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Judicial Dissonance: An Analysis of Judicial Activism

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I. Introduction

On May 15, 2008, the California Supreme Court conducted a strict scrutiny analysis of sexual orientation discrimination under the Equal Protection clause of the state's constitution and struck down a statutory ban on same-sex marriage.¹ Shortly thereafter, on June 26, 2008, the U.S. Supreme Court announced their ruling regarding the 2nd Amendment and made a historical recognition of a person's individual right to "bear arms."² Then, on August 18, 2008, the California Supreme Court announced that the Free Exercise clause of the U.S. Constitution does not allow doctors to discriminate against their gay and lesbian patients.³ These decisions became lightning rods for the ongoing debate over judicial activism.⁴ Judicial activism has been in the mainstream media before⁵, but now, in light of the recent U.S. Supreme Court and California Supreme Court decisions, judicial activism became another instrument for politicians, legal scholars and activists alike to further divide this nation along its political lines.⁶

Judicial activism is defined as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to

¹ See *In re Marriage Cases*, 183 P.3d 384 (2008).

² See *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008)

³ See *North Coast Women's Care Medical Group v. San Diego Superior Court*, 189 P.3d 959 (2008).

⁴ See *infra* Section IV.

⁵ See *infra* Sections III and IV.

⁶ See *infra* Section IV.

guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.”⁷ Whereas judicial activism’s antonym, judicial restraint, is defined as “[t]he principle that, when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues” or “[a] philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent.”⁸ The origin of judicial restraint has long been established,⁹ whereas judicial activism was coined within the last century.¹⁰ Both words, and their underlying philosophies, however, anchor two polar ends of a debate that defines modern jurisprudence.¹¹

This comment will examine the debate over judicial activism with a particular focus on commentary spawned from the recent U.S. Supreme Court and California Supreme Court decisions, as well as *Bush v. Gore*¹². First, to lay the foundation of the comment, judicial impartiality and independence will be examined. This will bring to light the controlling norms of how judges are to ideally conduct themselves and render opinions in order to maintain public confidence in the judicial system. This comment will then discuss judicial activism and its history within jurisprudence. Transitioning

⁷ *Judicial Activism*, Black’s Legal Dictionary (8th ed. 2004).

⁸ *Judicial Restraint*, Black’s Legal Dictionary (8th ed. 2004).

⁹ See *Luther v. Borden*, 48 U.S. 1 (1849)

¹⁰ See *infra* Section III.

¹¹ See *infra* Sections II - IV.

¹² 531 U.S. 98 (2000).

from the history of judicial activism to a more contemporary discussion on the topic, this comment will examine commentary on recent U.S. Supreme Court and California Supreme Court cases as examples of the current discussions about modern judicial activism. An argument will be made that modern judicial activism lost its meaning within jurisprudence by becoming a political device used to further divide this nation. To conclude, an argument will be made that modern judicial activism can be reconciled within jurisprudence by being more firmly rooted in the debate over originalism versus interpretivism as methods of judicial interpretation.

II. Judicial Impartiality and Judicial Independence

“Public confidence in the judicial institution is one of the essential elements of the preservation of the rule of law.”¹³ In accordance with maintaining and promoting public confidence in the judiciary, “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the *integrity and impartiality* of the judiciary.”¹⁴ In essence, these statements propose that a judge is essential to the preservation of law through his or her deference to the rule of law and its impartiality. Moreover, “[t]he basic function of an independent and honorable judiciary is to maintain the utmost integrity in decision making.”¹⁵

¹³ David Rothman, *California Judicial Handbook*, 5 (1991).

¹⁴ *Id* at 6 (emphasis added).

¹⁵ *Id* at 9 (quoting the commentary to canon 1 of the 1992 Code of Judicial Conduct).

Coincidentally, a recent survey asked judges what they thought were the most important duties of the judiciary.¹⁶ As for their responses, “[t]he four responsibilities judges chose as the most important were ‘making impartial decisions,’ ‘ensuring fairness under law,’ ‘defending constitutional rights and freedoms,’ and ‘providing equal justice for rich and poor.’”¹⁷ Furthermore, “[s]tudies show if people are treated well in court they think they’re getting a fair hearing,” but “studies also show that if people come to court and . . . are not treated with respect or dignity and don’t think they got a fair hearing, they are unhappy.”¹⁸ These principles culminate into the “fundamental duty” that judges are to “be faithful to the law regardless of partisan interest, public clamor, or fear of criticism.”¹⁹ Moreover, judges are not “to be influenced by political considerations, public opinion, the need to be popular, or the desire to curry favor with the powerful.”²⁰ “Judicial independence requires that judges have the courage to do what is right, regardless of these pressures, as well as the courage to stand between abuse of power by the state and the individual before the court.”²¹ Thus, “[a] judge must expect to

¹⁶ Damon Cann, *Beyond Accountability and Independence*, *Judicature*, Vol. 90, No. 5, p. 229 (March/April 2007).

¹⁷ *Id.*

¹⁸ The American Judicature Society, *A Conversation about Judicial Independence and Impartiality*, *Judicature*, Vol. 89, No. 6, p. 340 (May/June 2006)/

¹⁹ David Rothman, *California Judicial Handbook*, 7 (1991) (internal quotations and citation omitted).

²⁰ *Id.*

²¹ *Id.*

be the subject of constant public scrutiny, and accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly."²²

A judge's duty goes beyond their personal judicial impartiality and includes promoting the integrity of the entire judicial system. A judge's duty also lies in promoting judicial independence by maintaining separateness of the judicial branch from the executive and legislative branches of government.²³ Former U.S. Supreme Court Justice Sandra Day O'Connor once said that "the judicial branch has . . . the power to declare statutes or executive acts unconstitutional . . . or [rule] that some regulation or executive act is not authorized by statute."²⁴ Former Justice O'Connor further stated that "the courts are important guardians of constitutionally guaranteed freedoms in our common law system . . . the system breaks down without judicial independence."²⁵ Therefore, the rule of law and protection of individual freedoms, both essential to judicial impartiality and independence, are to be preserved through judicial review by "qualified and independent judges."²⁶

Judges, however, are not automatons void of personal experiences, morals, and politics. "The honesty and integrity of decision making itself are the most significant

²² *Id* at 10.

²³ The American Judicature Society, *A Conversation about Judicial Independence and Impartiality*, Judicature, Vol. 89, No. 6, p. 339 (May/June 2006).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id* at 51.

elements of justice, yet they are the most difficult and subtle elements and take place in the privacy of a judge's mind."²⁷ Additionally, "[u]nless articulated, no one else can know whether the judgment was guided by fear of public opinion, desire for advancement, favoritism, or personal bias. Moreover, wrestled judgment may also be influenced by unconscious factors."²⁸ To highlight this concept, Judge Otis D. Wright II of the U.S. District Court, Central District of California was once asked how he separates his "personal philosophies" from his "judicial responsibilities":²⁹

There are a lot of issues which come before you where the law is clear and you simply apply the law. There are also a lot of cases that come before you that are a close call where the law is not so clear or where you are given wide discretion. My attitude is this. I have been investigated, examined and all but autopsied, and my friends and associates interrogated at length. Every aspect of my life has been turned inside out. For whatever reason, the government determined that I am fit to do this job. They know that there will be times when the decisions I reach will be largely based on who I am and the things I believe in. The powers-that-be have decided that they can live with that.³⁰

Judge Wright's comments evidence the importance of a judge to be self-aware of personal experiences, morals and politics that could influence their decision-making. However, his comments also evidence how judicial ethics estop judges from solely

²⁷ David Rothman, *California Judicial Handbook*, 10 (1991).

²⁸ *Id.*

²⁹ An Interview with Hon. Otis D. Wright II '80, Judge of the United States District Court, Central District of California, <http://www.swlaw.edu/about/alumprofiles/wrightqanda> (last visited Oct. 25, 2008).

³⁰ *Id.*

relying on such influential factors. Nonetheless, as Judge Wright mentions, there may be “times when the decisions [he] reach[es] will be largely based on who [he is] and the things [he believes] in,” but such times are rare and require a great determination of justice without clear instruction from the law.³¹ In such times of an unclear judicial path, no judge should “pull or change or temper a decision because [they] are concerned that somebody might say . . . [they] are an activist judge.”³²

III. Judicial Activism and Its History

An activist judge is a judge that is accused of performing judicial activism.³³ As mentioned earlier, judicial activism has been defined as “[a] philosophy of judicial decision-making whereby *judges allow their personal views about public policy, among other factors, to guide their decisions*, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.”³⁴ With suspected ignorance of judicial precedent being the exemplar of judicial activism, the foregoing definition appears to be a strict interpretation of the phrase. Nevertheless, it is the definition’s focus on judges allowing “personal views about public policy . . . to guide their decisions”³⁵ that evidences the modern interpretation of judicial activism.

³¹ *Id.*

³² The American Judicature Society, *A Conversation about Judicial Independence and Impartiality*, *Judicature*, Vol. 89, No. 6, p. 343 (May/June 2006).

³³ *Id.*

³⁴ *Judicial Activism*, *Black’s Legal Dictionary* (8th ed. 2004) (emphasis added).

³⁵ *Id.*

The intent and use of judicial activism today is different from the intent and use of judicial activism when it was originally coined as a phrase.

As Keenan Kmiec emphasizes, the concept of judicial activism existed long before the coining of the term, when scholars, jurists and judges alike debated the then concept of “judicial legislation”, or when judges make “positive law.”³⁶ The merits of judicial legislation were widely debated during the first half of the twentieth century, reaching critical mass during the *Lochner*³⁷ era of the U.S. Supreme Court:³⁸

Critics assailed the [Lochner] Court's preference for business interests as it repeatedly struck down social legislation in the name of substantive Due Process. While some modern scholars consider *Lochner* and its progeny virtually synonymous with “judicial activism,” the term is conspicuously absent from contemporaneous criticism.³⁹

After the *Lochner* era of the U.S. Supreme Court, President Franklin Roosevelt’s New Deal brought a new wave of criticism over judicial legislation, but again, “contemporaneous literature does not mention ‘judicial activism’ by name.”⁴⁰ It was not until after the New Deal’s constitutional affirmation that “judicial activism” became an operative phrase.⁴¹

³⁶ Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 Cal. L. Rev. 1441, 1444 (2004)

³⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

³⁸ *Id.* at 1445.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

The first use of the phrase “judicial activism” appeared in an article by Arthur Schlesinger Jr. for *Fortune* magazine in 1947.⁴² Schlesinger’s article profiled the then nine U.S. Supreme Court Justices and explained the political make up of the Court by characterizing “Justices Black, Douglas, Murphy, and Rutledge as the ‘Judicial Activists’ and Justices Frankfurter, Jackson, and Burton as the ‘Champions of Self Restraint,’” with “Justice Reed and Chief Justice Vinson compris[ing] a middle group.”⁴³ Schlesinger noted that “none of the justices openly questioned the constitutionality of the New Deal,” but “[i]nstead, the Court split over the interpretation of legislation and the proper function of the judiciary in a democracy.”⁴⁴ Ultimately, Schlesinger defined judicial activists as those who believe that:

the resources of legal artifice, the ambiguity of precedents, 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. In short, there are no unassailable right answers, and policy concerns move to the forefront. A wise judge, if he accepts this philosophy, knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results. . . . [Judicial activists also] believe that law and politics are inseparable. They see judicial decisions as result-oriented, because no result is foreordained. They adopt the famous Learned Hand dictum that ‘the words a judge must construe are ‘empty vessels into which he can pour nearly anything he will.’⁴⁵

⁴² *Id* at 1446.

⁴³ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1446.

⁴⁴ *Id* (internal quotations and citations omitted).

⁴⁵ *Id* at 1447 (internal quotations and citations omitted).

The antithesis of judicial activism, in Schlesinger's mind, was the "Champion of Self Restraint" that believed in "laws hav[ing] fixed meanings, and deviation from those meanings is inappropriate, no matter which groups may benefit from the departure."⁴⁶

Schlesinger further defined the "Champion of Self Restraint" as someone who:

seeks to resist judicial supremacy, either of the right or of the left, in the name of deference to the legislative will, and rests on faith in the separation of powers and the democratic process. The Champions of Judicial Restraint [] understand the judicial role much as Justice Holmes did. If the legislature makes mistakes, it is up to the legislature to remedy them. Any other course will sap the vigor of our democracy by encouraging legislatures in an irresponsibility based on an expectation that the courts will backstop their wild pitches. . . . [The Champion of Judicial Restraint] is predicated on the belief that all law is not politics. These justices might have conceded that there are many close cases, but they believed that common law, statutes, and the Constitution are not empty vessels. . . . Just as importantly, they thought that because reasonable people can hold vastly different notions of justice, it is unfair and unjustifiable to force one's view upon others. Any attempt to do so would lead toward a state of judicial despotism that would threaten the democratic process.⁴⁷

After discussing the two opposing factions, Schlesinger saw inherent danger in judicial activism and those who practiced it. Schlesinger preferred to "limit judicial activism to civil liberties cases."⁴⁸ Schlesinger argued that all judicial decisions, sans decisions regarding "fundamental rights of political agitation," "be entrusted as completely as possible to institutions directly responsible to popular control."⁴⁹

⁴⁶ *Id.*

⁴⁷ *Id.* at 1448-49 (internal quotations and citations omitted).

⁴⁸ *Id.* at 1449.

⁴⁹ *The Origin and Current Meanings of "Judicial Activism"*, *supra*, at 1449.

Schlesinger felt the debate of judicial activism centered on the following factors: “unelected judges versus democratically enacted statutes; results-oriented judging versus principled decision-making; strict versus creative use of precedent; democratic supremacy versus human rights; law versus politics; and other equally fundamental dichotomies.”⁵⁰ While Schlesinger’s discussion was revolutionary at the time, some scholars argue that Schlesinger’s definition of judicial activism lacked clarity and left itself open to ambiguity and abuse of interpretation.⁵¹ Early usage of post-Schlesinger judicial activism appeared in not only scholarly work, but also within judicial opinions.⁵²

Although early academic usage pointed towards a positive connotation, particularly with a penchant towards civil rights cases, judicial activism quickly became a negative label by the mid-1950s.⁵³ During this period, initial scholarly works expanded upon Schlesinger. One such expansion upon Schlesinger’s judicial activism came from Edward McWhinney, then a barrister-at-law and Professor of Law at the University of Toronto.⁵⁴ McWhinney first sought to “understand the philosophic conflicts in the United States Supreme Court much as Schlesinger did nearly a decade earlier, by examining the ‘dilemma bequeathed to the Court’ by Justice Holmes.”⁵⁵ McWhinney identifies Holmes’ “two-sided” view of the judicial role:

⁵⁰ *Id.*

⁵¹ *Id* at 1449-1450.

⁵² *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1451.

⁵³ *Id* at 1451-52.

⁵⁴ *Id* at 1452.

⁵⁵ *Id* (internal citations omitted).

First, there is the ‘judicial self-restraint’ concept Holmes espouses in his famous dissent in *Lochner v. New York*, which amounts to a “presumption of constitutionality” for legislation even if a judge personally does not care for it. Judicial self-restraint is at odds, though, with another component of Holmes’ judicial philosophy: the “tradition of judicial activism, involving the notion that in certain areas of subject matter, notably the field of political and civil rights, the Court should look with a jealous eye on legislation cutting down or trenching on those rights.” Under this tradition, a ‘judicial presumption of invalidity (or unconstitutionality)’ should arise for legislation involving such rights.⁵⁶

Ultimately, McWhinney supports restraint over activism:

judicial review is not always a very efficient form of policy-making Judges are well versed in the law but they are manifestly not the best equipped to translate community values into constitutional policies. Second, the adversarial process and case or controversy requirements severely limit the efficacy of judicial activism.⁵⁷

McWhinney later published an article entitled *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, which presents a more “sophisticated” definition of judicial activism.⁵⁸ Specifically, “McWhinney offers a rubric for theorizing about judicial activism. He argues that, by focusing on issues of timing and technique, Court-watchers can formulate meaningful profiles of each Justice to describe when and how they employ judicial activism.”⁵⁹ Moreover, “broad labels are blunt tools” that cannot rule over a judge’s “jurisprudence”:

⁵⁶ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1452-53 (internal quotations and citations omitted).

⁵⁷ *Id* at 1453.

⁵⁸ *Id* at 1454.

⁵⁹ *Id* at 1455.

‘An activist qua what?,’ he asks. ‘It is not even enough to speak of a ‘civil libertarian’ activist. A judicial attitude, such as [Justice] Black’s favoring the restriction of state action interfering with speech-press liberties, may be activist qua speech but passivist qua the protections of states-rights and local self-determination in a federal system.’ Or, as some scholars have written of justices on the Rehnquist Court, a judge might be activist qua constitutional federalism and relatively passivist on social issues . . . terms like “judicial activist” can be useful if they are employed with precision and explained in detail.⁶⁰

In the end, although refining Schlesinger’s initial description of judicial activism, McWhinney’s contribution was cognizant enough to realize the then recent academic debate over judicial activism was just the beginning of a new analysis in jurisprudence.⁶¹

The early academic works on judicial activism spawned the initial incorporation of judicial activism into opinions of then sitting judges. The late Hon. Joseph C. Hutcheson, Jr. of the Fifth Circuit Court of Appeals was the first judge to use judicial activism in a published opinion.⁶² In *Theriot v. Mercer*⁶³, “Judge Hutcheson used a footnote to condemn a strain of Seventh Amendment jurisprudence discussed in a dissent in *Galloway v. United States*⁶⁴ as a form of judicial activism.”⁶⁵ Judge Hutcheson’s use of judicial activism is largely unsupported within his opinion in *Theriot v. Mercer*, and

⁶⁰ *Id* (internal citations omitted).

⁶¹ *Id.*

⁶² *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1455.

⁶³ 262 F.2d 754 (5th Cir. 1959).

⁶⁴ 319 U.S. 372 (1943).

⁶⁵ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1456 (internal quotations and citation omitted).

“[h]is use of the term ‘judicial activism’ is more akin to name-calling than reasoned argument.”⁶⁶

In *Turpin v. Mailet*⁶⁷, an exchange between the dissent and concurring opinions deeply examined the concept of judicial activism.⁶⁸ Specifically, “the dissent undertakes a brief reexamination of ‘the role that the federal judiciary was designed to play in our democratic society’ and argues that ‘the judiciary was to be precluded from participating in the legislative process.’”⁶⁹ Furthermore, “the dissent makes a reasoned argument from diverse authorities, explaining why the majority should have left the decision in the case to democratically elected and accountable legislatures.”⁷⁰ Ultimately, “[t]he majority respond[ed] by finding common ground and explaining that each side’s approach is not much different from the other’s.”⁷¹

Judge J. Harvie Wilkinson III of the Fourth Circuit Court of Appeals contributed the next, and perhaps most notable, contribution to the discussion of judicial activism.⁷² In *Brzonkala v. Virginia Polytechnic Institute and State University*⁷³, Judge Wilkinson’s

⁶⁶ *Id* at 1457-58 (internal citation omitted).

⁶⁷ 579 F.2d 152 (2d Cir. 1978).

⁶⁸ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1459-60.

⁶⁹ *Id* at 1460 (quoting *Turpin*, 579 F.2d at 172, 173).

⁷⁰ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1461.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

concurring opinion explains that judicial activism:

falls into three general stages. The first stage was the *Lochner* era, ‘beginning roughly with the decision in *Lochner v. New York*, and continuing through the early New Deal,’ which ‘is still widely disparaged for its mobilization of personal judicial preference in opposition to state and federal social welfare legislation.’ The second stage took place during the ‘Warren and Early Burger Courts,’ roughly the 1950s through the early 1970s, which ‘focused on finding new substantive rights in the Constitution and down played that document’s structural mandates.’ . . . Finally, the third stage of judicial activism ‘probably began with *New York v. United States*⁷⁴,’ and continues into the twenty-first century. . . ‘The common thread of contemporary activism,’ Judge Wilkinson explains, ‘is an interest in reviving the structural guarantees of dual sovereignty.’⁷⁵

Kmiec faults *Turpin* and *Brzonkala* for lack of clarity and depth, but uses the concepts of *Turpin* and *Brzonkala* to create a five prong formulation of judicial activism.⁷⁶ Kmiec concludes that judicial activism, particularly modern judicial activism, has “five core meanings []: (1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial legislation, (4) departures from accepted interpretive methodology, and (5) result-oriented judging”⁷⁷ (collectively “Kmiec’s Prongs”). Kmiec’s Prongs combine Schlesinger’s original constructions of judicial activism with Judge Wilkinson’s more contemporary interpretation. With Kmiec’s Prongs, however, judicial activism seems to have gained a clear definition and effect.

⁷⁴ 505 U.S. 144 (1992).

⁷⁵ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1462 (quoting *Brzonkala*, 169 F.3d at 890, 892).

⁷⁶ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1463.

⁷⁷ *Id* at 1444, 1463-76.

The last of Kmiec's Prongs, "result-oriented judging," is of particular interest when transitioning this comment to a conversation regarding contemporary judicial activism. Kmiec defines "result-oriented judging" to be when a "judge has an ulterior motive for making the ruling; and the decision departs from some 'baseline' of correctness."⁷⁸ In light of this definition, however, Kmiec admits "it can be exceedingly difficult to establish a non-controversial benchmark by which to evaluate how far from the 'correct' decision the supposedly activist judge has strayed."⁷⁹ As discussed below, contemporary judicial activism, at least commentary thereto, focuses on "result-oriented judging." Yet, the lack of a bright line "benchmark" used to determine how far a judge has "strayed" from a "correct decision" has allowed the integrity of judicial activism to be degraded. Without a bright line "benchmark," judicial activism, particularly judicial activism defined as result-oriented judging, is used in contemporary political and judicial commentary as a device in furtherance of political divisiveness across the country.

IV. Contemporary Judicial Activism

Today's activist judge is defined by some as a judge who makes a decision that someone didn't like⁸⁰. As a result, judicial activism has become a phrase used by political and judicial commentators to express the dislike of a particular judicial opinion. Kmiec acknowledges that "it can be exceedingly difficult to establish a non-controversial benchmark by which to evaluate how far from the 'correct' decision the supposedly

⁷⁸ *Id* at 1476.

⁷⁹ *Id* (internal quotations and citation omitted)

⁸⁰ The American Judicature Society, *A Conversation about Judicial Independence and Impartiality*, Judicature, Vol. 89, No. 6, p. 343 (May/June 2006)

activist judge has strayed.”⁸¹ However, without a “non-controversial benchmark,” commentators from both the liberal and conservative sides of the political spectrum create their own “benchmark” from which to criticize decisions as “wrong” – political party partisanship. Unfortunately, the misuse of judicial activism has entered into not just scholarly media, but also mainstream media. Accordingly, the misuse of judicial activism is degrading its original concepts and spirit.

Arguably, one of the most “conservative-oriented” judicial opinions came down in *Bush v. Gore*⁸². In *Bush v. Gore*, the U.S. Supreme Court effectively ended the highly-contested Presidential election of 2000 by essentially giving the Presidency to then Texas Republican Governor George W. Bush⁸³. The Court found that although there were violations of the Equal Protection clause due to different vote counting standards throughout Florida’s counties, the recount of Florida’s votes had to cease in deference to the deadline posed by Florida law⁸⁴. The Court’s decision was announced on the day of Florida’s deadline, and it was limited to just this particular case⁸⁵. The irony of the Court’s decision was that the Court itself stayed Florida’s recount to hear the case just days before the deadline⁸⁶. In a sense, the Court stopped the vote recount to hear the

⁸¹ *The Origin and Current Meanings of “Judicial Activism”*, *supra*, at 1476. (internal quotations and citation omitted)

⁸² 531 U.S. 98 (2000).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Bush v. Gore* on Application for Stay, 531 U.S. 1047 (December 9, 2000)

case, but then decided the vote recount, with new counting standards, could not continue because it could not meet the original deadline.

Immediate reactions ensued from this unprecedented move by the Court. Jamin Raskin, a professor of constitutional law at American University's Washington College of Law, noted that *Bush v. Gore*:

mocks legal reasoning and represents an affront to the rule of law. It has no grounding in originalism or textualism, the watchwords of the conservatives. It constitutes an assault on federalism and the separation of powers, both of which conservatives pretend to love. And it makes a mockery of the phrase "judicial restraint." In a slapdash job of constitutional interpretation, the conservatives upended and ravaged four foundational relationships in our constitutional system. It usurped the role of the Florida Supreme Court in interpreting state law. It usurped the role of the American people by halting the counting of ballots in a presidential election and effectively choosing the president for them. It usurped Congress' powers to accept or reject the states' electoral college votes. And it reversed the proper distribution of powers in federal government by having Supreme Court justices appoint the president rather than vice versa. To accomplish these feats, the court had to trample its own restrictive rules about who can even be heard in federal court. . . . But in *Bush v. Gore*, the Rehnquist majority did not even ask, much less explain, how Bush was personally injured by the hypothetical possibility that anonymous third-party citizens might have their ballots counted differently in Florida's presidential election. Nor, for that matter, did the justices ask how stopping the vote counting would redress those third-party injuries.⁸⁷

⁸⁷ Jamin Raskin, *Bandits in Black Robes: Why you should still be angry about Bush v. Gore*, Washington Monthly, March 2001, found at <http://www.washingtonmonthly.com/features/2001/0103.raskin.html> (last visited Nov. 1, 2008).

Raskin further stated that:

[t]he tragedy here is that the majority not only ordered actual disenfranchisement as the remedy for potential disenfranchisement but actually used voting rights rhetoric to nullify the right to vote. If there was an equal protection violation in *Bush v. Gore*, it is found not in anything Florida did, but in the very relief that the court ordered. Still, the decision was not out of character for the Rehnquist Court. Far from it. For at least a decade, the court has been promoting a deeply conservative and racialized ideology of electoral politics that finally collapsed into bare-knuckled Republican partisanship in *Bush v. Gore*⁸⁸.

Raskin’s criticism continued by saying “there is no use in anyone pretending the selection of judges is not a political event, indeed a partisan one, or that it has ever been anything else. Supreme Court justices have been political actors from the beginning.”⁸⁹ Raskin’s concluded that “it has been the Democrats’ wimpiness in challenging Republican judicial nominees that helped to create the five justice *Bush* majority,” and that the goal now is for “people to take the Constitution back from the court.”⁹⁰

Raskin’s criticisms are unique to the notions of result-oriented judging and the establishment of a benchmark to examine how the Court strayed from the correct decision. Raskin first attacked the Court on its opinion by showing the Court surprisingly lacked deference to the traditionally conservative values of federalism and judicial restraint.⁹¹ Raskin further criticized the Court on its “mockery” of “judicial restraint.”⁹²

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

Raskin then explicitly called the Court “bare-knuckled Republican partisanship.”⁹³ It is clear from Raskin’s comments that *Bush v. Gore* was result-oriented and that political party partisanship was the benchmark from which to evaluate the opinion. The concept of party partisanship prevails throughout current commentary on judicial activism.

Another highly-criticized, conservative-oriented opinion was the recent *District of Columbia v. Heller*.⁹⁴ In *Heller*, the Court decided that the District of Columbia’s “ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”⁹⁵ As posed by the foregoing, the Court’s reasoning relied not only on a pre-existing right to carry arms for self-defense, but also on a historical examination of state constitutions, the drafting of the Second Amendment and the Court’s own precedents.⁹⁶ Although cloaked in simplistic reasoning and supported in supposed precedent, the Court’s decision was immediately refuted by judicial commentators.

The irony of some of the criticism of *Heller* is the source of such criticism. Judge Wilkinson of *Brzonkala* fame, a conservative judge in his own right, called *Heller* “a failure—the Court’s failure to adhere to a conservative judicial methodology in reaching

⁹³ Jamin Raskin, *Bandits in Black Robes: Why you should still be angry about Bush v. Gore*, Washington Monthly, March 2001, found at <http://www.washingtonmonthly.com/features/2001/0103.raskin.html> (last visited Nov. 1, 2008).

⁹⁴ 128 S.Ct. 2783 (2008)

⁹⁵ *Id* at 2821-22.

⁹⁶ *See, generally, Heller*, 128 S.Ct. 2783 (2008).

its decision.”⁹⁷ Furthermore, Judge Wilkinson proposes that “*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.”⁹⁸ Judge Wilkinson also compares *Heller* to another historical case, *Roe v. Wade*⁹⁹, to demonstrate that

[b]oth decisions share four major shortcomings: an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism. These failings have two things in common. First, each represents a rejection of neutral principles that counseled restraint and deference to others regardless of the issues involved. Second, each represents an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves.¹⁰⁰

Wilkinson concludes that “the Court now takes an issue about which the nation is deeply divided and narrows democratic outlets, overlooks regional differences, and imposes a rigid national rule. *Heller* thus represents the worst of missed opportunities—the chance

⁹⁷ Wilkinson, J. Harvie, *Of Guns, Abortions, and the Unraveling Rule of Law*. Virginia Law Review, Forthcoming, Available at SSRN: <http://ssrn.com/abstract=1265118> (last visited Nov. 1, 2008)

⁹⁸ *Id.*

⁹⁹ 410 U.S. 113 (1973).

¹⁰⁰ Wilkinson, J. Harvie, *Of Guns, Abortions, and the Unraveling Rule of Law*. Virginia Law Review, Forthcoming, Available at SSRN: <http://ssrn.com/abstract=1265118> (last visited Nov. 1, 2008).

to ground conservative jurisprudence in enduring and consistent principles of restraint.”¹⁰¹

Although Wilkinson invokes a lot of the sentiments he first expressed in *Brzonkala*, Wilkinson himself falls into the trap of benchmarking by political party partisanship. By calling *Heller* “a failure to adhere to a conservative judicial methodology” and “a transfer of power to judges from the political branches of government,”¹⁰² Wilkinson’s arguments implies outside political influences are the real reason for the Court’s result-oriented judgment. These exact sentiments can be seen in other commentary whereby the Court’s:

lengthy exposition of the Second Amendment is bad history--simplistic ‘law-office’ history that ignores the complexities of historical research. . . . Practitioners of originalism also have been accused of abandoning their originalist principles when it when it suits their political purposes to do so. . . . [I]n a number of instances originalists can be seen ignoring the historical record when it conflicts with their political agenda. [Concluding] that originalism often devolves into “a doctrine only of convenience and not of principle.”¹⁰³

Not to be outdone by their conservative counterparts on the bench, liberally oriented judges are also criticized by commentators who misuse judicial activism and invoke notions of benchmarking by political partisanship. On August 18, 2008, the California Supreme Court announced that the First Amendment right to free exercise

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Shaman, Jeffrey M., *The Wages of Originalist Sin: District of Columbia v. Heller*, (July 17, 2008), available at SSRN: <http://ssrn.com/abstract=1162338> (last visited Nov. 1, 2008).

does not allow doctors to discriminate against their gay and lesbian patients.¹⁰⁴ The Court based its opinion on an interpretation of the state's Unruh Civil Rights Act, which does not allow business to discriminate on the basis of, *inter alia*, sexual orientation.¹⁰⁵ Conservative commentators immediately decried that the Court attacked religion and its moral values.¹⁰⁶ One critic even went as far as to say the following:

Shamefully, wrongly, and unconstitutionally, the judges have eliminated the free exercise of religion in a business environment, and have limited religious freedom to speech and nonprofit work. This terrible ruling means business owners and for-profit practitioners, such as doctors, can exercise their religious freedom only as long as there is no conflict with homosexual or bisexual "rights." Because now, according to the California Supreme Court, the homosexual agenda TRUMPS religious freedom in any business conflict. Religious values against fornication or homosexuality aren't allowed anymore! Decades of teaching churchgoers to separate politics from religion has been completely successful: we now have an immoral state government and a state court system that won't abide by the California Constitution.¹⁰⁷

¹⁰⁴ See *North Coast Women's Care Medical Group v. San Diego Superior Court*, 189 P.3d 959 (2008).

¹⁰⁵ *Id.*

¹⁰⁶ See Ohso, *Why the California courts punish morality*, <http://antimisandry.com/93854-post59.html> (last visited Nov. 1, 2008); Matthew Eppinette, *California Supreme Court Ruling Threatens Medical Care and Religious Freedom*, Americans United For Life, (August 18, 2008), available at <http://blog.aul.org/2008/08/18/california-supreme-court-ruling-threatens-medical-care-and-religious-freedom/> (last visited Nov. 1, 2008)

¹⁰⁷ Ohso, *Why the California courts punish morality*, <http://antimisandry.com/93854-post59.html> (last visited Nov. 1, 2008)

Even more highly criticized was the California Supreme Court's decision to conduct a strict scrutiny analysis of sexual orientation discrimination under the Equal Protection clause of the state's constitution and strike down a statutory ban on same-sex marriage.¹⁰⁸ Specifically, the California Supreme Court held that sexual orientation, like race or religion, is a suspect class for purposes of the California state constitution.¹⁰⁹ As a suspect class, sexual orientation discrimination faces strict scrutiny under the state's Equal Protection clause, and the statutory ban on same-sex marriage fails.¹¹⁰

Reactions to *In re Marriage Cases* exemplify political benchmarking. One critic "stipulated" to political benchmarking:

Let's stipulate that these gay-marriage decisions inevitably degenerate into cartoonish attacks on the judiciary and—in an election year—even more cartoonish battles over judicial ideology. Every time a state court reads its own constitution and precedent to find a right to gay marriage, the critics always cry activism. They do that before they read the opinion, which means they can do it regardless of what said state constitution and precedents say. If the decision is for gay marriage, it's activist, and whatever the court did to get there is activism. Once you recognize this fact, you can [*In re Marriage Cases*] opinion (and the instant criticism of the opinion) for what it is: Even though the majority did what it was supposed to do and offered up a rigorous close reading of state law and precedent, it will be defended and also criticized solely in terms of judicial elitism and overreaching. That's too bad. There's some pretty interesting law stuff in here. But the only real fight that emerges from today's Supreme Court decision (all but one of the justices was appointed by a Republican governor, incidentally) is over what makes a judge an

¹⁰⁸ See *In re Marriage Cases*, 183 P.3d 384 (2008).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

activist and who can properly say "nyah, nyah, nyah" come November.¹¹¹

Another critic states that:

the [*In re Marriage Cases*] decision was a raw exercise in judicial policy-making with no connection to the words or intent of the state constitution. It is inconceivable that anyone but a supporter of gay marriage "as a matter of policy" could have found in vague constitutional phrases such as "equal protection" a right to judicial invalidation of the marriage laws of every state and nation in the history of civilization. . . . All of this mitigates the affront to democracy. But it is still an affront, no less for the fact that three of the four majority justices are Republican appointees. And while conservative judges are not above displacing democratic choices with made-up constitutional law, that urge seems stronger on the Left.¹¹²

Although supporting *In re Marriage Cases*, another commentator still used political benchmarking to say that "[j]udicial [a]ctivism is used when 'conservatives' don't like a decision, even though it may be based on judicially logical reasoning."¹¹³

However, the most significant criticism of the Court's opinion to be found is the voter initiative commonly known as Proposition 8.¹¹⁴ Proposition 8 bans same-sex marriage by amending the California state constitution to say that marriage is solely

¹¹¹ Dahlia Lithwick, *Who You Calling Activist?*, Slate.com (May 15, 2008), available at <http://www.slate.com/id/2191500/> (last visited Nov. 1, 2008).

¹¹² Stuart Taylor Jr., *Gay Marriage by Judicial Decree*, National Journal, http://www.nationaljournal.com/njmagazine/or_20080524_4694.php (last visited Nov. 1, 2008).

¹¹³ J's Poli Rant, <http://jspolirant.blogspot.com/2008/08/judicial-activism-prop-8-and-lds-chruch.html> (last visited Nov. 1, 2008).

¹¹⁴ See Cal. Const. art. 1, § 7.5 (passed November 4, 2008).

between one man and one woman.¹¹⁵ Political lines divided those who supported Proposition 8, with numerous conservative groups endorsing, and those who opposed Proposition 8, with numerous liberal groups fighting. Proposition 8 embodies the notion of political benchmarking and is a referendum on the California Supreme Court's supposed liberal, result-oriented opinion in *In re Marriage Cases*.

Political benchmarking by commentators, whether liberal or conservative, has taken a toll on the concept of judicial activism, which in turn has taken a toll on jurisprudence as a whole. Jaime Huff of *Red Country*, a conservative oriented news website, recently said that “[j]udicial activism is when courts go beyond mere interpretation of law, and instead create law, substituting their own political opinions for the elected legislature.”¹¹⁶ Huff feels that any activism should be reserved for the elected, legislative body, as legislators are subject to ejection from office, unlike life-tenured federal judges.¹¹⁷ Huff furthers her arguments to say that:

[f]ederal judges have been issuing rulings and opinions on policy questions that should be decided democratically. Because their tenure doesn't end until their pulse does, these judges show little regard for the authority of elected bodies, and consequently, for the will of the people. True activists seek to make their case democratically by influencing voters that their cause is right. Dissimilarly,

¹¹⁵ *Id.*

¹¹⁶ Jaime Huff, *Judicial Activism: An Abuse of Power*, Red Country (June 25, 2008), available at <http://www.redcountry.com/rclaw/2008/06/judicial-activism-an-abuse-of/> (last visited Nov. 2, 2008).

¹¹⁷ *Id.*

activist judges practice a different method, sparing themselves the hassle of the legislative process.¹¹⁸

Huff's comments seem to have fundamental roots in a Wilkinson-Schlesinger hybrid theory of judicial activism, but it is not hard to see Huff's political overtones when the commentary is paired with the reporting of Senator John McCain's thoughts on the "evils" of judicial activism.¹¹⁹ Huff reported that Senator McCain feels that "the remedy available to restore order in our courts is to find, nominate, and confirm the right judges," and that should Senator McCain have won the 2008 Presidential election, "Senator McCain [would have] committed himself to select justices who have an established record of judicial restraint . . . and . . . who will act with humility and self-control."¹²⁰

Huff's reporting shows the clear and present danger with political benchmarking of judges. When criticisms of judicial activism, seemingly grounded in scholarly theory, are layered with political commentary, judicial activism loses its integrity. Senator McCain degraded the essence of judicial activism further by labeling it as evil and campaigning on how he would have changed the judiciary because of it. If Senator McCain had won the 2008 Presidential election, his judicial appointments would have been founded on a complete misuse of judicial activism. Therefore, the fact that political benchmarking could have actually influenced judicial appointments demonstrates the effects the misuse of judicial activism has on jurisprudence as a whole.

However, one need not solely look towards Senator McCain to see the possible effects of political benchmarking and misuse of judicial activism. Such effects are

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

currently in place with the already appointed judges. Chief Justice Roberts' confirmation hearings demonstrate judicial activism's misuse, as Chief Justice Roberts then stated that "judicial activism is used to describe unjustified intrusions by the judiciary into the realm of policy making, the criticism is well-founded. . . . The proper exercise of the judicial role in our constitutional system requires a degree of institutional and personal modesty and humility."¹²¹ Chief Justice Roberts' comments imply that judicial activism has been sequestered to political based policy making. Furthermore, a now sitting U.S. Supreme Court Chief Justice is actively misusing judicial activism to describe how his own decision making process.

One of the harshest critics of the current state of jurisprudence is none other than retired U.S. Supreme Court Justice Sandra Day O'Connor. Justice O'Connor's greatest fear is retaliation against the judiciary due to political benchmarking¹²², and this fear is slowing becoming a reality¹²³. Justice O'Connor sees such threats of retaliation through proposed judicial reform, and is "concerned about judicial reform, whether coming from

¹²¹ Chief Justice Roberts' Senate Judiciary Committee Questionnaire (Aug. 2, 2005), available at

http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/supreme_court_watch/roberts-judiciary-questionnaire.htm (last visited Nov. 2, 2008).

¹²² The American Judicature Society, *A Conversation about Judicial Independence and Impartiality*, Judicature, Vol. 89, No. 6, p. 341 (May/June 2006)

¹²³ Hon. Sandra Day O'Connor, *The Threat to Judicial Independence: A ballot initiative is the latest attempt to intimidate judges.*, Wall Street Journal (October 1, 2006), available at <http://www.opinionjournal.com/extra/?id=110009019> (last visited Nov. 2, 2008).

Republicans or Democrats, that is driven by nakedly partisan result or any other reason.”¹²⁴ Judicial reform can come in the form of age limits for judges¹²⁵, the repeal of judicial immunity or the investigation and monitoring of the judiciary.¹²⁶ Although Justice O’Conner notes that such attempts to reform the judiciary are not new to America, “the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history. The ubiquitous ‘activist judges’ who ‘legislate from the bench’ have become central villains on today’s domestic political landscape.”¹²⁷ Justice O’Conner further sees how:

[e]lected officials routinely score cheap points by railing against the ‘elitist judges,’ who are purported to be of touch with ordinary citizens and their values. Several jeremiads are published every year warning of the dangers of judicial supremacy and judicial tyranny. Though these attacks generally emit more heat than light, using judges as punching bags presents a grave threat to the independent judiciary.¹²⁸

Justice O’Conner also comments on the increasing number of physical threats to individual judges who make “activist” decisions.¹²⁹ Finally, Justice O’Conner feels that

¹²⁴ The American Judicature Society, *A Conversation about Judicial Independence and Impartiality*, Judicature, Vol. 89, No. 6, p. 341 (May/June 2006).

¹²⁵ *Id.*

¹²⁶ Hon. Sandra Day O’Conner, *The Threat to Judicial Independence: A ballot initiative is the latest attempt to intimidate judges.*, Wall Street Journal (October 1, 2006), available at <http://www.opinionjournal.com/extra/?id=110009019> (last visited Nov. 2, 2008).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

“all of society has a keen interest in countering threats to judicial independence. Judges who are afraid--whether they fear for their jobs or fear for their lives--cannot adequately fulfill the considerable responsibilities that the position demands. . . . [W]e must recommit ourselves to maintaining the independent judiciary.”¹³⁰

While Justice O’Conner certainly paints a doomsday scenario, not all hope is lost. In direct response to Justice O’Conner’s comments, Justice William Pryor of the U.S. Court of Appeals for the 11th Circuit stated that “[a]lthough the fringes of American politics offer a few disturbing examples of ignorance of the judicial function . . . what is truly surprising about today’s judiciary is how strong it really is.”¹³¹ In particular, Justice Pryor argues that contemporary criticisms of the judiciary are mild, the judiciary has rendered decisions worth of harsh critique, and judges must not respond to such political criticisms.¹³² Justice Pryor also argues that “[m]any Americans today believe that more recent decisions of the court are also terribly wrong. . . . On these fronts, citizens are more, not less, likely to respect the rule of law when they know that the law can be criticized and changed by ordinary political processes.”¹³³ Therefore, Justice Pryor feels “[t]hese efforts are a healthy part of our democratic process and a recognition of the

¹³⁰ *Id.*

¹³¹ Hon. William H. Pryor, Jr., *'Merely Judgment' America's courts are not above public criticism*, Wall Street Journal (October 8, 2006), available at <http://www.opinionjournal.com/editorial/feature.html?id=110009059> (last visited Nov. 2, 2008).

¹³² *Id.*

¹³³ *Id.*

fallibility of the judiciary,” and “[i]n that way, [judges] have the foremost responsibility of safeguarding [their] independence.”¹³⁴

Judicial activism’s salvation also appears in a recent opinion editorial of the *Los Angeles Times*.¹³⁵ In response to Judge Wilkinson’s “warning” of *Heller*¹³⁶, the *Los Angeles Times* opined that “[w]hat’s more enlightening about [this] critique[], however, is that [it] demonstrate[s] that there are no real originalists, only activists of different stripes. And that’s OK.”¹³⁷ Specifically, “[i]t is essential to recognize that one original intent of the Constitution’s framers was to create an elastic document, adjustable for the ages.”¹³⁸ The *Los Angeles Times* article catapults judicial activism into the debate between originalism and interpretivism methodologies of judicial interpretation. This is

¹³⁴ *Id.*

¹³⁵ *Two courts, one ‘sin’*, *Los Angeles Times* (October 22, 2008), available at http://articles.latimes.com/2008/10/22/editorial_pages/ed-court22 (last visited Nov. 2, 2008).

¹³⁶ Wilkinson, J. Harvie, *Of Guns, Abortions, and the Unraveling Rule of Law*. *Virginia Law Review*, Forthcoming, Available at SSRN: <http://ssrn.com/abstract=1265118> (last visited Nov. 1, 2008) (“*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts”).

¹³⁷ *Two courts, one ‘sin’*, *Los Angeles Times* (October 22, 2008), available at http://articles.latimes.com/2008/10/22/editorial_pages/ed-court22 (last visited Nov. 2, 2008).

¹³⁸ *Id.*

precisely where judicial activism needs to be to salvage its integrity and purpose in today's jurisprudence.

V. Reconciliation of Judicial Activism

As noted earlier, Kmiec's fourth Prong of judicial activism was "departure[] from accepted interpretive methodology."¹³⁹ Kmiec defines "departure from accepted interpretive methodology" to be "the failure to use the 'tools' of the trade appropriately-- or not at all."¹⁴⁰ Furthermore, "[a]ccusations of this form of judicial activism are common, but divergences of opinion over what constitutes an appropriate interpretative tool make it difficult to distinguish principled but unorthodox methodologies from 'activist' interpretation."¹⁴¹ Ultimately, Kmiec sees two meanings to this Prong:

First [] it can mean that a judge uses different (in kind or number) tools to make a decision, compared to what another judge would have used. This can occur because a judge makes a mistake, or because her judicial philosophy requires that she not avail herself of certain interpretive guides. Second, and more usefully, it can mean that two people agree on what tools should be used to make a decision, but disagree on how to apply the tools in a particular case.¹⁴²

Originalism and interpretivism are arguably two of the most widely accepted forms of interpretive methodology. Originalism is "[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and

¹³⁹ *The Origin and Current Meanings of "Judicial Activism"*, *supra*, at 1444, 1463-76.

¹⁴⁰ *Id* at 1473.

¹⁴¹ *Id* at 1473-74.

¹⁴² *Id* at 1475.

adopted it.”¹⁴³ In contrast, interpretivism is “[a] doctrine of constitutional interpretation holding that judges must follow norms or values expressly stated or implied in the language of the Constitution.”¹⁴⁴ It is commonly said that while originalism may look at the “letter of the law,” interpretivism looks towards the “spirit of the law.” Without getting into the full history and critique of these two methods of constitutional interpretation, originalism and interpretivism are quintessential to any logical discussion of constitutional law. What makes the debate over originalism and interpretivism ripe for including judicial activism is the ability to combine two of Kmiec’s Prongs.

In today’s judicial climate, one can no longer avoid associating judicial activism with result-oriented judging. Although many in the judiciary may disagree, in the end, result-oriented judging is becoming increasingly popular in order to reconcile justice with today’s ever changing technology, social values, and world events. Furthermore, while originalism and interpretivism maybe accepted interpretative methodologies, it is also today’s ever changing technology, social values, and world events that make commitment

¹⁴³ *Originalism*, Black’s Legal Dictionary (8th ed. 2004).

¹⁴⁴ *Interpretivism*, Black’s Legal Dictionary (8th ed. 2004) (“A long-standing dispute in constitutional theory has gone under different names at different times, but today’s terminology seems as helpful as any. Today we are likely to call the contending sides ‘interpretivism’ and ‘noninterpretivism’ -- the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the instrument.” John Hart Ely, *Democracy and Distrust* 1 (1980)).

to one methodology over the other increasingly difficult. One might argue that today's world requires a more "living, breathing" interpretation of the Constitution to conform with society, while another might argue that it is because of the changing world that it is necessary to stick to the strict intent of writers of the Constitution. As evidenced by the opinion editorial of *The Los Angeles Times*, even some staunch originalists like Justice Scalia tend to stray from their core methodology to make a reasoned decision in today's environment.¹⁴⁵ After all, *The Los Angeles Times* argued that "there are no real originalists, only activists of different stripes. And that's OK."¹⁴⁶ Thus, by taking result-oriented judging and melding it with the departure from the accepted interpretive methodologies of originalism and interpretivism, judicial activism can be reframed.

Judicial activism should be used to describe what exactly occurred with *Heller* – when one proponent of an accepted methodology of judicial interpretation, whether originalism or interpretivism, departs from said methodology in order to submit a result necessary to conform society with an established precedent of justice. Although Justice Scalia may adamantly disagree, as the *Los Angeles Times* proposed, Justice Scalia departed from his staunch originalism to use an interpretivism approach in order to find the right to self-defense in the Second Amendment of the U.S. Constitution.

This concept of judicial activism, however, is not without fault. In order to use judicial activism in such manner, one must first know which accepted methodology an

¹⁴⁵ *Two courts, one 'sin'*, Los Angeles Times (October 22, 2008), available at http://articles.latimes.com/2008/10/22/editorial_pages/ed-court22 (last visited Nov. 2, 2008).

¹⁴⁶ *Id.*

individual judge or court supported before the decision in question. For example, in order to call the California Supreme Court or its Justices activist in light of the *In re Marriage Cases* decision, one must know whether said Court or Justices used either originalism or interpretivism in defiance of their support for the contrary before *In re Marriage Cases*. Although one might argue the California Supreme Court, being traditionally liberal, might be inclined to be interpretivist and therefore did not depart from their chosen methodology, one must remember that the California Supreme Court is made up of a number of Republican nominees, with Republicans tending to be originalists. This highlights the need to know which methodology a court or individual judge used and supported previously. Otherwise, without this key element, judicial activism becomes misused once again.

However, this construction of judicial activism should be scrapped all together. With research, it is not too difficult to determine which methodology was previously supported by a court or individual judge. One can look at past decisions, reputation in the legal community, and references in the media as sources to determine a judge's interpretive preference. Ultimately, it does not take much to determine a judge's or court's previous preference. In order to preserve judicial activism as a critical element of jurisprudence, some work is needed to establish a new foundation for judicial activism.

Judicial activism is necessary in evaluating previous judicial decisions and understanding why departure from a previously held methodology was appropriate in rendering the current decision. Without knowing Justice Scalia to be an originalist, *Heller* would have not been so groundbreaking to the legal community. Once political benchmarking is replaced in favor of determining if a court or individual judge departed

from a previously supported method of judicial interpretation, judicial activism regains its stature in judicial debate.

VI. Conclusion

As discussed, judicial activism has roots in mid-twentieth century academia and judicial discourse. Early judicial activism, while vague, still denoted when judges ignored judicial precedent, judicially legislated, or departed from accepted methodology. However, over time, its lack of clarity and entrance into mainstream media degraded judicial activism's integrity to political benchmarking. Judicial activism is now used to label judicial decisions, if not individual judges, as "wrong" or "activist" without any logical, judicial reasoning. Yet, there is a chance for judicial activism to regain its legitimacy as a scholarly debate topic by looking for a different anchor in use. Judicial activism should be grounded in the time-honored debate of originalism and interpretivism methodologies of constitutional interpretation. Only then can the focus on judicial activism turn from mere political benchmarking to the fundamental philosophies of constitutional law itself. By reframing judicial activism, judicial activism restores its integrity and becomes a true essence of judicial debate.

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