

PREFERENTIAL JUDICIAL ACTIVISM

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Introduction

The term “judicial activism”¹ has come under fire in the last two decades—primarily by politically conservative commentators who decry the methodological legitimacy of judges relying on policy preferences and contemporary societal norms, in addition to precedent and the history and text of the Constitution, to inform their opinions.² Chief Justice Roberts emphasized this perspective in his 2005 confirmation hearings, when he described the limited role of a judge as one who should “call balls and strikes, and not pitch or bat.”³

Nonetheless, the Court has decided several cases in recent years in which the politically conservative judges on the Court have been labeled as judicial activists;⁴ one of the most prominent of these is *Shelby County v.*

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¹ Many commentators credit the first use of this term to a 1947 magazine article, see Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 202, 208, but the debate over the role of judges in making law is centuries old. See THE FEDERALIST No. 78 (Alexander Hamilton) (opining that the judiciary played an important role in lawmaking to the extent necessary to safeguard individual rights); see generally Paul Carrese, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* (2003) (questioning the political origins and scope of judicial lawmaking).

² See Keenan D. Kmiec, *The Origins and Current Meanings of ‘Judicial Activism,’* 92 CALIF. L. REV. 1441, 1442 (2004) (highlighting commentary from Judge Frank Easterbrook lamenting that “everyone scorns judicial activism”); see also Bob Ward, *In Snowmass, Justice Antonin Scalia says judges should not be policymakers*, ASPEN TIMES, July 21, 2013, available at <http://www.aspentimes.com/news/7382102-113/scalia-judges-society-court> (noting that Justice Scalia used the “twin terrors of Nazi Germany and radical Islam to warn...about the dangers of judicial activism”).

³ Todd S. Purdum & Robin Toner, *Senators to Question First Supreme Court Nominee in 11 Years*, N.Y. TIMES, Sept. 13, 2005, available at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13confirm.html>.

⁴ See, e.g., Geoffrey R. Stone, *Selective Judicial Activism*, 89 TEX. L. REV. 1423 (2012) (labeling a number of decisions by the Roberts Court as “unmistakably activist,” including *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment is applicable to the states), *Dist. of Columbia v. Heller*, 554 U.S. 570, 595, 635 (2008) (holding that the Second Amendment conferred an individual right to bear arms), and *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–78 (2007) (holding that a race-conscious school

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Holder.⁵ In this symposium essay, I juxtapose the Court’s activism in *Shelby*—justified by the majority as necessary in light of the fundamental rights at stake—with its rigid and overly formalistic⁶ refusal to allow the litigation of national security-related cases in which ample evidence of the government’s abuse of fundamental rights exists.⁷ Although the national security cases are characterized by the judicial refusal to engage, and *Shelby*, to the contrary, is an example of an overaggressive judiciary, both share a problematic end result: enabling the undermining of the rights of vulnerable populations.⁸ I conclude that the Court is engaging in “preferential judicial activism,” whereby justices decide whether to formalistically dismiss cases before they even get to the stage of “calling balls and strikes” or, instead, engage in judicial activism based on their policy preferences.

1. Judicial Activism in *Shelby*

The majority in *Shelby* characterized the Court’s review of the Voting Rights Act of 2006 (“VRA”) as necessary given the fundamental rights at stake and the unusually broad reach of the VRA in mandating federal jurisdiction over voting matters.⁹ The Court acknowledged the substantial

placement program was unconstitutional)); Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485 (2012) (describing the invalidation of part of the Bipartisan Campaign Reform Act of 2002 in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) as “conservative judicial activism”); Bryan Adamson, *Ricci v. DeStefano: Procedural Activism?*, 24 NAT’L BLACK L.J. (2011) (framing the Supreme Court decision overturning local decision-making regarding firefighter hiring in *Ricci v. DeStefano*, 557 U.S. 557 (2009) as procedural judicial activism).

⁵ 133 S.Ct. 2612 (2013).

⁶ Judicial formalism can be conceived in numerous ways, but I have used it elsewhere and here to describe a judicial methodology that gives primacy to narrow rule-following rather than viewing the judicial role as acting when necessary to preserve individual rights. See Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629 (2012). See also Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 612–16 (1999) (describing one form of formalism as “a purposive rule-following”). Other commentators have described the constraints of judicial formalism as “a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.” Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983). On the other hand, Justice Antonin Scalia has supported use of a formal approach to maximize stability and credibility in the Supreme Court’s decision making, opining that a “discretion-conferring approach is ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.” See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

⁷ See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225 (2009) (arguing that the Supreme Court’s national security cases should be analyzed and understood in the larger context of its public law jurisprudence).

⁸ Cf. Stone, *supra* note 4, at 1429 (arguing that there is no principled basis to undergird the activism of the conservative justices on the Court).

⁹ *Shelby Cnty.*, 133 S.Ct. at 2618 (acknowledging the historical need for the “extraordinary measures” employed under the Voting Rights Act of 1965, but noting that “[t]here is no

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evidence compiled by Congress in support of VRA renewal,¹⁰ the overwhelming congressional vote reauthorizing the VRA¹¹ and the longstanding tradition of the Court engaging in constitutional avoidance wherever possible¹² –all well-established grounds for deferring to Congress altogether. Yet the majority opined that it had little choice but to apply a high degree of scrutiny to the VRA,¹³ minimizing the objections of the dissenting justices and claiming the necessity of review given Congress’s purported failure to address the constitutional questions previously raised by the Court.¹⁴

The dissent in *Shelby*, on the other hand, focused on the obligation of the court to defer to Congress¹⁵ and the lack of “usual restraint” that the Court exhibited in taking the case and then gutting the power of the VRA¹⁶ to combat the ongoing and serious problems of voter discrimination that both opinions acknowledge.¹⁷ In framing its objections in this manner, the dissent essentially accuses the majority of preferential judicial activism—taking on *Shelby* for the purpose of promoting its own preferences.¹⁸

2. Judicial Formalism in the National Security Context

By contrast, the judiciary’s stance in national security-related cases in which plaintiffs allege violations of fundamental rights has been characterized by a rigid, formalistic refusal to allow plaintiffs access to

denying...that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions”).

¹⁰ *Id.* at 2629 (acknowledging that Congress “compiled thousands of pages of evidence before reauthorizing the Voting Rights Act”).

¹¹ *Id.* at 2621.

¹² *Id.*

¹³ *Id.* at 2622 (citing the need to follow up on the Court’s previous evaluation of the VRA in *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009)).

¹⁴ *Id.* at 2631 (opining that “Congress could have updated the coverage formula...but did not do so. Its failure to act leaves us today with no choice”). In couching the lack of change to the coverage formula under Section 5 of the VRA as a congressional failure, the Court fully ignored the political realities hamstringing a politically divided Congress. See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court and Congress*, 86 S. CAL. L. REV. 205 (2013) (arguing that a politically polarized Congress cannot effectively provide a corrective check on Supreme Court decisions that overreach).

¹⁵ *Shelby Cnty.*, 133 S. Ct. at 2635-38 (Ginsburg, J., dissenting).

¹⁶ *Id.* at 2644.

¹⁷ *Id.* at 2633.

¹⁸ See Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG, (Jun. 25, 2013), <http://www.scotusblog.com/2013/06/the-curiousdisappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/> (highlighting the extraordinary and irregular steps that the majority goes through to justify its decision-making).

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courts, usually based on the acceptance of government invocations of procedural barriers to litigation. Although the judiciary has historically deferred to executive branch decision making with regard to foreign policy and national security matters,¹⁹ that deference has expanded significantly and concretized recently. Such judicial formalism has consistently led to the dismissal of cases alleging serious government abuse in the post-September 11 context.

Government invocations of procedural hurdles have led to dismissals in a number of contexts. Detainees alleging mistreatment and abuse while in detention facilities within the United States have been largely unable to bring suit against government actors, based on the Supreme Court's imposition of strict pleading standards²⁰ that constitute an almost insurmountable hurdle for plaintiffs without the benefit of non-public information.²¹ The Supreme Court also denied certiorari in numerous cases dealing with well-supported allegations of extraordinary rendition and torture,²² even where dissenting opinions from lower courts²³ and detailed

¹⁹ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 796-98 (noting that although “proper deference must be accorded to the political branches,” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S. Ct. 216, 81 L.Ed. 255 (1936)) but reasoning nonetheless that the grant of habeas corpus rights to detainees at Guantanamo “does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (Breyer, J., concurring) (noting that “judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so”).

²⁰ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding that government officials were not liable for abuses committed by their subordinates absent evidence at the pleadings stage that they ordered the allegedly discriminatory activity).

²¹ See Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (arguing that the heightened pleading standard established in *Iqbal* creates severe obstacles for the litigation of legitimate allegations of abuse).

²² See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011) (upholding the dismissal of a suit alleging extraordinary rendition and torture based on the government invocation of the state secrets privilege); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010) (dismissing suit seeking damages for extraordinary rendition and torture upon a finding that constitutional and international law obligations did not apply and that special factors counseled hesitation in the absence of congressional guidance); *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d*, 479 F.3d 296 (4th Cir. 2007), *and cert. denied*, 552 U.S. 947 (2007) (dismissing suit seeking damages for extraordinary rendition and torture upon upholding the government’s invocation of the state secrets privilege). In many of these cases, a vocal dissent argued that the courts were succumbing to the policy preferences of the administration and not engaging in the type of rule of law analysis required given the allegations at issue.

²³ *Mohamed*, 614 F.3d at 1095 n.5 (Hawkins, J., dissenting) (noting that former employees of the defendant understood that their extraordinary rendition flights resulted in the torture of detainees, but that the company continued to run the flights because they “paid very well”); *Arar*, 585 F.3d at 615, 618 (Sack, J., dissenting) (noting that the allegations of Arar’s mistreatment and

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investigations in other nations found credible evidence that the alleged abuses occurred and that the victims deserve compensation.²⁴ Similarly, a case where the plaintiff sought accountability for the targeted killing by the U.S. government of a U.S. citizen living overseas was dismissed,²⁵ despite public admissions by the Obama administration that the killing occurred as alleged.²⁶

These examples of judicial formalism that enabled the dismissal of cases at the pleading stage illustrate the judiciary's internal struggle to determine its appropriate role when confronted with questions of constitutional rights during times of war or perceived emergency.²⁷ This dilemma has confronted courts in constitutional democracies around the world,²⁸ but many foreign courts, unlike those in the United States, have

torture was credible and detailed in a report by the Department of Homeland Security's Office of the Inspector General).

²⁴ See Setty, *Judicial Formalism*, *supra* note 6, at 1640 (citing *Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs*, [2008] EWHC (Admin) 2048, [38]-[47] (Eng.)); see *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (E.Ct.H.R. Dec. 13. 2012) (awarding €60,000 to Khalid El-Masri based on Macedonia's complicity with the CIA rendition and torture of El-Masri); Patrick Wintour, *Guantánamo Bay detainees to be paid compensation by UK government*, THE GUARDIAN, Nov. 15, 2010, available at <http://www.theguardian.com/world/2010/nov/16/guantanamo-bay-compensation-claim> (noting that Binyam Mohamed would be paid one million pounds from the British government in compensation for suffering extraordinary rendition and torture).

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (2006) (concluding after a detailed and lengthy inquiry that Arar had been subject to extraordinary rendition and torture as he alleged).

²⁵ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing suit seeking injunctive relief for the listing of plaintiff's son on the U.S. targeted killings list based on standing and political question grounds).

²⁶ President Barack Obama, Remarks of President Barack Obama, (May 23, 2013) available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>.

²⁷ In *Minimalism at War*, Cass Sunstein analyzes three categories of judicial decision-making in wartime: national security maximalism, in which courts defer broadly to executive branch claims of Article II authority without weighing the cost in terms of constitutional liberty interests; liberty maximalism, in which courts maintain a peacetime approach to the protection of constitutional liberty interests; and minimalism, in which courts use constitutional avoidance theory, statutory authority, and a narrow approach to creating precedent to weigh security and liberty interests. See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50-52 (2004). Sunstein views national security maximalism as inadequately accounting for fundamental liberty principles, liberty maximalism as unrealistic and unwarranted given the need for greater government intrusion into liberties during wartime, concluding that minimalism is the most appropriate judicial approach during wartime. *Id.* I suggest that *Mohamed* and similar decisions should be conceived of differently, reflecting a formal and narrow adherence to procedures and rules as a means of enabling deference to executive secrecy claims and avoiding real engagement in the civil liberties dilemma underlying the case.

²⁸ See generally Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 125-26 (2003) (discussing the obligation of the Israeli

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allowed such cases to continue and plaintiffs to have their grievances heard in court.²⁹ Yet in the United States, the ability of plaintiffs to seek government accountability in the courts has been conspicuously absent.³⁰

Conclusion

The judiciary's consistent unwillingness to allow those abused by counterterrorism policies to litigate their basic human and civil rights should be read alongside *Shelby's* preferential judicial activism that set the stage for undermining protections of the right to vote for racial minorities. Taking these two dynamics together, it becomes clear that multiple reforms need to be undertaken to protect individual rights. First, Congress should attempt to surmount its political differences to offer legislation to protect individual rights. In the national security-related cases referenced here, the Bush and Obama administrations successfully demanded dismissal; even as courts acquiesced, they exhorted Congress to offer guidance³¹ or a specific remedy for plaintiffs³² who offer compelling evidence that they suffered from abuse at the government's hands.³³ In the context of *Shelby County*, President Obama, Attorney General Holder and members of Congress have encouraged passage of legislation to strengthen access to the ballot box for racial

judiciary to remain vigilant against incursions on the rule of law); Aileen Kavanagh, *Constitutionalism, Counterterrorism and the Courts: Changes in the British Constitutional Landscape*, 9 INT'L J. CONST. L. 172, 173–74 (2011) (discussing the extent to which U.K. courts have engaged in constitutionalism as part of their decision-making after the passage of the Human Rights Act of 1998); Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21 NAT'L L. SCH. INDIA REV. 51, 59–67 (2009) (arguing that the Indian Supreme Court has been inconsistent in its approach to terrorism-related cases and other cases involving fundamental rights).

²⁹ See generally Setty, *supra* note 6 (detailing plaintiffs' access to court in United Kingdom and Israeli cases involving allegations of extraordinary rendition and torture).

³⁰ See generally *id.*

³¹ *Arar v. Ashcroft*, 585 F.3d 559, 564-65 (2d Cir. 2009) (noting that only if "Congress chooses to legislate on this subject, then judicial review...would be available"); *but see id.*, at 615 (Sack, J., dissenting) (arguing that additional congressional guidance was not required before allowing Arar to pursue his claims).

³² To be specific, the majority in *Mohamed*, after finding that plaintiffs' suit should be dismissed, suggested that that Congress could initiate an investigation into government abuses, enact private bills to compensate the plaintiffs, or take up state secrets reform. See *Mohamed*, 614 F.3d at 1091–92. The majority further suggested that the executive branch may decide someday to compensate the victims of the extraordinary rendition program, as was done decades after the rendition and internment of individuals of Japanese descent during World War II. See *id.* at 1091. It is noteworthy that the majority considered the reparations awarded to World War II internees as a potentially appropriate model of compensation for extraordinary rendition and torture, considering that the deferential formalism of *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that race-based exclusion orders were constitutional), is viewed by most modern commentators as a profound failure of the judiciary to apply a rule of law analysis to a case weighing security interests with human rights.

³³ See Setty, *supra* note 6, at 1638, 1644 (noting the evidence supporting the veracity of Mohamed's allegations).

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minorities.³⁴ It is clear that Congress must assert its role to protect the civil rights of vulnerable populations.³⁵ At the same time, courts must acknowledge the ongoing preferential judicial activism that has distorted the judiciary's role and fueled critiques of the current Court as being problematically politicized;³⁶ only through such acknowledgement and the rejection of those preferential norms can the judiciary reassert its institutional role as a bulwark to protect individual rights.

³⁴ See, e.g., President Barack Obama, Statement by the President on the Supreme Court Ruling on *Shelby County v. Holder*, (June 25, 2013) available at <http://www.whitehouse.gov/the-press-office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder>; Attorney General Eric Holder, Attorney General Eric Holder on Voting Rights Act Decision (June 25, 2013) available at <http://www.c-spanvideo.org/program/HolderonV>; Press Release, Representative Nancy Pelosi, Pelosi: Supreme Court Takes a Step Backward on Voting Rights (June 25, 2013) available at <http://pelosi.house.gov/news/press-releases/pelosi-supreme-court-takes-a-step-backward-on-voting-rights>; Press Release, Representative John Lewis, Rep. John Lewis Calls Court Decision “a Dagger” in the Heart of Voting Access (June 25, 2013) available at <http://johnlewis.house.gov/press-release/rep-john-lewis-calls-court-decision-%E2%80%9C-dagger%E2%80%9D-heart-voting-access>; Senator Patrick Leahy, “From Selma to *Shelby County*: Working Together to Restore the Protections of the Voting Rights Act” (July 17, 2013) available at <http://www.leahy.senate.gov/press/senate-judiciary-committee-holds-hearing-on-the-voting-rights-act>.

³⁵ See Rebecca E. Zietlow, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 9, 58-59, 164 (2006) (arguing that Congress has acted in rights-protective ways as a matter of principle, such as the passage of post-Civil War legislation like the Civil Rights Act of 1866).

³⁶ See, e.g., David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC, June 29, 2012, <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.