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Outlaws, Pirates, Judges: Judicial Activism as an Expression of Antiauthoritarianism in Anglo-American Culture

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OUTLAWS, PIRATES, JUDGES: JUDICIAL ACTIVISIM AS AN EXPRESSION OF ANTIAUTHORITARIANISM IN ANGLO-AMERICAN CULTURE

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I. INTRODUCTION

The election of Donald J. Trump as President of the United States in November of 2016 generally surprised most observers.[1] According to reports, his victory surprised even the candidate himself.[2] While the flawed polling data caused some of the widespread surprise,[3] much of the consternation concerned the unconventional nature of the candidate and his campaign. Not only did many of Trump's policy positions conflict with the traditional positions of his party,[4] but his authoritarian style

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[1] *See, e.g.*, Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html; Shane Goldmacher & Ben Schreckinger, *Trump Pulls off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016, 3:58 AM), https://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070; David A. Graham, *Donald Trump's Stunning Upset*, THE ATLANTIC (Nov. 9, 2016), https://www.theatlantic.com/politics/archive/2016/11/donald-trump-elected-president/507062/; Jim Norman, *Trump Victory Surprises Americans; Four in 10 Afraid*, GALLUP (Nov. 11, 2016), https://news.gallup.com/poll/197375/trump-victory-surprises-americans-four-afraid.aspx.

[2] *See* Kelly O'Donnell, *Uncertain Trump Team Prepared 2 Speeches on Election Night: Sources*, NBC NEWS (Nov. 9, 2016, 1:52 PM), https://www.nbcnews.com/storyline/2016-election-day/uncertain-trump-team-prepared-2-speeches-election-night-sources-n681511; Shannon Vavra, *Report: Trump Didn't Have a Victory Speech Prepared on Election Night*, AXIOS (July 17, 2017), https://www.axios.com/report-trump-didnt-have-a-victory-speech-prepared-on-election-night-1513304256-0da1a0a2-9083-4fad-bb3f-c3e7929b2054.html.

[3] *See* Carl Bialik & Harry Enten, *The Polls Missed Trump. We Asked Pollsters Why.*, FIVETHIRTYEIGHT (Nov. 9, 2016, 4:53 PM), https://fivethirtyeight.com/features/the-polls-missed-trump-we-asked-pollsters-why/; Kenneth P. Vogel & Alex Isenstadt, *How Did Everyone Get it so Wrong?*, POLITICO (Nov. 9, 2016, 12:15 AM), https://www.politico.com/story/2016/11/how-did-everyone-get-2016-wrong-presidential-election-231036.

[4] *See* Noah Bierman, *Here are the Places Where Donald Trump and the Republican Party Disagree*, L.A. TIMES (July 20, 2016), https://www.latimes.com/politics/la-na-pol-trump-gop-positions-20160720-snap-htmlstory.html (noting that some areas of disagreement between President Trump and the GOP include trade, immigration, social security, foreign policy, and the size of government); Philip Bump, *Donald Trump is not a Traditional Republican—*

differed sharply from previously conceived standards of presidential behavior.[5]

In addition to contributing to the shocking nature of his electoral victory, Trump's authoritarian style and worldview may indeed have contributed to the victory itself, as he appears to have been able to tap into a strong authoritarian current beneath the surface of American society. As early as the primaries, commentators asserted that Trump's authoritarian worldview was a primary motivator for his supporters.[6] As Trump proceeded to win the Republican nomination and the presidency, it became clear that rather than causing a dramatic shift into authoritarianism, Trump recognized the pre-existence of a strong authoritarian theme in American culture and knew how to harness it.[7]

Regardless of the extent that Trump's candidacy benefited from a latent strain of authoritarianism in American culture, Trump's presidency subsequently sparked a resurgence of antiauthoritarianism. Both President Trump's authoritarian approach to his office and the antiauthoritarian

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Including on Some Big Issues, WASH. POST (Aug. 30, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/30/where-donald-trump-differs-with-republican-party-orthodoxy/?noredirect=on&utm_term=.e2fc0164c828 (discussing differences between President Trump and the GOP, including his view on single-payer health care, immigration, and taxes); Greg Krieg et al., *Trump vs. the GOP on the Issues*, CNN (June 9, 2016), https://www.cnn.com/interactive/2016/06/politics/trump-vs-gop-platform-issues/.

[5] *See* Steve Denning, *Trump and Authoritarian Propaganda*, FORBES (Nov. 6, 2016, 8:52 AM), https://www.forbes.com/sites/stevedenning/2016/11/06/trump-and-authoritarian-propaganda/#16c089693e0a; *see also* Brett Edkins, *Donald Trump's Authoritarian Speech Confounds the Media*, FORBES (July 22, 2016, 12:16 PM), https://www.forbes.com/sites/brettedkins/2016/07/22/media-confounded-by-donald-trumps-authoritarian-speech/#7670964b67dd.

[6] Matthew MacWilliams, *The One Weird Trait that Predicts Whether You're a Trump Supporter*, POLITICO (Jan. 17, 2016), https://www.politico.com/magazine/story/2016/01/donald-trump-2016-authoritarian-213533 ("Trump's electoral strength—and his staying power—have been buoyed, above all, by Americans with authoritarian inclinations. And because of the prevalence of authoritarians in the American electorate, among Democrats as well as Republicans, it's very possible that Trump's fan base will continue to grow."); Amanda Taub, *The Rise of American Authoritarianism*, VOX (Mar. 1, 2016, 9:00 AM), https://www.vox.com/2016/3/1/11127424/trump-authoritarianism ("Much of the polarization dividing American politics was fueled not just by gerrymandering or money in politics or the other oft-cited variables, but by an unnoticed but surprisingly large electoral group—authoritarians.").

[7] *See* MATTHEW C. MACWILLIAMS, THE RISE OF TRUMP: AMERICA'S AUTHORITARIAN SPRING 31–32 (2016); David Frum, *How Donald Trump Could Build an Autocracy in the U.S.*, THE ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/; *see also* Christopher R. Browning, *The Suffocation of Democracy*, N.Y. REV. OF BOOKS (Oct. 25, 2018), https://www.nybooks.com/articles/2018/10/25/suffocation-of-democracy/.

reaction to the same became apparent immediately after his inauguration.[8] Following the inauguration, the National Park Service retweeted information regarding the relatively small size of the crowd for Trump's inauguration compared to that of his predecessor.[9] President Trump responded by ordering all federal government offices to suspend tweeting until further notice.[10] While most official social media accounts of the National Park Service complied with the gag order, rogue tweeting emerged first from the Badlands and then from unofficial social media accounts.[11] This began the Alt National Park Service, a movement started by National Park Service employees and other environmentalist actors explicitly to resist policies of the Trump Administration.[12] It also led to the subsequent widespread internet meme about park rangers leading the resistance.[13]

Another incident from early in the Trump presidency that demonstrated the existence of a strong antiauthoritarian element in American culture took the form of the response to the "Muslim ban"—an executive order banning foreign nationals from seven heavily Muslim nations and refugees from visiting the United States for a set period of time.[14] The executive order prompted numerous activities. There were airport protests across the nation,[15] as well as small lawyer armies

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[8] *See* Binyamin Appelbaum (@BCAppelbaum), TWITTER (Jan. 20, 2017, 1:04 PM), https://twitter.com/BCAppelbaum/status/822550063658532865.

[9] *Id.*

[10] William Turton, *National Park Service Banned from Tweeting after Anti-Trump Retweets*, GIZMODO (Jan. 20, 2017, 8:04 PM), https://gizmodo.com/national-park-service-banned-from-tweeting-after-anti-t-1791449526.

[11] Wynne Davis, *Rogue National Park Accounts Emerge on Twitter Amid Social Media Gag Orders*, NPR (Jan. 25, 2017, 4:40 PM), https://www.npr.org/sections/alltechconsidered/2017/01/25/511664825/rogue-national-park-accounts-emerge-on-twitter-amid-social-media-gag-orders.

[12] *See About*, ALT NAT'L PARK SERV., https://altnps.org/about (last visited Nov. 15, 2019).

[13] *See* MEME, https://me.me/i/first-they-came-for-the-scientists-and-the-national-parks-8183351 (last visited Feb. 18, 2020) ("First they came for the scientists . . . And the National Parks Services said, 'lol, no' and went rogue and we were all like, 'I was not expecting the park rangers to lead the resistance, none of the dystopian novels I read prepared me for this but cool.").

[14] Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978–79 (Jan. 27, 2017).

[15] James Doubek, *Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, NPR (Jan. 29, 2017, 5:30 AM), https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order.

swarming airports to provide pro bono assistance to travelers.[16] In addition, there was a taxi cab boycott of JFK Airport[17] and an Uber boycott.[18] Furthermore, there was a dramatic increase in donations to the ACLU and other activist groups.[19] And, of course, there was another ubiquitous internet meme.[20]

While chronicling all the antiauthoritarian protests and actions that occurred in response to various actions of the Trump Administration would be well beyond the scope of this article, an examination of hashtag usage shows both the broad appeal and persistence of antiauthoritarianism in response to perceived authoritarianism from the White House. In a recent study, the Pew Research Center found that #Resist had been used on Twitter an average of nearly sixty-thousand times per day during the time period from Trump's inauguration through May 1, 2018.[21] Other hashtags, such as #BlackLivesMatter and #MeToo, which one can also view as antiauthoritarian within their contexts, were used even more within the same time period.[22] The hashtag usage combined with the prevalence of the park ranger resistance and anti-Muslim ban memes discussed above, both of which derive from a famous poem lamenting the failure of German intellectuals to challenge the authority of the Nazi Party

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[16] *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html; *see also* Dahlia Lithwick, *The Lawyers Showed Up*, SLATE (Jan. 28, 2017, 10:58 PM), https://slate.com/news-and-politics/2017/01/lawyers-take-on-donald-trumps-muslim-ban.html.

[17] Mary Papenfuss, *Striking New York Cabbies Join Airport Protest Against Trump's Muslim Crackdown*, HUFFPOST (Jan. 28, 2017, 8:49 PM), https://www.huffpost.com/entry/new-york-cabbies-strike-muslim-ban_n_588d2cd0e4b0b065cbbc6512.

[18] *See* Lucinda Shen, *200,000 Users Have Left Uber in the #DeleteUber Protest*, FORTUNE (Feb. 3, 2017), http://fortune.com/2017/02/03/uber-lyft-delete-donald-trump-executive-order/. The problems began when Uber turned off the surge pricing for trips to New York's JFK Airport during the protests of the immigration ban, which activists interpreted was a sign of support for the Executive Order that banned immigration from seven Muslim-majority nations. *Id.*

[19] Liam Stack, *Donations to A.C.L.U. and Other Organizations Surge After Trump's Order*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/aclu-fund-raising-trump-travel-ban.html.

[20] MEME, https://me.me/i/first-they-came-for-the-muslims-and-we-said-not-8524873 (last visited Nov. 15, 2019) ("First they came for the Muslims . . . AND WE SAID NOT THIS TIME MOTHERF***ERS").

[21] MONICA ANDERSON ET AL., AN ANALYSIS OF #BLACKLIVESMATTER AND OTHER TWITTER HASHTAGS RELATED TO POLITICAL OR SOCIAL ISSUES, PEW RES. CTR. (July 11, 2018), http://www.pewinternet.org/2018/07/11/an-analysis-of-blacklivesmatter-and-other-twitter-hashtags-related-to-political-or-social-issues/.

[22] *Id.*

in the 1930s,[23] indicate that the antiauthoritarian attitudes toward the Trump White House resonate with a broader swath of Americans than the small minority actively engaging in protests.

Interestingly, the same Pew study also found prevalent use of #MAGA, indicating support for President Trump's policies during the same time period, which reinforced the notion that strands of both authoritarianism and antiauthoritarianism exist simultaneously in American culture.[24] This makes sense as the two concepts act as different sides of the same coin. Indeed, results from a psychological study of an earlier time that saw increased levels of both authoritarianism and antiauthoritarianism in America in the wake of the 9/11 terror attacks suggest that authoritarianism and antiauthoritarianism exist as different poles of a single spectrum.[25] Furthermore, the study found that authoritarian and antiauthoritarian rhetoric frequently occurred within the same argument by the same actor, which lead to the conclusion that authoritarianism/antiauthoritarianism are cultural traits rather than individual personality traits.[26] In other words, as individual Americans respond to President Trump either positively or negatively on an emotional level, they may be accessing cultural traits of authoritarianism and antiauthoritarianism as tools to express positivity or negativity.[27]

While the public often views courts and judges in the American legal system as ostensibly non-partisan, they nevertheless possess access to the same cultural tools of authoritarianism and antiauthoritarianism.[28] A brief examination of select cases from the early years of the Trump presidency reveals that courts do sometimes couch their decisions in authoritarian or

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[23] *See* Megan Garber, *'First They Came': The Poem of the Protests*, THE ATLANTIC (Jan. 29, 2017), https://www.theatlantic.com/entertainment/archive/2017/01/first-they-came-poem-history/514895/.

[24] ANDERSON ET AL., *supra* note 21.

[25] *See* Andrew J. Perrin, *National Threat and Political Culture: Authoritarianism, Antiauthoritarianism, and the September 11 Attacks*, 26 POL. PSYCHOL. 167, 187 (2005) ("The paper suggests that instead of a simple threat-authoritarianism causal link, authoritarianism and antiauthoritarianism are paired elements of political culture that are invoked together in the face of a national threat.").

[26] *See id.* at 167, 188.

[27] *See id.* at 188.

[28] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (pre-enforcement action against the President, seeking to prohibit implementation and enforcement of the Presidential Proclamation that banned entry by nationals from Muslim countries); Regents of Univ. Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (action brought against Department of Homeland Security based on rescission of Deferred Action for Childhood Arrivals (DACA)); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp.3d 1011 (N.D. Cal. 2018) (seeking to enjoin rescission of DACA).

antiauthoritarian styles. *Trump v. Hawaii* is an example of an authoritarian decision, which upheld President Trump's final attempt at a travel ban.[29] In upholding the executive order, the Court emphasized the President's authority to regulate immigration.[30] The Court buttressed the authority by noting that Congress had delegated it and that the delegating statute granted the President broad discretion.[31] The Court stated that the statute "exudes deference to the President in every clause."[32] The Court ultimately held that the statute "vests the President with 'ample power' to impose entry restrictions."[33] The emphasis on deference to presidential power takes a decidedly authoritarian turn. Conversely, for an example of judicial antiauthoritarianism one can look to California federal litigation in which an injunction prevented the Trump Administration from halting the DACA program.[34] Whereas the Supreme Court in *Trump v. Hawaii* emphasized the President's power,[35] the Court of Appeals for the Ninth Circuit chose to emphasize the effect of power on individuals by using the sympathetic story of Dulce Garcia, whom the court asserts "embodies the American Dream,"[36] as bookends to its discussion of the relevant law.[37] Furthermore, while the opinion acknowledges the power of the executive branch in immigration, it emphasizes the accountability that accompanies power:

> The Executive wields awesome power in the enforcement of our nation's immigration laws. Our decision today does not curb that power, but rather enables its exercise in a manner that is free from legal misconceptions and is democratically accountable to the public. Whether Dulce Garcia and the hundreds of thousands of other young dreamers like her may continue to live productively in the only country they have ever known is, ultimately, a choice

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[29] Trump v. Hawaii, 138 S. Ct. 2392, 2408, 2423 (2018).

[30] *See id.* at 2408 (recognizing that the President has "broad discretion" to suspend the entry of aliens into the United States, and that President Trump lawfully exercised that discretion).

[31] *Id.*

[32] *Id.*

[33] *Trump*, 138 S. Ct. at 2408 (quoting Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993)).

[34] *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018); *see also* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp.3d 1011 (N.D. Cal. 2018).

[35] *Trump*, 138 S. Ct. 2392 at 2408 ("By its plain language, [the statute] grants the President broad discretion to suspend the entry of aliens into the United States . . . [and] vests the President with ample power to impose entry restrictions . . . . ").

[36] *Regents*, 908 F.3d at 485.

[37] *Id.* at 520.

> for the political branches of our constitutional government. With the power to make that choice, however, must come accountability for the consequences.[38]

Similarly, in issuing the injunction that formed the basis of the appeal, Judge Alsup acknowledged the executive branch authority[39] before identifying limits on such authority,[40] ultimately holding that the government had transgressed those limits.[41] Judge Alsup also engaged in some world-class trolling—quoting President Trumps' tweets that were sympathetic to DACA, the program the Trump Administration sought to halt.[42] In issuing and upholding the injunction, both Judge Alsup and the Ninth Circuit found the decision to halt DACA to be "arbitrary and capricious,"[43] which is a term of art within administrative law[44] that carries connotations critical of authority.[45] Thus, both courts and individuals tap into the cultural concepts of authoritarianism and antiauthoritarianism.

Reactions to judicial opinions that invoke authoritarian or antiauthoritarian styles tend to vary based on the viewpoint of the reactor. A common refrain leveled against antiauthoritarian decisions in particular, however, is that they are politically-motivated decisions of "activist judges."[46] For instance, in response to the DACA decisions

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[38] *Id.*

[39] *See Regents*, 279 F. Supp.3d at 1018–19 ("All agree that a new administration is entitled to replace old policies with new policies so long as they comply with the law.").

[40] *See id.* at 1019, 1037–44, 1046. The Court considered whether the new administration terminated DACA based on a mistake of law rather than in compliance with the law." *Id.* at 1018–19.

[41] *Regents*, 279 F. Supp.3d at 1046.

[42] *See id.* at 1047. President Trump tweeted, "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really! . . . " *Id.* Additionally, he tweeted, "Congress now has [six] months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!" *Id.*

[43] Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511 (9th Cir. 2018); *Regents*, 279 F. Supp.3d at 1046.

[44] *See* 5 U.S.C. § 706 (2012) ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious . . . ").

[45] *See Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "arbitrary" as "founded on prejudice or preference rather than on reason or fact"); *Capricious*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "capricious" as "contrary to the evidence or established rules of law").

[46] *See* Katia Dmitrieva, *Sessions Takes On 'Activist' Judges Slowing Down Trump's Agenda*, BLOOMBERG (Mar. 10, 2018, 3:37 PM),

discussed above, Attorney General Sessions strongly criticized the decisions as being activist and as lacking respect for "constitutional responsibilities."[47] While criticisms of this nature tend themselves to conform to partisan objectives, judicial opinions consistently labeled as activist do typically feature a court actively rejecting authority put before it.[48]

This article will argue that the rejection of what scholars otherwise view as controlling legal authority lies at the heart of judicial activism. Furthermore, it will argue that judicial activism itself channels the antiauthoritarian current in American culture (and in English culture predating its importation to America). Part II will examine the extensive scholarly writings already existing on judicial activism in order to identify common themes and to explore to what extent scholars have arrived at a consensus definition of judicial activism. Part III will then show that judicial activism may better be understood within the context of law as culture and will offer an updated definition of judicial activism that accounts for a cultural component. Part IV will then delve into expressions of antiauthoritarianism in broader, non-legal Anglo-American culture to demonstrate under what circumstances Anglo-American culture actively encourages antiauthoritarian behavior and attitudes. It will do so specifically through the lens of recurring cultural motifs of outlaws and pirates. Part V will then analyze four sets of judicially activist decisions to gauge the extent to which the decisions align with culturally appropriate exercises of antiauthoritarianism. The first set of decisions will consist of United States Supreme Court decisions that scholars commonly describe as activist. If judicial activism is indeed a cultural phenomenon, however, then one would expect it to be more commonplace than a handful of high profile and oft-discussed Supreme Court decisions cherry picked from throughout history. Therefore, the second and third sets of decisions will comprise United States Supreme Court cases from the 2017-2018 term and cases from courts other than the United States Supreme Court. The fourth set of decisions to be analyzed will be a selection of "problem cases," which are activist cases that even apologists of judicial activism decry, and non-activist cases that nonetheless face criticism for their

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https://www.bloomberg.com/news/articles/2018-03-10/sessions-takes-on-activist-judges-slowing-down-trump-s-agenda.

[47] *See id.* ("I am shocked by the actions of certain judges who fail to respect the constitutional responsibilities of the executive and legislative branches.").

[48] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

results. Ultimately, this article will argue that assessing judicial activism through the cultural prism of acceptable antiauthoritarianism provides a tool to differentiate between proper and improper judicial activism.

II. ON JUDICIAL ACTIVISM

The term "judicial activism" entered the public consciousness in 1947 when famed historian Arthur M. Schlesinger, Jr. used the term to describe a wing of the Supreme Court in a short piece for Fortune magazine.[49] The act of judicial activism certainly existed before the coining of the term—after all, a hundred and thirty-odd years before the Fortune piece, *Marbury v. Madison* invalidated a statute[50] and created the process of judicial review,[51] which besides being itself activist, enabled all subsequent activism. Schlesinger's pithy phrase drew increased attention to the phenomenon.

While not truly a legal piece itself, Schlesinger's article not only prompted a robust scholarly debate on the subject of judicial activism—one estimate asserted that Schlesinger's term appears in law review articles at the rate of 450 times per year[52]—but also largely helped frame the debate. Schlesinger's article provided thumbnail sketches of the Justices as people to provide a snapshot of the Court at a particular moment in time.[53] For example, Schlesinger describes Justices Rutledge and Murphy with a mix of physical characteristics, personality traits, and mannerisms: "Rutledge, with his honest and friendly face, rocking and squirming in his chair; Murphy, grinning or glum under bushy eyebrows[.]"[54] Schlesinger described the other justices similarly.[55] Additionally, Schlesinger extended the thumbnail sketch tone to his

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[49] *See* Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, XXXV FORTUNE 73, 74 (Jan. 1947).

[50] Marbury v. Madison, 5 U.S. 137, 180 (1803).

[51] *Id.* at 177–78. The Court stated:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 178.

[52] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441, 1442 (2004).

[53] *See* Schlesinger, *supra* note 49, at 73.

[54] *Id.*

[55] *See id.*

description of judicial activism itself, presenting the concept as a "great debate" between "judicial activists" and "champions of self-restraint," at least partially driven by personal clashes.[56] He then presented the ideologies of the two sides of the debate in a single paragraph: "In brief, the Black-Douglas wing appears to be more concerned with settling particular cases in accordance with their own social preconceptions; the Frankfurter-Jackson wing with preserving the justiciary in its established but limited place in the American system."[57]

Thus, Schlesinger's famous piece focused mostly on superficial characteristics and did not provide an in-depth framework for an ideology of judicial activism. What Schlesinger did do, however, is identify the existence of differing attitudes about the role of the Court held by members of the Court itself[58] and present the tension between those elements as representing a unique tipping point with potential ramifications for the unfolding of American history.[59] While Schlesinger oversold the latter point a bit—noting in conclusion that the tension's "wise resolution could easily make this Court, with its remarkable abilities and its agreement on a wide range of constitutional fundamentals, one of the great creative Courts of history"[60]—he astutely observed that the "conflict on the Court, if it can be restrained from intellectual and personal extremes, may lead to a debate in the most fruitful tradition of American political thought."[61]

Schlesinger's pithy phrasing, his vague and stylistic definition of his terms, and his suggestion that the issue nonetheless amounted to history unfolding before his readers' eyes combined to set the table for a plethora of scholarship on judicial activism and its role in American society.[62] Because of the vagueness in Schlesinger's Fortune piece, scholars writing on judicial activism enjoy wide latitude in their approaches to the topic, which has led several of them to allege widespread disagreement on the

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56 *Id.* at 76, 78–79.

57 Schlesinger, *supra* note 49, at 201.

58 *See id.* (noting that "[t]he Black-Douglas group believes that the Supreme Court can play an affirmative role in promoting the social welfare; the Frankfurter-Jackson group advocates a policy of judicial self-restraint.").

59 *See id.* ("[T]he clash of judicial personalities has transformed [the questions at issue] from mere marginal divergencies to into a fundamental conflict over the proper function of the judiciary in a democracy.").

60 *Id.* at 212.

61 Schlesinger, *supra* note 49, at 212.

62 *See generally id.*

topic.[63] When one views the collective scholarship as a whole, however, certain trends emerge. First, scholars tend to agree that judicial activism is both ubiquitous and bipartisan.[64] Second, scholars tend to discuss judicial activism in normative terms, often negatively,[65] though some scholars play the role of judicial activism apologists. Third, scholars tend to offer improved definitions for identifying judicial activism.[66] Furthermore, the offered definitions converge on something resembling a consensus.[67] Let us examine each of these trends in turn.

A. Ever-present Activism

Despite Schlesinger's attempt to portray the balance on the Supreme Court in 1947 between the activists and the champions of restraint as a unique tipping point in history,[68] legal scholars rightly point out that concern over the proper role of judges and courts in American society certainly existed prior to 1947.[69] For example, Kmiec sees that common law asked the same question as the pre-twentieth century discussions asked regarding the role of "judicial legislation."[70] A number of other scholars point to the debates housed in *The Federalist* for evidence of early debate on the role of the Supreme Court in particular.[71] For instance,

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[63] *See, e.g.*, Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195 (2009) (defining a functional concept of activism based on unenforced norms of judicial propriety); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (identifying seven indices of judicial activism rather than defining the term by use of a single definition); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43 (2007) (focusing on an empirical examination on how recent United States Supreme Court justices have in fact exercised judicial power); Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L. J. 709 (2009) (correlating judicial activism to judicial responsibility).

[64] *See, e.g.*, Green, *supra* note 63, at 1197; Marshall, *supra* note 63, at 1217; Ringhand, *supra* note 63, at 45; Segall, *supra* note 63, at 709.

[65] *See, e.g.*, Green, *supra* note 63, at 1199; Marshall, *supra* note 63, at 1217–18 n.3; Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 389, 391 (1969); Segall, *supra* note 63, at 709–10.

[66] *See, e.g.*, Kmiec, *supra* note 52, at 1463–65; Segall, *supra* note 63, at 710–11.

[67] *See* Segall, *supra* note 63, at 719 ("Although the tests vary in style and substance, one common theme is the importance of examining the results reached by the Supreme Court.").

[68] *See* Schlesinger, *supra* note 49, at 201.

[69] Kmiec, *supra* note 52, at 1444.

[70] *Id.* at 1444–45.

[71] Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1257–58, 1271 (2002); Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint*, 47 MD. L. REV. 118, 119–20 (1987); Segall, *supra* note 63, at 714 n.18.

Segall, Cox, and Brown all invoke *The Federalist No. 78* as evidence that the founders saw the role of the Court as worthy of public debate.[72] Other scholars similarly reference *The Federalists Nos. 48*,[73] *39*,[74] and *51*.[75]

Beyond establishing the existence of debate on the role of the Court prior to Schlesinger's tipping point, scholars also document the Supreme Court's activist behavior in eras other than the one that Schlesinger witnessed.[76] Indeed, in one of the more comprehensive looks at the history of judicial activism, Craig Green asserts that modern focus on Schlesinger's term draws attention away from the fairly strong tradition of Supreme Court activism in the United States, noting that "confusion and disdain over the *term* 'judicial activism' have obscured a deeper *concept* of judicial activism that is a pillar of our legal system."[77] He goes on to describe four eras of controversial judicial conduct in United States history: the Lochner era, during which the Court invented the constitutional right to contract amongst other pro-industry, anti-statutory regulation decisions;[78] the post-Civil War decades, during which the Court eviscerated the meanings of constitutional liberty and equality as provided by the Reconstruction Amendments, reversed a constitutional ban on paper money, and even helped decide a presidential election (though the Justices did this as members of the 1876 Electoral Commission and not as a body of the Court);[79] the Dred Scott era, during which the Court departed from precedent and struck down the Missouri Compromise in order to bolster the institution of slavery;[80] and the Marshall Court decades, during which the Court established the concepts of judicial review and implied congressional authority.[81] Astute readers may note that Green's eras of activism include the early republic, the antebellum period that succeeded the early republic, the reconstruction/post-civil war years following the antebellum period, and

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[72] Brown, *supra* note 71, at 1271 n.62; Cox, *supra* note 71, at 119–20 n.7; Segall, *supra* note 63, at 714 n.18.

[73] Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 151 n.58 (2001).

[74] Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*, 73 U. COLO. L. REV. 1363, 1377 n.48 (2002).

[75] Kevin Jefferies, *Judicial Activism and the Necessity of Auxiliary Precautions*, 43 S. TEX. L. REV. 213 (2001).

[76] *See* Green, *supra* note 63, at 1198 (discussing the role of the Supreme Court during the Obama administration).

[77] *Id.*

[78] *Id.* at 1209–10.

[79] *Id.* at 1211.

[80] Green, *supra* note 63, at 1213–14.

[81] *Id.* at 1215–16.

the Gilded Age/turn-of-the-century era that succeeded Reconstruction.[82] In other words, Green views judicial activism as essentially a constant in pre-twentieth century America. No wonder he describes it as a pillar of our system.

Other scholars identify eras of judicial activism similarly to Green. For instance, Judge William Wayne Justice also points to the Marshall Court, the *Dred Scott* era, the "separate but equal" and *Lochner* eras; he then adds the New Deal era, the Warren Court, and the Rehnquist Court.[83] He thereby demonstrates that the constant of judicial activism did not end in the twentieth century.[84] Amusingly, Judge Justice characterizes the constant nature of judicial activism with this little gem of snark: "[o]ne of the longest running dramas in American political life may be entitled appropriately 'The Quest for Constitutional Meaning.'"[85] Archibald Cox similarly notes that the independent judiciary constitutional interpretation is a constant (and in his view essential) process throughout American history.[86] He describes the process as existing between the poles of judicial activism and judicial restraint, both of which he views as having existed throughout U.S. history.[87] Additionally, Alpheus Thomas Mason notes that the Supreme Court has been "an instrument of government, actively involved in politics" from *Marbury* onwards.[88] Mason then identifies the usual suspects: the Marshall Court, the *Dred Scott* era, the *Plessy* era, and the Warren Court.[89] He asserts that the *Lochner* era from 1890 to 1937, however, represents the "greatest period of judicial pre-eminence in the Court's history."[90] Rogers and Vanberg also view the *Lochner* era as the most extreme era of judicial activism.[91] Thus, legal

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[82] *Id.* at 1256.

[83] William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 2–6 (1992).

[84] *See id.* at 3 ("The notion that the judiciary must invalidate unconstitutional government actions has since become an established part of our constitutional system, and has been recognized as such for at least the past century and a half.").

[85] *Id.*

[86] *See* Cox, *supra* note 71, at 118–19.

[87] *See id.* at 121–22 ("The varieties of current opinion concerning the proper role of the Supreme Court in constitutional interpretation can best be pictured by imagining two lines drawn horizontally from left to right across a piece of graph paper, each linking two magnetic poles, pulling Justices and observers in opposite directions.").

[88] Mason, *supra* note 65, at 386.

[89] *See id.* at 387, 389.

[90] *Id.* at 389.

[91] *See generally* James R. Rogers & Georg Vanberg, *Resurrecting Lochner: A Defense of Unprincipled Judicial Activism*, 23 J. L., ECON., & ORG. 442 (2007) (arguing that judicial review still works to improve the overall quality of legislation).

scholars have established the widespread existence of judicial activism throughout United States history notwithstanding Schlesinger's description of a pivotal moment.

A significant conclusion that follows from the temporal ubiquity of judicial activism in the United States takes the form of the realization that acts of judicial activism do not come solely from proponents of any single political philosophy. Several scholars note that the original complaints of judges overstepping their role came from progressives bemoaning the *Lochner* era Court's invalidation of statutes aimed at promoting social welfare.[92] These same scholars also point out the conservatives' later criticism of the progressive Warren Court.[93] In response to the extreme conservative criticism directed at the Warren Court's activism, some scholars have taken steps to demonstrate that the conservative Rehnquist Court engaged in just as much activism as its more liberal predecessor.[94] In particularly persuasive fashion, Ringhand uses an empirical model to demonstrate that "conservative justices as well as their more liberal counterparts actively 'replace' legislative choices with their own preferred outcomes, and they do so at a roughly equal pace . . . "[95] Even some conservative-leaning scholars acknowledge that the Rehnquist Court veered into activism at times.[96]

To account for the bipartisan, or perhaps more accurately extra-partisan, nature of widespread judicial activism in our society, Cox provides a useful biaxial model for thinking about judicial opinions. In his model, opinions lie in one of four quadrants based on how liberal, conservative, activist, or restrained they are.[97] Under this model, "liberal" refers to opinions that "tend in varying degrees to see the proper role of all branches of government as the active promotion of human freedom and

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92 *See* Brown, *supra* note 71, at 1259–60; *see also* Segall, *supra* note 63, at 716.

93 *See* Segall, *supra* note 63, at 714–15. The Warren Court's decisions on prayer in school, one person/one vote, and criminal procedure are just some of the debates that lead to conservative criticism. *Id.*

94 *See, e.g.*, Jack M. Balkin & Sanford Levenson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1081, 1092 (2001); Peter M. Shane, *Federalism's Old Deal: What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 204 (2000).

95 Ringhand, *supra* note 63, at 45.

96 *See, e.g.*, Marshall, *supra* note 63, at 1232–36 (describing the Rehnquist Court as activist, but in an acceptable way); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1210–15 (2002) (depicting the Rehnquist Court as activist but in an acceptable, Burkean way).

97 *See* Cox, *supra* note 71, at 121.

equality,"[98] while "conservative" opinions "insist that the proper role of government is confined to the preservation of public order, health, safety, and morality."[99] Cox's model is useful as a tool because it enables the evaluation of individual opinions in positive or negative terms depending upon the values of the observer, while treating absolute activism and absolute restraint as extremes on a spectrum—either of which can be invoked by observers to criticize an opinion. This is crucial because recognizing the widespread occurrence of judicial activism from all angles of the political spectrum renders it essential to be able to evaluate the phenomenon of judicial activism in normative terms. This leads us to the second broad trend in the scholarly treatment of judicial activism: normative judgment.

B. Judging the Judges: Normative Treatment of Judicial Activism

As one would expect of legal scholars, much of the scholarly commentary on judicial activism adopts normative terms in its discussion. Legal scholars' normative treatment of judicial activism runs the gamut from critically negative to positive apologies, with gradations in between. Let us examine the poles before turning to the middle ground.

1. Negative Views of Judicial Activism

Arguably, the primary critique of judicial activism derives from the notion that by engaging in activism, courts (particularly the Supreme Court) improperly insert themselves into the political process and subvert the public will by replacing it with their own. This critique was first issued in the seminal (and sarcastically titled) work, *The Least Dangerous Branch*,[100] and has been referred to and referenced by legal scholars as the counter-majoritarian problem.[101] Scholars continue to reference counter-majoritarianism as a problem with judicial activism.[102] It has been equated

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98 *Id.*

99 *Id.*

100 *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press, 2d ed. 1962).

101 Marshall, *supra* note 63, at 1219–20 ("Counter-Majoritarian Activism: the reluctance of the courts to defer to the decisions of the democratically elected branches.").

102 *See, e.g.*, Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 239–40 (1983) ("Majoritarianism . . . suggests that when the Court exercises judicial review, it substitutes another public policy for that enacted by elected representatives

with an equally disturbing transparency problem, in which the Court fails to disclose its inherently political and less-than-fully-democratic process.[103] Similarly, Balkin and Levenson describe the activism of the Rehnquist Court as a "constitutional coup,"[104] setting aside the popular will (and the popular vote in the 2000 Presidential election).[105]

Beyond the counter-majoritarian critique, constitutional originalists also view judicial activism as a societal ill.[106] Notably, the originalist critique differs from the counter-majoritarian critique; as the former accepts that the Court, by failing to strike down statutes that conflict with the Constitution, would be failing its duty,[107] and the latter views the Court setting aside democratically passed legislation as inherently problematic.[108] Thus, originalists only view opinions as problematically activist if they lead "courts to adopt doctrines that contradict the text of the Constitution *either* to uphold or nullify a law."[109] Regardless of

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in Congress, state legislatures, or city councils. Such action is often seen as illegitimate from the perspective of democratic theory.").

[103] *See* Segall, *supra* note 63, at 710–14.

> The essential problem . . . has been the shared assumption among liberals and conservatives that judicial activism can be measured in some meaningful way by examining how often the Court invalidates state and federal legislation; how frequently the Court overturns its own precedent; and under what circumstances the Court reverses the decisions of other political actors.

Id. at 710.; *see also* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 3–7 (ABC-CLIO, LLC, 2012) ("[T]he Justices employ the fancy but misleading jargon of constitutional law . . . to hide the personal value judgments that actually support their decisions . . . . Thus . . . the Justices fail to act like true judges.").

[104] Balkin & Levenson, *supra* note 94, at 1050.

[105] *Id.* at 1045–50.

[106] *See* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases,* 73 U. COLO. L. REV. 1275, 1279 (2002). Barnett states:

> We should adhere to the original meaning because—right here, right now—we are committed to a written constitution, and the whole reason for putting a constitution in writing is to constrain the behavior of political and judicial actors. If those actors can change its meaning as they desire and in the absence of a written amendment, the written constitution will have failed in its principal purpose, and our commitment to it rings hollow.

Id. at 1279.

[107] *See id.* at 1276, 1279–80 ("Though we may often disagree over whether a particular statute is constitutional, we all share the conviction that the Supreme Court and lower federal courts should strike down or nullify unconstitutional laws enacted by legislative majorities.").

[108] *See* Marshall, *supra* note 63, at 1220 ("Counter-Majoritarian Activism: the reluctance of the courts to defer to the decisions of the democratically elected branches."); Canon, *supra* note 102, at 240 ("Such action is often seen as illegitimate from the perspective of democratic theory.").

[109] Barnett, *supra* note 106, at 1276.

allowing for nullification of unconstitutional statutes, originalists nonetheless advocate strenuously for a restrained, non-activist judiciary, going so far as to suggest that there would be no way to restrict judges from arbitrary behavior if not for originalist restraint:

> On one side of the debate are the "originalists," or interpretivists, who maintain that the provisions of the Constitution mean what the Founders intended them to mean—the "original intention." On the other side are the nonoriginalists, or noninterpretivists, who insist that judges are free to interpret the Constitution in light of what is "good and just" and the like.[110]

Of course, some critics of judicial activism include more than one complaint in their critiques. For example, Marshall includes both the counter-majoritarian and originalist critiques among his "seven sins of judicial activism"[111] Marshall proceeds to add abandoning precedent, acting extra-jurisdictionally, engaging in "judicial creativity," employing overly aggressive remedies, and misusing judicial power to accomplish partisan objectives to round out his seven sins.[112] Additionally, some works on judicial activism, while not offering full critiques themselves, clearly rest on negative assumptions about judicial activism.[113]

Thus, critics of judicial activism cast the phenomenon as one of irresponsible judges dangerously drifting out of their lanes by failing to respect an array of positive ideas, such as the democratic process, the Constitution, or stare decisis. Yet, judicial activism is not without its defenders, who attempt to counter the criticisms.

2. *Activism Apologists*

Perhaps unsurprisingly, commentary from sitting federal judges comprises some of the strongest defense of judicial actions labeled as activist. For instance, Judge Frank M. Johnson, Jr., sitting in the United States Court of Appeals for the Fifth Circuit at the time of his writing, asserts that the Framers of the Constitution recognized that an independent

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[110] Raoul Berger, *New Theories of "Interpretation:" The Activist Flight from the Constitution*, 47 OHIO ST. L. J. 1, 2 (1986).

[111] *See* Marshall, *supra* note 63, at 1219–20.

[112] *Id.* at 1220.

[113] *See, e.g.*, Kmiec, *supra* note 52, at 1463–76 (using loaded terms such as "judicial legislation" and "result-oriented judging" when describing judicial activism).

judiciary is essential to a functioning constitution,[114] and that the doctrines of federalism and separation of powers merely limit courts' exercise of judicial power rather than ban it altogether.[115] Johnson counters criticism that courts go beyond interpretation, pointing out that the critiques suffer from three fallacies: the "watershed fallacy," or the assumption of activism as a new phenomenon and not as a key feature of the American political system from its inception;[116] the "elitist fallacy," or the assumption that judges only use the Constitution as a mere sounding board for personal philosophy;[117] and the "omnipotence fallacy," or the overstatement of the power of federal courts and the dangerousness of judges.[118] For Johnson, judicial activism is a feature of the system and not a bug.[119] Indeed, he asserts that the sudden appearance of strict constructionists in the 1970s (which he attributes to the rise of Nixon) actually represents a more revolutionary development than the activism of the Warren Court.[120] Johnson's fellow judge, William Wayne Justice, sitting in the United States District Court for the Eastern District of Texas, also espouses the view that judicial activism is a feature of the system and indeed is a necessary tool for federal judges to actually do their job.[121] For Judge Justice, critiques of activism amount to mere rhetorical devices for attacks on the necessary functions of federal courts, namely determining constitutional meaning and providing remedies for cases in controversy.[122] Similarly, Judge J. Skelly Wright, a senior member of the Court of Appeals for the D.C. Circuit at the time of his writing, views activism as impossible to avoid without abdicating the judge's duty, noting that "the inevitable politics of judging should not be apologized for, but accepted and even welcomed."[123] Judge Kim McLane Wardlaw, sitting in the Court of Appeals for the Ninth Circuit at the time of her

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[114] *See* Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L. J. 901, 902 (1979).

[115] *Id.*

[116] *Id.* at 903

[117] *Id.* at 903.

[118] Johnson, *supra* note 114, at 903.

[119] *See id.* at 904 (describing "activism" as "an old and persistent theme").

[120] *Id.* at 904–05.

[121] *See generally* Justice, *supra* note 83 (noting that "[r]emedial activism, the ordering of detailed remedies in institutional reform cases, is nothing more than an application of the traditional role of the judge: to resolve disputes and remedy wrongs.").

[122] *See id.* at 4–5, 10–13.

[123] *See* J. Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L. Q. 487, 520 (1987).

writing, goes even further than her colleagues. She uses the teachings of Judge Cardozo, whom she portrays as the greatest expert in history on the art of judging, to show that all but the easiest cases use at least elements of activism.[124] She takes it a step further by asserting that empathy and a desire for justice are positive traits in judges, noting that "[t]here are times when the judge's sense of justice necessarily comes to bear on his consideration of the legal problems with which he is presented. Black robes are not magical garments; they cannot transform the wearer from human to automaton."[125] For the sitting judges who have chosen to write on the subject, judicial activism, and even a personal sense of justice, represent essential tools in the fulfillment of their duties.

This is not to say that sitting judges are the only ones who defend judicial activism; several legal academics and scholars also enter the fray. In his defense of judicial activism, Kevin Jefferies echoes the view of the judges that activism is a feature of the system that the Framers of the Constitution designed, going so far as to borrow from *The Federalist No. 51* for both his title and introductory quote: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[126] For Jefferies, "the freedom given federal judges by their lifetime appointment, the basis of judicial activism, is a critical check on the executive and legislative branch and an essential ingredient in the prevention of tyranny[.]"[127] Rogers and Vanberg take the defense of judicial activism to the extreme by portraying it as a key component of the system. They advocate for even unprincipled judicial activism as a net good, as the "shadow of judicial review" exerts a positive effect on the amount of effort legislators put into drafting laws.[128] While she does not go quite as far as Rogers and Vanberg, Rebecca L. Brown also recognizes that the problematic nature of *Lochner* stems not from its activism.[129] In fact, Brown asserts that:

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[124] *See generally* Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1632 (2010) (noting Judge Cardozo's success in discrediting the legal formalists' view of the law as a closed system of preordained rules).

[125] *Id.* at 1645.

[126] Jefferies, *supra* note 75, at 213 (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

[127] *Id.* at 230.

[128] Rogers & Vanberg, *supra* note 91, at 443.

[129] Brown, *supra* note 71, at 1265–68 (noting that "[t]he error of *Lochner* was not its activism any more than it was the Court's protection of rights or its suspicion of legislative

> . . . the ability of a Court to defend its understanding of good government and its own role in constitutionalism—is the true measure of a successful Court, and not whether it follows precedent, not whether it reaches out to answer questions not raised by the parties, not whether it fails to give deference to coordinate branches of government; in short, not whether it is activist. Rather, we must judge a court by how it has justified its particular brand of activism.[130]

Thus, apologists of judicial activism counter its critics by emphasizing the necessary and beneficial roles an independent judiciary and judicial activism play in our constitutional system. Of course, there is a lot of room in the middle between the critics of judicial activism on the one hand, and its apologists on the other. Let us now examine the middle ground.

3. *The Middle Ground: Mixed Bags and Begrudging Realists*

Two approaches primarily occupy the ground between the poles of judicial activism's critics and defenders. One may describe the first approach as consisting of scholars who view judicial activism as a mixed bag in that some instances of judicial activism are defensible, while other instances go beyond the pale. For example, Mason notes that the rationale behind activism has shifted over time from one of holding property rights sacrosanct during the *Lochner* era to a rationale focusing on egalitarianism and civil liberties.[131] This recognition of change over time and differing rationales for differing circumstances allows for observers to view different instances of activism with different levels of approbation or praise. Similarly, Young thinks that the term judicial activism should be stripped of its unwavering negative connotation.[132] Thus, cases should be viewed on their own individual circumstances as to whether their activist elements are justified.[133] For Young, judicial activism that proceeds in a Burkean manner is defensible and perhaps even warranted in some circumstances.[134] Judge Frank H. Easterbrook of the Seventh Circuit is the rare judge who, instead of wholly defending judicial activism, argues

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moves. Its error was an impoverished and inflexible understanding of what the common good might entail during a period of ongoing radical social and economic changes.").

130 *Id.* at 1270.

131 *See* Mason, *supra* note 65, at 389.

132 *See* Young, *supra* note 96 at 1162–63.

133 *See id.* at 1163.

134 *Id.* at 1209.

that activism, like judicial restraint, can be good or bad depending upon the circumstances.[135]

In addition to the commentary calling for instances of judicial activism to be evaluated on a case-by-case basis, scholars also offer means by which to perform that case-by-case analysis in order to separate the good acts of activism from the bad. Cox, who provides the biaxial model for evaluating degrees and political direction of activism described above, argues that activist courts can be true to the framers' original intent by embodying revolutionary principles in their activism.[136] Jones also seeks to distinguish between what he terms proper and improper activism, identifying the former as activism focused "on policing the boundaries of power between the jurisdictional government entities within our system," and the latter as activism that "seeks to substantively correct perceived injustices in the law through the use of any number of extra-constitutional sources."[137] Both of these systems rely on measuring activist acts against foundational principles in determining the propriety of the activism.[138]

Yet, there seemingly exists a second approach to the middle ground in the debate between critics and defenders of judicial activism, an approach traveled by pragmatists and realists who begrudgingly accept the continued existence of judicial activism and write in hopes of mitigating its harms to fashion it into something more or less useful. Judge Richard Posner joins his former colleague from the Seventh Circuit in the middle ground via this second path, expressly rejecting normative academic studies of judicial activism in favor of a more realist, social scientific approach.[139] Posner views the Supreme Court as being on the way to becoming a constitutional Court, instead of acting as a general purpose appellate court, a role it increasingly leaves to the Circuits.[140] Furthermore, Posner views constitutional courts as inherently political.[141] For Posner, there is no point in condemning judicial activism since it is likely to continue or even increase as the Court's role shifts; instead he seeks to constrain it by advocating for a culture of "modest political

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[135] *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1403–05 (2002).

[136] Cox, *supra* note 71, at 129–31 (arguing that "the Court should confine the grants of federal power and the guarantees of individual rights to the particular instances that the framers specifically had in mind").

[137] Jones, *supra* note 73, at 144–45.

[138] *See id.* at 179.

[139] *See* Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 32, 32–33 (2005).

[140] *Id.* at 37–38.

[141] *Id.* at 38-39.

judging," arguing that judges should feel "bashful about being a politician in robes" and strive for a high threshold for invalidating actions of other branches.[142] Green somewhat echoes Posner's position in that he views judicial activism as an unavoidable byproduct of our independent judiciary, and advocates for establishing strong cultural beliefs about the roles of courts as a check to discourage judges from abusing their power.[143]

The focus on the role of culture in molding judicial activism is interesting. Parts III, IV, and V of this article will argue that culture does indeed inform judicial activism, though not necessarily in the way that Posner and Green hope. Indeed, a cultural lens may ultimately be useful for determining good judicial activism from bad and may look more like Cox's revolutionary principles than Posner's culture of modesty. Before we can fully explore the role of culture in judicial activism, however, we should address the third broad trend found in scholarly writing on judicial activism: offering improved definitions for judicial activism as a term.

C. Converging on Consensus: Defining Judicial Activism

Complaints of the lack of an adequate definition of the term "judicial activism" remains a common, almost universal, refrain in scholarly writing on the subject.[144] At least a couple of commentators attribute the wide variety of approaches taken to defining judicial activism to the vagueness inherent in Schlesinger's original use of the term.[145] Despite the chronic protestations, however, as scholars continue to offer variations on a definition,[146] something akin to consensus emerges on at least a base definition of judicial activism.

This baseline consensus essentially converges upon the concept that judges engage in activism when they reject authorities' observers would otherwise expect them to follow. In the most basic form, this would be when judges depart from legislation that they should be applying or when

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142 *Id.* at 54.

143 Green, *supra* note 63, at 1224–26.

144 *See, e.g.*, Canon, *supra* note 102, at 237; Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1753–54 (2007); Easterbrook, *supra* note 135, at 1401; Green, *supra* note 63, at 1197–98; Kmiec, *supra* note 52, at 1143; Ringhand, *supra* note 63, at 43; Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 567–68 (2007); Segall, *supra* note 63, at 719.

145 Green, *supra* note 63, at 1201–03; Kmiec, *supra* note 52, at 1149–50.

146 Roberts, *supra* note 144, at 576.

they depart from precedent. For instance, in constructing her empirical model, Ringhand uses the invalidation of statutes and the overturning of precedent as indicators of activist judicial behavior.[147] Similarly, Roberts distinguishes between "institutional external activism" and "institutional internal activism.[148] The former she describes as courts exceeding the normal constraints on their role exercised by core doctrines, such as separation of powers and federalism,[149] and the latter which she depicts as judges exceeding constraints within the judicial branch, such as precedent.[150] She uses this distinction to evoke the same notion of courts rejecting authorities of other branches or states or rejecting their own precedents.[151]

Of course, many observers view courts as constrained by more than legislation and precedent. Roberts adds another category to her external/internal model—"decisional process activism."[152] As such, she views courts as also constrained by accepted canons of interpretation.[153] Roberts' final two categories, "empty political epithet" and "multidimensional activism," are either not really activism or some combination of her first three categories involving judges rejecting authority that they should ordinarily follow.[154] Similar to Roberts, Canon adds an element of interpretive fidelity (albeit one he ties to originalism) to elements of majoritarianism—respecting legal authorities created by the democratic branches—and interpretive stability—adhering to precedent—in identifying constraints judges normally follow.[155] Canon adds three additional elements for measuring activism that all deal with the extent to which courts set policy and measure degrees to which judges exceed their role rather than identify constraints on the judicial role itself.[156] Thus, the policy-centered elements necessarily flow from the

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147 Ringhand, *supra* note 63, at 44.

148 *See* Roberts, *supra* note 144, at 580–91.

149 *Id.* at 580–81.

150 *Id.* at 578–88.

151 *Id.* at 588–89.

152 *See* Roberts, *supra* note 144, at 591.

153 *See id.* at 591–95 (stating that a classic example of decisional process activism arises from the textual interpretation of a statute or the Constitution).

154 *Id.* at 595–600.

155 Canon, *supra* note 102, at 239.

156 The three additional elements Canon includes are substance/democratic process distinction, specificity of policy, and availability of an alternate policymaker. *Id.* Substance/democratic process distinction is the degree to which judicial decisions make substantive policy rather than affect the preservation of democratic political processes. *Id.* Specificity of policy relates to the extent to which a judicial decision, instead of agencies or

elements based on the rejection of authorities to which judges should normally defer. Both Young and Marshall similarly define judicial activism as comprising the rejection of authorities from other branches, the denial of original intent, and the disregard of precedent.[157] Like Canon, Young adds additional factors dealing with breadth of remedy that flow from those dealing with rejecting authority.[158] For Young, all of the factors clearly involve a rejection of proper authority, as he states that the behaviors he describes "are linked by a common thread: they all involve a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its own independent judgment about the correct legal outcome."[159] Marshall also adds remedial and procedural elements that result as consequences from the common elements of rejecting authorities from other branches, original intent, or precedent.[160] Thus, some scholars add departing from the original intent of the framers of the Constitution as an authority judges are normally expected to follow to the same extent as they follow legislation and precedent.

Interestingly, there are some commentators that view originalism/constitutionalism as such a strong constraint that they argue that courts may engage in activist behavior by not striking down actions of the other branches that themselves violate the original intent of the Constitution. For example, Kmiec hedges on the first element of a definition of judicial activism by adding the qualifier of "arguably constitutional" to actions of other branches when discussing courts' obligations to defer to legislation or regulation.[161] Additionally, Barnett opines that constitutional originalism is paramount, alleging that "it is activist for courts to adopt doctrines that contradict the text of the

individuals, establishes policy. *Id.* And finally, availability of an alternate policymaker relates to the extent to which a judicial decision supersedes serious considerations of the same problem by other governmental agencies. Canon, *supra* note 102, at 239.

[157] *See* Marshall, *supra* note 63, at 1219–20 (discussing counter-majoritarian activism; non-originalist activism; precedential activism); *see also* Young, *supra* note 96, at 1144–45.

[158] *See* Young, *supra* note 96, at 1144.

[159] *Id.* at 1145.

[160] *See* Marshall, *supra* note 63, at 1219–20. Marshall discusses precedential activism, which is the failure of the courts to defer to judicial precedent; jurisdictional activism, which is the failure of the courts to adhere to jurisdictional limits on their own power; judicial creativity, which is the creation of the new theories and rights in constitutional doctrine; and partisan activism, which is the use of judicial power to accomplish partisan objectives. *Id.* at 1220.

[161] *See* Kmiec, *supra* note 52, at 1463–65 ("[T]he Court is engaging in judicial activism when it reaches beyond the clear mandates of the Constitution to restrict the handiwork of the other government branches.").

Constitution *either* to uphold or nullify a law."[162] Thus, a complicating concept of activist restraint enters the picture upon addition of constitutionalism as a judicial constraint; the major complication being that determining the limits of the text/intent/meaning of the Constitution tends to vary quite a bit depending upon the point of view of the person doing the evaluating of the judicial behavior, as Cross and Lindquist note.[163]

Thus, commentators on judicial activism generally agree that rejection of authorities that we normally expect courts to follow lies at the heart of the definition of judicial activism. Commentators also generally agree, however, that such a definition is not without its limits. Another limit to the definition, not yet discussed, is that it does not get at why judicial activism occurs. Incorporating a cultural component to the basic definition may help to ameliorate the difficulties with a definition based on rejection of authority. Let us now turn our attention to the interplay between law and culture.

III. LAW AS CULTURE

Culture is undoubtedly a rather broad concept that may be even more difficult to define as a term than judicial activism. One legal anthropology scholar recognizes the flexibility of—and therefore the difficulty in defining—the term: "the concept of culture belongs to a rich and contested intellectual history in which it has functioned frequently and effectively as an analytical device."[164] For culture to be a useful analytical device for the purposes of the current paper, however, we will need to define the concept in slightly more specific terms. James M. Donovan defines culture by the role it plays: "Culture provides a template of default ways of being in a wide assortment of social and existential contexts. Culture is not determinative, but it does provide ready-made solutions to the most commonly encountered problems of living and especially of group living."[165] This role-based definition accurately serves our purposes of looking at how judges' own culture influences their decision-making when they encounter the common problem (at least for them) of the

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[162] Barnett, *supra* note 106, at 1276.

[163] *See* Cross & Lindquist, *supra* note 144, at 1760 (noting that the determination of judicial activism is contingent on the commentator's view of what the Constitution requires).

[164] Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 40 (2001).

[165] JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 227 (AltaMira Press, 2008).

difficult case. Lawrence Rosen also employs a role-based definition of culture, which he views as providing the capacity to categorize human experience.[166] Furthermore, Rosen views cultural responses based on categories as having largely replaced humane instinct, even before such a time as we evolved into modern homo sapiens.[167] A recent, comprehensive bird's-eye view of the totality of the human experience similarly asserts that a cognitive revolution occurred in humans around 70,000 years ago and enabled human language to express imagined concepts and events, ultimately leading humans towards the path of global dominance.[168] Notably, the work emphasizes that the resulting capacity to use one's imagination enabled cooperation of increasingly large groups of humans in vastly complex social structures through concepts such as shared myth and religion.[169] This opinion correlates well with Donovan's definition of culture as providing solutions to the problems of group living.

Law, as much as shared myth, enables cooperation of large groups of people; indeed, law may even be seen as one of the shared imaginings that make ordered civilization possible. Donovan describes law as "one piece of social reality that it has been useful to treat as a separate idea."[170] In essence, law is one of several categories of cultural norm that act together for social regulation, although a category of norm that anthropologists recognize by certain specific characteristics.[171] As such, "law can be seen as one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings."[172] Rosen discusses the interrelation between law and culture even more forcefully, noting that:

> [L]aw is so inextricably entwined in culture that, for all its specialized capabilities, it may, indeed, best be seen not simply as a mechanism for attending

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166 *See* LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION 3 (Princeton University Press, 2006) ("[T]his categorizing capacity—the key feature of the concept of 'culture'—was not something that happened after we became human but something that actually preceded our present speciation.").

167 *Id.*

168 *See* YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND 20–25 (HarperCollins Publishers, 2014) (noting that genetic mutations changed the inner wiring of the brains of Sapiens, enabling them to think in unprecedented ways and to communicate using an altogether new type of language).

169 *Id.* at 24.

170 DONOVAN, *supra* note 165, at 4.

171 *See id.* at 10.

172 Mezey, *supra* note 164, at 45.

> to disputes or enforcing decisions, not solely as articulated rules or as evidence of differential of power, and not even as the reification of personal values or superordinate beliefs, but as a framework for ordered relationships, an orderliness that is itself dependent on its attachment to all the other realms of its adherents' lives.[173]

If one views law as a social construct that acts as a single strand of a broader cultural weave in this manner, then the value of examining law through a cultural lens becomes evident. As Sarat and Simon put it, the cultural study of law "invites us to acknowledge that legal meaning is found and invented in the variety of locations and practices that comprise culture, and that those locations and practices are themselves encapsulated, though always incompletely in legal forms, regulations, and legal symbols."[174] Therefore, the study of law resembles other forms of cultural inquiry because of its connection to specific localities. Naturally, it follows that the study of law could benefit from anthropological techniques, or at the very least by acknowledgment of its anthropological nature.[175] Clifford Geertz, one of the pioneers of legal anthropology, sums it up succinctly: "law is local knowledge not placeless principle."[176] Accordingly, to fully understand the law of a specific place, one must understand its culture, and vice versa. As Rosen states, "[t]o understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture."[177] Thus, for Rosen, cultural assumptions fill in gaps of knowledge and can even underpin the findings of fact in a legal controversy.[178] To illustrate his position, Rosen uses judges and jury members as an example. Those individuals may evaluate the sincerity of a witness based on body language, which of course varies culturally from place to place.[179] Ultimately, Rosen advocates for the practical application

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[173] ROSEN, *supra* note 166, at 7.

[174] Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L & HUMAN. 3, 21 (2001).

[175] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167 (Basic Books, Inc., 1983).

[176] *Id.* at 218.

[177] ROSEN, *supra* note 166, at 5.

[178] *See id.* at 5–6 ("It is no mystery that law is part of culture, but it is not uncommon for those who, by profession or context, are deeply involved in a given legal system to act as if 'The Law' is quite separable from other elements of cultural life.").

[179] *Id.* at 117 ("[T]he ways in which even the same orientations [of a person's body language] may be displayed obviously vary enormously from one cultural or subcultural context to another.").

of legal anthropology in any number of legal situations.[180] Rosen's advocacy echoes that of Donovan and Anderson, who argue that the practical application of cultural data can help settle individual legal disputes.[181] Donovan and Anderson take the argument further, however, by also suggesting that the theoretical and practical application of anthropology greatly benefits the study of law.[182] They assert that "some concepts that appear to be wholly legal in nature will, upon closer scrutiny, reveal themselves to be dependent upon anthropological ideas in research."[183] Donovan and Anderson illustrate this idea using international human rights law, which they portray as deriving from changing social values.[184] They ultimately conclude that "[a]nthropology can clarify for law other concepts besides human rights. Religion . . . is another. Law could also benefit from an anthropological understanding of 'race'."[185] The propriety or impropriety of judicial activism could be one such concept that anthropology can help clarify.

How then does an analysis of law as culture proceed? Mezey postulates three models of viewing law as culture:

> Law as culture might be understood in a number of different ways . . . . First, one might analyze the relationship between law and culture by articulating the unspoken power of law in the realm of culture. Second, one might think about the relationship by emphasizing the enduring power of culture over legal institutions and decision-making. Lastly, one might reject the distinctions suggested by a "relationship" between the two and seek to synthesize law and culture, by pointing to the ways in which they are one and the same.[186]

Mezey's second model would be the one to employ when assessing how broader culture influences the legal culture that produces widespread judicial activism. She expounds upon this model by noting that:

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[180] *See generally* LAWRENCE ROSEN, THE JUDGMENT OF CULTURE: CULTURAL ASSUMPTIONS IN AMERICAN LAW (Routledge, 2018) (considering, through an anthropology lens, how cultural assumptions are built into American legal decision-making by demonstrating the many ways courts express their understanding of human nature).

[181] *See* JAMES M. DONOVAN & H. EDWIN ANDERSON, III, ANTHROPOLOGY & LAW 29–31 (Berghahn Books, 2003).

[182] *See id.* at 144 ("Law benefits from an infusion of anthropological thinking[.]").

[183] *Id.*

[184] *See id.* at 144–64 (discussing international human rights law).

[185] DONOVAN & ANDERSON, *supra* note 181, at 164.

[186] Mezey, *supra* note 164, at 47.

> [L]aw as culture might mean emphasizing the persuasive power of culture, a power that might be conceived as either excluding the possibility of a legal realm that could be articulated without recourse to culture or establishing the possibility of cultural regulation that functioned independently of law.[187]

She describes the culturally relevant considerations that play into the regionally varying practices of speed limit enforcement as an example of this sort of relationship, none of which actually meet the letter of the written law.[188]

The influence of cultural practices over law is not limited to citizens and law enforcement, as in the speed limit example. Other scholars contributing to the legal anthropology field provide examples of judges and lawmakers also swaying under the influence of culture in reaching their decisions. Examples from Rosen include the unenforceable nature of unconscionable contracts making it into the Uniform Commercial Code from common law decisions by judges who followed cultural concepts of fairness rather than the letter of the law;[189] the evidentiary rules providing exceptions to the exclusion of hearsay as reflecting cultural assumptions about when people are likely to tell the truth;[190] John Marshall's invocation of public opinion in applying a cultural value of justice in formulating a framework for (admittedly limited) indigenous rights in the Cherokee cases;[191] and the long-standing Anglo-American practice of jury nullification, in which juries refuse to apply legal remedies when those remedies are based on cultural assumptions not shared by the jurors.[192]

Donovan provides a helpful visualization of how law relates to various other types of cultural norms. He divides norms into four broad types: "norms of morality," which espouse ideals of what people ought to do;[193] "typical norms," which identify what people are typically expected to do;[194] "minimal norms," which serve as the baseline for what people

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187 *Id.* at 49.

188 *See id.* at 49–51 ("Despite the existence of formal law, it is culture that actually determines the 'legal' speed limit.").

189 ROSEN, *supra* note 166, at 30–32.

190 *See id.* at 94–95 ("Anglo-American evidentiary rules, which tend to be fashioned as if a jury were present, are not, of course, mere artifacts of the law but reflections of their cultures' assumptions.").

191 *Id.* at 153–54 (noting that Marshall was "extremely clever" in his reference to public opinion when addressing the legality of the Cherokee Indian situation).

192 *Id.* at 156–57.

193 DONOVAN, *supra* note 165, at 245.

194 *Id.*

must do (i.e., the floor of social responsibility rather than the ceiling);[195] and "phative norms," which indicate expressive behaviors that establish mutual belonging to a given group.[196] He then further describes his normative typology as existing along two axes: one running between "cohesion" and "control," which indicates whether the norm's enforcement takes the form of internalization or external pressure;[197] the other running between "substantive," which indicates what must be done, and "procedural," which rather indicates how it must be done.[198] Under this model, Donovan views law as a prime example of "minimal norms" in the cohesion-procedural quadrant—law very much sets the minimum standards of socially acceptable behavior, describes in detail how to comply with said socially acceptable behavior, and is internalized by those subject to it.[199] In the cohesion-substantive quadrant, adjoining law on one side, however, lies the norms of morality, or the ideal norms, which Donovan equates with religion or similar deeply-held moral beliefs.[200] Custom, representing typical norms, and etiquette, representing phative norms, occupy the other quadrants.[201] Donovan stresses that none of the types of norm operate truly on their own: "[e]ach type of norm generates its own bonds of social relationships, and it is the latticed network of all of them that allows the group to cohere over time."[202] For purposes of examining how extralegal cultural norms influence judicial behavior, let us focus on Donovan's cohesion quadrants featuring internalized norms.

The constraints upon judges discussed in Part I, such as the expectation that they defer to the acts of the more democratic branches or that they adhere to precedent, can be viewed as minimal norms, procedurally focused, and internalized by legal practitioners. In this way they act as any other feature of our law. What happens though, if these baseline expectations conflict with ideal norms representing our deepest-held cultural values? Robert Post contemplates such clashes in identifying authorities that courts look to for interpretive guidance beyond the authority of the law in interpreting the Constitution.[203] In particular, Post

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195 *Id.*

196 *Id.* at 245.

197 DONOVAN, *supra* note 165, at 245–46, 249.

198 *Id.* at 246.

199 *Id.* at 247–49.

200 *Id.* at 249.

201 Donovan, *supra* note 165, at 249.

202 *Id.* at 250.

203 *See* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 14–29 (1990) (recognizing that judges require and must be able to articulate a "theory" of

notes that courts sometimes recognize what he terms "an authority of ethos," which manifests as "responsive interpretation."[204] This responsive interpretation "engages in an ongoing process of national self-definition, [and] appeals to the authority of the Constitution as, for lack of a better word, ethos."[205] Post views the directness of an inquiry of responsive interpretation helpful for courts considering constitutional cases because it "empowers them to uncover and articulate substantive constitutional values."[206] The discussion of ethos and constitutional values recognizes that greater cultural values, perhaps what we might term ideal norms, do influence judicial decision-making.

Thus, accounting for the interplay of law and other cultural norms could improve our understanding of judicial activism. After all, Rosen notes:

> That fit of legal sensibility and cultural style will take place whether we try to ignore it or not, and it is by grasping the very nature of culture and law's place within it—grasping the symbiotic relation of a culture's constituent domains and the ways in which they are interlaced—that the place of law in the ordering of relationships may most realistically be sought.[207]

How might the consensus definition of judicial activism be altered to account for other cultural values? This article offers the following suggestion: judicial activism is an antiauthoritarian rejection of the ordinarily accepted constraints on judicial decision-making when those constraints conflict with deeply held cultural values of liberty, equality, and social justice.

To support this definition, however, we would ideally find other examples of the expression of antiauthoritarian ideals in a positive light within Anglo-American culture. Let us turn to a brief examination of these elements within our culture. For purposes of keeping the scope of this project manageable, let us limit the examination to two recurring cultural motifs that glorify antiauthoritarianism in the contexts of liberty, equality, and social justice: the outlaw and the pirate.

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constitutional interpretation when the meaning of any statute or other legal instrument is ambiguous).

204 *Id.* at 23.

205 *Id.* at 26.

206 *Id.* at 28.

207 ROSEN, *supra* note 166, at 199.

IV. OUTLAWS, PIRATES, AND THE GLORIFICATION OF ANTIAUTHORITARIANISM IN ANGLO-AMERICAN CULTURE

Before proceeding with our examination of depictions of outlaws and pirates in Anglo-American culture, a few points of order need establishing. First, the argument here is not that Anglo-American culture is inherently antiauthoritarian as a whole, but merely that there exists a current of antiauthoritarianism as one stream among many within the culture. Second, tropes of outlaws and pirates are far from the only representation of the current of antiauthoritarianism within our culture. Further depictions, however, are beyond the scope of this work. Third, the examination will proceed primarily by looking at Anglo-American literary and popular culture. As evidenced by Harari's description of a cognitive revolution,[208] the stories we tell hold great power and influence over how we interact with the world. In fact, Rosen describes culture as a "storehouse of stories" and notes that law as a component of culture also engages in storytelling.[209] Therefore, it makes sense to look at our culture's most explicit stories. Finally, the reader will no doubt have noticed use of the phrase "Anglo-American" in describing the culture underpinning our legal system. Not only did the United States inherit the English language and the common law from our former colonial sovereign, but we also inherited cultural tropes, including those of outlaws and pirates. Let us begin our examination at the English beginnings of the tropes.

A. Outlaws and Pirates in Early English Literature

When one thinks of outlaws in an English context, doubtless a certain denizen of Sherwood Forest springs to mind; yet the outlaw literary tradition actually predates tales of Robin Hood. In their academic compilation of Middle English Robin Hood texts, Knight and Ohlgren identify and reproduce several precursor tales featuring earlier outlaws and similar themes as more familiar stories.[210] For instance, Hereward the Wake is an outlawed Anglo-Saxon who uses a bow and gathers an armed

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208 *See* HARARI, *supra* note 168, at 20–25 ("The appearance of new ways of thinking and communicating, between 70,000 and 30,000 years ago, constitutes the Cognitive Revolution.").

209 ROSEN, *supra* note 166, at xii–xiii.

210 *See generally* ROBIN HOOD AND OTHER OUTLAW TALES (Stephen Knight & Thomas Ohlgren eds., Medieval Institute Publications, 1997) (discussing medieval tales of Robin Hood and other outlaws).

band to oppose a tyrannical king, namely the Conqueror himself.[211] None of the earlier outlaws, however, have enjoyed the staying power of Robin Hood in the public consciousness. Indeed, in discussing Robin Hood's lasting legacy, Knight and Ohlgren note that:

> Only King Arthur of the medieval heroes has had such longevity, but there are striking differences. One is that where Arthur represents authority under some serious and ultimately tragic form of pressure, the Robin Hood tradition always presents, in many varied forms, resistance to authority—the two heroes in a real sense are the reflex of each other.[212]

The earliest surviving mentions of Robin Hood occur as brief mentions in various chronicles, though Robin Hood clearly existed in the oral tradition prior to being put to paper, as "rymes of Robyn Hood" are directly referenced by the drunken priest representing Sloth in *The Vision of Piers Plowman*: "I kan noght parfitly my Paternoster as the preest it syngeth/But I kan rymes of Robyn Hood and Randolf Erl of Chestre."[213] An example of an early chronicle's treatment of Robin Hood occurs in a chronicle from the early fifteenth century: "Litil Iohan and Robert Hude/Waythman war commendit gud;/in Ingilwode and Bernnysdaile/Thai oyssit al this tyme thar trawale."[214] Note how well this brief mention conforms to modern versions of the legend; not only is Little John present, but the outlaws ply their trade from forests and receive public praise.

More fleshed out versions of the Robin Hood legend survive in a handful of ballads from a similar time period as Wyntoun's chronicle.[215] One of the earliest surviving ballads, *Robin Hood and the Monk*, features familiar themes such as the presence of some of the more noted merry men, Robin's opposition to the "schereff of Notyngham," and "mery Scherwode."[216] *Robin Hood and the Potter*, a slightly later ballad dated to

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[211] STEPHEN KNIGHT & THOMAS OHLGREN, *Hereward the Wake*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210 (Michael Swanton, trans., 1997).

[212] STEPHEN KNIGHT & THOMAS OHLGREN, *Robin Hood and Other Outlaw Tales: General Introduction*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[213] William Langland, *William Langland's The Vision of Piers Plowman*, UNIV. MICHIGAN, https://quod.lib.umich.edu/c/cme/PPlLan/1:6?rgn=div1;view=fulltext (last visited Mar. 15, 2020).

[214] Andrew of Wyntoun, *Orygynale Chronicle (c. 1420)*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[215] *See* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[216] STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Monk*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210; STEPHEN KNIGHT & THOMAS H.

the latter half of the fifteenth century, fleshes out the themes more fully and features what Knight and Ohlgren refer to as the "full and free ethics of the forest."[217] *Robin Hood and the Potter* also features an early act of wealth redistribution, as Robin, having either sold all the Potter's wares at ridiculous prices or given them to the Sheriff's wife as part of a ruse to infiltrate the Sheriff's house in disguise, pays the potter significantly more than the wares' worth with money liberated from the Sheriff:

> Potter, what was they pottys worthe
> To Notynggam that Y ledde with me?"
> "They wer worthe to nobellys," seyde he,
> "So mot Y treyffe or the;
> So cowed Y had for tham,
> And Y had be there."
> "Thow schalt hafe ten ponde," seyde Roben,
> "Of money feyre and fre;
> And yever whan thow comest to grene wod,
> Wellcom, potter, to me.[218]

Forced wealth redistribution from the elite classes of society to common folk such as this became so intrinsic to the Robin Hood myth over the course of the late fifteenth and early sixteenth centuries that John Major saw it as reason to include Robin Hood and Little John in his *Historia Majoris Britanniae*.[219]

Thus, even from its late medieval origins, the portrayal of Robin Hood involves three broad recognizable themes. First, Robin Hood is expressly an antiauthoritarian figure.[220] This can be seen through his struggles with the sheriff, an office which like its forerunner, the shire-

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OHLGREN, *Robin Hood and the Potter: Introduction*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[217] STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter: Introduction*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[218] STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[219] John Major, *Historia Majoris Britanniae* (1521), *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[220] STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and Other Outlaw Tales: General Introduction*, *supra* note 210 ("[T]he Robin Hood tradition always presents . . . resistance to authority.").

reeve,[221] represented the authority of the crown at the local level.[222] Robin Hood's antiauthoritarian attitude can also be seen through his flexible attitude towards societal roles of class, such as when he takes on the persona of the Potter.[223] Second, Robin Hood and his followers live free in an idyllic forest, outside the bounds of law and society's restrictions.[224] Not only that, but Robin Hood's men feel free to mock their leader, who responds in companionable fashion, such as when he loses a bet with Little John over his inability to beat the Potter in a fight.[225] Third, Robin Hood and his companions stand up for people from the lower social orders against those society places above them.[226] In a way, the latter two themes serve as justification for approbation of the first. Robin Hood's antiauthoritarianism is celebrated by the resulting freedom and justice. I would argue that these literary themes align with cultural ideal norms of liberty, equality, and social justice.

The Robin Hood mythology and its themes definitely struck a chord in the collective English imagination over the following centuries.[227] In addition to being featured in an ever increasing number of ballads, Robin Hood also made frequent appearances on stage.[228] Interestingly, authority figures over time attempted to temper the antiauthoritarian appeal of Robin Hood, either by banning performances of the Robin Hood myth or by retconning the hero as a genteel nobleman.[229] The attempts at minimizing his antiauthoritarian influence failed, however, as Robin Hood emerged as a national hero in the eighteenth century—an "exemplar of the 'free-born Englishman,' [and] an ardent defender of the political

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221 *See Shire-reeve*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining shire-reeve as "[t]he reeve of a shire, or county").

222 *See Reeve*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining reeve as "a ministerial officer of high rank having local jurisdiction; the chief magistrate of a hundred").

223 *See* STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210

224 STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter: Introduction*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

225 STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

226 STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter: Introduction*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

227 *See* STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and Other Outlaw Tales: General Introduction*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

228 *Id.*

229 *See* STEPHANIE L. BARCZEWSKI, MYTH AND NATIONAL IDENTITY IN NINETEENTH-CENTURY BRITAIN: THE LEGENDS OF KING ARTHUR AND ROBIN HOOD 21–25 (Oxford University Press 2000).

rights of the people at large."[230] Two widespread publications of collections containing various versions of the Robin Hood myth in 1765 and 1795 assisted his rise to the status of national hero.[231]

The outlaw's popularity received another boost in the early nineteenth century with Sir Walter Scott's *Ivanhoe*, originally published in 1820.[232] *Ivanhoe* features Robin Hood as Locksley, who plays a key role in rescuing the heroes of the piece from the villains by leading his merry men in an assault on the castle where the heroes face imprisonment.[233] Scott portrays Locksley as a free Saxon nobleman rebelling against Norman tyranny, with Locksley describing the Saxon leader as "the friend of the rights of Englishmen."[234] Scott's portrayal is in line with the Whig view of history, which dominated nineteenth century Britain and emphasized elements of freedom and individual rights in English history.[235] Part of this involved glorifying the Saxon past and attributing the development of freedom-curbing institutions to the continental influence of the Normans.[236] While Scott primarily wrote as a novelist, a number of Whig historians also attempted to fit Robin Hood into a narrative of traditional English freedom standing up to absolutist institutions created by Norman monarchs by including him amongst the supporters of Simon de Montfort in his rebellion against Henry III.[237] Montfort's rebellion, while ultimately unsuccessful, saw advances in the role of Parliament primarily through the inclusion of representatives for commoners for the first time.[238] Thus, Whiggish historians going to

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230 *Id.* at 21, 30–31.

231 *See* THOMAS PERCY, RELIQUES OF ANCIENT ENGLISH POETRY CONSISTING OF OLD HEROIC BALLADS, SONGS AND OTHER PIECES OF OUR EARLIER POETS (Henry B. Wheatley, ed., 1765) ("The chief heroes of the older ballads were King Arthur and his knights, Robin Hood, and Guy of Warwick . . . . From a local hero [Robin Hood] grew into national fame, and superseded Arthur in popular regard."); JOSEPH RITSON, ROBIN HOOD: A COLLECTION OF ALL THE ANCIENT POEMS, SONGS, AND BALLADS, NOW EXTANT, RELATIVE TO THAT CELEBRATED ENGLISH OUTLAW (1795).

232 SIR WALTER SCOTT, IVANHOE (Lerner Publishing Group, Inc. 2014) (1820).

233 *Id.* at 208, 227.

234 *Id.* at 208.

235 *See generally Whiggism,* THE ENCYCLOPEDIA OF LIBERTARIANISM, https://www.libertarianism.org/encyclopedia/whiggism (last visited Mar. 18, 2020). "Whiggism" refers to the philosophical principles of the British Whig party, which came to be called the Liberal party. *Id.*

236 *See* ERNST BREISACH, HISTORIOGRAPHY: ANCIENT, MEDIEVAL, & MODERN 248–257 (3d ed. 2007).

237 BARCZEWSKI, *supra* note 229, at 73–75.

238 *See generally* ADRIAN JOBSON, THE FIRST ENGLISH REVOLUTION: SIMON DE MONTFORT, HENRY III AND THE BARONS' WAR (2012).

lengths to place Robin Hood in the historical context of Montfort's rebellion indicates how strongly the outlaw was associated with liberty and English rights by the nineteenth century. Furthermore, because of the author's prominence (which extended to America), Scott's use of the outlaw cemented Robin Hood in the role of guardian of English liberty and rights.[239] As Barczewski notes, "Scott's influence upon subsequent treatments of the legend of Robin Hood can scarcely be exaggerated."[240]

While Sir Walter Scott and the Whigs may have cemented Robin Hood's place in the popular imagination, the antiauthoritarian themes promoting liberty, equality, and social justice clearly predated the Whig revision. It makes sense, then, that one finds similar themes in the early portrayals of the other grand scofflaw of English tradition: the pirate.

Although English audiences may have been predisposed to positively receive tales of nautical adventure by the pre-colonial voyage narratives of Hakluyt and Smith,[241] the nautical trope combined with the outlaw trope took great effect in a 1724 work entitled *A General History of the Pyrates,* published in several editions under the name of Captain Charles Johnson[242] (though in actuality most likely written by Daniel Defoe).[243] In fact, many modern editions of the work list Defoe as the author instead of Johnson.[244] Regardless of the authorship, the work provides much of the foundation for the depictions of pirates in subsequent Anglo-American culture.[245] Though the various editions contain slightly different content, as some passages occur in one but not another, taken as a whole, *A General History of the Pyrates* presents many of the same themes as the Robin Hood mythology.[246]

First, the antiauthoritarian inclinations of the work's subjects abound throughout the tales. For instance, Defoe describes the beginning of the loose collective of pirates on which his work focuses as a direct result of strict, authoritarian Spanish trade restrictions and the willingness of

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239 BARCZEWSKI, *supra* note 229, at 127, 130.

240 *Id.* at 129.

241 *See, e.g.,* RICHARD HAKLUYT, THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFIQUES AND DISCOVERIES OF THE ENGLISH NATION (1589); JOHN SMITH, THE GENERALL HISTORIE OF VIRGINIA, NEW ENGLAND, AND THE SUMMER ISLES (Bobbs-Merrill 1970) (1624).

242 *See* Captain Charles Johnson, A GENERAL HISTORY OF THE PYRATES (2nd ed. 1724).

243 John Robert Moore, *Defoe, Stevenson, and the Pirates*, 10 ELH 35, 50 (1943).

244 *See, e.g.,* Sandy Hobbs & David Cornwell, *Sawney Bean, the Scottish Cannibal*, 108 FOLKLORE 49, 51 (1997).

245 *See* DANIEL DEFOE, A GENERAL HISTORY OF THE PYRATES (Manuel Schonhorn, ed., 1999).

246 *See id.*

English authorities in Jamaica to help prosecute violators.[247] Additionally, Defoe details multiple instances of pirates accepting the king's proclamation (offering forgiveness for pirates wishing to go straight), but subsequently strafing under the restrictions of only attacking ships of nations at war with England and backsliding into their piratical ways.[248]

Second, Defoe's pirates clearly possess an eye for their own liberty and freedom from governance. Defoe tells how the pirates, looking for a realm of their own where they can live by their own laws, settle on the Island of Providence in the Bahamas, a nominally English colony that had been rendered free territory by destruction and depopulation caused by Spanish raiding in a previous war.[249] Much like Robin Hood and his men chose to live outside the laws of English society by inhabiting the forest, the pirates chose to live outside English laws in their own version of wilderness.[250] Similarly to Robin Hood, Defoe's pirates also do not care to remain wedded to particular social classes, as can be seen through the tale of Stede Bonnett, a wealthy and educated member of the planter class who chooses to forsake his station for the ways of piracy.[251]

Third, themes of equality and social justice also recur in Defoe's work. In describing governance among the pirates, Defoe portrays them as chaotically democratic and relatively egalitarian in outlook:

> Tho' these Pyrates consorted together, they were not under the Government of one particular Head, as Admiral, but each Captain and Company were regulated by their own Laws, independently of the rest; nor were the Captains themselves always obey'd, every thing of Moment being carried by the Vote of the Company, the Captain having only a double Vote in all Elections; and all Prizes that were taken, were divided equally between the Men who took them, whether they were in one Ship or Vessel, or two, or three; the Captains receiving two Shares, and the Officers a Share and a half, and others a share and quarter, and a single share to each private Man; but, upon any notable Piece of Service, the principal Pyrates would take upon them, to give away a quarter, or a half Share of one Man's, whom they found remiss in their Duty, to another whom they esteem'd of more Worth and Merit.[252]

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247 DANIEL DEFOE, A GENERAL HISTORY OF THE ROBBERIES AND MURDERS OF THE MOST NOTORIOUS PYRATES 43–45 (Garland Publishing ed., 1972) (1724).

248 *Id.* at 69, 87–88.

249 *Id.* at 46–47.

250 *See id.* at 47.

251 *See* DEFOE, *supra* note 247, at 60.

252 *See id.* at 46.

The concepts of democracy, equality, and meritocracy described by Defoe sometimes extended to the selection of the captains and officers by the crew, as seen in the election of Bartholomew Roberts following the death of the crew's previous captain.[253] The concept of equality amongst pirates is reinforced by the tales of two woman pirates, Mary Read and Anne Bonney, who act as normal crew members up until the moment that they plead pregnancy to escape the gallows.[254] Defoe also portrays instances of pirate captains adhering to their own concepts of social responsibility by looking out for their crew members, such as when Blackbeard raids the Carolinas in search of medicine needed by his crew.[255]

While Defoe's pirates did not rise to the level of national hero as Robin Hood had, almost every named captain who serves as the subject of one of Defoe's tales meets an ignominious end as an executed felon[256]—the work did greatly influence a later writer, Robert Louis Stevenson.[257] In turn, Stevenson helped elevate pirates in the public consciousness by introducing them into children's literature by using them as the backdrop for his classic coming of age tale, *Treasure Island*.[258] While the pirates in *Treasure Island* largely fill the role of villains, individual pirates are portrayed more sympathetically. Three in particular—Billy Bones, Ben Gunn, and Long John Silver—act as mentors or guides in various ways on the protagonist's journey to adulthood.[259] Like its forebear, *Treasure Island* expresses themes of liberty, equality, and social justice. In terms of liberty, the entire adventure liberates Jim Hawkins from a life of drudgery as the only son of a widowed innkeeper.[260] Similarly, the complex but sympathetic figure of Long John Silver manages ultimately to escape capture.[261] In terms of equality, Long John Silver, who is a cripple,[262] sits at the top of the pirate hierarchy; while young Jim Hawkins who is not the captain, squire, or doctor, acts as the principal agent of the pirates' downfall by depriving

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253 *See id.* at 161.

254 *See id.* at 117–34.

255 DEFOE, *supra* note 247, at 74–75.

256 *See id.* at 657.

257 Moore, *supra* note 243, at 50–51.

258 *See id.* at 42, 50.

259 *See generally* ROBERT LOUIS STEVENSON, TREASURE ISLAND (Oxford University Press 1963) (1883).

260 *Id.* at 9, 20.

261 *Id.* at 255.

262 *See id.* at 55–56.

them of the ship.[263] In terms of social justice, Jim Hawkins and his social betters, including the financier of the expedition, split Flint's treasure fairly.[264] The pirates also operate in a democratic way similar to Defoe's pirates, as they at one point vote to depose Silver as their leader.[265] Thus, Defoe's portrayal of pirates as antiauthoritarian while also acting in some ways in furtherance of liberty, equality, and social justice (within their specific society, of course) recurs in Stevenson's famous depiction of pirates.

As seen through the medieval and early modern depictions of outlaws, primarily Robin Hood, the appropriation of the figure of Robin Hood by the Whigs and the similar representations of pirates, English literary culture contains a current that celebrates certain acts of antiauthoritarianism. In particular, antiauthoritarianism is celebrated when it acts in furtherance of or in combination with themes of liberty, equality, and social justice—norms that were clearly valued by English society. Let us now look at how these norms, and portrayal of antiauthoritarianism in their furtherance, transplanted to America.

B. Outlaws and Pirates in Early American Literature

In the field of intellectual history and political culture, noted historian Bernard Bailyn shows that the revolutionary political ideals held by the founders of the United States, while influenced by multiple sources, mainly derived from a fringe English ideology valuing freedom and equality to the extreme.[266] Furthermore, Bailyn demonstrates that the ideas took root and flourished in America to a much greater extent than they had in England.[267] Accordingly, the ideal norms of liberty and equality that existed in England would have transferred to America, potentially even in stronger form. Indeed, one recent study of the Declaration of Independence, which in many ways seeks to identify the core values of a new nation, argues that the document encapsulates deeply held beliefs of not only freedom, but also equality.[268]

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263 *See* STEVENSON, *supra* note 259, at 177–79.

264 *Id.* at 255–56.

265 *See id.* at 205–11.

266 *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION viii (Belknap Press 1967).

267 *Id.* at xi.

268 *See* DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY 269 (Liveright Publishing Co. 2014) ("Equality is

Given the transfer and strengthening of these ideal norms, to say nothing of the continued shared language between the United States and its former mother country, it should not come as a surprise that depictions of outlaws and pirates also continued in the new nation. In actuality, several of the English works discussed were reproduced in American editions with illustrations provided by American artists.[269] Of these works, Howard Pyle's *The Merry Adventures of Robin Hood* may be the most significant, for Pyle not only drew the illustrations but also provided the text for a retelling of the legends.[270] And, retelling is what they were, as Pyle's work largely borrows from the ballads.[271] For instance, Pyle relates a story of Robin Hood and a butcher that retells *Robin Hood and the Potter* with only a few slight changes: the substitution of a butcher for a potter; Robin overpaying the butcher for his wares at the beginning of the tale rather than the end; and Robin luring the sheriff to the forest with the promise of great horned beasts instead of offering to lead the sheriff to Robin Hood.[272] Needless to say, the American editions of the earlier works continued to express approbation for antiauthoritarian behavior corresponding to pursuit of liberty, equality, and social justice.[273]

American literature, however, also introduced new variations on the traditional outlaw theme—variations that reflect the opportunities offered by an untamed frontier. The *Turner Thesis*, named for historian Frederick Jackson Turner,[274] holds that a distinct American identity shaped largely by the shared experiences of conquering a continent frontier by frontier—albeit stemming from seeds planted by British institutions—emerged after the United States split from Britain.[275] While the *Turner Thesis* may have been overstated, one can definitely see the influence of the frontier in early

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the foundation of freedom because from a commitment to equality emerges the people itself[.]").

[269] *See, e.g.*, HOWARD PYLE, THE MERRY ADVENTURES OF ROBIN HOOD (1883); PAUL CRESWICK, ROBIN HOOD (N. C. Wyeth illus., 1917); Susan R. Gannon, *The Illustrator as Interpreter: N.C. Wyeth's Illustrations for the Adventure Novels of Robert Louis Stevenson*, 19 CHILDREN'S LITERATURE 90, 91 (1991).

[270] *See* PYLE, *supra* note 269.

[271] *See* John Cech, *Pyle's* Robin Hood*: Still Merry After All These Years*, 8 CHILDREN'S LITERATURE, 11, 11 (1983).

[272] *Compare* PYLE, *supra* note 269, *with* STEPHEN KNIGHT & THOMAS H. OHLGREN, *Robin Hood and the Potter*, *in* ROBIN HOOD AND OTHER OUTLAW TALES, *supra* note 210.

[273] *See* CRESWICK, *supra* note 269; Gannon, *supra* note 269; PYLE, *supra* note269

[274] *See* BREISACH, *supra* note 236, at 313 (noting that the thesis "spoke of an American nation that was unique in character and development" and that it "became America's declaration of historiographical independence from Europe.").

[275] *Id.* at 314.

American literature, especially through the depictions of outlaws in two new forms: the frontiersman, who consciously leaves the restrictions of society behind, and the gunslinger of the lawless "wild west."

The trope of the frontiersman as an individual who lives outside the bounds and rules of society entered the public consciousness in a major way with the publication of five novels by James Fenimore Cooper, collectively known as *The Leatherstocking Tales*.[276] Much like Robin Hood and his men chose liberty by living in the forest outside the bounds of society, Cooper's protagonist Natty Bumppo (a.k.a. The Leatherstocking, Hawkeye, La Longue Carabine, Trapper, Pathfinder, or Deerslayer) seeks freedom on the frontier and struggles when white society arrives to previously wild or native places.[277] Furthermore, Cooper promotes the benefits of the liberty by portraying Bumppo as an ideal, a man of genuine honesty untouched by the guiles of society.[278] *The Leatherstocking Tales* also reflect the ideal of equality, as seen through the companionship and partnership between Natty Bumppo and Chingachgook (a.k.a. Sagamore), an American Indian of the Mohican nation.[279] Bumppo highlights the equal nature of their partnership when comforting Chingachgook following the death of Chingachgook's son, Uncas:

> "No, no," cried Hawkeye, who had been gazing with a yearning look at the rigid features of his friend, with something like his own self-command, but whose philosophy could endure no longer; "no, Sagamore, not alone. The gifts of our colours may be different, but God has so placed us as to journey in the same path. I have no kin, and I may also say, like you, no people. He was your son, and a red-skin by nature; and it may be, that your blood was nearer;—but if ever I forget the lad, who has so often fou't at my side in war, and slept at my side in peace, may He who made us all, whatever may be our colour or our gifts, forget me. The boy has left us for a time, but, Sagamore, you are not alone!" Chingachgook grasped the hand that, in the warmth of feeling, the scout had stretched across the fresh earth, and in that attitude of friendship, these two sturdy and intrepid woodsmen bowed their heads together, while scalding tears fell to their feet, watering the grave of Uncas, like drops of falling rain.[280]

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[276] *See generally* JAMES FENIMORE COOPER, THE LEATHERSTOCKING TALES (Library of America 1985).

[277] *See generally id.*

[278] *See generally id.*

[279] *See generally id.*

[280] JAMES FENIMORE COOPER, THE LAST OF THE MOHICANS 342 (Modern Library Classics 2001).

The death of Uncas also highlights a theme of social justice in Cooper's work because the passing of Uncas renders Chingachgook the last of the Mohicans, and represents sorrow at the passing of American Indian society.[281] This is made explicit by Tamenund, an American Indian sage, who states:

> "Go, children of the Lenape; the anger of the Manitto is not done. Why should Tamenund stay? The pale-faces are masters of the earth, and the time of the red-men has not yet come again. My day has been too long. In the morning I saw the sons of Unamis happy and strong; and yet, before the night has come, have I lived to see the last warrior of the wise race of the Mohicans!"[282]

The theme of social justice also plays a prominent role in *The Pioneers*, which recounts the verbal struggle between Bumppo, who advocates for balanced, unwasteful use of natural resources, and the settlers who bring the wasteful appropriation of resources by civilization.[283] Thus, the themes of liberty, equality, and social justice carry over into the frontiersman as outlaw. While Cooper's portrayal of the frontiersman features less overt antiauthoritarianism, or at least less overtly violent antiauthoritarianism—Natty Bumppo's preferred method of rejecting authority is to disappear into the woods, as at the end of *The Pioneers*[284]—the second form of new outlaw in American literature, the western gunslinger, takes on a more traditional role of antiauthoritarian behavior.

While cataloging every dime novel occurrence of the gunslinging western outlaw is a project beyond the scope of this work, let us look at one of the more famous examples—*The Life and Adventures of Joaquin Murieta: Celebrated California Bandit*.[285] Ridge portrays Murieta as an initially honest prospector of Mexican descent in California during the Gold Rush,[286] who eventually violently rejects the authority of the Americans engaging in a campaign of racially-motivated tyranny and abuse.[287] In addition to their antiauthoritarian actions, Murieta and his men enjoy the liberty of the wild hills to which they retreat wreaking

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281 *See id.*

282 *Id.*

283 *See* COOPER, THE LEATHERSTOCKING TALES, *supra* note 276, at 14.

284 *See id.* at 464–65.

285 *See* YELLOW BIRD (JOHN ROLLIN RIDGE), THE LIFE AND ADVENTURES OF JOAQUIN MURIETA: THE CELEBRATED CALIFORNIA BANDIT (Univ. of Oklahoma Press ed. 1955).

286 *Id.* at 8.

287 *Id.* at 9–13.

vengeance upon the Americans.[288] Additionally, as much as Defoe's pirates showed an egalitarian view towards gender, Murieta and his bandits include women among them who ride and dress as men.[289] Furthermore, Murieta creates a network of sympathetic allies, not just amongst his fellow Mexicans, but also among Indians and a few friendly Anglos.[290] The theme of social justice is also present (as is justice of the personal vengeance category), as seen through Murieta's motivations for banditry,[291] as a way to counter racial oppression[292] and to avenge his wronged family members, including his raped wife and his lynched brother.[293] Thus, one sees a recurrence of the outlaw themes of antiauthoritarianism, liberty, equality, and social justice in the literary depictions of western gunslingers, as seen through the example of Joaquin Murieta.

While the tropes of outlaws and pirates emigrated to American literature in both their traditional English and new, distinctly American forms in the nineteenth century, the invention of new media types in the twentieth century saw a burgeoning of American pop-culture. Within the bourgeoning popular culture, depictions of outlaws and pirates proliferated in a myriad of forms.

C. *Mass Media and the Proliferation of Outlaws and Pirates in Modern Popular Culture*

The twentieth century saw an expansion in the ways in which we tell stories; film, television, popular music, and video games joined traditional literature of the page and stage as media for expression. Yet, in many ways, although the methods of storytelling changed, the values expressed in the stories remained aligned with ideal norms. As new methods of storytelling emerged, so too did new depictions of outlaws and pirates. Sometimes the various new media depictions retell familiar tales, and other times they tell new stories. Recurring throughout the depictions, however, run the themes of antiauthoritarianism—liberty, equality, and social justice. Another feature of modern popular culture is the ease with which it crosses national boundaries (and is sometimes produced by joint,

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288 *See id.* at 14–15.

289 *See* YELLOW BIRD (JOHN ROLLIN RIDGE), *supra* note 285, at 29–30.

290 *See id.*

291 *See id.* at 8.

292 *Id.* at 9.

293 YELLOW BIRD (JOHN ROLLIN RIDGE), *supra* note 285, at 10, 12.

multinational ventures). In this section we will address depictions originating from both the United States and the United Kingdom, as we have already demonstrated shared cultural ideals between the two nations.

Of the familiar literary tales, Robin Hood reappears in new media perhaps the most often; film versions of the legendary outlaw abound.[294] He also appears in numerous television adaptations.[295] Additionally, film and television versions of *Ivanhoe* feature Robin Hood in his traditional role.[296] The film and television versions of Robin Hood tend to lean heavily into the Whig versions in which Robin advances the cause of liberty by foiling or helping to foil the tyrannical predations of Prince John, who is abusing government institutions.[297] Portrayals of Robin Hood and his band living free in the forest also feature prominently.[298] In terms of equality and social justice, the onscreen portrayals of Robin Hood generally depict a character performing his traditional duty of robbing from the rich to give to the poor.[299] Interestingly, the more recent onscreen versions of the legend advance the themes of equality and social justice further, either by introducing a Saracen character,[300] or by giving Marian or other female characters more active, heroic roles,[301] or both.[302] Regardless, the Robin Hood mythology's glorification of

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294 *See, e.g.*, ROBIN HOOD (Summit Entertainment 2018); ROBIN HOOD (Universal Pictures 2010); ROBIN HOOD: MEN IN TIGHTS (20th Century Fox 1993); ROBIN HOOD: PRINCE OF THIEVES (Warner Bros. Pictures 1991); ROBIN AND MARIAN (Columbia Pictures 1976); ROBIN HOOD (Walt Disney Productions 1973); THE ADVENTURES OF ROBIN HOOD (Warner Bros. Pictures 1938).

295 *See, e.g., Robin Hood* (British Broadcasting Co. 2006–2009); *Maid Marian and her Merry Men* (British Broadcasting Co. 1989–1994); *Robin of Sherwood* (HTV 1984–1986); *The Legend of Robin Hood* (British Broadcasting Co. 1975).

296 *See, e.g., Ivanhoe* (British Broadcasting Co. 1997); *Ivanhoe* (Metro-Goldwyn-Mayer 1952).

297 ROBIN HOOD (2010), *supra* note 294; *Ivanhoe* (1997), *supra* note 296; ROBIN HOOD: MEN IN TIGHTS (1993), *supra* note 294; ROBIN HOOD (1973), *supra* note 294; *Ivanhoe* (1952), *supra* note 296; THE ADVENTURES OF ROBIN HOOD (1938), *supra* note 294.

298 ROBIN HOOD (2010), *supra* note 294; *Robin Hood*, *supra* note 295; ROBIN HOOD: MEN IN TIGHTS (1993), *supra* note 294; ROBIN HOOD: PRINCE OF THIEVES (1991), *supra* note 294; ROBIN HOOD (1973), *supra* note 294; THE ADVENTURES OF ROBIN HOOD (1938), *supra* note 294

299 ROBIN HOOD (2010), *supra* note 294; ROBIN HOOD, *supra* note 295; ROBIN HOOD: MEN IN TIGHTS (1993), *supra* note 294; ROBIN HOOD: PRINCE OF THIEVES (1991), *supra* note 294; ROBIN HOOD (1973), *supra* note 294; THE ADVENTURES OF ROBIN HOOD (1938), *supra* note294.

300 ROBIN HOOD (2018), *supra* note 294; ROBIN HOOD: MEN IN TIGHTS (1993), *supra* note 294; ROBIN HOOD: PRINCE OF THIEVES (1991), *supra* note 294; *Robin of Sherwood, supra* note 295.

301 *Maid Marian and her Merry Men*, supra note 295.

302 *Robin Hood, supra* note 295.

antiauthoritarianism in the advancement of liberty, equality, and social justice remains very much alive in our cultural consciousness.

Similar to Robin Hood, pirates have appeared in Hollywood while continuing to echo the themes of their literary roots. The most direct portrayal of one of the literary narratives of pirates is the 1950 film adaptation of *Treasure Island*,[303] though later adaptations involving Muppets and an animated transposition to outer space also hew surprisingly closely to Stevenson's plot and characterization.[304] As such, the themes of liberty, equality, and social justice that occur in the novel recur in the films. The 1950 film also famously featured actor Robert Newton's exaggerated English West Country accent as pirate dialect so effectively that most subsequent portrayals of pirate speech followed it.[305] It also spawned International Talk Like a Pirate Day, further keeping pirates culturally relevant.[306]

A General History of the Pyrates has largely exerted a more indirect influence on modern depictions of pirates than *Treasure Island.* Ironically, one of the works that borrows most heavily from Defoe's account takes the form of a prequel series to Stevenson's *Black Sails*.[307] The series features historical pirates described by Defoe as characters,[308] depicts the pirates' attempts to create their own society under their own code in New Providence,[309] and ultimately portrays the end of the venture at the hands of Woodes Rogers in *A General History of the Pyrates*.[310] Defoe's influence, however, can also be seen in pirate films with fewer direct connections. For instance, both *Captain Blood* and the *Pirates of the Caribbean* movie series feature pirates who have created their own societies with their own codes.[311] Interestingly, both *Captain Blood* and the *Pirates of the Caribbean* series rather strengthen the theme of liberty

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303 TREASURE ISLAND (Walt Disney Productions 1950).

304 TREASURE PLANET (Walt Disney Pictures 2002); MUPPET TREASURE ISLAND (Walt Disney Pictures 1996).

305 TREASURE ISLAND (1950), *supra* note 303; Gretchen McCulloch, *Why do Pirates Talk Like That?*, SLATE (Sep. 19, 2014, 11:32 AM), https://slate.com/human-interest/2014/09/pirate-speech-origins-in-west-country-english-via-robert-newton-aka-long-john-silver.html.

306 *Id.*

307 *Compare* DEFOE, *supra* note 247, *with Black Sails* (Starz 2014–2017).

308 *Black Sails* (2014-2017), *supra* note 307; DEFOE, *supra* note 247.

309 *Black Sails* (2014-2017), *supra* note 307; DEFOE, *supra* note 247.

310 *See* DEFOE, *supra* note 247, at 50–53.

311 PIRATES OF THE CARIBBEAN: AT WORLD'S END (Walt Disney Pictures 2007); PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003); CAPTAIN BLOOD (Warner Bros. Pictures 1935).

from the earlier works. *Captain Blood*'s title character rises to piracy from political slavery, and in almost an echo of the Whig treatment of Robin Hood, sees his fortunes turn with the restoration of good government via the Glorious Revolution.[312] In *Pirates of the Caribbean: Curse of the Black Pearl*, pirate Captain Jack Sparrow describes his ship as "freedom."[313] Similarly, the second and third films in the series portray the various pirate characters as plotting to prevent a world devoid of autonomy at the hands of the tyrannical institution of the East India Trading Company.[314] The *Pirates of the Caribbean* movies also express themes of equality and social justice, as seen through the pirate crews of mixed genders and races as well as through the Governor's daughter, Elizabeth Swan, choosing a blacksmith's apprentice over a Post Captain in *His Majesty's Navy* for a romantic partner.[315]

The influence of *A General History of the Pyrates* extends to video game depictions of pirates. Pirates began featuring as a subject of video games fairly early in the development of the new medium with Sid Meier's *Pirates!*[316] The game features elements found in Defoe's work, such as division of plunder into equal shares and the potential removal of captains by their crews.[317] A 2004 remake of the game includes these features as well as many of the captains whose exploits Defoe chronicled as legendary pirates the player can vanquish.[318] Significantly, the player's character in the remake is forced into a life of adventure on the high seas by the evil actions of a corrupt nobleman, whom the player must pursue to rescue various imprisoned family members of the player's character.[319] Thus, in addition to the elements of the pirate view of equality taken from Defoe, the game features the theme of pirate liberty in the face of social and political oppression.

The theme of pirates setting themselves at liberty outside the oppression of ordered society also reverberates throughout the video game

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312 CAPTAIN BLOOD (1935), *supra* note 311.

313 PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (2003), *supra* note 311.

314 PIRATES OF THE CARIBBEAN: AT WORLD'S END (2007), *supra* note 311; PIRATES OF THE CARIBBEAN: DEAD MAN'S CHEST (Walt Disney Pictures 2006).

315 PIRATES OF THE CARIBBEAN: AT WORLD'S END (2007), *supra* note 311; PIRATES OF THE CARIBBEAN: DEAD MAN'S CHEST (2006), *supra* note 314; PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (2003), *supra* note 311

316 SID MEIER'S PIRATES! (MicroProse 1987).

317 *Id.*

318 SID MEIER'S PIRATES!: LIVE THE LIFE (Firaxis Games 2004).

319 *Id.*

that follows *A General History of the Pyrates* most closely—*Assassin's Creed IV: Black Flag*.[320] Set in the backdrop of the pirate settlement of Providence described by Defoe, the game features many of Defoe's pirates as major characters and sees them complete expeditions taken directly from the pages of *A General History of the Pyrates*, such as when Blackbeard raids the Carolinas in search of medicine.[321] As such, the themes of antiauthoritarianism, liberty, equality, and social justice from Defoe's treatment of the pirates, also run through *Black Flag*. The game drastically expands the themes by presenting Providence not just as a pirate society, but as a pirate republic; portraying the protagonist, Edward Kenway, as combating corrupt institutions such as the slave trade; and featuring egalitarian interactions among pirates of mixed races, genders, and classes.[322] In fact, this strengthening of the recurring themes aligns the game with the overarching themes of the broader series, which depicts a heroic, yet antiauthoritarian, "brotherhood" of assassins waging secret war in the name of human freedom and equality against the sinister and tyrannical templar order.[323] Given this theme, basing a game on Defoe's depiction of pirates makes a lot of sense.

Frontiersmen and gunslingers as different kinds of outlaws also appear frequently in modern narratives in various media. Examples of the former include film adaptations of James Fenimore Cooper's classic tales as well as television series featuring historical figures acting in the role.[324]

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320 ASSASSIN'S CREED IV: BLACK FLAG (Ubisoft Annecy Production Studio 2013).

321 ASSASSIN'S CREED IV: BLACK FLAG (2013), *supra* note 320; DEFOE, *supra* note 247.

322 ASSASSIN'S CREED IV: BLACK FLAG (2013), *supra* note 320.

323 *See* ASSASSIN'S CREED (Ubisoft Montreal 2007); *see also* ASSASSIN'S CREED II (Ubisoft Montreal 2009); ASSASSIN'S CREED: BROTHERHOOD (Ubisoft Annecy Production Studio 2010); ASSASSIN'S CREED: REVELATIONS (Ubisoft Annecy Production Studio 2011); ASSASSIN'S CREED: SYNDICATE (Ubisoft Quebec 2015).

324 *See, e.g.*, THE LAST OF THE MOHICANS (United Artists 1936). The plot summary is as follows: "As Alice and Cora Munro attempt to find their father, a British officer in the French and Indian War, they are set upon by French soldiers and their cohorts, Huron tribesmen led by the evil Magua. Fighting to rescue the women are Chingachgook and his sons Uncas, the last of the Mohican tribe, and their white ally, the frontiersman Natty Bumppo, known as Hawkeye." *See The Last of the Mohicans (1936)*, IMDB, https://www.imdb.com/title/tt0027869/ (last visited Mar. 20, 2020). *See* THE LAST OF THE MOHICANS (20th Century Fox 1992). The plot summary is as follows: "Three trappers protect the daughters of a British Colonel in the midst of the French and Indian War." *See The Last of the Mohicans (1992)*, IMDB, https://www.imdb.com/title/tt0104691/ (last visited Mar. 20, 2020). *See Davy Crockett* (Disney-ABC Domestic Television 1954–1955). The plot summary is as follows: "Legends from the life of famed American frontiersman Crockett and his friend George Russell fight in the Creek Indian War. Then Crockett is elected to Congress and brings his rough-hewn ways to the House of Representatives. Finally, Crockett and Russell journey to Texas and partake in the last stand at the Alamo." *See Davy Crockett (1954–1955)*, JOHN WAYNE MESSAGE BOARD

Of these, the 1992 film adaptation of *The Last of the Mohicans* bears special mention, as it strikes a decidedly more expressly antiauthoritarian tone than its source material.[325] In the film, Hawkeye, rather than reject society by absenting himself from it, verbally rejects British authority and aids his fellow Americans, some of whom speak with proto-revolutionary sentiments, in deserting.[326] The film also drives home the social justice theme of the plot by portraying the villain, Magua, as having been twisted by the cruel oppression of European colonizers.[327]

Examining in detail every gunslinger who has appeared on screen in a Western would be well beyond the scope of this work; however, a few examples will suffice to show that this trope also persists in our culture. First, let us highlight a film expressly about an outlaw—*The Outlaw Josey Wales*.[328] Similar to Joaquin Murieta, Josey Wales turns to outlawry to avenge himself of injustices committed against his family by institutional powers, in his case unscrupulous union soldiers.[329] Familiar themes of liberty, equality, and social justice recur as Josey removes himself to the Texas frontier, forms a lasting partnership with Cherokee Lone Watie, and eventually makes peace with his demons as well as with the neighboring Commanche.[330] Second, Joaquin Murieta himself appears onscreen in *The Mask of Zorro*, in an apparent nod to the influences of Ridge's portrayal on the earlier Disney television series, *Zorro*.[331] Both portrayals of Zorro

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(JWMB), https://dukewayne.com/index.php?thread/6803-davy-crockett-1954-1955-tv/ (last visited Mar. 20, 2020). *See Daniel Boone* (20th Century Fox Television 1964–1970). The plot summary is as follows: "Frontier hero Daniel Boone conducts surveys and expeditions around Boonesborough, running into both friendly and hostile Indians, just before and during the Revolutionary War." *See Daniel Boone,* IMDB, https://www.imdb.com/title/tt0057742/ (last visited Mar. 20, 2020).

325 THE LAST OF THE LAST OF THE MOHICANS (1992), *supra* note 324.

326 *Id.*

327 *Id.*

328 THE OUTLAW JOSEY WALES (Warner Bros. 1976); *see The Outlaw Josey Wales (1976),* IMDB, https://www.imdb.com/title/tt0075029/?ref_=ttmi_tt (last visited Mar. 20, 2020) ("Missouri farmer Josey Wales joins a Confederate guerrilla unit and winds up on the run from the Union soldiers who murdered his family.").

329 *Id.*

330 *Id.*

331 THE MASK OF ZORRO (TriStar Pictures 1998); *see The Mask of Zorro,* IMDB, https://www.imdb.com/title/tt0120746/ (last visited Mar. 20, 2020) ("A young thief, seeking revenge for the death of his brother, is trained by the once great, but aged Zorro, who also pursues vengeance of his own."); *see* Stephen Andes, *Zorro's Origins and The Head of Joaquin Murrieta*, MEDIUM (Dec. 12, 2018), https://medium.com/@steveandes/zorros-origins-and-the-head-of-joaquin-murrieta-decdf28edf48; *see Zorro* (Disney-ABC Domestic Television 1957–1959); *see Zorro,* IMDB, https://www.imdb.com/title/tt0050079/ (last visited Mar. 20, 2020)

lean heavily on the trope of the outlaw as an antiauthoritarian defender of liberty, equality, and social justice.[332] *Unforgiven* depicts an aging outlaw come out of retirement to avenge and to protect a group of sex workers, left vulnerable by a corrupt sheriff to the depredations of employees of the local industrial power.[333] While significantly darker in tone than most similar films, *Unforgiven* nonetheless messages approval of antiauthoritarian actions to thwart tyrannical abuses of power and protect society's most vulnerable.[334] Thus, the nineteenth-century tradition of the western gunslinger continues in our culture.

In addition to full narratives, twentieth and twenty-first century media include the use of outlaw and pirate terminology and imagery in other fields, such as popular music and advertising.[335] For instance, members of a subfield of country music opposed to the rigid structures and corporate values of the Nashville country music industry came to call their movement and music style "Outlaw Country."[336] Other examples come from punk music, which is perhaps the most antiauthoritarian form of music in which pirate imagery abounds in the names of bands (e.g., Black Flag)[337] albums (e.g., Rum Sodomy & The Lash),[338] and songs (e.g., Friggin' in The Riggin'),[339] with one song, *Queen Anne's Revenge*, even referencing Blackbeard's ship from *A General History of the Pyrates*.[340] Hip-Hop, another musical genre with antiauthoritarian overtones, also frequently features songs that invoke the Robin Hood-esque language of robbing from the rich to give to the poor.[341] In the

("Don Diego de la Vega opposes the corrupt tyrants of Spanish California as the masked swordsman, Zorro.").

[332] THE MASK OF ZORRO (1998), *supra* note 331; *Zorro* (Disney-ABC Domestic Television 1957–1959), *supra* note 331.

[333] UNFORGIVEN (Warner Bros. Pictures 1992); *see Unforgiven,* IMDB, https://www.imdb.com/title/tt0105695/ (last visited Mar. 20, 2020) ("Retired Old West gunslinger William Munny reluctantly takes on one last job, with the help of his old partner Ned Logan and a young man, The "Schofield Kid.").

[334] *Id.*

[335] *See, e.g.,* ICE CUBE, TOMORROW (EMI 2008); *Captain Morgan TV Commercials*, ISPOT.tv, https://www.ispot.tv/brands/dNz/captain-morgan (last visited Mar. 14. 2019).

[336] *See* JASON MELLARD, PROGRESSIVE COUNTRY: HOW THE 1970S TRANSFORMED THE TEXAN IN POPULAR CULTURE 117–24 (2013).

[337] *See* BLACK FLAG, https://www.blackflagband.com/ (last visited Mar. 14, 2019).

[338] *See* THE POGUES, RUM SODOMY & THE LASH (MCA Records 1985).

[339] *See* SEX PISTOLS, FRIGGIN' IN THE RIGGIN' (Virgin Records 1979).

[340] FLOGGING MOLLY, QUEEN ANNE'S REVENGE (SideOneDummy 2004); DEFOE, *supra* note 247.

[341] *See, e.g.,* ICE CUBE, TOMORROW (EMI 2008); FREEWAY & JAKE ONE, THROW YOUR HANDS UP (Rhymesayers Entertainment 2010); PUBLIC ENEMY, WATCH THE DOOR (Guerilla

advertising world, the famous tobacco advertising campaign featuring the "Marlboro Man" evokes the freedom of the frontier combined with images of cowboy attire associated with westerns and gunslingers.[342] Similarly, a promotional campaign for Captain Morgan rum features either a pirate captain engaging in various acts of exaggerated independence, free of inhibitions, or regular people behaving similarly before striking a pirate pose.[343] Allusions such as these work because the narratives connected to the images and phrasings used by songs and ads carry with them the cultural connotations of liberty, equality, and social justice established by those narratives.

In summary, the tropes of the outlaw and the pirate have featured prominently in English and then American culture from the late middle ages onwards in various forms. Furthermore, each trope glorifies and even celebrates antiauthoritarianism taken in the promotion of liberty, equality, or social justice. As our culture has shifted, those themes have increased in strength and expression. Additionally, as the advertising examples demonstrate, anyone who has grown up in our culture will have internalized the connection between the symbols of outlaws and pirates and their association with idealized antiauthoritarianism concepts. Thus, Americans may be culturally conditioned to reject authority when that authority conflicts with our ideal norms of liberty, equality, and social justice—or at least conditioned to be able to tap into that cultural current under certain circumstances. Let us now look to see how this plays out with American judges by turning our gaze to judicially activist cases.

V. ANTI-AUTHORITARIAN JUDGES: JUDICIAL ACTIVISM AS A REFLECTION OF IDEAL NORMS OF LIBERTY, EQUALITY, AND SOCIAL JUSTICE

Before beginning our analysis of the cases, it may be helpful to remind the reader of the definition of judicial activism incorporating a cultural component suggested above in Part III, namely that judicial activism is an antiauthoritarian rejection of the ordinarily accepted constraints on judicial decision-making when those constraints conflict

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Funk Recordings 2006); GETO BOYS, DAMN IT FEELS GOOD TO BE A GANGSTA (Rap-a-Lot 1992).

[342] *See Marlboro Commercials*, YOUTUBE, https://www.youtube.com/watch?v=m7pProAG_fA (last visited Mar. 14, 2019).

[343] *See Captain Morgan TV Commercials*, *supra* note 335.

with deeply held cultural values of liberty, equality, and social justice.[344] In examining how specific cases align with the suggested definition, this Article will look at examples from four groups of cases. First, we will look at a selection of cases from eras of the Supreme Court commonly identified as activist: the Marshall Court, the *Lochner* Era, the Warren Court, and the Rehnquist Court.[345] Second, we will look at cases exhibiting activism from the most recently completed Supreme Court term, the 2017-2018 term. It is important to do so because if judicial activism is indeed a manifestation of cultural values, then one would expect it to be rather more commonplace than a handful of historically significant cases. Similarly, one would expect to find it beyond just the Supreme Court of the United States. Accordingly, the third group of cases to be examined will feature examples of activism from state courts as well as lower federal courts. Finally, we will look at examples of problem cases that act in ways counter to the ideal norms described above, either through extreme judicial action or through extreme judicial restraint. In examining each of these groups of cases, a two-pronged methodology will be used. First, we will examine in what sense each holding is an act of antiauthoritarianism. Following this, we will look at the language used in each case's rationale that suggests the application of ideal norms of liberty, equality, or social justice. Having established our framework, let us now turn to examining specific activist cases.

A. The Usual Suspects: Sample Cases from Courts Commonly Identified as Activist

As described in Part II above, scholars generally recognize that judicial activism has been a fairly constant phenomenon in American law, with particular emphasis being placed on the Marshall Court, the Lochner Era, the Warren Court, and the Rehnquist Court.[346] As such, let us now look at a sample case from each era embodying the spirit of activism of the judicial era in which it was decided.

As with many issues in American constitutional law, an examination of judicial activism should begin at the logical starting point of *Marbury*

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344 *See supra* Part III.

345 *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Lochner v. New York, 198 U.S. 45 (1905); Marbury v. Madison, 5 U.S. 137 (1803).

346 *See supra* Part II.

v. Madison.[347] *Marbury*'s antiauthoritarian act was invalidating the portion of the Federal Judiciary Act of 1789, which conferred upon the Supreme Court the ability to issue writs of mandamus as a court of original jurisdiction.[348] The Court rejected the authority of the statute, which ordinarily courts would be expected to apply and to interpret.[349] The Court's rationale for this antiauthoritarian act derives directly from a desire to safeguard liberty.[350] As Chief Justice Marshall asks:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.[351]

Marshall goes on to note that if Congress can change the Constitution by ordinary acts, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable."[352] Thus, the Court stressed the roles the limitations of government found in the Constitution play in safeguarding liberty by rejecting an authority that exceeds those limits.[353] Such a rationale is reminiscent of the later depictions of Robin Hood as a force of liberty resisting sinister government institutions and aligns well with an ideal norm of liberty.

During the Lochner Era, the Court invoked concepts of liberty when striking down statutory authorities. As an example, let us look at the case that gives the era its name: *Lochner v. New York*.[354] The antiauthoritarian act in *Lochner* involved invalidating a state labor law that prevented bakery employees from working more than ten hours per day, six days per week.[355] Again, the Court strikes down an authority we would normally expect courts to apply and interpret, reaching across the divide of

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347 *See* Marbury v. Madison, 5 U.S. 137 (1803).
348 *Id.* at 138, 180.
349 *Id.* at 180.
350 *Id.* at 174.
351 *Marbury*, 5 U.S. at 176–77.
352 *Id.* at 177.
353 *Id.* at 177–78.
354 Lochner v. New York, 198 U.S. 45 (1905).
355 *Id.* at 64.

federalism to do so.[356] The Court expressly couches its action in terms of freedom, noting that the "employee may desire to earn the extra money, which would arise from his working more than the proscribed time, but this statute forbids the employer from permitting the employee to earn it."[357] The Court continues:

> The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.[358]

Thus, the Court directly invokes the ideal norm of liberty. *Lochner*, however, is a somewhat complicated case because it pits ideal norms against each other. As Justice Harlan's dissent makes clear:

> It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor.[359]

Thus, in *Lochner*, tension exists between the ideal norm of liberty on the one hand and the norms of equality and social justice on the other. Interestingly, the majority opinion itself notes this tension, indicating it needs to make a difficult choice in adjudicating the balance between general welfare and individual right.[360] To our modern sensibilities, the Court in *Lochner* may have made the wrong decision in how to establish the balance, which in part accounts for the reputation the case has; however, in rejecting the authority of the state statute, the Court did invoke the ideal norm of liberty.

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356 *See id.* ("[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.").

357 *Id.* at 52–53.

358 *Lochner*, 198 U.S. at 53.

359 *Id.* at 69 (Harlan, White, and Day, JJ., dissenting).

360 *See id.* at 54 (majority opinion).

As the *Lochner* Era Court placed more emphasis on liberty when it came into tension with equality and social justice, the Warren Court is famous for having tacked in the opposite direction. For example, *Brown v. Board of Education* serves as a good example of the activism of the Warren Court.[361] In *Brown*, the Court broadly invalidated a swath of state and local legislation providing for segregated public schools, expressly rejecting its own precedent and the "separate but equal doctrine" established in *Plessy v. Ferguson*.[362] Thus, *Brown*'s antiauthoritarianism includes hostility against statutory authorities from across the federalism divide, as in *Lochner*, but also a repudiation of precedential authority we would have expected to control the issue. The Court expressly evoked the ideal norm of equality in reaching its decision, noting that "separate educational facilities are inherently unequal."[363] Furthermore, on its way to the ultimate holding, the Court also discussed public education in terms consonant with the ideal norm of social justice:

> [Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awaking the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[364]

Therefore, the failure to provide quality education to certain populations would unjustly render them unequal in society throughout their lives. The Court further made explicit how segregated education inherently fails to provide children of color with equal opportunity: "To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[365] *Brown* thus demonstrates how the Warren Court felt comfortable striking down wide swaths of the legal landscape in order to advance ideal norms of equality and social justice.

As discussed in Part II above, scholars often point to the Rehnquist Court as an example of conservative judicial activism to show that judicial

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361 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

362 *Id.* at 495 (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

363 *Id.*

364 *Id.* at 493.

365 *Brown*, 347 U.S. at 494.

activism is not limited to progressive judges, such as those who sat on the Warren Court. The Rehnquist Court's conservative activism generally takes the form of reinforcing the concept of federalism. Let us look at *United States v. Lopez* as an example.[366] In *Lopez*, the Court rejected statutory authority and invalidated a federal act that criminalized the carrying of firearms into schools.[367] In providing the rationale for its invalidation, the Court used language evocative of that used by Justice Marshall writing for the majority in *Marbury*, stressing the importance of the division of government powers, not just in terms of separation of powers, but also in terms of federalism, in safeguarding liberty from governmental abuse: "[t]his constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties' . . . . '[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'"[368] Establishing the importance of federalism to upholding liberty, the Court then turned to examining the statute and found that Congress lacked the authority to legislate the use of guns in schools, noting that:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.[369]

The Court equated upholding the particular law with shifting the nature of Congress's commerce power from enumerated to general, a move which the Court casted as a threat to liberty.[370] Reinforcing this portrayal were the Court's multiple references to the defendant as a high school student or as a "local student," implying that a kid who made a simple mistake would be dogged by a federal felony the rest of his life because of a tyrannical overreach by Congress.[371] Thus, similar to the Marshall Court, the Rehnquist Court interpreted its duty as reinforcing constitutional structures to safeguard the ideal norm of liberty.

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366 United States v. Lopez, 514 U.S. 549 (1995).
367 *See id.* at 551 (discussing the Gun-Free School Zones Act of 1990).
368 *Id.* at 552 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
369 *Id.* at 567.
370 *Lopez*, 514 U.S. at 567.
371 *Id.*

Through these examples, one sees that the Supreme Court throughout history has employed rhetoric connected to ideal norms of liberty, equality, or social justice in justifying actions taken against authorities it would normally follow. If judicial activism, however, truly is an expression of higher cultural ideals, then we would expect it to occur rather frequently. Those ideals would in theory be a constant influence upon judges. As such, let us now turn our attention to the 2017-2018 Supreme Court term.

B. The 2017-2018 Supreme Court Term's Active Rejection of Authorities

When looking at the 2017-2018 Supreme Court term as a whole, several cases stand out for their rejection of legal authorities. For example, let us look at *Carpenter v. United States*.[372] In *Carpenter*, the Court took issue with a federal statute allowing authorities to obtain data from cell phone providers via a court order based on "reasonable grounds" instead of the "probable cause" standard of a traditional warrant.[373] Furthermore, the Court departed from the "third-party doctrine" established by precedent.[374] Although the majority's holding was narrow in that it declined to extend precedent, Justice Kennedy's dissent makes clear the drastic nature of the dseparture of precedent: "This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent."[375] The Court justifies its restriction of statutory authority and its departure from precedent by invoking the vital part the Fourth Amendment plays in protecting liberty from governmental abuse, indicating that the Amendment's role "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[376] The Court then described the aims of the Framers in drafting the Fourth Amendment as being "to place obstacles in the way of a too permeating police surveillance."[377]

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372 Carpenter v. United States, 138 S. Ct. 2206 (2018).

373 *Id.* at 2221.

374 *Id.* at 2220 (declining to extend United States v. Miller, 425 U.S. 435 (1976) and Smith v. Maryland, 442 U.S. 735 (1979)).

375 *Carpenter*, 138 S. Ct. at 2223 (Kennedy, Thomas, and Alito, J.J., dissenting).

376 *Id.* at 2213 (majority opinion) (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 528 (1967)).

377 *Id.* at 2214 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

Additionally, the Court portrayed cell phones and the data they collect as enabling such a police state, asserting that "cell phone location information is detailed, encyclopedic and effortlessly compiled."[378] Furthermore, the Court argued that cell phones are integral to modern life, stating that they are "indispensable to participation in modern society[,]" to an extent that the choice to not have your location tracked, i.e., to not use a cell phone, is not actually a valid choice.[379] Thus, in *Carpenter*, the Court rejected the applicability of precedent (the third-party doctrine established by *Smith* and *Miller*) and departed from the language of statutory authority in establishing a constitutional requirement that police obtain a warrant based on probable cause in order to retrieve cell phone location information from cellular providers.[380] The Court arguably did so because of concerns about threats posed by technology to the ideal norm of liberty.

Janus v. American Federation of State, County, & Municipal Employees, Council 31 featured a similar, but stronger rejection of precedential authority.[381] In *Janus*, the Court expressly overruled precedent that allowed public labor unions to charge non-members fees in connection with union efforts that benefitted those non-members.[382] and This action thus invalidated a wide swath of state laws across the country. To justify its rejection of both precedential and state statutory authority, much like in *Lochner*, the Court used language pertaining to employees' individual rights and liberties, asserting that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees."[383] Specifically, the Court found that the statute in question impinged upon employees' First Amendment rights of free speech, stating: "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[384] The Court then extended the concept of compelled speech to also cover compelled subsidization of speech, stating that "[b]ecause the compelled subsidization of private speech seriously impinges on First Amendment

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378 *Id.* at 2216.

379 *Carpenter*, 138 S. Ct. at 2220.

380 *Id.* at 2221.

381 Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

382 *See id.* at 2459–60 (overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977)).

383 *Id.* at 2460.

384 *Id.* at 2463.

rights, it cannot casually be allowed."[385] Thus, the Court in *Janus* overturned precedent and invalidated state laws, thus allowing for mandatory union fees, because the Court deemed it a necessary step to protect the rights of individuals—a sentiment that aligns with an ideal norm of liberty.

Similarly, *Murphy v. National Collegiate Athletic Association* invoked liberty as a rationale for the invalidation of a federal statute.[386] In *Murphy*, the Court declared the Federal Professional and Amateur Sports Protection Act unconstitutional under federalism and the anti-commandeering doctrine.[387] The rationale for invalidating the statutory authority relied on federalism as part of the Framers' safeguards of liberty.[388] The Court in *Murphy* explained how the system of dual sovereigns limits both state and federal power and expressly declared that the anti-commandeering doctrine's protection of federalism "serves as 'one of the Constitution's structural protections of liberty.'"[389] Because of the potential threat to destabilize the institutional safeguards protecting the ideal norm of liberty, the Court concluded that the statutory authority must be struck down.[390]

Additionally, the 2017-2018 term featured a case in which the Court struck down a federal statute because of the negative effect it exerted upon the ideal of equality.[391] In *Sessions v. Dimaya*, the Court struck down the federal statutory definition of "crime of violence" as unconstitutionally vague and disallowed the Immigration and Nationality Act's reference to the definition.[392] As we will see, the rationale for rejecting the statutory authority stemmed from the Court's desire for equal protection of the laws. The Court noted that "[b]ecause the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily 'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice."[393] As such, the Court held that the statute

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385 *Janus*, 138 S. Ct. at 2464.

386 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

387 *Id.* at 1478.

388 *Id.* at 1477.

389 *Id.* at 1477 (quoting Printz v. United States, 521 U.S. 898, 921 (1997)).

390 *See Murphy*, 138 S. Ct. at 1484–85 ("[The Court's] job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA 'regulate[s] state governments' regulation' of their citizens . . . . The Constitution gives Congress no such power.").

391 *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

392 *Id.* at 1216.

393 *Id.* at 1223 (quoting Johnson v. United States, 135 S. Ct. 2551, 2559 (2015)).

in question "produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[394] In his concurrence, Justice Gorsuch stated that the connection between arbitrariness and unequal application of the law more forcefully, noting that vague laws "can invite the exercise of arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."[395] Thus, concerns for equality and equal application of the laws undergird the holding and rationale in *Dimaya*.

This brief look at examples from the most recently completed Supreme Court term indicates that the Court does indeed regularly engage in the antiauthoritarian judicial action of rejecting authorities. Furthermore, it indicates that the Court does so when the authorities in question conflict with ideal norms such as liberty or equality. Such findings suggest that deeply held cultural values do influence judicial behavior. If, however, the judicial activism so examined does flow from shared cultural values, then we should also see similar acts of antiauthoritarianism with similar rationales in courts beyond just the Supreme Court of the United States. As such, let us now explore examples of recent judicial activism from state courts and lower federal courts.

C. *Judicial Activism Beyond the Supreme Court of the United States*

While a comprehensive survey of state cases from across the country would defy all concepts of feasibility, a pair of examples from the past year will demonstrate that state courts do indeed reject authorities that clash with ideal norms of liberty, equality, and social justice. For instance, in *Bevin v. Commonwealth ex rel. Beshear*,[396] the Kentucky Supreme Court declared a state statute unconstitutional on procedural grounds, and thus void.[397] The government's argument that the case raised a non-justiciable political question was unconvincing.[398] The court took drastic action against the statutory authority out of a concern for institutional constraints on government in the furtherance of liberty. Specifically, the Kentucky Constitution requires bills to be read in each house three times

394 *Id.* (quoting Johnson v. United States, 135 S. Ct. 2251, 2558 (2015)).
395 *Sessions*, 138 S. Ct. at 1223–24 (Gorsuch, J., concurring).
396 *See* Bevin v. Commonwealth ex rel. Beshear, 563 S.W.3d 74 (Ky. 2018).
397 *Id.* at 78.
398 *Id.*

before they may be passed as laws.[399] In *Bevin*, the Kentucky Supreme Court described the peculiar process by which the state legislature attempted to comply with the constitutional provision—at the end of the legislative term, and lacking the time for the required three readings for passing a pension reform bill demanded by the governor, the legislature replaced an eleven page bill authorizing new wastewater facilities with a 291 page pension bill via amendment.[400] Furthermore, the court pointed out that of the six required readings, five of the readings were of the bill in its wastewater iteration.[401] The court expressed disapproval of such legislative schemas: "The Court's power, indeed, its duty, to declare the meaning of constitutional provisions is a primary function of the judicial branch in the scheme of checks and balances that has protected freedom and liberty in this country and in this Commonwealth for more than two centuries."[402]

The court concluded that compliance with these institutional safeguards "cannot be achieved by reading a bill only by its title which has no rational relationship to the subject of the law being enacted."[403] Thus, the Kentucky Supreme Court acted in furtherance of the ideal norm of liberty in striking down statutory authority.

An example of a state court rejecting legislative authority in furtherance of the ideal norm of equality can be seen in *League of Women Voters of Pennsylvania v. Commonwealth*.[404] In *League of Women Voters*, the court acted against two separate authorities. First, it invalidated the statute that provided Pennsylvania's 2011 congressional redistricting.[405] In reaching its result, the court also rejected precedential authority.[406] The court's rationale for its actions took the form of asserting that the partisan gerrymandering featured in the redistricting act "deprives [p]etitioners of their state constitutional right to free and equal elections."[407] Additionally, the court emphasized the central role that equal rights play in Pennsylvania's values: "[t]he people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding

399 KY. CONST. § 46.
400 *See Bevin*, 563 S.W.3d at 79.
401 *See id.* at 80.
402 *Id.* at 83.
403 *Id.* at 93.
404 *See* League of Women Voters of Pa v. Commonwealth, 178 A.3d 737 (Pa. 2018).
405 *Id.* at 825.
406 *Id.* at 813 (abrogating Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002)).
407 *Id.* at 818.

document is the ancestor, not the offspring, of the Federal Constitution."[408] Such language strongly suggests that equality is certainly recognized as an ideal norm in Pennsylvania.

Federal trial and intermediate appellate courts also engage in the rejection of legal authorities that run afoul of ideal norms such as equality and social justice. Such actions can be clearly seen in the spate of lower courts enjoining the enforcement of state restrictions prohibiting same-sex marriage, as a good number of these decisions occurred before the Supreme Court took the same action in *Obergefell v. Hodges*.[409] Let us look specifically at *Bourke v. Beshear* as an example.[410] In *Bourke*, a federal district court held a provision of the Kentucky Constitution, along with four statutory provisions that restricted recognition of marriage to opposite-sex couples, as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[411] The court based its rationale for its invalidation of state statutory and constitutional authority on concepts of equality and social justice, recognizing that "[n]o one disputes that the same-sex couples who have brought this case are treated differently under Kentucky law than those in comparable opposite-sex marriages."[412] This also poses a problem for the court since it provided a non-exhaustive list of examples of individual rights based on both federal and state law, dependent upon having one's marriage recognized by the government.[413] Thus, the court asserted that Kentucky's laws' "purpose and principal effect [is] to treat two groups differently."[414] Such disparate treatment "demeans one group by depriving them of rights provided for others."[415] Such language invokes ideal norms of equality and social justice, ideals which support the court's invalidation of statutory and constitutional authority.

The above examples demonstrate that courts other than the Supreme Court often reject authorities that we would normally expect them to follow, and that they do so for similar rationales as those employed by the

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408 *League of Women Voters*, 178 A.3d at 741.

409 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015); *see, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012); Marry Bishop v. United States ex. rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013).

410 *See* Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D.Ky. 2014).

411 *Id.* at 544.

412 *Id.* at 547.

413 *Id.* at 546–47.

414 *See Bourke*, 996 F. Supp. 2d at 550.

415 *Id.* at 551.

Supreme Court. This supports the notion that deeply held cultural norms of liberty, equality, and social justice do inform the behaviors of judges and lead them to occasional acts of judicial antiauthoritarianism. The existence of these ideal norms may also help us to explain why certain episodes of the exertion of judicial power, or the lack thereof, trouble our consciences. Let us now turn to the problem cases.

D. The Problem Cases: Unjustified Activism and Unjustified Restraint

On occasion, the Supreme Court flexes judicial muscle in a way that may be viewed as antiauthoritarian, but which does not align with ideal norms of liberty, equality, or social justice. On other occasions, the Supreme Court demurs from exercising its authority to invalidate authorities that clearly conflict with those same ideal norms. Both types of cases are generally met with the general repugnance of history. A prime example of an unjustified activist case is *Dred Scott v. Sanford*.[416] The authority expressly attacked in *Dred Scott* was the Act of Congress that created the Missouri Compromise, prohibiting slavery in federal territories north of a certain line.[417] Although the Court's rationale does invoke some language of property rights, the main basis of its argument was the indelible protections of slavery found in the Constitution, equating racial slavery to a cherished value of the framers.[418] In reaching this decision, the Court also held "people of the United States" to mean "citizens" and precluded the possibility that descendants of African slaves could ever amount to citizens or people.[419] Thus, the motivation of the Court in *Dred Scott* ran counter to norms of liberty and equality. While it is true that the Framers included slavery in the Constitution, they were aware of its tension with their stated ideals, as can be seen through their use of euphemisms such as "all other [p]ersons" or "such Persons as any of the States now existing shall think proper to admit."[420] Additionally, in his first draft of the Declaration of Independence, Thomas Jefferson, being the recidivist that he was, included the African slave trade and slavery of men as an evil perpetrated by King George before the Continental Congress edited it out.[421] Thus, our laws, which amount to minimal norms

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416 Dred Scott v. Sanford, 60 U.S. 393 (1856).
417 *Id.* at 452.
418 *Id.* at 451–52.
419 *Id.* at 404–07.
420 *See* U.S. CONST. art. I §2 cl. 3; U.S. CONST. art I. §9 cl. 1.
421 ALLEN, *supra* note 268, at 153–55.

in Donovan's model, have always fallen short of the ideal norms they are meant to further. Indeed, this very discrepancy is why some acts of judicial antiauthoritarianism receive celebration as advancing the laws closer to our ideals; yet *Dred Scott* receives the scorn it deserves for moving our laws even further from our ideals.

Cases in which the Court fails to act to move our laws closer to our ideals suffer similar consignment to the dustbins of history. As an example of this sort of case, let us look at *Korematsu v. United States*.[422] In *Korematsu*, the Court upheld executive orders issued under the auspices of a Congressional Act that removed Japanese Americans from their homes and put them in internment camps.[423] The Court's rationale took a decidedly authoritarian tone, justifying the action based on credible threats to national security posed by potential espionage.[424] Under the facts of the case, ideal norms of liberty, equality, and social justice all suggest that the Court should have taken an antiauthoritarian tack instead of an authoritarian one. Indeed, Justice Murphy's dissent, mincing no words, stated:

> This exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.[425]

The unjustified restraint exercised by the Court in *Korematsu* gives that case nearly as bad a reputation as *Dred Scott*.

Thus, when courts engage in antiauthoritarian activism without being guided by ideal norms such as liberty, equality, or social justice, their acts are recognized as deeply flawed. Similarly, when courts exercise authoritarian restraint when those same ideal norms suggest action, their results are met with similar scorn.

The ideals of liberty, equality, and social justice described in Part IV do exist as ideal norms that exert influence over American legal culture. This is seen by the rationales promoting liberty and equality employed by the cases most associated with judicial activisms; the existence of multiple similar cases within the most recent Supreme Court term, as well as in courts other than the Supreme Court; and the contempt with cases such as

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422 Korematsu v. United States, 323 U.S. 214 (1944).
423 *Id.* at 216–17.
424 *Id.* at 217.
425 *Id.* at 233 (Murphy, J., dissenting).

Dred Scott and *Korematsu* that do not conform with concepts of liberty and equality.

VI. CONCLUSION

Applying a legal anthropological lens to the phenomenon of judicial activism results in a better understanding of the phenomenon. Viewing judicial activism as a legal expression of the sort of antiauthoritarianism that our culture glorifies and promotes, as seen through the recurring literary and popular cultural tropes of the outlaw and the pirate, allows for an improved definition of judicial activism as well as for a better way of evaluating individual cases, both activist and restrained, in terms of their fit within our cultural values. Though culture can and will change over time, the longevity of the outlaw and pirate tropes along with their long association with themes of liberty, equality, and social justice, reveal the existence of deeply held ideal norms aligning with those themes within American culture. Furthermore, many of the associations between the tropes and the themes have only increased over time. An examination of "activist" caselaw reveals largely the same themes at play in those instances when courts reject legal authorities that they would normally be expected to follow. Because our society does value ideal norms of liberty, equality, and social justice, judicial activism should be accepted as a net positive if it advances those norms. Conversely, judicial restraint should be ridiculed if it passes on an opportunity to strike down authority that runs counter to the same. For these reasons, it makes sense to view judicial activism as an antiauthoritarian rejection of the ordinarily accepted constraints on judicial decision-making when those constraints conflict with deeply held cultural values of liberty, equality, and social justice.