This Article describes the principal ways in which the idea of the judicial center has been articulated in the twentieth and twenty-first centuries, emphasizing connections between shifting formulations of the idea and the jurisprudential perspectives driving commentary on the Supreme Court by political scientists, journalists, and legal scholars. It then seeks to explain, in light of that description, why the idea of the judicial center is currently perceived by many commentators as an important point of departure for their observations on the dynamics of the Rehnquist Court. It concludes with some observations about how one might sharpen an understanding of the idea of the judicial center through further scholarly investigations.
INTRODUCTION

In 1995, New York Times correspondent Linda Greenhouse wrote an article whose first sentence identified “[t]he birth struggle of a new era” on the Supreme Court.1 Greenhouse suggested that “[l]ong-held assumptions about the authority of the national government, the relationship between Washington and the states, and the ability of the Federal Government to take race into account in making public policy, were all placed on the table for dissection.”2 She claimed that, “[a]n ascendant bloc of three conservative Justices with an appetite for fundamental, even radical change, [had driven] the Court on a re-examination of basic Constitutional principles” in the 1994 Term.3

Greenhouse’s article was entitled “Farewell to the Old Order in

2. Id.
3. Id.
the Court," and its headline stated, "The Right Goes Activist." The article, however, was not just about the "unstable [and] riveting" actions of a "conservative bloc" on the Court.4 It was also about the fact that, according to Greenhouse, "[t]he center all but disappeared from the Court this term."5 Two Justices nominated by President Bill Clinton, Ruth Bader Ginsburg and Stephen G. Breyer, were "widely expected to help anchor a strong central bloc."6 But "there turned out to be virtually no center for these two experienced Federal judges to anchor [as they] joined a Court that, far from converging toward the center, was driven by competing visions of the Constitution and the country."7 As the "center" of the Court vanished, Greenhouse suggested, Ginsburg and Breyer found themselves "on one side [of a] divide" on constitutional issues, along with Justices John Paul Stevens and David Souter.8 The other side included the "ascendant bloc," composed of Chief Justice William Rehnquist, Justices Antonin Scalia, and Clarence Thomas, plus "conservative" Justices Anthony Kennedy and Sandra Day O'Connor, on whom the ascendant bloc of Justices "could usually count ... in nearly all the term's most important contested cases."9 The "center" of the Court was "a void," Greenhouse announced.10

In applying the terms "center" and "central bloc" to Supreme Court Justices, Greenhouse was drawing on several decades of scholarship in which those terms had come to be used as encapsulations of the postures of Justices. The use of the terms had evolved over those decades, and by the time Greenhouse employed them, the terms could have been understood as having any of three possible meanings.

One meaning of "center" was spatial. The term located the position of a Justice on a Court based on the voting pattern of that Justice in a sample of cases. The sample typically involved cases raising constitutional issues, or other issues with discernible policy implications, that resulted in nonunanimous decisions. The location of a Justice—in a "left," "right," or "center" position on the Court—was determined by attaching ideological labels to outcomes in the cases, then tabulating the Justice's endorsement of those outcomes.

4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
Such tabulations resulted in the identification of some Justices at the "center" of a Court because their votes in the sampled cases tended to alternate, in a roughly equal fashion, between "left" (or "liberal") and "right" (or "conservative") outcomes.\(^\text{11}\)

Greenhouse's article used, "as a rough measure of the Court's ideological polarities," the opposing positions of Chief Justice Rehnquist and Justice Stevens in nonunanimous cases.\(^\text{12}\) Rehnquist and Stevens were on opposite sides in thirty-five such cases, and Greenhouse took it as self-evident that Rehnquist's voting position, in all the cases, could be characterized as right of center, and Stevens's as left of center.\(^\text{13}\) She then examined the alignment of other Justices with Rehnquist or with Stevens. This produced findings, for the 1994 Term, in which some Justices, such as Breyer, who voted sixteen times with Rehnquist and eighteen times with Stevens, or Souter, who voted fourteen times with Rehnquist and twenty times with Stevens, appeared closer to the "center" of the Court than other Justices, such as Thomas, who voted thirty-three times with Rehnquist, and Ginsburg, who voted twenty-three times with Stevens.\(^\text{14}\)

The spatial meaning of the idea of a "center" on the Court was drawn from the technique of voting alignment analysis, which was originally introduced into commentary on the Court by behavioralist political scientists.\(^\text{15}\) It will be important to distinguish this meaning of judicial center from a second meaning of the concept that Greenhouse used in her article. That meaning was captured in her statement that Ginsburg and Breyer were "widely expected to help anchor a strong central bloc" of Justices because they were "pragmatic moderates" who, after being nominated by President Clinton, "easily won confirmation with strong bipartisan support."\(^\text{16}\) Used in this way, a posture at the "center" of the Court was equated with the political stances of pragmatism and moderation. The chief

\(^{11}\) See infra Part I.A–B (discussing the use and application of the spatial meaning of the term "center" by C. Herman Pritchett and others).

\(^{12}\) Greenhouse, supra note 1, at E4.

\(^{13}\) See id.

\(^{14}\) Id.


\(^{16}\) Greenhouse, supra note 1, at E4.
function of pragmatist or moderate stances by Justices on the Rehnquist Court in the mid-1990s, Greenhouse implied, was to serve as a brake against efforts by other Justices to institute “fundamental, even radical change” in constitutional interpretation. This idea of the judicial center was also locational, but in a different sense from the spatial meaning. It denoted a place on the ideological spectrum in which constitutional law and contemporary politics are said to interact. It referred to Justices whose ideology was situated between the “extremes” of right and left on that spectrum.

It is already apparent that what I will be calling the spatial and political meanings of “center” may be difficult to distinguish. But the literature in which those meanings emerged—commentary on the Court by political scientists—drew two different inferences from the characterization of Justices as occupying the spatial center of a Court or being political moderates. Justices whose voting patterns revealed them to be at the center of the Court for a given Term were just that: during one year their votes alternated between “left” and “right” policy outcomes in a roughly equal fashion. They might not be “at the center” of the Court in some other Term, and their spatial location said nothing about the political or jurisprudential bases for it.

The methodology that characterized Justices as being at the spatial center of a Court was designed to be a positive exercise in behavioral science.

In contrast, describing Justices as being in the “center” of the Court because they occupied “moderate” positions on an ideological spectrum with “extremes” was a more ambiguous term in the political science literature commenting on the Court. Sometimes it seemed to mean that a Justice self-consciously steered a pragmatic course between ultraleft and ultraright policy outcomes. And sometimes it seemed to mean that a Justice was temperamentally disposed to take a cautious approach, or to split the difference between competing ideological stances. The effort by commentators to distinguish between these two senses of judicial center was to have significant implications for the intelligibility of the concept.

17. Id.

18. See, e.g., C. Herman Pritchett, The Voting Behavior of the Supreme Court, 1941-42, 4 J. POL. 491, 495 (1942) [hereinafter Pritchett, Voting Behavior] (describing a “central” group of Justices located between a “fairly definitive left-wing” and a “less definitive right-wing”).

Greenhouse’s article also revealed that by the 1990s, a third meaning of “judicial center” had surfaced. She claimed that if the label “liberal” applied to Justices “who sought to use the Court as an engine of social change,” the “bloc” of Justices Breyer, Ginsburg, Stevens, and Souter might be called “conservatives.” This was because Breyer, Ginsburg, Stevens, and Souter were the ones “argu[ing] on behalf of that onetime conservative shibboleth, judicial restraint,” by supporting “adherence to precedent” and by resisting judicial “reaching out to decide cases that [were], arguably, not properly before the Court.”

Greenhouse’s comments implied that Justices who resisted sweeping rightward changes in constitutional jurisprudence, on a Court that potentially tilted right, could be seen as occupying the judicial center because they were jurisprudential conservatives. That usage of “center” was predicated on a distinction between political and jurisprudential conservatism: Greenhouse assumed that the Justices on the Rehnquist Court who were inclined to favor dramatic doctrinal changes were situated on the right end of the political spectrum, whereas those she described as jurisprudential conservatives were not. Subsequent commentators have not been particularly enamored with the term “conservative” to describe Justices who resist sweeping changes in constitutional law on jurisprudential grounds. Their preferred label has been “centrist.” Thus, the terms “center” and “centrist” are now often used to denote Justices who resist sweeping changes in constitutional law, ostensibly on jurisprudential grounds, in the face of pressure from a bloc of right-leaning Rehnquist Court Justices poised to attempt a broad reexamination of constitutional principles.

Greenhouse’s multiple formulations of the judicial center not only serve to introduce the different ways that idea has been represented in commentary, they can also be seen as summoning up a distinct portrait of the current Rehnquist Court. According to that portrait, the Rehnquist Court has no “judicial liberals,” Justices who are “activists” with progressive social agendas. Its activists are members of the ideological right who have an interest in reexamining established constitutional doctrines, such as those affecting the

21. Id.
22. See id.
23. See id.
24. See, e.g., sources cited infra notes 397–401 and accompanying text.
25. See infra Part V.B.
relationship between the federal government and the states, or those defining the ability of governmental institutions to take race, gender, or sexual preference into account in making public policy.

Confronted with this pressure from right-wing activists on the Court, the portrait suggests, other Justices have assumed two sorts of "centrist" postures. Some Justices have alternated between support for, and opposition to, rightward outcomes in constitutional cases, staking out a "center" location on the Court. Breyer's and Souter's voting alignments in the 1994 Term, Greenhouse suggested, put them in that location; O'Connor's and Ginsburg's voting alignments did not.\(^2\) 6 On the other hand, O'Connor and Ginsburg could be called "centrists" because they appear to be disinclined to embrace sweeping reexaminations of constitutional doctrine. Thus, in the portrait both sets of centrists may be seen, possibly for different reasons, as inclined to oppose sweeping, right-leaning changes in constitutional jurisprudence. The "center" of the Rehnquist Court is being defined in opposition to its activist right.

When a term has multiple meanings and combines normative and descriptive components, questions arise as to whether it can function as a useful analytical label, or whether it instead invites confusion or even approaches unintelligibility. One might well conclude that the idea of the judicial center, with its different spatial, political, and jurisprudential connotations, has little chance of bringing clarity to the commentary on the Supreme Court. But the increased use of the terms "center" and "centrist" by commentators, and the prominent role of those terms in the portrait of the Rehnquist Court just described, suggests that the idea has some resonance. Moreover, the multiple ways in which the idea has been formulated suggests that it needs to be unpacked.

One way to distill the import of a resonant idea in constitutional commentary is to consider the ways in which the idea has been formulated over time. In the case of the idea of the judicial center, such an analysis results in two findings that serve to buttress the importance of the idea in late twentieth and twenty-first century constitutional commentary. One finding is that shifting formulations of the terms "center" and "centrist" can be matched up with shifting conceptions of the idea of the judicial center itself: the dominant understanding of that idea has significantly changed between the 1940s and the present. The other finding is that dominant understandings of the idea of a judicial center have tracked the

criteria commentators on the Supreme Court have emphasized in evaluating the performance of twentieth and twenty-first century Supreme Court Justices. Those criteria have also changed over time. Historicizing the idea of the judicial center thus provides an opportunity to track shifts in the starting jurisprudential premises that have informed commentary on the Court from World War II until the present.27

This Article describes the principal ways in which the idea of the judicial center has been articulated in the twentieth and twenty-first centuries, emphasizing connections between shifting formulations of the idea and the jurisprudential perspectives driving commentary on the Supreme Court by political scientists, journalists, and legal scholars. It then seeks to explain, in light of that description, why the idea of the judicial center is currently perceived by many commentators as an important point of departure for their


One assumption is that evocative labels and concepts in American constitutional jurisprudence, such as judicial “liberalism,” “conservativism,” “centrism,” “strict” or “rational basis” scrutiny, or even “judicial review,” have universal and contextual dimensions that need to be unraveled before they can be meaningfully employed. “Unpacking” refers to the process of using the techniques of intellectual history, and political and social theory, to unravel the changing meaning of those labels and concepts.

The other assumption, captured in the term “historicizing,” is that such labels and concepts have dominant meanings in particular periods of time which are replaced by subsequent dominant meanings. When a concept or label, such as “liberalism” or “strict scrutiny,” has a dominant meaning for judges or commentators, they are inclined to universalize its meaning, believing that it can serve as a useful way of approaching judicial decisions made in a previous time period. That belief is almost inevitably misguided. To take just one example, tiers of scrutiny developed in the twentieth century are of no analytical value in explaining the constitutional decisions of the Marshall Court, because no practice of varying the level of constitutional scrutiny with the subject matter of a particular case existed in early nineteenth century constitutional jurisprudence. “Historicizing” refers to the process of using techniques of intellectual history to demonstrate the precise contextual meaning of evocative labels and concepts in given historical periods.

The cumulative effect of the methodology is to show that the most evocative terms of constitutional discourse are inherently ambiguous and contingent, but that close analysis of their use over time can serve to enhance their descriptive and analytical value.
observations on the dynamics of the Rehnquist Court. It concludes with some observations about how one might sharpen an understanding of the idea of the judicial center through further scholarly investigations.28

I. JUDICIAL BEHAVIORALISM AND THE IDEA OF THE CENTER IN THE 1940S

This Section examines the idea of the judicial center in a historical period in which that concept primarily signaled the spatial location on the Court of Justices whose voting patterns alternated between support for “left” and “right” outcomes in nonunanimous cases with discernible public policy implications. The purpose of this Section is to illustrate how this version of the idea, which surfaced mainly in political science literature, was connected to the emergence of behavioralist theories of judicial decisionmaking.

A. Behavioralism and Voting Alignments on the Supreme Court

In the 1940s, political scientists began to employ the term “center” in their studies of the work of Supreme Court Justices. The term had a specialized meaning: it was used to characterize a Justice’s voting pattern in certain nonunanimous cases deemed to have significant policy implications. When a Justice was said to occupy “the center” of the Court, or to be a “central” Justice, the designation meant that when the Court divided on cases raising policy issues, he tended to vote with Justices supporting “left” policy outcomes about as much as he voted with Justices supporting “right” policy outcomes. That definition of judicial center was associated with a particular methodology for deriving the political perspectives of Supreme Court Justices: voting alignment analysis.

Voting alignment analysis, as applied to Supreme Court Justices, was a technique premised on a behavioralist theory of judicial decisionmaking. That theory was endorsed by many commentators on the Court from the 1940s through the 1960s.29 Advocates of

28. This Article’s primary focus is on commentary by political scientists, journalists, and legal scholars on the Supreme Court. Although it makes reference to broader theories of judging, such as judicial behavioralism, and of the judicial function, such as process jurisprudence, it gives principal attention to commentators’ application of those theories to the Court’s decisionmaking in visible constitutional cases. Because the Article only surveys a particular subset of twentieth and twenty-first century constitutional commentary, its general arguments should be understood as limited by that frame of reference.

29. See infra Part II.D.
judicial behavioralism assumed that judges were like other public officials holding power: they made their decisions on the basis of ideology and politics, and the legal justifications they offered for those decisions were in the service of the outcomes they preferred. Judicial behavioralists believed that a once-dominant jurisprudential proposition that judges merely "followed" the dictates of some essentialist entity called "law" in making decisions had revealed itself to be incoherent. The open-ended nature of authoritative legal sources such as the Constitution or the common law, the corresponding interpretive freedom accorded judges, and the fact that many judicial decisions involved contested issues of public policy meant that the calculus of judges in making decisions was similar to that of legislators.  

The assumptions of judicial behavioralism reflected themselves in two lines of post-World War II commentary on the constitutional law decisions of Supreme Court Justices. One of those lines, which will be subsequently considered, assumed that judges themselves had come to accept some of the ideas associated with judicial behavioralism, especially the idea that they had the potential to have a significant impact on public policy in their role as constitutional interpreters. Some judges relished that feature of their work, whereas others worried about the implications of policymaking by unelected, politically unaccountable officials in a democracy. Accordingly, some "activist" Supreme Court Justices aggressively scrutinized legislation on constitutional grounds if they thought its effects unjust, while others, advocates of judicial "restraint," deferred, on grounds of democratic theory, even to legislators whose policies they deplored.  

The other line of commentary, primarily by political scientists such as C. Herman Pritchett, treated judicial decisionmaking, at least in cases with strong policy implications, as an exercise virtually

30. In legal scholarship, the emergence of judicial behavioralism has typically been linked with the Realist movement in jurisprudence that surfaced in American law schools in the 1920s and had become orthodox by the 1940s. Parallels between the work of Realist legal scholars and behavioralist-inspired literature in other disciplines in the early twentieth century are the subject of Edward A. Purcell, Jr., The Crisis of Democratic Theory passim (1973). For examples of the effects of judicial behavioralism on early twentieth century commentary, see Neil Duxbury, Patterns of American Jurisprudence 114-35 (1995) and White, The Constitution and the New Deal, supra note 27, at 171-97.

31. See infra notes 159-74 and accompanying text.

32. See infra note 445 and accompanying text.

33. See infra, text accompanying notes 119-20.
identical to that engaged in by legislators. Once judges were taken to be political actors, and legal doctrine characterized as indeterminate and open-ended, scholars whose expertise lay in the study of politics began to expand their inquiries to include the performance of Supreme Court Justices, particularly in constitutional cases. In this version of judicial behavioralism, the significance of constitutional cases was assumed to lie in their outcomes, and consequences for public policy, rather than in the niceties of constitutional doctrine. The outcomes in constitutional cases could be described in ideological terms, the voting records of Justices in those cases compiled, and a judge’s performance characterized in the ordinary labels of politics.

The work of Pritchett in the 1940s and 1950s furnishes an example of this line of behavioralist political science scholarship. A 1942 article in the Journal of Politics provides an illustration of Pritchett’s methodology, which he would employ in studies of the

34. Pritchett’s work has been singled out for detailed examination for two reasons. First, he pioneered the technique of determining the ideological perspectives of Supreme Court Justices from the alignment of their votes in nonunanimous cases with discernible public policy implications. His initial use of the technique appeared in Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941. See Pritchett, supra note 15. Pritchett’s version of voting alignment analysis was extremely influential: in 1948 a commentator wrote that “[s]ince Pritchett began his work ... he has had a host of imitators and followers .... The result is that almost everyone working in the field of Supreme Court study has become a sort of one-scholar census taker.” John P. Frank, Book Review, 34 IOWA L. REV. 143, 144 (1948) (reviewing C. HERMAN PRITCHETT, THE ROOSEVELT COURT (1948)). For additional examples of political science scholars employing variations of Pritchett’s methodology in the 1950s, see Fellman, supra note 15 and Jacobs, supra note 15, at 938–46.

Pritchett’s work also implicitly encouraged judicial behavioralists in the political science community to employ more sophisticated and detailed quantitative research techniques. For examples, see generally Fellman, supra note 15; Jacobs, supra note 15; and Glendon Schubert, Behavioral Research in Public Law, 57 AM. POL. SCI. REV. 433, 442–43 (1963). The efforts of this line of behavioralist quantifiers caused legal scholars in the 1960s to take note of political science literature on judicial decisionmaking. See, e.g., Symposium, Social Science Approaches to the Judicial Process, 79 HARV. L. REV. 1551, 1551–1628 (1966). They also spawned critical reactions from both political scientists and legal academics. Two prominent examples were THEODORE L. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE 7–39 (1964) and Lon L. Fuller, An Afterword: Science and the Judicial Process, 79 HARV. L. REV. 1604, 1604–28 (1966).

Second, Pritchett was prepared to modify his methodology when he found that it was ceasing to have much descriptive or analytical purchase on the work of the Court. He was far more responsive to commentary on the Court from scholars who did not share his perspective than many subsequent judicial behavioralists in the political science community. See, e.g., infra notes 56, 127–31, 167–69 and accompanying text. Thus, Pritchett’s work can serve as a more faithful barometer of changing trends in twentieth century Supreme Court commentary than the work of several of his behavioralist-inspired colleagues who developed methodologies for studying the Court.
The methodology, voting alignment analysis, produced the first sustained formulation of the idea of a judicial center in the literature of Supreme Court commentary.

Pritchett began his description of voting alignment analysis with a statement of its governing assumptions. He took "[t]he essential nature of the task of a Supreme Court Justice" to be "not unlike that of a Congressman." Both were "confronted periodically with important issues of public policy." Both needed to "formulate a conclusion and register [a] vote" regarding such issues. And both had a good measure of discretion in their decisionmaking:

[Although] theoretically, the legislator's discretion is much wider than that of the judge ... from the accumulation of 150 years, precedents can be found to support almost any judicial decision. Particularly in the high peaks of public law where the Supreme Court moves, the fences are few and the Justices are largely free to vote their convictions.

Having described the Justices as political actors who dealt with important issues of public policy and who were largely free, notwithstanding legal doctrine, to vote their convictions, Pritchett sought to characterize their jurisprudential stances through an analysis of their voting behavior. His method consisted of an exploration of the Justices' voting records "in terms of alignments and issues." Such an approach would expose "their respective attitudes, as revealed in their answers to the legal questions propounded to the Court." By "attitudes" he meant whether a Justice could be described as on the "left," on the "right," or at the "center" of the Court. By "answers to ... legal questions," he meant the Justices' responses to the issues of social policy that particular public law cases presented.

35. Pritchett, Voting Behavior, supra note 18, passim. Pritchett used the technique in several articles and two books between the early 1940s and the 1960s. See sources cited supra notes 15, 18, and 19, and infra notes 56, 59, and 60. See also PRITCHETT, THE ROOSEVELT COURT, supra note 19, at 32–35.
37. Id.
38. Id.
39. Id.
40. Id. at 491–92.
41. Id. at 491.
42. Id.
43. See id. at 495–96.
44. See id. at 499–505.
Pritchett's method required him to identify a sample of relevant cases, to characterize the public policy issues in those cases, and to describe the resolutions of those issues in ideological terms.\(^4\) Having done so, he simply totaled up the votes of individual Justices in the cases, noting at the same time the amount of times a Justice voted with or against each of his colleagues.\(^4\) This enabled him to identify "bloc[s]" of Justices who voted with one another on the "left" or "right" sides of issues.\(^7\) It also, ultimately, enabled him to characterize the perspectives of some Justices as being "at the center" of the Court in a particular Term.\(^4\)

All of the steps in Pritchett's method required him to make assumptions, some of them fairly heroic. His first assumption was that only nonunanimous cases should be counted in the sample, which resulted in his generalizations about the Justices being based on a comparatively small sample of cases that he deemed particularly significant.\(^4\) In the 1941 Term, for example, Pritchett's survey only considered 59 of the 162 cases the Court decided with full opinions.\(^5\) The emphasis on nonunanimous opinions also resulted in the sample's inclusion of some cases in which the Justices were divided but whose policy implications were not obviously apparent.\(^5\)

Perhaps the most heroic assumption of Pritchett's methodology, however, was not his decision to limit his sample to nonunanimous cases but his choice of baselines for characterizing the voting alignments he found. The baseline question was at once the most potentially fruitful and the most potentially misleading step in Pritchett's methodology. If he could convincingly label a group of policy outcomes in cases as "left" or "right," and "blocs" of Justices as consistently supporting "left" or "right" outcomes, then he could arguably track the political sensibility of each member of the Court, at least with respect to cases decided in one Term. But how was he to determine which outcomes were "left" or "right"?

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45. Id. at 499-506.  
46. See id. at 492-98.  
47. See id. at 495.  
48. See id. at 495-96.  
49. Id. at 492-97.  
50. Id.  
51. Pritchett found it significant that the Court had a lower percentage of unanimous opinions in its 1941 Term than in any other Term for the past ten years, and produced a Table demonstrating that finding. Id. at 493. But he did not indicate how many of the nonunanimous opinions he surveyed in the 1941 Term included cases involving "important issues of public policy," whose resolutions might have been susceptible to being characterized as "left" or "right" outcomes. Id. at 491.
Pritchett initially seemed to assume that his readers would take his characterizations of outcomes in cases as self-evident. In his 1942 article he presented a chart of agreements among Justices in dissenting opinions in the 1941 Term which demonstrated that some Justices regularly joined the dissents of some of their colleagues, but rarely joined the dissents of others. The chart, he conceded, "is by no means a precise measure of the affinity between the Justices," but "it does call attention to some important alignments." The chart revealed that Justices William O. Douglas, Hugo Black, and Frank Murphy joined each others' dissents "quite often," and that Chief Justice Harlan Fiske Stone and Justice Owen Roberts had joined each other in dissent "on [twelve] occasions." Pritchett described Douglas, Black, and Murphy as "a bloc," and claimed that Roberts, Stone, and Justice Felix Frankfurter were not "a bloc in the same way," because although Frankfurter joined Stone in ten dissents, Roberts only joined Frankfurter's dissents four times.

At this point, Pritchett's "chart of agreements" would only seem to have tabulated how many times a particular Justice had joined the dissenting opinions of his colleagues. Since the chart did not reveal the grounds for a Justice's failure to join a dissenting opinion, or even whether such a Justice had been with the majority or dissented separately, it did not say much about what "agreement" meant, and, on its face, did not seem to say anything about the political sensibilities of the Justices. But Pritchett claimed that "the general impression" of his chart was "that of a fairly definite left-wing bloc composed of Douglas, Black, and Murphy, a less definite right-wing pairing of Roberts and Stone, and a central group containing Justices James Byrnes, Robert Jackson, and Stanley Reed, with Frankfurter on the right fringe of this central group."

Pritchett initially gave no indication as to how he had determined

52. Id. at 494.
53. Id.
54. Id.
55. Id.
56. In a subsequent work, taking note of law professor Mark Howe's "doubt whether the statistical analysis of Supreme Court opinions can, under any circumstances, be fruitful," Pritchett noted that "the justices may agree as to the way a case should be decided but for different reasons . . . one justice may have in mind the substantive problem in the case, while for another it turns on a procedural question." C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 275 (1954) [hereinafter PRITCHETT, CIVIL LIBERTIES] (quoting Mark DeWolfe Howe, Justice in a Democracy, ATLANTIC MONTHLY, Dec. 1949, at 36). He felt that "these difficulties can be minimized by careful and understanding handling of the data." Id.
57. Pritchett, Voting Behavior, supra note 18, at 495.
that certain blocs of Justices were "left-wing" or "right-wing." In a footnote in his 1942 article he said that "[t]he terms 'right' and 'left' are used simply as convenient handles, with full realization of their inadequacy in explaining the divisions of opinion of the Court and their inaccuracy in describing the respective philosophies of the justices." He continued to use the labels "left" and "right" to describe groups of Justices in two subsequent articles on voting alignments in the Court, one covering the 1943 Term and the other summarizing data from the 1936 through the 1946 Terms.

On closer investigation, the reasons Pritchett felt comfortable designating blocs of Justices as "left" or "right" are clear. The step that Pritchett regarded as most crucial to his voting alignment analysis of Supreme Court decisionmaking was, as he put it in a 1945 article, "what may be called the 'pattern' of dissent." By tabulating the number of times Justices dissented in nonunanimous cases, and especially the number of times they joined other Justices in dissents, Pritchett determined a "range between high and low agreement rates as an index of relative moderation or extremism in judicial attitudes." Justices on each wing had broad high-low agreement rates.

Once his tabulations determined groups of Justices who had high agreement rates with some of their colleagues, and low agreement rates with others, those Justices became candidates for being placed in "blocs." He then associated the blocs with "wings of the Court." The labels "left" and "right" conveyed Pritchett's rough impression of the political philosophies of the Justices in the respective wings. For example, in his 1942 article Pritchett said that the votes of Black, Douglas, and Murphy in the 1941 Term:

[s]how them to be generally more concerned for the protection of civil liberties and the rights of criminal defendants, more likely to support the government in its tax and regulatory policies, more desirous of limiting judicial review of administrative action and more likely to vote for labor than

58. Id. at n.6.
59. C. Herman Pritchett, Dissent on the Supreme Court 1943-44, 39 AM. POL. SCI. REV. 42 (1945) [hereinafter Pritchett, Dissent on the Supreme Court].
60. C. Herman Pritchett, The Roosevelt Court: Votes and Values, 42 AM. POL. SCI. REV. 53 (1948) [hereinafter Pritchett, Votes and Values].
61. Pritchett, Dissent on the Supreme Court, supra note 59, at 44.
62. Pritchett, Votes and Values, supra note 60, at 54 (emphasis in original).
63. Id.
Those attitudes, in his view, merited the label "left."  

To underscore this point, Pritchett reminded his readers that most of the Court's nonunanimous cases, in any given Term, raised "[s]ubstantial issues of public policy," and that "the legal conclusions of the Justices are invariably affected by their economic philosophy, their political views, and the acuteness of their social conscience." He eventually divided cases with public policy implications into those "involving civil liberties, rights of criminal defendants, federal regulatory action, employer-employee controversies, anti-monopoly issues, and state taxation and regulation problems." The best explanation for the votes of Justices in these lines of cases, he suggested, was that "on these questions of public policy the justices have conflicting preferences, and they vote . . . to promote the policies in which they believe." Thus "attitudes on civil liberties, labor, monopoly, and the like are the primary values in terms of which the judges have made their decisions."

This closer look at the assumptions that drove Pritchett's voting alignment analysis of the Justices who served on the Court in the 1940s reveals that his methodology was deeply invested in the premises of judicial behavioralism. Not only did Pritchett assume that Supreme Court Justices resembled a species of legislators, deciding questions of public policy on the basis of their social and economic preferences, he also assumed that the attitudes of Justices could be determined exclusively on the basis of their voting patterns in certain nonunanimous cases, those whose policy implications seemed obvious to a commentator because they involved "civil liberties," or labor issues, or the regulation of business.

In the articles in which Pritchett grouped Justices as belonging to blocs, he devoted no attention to judicial language in the opinions accompanying the votes that he tabulated. Even though he recognized that "all the justices are impelled, more or less often, to arrive at results in their decisions which they would never reach if they had the freedom of legislative choice," he did not feel the need to incorporate any judicial statements saying as much into his

64. Pritchett, Voting Behavior, supra note 18, at 505.
65. Id. (claiming these attitudes were more akin to "the New Deal Stereotype").
66. Id. at 499.
67. Pritchett, Votes and Values, supra note 60, at 66.
68. Id.
69. Id.
70. Id. at 67.
Clearly, Pritchett thought if one took for granted that the decisionmaking calculus of judges resembled that of legislators, and that much constitutional doctrine was open-ended and malleable, such statements were not worth dissecting.

In contrast, Pritchett believed that the outcomes in certain categories of nonunanimous cases were quite revealing data. They could demonstrate, by themselves, "the basic pattern of division on the present Court," which was "between conflicting systems of preferences on matters of social and economic policy."\(^{71}\) Outcomes in certain cases were worth surveying, he felt, even when they did not show any "conflicting systems of preferences."\(^{72}\) For example, although Pritchett found that outcomes in "labor" cases in the 1943 Term only revealed that "the left wing" was "almost unanimous for labor" and "the right wing (Roberts excepted) generally for labor,"\(^ {73}\) he continued to use labor cases as a meaningful category for determining "left" and "right" attitudes.\(^ {74}\)

**B. Voting Alignment Analysis and the Judicial Center**

Pritchett's voting alignment analysis produced the first durable use of the term "center" as applied to Supreme Court Justices. On its face, the term had only a technical meaning, derived from Pritchett's methodology. "Center" or "central" Justices were those whose ranges of agreement and disagreement with their colleagues, based on voting alignments in the nonunanimous cases in Pritchett's sample, were comparatively narrow.

Pritchett's initial formulation of the idea of a judicial center came in his 1942 article, where he identified a "central group" of Justices, consisting of Byrnes, Jackson, and Reed, and described Frankfurter as "on the right fringe of this central group."\(^ {75}\) His use of the term "central" came after he had introduced a chart of agreements among the Justices in dissenting opinions for the 1941 Term.\(^ {76}\) The chart described Douglas, Black, and Murphy as a "fairly definite left-wing bloc" and Roberts and Stone "a less definite right-wing pairing."\(^ {77}\) It also revealed that Byrnes, Jackson, and Reed had joined dissents by Douglas, Black, and Murphy approximately as often they had joined

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71. Id.
72. Id.
76. Id.
77. Id.
dissents by Roberts and Stone. Pritchett thus concluded that Byrnes, Jackson, and Reed were "central Justices," as "likely to be found with the right wing as with the left."78

As Pritchett's methodology developed, it was clear that under his definition of "center" a Justice who rarely dissented—indeed who never filed a dissent at all—could be assigned to a "central" position on the Court so long as the Court's majorities tended to be composed of shifting "wings" of Justices who typically opposed each other. In his 1942 article, Pritchett had described Chief Justice Charles Evans Hughes as "located . . . squarely at the center of balance on the Court" during its 1931 Term.79 Pritchett's evidence was that Hughes had agreed with "every [majority] decision rendered" in nonunanimous cases, and that the competing wings on the Court that Term were so "well-defined" that "members of one wing [Justices James McReynolds, Pierce Butler, George Sutherland, and Willis Van Devanter] never joined in a dissent with Justices in the other group [Justices Louis Brandeis, Benjamin Cardozo, Stone, and Roberts]."80

Pritchett described Hughes in a similar fashion in a 1945 article. In the 1937 Term, Hughes did not file a single dissent. Pritchett claimed that "the alignments into left and right wings" in that Term "were clear-cut, regular, and almost symmetrical."81 But Roberts had since moved from a "left" bloc to a bloc that included Sutherland, Butler, and McReynolds: he was said to be "to [the] right" of Hughes. Pritchett had characterized Hughes as "in the exact center of the Court" simply because Hughes had consistently joined shifting majorities composed of Justices on the "left" and "right" wings.82 He was using the term "center" in a spatial sense.

But as Pritchett began to expand voting alignment analysis to cover larger segments of time, he encountered, as his characterizations of Hughes and Roberts illustrated, the tendency of judicial postures, and judicial "blocs," to shift from one Term to another. In a 1948 article in which Pritchett surveyed the percentage of agreements among Justices for a time span covering the 1931 through the 1946 Terms, he stated that between the 1931 and 1935 Terms, where the personnel of the Court did not change, there were "three clearly defined blocs which can be referred to as the left,

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78. Id.
79. Id. at 496.
80. Id.
81. Pritchett, Dissent on the Supreme Court, supra note 59, at 46.
82. Id.
center, and right of the Court." The "center of the Court" consisted of Hughes and Roberts, and their "central" status was determined by Pritchett's usual method: their ranges of agreement with other Justices were comparatively narrow in a setting in which the ranges of agreement of Justices located in "wings" of the Court were quite broad, and thus they occupied space at the Court's center.

But by the 1937 Term, Pritchett claimed, a personnel change had begun to affect the ranges of agreement among the Justices. Justice Black had replaced Van Devanter, and "he was too far to the left for any of the other justices except Cardozo." By that statement Pritchett meant to convey two rather different ideas. First, when one examined the percentages and ranges of agreement among Justices in nonunanimous cases, only Cardozo agreed with Black substantially (88% of the time) in a setting in which Black's range of agreement and disagreement with other Justices was quite broad, ranging from 88% to 9%. Second, two other members of a "left" bloc, Brandeis and Stone, did not agree with Black as often (70% and 68% of the time) as Cardozo did. This was particularly interesting, Pritchett felt, because Hughes had agreed with Black 67% of the time, and Roberts had agreed with Black 64% of the time. Hence, Pritchett decided that "the more moderate left-wing members" of the Court had "merged with the center" that Term.

The two uses of the term judicial "center" described above did not convey the same message, and another passage in Pritchett's 1948 article demonstrates that he had come to use his concept of the range between high and low agreement rates in a Justice in two different ways. In discussing the "central" status of Hughes and Roberts on the Court between 1931 and 1936, Pritchett said:

[T]he center of the Court consisted of Hughes and Roberts. This pair had their highest rates of agreement with each other and with the more moderate left- and right-wing justices . . . . It is a characteristic of center justices that they have neither very

83. Pritchett, Votes and Values, supra note 60, at 55.
84. Id. at 55–59. Over a five-year period Pritchett found that in the sample of nonunanimous decisions he took to be relevant, Stone had agreed with "right" bloc members only 20% of the time and "left" bloc members 89% of the time, whereas Butler had agreed with "right" bloc members 87% of the time and "left" bloc members 20% of the time. Id.
85. Id. at 60.
86. Id. at 56.
87. Id.
88. Id.
89. Id. at 60.
high nor very low rates of agreement with their colleagues on either side of the Court. . . . These data suggest the possibility of using the range between high and low agreement rates as an index of relative moderation or extremism in judicial attitudes. . . . A range of 100 would be evidence of extreme opposing attitudes, while a range of zero would mark a moderate justice who was a kind of common denominator for his brethren. Broad ranges are characteristic of the justices on the two wings of the Court, and narrow ranges mark the center justices.  

It was not clear from the passage whether Pritchett meant to imply, in associating a broad range of agreement rates with “extremism in judicial attitudes” and a narrow range with “moderation,” that “center” Justices were politically moderate persons, or whether he was simply repeating his previous claim that Justices at the center of a Court tended to occupy a space determined by the roughly equal proportions of their agreement and disagreement with their colleagues in sampled cases. In his previous voting alignment studies of the Court, Pritchett had suggested that the only criterion for placing Justices in “blocs” and “wings” was their tendency to regularly agree, or regularly disagree, with one another in nonunanimous cases with discernible policy implications. But the above passage, taken together with statements such as “[Black] was too far to the left for any of the other justices except Cardozo” and “the more moderate left-wing members merged to the center,” implied that “extreme opposing attitudes” in Justices were a function of political ideology, and hence a “central” location on a Court might be a location on a political spectrum.

The rest of Pritchett’s 1948 article did not pursue this potential alternative meaning of “center.” He referred to a “new left-wing alignment” in the 1938 Term, a new “center” in that Term, “composed of Reed, Stone, Brandeis, and Hughes,” a “very solid left” in the 1939 Term, and a “center,” for that Term, composed of Frankfurter, Reed, and Stone. Those comments suggested that the designation of Justices in the center of the Court was purely a function of their tendency to agree or disagree, during a given Term, in

90. Id. at 55, 59.
91. See Pritchett, Voting Behavior, supra note 18, at 494–98.
92. See supra note 85 and accompanying text.
93. See supra note 89 and accompanying text.
94. Pritchett, Votes and Values, supra note 60, at 60.
roughly equal proportions with “left” and “right” Justices. Even Pritchett’s statement that there was “no particular cohesiveness in the center” in the 1941 Term seemed only to mean that several Justices, some of them previously associated with “left” blocs and others with “right” blocs, had exhibited narrow ranges of agreement in nonunanimous cases.\(^9\)

As Pritchett began to struggle with the use of the labels “left,” “right,” and “center” over longer segments of time, his data for the 1948 article revealed another development that threatened to make those categories even less precise. That development was the noticeable narrowing of the range of agreement among Justices after the 1940 Term.

Between the 1936 and 1940 Terms the average range of agreements among Justices had been quite broad: 68, 75, 76, 69, and 67 points. This meant that most of the Justices on the Court were agreeing with some of their colleagues a good deal, but others rarely. For nine Justices to average a range of agreement that spanned 75 and 76 points, on a 100 point scale, meant that there were very high patterns of concordance and disagreement among several Justices, at least in the cases Pritchett sampled.\(^9\)

In contrast, between the 1941 and 1946 Terms the average range of agreement in the nonunanimous cases in Pritchett’s sample\(^9\) was

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95. The ranges of agreement for all the Justices on the Court except Black and Douglas were low in the 1941 Term. Roberts’s and Stone’s ranges were 47, Murphy 44, Frankfurter 36, Jackson 26, Byrnes 16, and Reed 11. Id. at 57. Frankfurter, who had agreed with Douglas and Black 100% of the time in the 1938 Term, agreed with Douglas 34% of the time and Black 36% of the time in the 1941 term. Id. at 56. Stone had agreed with Black 81% of the time and Douglas 80% of the time in the 1939 Term. Id. He agreed with Black 25% of the time and Douglas 23% of the time in the 1941 Term. Id. at 57.

96. In nonunanimous opinions in the 1936 Term, Cardozo agreed with Stone 100% of the time, and Brandeis 90% of the time. Id. at 55. Stone agreed with Brandeis 91% of the time; Cardozo agreed with McReynolds 13% of the time; Stone agreed with McReynolds 17% of the time; and Brandeis agreed with McReynolds 17% of the time. Id.

In nonunanimous opinions in the 1938 Term, Black, Douglas, and Frankfurter agreed with one another 100% of the time. They never agreed with McReynolds. Id. at 56. They agreed with Butler 6%, 9%, and 5% of the time, respectively. Id.

97. It is important to recall that Pritchett’s version of voting alignment analysis did not consider all nonunanimous cases. He was only interested in surveying nonunanimous outcomes that he felt comfortable categorizing in ideological terms. A case such as *Erie Railroad v. Tompkins*, for example, was not part of Pritchett’s sample because it was, technically, not a “nonunanimous” outcome (*Erie* was decided 8-0, with three Justices concurring and one Justice, Cardozo, not participating). 304 U.S. 64, 68 (1938). In addition, *Erie* did not fall into any of the categories of cases that Pritchett treated as raising issues of public policy with distinct ideological ramifications. *Erie* was, of course, one of the most significant Court decisions of the twentieth century, and the issue it
41, 43, 39, 46, 28, and 37. And if one eliminated Justices Black and Douglas from the sample (even those Justices' ranges of agreement did not exceed 72 for those Terms), the ranges of agreement for all the other members of the Court varied from 58 to 11 for that time interval.98 In the 1945 Term the ranges of agreement for all the Justices, including Black and Douglas, varied from 38 to 21.99 In the 1946 Term it varied from 46 to 30.100 In short, Pritchett's principal criterion for "center" Justices—those who had neither very high nor very low rates of agreement with their colleagues—suggested that all the Justices on the Court in the 1945 and 1946 Terms were in a "center" bloc.

Pritchett had difficulty reconciling that trend with his voting alignment approach to the Court's decisions. At one point he advanced a conclusory explanation for the trend, stating that "all the justices have more in common with colleagues on the other side of the Court, and less in common with members of their own wing, than was previously the case."101 At another point he seemed to back away from any explanation, stating that the data he had collected on the ranges of voting agreements among Justices "throws no light on the values in terms of which the justices have made their decisions, and affords no explanation of judicial motivation."102 The last statement flew in the face of his initial reasons for adopting voting alignment studies of the Court.

In each of his articles discussed above, Pritchett made an effort to link voting patterns to judicial preferences on matters of social policy. Although one might quarrel with his categories of cases raising discernible policy issues, or his association of support for particular outcomes in those cases with "left" or "right" judicial perspectives, Pritchett had invested the terms "left" and "right" with some fairly determinate content.103 In a 1945 article, he had suggested

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98. Pritchett, Votes and Values, supra note 60, at 56.
99. Id. at 58.
100. Id. at 59.
101. Id. at 61.
102. Id.
103. Compare the definitions of "conservative" and "liberal," as applied to Justices on the Warren Court, by a political scientist writing a decade after Pritchett's studies appeared. Clyde E. Jacobs applied the term "conservative" to "those justices who support a relatively restrictive interpretation of civil liberties—both constitutional and statutory,"
that even when most of the Justices on the Court could be described as "liberals," divisions between them were "still explicable in terms of differing degrees of orientation toward left or right."104 "Liberalism," Pritchett felt, "is a realm broad enough for the development of its own left and right wings."105

Although Pritchett noted that the Court's "left" and "right" wings seemed to be breaking down after the 1940 Term, he did not acknowledge that the trend was damaging to the coherence of his characterization of some Justices as being in the "center" of the Court. Under Pritchett's voting alignment analysis, center judges were given that label because they voted roughly equally with "left" or "right" blocs. Their "central" position on the Court only became intelligible if the blocs themselves had some integrity. Pritchett had designed his "blocs" and "wings" on the Court to have substantive content: they signaled "left" or "right" patterns of judicial voting on policy issues.

In short, Pritchett's formulation of the idea that some Justices were located in the center of a Court had never been purely spatial. Calling Justices "central" because of their narrow range of agreements with their colleagues was only a meaningful designation when "left" and "right" blocs on a Court were clearly visible. And since the labels affixed to those blocs signified ideological perspectives, so did a "central" position. Justices at the center of a Court appeared to be those whose ideology was roughly midway between "left" and "right." They appeared to be political moderates, if one thought of uniformly left and uniformly right ideological perspectives as occupying the extremes of an American political spectrum. Thus, Pritchett's claim that his data on ranges of agreements said nothing about judicial values seemed at war with his own methodology.

Once Pritchett's own data revealed that all the Justices on the Court in the 1945 and 1946 Terms had narrow ranges of agreement in nonunanimous cases, the idea of a judicial center, in the sense in which Pritchett had expressed it, no longer seemed to be a coherent analytical concept. The "center" of the Court in the 1945 and 1946 Terms, according to voting alignment analysis, was virtually all-inclusive. And since the whole point of voting alignment analysis was

and the term "liberal" as "interchangeable with libertarian." Jacobs, supra note 15, at 937 n.3.

104. Pritchett, Dissent on the Supreme Court, supra note 59, at 53–54.
105. Id.
to permit commentators to discern the "conflicting systems of preferences on matters of social and economic policy" exhibited by Justices on the Supreme Court, placing Justices at the "center" of a Court whose members exhibited strikingly narrow ranges of agreement was no help in discerning those systems of preferences.

C. Judicial Behavioralism and the "Activism"-"Restraint" Debate in Political Science

1. The Reconfiguration of Judicial Labels

In the 1948 article in which he had pointed out the deterioration of clearly defined opposing blocs of Justices on the Court, Pritchett had also noted that some commentators were suggesting "that the present split" among the Justices was "not primarily along liberal-conservative lines," but was instead "a battle of judicial activists against apostles of judicial restraint." That statement revealed the emergence of a line of commentary, in the years after World War II, which sought to explain how a Court whose members had been appointed exclusively by two Democratic Presidents, Franklin Roosevelt and Harry Truman, could be dividing more frequently in visible cases, and producing more dissenting opinions, than the Court of the mid-1930s, which had allegedly contained two incompatible blocs of "conservative" and "liberal" Justices.

One of the earliest examples of that line of commentary was a 1947 article by the political historian Arthur Schlesinger, Jr. on the Vinson Court. Schlesinger began the article by referring to "Roosevelt's Supreme Court," and subsequently noted that "[o]n

106. Pritchett, Votes and Values, supra note 60, at 67.
107. Id.
108. Pritchett's statistics revealed that in the 1935, 1936, and 1937 Terms, when the Court was ostensibly split between two wings of Justices that opposed and supported New Deal legislation and complementary social welfare legislation at the state level, the total number of dissenting votes cast by Justices ranged between 80 and 88, or between .50 and .52 dissenting votes cast per opinion. Id. at 54. In contrast, in the 1944, 1945, and 1946 Terms, the number of dissenting votes cast ranged between 156 and 246, or between 1.14 and 1.71 dissenting votes per opinion. Id.
109. Arthur M. Schlesinger, Jr., The Supreme Court: 1947, 35 FORTUNE 73 (1947). In a 1955 book review, political scientist J.H. Leek stated that Schlesinger's article was the first to popularize the terms "judicial activism" and "judicial self-restraint" as labels for opposing jurisprudential perspectives. J.H. Leek, Book Review, 8 OKLA. L. REV. 127, 128 (1955). I have been unable to find any earlier use of the terms in print. In a November 18, 2004 conversation with the author, Schlesinger stated that he "borrowed" the terms "activism" and "self-restraint" from Harvard Law Professor Thomas Reed Powell, who frequently commented on the Court. See, e.g., Thomas Reed Powell, Our High Court Analyzed, N.Y. TIMES, June 18, 1944, § 6 (Magazine), at 17.
basic questions of the power to govern, this Court stands united.” He believed, however, that “a fundamental conflict” had emerged among the Vinson Court Justices “over the proper function of the judiciary in a democracy.” The central labels Schlesinger used to describe that conflict were judicial “activism” and judicial “self-restraint.” Activists, such as Black and Douglas, believed “that the Supreme Court can play an affirmative role in promoting the social welfare.” Apostles of restraint, such as Frankfurter and Jackson, wanted “to give the legislature discretion . . . to resist judicial supremacy, either of the right or of the left.”

The debate between activists and advocates of restraint, Schlesinger felt, was “not a debate between conservatives and liberals,” as nearly “the entire Court” was “made up of New Dealers.” It was a debate between those who wanted to “use [the] political power [of the Court] for wholesome social purposes” and those who believed that when the Court “substitut[ed] its own for the legislative preference,” it moved “toward a state of judicial despotism that threatens the democratic process.” One wing appeared to be “more concerned with settling particular cases in accordance with their own social preconceptions”; the other with “preserving the judiciary in its established but limited place in the American system.”

Schlesinger felt that there was something to be said for both positions. Advocates of self-restraint touched a chord when they argued that “[t]he price of [judicial] policymaking . . . must inevitably be political reprisal,” and that the Court was “sap[ping] the vigor of our democracy” and “encouraging legislatures in an irresponsibility” when it too readily intervened to review legislation. On the other hand, activists might well be accurate in surmising that “in actual practice” legislatures were not self-correcting, and “harm, possibly irreparable, [was] done to defenseless persons.” He ultimately concluded that “[t]he larger interests of democracy in the U.S. require

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110. Schlesinger, supra note 109, at 73, 201.
111. Id.
112. Id. at 74, 76.
113. Id. at 201.
114. Id. at 204.
115. Id. at 208.
116. Id. at 202.
117. Id. at 204.
118. Id. at 201.
119. Id. at 204.
120. Id. at 206.
that the Court contract rather than expand its power," so that most policy questions should "be entrusted as completely as possible to institutions directly responsive to popular control."

The exception, he believed, following a "doctrine" announced by Stone in *United States v. Carolene Products Co.*, was when "laws restrict political agitation."

Pritchett had not initially been persuaded that divisions on the Court could helpfully be characterized as reflecting postures of activism or restraint. As late as 1948 he continued to insist that "the range of discretion which is available to a member of the Court is quite wide enough to permit his personal values to exercise a controlling influence in a considerable proportion of his decisions." Moreover, he argued, "evidence is lacking . . . that any justice has been able to avoid writing his personal preferences into law." The "basic pattern of division on the present Court," Pritchett concluded, "is still between conflicting systems of preferences on matters of social and economic policy."

In two books he produced between 1948 and 1954, however, Pritchett admitted that the terms "activism" and "restraint" had the merit of capturing opposing views on a question that had come to be central for the Court in those years: when should the Supreme Court decide that "persons under the protection of the American Constitution were entitled to have [it] act directly to safeguard them from [majorities]?" As cases raising that question repeatedly surfaced in the late 1940s and early 1950s, Pritchett recognized that a discernibly "liberal" Court had needed to "bear constantly in mind the necessity of judicial self-restraint" because a "policy of judicial activism sponsored by a liberal court [was] no more consistent with the democratic process than a like conservative policy." Eventually Pritchett was to conclude, after using voting alignment analysis to identify patterns of division on the Court between the 1946 and 1952 Terms, that those patterns could be more accurately described in terms of the activism-restraint debate than in the traditional labels of

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121. *Id.* at 208.
122. 304 U.S. 144 (1938).
125. *Id.*
126. *Id.*
129. *Id.* at 286.
liberalism and conservatism.\textsuperscript{130}

2. The Activism-Restraint Debate and the Judicial Center

The meaning of Pritchett's terms "central" and "center," already stripped of precision by the narrow ranges of agreement among the Court's Justices in the 1940s and 1950s, was further obfuscated by the interjection of the terms "activism" and "restraint" to describe the postures of Justices. In his 1948 book on the Court, Pritchett discussed how the narrowing of ranges of agreement required him to abandon the terms "liberal" and "conservative" as labels. The labels were only useful, he felt, if the "judicial blocs" he identified were coherent, so that "[i]n only a very few instances did a justice in one wing find himself dissenting in company with a justice from the other wing."\textsuperscript{131} Once divisions on the Court became more varied in the 1940s, and range of agreements narrowed, Pritchett avoided the terms, believing that they could no longer capture "opposed complexes of preferences in matters of public policy."\textsuperscript{132}

Pritchett did not, however, abandon the terms "left," "center," and "right" as "locations of the justices."\textsuperscript{133} He believed that if those terms were used spatially, "a strictly relative sense indicating direction of deviation away from the majority view of the Court at any given time," they remained useful.\textsuperscript{134} But it was hard to know what the term "center" could mean under those definitions. We have already seen that equating the "center" with the position endorsed by a cumulative majority of the Justices in cases with public policy implications threatened to make the term unintelligible when Justices on a Court had narrow ranges of agreement. When the criteria of activism and deference were offered as additional variables affecting a Justice's voting posture, the label "center" seemed even less helpful.

If a case with public policy implications came up, and a majority of Justices endorsed a particular outcome, Pritchett assumed that the outcome represented the "center" of the Court for that case.\textsuperscript{135} If he then felt comfortable characterizing the outcome as "left" or "right" on a spectrum of policy preferences, he could use cumulative voting alignments to chart the position of the Court as a whole in a given

\begin{enumerate}
\item Pritchett, Civil Liberties, supra note 56, at 227.
\item Pritchett, The Roosevelt Court, supra note 19, at 33.
\item Id. at 34.
\item Id.
\item Id.
\item Id.
\end{enumerate}
That sort of analysis lay behind Pritchett's characterization of the Roosevelt Court, in the years 1937 through 1947, as a "liberal" Court, or, more precisely, as a Court whose "center" (cumulative majority position) favored "left" rather than "right" policy outcomes. But it was hard to know how Pritchett's analysis illuminated the perspectives of individual Justices on the Court. If a Justice repeatedly voted with majorities, Pritchett's terminology did not clarify whether he was a "center" Justice or a "left" Justice. It did not reveal whether the reasons a Justice voted with majorities were connected to his position in the activist-restraint debate or his substantive views on policy issues. For example, Frankfurter, whom Pritchett characterized as a "libertarian" on the Vinson Court between 1946 and 1952, occasionally joined Vinson Court majorities to uphold legislation restricting civil liberties. Pritchett did not indicate whether these votes made Frankfurter a "center" judge on that Court, and if so, how his position differed from that of other members of Vinson Court majorities in civil liberties cases, whom Pritchett believed to be hostile to civil liberties claims on substantive grounds.

In short, although the introduction of the terms "judicial activism" and "judicial restraint" into commentary on the Court may have helped scholars, such as Pritchett and Schlesinger, clarify divisions among Stone and Vinson Court Justices who appeared to be generally supportive of liberal policies, it failed to sharpen the meaning of the labels "center" or "central" for Justices on those Courts. If the term "center" only designated the position of a judge who agreed and disagreed with his colleagues in roughly equal proportions, it applied to too many Justices in the 1940s and early 1950s to be distinctive. If it signified a "moderate" stance somewhere between "left" and "right" perspectives, one could not tell whether the votes that had produced that stance were the result of policy preferences or theories about the judicial function. When

136. Id.
137. Id. at 264.
138. PRITCHETT, CIVIL LIBERTIES, supra note 56, at 190, 201.
139. See id. at 201-05, 224-25.
140. See id. at 227-31.
141. For an example, see Pritchett's tables summarizing the range of agreements among Justices in nonunanimous opinions for the 1946-1952 Terms. PRITCHETT, THE ROOSEVELT COURT, supra note 19, at 182, 184 (Tables 5 and 7).
142. Pritchett used the term "center" at one point to describe the voting patterns of Chief Justice Fred Reed, Justice Vinson, and Justice Harold Burton in nonunanimous cases during the 1946, 1947, and 1948 Terms. Id. at 182. But he conceded that "[t]he tables ... do not relate the divisions to issues or throw any light on why the justices voted.
Pritchett eventually came to label Vinson Court Justices on the basis of their "voting record ... in federal and state civil liberties cases" between 1946 and 1953, he used the terms "libertarian activist," "libertarian restraint," and "the Vinson majority," who were "less libertarian." He did not employ the terms "center" or "central."

The difficulties Pritchett encountered with his use of the term "center" were a function of his effort to confine the term to a spatial meaning even though his methodology presupposed that the judicial locations of "left" and "right" had a political meaning. On the one hand, Pritchett sought to be the objective behavioral scientist, simply recording the votes of Justices in certain nonunanimous cases and assigning them spatial positions on a political voting spectrum whose "left" and "right" ends he and his audience took to be readily demonstrable. On the other hand, however, the location of Justices on the "left" or "right" was intended to have distinct political overtones: Pritchett was ultimately seeking to characterize the Vinson Court's responsiveness to civil liberties issues, and to equate judicial responsiveness to civil liberties concerns with a "left" position on the political spectrum. So the characterization of a Justice at "the center" of a Court was bound to be taken as having some political overtones even when Pritchett intended it primarily as a spatial characterization.

II. JUDICIAL BEHAVIORALISM AND PROCESS THEORY IN THE 1950s AND 1960s

This Section argues that in the same period that the categories of

143. Id. at 186.
144. Id. at 225.
145. Id. at 192.
146. Id. at 202.
147. Id. at 227.
148. A passage from Civil Liberties, supra note 56, will illustrate this difficulty. After presenting a table summarizing the range of agreement and disagreement among Justices in dissenting opinions from the 1946 through the 1948 Terms, Pritchett said that the table "brings out ... very clearly the four-judge left, the three-judge center, and the two-judge right." Id. at 182. He meant those labels to be understood spatially, since he spoke of the "average interagreement rates" of the Justices in the groups being high ("73.5, 76, and 74\%\) respectively"). Id. But he then subsequently said that: "[t]he death of Murphy and Rutledge in the summer of 1949 and their replacement by Clark and Minton was bound to cause a reorientation on the Court. The expectation was that the two new appointees would generally align themselves with the Court's center group." Id. It is hard to imagine that "the expectation" to which Pritchett referred was based on anything but an anticipated political agenda. "[T]he Court's center group" thus had an ideological as well as a spatial connotation. Pritchett did not acknowledge this in his book Civil Liberties. See id.
activism and restraint were complicating behavioralist analysis of the Court by political scientists, the implications of judicial behavioralism were serving to turn the direction of legal commentary toward an increased emphasis on the theories of the judicial function advanced by Justices in their public law decisions. Between the early 1950s and the mid 1960s, an influential line of scholarship by legal academics argued that the "processes" of Supreme Court decisionmaking—such as the decision to use, or to decline to use, the Court's certiorari power to resolve conflicting lines of lower court decisions, the level of doctrinal generality employed by Justices in opinions, and the explicit and implicit theories of the Court's constitutional authority expressed in opinions—were the most important features of the Court's performance, far more important than the actual results the Court reached. Close study of those features, this line of scholarship suggested, would not merely reveal that the categories of activism and restraint were far more helpful than labels such as "liberal" and "conservative" in analyzing the performance of Supreme Court Justices. It would also illustrate the crucial importance of theories of the judicial function in understanding the dynamics of the Court.148

Because the literature of process jurisprudence tended to be critical of behavioralist political science studies of the Court,149 and in some instances appeared to be affirming the integrity of "neutral" legal principles that transcended the short-run policy outcomes of cases,150 the behavioralist starting premises of process theorists may be underappreciated. Process jurisprudence is best understood as an effort to domesticate, rather than to reject, judicial behavioralism. One might compare, with Pritchett's comment in the 1940s that the decisionmaking calculus of a judge resembled that of a legislator, a 1966 statement made by Lon Fuller, one of the most visible

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148. The literature on process theory, both as a general jurisprudential perspective and as a "school" of Supreme Court commentary, is vast. I am focusing here on only a selected number of works that are relevant to the evolving idea of a judicial center in that commentary. On the historical and jurisprudential dimensions of process theory, see DUXBURY, supra note 30, at 205–99; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION [hereinafter WHITE, THE AMERICAN JUDICIAL TRADITION] 292–368 (2d ed. 1988); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136–63 (1978). The first work to use the term "process" to historicize the line of commentary was Bruce Ackerman, Book Review, 103 DAEDALUS 119 (1974). Compare the less felicitous term employed in G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 VA. L. REV. 279, passim (1973).

149. See Fuller, supra note 34 passim; Henry M. Hart, Foreword to The Supreme Court, 1958 Term, 73 HARV. L. REV. 84 (1959).

proponents of process theory:

It would be foolish to assert that when judges are engaged in solving problems all their personal attitudes and values become dissipated in a bright glow of objectivity. The final solution may well be skewed in one direction or another by something that may be termed a personal . . . predilection.\(^{151}\)

Fuller followed this statement, however, by insisting that although what judges "wish to achieve" was guided by "some felt need, or by a sense of what is right and just, or simply by personal preference," the "choice of means" was "a matter of rational calculations."\(^{152}\) And in judicial decisionmaking "means and ends mov[ed] in circles of reciprocal influence."\(^{153}\) Once one understood that the "social aims" of judges could not be separated "from the institutional means essential for achieving them," any analysis of the decisions of judges needed to take into account not only "judicial statements about ends [but also] judicial solutions for the problem of means."\(^{154}\)

The reciprocal relationship between the ends and the means of a judicial decision—the ways in which judicial opinions grounded their results in doctrinal ratiocinations and implicit or explicit theories of the judicial function—was the primary focus of process theorists. Their analytical goal was to improve the judicial elaboration of doctrinal principles and to make judges more self-conscious about the boundaries of their institutional authority in a society governed by democratic theory. Their normative goal was to justify a limited measure of lawmaking by judges by preventing the sort of willful, subjective, unreasoned judicial decisions that might encourage critics of the judiciary to conclude that those decisions were nothing but the products of biased humans whose office afforded them legal power.

It was inevitable, given the goals of process theorists, that their scholarship would turn away from behavioralist-inspired voting analysis to approaches that emphasized doctrinal and institutional constraints on judges. It was therefore inevitable that they would find the categories of activism and restraint more fruitful criteria for evaluating the performance of Supreme Court Justices than categories derived from voting patterns and employing political labels such as "left" or "right." The emergence of process theory literature

\(^{151}\) Fuller, supra note 34, at 1619.
\(^{152}\) Id. at 1626.
\(^{153}\) Id. at 1627.
\(^{154}\) Id.
served to underscore the perceived importance of the axes of activism and restraint in characterizing the stance of Supreme Court Justices, and eventually—as Pritchett’s work illustrated—political scientists who conducted voting alignment studies began to use the terms as well.\textsuperscript{155}

A. The Transformation of the Activism-Restraint Categories

In 1948, Arthur Sutherland, a law professor at Cornell and a former clerk to Justice Holmes, wrote, in reviewing Pritchett’s \textit{The Roosevelt Court}:

By and large, practicing lawyers are open to criticism for not explaining to the public ... what law is, and how it is administered. ... [C]onstitutions and statutes cannot possibly provide in detail for all the infinite varieties of human conflict; [] broad standards are the most that can be prescribed; and [] men, more or less wise, patient, and well-informed, must apply these standards to specific situations. Human beings, that is to say, make the actual rules of conduct. ... That judges are human, like other men, and that their emotions, their experiences, their background all affect their ideas of the meaning of a phrase like “due process of law” can surprise only those who never ... read any of the recent books on the Supreme Court. ... The “doctrine of judicial self-restraint operated in Holmes’s day to protect liberal state and federal programs of economic legislation from invalidation by reactionary courts. But what happens when the courts become liberal and are confronted with the product of reactionary legislatures?” Is it still “liberal” to sit back and let the statute stand?\textsuperscript{156}

Comments such as Sutherland’s suggest that in the late 1940s legal commentators had not fully disengaged the activism-restraint debate from conventional political labeling of the Justices’ perspectives.\textsuperscript{157} But in a 1951 article by Louis Jaffe, assessing the Court’s performance in its 1950 Term, one can observe evidence that the activism-restraint debate had taken on some additional

\textsuperscript{155} \textit{See}, e.g., \textit{PRITCHETT, CIVIL LIBERTIES}, supra note 56, at 201–02.


\textsuperscript{157} \textit{Id.} For additional examples, see Note, \textit{Mr. Justice Reed—Swing Man or Not?}, 1 \textit{STAN. L. REV.} 714, 718 (1949).
In Jaffe's usage, judicial restraint had come to be associated not simply with opposition to aggressive judicial scrutiny of "conservative" or "liberal" legislation, but also for the maintenance of a distinction between unseemly judicial policymaking and prudent, reasoned judicial adjudication.159

Jaffe began the article by noting that the "Black-Murphy-Douglas-Rutledge bloc" had "held a pivotal position" on "[t]he Roosevelt Court," and had interpreted constitutional and statutory law "to forward its program of social reform."160 This comment might have been made by Pritchett. Jaffe next claimed, however, that "the Court's work," for much of the 1940s, "was not law but politics."161 It reflected "an excess of passion for immediate results, a naive expectation that ... all things could be quickly put right."162 His objection was not to the substance of the results reached by the Court but to the fact that it had insufficiently emphasized "the stating of reasons" justifying its decisions.163 Although the Court in the 1950 Term was far less dedicated to furthering social reform, Jaffe suggested, its opinions remained insufficiently justified.164

Jaffe's article suggested that more was at stake in the activism-restraint debate than whether judges should protect civil liberties or leave their fate to legislatures. A judicial decision to overrule another branch of government, or to defer to it, needed to be grounded in a carefully articulated statement of legal reasons justifying the decision.165 The articulation of cogent legal reasons for judicial results was a core function of judges because, in a constitutional democracy, they had the ultimate power to decide questions of law but an obligation to square their decisions with democratic theory. An "excess of passion for immediate results" in pursuit of a "program of social reform" could adversely affect the production of fully

158. Louis L. Jaffe, Foreword to The Supreme Court, 1950 Term, 65 HARV. L. REV. 107 (1951).
159. Id. at 107.
160. Id.
161. Id.
162. Id. at 110.
163. Id.
164. Id. at 114. Jaffe's article suggests that in the years in which process jurisprudence first emerged, the goal of its adherents was not to challenge the assumptions of judicial behavioralism, nor to object to the policies furthered by "liberal activists" on the Court, but to claim that the line between illegitimate judicial "politics" and defensible judge-made "law" centered on the production of judicial opinions that provided adequately reasoned legal justifications for the outcomes they reached. Id. at 107-14. See also DUXBURY, supra note 30, at 223-36, 258-62 (intimating the same).
165. Jaffe, supra note 158, at 110.
considered and elaborated legal reasons.\textsuperscript{166}

Just as he had taken note of Schlesinger's use of the terms "judicial activism" and "judicial restraint," Pritchett took note of the expanded dimensions of the activism-restraint debate illustrated by work such as Jaffe's. As he gave more consideration to the postures of activism and restraint in his studies of the Court in the 1950s, Pritchett noticed that the conception of judicial restraint had become refined from its earlier articulations, as in Schlesinger's 1947 article, where it primarily centered on the judicial choice to defer to, or to invalidate, legislative policies.\textsuperscript{167} By the mid-1950s, Pritchett had recognized that the posture of judicial restraint potentially applied to a number of other instances in which courts served as "the instruments of political and social accommodation and adjustment in a complicated governmental system."\textsuperscript{168} Judicial restraint, Pritchett came to believe, was a posture that emphasized "appropriate judicial standards and proper . . . judicial techniques."\textsuperscript{169}

As such, Pritchett noted, judicial restraint was potentially implicated in cases involving the reach of the Supreme Court's jurisdiction, such as those seeking constitutional definitions of "cases and controversies" and of "political questions,"\textsuperscript{170} or those raising technical jurisdictional issues, such as whether a case was ripe for review, had been rendered moot, or could not be entertained because the moving party lacked standing to bring it.\textsuperscript{171} It was also implicated in separation-of-powers cases where courts were reviewing the acts of executive or administrative officials.\textsuperscript{172} It was implicated in federalism cases, testing the Court's power to review the actions of state courts and legislatures and to allocate powers between Congress and the states.\textsuperscript{175} And it was implicated in a series of techniques for postponing or avoiding full-blown decisions on constitutional questions in order to prevent courts from being drawn into consideration of issues that were still percolating in the body politic.\textsuperscript{174}

B. Elevating the Ideological Stakes of the Activism-Restraint Debate

A cottage industry of legal scholarship would develop around

\begin{itemize}
\item \textsuperscript{166} Id. at 107, 110.
\item \textsuperscript{167} PRITCHETT, THE ROOSEVELT COURT, supra note 19, at 278.
\item \textsuperscript{168} PRITCHETT, CIVIL LIBERTIES, supra note 56, at 201.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 202.
\item \textsuperscript{171} Id. at 220–24.
\item \textsuperscript{172} Id. at 203, 224.
\item \textsuperscript{173} Id. at 213.
\item \textsuperscript{174} Id. at 222.
\end{itemize}
“process” dimensions of judicial restraint in the 1950s and 1960s. Legal commentators increasingly began to emphasize what they called the “craft” dimensions of judicial restraint, urging judges to be attentive to the limited scope of the Court’s institutional powers, to avoid the summary or peremptory judicial resolution of complicated questions, and to derive durable, transcendent constitutional principles on which to ground the resolution of divisible cases.\(^\text{175}\) As those craft dimensions of judging became more prominent in process jurisprudence, the ideological stakes of the activism-restraint debate were elevated. In the hands of process theorists, judicial restraint became associated with the preservation of a distinction between principled judicial decisionmaking that upheld the rule of law in a constitutional democracy and willful judicial policymaking in the service of desired social results.

By the late 1950s, judicial restraint had become a normative ideal espoused by both scholars and judges. The most visible evidence of the attraction of scholars to judicial restraint came in a series of articles, many of them in the *Harvard Law Review*, that criticized the Court on three related grounds, summarized by Philip Kurland in 1959.\(^\text{176}\) One ground was the misguided belief of some Justices “that their function is to utilize the power at hand for the accomplishment of those ends of ‘social justice’ which they conceive to be appropriate.”\(^\text{177}\) A second was the production of “too many opinions which obfuscate rather than enlighten.”\(^\text{178}\) The third was the tendency of some Justices, “who regard themselves as sitting as a court of errors and appeals,” to take too many cases that were “of importance only to the immediate litigants” because they had caught the fancy of “four members of the Court,” the number required to ensure that a petition for certiorari would be entertained.\(^\text{179}\)

\(^{175}\) For a fuller compilation of literature exemplifying this “process” perspective, see DUXBURY, supra note 30, at 236–82.


\(^{177}\) *Id.* at 463. The strongest statements of this view made in the 1950s came in two lectures at Harvard Law School, a 1957 lecture by Judge Learned Hand, published as THE BILL OF RIGHTS 56–76 (1958), and a 1959 lecture by Columbia law professor Herbert Wechsler, published as *Toward Neutral Principles of Constitutional Law*, supra note 150, at 20–35.


\(^{179}\) Kurland, supra note 176, at 465. Some commentators criticized the Court for
Kurland also noted that in August 1958, the Conference of the Chief Justices of the States had passed a resolution, by a 36–8 vote, which concluded that the Supreme Court of the United States "has tended to adopt the role of policy maker without judicial restraint," and urged the Court to "exercise ... the power of judicial self-restraint by recognizing and giving effect to the difference between that which ... the Constitution may prescribe and permit, and that which ... a majority of the Supreme Court ... may deem desirable or undesirable." Commenting on the action by the Conference of Chief Justices, Sanford Kadish found it an example of "recent attacks on the Court" in which "the heroes have come to be identified as the 'judicial passivists'; the villains as the 'judicial activists.'" Kadish stated that "recently ... these terms have superseded the old liberal-conservative labels as the framework for debating Supreme Court decisions."

Cumulatively, the process theorists had transformed the labels of "activism" and "restraint" from synonyms for judicial liberalism and conservatism to terms whose ideological content was to be understood, at least facially, in a different way. When Albert Sacks complained about the Court's performance in the 1953 Term, in which Brown v. Board of Education was decided, he said, of some of the Court's more cryptic decisions, "the difficulty is not in the result reached, but in the absence of explanations of what was decided." Repeatedly scholars such as Jaffe, Sacks, Brown, Wellington, Hart, Wechsler, Bickel, and Kurland stated that they had no particular quarrel with the substantive orientation of the Warren Court; their concern was with its reasoning processes, which too often suggested, as Kurland put it, "confusion of the judicial and legislative increasingly using the certiorari power to summarily reverse the decisions of lower federal courts without even hearing arguments. See Ernest J. Brown, Foreword: Process of Law to The Supreme Court, 1957 Term, 72 HARV. L. REV. 77, 77–82 (1958). Others went further, suggesting that by taking too many cases and spending too little time on opinion-writing, the Court produced opinions with "[t]echnical mistakes" that "lack the underpinning of principle which is necessary to illumine large areas of the law ..." Hart, supra note 149, at 99–100.


182. Id.


184. Sacks, supra note 178, at 103.
functions."\textsuperscript{185} Bickel and Wellington's 1957 critique of the Court encapsulated the process theorists' perspective. "The Court's product," they announced, "has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine."\textsuperscript{186}

The ideology of judicial restraint had become associated with preserving the professional integrity of the judiciary. Taking fewer cases, spending more time writing opinions, resisting invitations to make "proclamations of doctrine irrelevant to the case,"\textsuperscript{187} waiting for litigated issues to become fully ripe, and spelling out more clearly the "bridge between the authorities . . . and the results"\textsuperscript{188} would allow the Court, as Paul Freund put it, to "use the litigation process for the refinement and adaptation" of durable legal principles.\textsuperscript{189}

By maintaining that there was a connection, especially in constitutional law, between the production of technically competent opinions and the professional stature and integrity of the judiciary, process theorists had expanded the conception of judicial restraint to include not simply avoiding the impulse to second-guess the legislative branch on a matter of policy but, in addition, avoiding a number of other pitfalls that awaited courts that too hastily set out to promote substantive justice or a program of social reform. When one argued for judicial restraint, therefore, it was not because one opposed justice and reform. It was because one did not want the Court's stature to suffer because it had too hastily ventured outside its areas of competence, issuing broad pronouncements on matters of public policy that it could not adequately connect to the actual cases it was being asked to decide. In sum, process theorists could claim that in advocating judicial restraint they were neither espousing liberalism nor conservatism. They were merely seeking to preserve "public faith in the objectivity and detachment of the Court, without which [it] will be . . . unable to perform those . . . vital functions which properly fall within its scope."\textsuperscript{190}

\textsuperscript{185} Kurland, \textit{supra} note 176, at 465.
\textsuperscript{186} Bickel & Wellington, \textit{supra} note 178, at 3.
\textsuperscript{187} Kurland, \textit{supra} note 176, at 465.
\textsuperscript{188} Bickel & Wellington, \textit{supra} note 178, at 3.
\textsuperscript{189} Paul A. Freund, \textit{The Supreme Court Crisis}, 31 N.Y. STATE BAR BULL. 66, 78 (Feb. 1959).
\textsuperscript{190} Kurland, \textit{supra} note 176, at 466.
C. The Collapse of the Idea of the Center in Legal Scholarship in the 1950s and 1960s

Not all commentators in the 1950s and 1960s were enamored of the process versions of judicial restraint. One former judge found nonsensical the proposition that more collegial discussion, fewer cases, and more time accorded to drafting opinions would produce more reasoned decisions.191 Several scholars, responding to Wechsler’s insistence that the Court search for “neutral principles” of constitutional law on which to base its decisions, doubted that neutrality was an intelligible concept in constitutional adjudication192 or argued that a judicial search for impersonal and durable principles only served to deter judicial creativity and discourage courts from doctrinal innovation.193 Moreover, the occasional unreconstructed behavioralist continued to maintain that judicial restraint did not produce greater judicial objectivity or neutrality, since it was just as capable of being employed in the service of results as any other jurisprudential perspective.194

Most of those critics of process theory versions of judicial restraint approved of the Warren Court’s solicitude for the constitutional claims of disadvantaged minorities. But few used the term “conservative” to describe advocates of judicial restraint or “liberal” to describe their own positions.195 And no legal commentator from the early 1950s through the early 1960s—the years in which process versions of judicial restraint became dominant in law journal literature—used the terms “center” or “centrist” to describe

195. One exception was Charles Clark, who said that the career of “the chief judicial exponent of self-restraint,” Frankfurter, “has fallen short of its earlier promise because he has seemed not to press for the liberal point of view,” and that the insistence of some process theorists that constitutional decisions be grounded on “neutral principles” eventually “re-enforce[d] the dead hand of the law and the rule of the past.” Clark, Unprincipled Decision, supra note 193, at 661, 664.
the position of Justices on the Court. Of the group of commentators who surveyed the Court's performance in annual issues of the Harvard Law Review from 1951 to 1962, the last even to apply the term "bloc" to groups of Justices had been Louis Jaffe in 1951, and he had been speaking of the Court in the 1940s. Not only had the activism-restraint debate replaced "left" and "right" blocs as the axis of commentary, the focus of discussions of the Court had shifted from behaviorally oriented observations to the technical analyses of professional lawyers. In this discourse of commentary, the idea of a judicial center had no significance.

D. Judicial Behavioralism and the Idea of the Center in Political Science Literature in the 1950s and 1960s

1. Scaling Analysis

In the same time period that process theory became the dominant perspective of legal commentators on the Court, a line of political science scholarship emerged whose focus on the internal processes of governing institutions in a democratic society, particularly legislatures, paralleled that of the process theorists. Alongside that line of commentary, however, emerged other political science scholarship that continued to refine the behavioralist-inspired techniques for investigating the Court that Pritchett had pioneered. One group of behavioralist political science scholars developed a technique called scaling, in which, as Glendon Schubert put it, judicial ideologies could be "reconstruct[ed] ... from decisional behaviors." Scaling analysis first identified, as Pritchett had, the policy implications of cases decided by the Court. It then associated a judge's votes for particular policy outcomes with "microattitudes," such as favoring "political freedom, fair procedure," and unions, being "anti-business," or supporting "fiscal claims." It further associated those microattitudes with "macroattitudes," such as "political liberalism," "economic liberalism," "political

196. See sources cited in DUXBURY, supra note 30, at 242–51.
198. Schubert, Ideologies and Attitudes, supra note 197, at 27.
conservatism,” and “economic conservatism.”

The result was a scale on which all the Justices that served on the Court could be ranked, and their ideologies labeled.

Glendon Schubert, in a 1967 article, produced a table summarizing the rankings of Justices on “general scales of political liberalism and of economic liberalism” between 1946 and 1963. The table suggested that six Justices who served on the Court during that time period were both “political” and “economic” liberals, six were “economic conservatives,” and four were “political conservatives.”

One Justice, Harold Burton, was simply labeled a “conservative,” because his political microattitudes (his response to cases raising issues of political freedom and fair procedure) received exactly the same weight on the scale as his economic microattitudes (his response to cases involving unions, issues affecting the business community, and fiscal claims). And one Justice, Byron White, was labeled a “moderate” because the scaling of his attitudes resulted in his being placed almost exactly at the mid-point of the “liberal”-“conservative” scale.

Behavioral political science analysis of the performance of Supreme Court Justices received some sharp criticism, in the decade of the 1960s, from both legal scholars and other political scientists.

199. Id. at 27–28.
200. Id. at 28.
201. Id.
202. Id. The political and economic liberals were Justices Murphy, Wiley Rutledge, Douglas, Black, Earl Warren, and Wilson Brennan; the economic conservatives were Justices Arthur Goldberg, Potter Stewart, Frankfurter, Jackson, Harlan, and Charles Whittaker; the political conservatives were Justices Tom Clark, Vinson, Sherman Minton, and Reed. Id.
203. Id.
204. Schubert ranked eighteen Justices. Murphy was ranked first on the scale of political liberalism and first on the scale of economic liberalism. Reed was placed eighteenth on the political liberalism scale and Whittaker eighteenth on the economic liberalism scale. White ranked eighth on the political liberalism and ninth on the economic liberalism scale. Id.
205. See, e.g., Fuller, supra note 34, at 1617 (concluding that “the choice of the mathematical procedure to be followed” in any quantitative analysis of the work of Supreme Court Justices “must rest ultimately on a quite unscientific conception of the qualities of human motivation as it operates in judicial decisions”).
scientists.206 One political science critic, in the course of claiming that there was a "basic circularity in statistical approaches to the problem of judicial attitudes" because "[c]onsistency in voting behavior is used to infer the attitude, and then the attitude is used to explain the consistency," found that scaling tended to distort the position of Justices in "the middle" of the Court.207 "Even if the votes of the middle Justices are consistent in terms of the scale," Martin Shapiro argued, "their position in the middle indicates that they hold the attitude measured by the scale less strongly than do the other Justices."208 Thus, in close cases, "[t]hose Justices who actually control the Court's decision are ... the least influenced by the attitudes that the scaler is using to explain the behavior of the Justices."209

Shapiro's comments about "middle" Justices, and Glendon Schubert's response to them, reveal that for all the efforts of behavioralist scholars to associate the idea of a judicial center with the location of a judge whose voting record, in cases with significant policy dimensions, placed him roughly between blocs of Justices who mainly supported "left" or "right" outcomes, commentators were resisting a purely spatial understanding of "center." In the process of reasserting that he only intended to employ "middle" or "moderate" in a spatial sense, Schubert unwittingly revealed the difficulties in doing so.

"In the first place," Schubert said of Shapiro's claim about "middle" Justices, "ordinal positions on a scale ... are strictly relative indices."210 When he ranked Frankfurter on a "political liberalism" scale between the 1947 and 1961 Terms, Frankfurter’s ranking shifted "from the fifth rank on the 1947 and 1948 ... scales, to third during 1949–54, and then to fourth in 1955, back to fifth in 1956–57 ... then to seventh in 1958–60 [and to] eighth ... for the 1961 Term."211 The rankings, Schubert claimed, did not "indicate any change whatsoever in his attitude toward political liberalism."212 They only signified Frankfurter's position with respect to the attitudes of the other

207. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 14 (1964).
208. Id. at 37.
209. Id.
210. Schubert, Ideologies and Attitudes, supra note 197, at 34.
211. Id.
212. Id.
Justices he sat with in a given year.

Thus "middle" was not intended to convey ideological moderation in any universal sense. Nor was it intended to convey a temperamental attitude. It was a mistake to think that if a Justice had a moderate rank on scales, he must therefore have a moderate intensity of preference for the views he held. A "scale rank," Schubert repeated, "is ... strictly a social index, a measure of how one person relates to others."²¹³

But Schubert had previously suggested that "[t]he justice in the middle may be the central decisionmaker," and that "empirical studies of political behavior show" that a person "in the middle" on policy issues tended to be "the most—not the least—involved member of the group, in regard to whatever the policy issue may be."²¹⁴ Schubert even claimed that this high level of involvement on the part of "middle" Justices affected a Justice's "belief system, as well as ... his interactions with other members of the group."²¹⁵ The "middle" position of a Justice, Schubert felt, encouraged his judicial colleagues to "appeal for his support on an ideological level," so the Justice was constantly being asked to examine and discuss his views.²¹⁶

2. Scaling and the Idea of the Judicial Center

In his response to Shapiro, Schubert had claimed that the terms "moderate," "middle," and "medial," which he used interchangeably, only meant that although "moderate justices ... tend to be less intense in their attitude ... than the more extreme justices at the margins of the scale," this "lesser degree of intensity" was "a function of [such Justices'] social position" in a group of Justices.²¹⁷ But he had also argued that a "middle" Justice's "attitudinal position" was "the most important one to the decisionmaking of the Court on the issue under consideration, because his relatively moderate view will be closest to the modal position for most decisions and opinions of the Court on that issue."²¹⁸ The latter comments, coupled with Schubert's earlier suggestion that "middle" Justices were perhaps more likely than others to have highly developed belief systems because they were frequently asked to support the views of their colleagues on both ends of an ideological spectrum, revealed that when a Justice

²¹³. Id. at 35.
²¹⁴. Id. at 34.
²¹⁵. Id.
²¹⁶. Id.
²¹⁷. Id. at 38.
²¹⁸. Id. at 38–39.
was designated as holding a "central" or "middle" position on a Court, that designation necessarily had more than one set of implications.

One set of implications recalled Pritchett's use of the terms "center" and "central": "moderate" Justices, on Schubert's scalograms, were Justices whose cumulative voting patterns, when coded for certain policy variables, revealed them to be situated roughly between Justices who were "liberals" and "conservatives." Schubert insisted that this use of "moderate" or "middle" was relative and term-specific, claiming that the fact that Frankfurter's rankings on the political liberalism scale had changed over time did not mean that his substantive views had changed. But Schubert's 1967 table ranking Justices on general scales of political and economic liberalism was an aggregate scale, and extended over seventeen years. Moreover, some of the Justices ranked, such as Black, Douglas, Frankfurter, Clark, and Reed, had served on the Court for all or most of those years. In this context, the labeling of Black as a highly ranked political and economic liberal, and of Reed as last among all the Justices ranked on political liberalism, seemed to be more than relative social indexes.

Thus, another implication of Schubert's characterization of Justices as "moderate," or in the "middle" of the Court, was that the labels signified that a Justice's stance toward policy issues was roughly in the center of an ideological spectrum that had existed on the Court for much of its recent history. That spectrum varied, at the margins, with changes in Court personnel, and might also vary with Terms because of the policy issues raised in cases decided in a given Term. But over time, Schubert's scaling technique assumed, the spectrum had enough consistency to allow Justices even to be ranked alongside Justices with whom they had not served. This meaning of "moderate" or "middle," especially when those terms were used on scales covering several years that made use of the labels "liberal" and "conservative," did not seem to be primarily relative and contextual. It seemed to signify a substantive policy vision roughly between "liberalism" and "conservatism." And since Schubert's scaling technique was dependent on substantive criteria (such as voting on

219. See id.
220. Murphy and Rutledge, who were ranked first and second on political liberalism and first and fourth on economic liberalism by Schubert's scalogram covering the 1946 through the 1963 Terms, did not serve with the seven Justices with whom their attitudes were compared (Warren, Brennan, White, Goldberg, Stewart, Harlan, and Whittaker). Id. at 28.
behalf of unions of in favor of "political freedom"), the judicial ideologies he derived from votes and the attitudes he associated with those votes were clearly meant to represent substantive policy positions. Thus when a Justice was cumulatively ranked as a "moderate" or in the "middle" of a spectrum of judicial liberals and conservatives, that ranking had substantive dimensions.

The last set of implications followed from Schubert's claim that "middle" Justices might well have strongly held policy views, and that those views typically represented the "institutional attitude" of the Court toward a particular issue. This suggested that the "middle" or "moderate" Justices on a given Court held considerable power. Substantively, their views represented something like a midpoint on the Court's ideological spectrum, so that, if one assumed a certain fluidity in judicial views, more Justices might be inclined to gravitate toward their positions. It also suggested that in closely divided cases the "middle" Justices—now assuming the role of "swing" Justices—might control the outcome of decisions. Being at the judicial "center" of a Court, this conception of "middle" implied, could mean being a very central figure in the development of that Court's collective stance toward policy issues.

E. The Idea of the Judicial Center in the Late 1960s

By the close of the 1960s, the term "center" had been all but abandoned in the two principal lines of scholarship analyzing the performance of Supreme Court Justices. The emergence of "activism" and "restraint" as the terms establishing the framework for evaluations of the Court by legal scholars had complicated efforts to attach ideological labels to the performance of Justices, and most legal academics, while occasionally associating "liberalism" with activism and "conservatism" with restraint, did not speak of "left" and "right" blocs of Justices. In the most influential body of scholarship that emerged in connection with the activism-restraint debate, process jurisprudence, the term "center" was not employed at all.

That development might have been expected because the general thrust of process theory was to resist attaching labels derived from the

221. Id. at 39.
222. Political scientist J. Woodford Howard argued, in a 1968 essay prompted by the emergence of behavioralist studies of the judiciary, that "fluidity of [judicial] choice is so extensive in empirical reality as to pose very serious problems of classification and inference" about judicial ideologies. J. Woodford Howard, Jr., On the Fluidity of Judicial Choice, 62 AM. POL. SCI. REV. 43, 44 (1968).
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study of other branch actors to judges. But the term "center" also dropped out of political science literature in the 1950s and 1960s. Not only did Pritchett no longer employ the term in his 1953 study of the Vinson Court, even though he continued to use voting alignment analysis to characterize groups of Justices, the term was not, on the whole, used by the behavioralist political science scholars who sought to refine and extend Pritchett's techniques. Nonetheless, terms very like the term "center" played important roles in the scaling techniques developed by Schubert and other behavioralist political scientists in the 1950s and 1960s to characterize the ideological positions of Justices and, hopefully, to predict their responses to forthcoming cases. Schubert's term "middle" seemed designed to replicate Pritchett's original use of "center" and "central," and Schubert insisted that his term "moderate" amounted to the same usage, namely a spatial location on an ideological continuum of judicial attitudes in a given Term. But Schubert had used "moderate" more ambitiously than that, as something resembling a substantive set of attitudes, between liberalism and conservatism, that could be charted over time. He had also associated judicial "moderates," whose voting records placed them in the "middle" of Courts, with a high degree of ideological awareness and a considerable amount of internal power. In the 1970s the ideological implications of Schubert's "middle" would help revive the idea of the judicial center. Schubert had described "middle" Justices, in part, as ones whose stances toward legal issues with discernible policy implications located them roughly

223. See, e.g., Pritchett, Civil Liberties, supra note 56, at 177-84 (using voting alignment tables).

224. Schubert, for instance, did not use such terms. Schubert, Ideologies and Attitudes, supra note 197. The term "center" occasionally cropped up in political science literature in the 1960s. Howard referred to one 1958 study by Eloise Snyder that "hypothesized that the high court assimilates its new members through a 'pivotal clique' in the ideological center," and suggested that "newcomers" to the Court might feel pressure to "restrain personal preferences and gravitate toward the center." Howard, supra note 222, at 45-46. But Snyder did not actually use the term "center." She argued that the Court tended to be divided between shifting cliques of Justices that were "read[y] to accept 'new' constitutional interpretations," (she called those Justices "liberals") and cliques that were "reluctan[t] to accept 'new' constitutional interpretations." ("conservatives"). Eloise Snyder, The Supreme Court as a Small Group, 36 Soc. FORCES 232, 234 (1958). This created opportunities for a shifting third clique, which she called "pivotal" because it "reflected a middle point of view," and could thus align itself with one or the other of the opposing cliques to "break [] ideological stalemate[s]." Id. at 238.

225. See Schubert, Ideologies and Attitudes, supra note 197, at 34.

226. Id. at 34-35 (noting that the Justice "in the middle" may be the "central decisionmaker").
in the mid-point of an ideological continuum of Justices, and for that reason were potentially powerful actors. Schubert had made these observations at a time when even though commentators had recognized groups of opposing Justices surfacing on the Vinson and Warren Courts in the 1950s and 1960s, most commentators described the lines of opposition as being produced, as Woodford Howard put it in 1968, by "the ever-popular dichotomy between 'libertarian activism' and 'judicial self-restraint.'"227

In the 1968 presidential election, however, Richard Nixon had campaigned against Warren Court "activism," which he equated with judicial support for substantively liberal policies, such as strong legal protection for the rights of persons accused of crimes.228 After Nixon assumed the presidency, he was given the opportunity to make four appointments to the Court between 1969 and 1972. Many commentators assumed that those appointments would result in the Court's being closely divided between three holdover Warren Court "liberals" (Douglas, Brennan, and Thurgood Marshall) and four Nixon-designated "conservatives" (Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist) in a manner resembling the Court of the 1930s.229 This assumption implied that the positions of "middle" Justices, Stewart and White, might be important in determining the Court's ideological tilt. In addition, in roughly the same time period, a term designed to convey the substantive implications of a political stance occupying the midpoint of an ideological spectrum had entered the lexicon of academic discourse. That term was "centrist." The term would provide a mechanism for commentators to revive the idea of a judicial center on the Supreme Court.

III. THE IDEA OF THE JUDICIAL CENTER IN THE 1970S

We have seen that when activism and restraint emerged as the dominant axes for evaluating judicial performance in the 1950s, two background elements had been important in that development. One element was the apparent support among almost all the "Roosevelt Court" Justices for the substantive policies of the New Deal. Commentators wondered why, given that support, nonunanimous decisions and dissenting opinions actually increased on the Court in

227. Howard, supra note 222, at 55.
the 1940s. The other was the fact that the divisions among Justices in constitutional cases seemed to be most prominent in civil liberties cases, in which legislative majorities were allegedly restricting the constitutionally protected freedoms of unpopular minorities. Since those cases were perceived as pitting New Deal liberals who believed that the heart of democratic theory was majority rule against New Deal liberals who believed that a democratic Constitution required protection for the rights of all citizens, they appeared to pose opposing theories of the Court's role in a democracy.

Those background elements of the activism-restraint debate served to undermine the usefulness of talking about "left" ("liberal") or "right" ("conservative") blocs on the Court. Not only were most of the Justices liberals, they were falling out on issues that did not lend themselves to predictably "liberal" or "conservative" resolutions. The axes of activism and restraint seemed more conducive to clarifying judicial positions on those issues. They made explicable the increased divisions on the Court: and, process theorists suggested, they went to the heart of judicial decisionmaking, because they highlighted the reciprocal relationship between ends (results) and means (reasoning) that all Supreme Court Justices had to confront.

Process theorists had not fully appreciated the connection between an apparent disappearance of conventional ideological divisions among Justices and the resonance of activism and restraint as evaluative categories. When Nixon's 1968 campaign, and his consequent opportunity to name four new Justices in a two-year period, was taken to be an effort to politicize the Court, the idea of ideological blocs among the Justices was revived. This Section discusses the relationship between that development and the emergence of newly dominant meanings for the term "center" in constitutional commentary.

230. See supra notes 96-100, 108 and accompanying text.
231. See supra notes 66-69 and accompanying text.
232. The most familiar examples involved the restriction of minority speakers, such as Jehovah's Witnesses, by legislative majorities. The divisions on the Court precipitated by compulsory flag salute legislation weave a particularly vivid illustration. See H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 171-76 (1981).
233. See supra Part II.A-B.
234. For examples of the heightened attention paid to ideological "blocs" on the Court in the early 1970s, see SIMON, supra note 228, at 18, 124, 288-94; LEVY, supra note 229, at 48.
A. The Emergence of the Term "Centrist"

The term "centrist" was not unknown in legal and political science literature prior to the 1970s, but it was used sparingly and did not always connote an ideological stance. Most of the uses of "centrist" referred to the Centrist party in Germany,235 and some equated "centrist" with "central."236 It was not until the 1960s that the term "centrist" began to be used in law journals to characterize a perspective located midway between left or right on the political spectrum. Thus Milton Handler, in a 1963 article on developments in antitrust law, said that "[w]hile as a nation it is not uncommon for us to swing from one extreme to another, our temper and tradition are centrist and we generally end up in the middle of the road."237 Chesterfield Oppenheim stated in 1965, in referring to the "shades of thinking" among law students, that they might be labeled "liberal or conservative or centrist."238 And Peter Magrath, reviewing a book on pornography in 1968, described its author as being "[t]rue to the centrist position" by "cluck[ing] his tongue" at the "extreme advocates of censorship" and the extreme defenders of pornographic expression.239

Although those comments signified that the term "centrist" had come to be associated with an ideological perspective, the term was not commonly employed by scholars evaluating the work of the Supreme Court until the 1970s. In the course of that decade, however, "centrist" emerged as a frequent characterization of the stance of Justices on the Burger Court. The increased use of the term can be connected to two related phenomena. One, previously mentioned, was the perception that the Court once again contained "left" and "right" blocs of Justices in the original sense in which

235. E.g., Digest of Foreign Events, 67 U.S. L. REV. 337, 339 (1933) ("[M]ost ... German industrial workers ... voted Socialist, Communist, or Centrist at the March elections."). That specialized use of "centrist" appeared as early as 1890. See William A. Dunning, Record of Political Events, 5 POL. SCI. Q. 357, 380 (1890) (noting that the "Centrist" party had 107 members in the German Reichstag).

236. E.g., Eugene F. Mooney, The Media is the Message, 20 J. LEGAL ED. 388, 391 (1968) (suggesting that legal education might "make a serious institutional move to a more centrist position in community decisionmaking" by adopting curricula that emphasized "the processes of living in society" rather than the "half-conceptual, half-fortuitous ... curricular framework ... used today").


Pritchett had used those designations. The other was the 1975 appointment to the Court of Judge John Paul Stevens, who was widely perceived on his confirmation as a Justice whose perspective was neither predictably "liberal" nor "conservative." Stevens's appointment, commentators suggested, might result in the balance of power on the Court being located in a group of Justices who were not consistently affiliated with the left or right blocs. Those Justices, including Stevens, were labeled centrists.

Evidence of the first phenomenon can be seen in commentary on the Court in the early 1970s, which posited the existence of "liberal" and "conservative" groups of Justices on the Court and revived a term long associated with behavioralist descriptions of Court personnel, the "swing" Justice who alternated between left and right perspectives. A 1975 article in the New York University Law Review, which analyzed voting patterns on the Burger Court from the 1969 through the 1974 Terms, felt that "the predictable voting patterns of the 'left' and 'right' factions of the Court" made it suitable for Pritchett's voting alignment analysis methodology. The article's purpose was to show that "swing voting" on the Court was a "myth" because "voting blocs . . . were remarkably strong" and even "the voting patterns of those Justices who swung between the ideological blocs" were generally consistent. This reflected common perceptions that with the Nixon appointees the Court had

240. See supra notes 35–65 and accompanying text.
241. See infra notes 251–60 and accompanying text.

244. Id. at 798, 800-02. Given the continued dominance of the categories of activism and restraint throughout the 1960s, it was suggestive that the article not only did not use those categories in discussing judicial voting patterns, but the authors also announced that they were "ignoring the nuances of judicial philosophy which may underlie several votes for the same result." Id. at 800. Its emphasis was only on identifying voting blocs, groups of Justices who "habitually . . . vote for the same result." Id. at 799 n.3.
245. Id. at 800.
246. Id. at 799.
become deeply divided on ideological grounds, and that "the cohesion of the Nixon appointees on the one hand and the three left-bloc Justices [Brennan, Douglas, and Marshall] on the other was remarkably firm." 247 The early Burger Court was said to be one "consistently divided" between "[stable] voting lineups," 248 with Powell and White not predictably affiliated with either bloc, but more likely to side with the Nixon appointees in nonunanimous cases with discernible policy implications. 249

The perception that "left" and "right" blocs of Justices existed on the early Burger Court did not itself encourage commentators to consider the possible impact of "centrist" Justices, because the early Burger Court was thought to be one in which the "conservative" group of Nixon appointees could commonly pick up a fifth vote from Stewart or White. 250 But Stevens's appointment, plus some evidence that the Nixon appointees were not as cohesive a group as once thought, brought the label "centrist" into discussions of the Court.

In November 1975, Lesley Oelsner of the New York Times wrote an article on the nomination of Stevens, who had previously served five years on the United States Court of Appeals for the Seventh Circuit. 251 In the first evaluative paragraph of the article, Oelsner said that Stevens "is regarded as something of a centrist, neither extremely conservative nor extremely liberal." 252 "Legal experts," Oelsner suggested, thought it "likely that . . . Stevens would take his place in the middle area of the Court's Justices, with Potter Stewart, Byron R. White, and Lewis F. Powell, Jr." 253 The Burger Court, Oelsner felt, "has had a more moderate tone than . . . at the height of the Warren

247. Id. at 856.
248. Id. at 858.
249. Id. at 800. Schultz and Howard employed Pritchett's technique of deriving voting blocs from surveying nonunanimous cases with discernible policy implications. They created three categories of such cases: First Amendment cases (excluding cases involving the religion clauses), id. at 823–32; "Criminal Law" cases, which included both constitutional and nonconstitutional cases involving criminal defendants, id. at 832–46; and "Cases Affecting Social Rights," which included "race cases, voting cases, cases involving conflict between the individual and the 'system,' and those involving the rights of indigents or the rights of individuals against business." Id. at 846–56. They claimed that their tabulations of votes for the 1971, 1972, and 1973 Terms revealed "strict or partial bloc voting" in nineteen of twenty-eight First Amendment cases, sixty-six of sixty-nine criminal law cases, and thirty-one of forty-seven "social rights" cases. Id. at 823, 834, 846.
250. See SIMON, supra note 228, at 290 (identifying "the emerging conservative majority" as "the four Nixon appointees plus Justices Stewart or White").
252. Id.
253. Id.
Court's activism," and Stevens's appointment "may help solidify the current tenor of the Court."\textsuperscript{254} Oelsner quoted Philip Kurland as suggesting that Stevens would "fall in with" Powell, Stewart, and White rather than Chief Justice Burger and Justices William H. Rehnquist and Harry A. Blackmun, "on what is the more conservative end" of the Court, or "Justices William J. Brennan, Jr. and Thurgood Marshall on the liberal side."\textsuperscript{255}

Oelsner's article illustrated a slightly altered perception of the Burger Court as well as a perception of Stevens as a "centrist." The article identified Justice Lewis Powell as in the "middle" of the Court, rather than as part of a "right" bloc of "Nixon appointees."\textsuperscript{256} It suggested that the Court's current "tenor" and "tone" was "moderate."\textsuperscript{257} Although it continued to list groups of Justices as being on the "liberal" and "conservative" "ends" or "sides" of the Court, it intimated that with Stevens's appointment the largest number of Justices on the Court might not be easily identified as "liberals" or "conservatives."\textsuperscript{258} Although Oelsner did not state explicitly that the Burger Court might now be controlled by judicial centrists, that inference could have been drawn from his article.

By the time Stevens had been on the Court for two terms, several commentators had concluded that he was a centrist, and that judicial centrists appeared to be increasingly influential on the Burger Court. An article surveying Stevens's Seventh Circuit opinions predicted that "in the tradition of Mr. Justice Powell, [Stevens] will probably assume a centrist position on the Court."\textsuperscript{259} Another, also based on Stevens's Seventh Circuit opinions and his testimony before the Senate Judiciary Committee after being nominated, concluded that Stevens "will in all likelihood be a centrist."\textsuperscript{260} At the same time commentators noticed that the Court itself might be exhibiting a centrist posture. One article, focusing on antitrust decisions in the 1977 Term, declared that the "middle course" of Justice Stewart "appeals to many of his brethren;" that "the absolutism of the Warren era" was "being replaced with a sense of moderation;" and that

\begin{itemize}
  \item \textsuperscript{254} \textit{Id.}
  \item \textsuperscript{255} \textit{Id.}
  \item \textsuperscript{256} \textit{Id.}
  \item \textsuperscript{257} \textit{Id.}
  \item \textsuperscript{258} \textit{Id.}
  \item \textsuperscript{259} Brandon Becker & Michael F. Walsh, Comment, \textit{The Interpenetration of Narrow Construction and Policy: Mr. Justice Stevens' Circuit Opinions}, 13 SAN DIEGO L. REV. 899, 929 (1976).
  \item \textsuperscript{260} Francis X. Beytagh, Jr., \textit{Mr. Justice Stevens and the Burger Court's Uncertain Trumpet}, 51 NOTRE DAME L. REV. 946, 951 (1976).
\end{itemize}
Justices Powell, Blackmun, and Rehnquist, along with Chief Justice Burger, were sometimes part of a “fluctuating majority favoring a temperate and balanced application of the antitrust laws.” The position of the majority was “centrist.” Another, in the course of giving an “initial assessment” of Stevens’s performance after two years, described him as having “maintained a centrist position with a marked degree of consistency” and predicted that his “independence and political moderation” might make him “a unifying force” on the Court.

1. The Burger Court as Centrist

By the late 1970s, an altered portrait of the Burger Court had emerged. In a 1979 review of Bob Woodward’s and Scott Armstrong’s The Brethren, which claimed to be an “inside” look at the Supreme Court, Gene Nichol summarized that portrait. There had been a “dramatic shift of power and philosophy” on the Court “since the resignation of Earl Warren,” Nichol wrote. In the decade since Warren’s departure:

[C]onsistent liberal majorities gradually gave way to more moderate or conservative judicial approaches .... Nixon appointees Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist, as well as Gerald Ford’s designee John Paul Stevens, manage[d] to deflect the direction of the highest tribunal away from the activist postures which characterized the Warren years .... [But] the result is not a knee-jerk conservative Court dominated by the Chief Justice. Rather, a strong centrist core composed of Justices Stewart, Powell, White and Stevens increasingly controls the outcome of cases. Remaining liberals Brennan and Marshall appear to be left isolated and embittered, no longer exercising substantial influence over their colleagues.

Although Nichol found that The Brethren had “serious deficiencies,” and exhibited “precious little understanding of the ... institution with which it deals,” he called its overview of the orientation of the Burger

264. Id.
Court one of the book’s “strong points.”\(^{265}\)

_The Brethren_ itself was filled with illustrations that a “centrist core” of Justices controlled the Burger Court’s direction. In one example, Potter Stewart was reported to have been “dumbfounded,” shortly after Lewis Powell joined the Court in 1971, when Powell told him that he voted with Warren Burger in a case because he thought he would “follow the leadership of the Court.”\(^{266}\) Stewart:

[d]ecided he had better explain to his new colleague something about the realities of life at the Court. The leadership was not Burger .... The leadership belonged to the Justices in the center ... those who were neither doctrinaire liberals or conservatives. It belonged to Stewart and White and Lewis Powell if he chose.\(^{267}\)

In another illustration, in the last paragraph of the book, Woodward and Armstrong stated that the Burger Court’s “turning away from the Warren Court” in the late 1970s “was orchestrated and controlled ... by Stewart, ... White, ... Powell, the most moderate of the Nixon appointees, and by Stevens, the new moderate.”\(^{268}\)

Although many commentators in the late 1970s shared Nichol’s view that _The Brethren_ focused on “irrelevant trivialities” and “gloss[ed] over problems of major significance to the Court as an institution,”\(^{269}\) they tended to accept the book’s overall characterization of the Burger Court as being dominated by “centrist” Justices. Prior to the appearance of _The Brethren_, three overviews of the Court had given very similar assessments. Richard Funston’s 1977 survey of voting patterns on the early years of the Burger Court found that “[a]fter an interim period, ... the Court ... settled into a trifurcated state” in which left and right “wings” were joined by “an uncohesive center” occupied by Stewart, White, and Powell.\(^{270}\) Elder Witt, in summarizing the 1977 Term, stated that “[t]aken as a whole, the [Court’s] decisions reflected a ‘centrist’ court.”\(^{271}\) And a general assessment of the Burger Court from the

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\(^{265}\) Id.


\(^{267}\) Id.

\(^{268}\) Id. at 444.

\(^{269}\) Nichol, supra note 263, at 303.


\(^{271}\) Elder Witt, _The Court’s Year: Centrist, Shifting Alliances_, C.Q. WKLY. REP., July
1969 through the 1977 Terms concluded that "[t]here is no majority which can be conceptualized simply along a liberal-conservative spectrum"; instead there was "an amorphous group of centrist Justices," which did not include Burger.272 By 1977, the number of those Justices had grown to a "floating quintet," consisted of Blackmun, Powell, Stevens, Stewart, and White, whose "center of gravity lay somewhat nearer to Burger than to Brennan."273 If the "Nixon quartet of Burger, Blackmun, Powell and Rehnquist" had ever been "a crucial voting bloc," it was for a "brief period," ending by the 1974 Term.274

Although the increased frequency of such comments meant that a portrait of the Burger Court as centrist was well established by the close of the 1970s, the concept of the judicial center had still not been defined with precision. The initial meaning of “centrist” in commentary on the Burger Court had been that of a judicial posture that was neither “liberal” in the sense used to characterize late Warren Court majorities nor “conservative” in the sense used to characterize the Nixon appointees in the early 1970s. Since that use of “liberal” and “conservative” echoed Pritchett’s use, referring to cumulative voting positions in cases with discernible policy outcomes,275 “centrist” seemed only to refer to a middle-of-the-road voting stance.

But as the number of Burger Court Justices identified as “centrists” grew, the term also came to take on spatial dimensions. It began to be used by some commentators to describe an apparently pivotal space between the Court’s “left” and “right” wings where the power on the Court resided.276

This use of “centrist” was employed by the authors of The Brethren when they asserted that in the late 1970s “the center was in control” of the Burger Court.277 They meant that a group of Justices, ranging from four to five, was not identified, philosophically, with the two “clear minority pairings” on the left and right of the Court, and that the group, because of their numbers, could not only control outcomes, but could exert some influence on the shape of the Court’s

22. 1978, at 1847.
273. Id.
274. Id.
275. See supra notes 40–48 and accompanying text.
276. See, e.g., Hodder-Williams, supra note 272, at 191.
277. See WOODWARD & ARMSTRONG, supra note 266, at 444.
The situation was complicated further by the fact that as an image of the Burger Court as centrist emerged, little attention was devoted to the jurisprudential connotations of centrism, as distinguished from its political or spatial connotations. This development might at first glance appear puzzling. Commentary on the Court from both legal scholars and political scientists, for the previous two decades, had increasingly analyzed the Court’s decisions, and internal divisions, along the axes of judicial activism and restraint rather than along those of left or right, liberal or conservative. And as the activism-restraint debate, with its process theory refinements, came to dominate commentary in those decades, the idea of the judicial center played a reduced role in characterizations of the Court or its Justices, even among behavioralist political scientists who continued to employ forms of voting alignment analysis. Why, then, when the term “centrist” emerged as a common term in Supreme Court commentary, was there so little effort on the part of commentators to chart a centrist jurisprudential posture along the axes of the activism-restraint debate?

Of the commentators who employed the term “centrist” to describe the Burger Court and its Justices, only three made an effort to describe a centrist posture, either in a Justice or in the Court generally, as reflecting a theory of the judicial function. In his 1976 assessment of Justice Stevens, Francis Beytagh concluded that Stevens revealed “a pronounced streak of Frankfurterianism tempered by a willingness to apply the law vigorously in those areas . . . where the fundamental nature of the rights at stake outweigh considerations of judicial self-restraint.” That comment suggested that in labeling Stevens a “centrist,” Beytagh meant a judge whose posture alternated between activism and deference. Similarly, in a 1979 article on Potter Stewart’s posture in racial discrimination cases, Gayle Binion described Stewart’s “approach to constitutional adjudication” as exhibiting a “tendency to narrow the issue, decision, and remedy,” which Binion associated with “restraint in constitutional decision-making.”

278. Id.
279. See supra notes 107-47 and accompanying text.
280. Beytagh, supra note 260, at 946.
"moderate approach" reflected a "centrist theoretical orientation.\textsuperscript{282} Beytagh's and Binion's descriptions of centrism as a theory of the judicial function were not identical. Beytagh characterized judicial centrists as those who selectively departed from a deferential posture when "fundamental rights" were "at stake,"\textsuperscript{283} and Binion described them as minimalists who eschewed the formulation of broad constitutional principles.\textsuperscript{284} The only extended discussion in the 1970s of jurisprudential centrism on the Burger Court suggested that it might include both of those attitudes. In his 1979 overview, Hodder-Williams began by noting that Nixon's "major consideration in selecting his nominees was that they should be 'strict constructionists' and not 'activists.'"\textsuperscript{285} If one assumed that the late Warren Court had a majority of "activists," and that "all of Nixon's appointees were ['strict constructionists']," Hodder-Williams claimed, "we would expect a radical alteration to the philosophical balance of the Court."\textsuperscript{286}

But there were some obstacles, Hodder-Williams felt, in the way of a conclusion that the Warren and Burger Courts could be contrasted along the lines of "activism" and "strict construction."\textsuperscript{287} Both terms embraced multiple judicial postures, so that a contrast between them needed to address each of the postures. One was how "eager" a judge was to "extend the reach of judicial power."\textsuperscript{288} Another was whether a judge "preferr[ed] his own vision of desirable policy to the legislation of elected assemblies."\textsuperscript{289} A third was whether a judge was inclined to "read[... his personal views into ... the Constitution.]"\textsuperscript{290} Hodder-Williams thought that a way to disentangle those postures was to ask a series of specific questions about the Burger Court's "activism."\textsuperscript{291} Had it "limited access to the Court and so cut down on the issues to be decided?"\textsuperscript{292} Had it "assumed the constitutionality of congressional legislation" and "tended to defer to the executive branch?"\textsuperscript{293} And had it "created

\begin{footnotesize}
\begin{enumerate}
\item[282.] \textit{Id.} at 905.
\item[283.] See Beytagh, \textit{supra} note 260, at 946.
\item[284.] See Binion, \textit{supra} note 281, at 904.
\item[285.] See Hodder-Williams, \textit{supra} note 272, at 174–75.
\item[286.] \textit{Id.} at 175.
\item[287.] \textit{Id.}
\item[288.] \textit{Id.}
\item[289.] \textit{Id.}
\item[290.] \textit{Id.}
\item[291.] \textit{Id.}
\item[292.] \textit{Id.}
\item[293.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
new rights and new absolutes from the sparse words of the Constitution?"\textsuperscript{294}

When these specific questions were asked, a somewhat counterintuitive picture emerged. On the one hand, the Court had "attempted to limit its power by curbing access to it."\textsuperscript{295} But Hodder-Williams suggested that this "self-restraint" could be seen as "a conscious means of advancing preferred ends," in particular "the administrative necessity of reducing the flow of litigation reaching the Court."\textsuperscript{296} And in other respects the Burger Court majorities appeared to have embraced activism. The Court had invalidated provisions of twenty-seven Acts of Congress in its first seven years, whereas only seventy-seven had been invalidated between 1789 and 1937.\textsuperscript{297} It had also regularly found acts of the executive branch unconstitutional.\textsuperscript{298} It had followed the Warren Court in "enlarging the rights which now, as a result of judicial action, are said to flow from the Constitution itself."\textsuperscript{299} Sex discrimination, abortion, and death penalty decisions were the most visible examples.\textsuperscript{300} In general, Hodder-Williams found that "the Burger Court has not been afraid to exercise its judicial muscle, to thwart the Executive, to countermand the laws of duly elected legislators, to draw from the sparse words of the Constitution new rights and new duties."\textsuperscript{301}

There were, however, occasional instances, Hodder-Williams believed, in which the Court, in addition to limiting the access of litigants to it, had "sought . . . to avoid decisions where they could be avoided, . . . to decide on narrow grounds where that is practicable and to evade the creation of new principles if at all possible."\textsuperscript{302} On the whole, the Burger Court had "stood firmly behind . . . Warren precedents,"\textsuperscript{303} but although some majorities were "ready to use [judicial] power with energy and conviction," other majorities "often abjure[d] the use" of that power.\textsuperscript{304} In the end, the Burger Court seemed more activist than restrained, but it also seemed "to be in a constitutional quandary, unsure how to balance conflicting

\begin{itemize}
\item \textsuperscript{294} \textit{Id.}
\item \textsuperscript{295} \textit{Id.}
\item \textsuperscript{296} \textit{Id. at 176.}
\item \textsuperscript{297} \textit{Id.}
\item \textsuperscript{298} \textit{Id. at 176–77.}
\item \textsuperscript{299} \textit{Id. at 178.}
\item \textsuperscript{300} \textit{Id. at 179–80.}
\item \textsuperscript{301} \textit{Id. at 186.}
\item \textsuperscript{302} \textit{Id.}
\item \textsuperscript{303} \textit{Id. at 180.}
\item \textsuperscript{304} \textit{Id. at 181.}
\end{itemize}
constitutional claims and lacking a coherent philosophy.\textsuperscript{305} Although Hodder-Williams had devoted attention to the issues of activism and restraint, he had not produced much evidence that Justices on the Burger Court were interested in the sorts of issues process theorists had thought central to developing a refined theory of the judicial function. Nor had he devoted much attention to those issues. His fullest statement of a theory that might be animating "[t]he Justices whose votes are critical in divided cases," the "floating center" of the Burger Court, came in this paragraph:

[Those Justices] have increasingly come to share a common approach, though not common values. . . . They respond to cases with the conscious restraint of Justices seeking to avoid the enunciation of broad principles. . . . [T]o characterize their approach . . . as "ad-hoccery" . . . emphasizes a tendency to employ a case-by-case approach to many of the conflicts brought to the Court. These conflicts are frequently extremely complex and ambiguous and the critical Justices respond to this complexity by acknowledging it.\textsuperscript{306}

The paragraph suggested that centrist Burger Court Justices were avoiding the "enunciation of broad principles" primarily because they perceived that the constitutional issues before them were "extremely complex and ambiguous," and caution was necessary.\textsuperscript{307} That stance could hardly be described as a sophisticated jurisprudential position.

IV. THE 1980S: THE IDEA OF A JUDICIAL CENTER EXPANDS

Hodder-Williams's 1979 survey of the Burger Court illustrated the common terms in which it would be understood for the remainder of Burger's tenure, which ended in 1986. Even though several commentators began to believe, in the later stages of Burger's Chief Justiceship, that the Court might once again be poised to institute sweeping changes in constitutional jurisprudence, a general impression that a floating majority of centrists dominated the Court remained in place. And although the idea of a judicial center on the Burger Court began to take on overtones of jurisprudential as well as political or spatial centrism, it was not associated with the activist-restraint debate.

\textsuperscript{305} \textit{Id.} at 186.
\textsuperscript{306} \textit{Id.} at 199.
\textsuperscript{307} \textit{Id.}
Two essays in a collection on the Burger Court that appeared in 1983 illustrated the established formulation of the idea of the judicial center in the 1980s and early 1990s. One described the Court as a collection of "rootless," centrist activists, and the other sought to explain why debates about the Court's constitutional jurisprudence no longer pivoted on the axes of the activism-restraint debate.

A. Centrism and Activism

The essays had been written in a period in which the two most visible theoretical perspectives in the literature of constitutional commentary had been advanced by heirs of process theory. The work of Ronald Dworkin and John Hart Ely in the late 1960s and early 1970s revealed that both had been influenced by the institutional and doctrinal orientation of process theorists, particularly their emphasis on the issue of how judges could derive appropriately general and durable constitutional principles that justified their supplanting the popularly elected branches as policymakers. But although that scholarship had been within the parameters of process jurisprudence, by the late 1970s Dworkin and Ely were moving outside those parameters. In two influential books, which appeared in 1977 and 1980, Dworkin and Ely argued that the values of equality (signified by the principle of equal concern and respect) and unrestricted political participation (signified by the principle that all members of society should be represented in democratic institutions of governance) were sufficiently foundational to serve as organizing premises for judges deciding constitutional cases.

For present purposes, the significance of those works by Dworkin and Ely is that their visibility revealed that by the early 1980s American constitutional theorists were increasingly inclined to believe that at bottom, constitutional adjudication was about value choices. Process theory had assumed that judicial value choices

311. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
312. This statement might not seem accurate with respect to Ely, who denied in
could be confined if judges were encouraged to give sufficient attention to the doctrinal and institutional constraints on their decisions that modern democratic theory demanded. If Supreme Court Justices derived appropriately general and durable constitutional principles on which to ground their decisions, and avoided substituting their judgments for those of other branch actors if such principles could not be derived, their (limited) role as policymakers could be preserved. Dworkin and Ely probed this assumption, and concluded that behind a perceived judicial obligation to derive durable constitutional principles lay a judgment about which foundational values made those principles durable, and behind a judicial decision to defer or not defer to other branch actors lay a judgment about what values democratic government had identified as foundational.

The attraction of Dworkin's and Ely's theories to their contemporaries in the 1980s lay in their insistence that judicial fidelity or indifference to the traditional institutional and doctrinal constraints of process theory was a choice about values.

We have seen that a version of this argument had been advanced by defenders of the Warren Court against their process-inspired critics. Dworkin's and Ely's versions of value-oriented constitutional theory made an effort to refine and develop the argument by positing that the principles of equal concern or respect, or participation in democratic governance, had been built into the structure of American constitutionalism and could thus be seen, despite their substantive character, as something approaching foundational constraints on judges. Both Dworkin and Ely acknowledged their indebtedness to process theorists, but the impact of their work was to move constitutional commentary away

Democracy and Distrust that "fundamental values" could serve as a basis for aggressive judicial review of legislation on constitutional grounds, and who also suggested that "participation" should be understood as a procedural rather than a substantive value. See ELY, supra note 311, at 44–72, 75. But in the very portion of Democracy and Distrust in which he claimed that "participational values" were procedural rather than substantive, Ely defended that claim by stating that "participational values [were] the values which our Constitution has preeminently and most successfully concerned itself," and "whose 'imposition' ... supports the American system of representative democracy." Id. at 75. Participation was, in short, a fundamental constitutional value. For more detail, see White, The Arrival of History, supra note 27, at 554–58.

311. See supra notes 175–79 and accompanying text.
314. See DWORKIN, supra note 311 passim; ELY, supra note 311 passim.
315. See DWORKIN, supra note 311 passim; ELY, supra note 311 passim.
316. See supra notes 170–90 and accompanying text.
317. DWORKIN, supra note 311 passim; ELY, supra note 311 passim.
318. See DWORKIN, supra note 311, at 4 (Hart & Sachs), 162 (Wechsler), 144 (Bickel); ELY, supra note 311, at 37–38 (Wellington), 69–70 (Bickel), 54–55 (Wechsler).
from the concerns of the activism-restraint debate. Since, as Dworkin and Ely suggested, a substantive prioritizing of values affected—and should affect—the way in which judges responded to the doctrinal and institutional dimensions of their decisions, all Justices could be seen as activists.\footnote{319} Even when the Court decided that doctrinal or institutional reasons precluded it from exerting supervisory authority over the other branches on a matter of policy, that decision represented a calculus about values.

1. Centrist Activism on the Burger Court

The prominence of Dworkin’s and Ely’s work in the 1980s can serve as a backdrop for the two essays on the Burger Court previously identified.\footnote{320} Vincent Blasi set out, in his essay, to demonstrate that “[b]y virtually every meaningful measure . . . the Burger Court has been an activist court,”\footnote{321} and that its “activism . . . has been generated as well as moderated by the pragmatic men of the center.”\footnote{322} As he put it in summary:

[The Burger Court’s] activism has been inspired not by a commitment to fundamental constitutional principles or noble political ideals, but rather by the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to some of the excesses and irrationalities of contemporary governmental decision-making. In other words, in the hands of the Burger Court judicial activism has become a centrist philosophy—dominant, transcending most ideological divisions, but essentially pragmatic in nature, lacking a central theme or an agenda.\footnote{323}

Blasi began his discussion of activism on the Burger Court by stating that “the activist-restraintist division” among judges and commentators “has been at the heart of constitutional discourse for at least the last fifty years.”\footnote{324} But he also suggested that “the 1970s and early 1980s may well be looked upon as the period during which the activist approach to judicial review solidified its position in American judicial practice.”\footnote{325} He noted that although the Burger Court’s

\footnotesize
319. DWORKIN, supra note 311 passim; ELY, supra note 311 passim.
320. Blasi, supra note 308; Shapiro, supra note 309.
322. Id. at 211.
323. Id.
324. Id. at 198.
325. Id.
opinions "of the last thirteen years abound with essays on the virtues of judicial self-restraint,"326 the practice, however, was different. The Burger Court had left intact "the great activist trilogy of the Warren years," decisions governing school desegregation, reapportionment, and the interrogation of criminal suspects.327 It had been no less willing than the Warren Court to invalidate acts of Congress.328 It had been equally willing to "step into the breach of a constitutional crisis," as in its expedited review of President Nixon's claims of executive privilege in the Watergate tapes controversy.329 It had been "a more active umpire of the federal system" than the Warren Court.330 And even in "its interpretation of the technical doctrines and statutes that demarcate the jurisdiction of the federal courts,"331 where commentators predicted that it would severely cut back on litigant access, the actual record was more mixed.332

Blasi concluded that the Burger Court's opinions "lack[ed] a central theme or an agenda," being doctrinally or theoretically "rootless."333 And the postures he associated with the Burger Court's rootless activism were also those he associated with its centrim. The centrist activists on the Court had "no deep-seated vision" of the Constitution or specific provisions.334 They were attracted to the "line-drawing aspect[s] of the process of doctrinal formation."335 They thought of the resolution of constitutional controversies as "practical compromises" rather than opportunities to exert "moral force," or to articulate "aspirations," or "ideals."336 They had "an addiction to ... middle-of-the-road doctrines"337 and a "powerful aversion to making fundamental value choices."338

Blasi's essay disengaged centrism from the activism-restraint debate, but at the same time suggested that it might have a jurisprudential as well as a spatial identity. Centrism still meant a spatial location: between "liberal" and "conservative" ideological

326. Id. at 199.
327. Id.
328. Id. at 200.
329. Id. at 201.
330. Id. at 203.
331. Id. at 196.
332. Id. at 206–08.
333. Id. at 211.
334. Id. at 212.
335. Id.
336. Id.
337. Id. at 214.
338. Id. at 216.
"extremes." But unlike the traditional function of Justices at the "center" of a Court, to "moderate but ... not generate the growth of constitutional principles," the Justices who dominated the Burger Court had transformed judicial activism into a "centrist philosophy." That philosophy, as Blasi understood it, was not simply the equivalent of political moderation. It was a deliberate attempt to avoid the full-scale resolution of conflicts between values. It reflected "a notable determination to fashion tenuous doctrines that offer both sides of a social controversy something important." It sought to match up a moderate political stance to doctrinal caution, emphasizing "[a]d hoc accommodations" and "short-term ... solutions" to the contested issues of policy that emerged in the form of visible Supreme Court cases.

2. Centrist Activism and Commentary

Looking at the Burger Court from another perspective, that of "fashions in constitutional commentary," Martin Shapiro came to a similar conclusion. But his interest was not so much in demonstrating that the activism-restraint debate no longer seemed resonant for the centrist Justices on the Court as in showing that it no longer seemed resonant for the legal academics who studied their decisions. Shapiro began by noting that "the generation of commentators" that dominated academic discourse between 1950 and 1970 had written "endlessly about judicial self-restraint," even after "the Warren Court had rendered the debate obsolescent by firmly choosing the path of activism." Shapiro's explanation for the preoccupation of those commentators with the activism-restraint debate was that they were principally interested in "the vindication of the New Deal," and were thus torn between their appreciation that the Warren Court "was engaged in a ... comprehensive constitutionalization of the New Deal's fundamental vision of social justice," and their recognition that it was also, in its aggressive scrutiny of other branch actors, "violating [the New Deal's] fundamental political theory of the strong presidency."

Commentators in the 1950s and 1960s "loved what the Court was

339. Id. at 211.
340. Id.
341. Id. at 216.
342. Id. at 216–17.
343. Shapiro, supra note 309, at 218.
344. Id.
345. Id. at 218–19.
doing but hated the fact that it was doing it.”

Having described constitutional commentary in the 1950s and 1960s as centered on the activism-restraint debate, Shapiro then claimed that by the early 1980s “all these New Deal tactical disagreements now seem old hat.”

His explanation for the apparent irrelevance of the debate was the appearance of “a new generation of Court commentators” whose “consciousness-shaping crisis was not 1937” but the crisis that led to Brown v. Board of Education in 1954. Those commentators now regarded the “central problem” of constitutional jurisprudence as “not whether the Court can or should act, but how it ought to act.” They were “developing a jurisprudence of values rather than institutional roles.”

They had coalesced around “a happy acceptance of the judicial activism that so troubled their immediate forbearers,” and were engaged in an effort to use “the Judeo-Christian tradition, historical experience, personal conviction, social democratic political and economic theory, and ethical derivations from modern biology [and] linguistics” to “posit certain values as ultimate or at least ‘higher.’”

The Burger Court, Shapiro believed, was also preoccupied with values: its leading constitutional decisions could be seen as efforts to avoid making definitive value choices on deeply contested social issues. Shapiro argued that “conflicts between individual autonomy and social justice that were suppressed in the Warren period” had emerged during Burger’s tenure, so that not only the Court, but American society at large, was having difficulty deciding how to respond to situations—affirmative action being only one example—in

346. Id. at 219.
347. Id. at 220.
348. Id. at 220 n.6.
349. Id. at 220.
350. Id.
351. Id.
352. Id. at 224. Shapiro included Dworkin and Ely among his “new generation of Court commentators.” He was somewhat pressed to make Ely, whom he acknowledged to have “rej ected” ethical positivism of the sort I have attributed to others of his generation,” a value-oriented theorist. Id. at 223–24. But he insisted that Ely’s focus on the value of participation, as implemented in “the representation-reinforcement doctrine,” amounted to a substantive commitment to the value of equality. “[A]lmost all of the real cases that the rest of the new generation of commentators can approve on equality grounds,” Shapiro claimed, “also will yield approval under the representation reinforcing formula.” Id. at 223.

Shapiro had an easier time with Dworkin, characterizing him, accurately, as “attempting to demonstrate that equality ought to be the central principle from which constitutional and other legal rules are to be deduced.” Id. at 224.

353. Id. at 228.
which "inequalities [were] visited by government action upon some individuals now in the hope that such visitations [would] result in equality for all later." Shapiro felt that conflicts between the values of autonomy and equality had resulted in the Burger Court having three imperfect choices: "compensating the underdog until equality is reached," "emphasiz[ing] the value of autonomy against the competing winds of equality," or "simply plung[ing] into the ad hoc wars of day-to-day elite politics." The third choice, which for Shapiro characterized the Burger Court's jurisprudential stance, was precisely the posture Blasi had associated with the centrist activists on that Court.

3. Implications

The Blasi and Shapiro essays, written at a moment when the identity of the Burger Court and the jurisprudential climate in which it operated seemed finally to have become clear to commentators, would have far-reaching implications. Three of those implications were particularly important.

First, Blasi's portrait of the Burger Court as being dominated by centrist activists was the dominant perception of the Court into the 1990s, even after Rehnquist replaced Burger as Chief Justice and the Court was seen by several commentators as more inclined to lean rightwards. The dominance of that image of the Court had two principal consequences. It gave the label centrist a scope and a resonance it had not previously had in commentary on the Court. Centrist Justices were not simply Justices located at the Court's center: they had a distinctive political and jurisprudential philosophy. The escalation of the label's significance greatly expanded the salience of the idea of the judicial center.

The image of the Burger Court as being dominated by centrist activists also reconfigured the jurisprudential setting in which commentary on the Court took place. No longer did that commentary focus on the activism-restraint debate. Blasi gave lip service to that debate, but then devoted his essay to demonstrating that the Court was now a collection of activists. Shapiro claimed that the current generation of scholars devoted to commenting on the Court had little interest in the debate. Their jurisprudential

354. Id. at 234–35.
355. Id. at 228 (emphasis in original).
356. See infra note 371–72 and accompanying text.
357. See Blasi, supra note 308, at 198.
philosophies were value-oriented versions of activism. Their posture toward the Court, while often critical, did not chastise the Court for insufficient deference to doctrinal or institutional imperatives. They criticized the Court for making the wrong value choices or avoiding making them altogether.\(^{359}\)

The collapse of the activism-restraint debate as a fulcrum for constitutional commentary was eventually to have the effect of accentuating the jurisprudential as well as the political implications of a centrist judicial posture. Blasi had described the jurisprudential basis of Burger Court majority decisions as rootless and emphasized the ad hoc quality of many majority opinions.\(^{360}\) In stressing the disinclination of Burger Court majorities to make fundamental value choices, he intended to contrast the Burger Court unfavorably with the late Warren Court.\(^{361}\) Shapiro's essay, however, suggested that the centrist majorities' posture might not be a product of timidity or the absence of a thematic vision. He thought that a deliberate judicial choice not to engage in substantive value prioritizing—to decline, for example, to make a full-scale commitment to equality as a constitutional imperative—might signal a tacit recognition that constitutional values once thought as mutually reinforcing, such as equality and freedom, could actually collide across a range of cases, leading to a reconsideration of the New Dealers' assumption that all social problems could be solved by government.\(^{362}\)

Shapiro's association of the Burger Court's ad hoc pattern of decisions with growing cultural conflicts between the constitutional values of equality and autonomy implied that centrist judging might not merely be the tentative groupings of Justices forced to make difficult value choices. It might also reflect a judicial belief that the Court would expose itself as having transgressed the limits of its authority if it attempted a full-scale substantive prioritization of constitutional values every time they conflicted. Centrist decisions, from this perspective, could be seen as versions of judicial self-restraint. They could also be seen as conscious efforts on the part of some Justices to stake out a position between the extremes of the "culture wars" that began to surface in the 1980s.

In that decade, Americans seemed, for the first time since the New Deal, deeply divided about the proper relationship between citizens and the government. Shapiro had forecast that division,

\(^{359}\) See Blasi, supra note 308, at 46; Shapiro, supra note 309, at 220–21.  
\(^{360}\) See Blasi, supra note 308, at 216–17.  
\(^{361}\) See id. at 211–12.  
\(^{362}\) See Shapiro, supra note 309, at 228–29.
noting the radical opposition between a perspective that the
government should compensate social, political, and economic
underdogs until true equality was reached and a perspective that
combined, in a "conservative political philosophy," a commitment to
the autonomy and privacy dimensions of individual freedom with
aggressive definitions of the constitutional principles of separation
of powers and federalism. Those perspectives were in fundamental
disagreement, Shapiro believed, not only about whether equality or
autonomy should be the transcendent constitutional values, but, more
fundamentally, about whether government should take care of
individual citizens or leave them alone. Judicial centrism could thus
be seen as a response to the culture wars of the late twentieth century.

This understanding of centrisim was to linger over the next two
decades. The intuition that centrisim might have jurisprudential as
well as political and spatial dimensions produced the multifaceted
characterization of the idea of a judicial center reflected in the
Greenhouse essay with which this Article began. The term
"center" or "centrist" began to be understood as a label with multiple
connotations, potentially identifying the political and the
jurisprudential philosophies of Justices as well as identifying their
spatial location on a Court. It also began to be understood as an
important reference point for thinking about the Rehnquist as well as
the Burger Courts against the backdrop of deep divisions in late
twentieth century political culture. With this development, the idea
of the judicial center became an integral part of commentary on the
Supreme Court of the United States.

V. THE IDEA OF THE CENTER ON THE REHNQUIST COURT

Although the idea of the judicial center had been a feature of
commentary on the Supreme Court since the 1940s, and had begun to
assume a prominent role in that commentary in the 1980s, it was not
until the mid-1990s that a series of factors combined to establish the
idea as a commonplace element in the writings of legal scholars,
political scientists, and journalists on the Rehnquist Court. This
Section identifies those factors and describes their cumulative
elevation of the idea to a conspicuous place in the lexicon of Supreme
Court commentary.

For most of the 1980s, the portrait of the Court sketched by Blasi

363. Id. at 228.
364. Id.
365. See supra notes 1-15 and accompanying text.
and the description of commentary advanced by Shapiro were treated as conventional wisdom in many places. Reviews on the book in which Blasi's and Shapiro's essays appeared,"""366 studies of individual Justices on the Court,"""367 and overviews of the Burger Court by legal scholars,"""368 political scientists,"""369 and journalists"""370 referred to the


367. E.g., Pierce O'Donnell, Justice Byron R. White: Leading From the Center, 72 A.B.A. J. 24 (1986); Stephen L. Wasby, Justice Harry A. Blackmun in the Burger Court, 11 Hamline L. Rev. 183 (1988). The importance of "centrist" as an evocative label for the members of the Burger Court can also be seen in articles that disagreed with the application of the label to particular Justices. See, e.g., Leslie Bender, The Powell-Stevens Debates on Federalism and Separation of Powers, 15 Hastings Const. L.Q. 549, 584 (1988) (applying voting alignment analysis to characterize Powell and Stevens as "fixed at opposite ends" of a debate on structure-of-government issues).

368. E.g., Russell W. Galloway, Jr., The Burger Court (1969-1986), 27 Santa Clara L. Rev. 31 (1987). My own essay on the Burger Court in the 1988 edition of The American Judicial Tradition referred to "the pragmatic, ad hoc character of its constitutional jurisprudence," stated that after 1975 the Court was "dominated by a shifting majority of centrists who preferred, for the most part, narrow and cautious dispositions of issues," quoted Blasi's characterization of the Court as having "a powerful aversion to making fundamental value choices," and suggested that that stance amounted to an implicit recognition of the culturally "divisive" character of the issues the Court confronted. WHITE, THE AMERICAN JUDICIAL TRADITION, supra note 148, at 423-24, 431, 456-57.


Justice Blackmun was quoted in the New York Times as holding the conventional view of the Burger Court as dominated by centrists. "I, with others, have been trying to hold the center," Blackmun was reported to have said in an address at George Washington University National Law Center in February, 1986. Neil A. Lewis, Blackmun on Search for the Center, N.Y. Times, March 8, 1986, at L7 (discussing Justice Blackmun's remarks). "I think we've been fairly lucky in how we've come out in the past two years."
collection of centrist Justices on the Court, the tendency of the Court to assume an activist stance, and the "moderate" political cast of the Court's decisions. Commentators also showed comparatively little interest in the activism-restraint debate and continued to see the Court's centrist decisions as temporizing efforts in a political culture that featured deep ideological divisions.

But by the end of the decade, Reagan's appointments of Rehnquist to replace Burger as Chief Justice, and of Sandra Day O'Connor and Antonin Scalia as Associate Justices, coupled with the retirement of Brennan, had created an impression that the Court was poised to turn decisively to the right. That impression lingered throughout the period between 1990 and 1996, with commentators alternating between the posture expressed in Greenhouse's 1995 article, that something like a rightward constitutional revolution was at hand, and a posture that Greenhouse herself had taken in previous articles, that, surprisingly, centrist Justices still dominated the Court.

Those trends in commentary were to contribute to the enhanced significance of the idea of the judicial center as a reference point for analysis of the Court's performance. Commentators on the Court began to take for granted that they would refer, in some fashion, to Justices at its center or Justices exhibiting a centrist approach. Although the terms "judicial center" and "judicial centrist" continued to be used in multiple ways, they were widely assumed to be clarifying labels. In particular, they were treated as terms that highlighted the divisions on the Court between "conservative" or "right" Justices on the Court and other Justices. The labels "center" and "centrist" were

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Id. Before O'Connor replaced Stewart on the Court, Blackmun allegedly said, "I had always put [Brennan and Marshall] on the left" and "[Burger and Rehnquist] on the right." Id. "Five of us were in the middle." Id. With O'Connor's appointment, he felt, "I think it is fairly clear that [she] is on the right and so the division now would be two, four, and three." Id.


eventually taken not only as describing the spatial location, but also as characterizing the political and the jurisprudential postures, of Justices who were distinct from the right-leaning advocates of a potential constitutional revolution.\textsuperscript{373}

\textbf{A. The "Center Holds" Thesis}

A crystallization of the ideological dimensions of the idea of the judicial center in the 1990s\textsuperscript{374} came in 1995, when James Simon published a book entitled \textit{The Center Holds}, "the story of a conservative judicial revolution that failed,"\textsuperscript{375} and several commentators reacted to Simon's claims.

Simon's book covered the 1986 through the 1991 Terms, a period that scanned the first year of Rehnquist's Chief Justiceship through the retirements of Brennan and Marshall and their replacements by Justices David Souter and Clarence Thomas. He argued that "two conservative Republican presidents, Ronald Reagan and George Bush," had sought to "reverse the liberal legacy of the Warren Court" through their judicial appointments.\textsuperscript{376} By 1988, Simon felt,

\begin{itemize}
  \item \textsuperscript{373} For a prediction that a refurbished "centrist liberalism" might emerge in the legal academy in the last years of the twentieth century, see Mark Kelman, \textit{Emerging Centrist Liberalism}, 43 FLA. L. REV. 417, 444 (1991). Kelman argued that centrist thought might have a renaissance because "the right-wing supply siders were wrong to think that everyone would prosper if the rich did," and "the left [had been] equally wrong to think that the masses would prosper if only the few stopped oppressing them." \textit{Id.}

  \item \textsuperscript{374} The idea of the judicial center was formulated in a variety of ways in the 1990s. In addition to being used as an ideological reference point, it was employed by political scientists working within the tradition of Pritchett. \textit{See, e.g.}, Robert Smith, \textit{Uncoupling the "Centrist Bloc"—An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court}, 62 TENN. L. REV. 1 (1994). Smith employed voter alignment analysis to argue that from 1990 through 1992 the "centrists" were not a cohesive voting bloc and could not "meaningfully be distinguished from the conservatives in terms of their influence on results and on the content of opinions." \textit{Id.} at 5, 17. He concluded that "the label 'centrist' does not identify a particular ideology or pattern of voting that is consistent from term to term or across subject areas." \textit{Id.} at 69.


  \item \textsuperscript{376} \textit{Id.} at 11.
\end{itemize}
Rehnquist was operating "with a working conservative majority" of Reagan appointees and "conservative holdover" White, and by the early 1990s Bush's appointments of Souter and Thomas were expected to "put the finishing touches on what conservatives ... expected to be a solid majority that would steer the Court safely to the right into the next century."\(^{377}\)

Nonetheless, in "most instances" between 1986 and 1992, Simon claimed, "the center held" because "liberal justices" were able to attract support from their more moderate colleagues who refused to join the ideologically committed conservatives on the right wing of the Court.\(^ {378}\) The showpiece of Simon's analysis was a joint plurality opinion by Justices Kennedy, O'Connor, and Souter in *Planned Parenthood v. Casey*,\(^ {379}\) testing the constitutionality of a Pennsylvania statute imposing restrictions on abortion decisions, which signaled that five votes remained on the Court to preserve *Roe v. Wade*\(^ {380}\) and some measure of protection for abortion rights.\(^ {381}\) "With the *Casey* decision," Simon claimed, "the momentum had shifted away from the anti-*Roe* movement on the Court . . . . [A] woman's constitutional right to control her own body during pregnancy seemed established beyond the Rehnquist Court's recall."\(^ {382}\)

Simon then generalized from the *Casey* example. He argued that when the *Casey* plurality opinion was taken together with *Lee v. Weisman*,\(^ {383}\) a 5–4 decision in the 1991 Term striking down a compulsory nonsectarian prayer at a public middle school graduation,\(^ {384}\) the decisions revealed that O'Connor, Kennedy, and Souter, all of whom participated in the *Lee* majority, had not joined the campaign of Rehnquist, Scalia, and Thomas to move constitutional jurisprudence in a rightward direction.\(^ {385}\) That argument extended a claim made by Ronald Dworkin in an August 13, 1992 article on *Casey*. Dworkin had entitled the article "The Center Holds!," referring only to the state of abortion rights on the Court.\(^ {386}\) Simon's use of the same title was intended to suggest that the influence of the Rehnquist Court's "center" went well beyond the

\(^{377}\) *Id.*
\(^{378}\) *Id.* at 12.
\(^{380}\) 410 U.S. 113 (1973).
\(^{381}\) *Planned Parenthood*, 505 U.S. at 845–46.
\(^{382}\) SIMON, supra note 375, at 166.
\(^{384}\) *Id.* at 597–99.
\(^{385}\) SIMON, supra note 375, at 292–93.
abortion context.

Having put forth this thesis, Simon had some difficulty supporting it. He presented internal accounts of cases in four areas: racial harassment, abortion, criminal procedure, and the First Amendment’s speech and religion clauses. In two of those accounts, Justices whom he described as “conservatives on the right wing” prevailed, joining majorities who declined to extend an 1866 civil rights statute to racial harassment in the private sector and who curtailed a series of Warren Court constitutional protections for criminal defendants. In one of Simon’s other accounts, which featured the Court’s response to Establishment Clause and free speech issues, only Lee v. Weisman provided evidence of the influence of centrist Justices. In the other line of First Amendment decisions, in which five-justice majorities vindicated speech rights by invalidating federal and state statutes criminalizing the burning of the American flag as a political protest, only four of the Justices in the majority were, in Simon’s terms, liberals or centrists. The fifth Justice was one of Simon’s “conservatives on the right wing,” Scalia.

In addition to those problems of documentation, the timing of Simon’s book was somewhat awkward. The book was published in August, 1995, just after, one reviewer noted, the appearance of “starkly conservative, five-to-four rulings” in the Court’s 1994 Term, the decisions that had prompted Greenhouse to declare that the “center is a void.” Kennedy and O’Connor, the reviewer suggested, had both joined the Court’s “conservative bloc,” and “Simon’s understandable desire to extrapolate broadly from the events of several years ago . . . left him wide open to grave embarrassment.” The newly constituted Court featured a division in which, “abortion aside, on most hotly contested issues O’Connor and Kennedy now side with the highly conservative trio of Rehnquist, Scalia, and Thomas,” so that “Ginsburg, Breyer, Stevens and Souter [were] on the short end of the count.” In sum, the reviewer claimed, “[t]he

387. SIMON, supra note 375 passim.
389. Id. at 270–75.
390. Id. at 274.
392. Id.
393. Id. at 979.
'center' hasn't held.'

When a symposium was held on Simon's book in 1996, most participants were critical of his "center holds" thesis. They believed that the thesis had little descriptive or predictive value, either because Simon had extrapolated from too little evidence, or because he had been too hasty to conclude that centrist Justices were dominating the Court, or because he had failed to recognize that if there was a center, it had moved rightward since the Burger Court years, or simply because he had misunderstood the significance of the Court's current jurisprudential conflicts.

Nonetheless the comments had the cumulative effect of confirming the importance of the terms "center" and "centrist" as evocative labels in the lexicon of constitutional commentary. Despite their differences with Simon, his critics tacitly acknowledged that the labels captured three defining features of the Court in the last years of the twentieth century. One was that the Court now contained no "liberals" in the sense in which that label had been applied to members of the Warren and Burger Courts: all its Justices who did not tilt decisively to the right were centrists of one kind or another. Another was the fact that even if the Court was appropriately labeled "starkly conservative," only three of its Justices could be characterized as consistent supporters of sweeping rightward constitutional changes. The other two "conservatives," Kennedy and O'Connor, were far less predictable, and thus Court majorities, throughout the 1990s, were more likely to alternate between "right" and "centrist" postures than to move decisively rightward.

The last feature followed from the first two. Although the "center" of the Court may have moved rightward, centrists on the Court now consisted of all those Justices who did not appear to support, on various grounds, a dramatic turn rightward in constitutional jurisprudence. This meant that there were six centrist Justices on the Court from 1994 on, representing a decisive "anti-right" majority.

394. Id. at 979.
397. Kim I. Eisler, A Defense of Activism, 40 N.Y.L. SCH. L. REV. 911, 921 (1996) ("There is certainly no extreme left on the Court anymore.").
398. Eisler listed Rehnquist, Scalia, and Thomas in this category. Id. at 921.
399. See Garrow, supra note 391, at 973.
Simon's book had precipitated a common reading of the internal dynamics of the Rehnquist Court, one that solidified among commentators in the late 1990s, as the Court's personnel remained constant. That common reading was as follows. The idea of the judicial center was an important starting point in understanding the identity of the Rehnquist Court. This was because the constitutional jurisprudence of that Court at the close of the twentieth century was a struggle for influence between two groups: the Justices on the right and everyone else. "Everyone else" was a centrist or a potential rightist. Most of those commenting on Simon's book were not convinced that the center had held. But they agreed that one could not meaningfully discuss the Court, in the 1990s, without addressing the idea of its center.\textsuperscript{400}

B. Centrist Judging and the Atmospherics of the Rehnquist Court

With Simon's thesis about the Rehnquist Court, and the reaction to it, the twentieth century intellectual journey of the idea of the judicial center reached the time frame in which Greenhouse had popularized an image of the Court as consumed by a clash between rightward leaning Justices and a potentially powerless center. Greenhouse's article had used the terms "center" and "centrist" in three different ways, and had taken those multiple meanings of "center" and "centrist" to be complementary rather than inconsistent.\textsuperscript{401} A centrist Justice, or a Justice at a Court's center, could be one whose voting record, in cases with discernible policy outcomes, placed the Justice approximately midway between the Justices who represented the "left" and "right" extremes on a policy spectrum. In addition, a centrist Justice could be one who exhibited a moderate or pragmatic political sensibility. Or a centrist Justice could be one who was jurisprudentially cautious or incrementalist, disinclined to endorse sweeping doctrinal changes. Often centrist Justices, or Justices at the center, exhibited all those tendencies at once.

As the personnel on the Rehnquist Court remained constant in the first years of the twenty-first century, the terms "center" and "centrist," with their multiple connotations, seemed increasingly well-suited to describe that Court's doctrinal dynamics. But it would be conclusory to claim that the emergence of the terms to prominence in commentary was itself an explanation for their saliency. The terms

\textsuperscript{400} See Eisler, \textit{supra} note 397, at 921; Garrow, \textit{supra} note 391, at 973.

\textsuperscript{401} See \textit{supra} notes 1–15 and accompanying text.
became salient, as well as prominent, because they helped capture some altered features of the Court’s internal culture. They provided an entry into the atmospherics of the later Rehnquist Court.\footnote{402. The descriptions of internal features of the Rehnquist Court in this Section are not based on first-hand accounts of Justices or law clerks. Although some literature discussing internal dimensions of the Court exists, see, e.g., EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998), I have not relied upon it. My comments in this Section are offered merely as suppositions, based on information that is available to anyone paying relatively close attention to the Court during the last decade.}

When the “Rehnquist Court” eventually comes to be encapsulated, the years between 1986 and 1994 will need to be distinguished from 1994 onward. The distinction will not necessarily rest on the tone or character of the Court’s constitutional jurisprudence. It will rest on the composition of the Court itself. The Rehnquist Court, between the 1994 Term and the present, has had no changes in personnel. In only one period in American constitutional history—the years between 1812 and 1823—has the Court’s membership remained constant for a longer duration. Moreover, in no previous epoch in American history has the Court been composed, for a longer period, of Justices who held the same professional position before their appointments. Eight of the nine current Justices were judges at the time of their nomination to the Court. These two features of the Rehnquist Court since 1994 can be seen as forming the background against which the internal developments sketched out in this subsection have taken place. Although the features might at first seem incidental, I will be arguing that they are not only historically striking but highly relevant to understanding the atmosphere of the current Court.

Some noteworthy internal developments have occurred on the Court since the mid-1990s. One has been the presence of two Justices, Scalia and Thomas, who propound a revisionist approach to constitutional interpretation, grounded on fidelity to the text, history, and the “original meaning” of constitutional provisions, that has undercut a series of established judicial interpretations of the Constitution in place, in some instances, since the 1940s.\footnote{403. See United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring); Lee v. Weisman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting).} A third Justice, Rehnquist, has seemed sympathetic to that mission, if somewhat less inclined to endorse Scalia’s and Thomas’s interpretive revisionism. Together those three Justices have generated a persistent intellectual pressure on their colleagues: pressure to join
them in their revisionist forays or find reasons for not doing so.\footnote{404}

No comparable interpretive revisionism from the left has been present on the Court. No Justice has been insisting, as Warren or Douglas or Brennan or Marshall periodically did, that the Constitution is bottomed on principles of social justice, or fundamental fairness, or the equality, dignity, and freedom of all human beings, and that if its provisions did not expressly codify those values, they should be interpreted as doing so.\footnote{405} But there are Justices on the current Court—Stevens, Souter, Ruth Bader Ginsburg, and Stephen Breyer—who came to maturity when the legacy of the New Deal was taken to be an established feature of governance in America and when the Warren Court’s brand of revisionism was being implemented.\footnote{406} Confronted with the prospective dismantling of landmarks from that time, they have reacted with some uneasiness. Presented with revisionist interpretive arguments based on textual fidelity and history, they have responded with alternative arguments. Mindful of past Court majorities’ rhetorical commitments to using the Constitution as a vehicle for social justice, they have appeared loath to abandon openly those commitments.\footnote{407}

These currents have contributed to an intellectual culture on the Court that encourages Justices to flesh out their interpretive approaches to constitutional provisions and to engage in debate with their colleagues about such approaches. The culture is already hospitable to intellectual exchange among Justices because of the constancy of the Court’s personnel, Rehnquist’s personal affability and laissez-faire attitude toward the airing of differing views, and the pre-Court experience of all of the Court’s members save the Chief Justice. Eight Justices on the Rehnquist Court have had previous

\footnote{404. For more on the emergence of originalism as a theory of constitutional interpretation, and the evolution of an originalist perspective between the late 1970s and the first decade of the twenty-first century, see White, The Arrival of History, supra note 27, at 587–96, 628–29.}

\footnote{405. See generally White, The American Judicial Tradition, supra note 148, at 318–25; The Warren Court in Historical and Political Perspective (Mark Tushnet ed., 1993).}

\footnote{406. Stevens was born in 1920, Ginsburg in 1933, Breyer in 1938, and Souter in 1939. 2 Joan Biskupic & Elder Witt, Guide to the U.S. Supreme Court (3d ed. 1997) 955, 959, and 961.}

careers as judges on courts who made decisions collectively. They came to the Court familiar with collegial discourse, regular intellectual exchange, and the process of circulating and critiquing draft opinions. And unlike their predecessors on the Court, they not only had multiple law clerks to assist in their research, they had the use of word processors, which created opportunities for Justices to work outside the Court building and to generate multiple drafts of documents in a comparatively rapid fashion. The circulation of memoranda, draft opinions, and other written communications have become the heart of the Justices’ exchanges with one another.

Another feature of the present Court’s composition has arguably contributed to its atmospherics in a different way. All its Justices are “post-Fortas,” and five of its Justices “post-Bork,” appointees. The nomination of Abe Fortas as Chief Justice to replace Earl Warren in 1968, with the filibustering of Fortas’s nomination by Republicans because of his close ties to the administration of Lyndon Johnson, and the subsequent partisan opposition to two of Richard Nixon’s nominees to the Court in the 1970s, ushered in a climate in which senatorial scrutiny of Court nominees has often been intense, ideological antipathy has become an acceptable ground for opposing a candidate’s nomination, and Court appointees have increasingly been lower court judges without visible political affiliations or controversial records.\textsuperscript{408} Justices Stevens, O’Connor, and Scalia, all appointed after the Fortas debacle, were lower court judges at the time of their nominations.

The remaining Justices on the Court were appointed after the abortive effort of the Reagan administration to nominate Robert Bork in 1987. In the wake of Bork’s defeat, the Reagan administration eventually\textsuperscript{409} resorted to the familiar post-Fortas formula, nominating Anthony Kennedy, a lower court judge with an inconspicuous judicial record and no identification with political or social controversy. That same pattern was followed in the nominations of Souter, Ginsburg, and Breyer. All were lower court judges with distinguished professional credentials, although Souter’s

\textsuperscript{408} On Fortas’s abortive nomination to the Chief Justiceship and his subsequent resignation from the Court, see \textsc{Laura Kalman, Abe Fortas}, 327–33, 370–76 (1990); \textsc{Lucas Powe, The Warren Court and American Politics} 468–81 (2000).

\textsuperscript{409} After Bork’s defeat, the next Reagan nominee, Douglas Ginsburg of the Court of Appeals for the D.C. Circuit, was also perceived by his political opponents as a rightist. Ginsburg withdrew his nomination after the disclosure that he had smoked marijuana in his youth became an embarrassment to an administration engaged in a visible “war on drugs.” For an account of the Bork nomination and its aftermath, see generally \textsc{Ronald M. Dworkin, The Bork Nomination}, \textsc{9 Cardozo L. Rev.} 101 (1987).
career, as a prosecutor and judge in New Hampshire, had been comparatively obscure. Ginsburg and Breyer had written a considerable amount of legal scholarship, and Ginsburg had been a visible proponent of legal remedies for gender discrimination, but their work was well within the academic mainstream, and they both had a reputation as judicial “moderates.”

Five members of the Rehnquist Court, then, might have been inclined to gravitate to the “center” simply because the screening process that put them on the Court made it so difficult to confirm candidates with views that were perceived to be on one end or another of the political spectrum. The nominations of the remaining members of the Court had not been constrained in the same fashion. Rehnquist, whose ideological inclinations were discernible on his nomination, was given close scrutiny but survived. O’Connor, the first woman nominated to the Court, had impressive professional qualifications and held an obscure judgeship in Arizona; she was not placed under intense scrutiny. Neither was Scalia, whose nomination was sent to the Senate along with that of Rehnquist for the Chief Justiceship. Rehnquist’s track record on the Court from 1971 to 1986 provoked some opposition, and in the process Scalia, who had not had occasion to pass on many visible constitutional issues as a lower court judge, was unanimously confirmed. Thomas’s confirmation process was uniquely bizarre, exceeding even that of Bork in its visibility and intertwining issues related to ideology with issues related to race and sexual contacts in the workplace, but Thomas also survived.

In post-Fortas, post-Bork terms, then, two of the three current

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411. Information from Justice Robert Jackson’s Court papers revealed that Rehnquist, while Jackson’s law clerk in the 1952 Term, had written a memorandum to Jackson stating that in his opinion Plessy v. Ferguson, 163 U.S. 537 (1896), the decision justifying “separate but equal” racially segregated facilities, “was right and should be reaffirmed.” Rehnquist acknowledged writing the memorandum but said that Jackson had a practice of asking his clerks to argue both sides of cases before the Court. Rehnquist’s co-clerk that Term, Donald Cronson, subsequently confirmed Rehnquist’s account, and he was eventually confirmed. See RICHARD KLUGER, SIMPLE JUSTICE 406-09 (1976).

Rehnquist Court Justices associated with revisionist, right-leaning constitutional jurisprudence were high profile nominees, and Scalia might well have been but for his being nominated along with Rehnquist. All the remaining Justices, including O'Connor, were nominees whose candidacies were designed to forestall intense political scrutiny, being either lower court judges with comparatively low profiles (O'Connor, Kennedy, Souter) or lower court judges with "moderate" track records (Stevens, Ginsburg, Breyer). So if centrism, in the sense of political moderation, was to be associated with judges with ideologically balanced judicial records who had otherwise avoided social and political controversy, all the Rehnquist Court Justices save Rehnquist, Scalia, and Thomas were potential centrists.

When these atmospheric features are added up, the following picture of the Rehnquist Court emerges. The Rehnquist Court, since 1994, has been an institution whose members have had the usual incentives Supreme Court Justices have to develop their own views of constitutional interpretation and to exchange those views with their colleagues. Those incentives may well have been heightened, in recent years, by the fact that all the Court's members are now familiar with the process of deciding constitutional cases and aware of the ambitious doctrinal agenda of some Justices. Moreover, despite the vigor of some of the exchanges among Justices that have found their way into opinions, there is no reason to think that norms of collegiality have been violated by what amounts to interpretive competitions among some Justices. Not only have all the Justices (who have now served with one another for at least a decade) had ample opportunities to know each other as colleagues, the relative de-emphasis the Court places on extended colloquies in conference, and its strong emphasis on the exchange of ideas through written communications, depersonalizes exchanges.413

The framework of interpretive debate on constitutional issues on

413. See LAZARUS, supra note 402. The book, which was published in 1998 but based on the author's experiences as a clerk for Justice Blackmun in the 1988 Term, described the Court as "an institution broken into unyielding factions that have largely given up on a meaningful exchange of their respective views or, for that matter, a meaningful explication or defense of their own views." Id. at 6. One commentator, after calling Lazarus's portrait "rather hyperbolic," noted that Lazarus's book appeared "during a term that was marked by unanimous decisions and a remarkable show of consensus on several very difficult issues." David Savage, A Journalist's Perspective, in THE REHNQUIST COURT: A RETROSPECTIVE 162-63 (Martin Belsky ed., 2002). "If this is a Court that is hopelessly divided into warring ideological factions," Savage concluded, "I have missed the story." Id. at 164.
the current Court has been shaped by the fact that at least two Justices, Scalia and Thomas, consistently advance revisionist interpretations of many constitutional provisions, grounded on originalist-inspired theories of judicial fidelity. The regular presence of arguments for doctrinal revisionism means that Justices are commonly confronted with the option of repudiating Court precedents with some historical pedigree. A shifting majority of Justices appears to be struggling with the implications of embracing that possibility. If one thinks of most of the members of that shifting majority as centrists—using the term in the combined sense of jurisprudential minimalism or incrementalism (as opposed to sweeping revisionism) and the avoidance of ideological extremes (as opposed to a firm embrace of a right-leaning constitutional ideology)—then the idea of the judicial center can be seen as a window into the current Court.

VI. UNFINISHED BUSINESS

If this effort to unpack the idea of a judicial center has suggested that the labels “center” and “centrist” have some potential to clarify the current dynamics of the Supreme Court, the conclusion is not much of an occasion for dancing in the streets. The history of the idea of the judicial center reveals that the concept has been used in quite different ways, that some of those ways have the potential to be quite unilluminating, and that even those definitions of “center” and “centrist” which seem to have some contemporary analytical purchase invite oversimplification. By way of summary, then, it seems worth recalling some of the difficulties with the various meanings of “center” and “centrist,” and suggesting how additional work might result in the terms being employed in more helpful ways.

A. Clarifying Judicial Behavioralism

The initial meaning of “judicial center” was associated with a starkly behavioralist theory of judging, in which the decisionmaking process of Supreme Court Justices was equated with that of members of Congress, the performance of Justices was associated almost exclusively with their voting records in cases with discernible policy dimensions, and the outcomes in those cases were given political labels. Even in a universe of commentary whose practitioners agree that Justices are a species of lawmakers and that constitutional

414. For a more extended discussion of those terms, see infra, text at notes 435–59.
415. See supra Part I.A–B.
adjudication is a form of policymaking, unrefined judicial behavioralism runs the risk of ignoring vital elements in the calculus of judges. One reason why the activism-restraint debate began to preoccupy commentators after the Second World War, and why a process jurisprudential perspective began to dominate commentary on the Court in the 1950s and 1960s, was that analyzing the performance of Justices along the established behavioralist axes of “left” and “right” voting “blocs” seemed intuitively unrewarding. When nearly all the Justices on the Supreme Court could be said to be sympathetic to the legislative policies of the New Deal and its legacy, and yet those Justices were consistently divided over whether they should exercise their constitutional review powers to override legislation, conventional descriptions of “left” and “right” policymaking that had been fashioned in the 1930s no longer seemed helpful.

After two decades of scholarship by process theorists who believed that the categories of activism and restraint came far closer to illuminating Supreme Court decisionmaking than conventional political labels or voting alignment studies, some of the inherent difficulties in behavioralist definitions of a judicial center were exposed. How meaningful was the spatial term “center” if voting patterns showed that a large number of Justices agreed with many of their colleagues in nonunanimous cases? More fundamentally, what did voting alignments reveal about judicial motivation? When a judge joined or declined to join an opinion, did that mean that the judge necessarily endorsed or opposed the outcome that opinion justified? Did it mean that the judge accepted, or rejected, the justifications advanced in the opinion? If much of constitutional adjudication, as process theorists suggested, turned on theories of the judicial function, how did one know whether a judge was supporting, or opposing, the policies embodied in legislative or executive acts, or whether that judge was supporting, or opposing, judicial scrutiny of those policies?

Further, the integrity of a judicial center, as a spatial location, was dependent on the integrity of spatial locations on the “left” and “right” of a Court. How could one tell whether those locations were coherent? How did one know that outcomes in a case were “left” or “right” outcomes in the first place? Students of American politics

416. Of course there are some contemporary commentators who do not hold those views of judging and constitutional adjudication, but their number would seem small enough to be discounted.
assumed that the contemporary political spectrum was always changing, so that the policies favored by "liberals" or "conservatives" also changed with time. Given this phenomenon, how could commentators confidently associate outcomes with "left" or "right" judicial philosophies? To take just one example, we have seen that in her 1995 article Greenhouse had used Stevens as the "left" end of the Rehnquist Court's spectrum, and Rehnquist as the "right" end, for the purpose of identifying Justices at the Court's center. She had also described Scalia's voting alignments as placing him far closer to Rehnquist than to Stevens. But in two of the most visible constitutional decisions of the 1989 and 1990 Terms, testing the constitutionality of state and federal statutes criminalizing flag desecration, Scalia, as noted, had joined majorities invalidating the statutes, whereas Stevens, along with Rehnquist, had voted to uphold the legislation.

The coherence of a behavioralist-inspired spatial meaning of "judicial center" is thus dependent on a series of simplifying assumptions, some of which commentators may be unable to stomach. Even when those assumptions are modified to consider doctrinal, institutional, and other "process" variables introduced by legal scholars, spatial definitions of the center of a Court, if they are to have any analytical value, seem to depend on descriptions of that Court's "left" and "right," which may be outmoded or arbitrary.

Proponents of spatial conceptions of the term "center" have emphasized the potential of voting alignment analysis to predict

417. See Greenhouse, supra note 1. More refined versions of this methodology have been recently applied to the Rehnquist Court. See, e.g., Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court (1953-1999), 10 POL. ANALYSIS 134, 146 (2002) (outlining a spatial spectrum with Stevens at one end, Thomas at the other, and Ginsburg, Breyer, Souter, O'Connor, Kennedy, Scalia, and Rehnquist at points from left to right).


420. For an interesting recent effort to modify a starkly behavioralist "attitudinal" model of Supreme Court voting by interjecting variables connected to the process by which cases come to the Court, such as the particular federal circuit court that decided the case below, see Theodore W. Ruger et al. The Supreme Court Forecasting Project, 104 COLUM. L. REV. 1150, 1157 (2004). The model employed by the forecasters "did better than ... legal experts in forecasting the outcomes" of the Court's 2002 cases, "due in large part to its ability to predict more accurately the important votes of the moderate Justices ... at the center of the current Court." Id. at 1150. The legal experts "did best at predicting the votes of the more ideologically extreme Justices, but had difficulty predicting the centrist Justices." Id. The forecasting model did "particularly well in forecasting 'economic activity' cases," while the legal specialists "did comparatively better in the 'judicial power' cases." Id.
which Justices’ votes will be crucial in closely divided cases. Such predictions are, of course, thought to be of great significance in constitutional litigation and commentary: practitioners in those areas devote a good deal of energy to identifying Justices whose voting patterns indicate that they could join opposing “blocs.” Attention has recently been paid to O’Connor as a decisive spatial centrist on the current Court, with some observers claiming that “when Justice O’Connor asks a question at oral argument, . . . nothing is more important . . . than making sure you’ve addressed her concerns.” If the label “centrist” had the capacity to particularize those concerns as well as to identify Justices likely to provide tie-breaking votes, it would be of considerable help to anyone interested in getting to the heart of a Court’s dynamics.

But the spatial meaning of center does not simply suffer from the difficulties incumbent on locating Justices on a Court between liberals and conservatives. It also fails to clarify what a centrist judicial stance means for individual judges. Concluding that a judge such as O’Connor might qualify for a centrist spatial position says nothing about why she might be inclined to join one bloc or another in a given case. It only says that if comparatively firm “left” and “right” blocs exist on a Court, a center judge votes with one about as much as the other.

Assume, however, that some form of voting alignment analysis could demonstrate that a Justice was occupying the center space on a Court for a sufficient amount of time to be noteworthy. It would seem that the next step would be to understand why, which would require an analysis of that Justice’s decisionmaking calculus in sufficient depth to produce an understanding of his or her jurisprudential sensibility. That task does not seem insurmountable, but would it produce uniform results for all Justices identified as centrists? It seems hard to imagine, for example, that biographically and doctrinally oriented studies of O’Connor and Kennedy, the two Justices regularly identified as most likely to join different blocs on the current Court, would produce anything like a common characterization of Justices at a Court’s spatial center. Without such


422. Lane described O’Connor as “the key centrist on a Supreme Court polarized between liberals and conservatives,” and as “straddling” the “voting blocs” on the Court. Id. at 12, 14. In Lane’s analysis, O’Connor is a more important “centrist” than Kennedy because “she provides a fifth vote to make a liberal majority more than Kennedy does.” Id.
a characterization, the value of the label reduces itself to a descriptive term for voting patterns of Justices that have already occurred. As such it may have some postdictive utility, but cannot be claimed to be a predictive tool.\textsuperscript{423}

One might nonetheless hope that sophisticated versions of voting alignment analysis, combined with intensive examinations of the jurisprudential postures of Justices whose voting patterns identified them as spatial centrists, might give the spatial dimensions of the idea of a judicial center some purchase. It hardly needs to be pointed out that no such work has yet appeared.

\textbf{B. Clarifying Centrism as a Political Ideology}

The second common meaning associated with the labels “center” or “centrist,” that of political moderation or pragmatism, would seem no less susceptible to oversimplification than any label derived from political ideology and applied to judging. We have seen that two sorts of difficulties attend the use of conventional political labels such as “liberal” or “conservative” to describe the postures of judges, difficulties related to inherent ambiguities in the use of those labels and difficulties incumbent in the task of ascertaining the jurisprudential dimensions of the labels. Calling any political actor a “liberal” or a “conservative” requires a baseline definition of those terms, and such baselines are slippery. Over the course of the nineteenth and twentieth centuries the term “liberal” underwent a major definitional shift in the vocabulary of American politics, moving from its “classical” version, signifying one who favored comparatively few governmental restrictions on economic and political activity, to its “modern” version, signaling a belief in the affirmative use of governmental power to further humane and progressive social ends.\textsuperscript{424} The label “liberal” thus called up quite different political visions at different times, complicating the meaning of judicial “liberalism.”\textsuperscript{425}

The label “conservative” brings its own difficulties, which primarily follow from the fact that the term has been employed both

\textsuperscript{423} Ruger et al., supra note 420, point out that “virtually all legal and political science scholarship on the Supreme Court is retrospective in nature.” \textit{Id.} at 1155–56. Not only “legal critiques of decisions” but “political science models that make claims of ‘prediction,’ ... typically regress past data sets to assess consistency with various motivational hypotheses.” \textit{Id.} Although some studies “speak in terms of ‘predictive’ accuracy, what they do is more technically called ‘postdiction.’ ” \textit{Id.} at 1153–54 n.17.

\textsuperscript{424} See WHITE, THE AMERICAN JUDICIAL TRADITION, supra note 148, at 151.

\textsuperscript{425} \textit{Id.} at 151–56.
universalistically and contextually. As a universalistic label, conservatism has been identified with support for the maintenance of an existing political order, whatever values that order embodies.\footnote{See Ernest A. Young, Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139, 1182–83 (2002).} As a contextual label, conservatism refers to a position on a historical or contemporary political spectrum. The universalistic and contextual dimensions of conservatism are sometimes combined in the claim that conservatives of all stripes tend to favor gradual rather than rapid change.\footnote{For a classic formulation, see CLINTON ROSSITER, CONSERVATISM IN AMERICA 9 (1982).} But one cannot know what support for gradual as opposed to more sweeping change means without a sense of the existing status quo. And if history is viewed as a process of continuous, qualitative change,\footnote{This “historicist” view of history (as distinguished from a view of history as a cyclical process in which societies emerge, mature, degenerate, dissolve, and reemerge) has been dominant in America since at least the late nineteenth century. See DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE xv, 94–97 (1991).} the content of the status quo can never remain constant, so that conservative political actors cannot be said to hold identical substantive visions across time. It seems that the best one can do with the label “conservative” is to associate it with a constantly changing situational posture.\footnote{For an extended discussion of the various meanings of political liberalism and conservatism, concluding that conventional approaches to defining them have been “positively riddled with problems,” see Young, supra note 426, at 1187–97.}

Finally, the labels liberal and conservative, as political referents, convey nothing about theories of the judicial function. When one characterizes a judge as a “liberal” or a “conservative,” does the characterization presuppose that the judge has a “liberal” or “conservative” theory of the interpretive role of judges, and, if so, how might such a theory be described? The only way to avoid that question is to subsume theories of the judicial function in political ideologies, which some unreconstructed judicial behavioralists have done,\footnote{See Rodell, For Every Justice, supra note 194, at 700–01; Schubert, Ideologies and Attitudes, supra note 197, at 25–26.} but that move serves to highlight the difficulties incumbent upon the application of crude behavioralist methodologies to judicial decisionmaking.

We have seen that in the 1950s and 1960s some commentators who were preoccupied with the activism-restraint debate assumed that if one thought about judging in accordance with that debate’s axes, judges who consistently maintained a deferential theory of their power to scrutinize the actions of other branch actors could have
been described as judicial "conservatives," if not necessarily as judges who supported conservative political goals. When legislative majorities restricted the rights of racial or political minorities in the 1950s, judicial deference to that legislation was sometimes characterized as politically as well as jurisprudentially conservative. When legislative majorities regulated economic activity or redistributed economic benefits in the same time period, judicial deference to that legislation could have been seen as a jurisprudentially conservative posture that supported liberal policies. Other permutations were possible: the fact was that deference, as opposed to activism, had come to be thought of in some circles as a "conservative" jurisprudential approach.

But any abiding belief in a bright-line distinction between political ideology and theories of the judicial function did not survive the 1970s. When commentators concluded that nearly all the members of the Supreme Court were activists of one political persuasion or another, the jurisprudential implications of deference became less clear. Some commentators, we have seen, suggested that the doctrinal caution of Burger Court Justices reflected substantive preferences rather than theories of the judicial function. In general, commentators lost interest in the permutations of liberalism, conservatism, activism, and deference that had occupied the scholars preoccupied with the activism-restraint debate.

The label "centrist" was first applied to judges in the 1970s and was intended to capture a judge's political ideology as well as that judge's spatial location. Commentators typically employed the terms "moderate" or "pragmatic" to describe centrist judges. But if "centrist" is used to signify a stance of moderation in a judge, the clarity of the term would again seem dependent on the existence of comparative baselines. Suppose conventional characterizations of the current Court as a collection of right-leaning Justices and centrists of various stripes are adopted. What is the baseline for determining a "centrist" ideological stance on a Court in which there are not thought to be any Justices on the "left?" If there is no left baseline on the current Court, the hypothetical left end of the spectrum must be a baseline drawn from politics at large. But why, when the primary purpose of labeling Justices on the current Court as centrists is to clarify their perspectives alongside those of their colleagues, would baselines drawn from political actors in the general population be

431. See Clark, Unprincipled Decision, supra note 193, at 660–62.
432. See Blasi, supra note 308, at 216–17.
relevant?

This suggests that if the label "centrist" is intended to convey the ideological stances of current Justices, considered as ordinary political actors, it does not really mean Justices who hold views, which mark them as neither predictable liberals nor predictable conservatives. Centrist Justices are "non-right" Justices: Justices not inclined wholly to embrace the right-leaning constitutional jurisprudence of Rehnquist, Scalia, and Thomas. As Kim Eisler put it in a comment on Simon's *The Center Holds*: "We have faced ... conservative threats before and the liberal wing has held. Now it seems that the best we can hope for is that the center will hold .... Now we are told to be grateful that 'the center has held,' because expectations ... have so dramatically fallen."\textsuperscript{433}

If the principal political connotation of the label "centrist," as applied to Justices on the current Court, is "non-rightist" rather than moderate or pragmatist, several additional unexamined issues would seem to be opened up. Is the characterization of the current Court as lacking any "liberals" just a way of saying that contemporary American political culture has moved rightward since the 1970s? Is it a way of saying that in the current climate of political opinion no current version of a Warren Court liberal would be nominated to the Court or could be confirmed? Or is it a way of suggesting that it is unclear what a judicial liberal would be in the twenty-first century?

In sum, if the stereotype of a twentieth century liberal Justice has now become a historical memory, and no such Justices serve or are expected to serve on the Court in the short run, then the only meaning of the term "centrist," as a political label, is non-right. And as such the label seems far too broad to be of much use. Surely there are ideological differences between Kennedy and Breyer, Ginsburg and O'Connor, Stevens and Souter that the label "centrist" obscures.

\textbf{C. Clarifying Centrist Jurisprudence}

Finally, there is the meaning of "centrist" as a jurisprudential philosophy. A fair amount of recent work has appeared on this topic.\textsuperscript{434} Moreover, there appears to be a common impression among

\textsuperscript{433} Eisler, \textit{supra} note 397, at 916–17.

\textsuperscript{434} The commentator who has done the most to portray jurisprudential centrism as a more considered perspective than the "ad hoc" decisionmaking posture associated with "centrist activism" by scholars in the 1980s has been Cass R. Sunstein. Sunstein's effort, which began with \textit{Incompletely Theorized Agreements}, 108 HARV. L. REV. 1733 (1995) [hereinafter Sunstein, \textit{Incompletely Theorized Agreements}] and culminated in \textit{ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT} (1999) [hereinafter
commentators as to what jurisprudential centrism on the Rehnquist Court means: it refers to a tendency of some Justices to decide cases on relatively narrow doctrinal grounds. The current association of jurisprudential centrism with what is now typically called judicial minimalism or incrementalism is reminiscent of the 1980s

**SUNSTEIN, ONE CASE AT A TIME**, was doubtlessly conceived in the shadow of potential rightward doctrinal revisionism, but has been more than an attempt to encourage a "center" of the Court to "hold." Sunstein's "judicial minimalism" draws on some of the contributions of process theorists, especially the idea of avoiding broadly generalized constitutional justifications which cannot sustain their application to a large range of future cases. But unlike the process theorists of the 1950s and 1960s, who argued that if transcendent constitutional principles justifying a decision could not be articulated the Court should leave the resolution to other branch actors, Sunstein seeks to make a virtue out of judicial decisions that are "incompletely theorized," grounded on tentative justifications that might (or might not) be extended over time, and which anticipate further dialogue about them in the culture at large. The real difficulty with most aggressive judicial intervention to resolve contested social issues, Sunstein suggests, is not that it is unlikely to be "principled" in the process theorists' sense, but that it is likely to be "maximalist": grounded on justifications that are too broad to bear the weight of future cases. Sunstein's approach thus anticipates cautious, "incremental" decisionmaking, featuring aligned sequences of cases that collectively may be capable of revealing a broader theoretical approach if that approach can be made to square with the foundational values of a democratic society. *Id.* at 259–63.

In a review of Sunstein's *The Partial Constitution* (1993), Mark Tushnet described Sunstein as "articulat[ing] a certain form of legal centrism." Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1072 (1993). Although in calling Sunstein a centrist, Tushnet was primarily referring to the substantive goals for constitutional law that Sunstein endorsed, he devoted considerable attention to what he called "the rhetoric of centrism," which included a discussion of Sunstein's theories of the judicial function. *Id.* at 1098–1114.

435. The currently common meaning of judicial minimalism equates it with what Sunstein has called "incompletely theorized" justifications for the results reached in cases. Minimalist justifications in an opinion tend to focus on the particular factual and doctrinal contexts of the case being decided and openly decline to extend the implications very far beyond those contexts. See Sunstein, *Incomplete Theorized Agreements*, supra note 434, at 1735–36, 1771–72; see also Liza Weiman Hanks, Note, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 STAN. L. REV. 903, 906 (1996) (noting Justice Souter's movement away from centrist Justices such as Kennedy and O'Connor in the early 1990s); Lyle Denniston, *The Pivotal Vote*, Balt. Sun, Oct. 1, 1995, at 1A (describing O'Connor's "style of crafting open-ended broadly phrased doctrine" as placing her at the center of the Court).

436. Judicial incrementalism is related to but distinct from judicial minimalism. It refers to a stance that emphasizes the step-by-step building of doctrinal frameworks through sequences of related cases. An incrementalist approach does not require that each step in the creation of a doctrinal framework be incompletely theorized, so it is not synonymous with minimalism, and Sunstein does not use the term. But since incompletely theorized justifications might be thought to anticipate the eventual statement of more fully theorized ones after doctrinal connections among sequences of cases are better appreciated, the postures of incrementalism and minimalism have been regularly linked by commentators. For a particularly helpful example, see Young, *supra* note 426, at 1183–84 (noting that incrementalism was a feature of the conservatism of Edmund Burke, who is the classic example of a situational or minimalist conservative).
literature that described centrist judges on the Burger Court as making “ad hoc” decisions. But whereas ad hoc decisionmaking on the Burger Court was seen as a reluctance, or an inability, to make fundamental choices among competing constitutional values, minimalism or incrementalism on the Rehnquist Court is commonly seen as a more considered and positive approach. Minimalism or incrementalism is a self-consciously centrist posture, commentators suggest, because it enables Justices on the Court to avoid embracing the interpretive principles associated with rightward constitutional revisionism without entangling themselves with the jurisprudential legacy of Warren Court activism.\textsuperscript{437} It also allows Justices to preserve doctrinal, theoretical, and even ideological flexibility in future cases.\textsuperscript{438} Such flexibility appeals to centrist judges because it widens their intellectual options while aggrandizing their power.\textsuperscript{439}

The association of judicial centrism with a minimalist or incrementalist jurisprudential stance represents a start toward understanding the jurisprudential implications of a judicial center. But unexplored issues remain. In particular, the emergence of attempts to describe the center of a Court in jurisprudential terms would appear to bring back into constitutional commentary the series of issues raised by the activism-restraint debate. If centrist minimalism and incrementalism reflect a theory of the judicial function, what sort of theory is it? Should the postures be regarded as a response to activism on the Court, or as versions of activism? Are they primarily interpretive postures, efforts to identify guiding principles for judges in the application of authoritative legal sources, or institutional postures, efforts to clarify when judges should exercise lawmaking power or let it remain in other governmental branches?

Some scholars are beginning to explore these issues.\textsuperscript{440} But it would seem that if centrism is to be identified with a particular jurisprudential approach, the context in which that approach has emerged needs to be fleshed out. If some Justices on the Court are minimalists, are there Justices who are maximalists?\textsuperscript{441} If some are

\textsuperscript{437} See Sunstein, One Case at a Time, supra note 434, at 9.
\textsuperscript{438} See id. at 9–13.
\textsuperscript{439} See Lane, supra note 421, at 26 (noting that some criticize O'Conor's "judicial minimalism" as a self-aggrandizing strategy, shuffling issues to the Supreme Court and, ultimately, her often-deciding vote).
\textsuperscript{440} See, e.g., Young, supra note 426, at 1151–54 (arguing that by adopting sweeping rules rather than narrow resolutions of particular sets of facts, an activist Court handcuffs future generations of jurists).
\textsuperscript{441} Sunstein, One Case at a Time, supra note 434, at 11 (applying the term "maximalist" (one who "sharply oppos[es] self-consciously narrow decisions") to Scalia
incrementalists, are there others who resemble some Warren Court Justices in their tendency to ground decisions on fullscale commitments to constitutional values? In short, to what jurisprudential tendencies are centrist Justices responding? And to what extent are the axes of the activism-restraint debate relevant to that inquiry? Has that debate disappeared from the discourse of commentary on the Court, as Blasi and Schapiro intimated in the early 1980s? Or does the context in which jurisprudential centrism has appeared suggest that a version of the debate may have resurfaced?

This is not the place to explore those questions in detail. But it would seem that if centrism is to emerge as an important perspective in the discourse of contemporary constitutional jurisprudence, its multiple meanings would need to be seen as a source of richness rather than a source of confusion. In the twentieth century history of commentary on the Court, such perspectives—liberalism and conservatism being obvious examples—have conveyed quite different messages as political ideologies and jurisprudential postures without losing their richness or becoming unintelligible. So it would seem if the idea of the judicial center is to emerge as an important ingredient in the mix of twenty-first century constitutional commentary, it would need to be understood as having significant political and jurisprudential implications. Moreover, those implications would need to be seen as sufficiently connected to make centrism appear to be a comparatively broad and deep approach toward constitutional interpretation by Supreme Court Justices.

Put specifically, can ideological centrism in the early twenty-first century—political moderation on a spectrum in which New Deal, Warren Court-style liberalism is no longer taken seriously and rightward constitutional revisionism is—become sufficiently yoked to jurisprudential minimalism or incrementalism for centrism to be seen as a coherent, potentially expansive alternative to revisionism? That is Sunstein's ambition in One Case at a Time, but his effort seems mainly hortatory.

and Thomas).

442. Id. at 4–5 (connecting minimalism to "a range of important and time-honored ideas in constitutional law" which combine in the proposition that "courts should exercise the 'passive virtues' associated with maintaining silence on great issues of the day."). Sunstein cites Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), as having an "obvious connection" to his effort to sketch judicial minimalism. Id. at 267 n.5. But the terms "activism" and "restraint" are not important to his discussion.
Here two lines of inquiry seem promising. Both begin with the hypothesis that on the current Court intellectual pressure is coming from the revisionist Justices on the right, with centrism being a response to that pressure. The first line posits a connection between sweeping doctrinal revisionism on the current Court and the interpretive techniques of fidelity to the text, history, and the original meaning of constitutional provisions that have been endorsed by several current Justices on various occasions. It then asks whether that purported connection sheds any light on the appearance of judicial minimalism and incrementalism. In particular it asks whether minimalism and incrementalism are being offered as alternative approaches to constraining the lawmaking power of judges.

In the modern jurisprudential universe, in which judges are conceded to exercise interpretive lawmaking power and a conflict between majoritarian democratic theory and lawmaking by unelected members of the Supreme Court is said to exist, one would expect theories of the judicial function, especially those endorsed by judges, to derive their normative appeal from their putative success in constraining judicial power. Unconstrained lawmaking by Justices with life tenure and little direct political accountability has been the bete noire of commentators on the Court for decades, and members of the Court have taken pains to disassociate themselves, rhetorically, from any intimation that power, rather than legal principles, is their currency.

443. Such a connection has been drawn in Erwin Chemerininsky, The Constitutional Jurisprudence of the Rehnquist Court, in THE REHNQUIST COURT: A RETROSPECTIVE, supra note 413, at 203-16. Chemerinisky, who believes that "[a]ll constitutional law is about value choices," concludes that "[t]he Rehnquist Court’s emphasis on original meaning is itself a value choice." Id. at 212. More pointedly, he suggests that "[t]he Court’s presentation of history as an objective basis for decisions really has subjective choices masquerading as objective rulings." Id. at 212.

444. For more on the relationship between perceptions that the Supreme Court is a “countermajoritarian” institution and an obligation on the part of judges to demonstrate that their constitutional decisions are constrained by history, the constitutional text, or the institutional and interpretive constraints of process theory, see White, The Arrival of History, supra note 27, at 523-58, 619-22.

445. The literature related to these propositions is vast. For one sustained effort to chart the emergence and evolution of scholarship and judicial decisions pivoting around the “difficulty” raised by the countermajoritarian status of the Supreme Court, see generally Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333 (1998); The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court, 91 GEO. L.J. 1 (2000); The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner, 76 N.Y.U. L. REV. 1383 (2001); The History of the Countermajoritarian Difficulty, Part Four: Law's Politics, 148 U. PA. L. REV. 971 (2000); The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 YALE
In this context, fidelity to the text, history, and the original meaning of constitutional provisions can be seen as a set of interpretive principles designed to constrain the exercise of lawmaking power by judges. If judges attend to the precise meaning of the Constitution's text, and supplement that meaning by using history to clarify the sense in which operative words and phrases in constitutional provisions were generally understood by those who framed them, they allegedly subject themselves to appropriate interpretive and institutional constraints. They do not substitute their potential understandings of a provision, as moderns, for the understandings of the drafters and ratifiers, and they do not therefore trespass beyond the institutional boundaries the framers of a provision meant to erect.446

In its idealized form, originalism would not be a revisionist theory of constitutional interpretation or of the institutional scope of judicial power. The "original meaning" of constitutional provisions, once discerned through appropriate techniques of judicial fidelity, would hypothetically remain forever in place.447 But it is abundantly clear that originalist jurisprudence has generated revisionist doctrinal postures toward late twentieth and twenty-first century constitutional issues because successive generations of Justices, since at least the 1930s, openly departed from the original meaning of constitutional provisions in applying them to new cases. The jurisprudential concept of a "living Constitution," whose judicially supplied meaning changes as new political, social, and economic conditions change, has been endorsed by many judges and commentators over the past several decades, and is irreconcilable with the interpretive philosophy of originalism.448 If the standard of constitutional interpretive correctness is fidelity to the historically grounded original meaning of constitutional provisions, a great many twentieth century interpretations of the Constitution by Supreme Court majorities have been erroneous. If one is a judicial originalist, they need to be revised.

The substantive implications of originalist-inspired constitutional


revisionism are commonly thought to tilt rightward on the contemporary spectrum of American politics. The previous discussion of conservatism as a political ideology suggests that such a conclusion is overly simple. Jurisprudential originalists should only be interested in "conserving" established judicial interpretations that are faithful to the historically grounded original meaning of authoritative legal sources. Originalism on the current Court can be said to point rightward only because contemporary political ideologies that endorse a limited conception of governmental regulatory and redistributive powers and a modest conception of federal power vis-à-vis that of the states—the mainstream conceptions of the framing period—are thought to lie on the right of today’s political spectrum. It may be appropriate to characterize originalist revisionists on the current Court as "rightists" in that sense, but the dominant feature of their jurisprudential stance is its revisionist doctrinal thrust.

Given the dual jurisprudential implications of contemporary originalism, centrist minimalism and incrementalism might be seen as efforts to avoid sweeping doctrinal revisionism without openly repudiating the idea that fidelity to the text and history of the Constitution can serve as a constraint on judges as interpreters. A difficulty with confronting originalism as a purported jurisprudence of constraint is that other twenty-first century theories designed to constrain judges as constitutional interpreters—squeezing judicial interpretations with current social practices, attitudes, or conditions, engaging in process-inspired exercises in judicial restraint, and being constantly sensitive to the countermajoritarian difficulty—allow judges more latitude for creative discretion than idealized versions of originalism, and thus arguably constrain them less. Moreover, the most direct attack on the theoretical coherence of originalism—that history is an elusive morass whose "meaning" is constantly being reinterpreted by subsequent generations and thus cannot serve as a foundational constraint—arguably brings its proponents back to

449. See, e.g., Chemerinsky, supra note 443, at 45 (only one of numerous essays on the current Court exhibiting that perception).

450. Although historians of the early Republic have advanced quite different causal explanations for the Framers' modest conceptions of governmental power itself, and of the reach of the federal government's power over the states, none has gainsaid their modesty, especially when compared with twentieth century conceptions. For an excellent summary of how the conceptions of the framers guided John Marshall's decisions, see KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 479–85 (2001).
square one; that "the Constitution is what the judges say it is" because no real constraints on judicial interpretation exist.

So it may be that centrist minimalism or incrementalism on the current Court is a way of avoiding doctrinal revisionism without being forced to confront originalists on their own textual and historical turf. This would seem especially true where centrist incrementalists continue to follow precedents whose interpretive pedigree can be shaken by an originalist assault, or where they avoid squarely overruling precedents whose viability now seems undermined. In the former instance, the initial constitutional justifications for the precedents need not be scrutinized; in the latter instance one of the arguments for originalism—that it avoids constant changes in constitutional law—is avoided.

All this raises the question whether centrist minimalism and incrementalism is anything more than a current version of the posture of avoiding full-blown constitutional decisions once championed by process theorists. If centrism is now to be thought of as an

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451. This phrase, regularly wrested from its context, was uttered in a 1907 speech by Charles Evans Hughes when he was Governor of New York. The paragraph in which the phrase appeared read as follows:

I have the highest regard for the courts. My whole life has been spent in work conditioned upon respect for the courts. I reckon him one of the worst enemies of the community who will talk lightly of the dignity of the bench. We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution. I do not want to see any direct assault upon the courts, nor do I not want to see any indirect assault upon the courts.


452. One might contrast the posture with more ambitious efforts by Justices opposed to doctrinal revisionism to fashion alternative sets of originalist-based interpretations. An example would be the historically grounded debate between Justices Souter and Thomas in religion cases. See Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 852–63, 868–76 (1995) (Thomas, J., concurring) (Souter, J., dissenting).


455. For all of Sunstein's efforts, his version of minimalism appears to boil down to that proposition, combined with an argument that incompletely theorized constitutional decisions reinforce democratic deliberation. See SUNSTEIN, ONE CASE AT A TIME, supra note 434, at 261–63. The latter argument was present in process theory literature of the 1950s and 1960s as well, although it did not use the "deliberative democracy" rubric.
emerging jurisprudential perspective, much more work in ferreting out its jurisprudential assumptions would seem necessary. An important concern of that inquiry should be whether a centrist approach, to serve as a considered alternative to originalism as a theory of judicial constraint, would need to disengage itself from the "living Constitution" approach to constitutional interpretation.\footnote{456. This assumes that judges and commentators will continue, at least in the short run, to emphasize the importance of constraints on judges as constitutional interpreters. One could of course argue that when judges are responsible for fashioning their own constraints in the form of interpretive approaches, those constraints are illusory. But the very appeal of originalism suggests that that argument, with its implications for a constitutional polity in which the Constitution is posited as the ultimate source of law and Supreme Court Justices are given constitutional interpretive authority, is widely treated as too discomfiting. See SUNSTEIN, ONE CASE AT A TIME, supra note 434, at 209–11 (discussing Justice Scalia's originalism).}

A second line of inquiry is raised by a recent article by Louis Bilionis.\footnote{457. Louis D. Bilionis, The New Scrutiny, 51 EMORY L.J. 481 (2002).} Bilionis portrays jurisprudential divisions on the current Court in quite a different way from most other contemporary commentators. Instead of distinguishing centrist from right-leaning Justices, he claims that the Court is dominated by a "conservative-centrist" majority, composed of Kennedy, O'Connor, Rehnquist, Scalia, and Thomas, whose principal goal is to establish a new model of judicial scrutiny on the Court.\footnote{458. \textit{Id.} at 485.} The model is designed to "smudge the boundary between strict scrutiny and the middle, creating space where more nuanced judgments in the spirit of measured reasonableness might occur."\footnote{459. \textit{Id.} at 515.} It "extends judicial review into the gray area between the poles of rigorous deference and aggressive activism. Bilionis's essay appears to be the first sustained effort to see centrism on the Rehnquist Court as part of the long history of changing standards of judicial scrutiny in American constitutionalism."

One need not accept Bilionis's description of judicial postures on the current Court to appreciate his effort to connect what others have seen as centrist minimalism or incrementalism to theories of judicial review. The history of American constitutionalism, since at least the early decades of the twentieth century, can be described in terms of competing theories of judicial scrutiny. One can start with the so-called "Lochner era," now the subject of intense scholarly interest, and trace the shifting dominance of quite different, and in places

\footnote{460. \textit{Id.} at 514.}
incompatible, constitutional review postures.461

From the uniformly aggressive scrutiny of the first two decades of the twentieth century, in which no subject matter considerations affected the Court's review posture, American constitutional jurisprudence has experienced periods in which commentators, and subsequently judges, attacked the Court for its lack of deference toward the policy judgments of legislatures and the Executive branch;462 experimented with the idea of "preferred" constitutional rights that triggered heightened scrutiny;463 championed a bifurcated review posture in which deferential scrutiny was treated as the norm but heightened scrutiny was reserved for a few areas, first outlined in the Carolene Products footnote;464 expanded the heightened scrutiny dimensions of bifurcated review during the later Warren Court

462. Id. at 315-18.
463. Id. at 318-21.

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Lovell v. Griffin, 303 U.S. 444, 452 (1938); Stromberg v. California, 283 U.S. 359, 369-70 (1931).

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see generally Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); on restraints upon the dissemination of information, see generally Lovell, 303 U.S. 444; Grosjean v. Am. Press Co., 297 U.S. 233 (1936); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); on interferences with political organizations, see generally Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg, 282 U.S. 359; Fiske v. Kansas, 274 U.S. 380 (1927); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis J., concurring); see also Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes J., dissenting); as to prohibition of peaceable assembly, see generally De Jonge v. Oregon, 299 U.S. 353 (1937).

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religion, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), or nationalities, Farrington v. Tokushige, 273 U.S. 284 (1927); Meyer v. Nebraska, 262 U.S. 390 (1923); Barrels v. Iowa, 262 U.S. 404 (1923), or racial minorities, Condon, 286 U.S. 73; Herndon, 273 U.S. 536; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Cf. South Carolina State Highway Dep't. v. Barnwell Bros. Inc., 303 U.S. 177, 184, n.2 (1938); McCulloch v. Maryland, 7 U.S. (4 Wheat.) 316, 428 (1819), and cases cited.
and began to experiment with "intermediate" levels of scrutiny in the Burger and Rehnquist Courts, producing the elaborate map of scrutiny levels, "tiers" of review, and doctrinal formulas for invoking them that has given twenty-first century constitutional exegesis such a blissfully recondite character. 466

All of this activity might seem so much gossamer were it not quite decisive in the Court's constitutional decisionmaking process. It may be that the most important jurisprudential consequence of the interplay between centrism and aggressive doctrinal revisionism on the current Court will be the eventual collapse of the bifurcated review model of judicial scrutiny. That model may now be in the stage of ultrarefinement and degeneration that marks the end of paradigmatic research designs. Smudging the boundary between "strict scrutiny and the middle" may be the first step in abandoning tiers of scrutiny altogether. In any event, the "new scrutiny" Bilionis identifies with centrism may be the first stirrings of something very important. Commentators might consider paying attention, particularly because charting the modification of established approaches to judicial scrutiny furnishes an opportunity to observe the details of doctrinal revisionism as it takes place.

In short, the idea of the judicial center, elaborated upon and dissected, seems capable of generating a spate of scholarly projects for twenty-first century constitutional commentary. The protean character of the idea itself, which can be a source of frustration for one trying to come to terms with it, might also be a source of intellectual stimulation. Late twentieth and early twenty-first century American constitutional scholarship has sometimes seemed haunted by a tendency in its practitioners to erect elaborate theoretical matrices from a few Court decisions whose staying power was overestimated. But the idea of a judicial center seems far more than a transient fad.

CONCLUSION

This Article began by intimating that the idea of the judicial center has had multiple connotations, none of which is entirely coherent and each of which stand in a potentially awkward relationship with one another. It concludes that despite these difficulties, thinking about Justices as being at "the center" of the current Supreme Court, or as being one or another varieties of

466. Id. at 328–30.
judicial centrists, takes one to the heart of some defining contemporary issues in twenty-first century constitutional law and jurisprudence. Because of the multiple meanings of a judicial center and their shifting use over time, unpacking the idea requires a certain tolerance for the arcane details of constitutional scholarship. What emerges at the end of the process, however, is a glimpse of a potentially new stage in the history of American constitutionalism. We would profit by cleaning up a lot of loose and misleading talk about "the center" and "centrism" as applied to Supreme Court Justices. But the idea of a judicial center actually delivers more than it might first seem to promise.