is notoriously difficult to define, as it encompasses a spectrum of judicial behaviors that range from judicial restraint to judicial assertiveness. Judicial restraint, characterized by deference to legislative bodies and adherence to precedent, is relatively straightforward to observe and quantify, often through metrics like statute invalidations. However, this focus can be misleading, as it may overlook the more nuanced aspects of judicial behavior that constitute activism. Judicial assertiveness, or what might be seen as activism, involves interpreting legal texts in ways that may challenge established norms or precedents, making it more complex to define and measure.

To approach the concept of "judicial activism," it is essential to consider both judicial constraints and judicial assertiveness.

Judicial constraints involve the limits imposed on judicial decision-making by legal texts, precedents, and institutional norms. While these constraints are harder to quantify, they can be approximated by examining factors such as departures from precedent, dissent rates, and decisions on justiciability. Each of these indicators, however, comes with its own set of limitations. For example, high dissent rates may indicate a lack of consensus within a court, but they do not necessarily correlate with judicial activism in a straightforward manner.

Institutional and procedural factors further complicate the measurement of judicial behavior, making any assessment of activism context dependent. For instance, some trends, such as higher dissent rates under abstract review as opposed to concrete review, are consistent across different legal systems. Yet, direct comparisons of invalidation and dissent rates between courts can often yield contradictory and misleading conclusions. These variables do not always align in ways that clearly indicate a court's level of activism, highlighting the complexity of making cross-jurisdictional comparisons.

In a narrow sense, such as when examining the frequency of statute invalidation, it is possible to compare courts and make tentative judgments about which might be more "activist." This approach, while useful in certain contexts, only captures a small aspect of what judicial activism entails. It risks oversimplifying the concept and ignoring the broader, more intricate dimensions of judicial behavior that contribute to a court's activism.

When considering the broader, multifaceted nature of "judicial activism" and the various indicators available, the task of comparison becomes significantly more complex and inherently problematic. The diversity of legal traditions, institutional structures, and political contexts across jurisdictions means that "judicial activism" cannot be easily or accurately measured using a one-size-fits-all approach. As a result, any attempt to compare the activism of different courts must be undertaken with caution, recognizing the limitations and potential for misleading conclusions.