Public Perception and Judicial Activism In Civil Versus Common Law Systems

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The level of outside influences, such as political allegiances, public opinion, or amici curiae briefs on judicial decision-making and judicial activism has long been debated. With the increase in social movements and widespread media via technology in the 21st century, the way public perception can contribute towards judicial decisions has increased. This research project examines the impact of popular opinions on judicial activism in different legal systems. The project highlights search and seizure and same-sex marriage cases in the highest federal courts within the United States, which utilizes a common law system, and Germany, a civil law system. It is inconclusive as to whether common law or civil law systems tend to be more favorable towards judicial activism; however, both systems employ judicial activism when there is a major shift in public opinion and a large-scale social movement.

The rise in social movements and shifts in public perception may appear to outpace the methods that courts use to interpret laws. Nuanced issues, such as the invasion of privacy via technology in investigations or the ever-growing continuum of sexual orientation and identity, have been brought forward to court systems. This study considers the implications of how a shift in time and public perception can influence judicial decision-making in various legal systems.

When critiquing countries in their application and interpretations of law, scholars often look at the differences between two major legal systems: common law and civil law. Civil law is defined as a court's adherence to statutory or written law ("What is the difference between common law and civil law", 2021) while common law is often associated with customs and judicial precedent ("What is the difference between common law and civil law", 2021). It is important to look at the differences between common and civil law, especially in the context of today's civil liberty activism, or lack thereof.

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There are many different factors that can affect the way a judge may rule a case and whether they take an activist route. This depends on the institutional constraints, such as court organization or models of decision-making, but can also include outside factors such as the public and social movements. Scholars in political science and other related fields have weighed the benefits and losses between the civil and common systems, especially in the context of judicial activism. However, they have not done so with the recent shifts in civil rights movements sweeping across Europe and America in the 21st century.

The main research question guiding this paper is "what is the impact popular opinion plays in judicial activism in civil versus common law, especially in terms of civil liberty cases?" In other words, the question examines the circumstances in which judges lean towards judicial activism, focusing on a comparative analysis between the two different legal systems. This question breaks down into two categories, common and civil law systems, with Germany representing the civil law system and the United States representing the common law system. These countries were chosen because they represented each legal system best and followed similar movements in civil rights activism. The paper will delve into the specifics of how each legal system works and how it allows judges to rule in civil liberty cases. For example, with a civil law system, it could be that there is a document enumerating the rights of the people that judges must follow, which allows them to pursue far-reaching decisions. On top of civil versus common law systems, I will be looking into judicial activism, defined as a method for the judicial branch to pursue social change that focuses on judicial legislation, result-oriented judging, and failure to adhere to precedents. It is imperative to address what it is about the current climate that may make judges more willing to pursue judicial activism, whether it is institutional changes, technology, or public activism. The current climate includes the new wave of awareness and inclusiveness. Judicial activism and civil liberties go hand in hand, as civil liberties increase in scope while judges pave new pathways of interpretation for the law. Because this question examines the conditions that lead up to judicial activism, it will directly correlate to the level of judicial activism.

It is expected that countries following common law traditions are more susceptible to judicial activism, whereas countries following civil law systems are less likely to. Common law has more opportunities for judges to overturn precedent or to legislate, as their decisions are influenced by things beyond codified law. Civil law systems strictly follow the written laws, which does not allow much room for personal interpretation, giving the judges little wiggle room on more nuanced issues. Because of this, it is predicted that the United States will be more favorable towards judicial activism, with a higher percentage of cases indicating judicial activist rulings. However, it could also be that common law systems will vary in their efforts towards judicial activism based on the political environment in courts. For example, if there is a court whose majority believes in originalist interpretations of the law, there will be less judicial activism. Despite these differences, it is expected that public pressure towards the government, such as social movements or news coverage of specific issues, will increase the amount of judicial activism in both legal systems, especially if there is a large public base of support involved in the specific issue.

With the introduction, research question, and argument presented, the rest of the paper will delve into existing literature, the research methodology, a deeper dive into the two cases, my research results, and the conclusion.

LITERATURE REVIEW

This literature review delves into how existing academic scholarship helps us understand judicial decision-making and how judicial activism works within it. Throughout the review, we will explore the history and trajectory of judicial activism, factors contributing to judicial decision-making, how this concept differs throughout the world, and how it applies to social movements.

History and Definitions

The term 'judicial activism' was popularized in 1947 through Fortune Magazine, which defined it as occurrences where judges use courts as an instrument to promote social good (Kmiec, 2004). In this article, the authors divided judicial decision making into two camps: activists and self-restraints. Judicial self-restraint is generally defined as the preservation of the judiciary's limited role in American governance by judges, while still permitting other branches to legislate. Activists, on the other hand, believed that the judiciary should use the tools given to create far-reaching decisions that promoted positive change (Kmiec, 2004). After the publication of this article, the term gained popularity as political theorists began to research activism further. More federal and state courts began to use activist methods of thinking when rendering judgments (Kmiec, 2004). Eventually, the view of judicial activists shifted to encompass more ideas, such as the malleability of law, where precedent was acknowledged but not strictly adhered to and policy concerns were at the forefront (Kmiec, 2004). Law and politics were considered inseparable, so judges should use their political power to promote social change.

Modern day definitions of judicial activism can be broadened into further characteristics: invalidation of constitutional actions of other branches, failure to adhere to precedent, departures from accepted interpretive methods, result-oriented judging, and judicial legislation (Kmiec, 2004; Bolick, 2019). Invalidation of constitutional actions of other branches and judicial legislation are the more far-reaching methods that judges can employ for judicial activism; it is more common for the courts to overturn precedent or to narrowly depart from accepted interpretive methods (Bolick, 2019). Some scholars take a step further and argue that judicial activism is an instance where a court strikes down any laws that violate individual rights or go beyond congressional boundaries, violating the separation of powers (Bolick, 2019). Other scholars dispute this definition, stating that at the broadest level, judicial activism strikes down any piece of duly enacted legislation and does not even require the overturning of precedent. A narrower interpretation, known as principled judicial activism, states that judicial activism should avoid artificial obstacles to individual rights, and instead recognize that state constitutions are a safeguard for freedom and that courts should align precedents with the Constitution (Bolick, 2019). This prevents the judicial branch from overreaching powers that belong to the other branches, thus preserving its role in the traditional American legal system.

Factors Contributing to Judicial Decision Making

There are multiple factors that can influence judicial decision-making which contributes to the levels of judicial activism. On a global level, this includes things relating to national governance, such as the degree of democracy, human-rights protection, and support for international law (Meernik et al., 2005). A country's tendency to uphold the rule of law, especially international laws, and treaties, and to pursue human-rights protections will generally push for more freedom and security for social groups through activist rulings. On a national level, decision making derives its influences from individual ideology and policy preferences, the complexity of cases, and external pressure from the media, interest groups and other political actors (Meernik et al., 2005). From these ideas, there are three primary models of judicial decision-making: legal, attitudinal, and strategic. A country's use of these models varies based on the amount of power and independence judges enjoy, which can influence the amount of judicial activism within common versus civil law on a broader level.

In the legal model, courts interpret a statute and make a rational decision based on sources of authority without the interference of a judge's own ideological beliefs. These sources of authority include existing precedents, doctrinal cues, fact patterns and the most persuasive aspects of a statute (Moyer, 2012). For example, circuit courts follow intermediate standards set by the district area rather than creating their own precedent because circuit courts are supposed

to follow the actions of higher courts to ensure uniformity (Perino, 2006). They do not have high levels of authority relative to higher courts and must follow set precedent or pre-existing fact patterns. Legal scholars argue that ideology does not play a large role, as the professional training to become a judge inoculates them from their personal worldviews (Perino, 2006; Moyer, 2012). In this case, judicial activism stems from changes in higher courts or new legislation. While this is the most advised method in judicial decision-making, it is often a wistful view, as individuals all suffer cognitive biases that influence their decisions despite professional training (Moyer, 2012). In actuality, judges tend to use attitudinal and strategic models.

The attitudinal model posits that judges interpret laws based on their ideological preferences and beliefs (Segal & Spaeth, 2002; Perino, 2006). There is always a degree of personal belief based on upbringing, prosecutorial and academic experiences that affect the worldviews of each judge (Meernik et al., 2005). An example of this is seen in the rise of judicial activism in Colombia, where judges with neoliberal views in economics focused on bettering social circumstances that would lead to market-driven economic growth. Because of their ideology, the judges made more liberal, activist decisions (Nunes, 2010). Specialization in a particular part of law, like business law or immigration law, also creates a bias in a judges' understanding of matters. Subject matter experts are more likely to engage in ideological decision making, as they believe that they know best due to their past expertise (Curry & Miller, 2015). Another study found that the strength of ideology is a primary predictor in judicial decision making in cases that are complex. The complexity of cases is correlated with the relative power of ideology versus law as explanatory mechanisms. Ideology acts as a filter for all judges, so when a case becomes more complex, judges fall back to personal beliefs as it allows them more security (Moyer, 2012). In summary, judicial activism in the attitudinal model stems from a judge's ideological belief towards change and progression. This can be positive when there is a liberal-leaning court that wants to expand judicial power but can be limiting when the court is conservative-leaning court that wants to limit the role of the judiciary.

The strategic model argues that judges are strategic actors whose decisions are influenced by and dependent on their institutional settings and other political actors (Perino, 2006). A phenomenon known as the "hierarchy postulate" finds that judges at a higher level in the judicial hierarchy can implement more radical decisions (Perino, 2006). Trial court judges often have the broadest range of goals, such as getting the outcome right or avoiding reversal from appellate courts and must conform to precedent. District courts must also enforce norms in criminal and civil cases but have slightly narrower goals such as ascertaining case facts. They are bound by precedent from both Supreme Court and circuit levels, which limits their autonomy. Federal trial and appeals courts have an even narrower range of goals, which allows for an increased influence on policy ideology on their decisions (Zorn & Bowie, 2010). At the top level, the Supreme Court has the narrowest set of goals and the most autonomy when it comes to decision-making, allowing them the most independence in personal preferences when creating decisions that will have a lasting impact (Zorn & Bowie, 2010, Perino, 2006). The ability to implement their decisions is another key aspect in the strategic model. Because judiciaries do not have an implementation mechanism, they must rely on other branches and the public to follow their rulings. It is easiest to make activist decisions in vertical cases, where lower courts can follow in example (Hall, 2014). An example of such a case would be to create a new test that courts could use as a framework when ruling on a case. Alternatively, there is less activism in lateral cases, which are dependent on non-judicial actors and other branches to implement decisions (Hall, 2014). An example of this would be striking down a piece of legislation, as it relies on the legislative branch. Higher courts fear non implementation, as it weakens the legitimacy and effectiveness of the institution. Studies have found that judicial activism is more prevalent in

countries with certain ideologies and where there is a strategic environment that allows for actual implementation of their decisions (Meernik et al., 2005). The strategic placement of the courts in terms of implementation and autonomy can help determine levels of judicial activism.

Nonjudicial actors and public opinion also play a large role in pressuring judges towards certain decisions; often activist ones. Amicus curiae briefs are briefs that are submitted by interest groups or interested individuals to provide additional information regarding a case and how a certain decision will influence a sector of society (Collins, 2004). These briefs provide guidance and can affect the decision of the Supreme Court, even if on a minimal level, showing how public opinion has some influence. Justices do not want their decisions neglected, overridden, or ignored by their elected counterparts since they share policymaking authority with other branches (Collins, 2004). Should an interest group not be satisfied with the Court's ruling, they can lobby with the legislative branch to pass legislation that would change the nature of a decision (Giles et al., 2008). Public opinion also plays a large role in the institutional legitimacy of courts, as they rely on the goodwill of the citizenry to enforce their decisions. Courts would lack support if they did not provide certain decisions that would benefit a larger sector of society (Collins, 2004). Supreme Court decisions often indirectly coincide with popular public opinion because public opinion influences the selection of presidents, who in turn nominate judges whose beliefs align with their ideology (Giles et al., 2008). Amicus curiae briefs, interest groups and presidential elections are all instances in which public opinion can influence judicial decision-making and the levels of activism.

Judicial Activism Across the World

Adversarial legalism, defined as policymaking, implementation, and dispute resolution (Kagan, 2019), is used in common law systems where two advocates represent a position in front of impartial individuals. This authority comes from the malleable nature of American law, where there is a battle to make law more responsive towards values and interests (Kagan, 2019). Formal legal contestation, defined as the competing interests invoking legal rights, duties and procedural requirements backed by formal law enforcement, legal penalties, or judicial review, is a primary characteristic of adversarial legalism. Having formal legal contestation pushes judicial decision-making to be result-oriented so that decisions are implemented and respected (Kmiec, 2004). Another major characteristic is litigant activism, which is a style of legal contestation where disputing parties gather evidence instead of judges or government officials. Litigant activism frames certain issues in a way that reports on the implications of a decision, especially at a higher-level court. These two characteristics are a product of judicial institutions where the authority is fragmented and hierarchical control is relatively weak (Sanders, 2013). Both common and civil law systems use adversarial legalism (Kritzer, 2004; Kagan, 2019), but in varying degrees, which can contribute towards levels of judicial activism.

While common law, which has a higher degree of adversarial legalism, can open more opportunities for judicial activism and far-reaching decisions, there are still issues with adversarial legalism that could hinder judicial activism. American regimes are more oriented towards sanctions when there are violations, which lowers the levels of judicial activism, especially in criminal cases (Kagan, 2019). The lack of a centralized power in adversarial legalism indicates that there is a subsequent lack of direction when dealing with social issues and individual justice. For example, Congress is dominated by interest groups, who arguably have too much power over the entire policy process, and political parties, who are interested in local patronage as opposed to national policy (Kritzer, 2004). As a result, there is a fragmented governmental system that lacks the level of justice needed (Kagan, 2019). Another example of adversarial legalism harming judicial activism is seen in Canada; a bijural state where both common and civil law coexist. In their language policies, Canada exercises judicial restraint

by design because it aligns with the political establishment. The court could prefer to lean this way because it allows for easier political interactions between the other branches (Macmillan & Tatalovich, 2003).

Civil law systems are able to pursue judicial activism, usually through policies and culture. An example of this is seen in Japan, where they follow a more codified system. Japan has a professional national bureaucracy with a strong state background. The courts are tightly controlled by a judicial executive who reports directly to the party in power. This centralization in authority facilitates management and reforms instead of the courts (Sanders, 2013). Indonesia is an example of a civil law system that does not follow adversarial legalism but still allows for judicial activism through culture. Judges can make activist decisions here due to the Islamic culture of judges, which is more sympathetic towards social issues. Their government takes a more punitive stance towards drug issues, but the judicial arm focuses more on rehabilitation. Instead of incarceration, these judges prefer to promote drug rehabilitation programs (Mustafa, 2021). As discussed previously, common law systems have a greater level of independence due to the inherent structure of adversarial legalism (Kritzer, 2004) and court hierarchy (Zorn & Bowie, 2010).

On an international level, judicial decision-making in criminal law is based on the severity of the crimes, which does not allow for much judicial activism. Judges examine the legal case facts according to the Rules of Procedure and Evidence and UN Security Council's International Criminal Tribute statute, which weighs the gravity of the offense and the circumstances of sentencing criteria (Meernik et al., 2005). Judges tend to punish genocide crimes most severely, crimes against humanity with less severity and war crimes least severely. This is because genocide attempts to eliminate an entire group of people based on their identity while war crimes are not as targeted. Crimes against humanity, while still involving deliberate and widespread attacks against civilians, also generally do not include the intent to destroy based on identity (Meernik et al., 2005). The decisions in these cases adhere to a strict criterion, which does not allow for judicial activism on the international criminal stage. With that being said, a new wave of the "right to accountability" has emerged with transnational justice in criminal law, pushing for countries for stronger enforcement of human rights treaties. There is an increased level of state responsibility in investigating and prosecuting individuals. The states are held to a standard when criminalizing offenses to ensure that adequate punishment is met (Teitel, 2015). The shift to a stronger state of transnational justice and accountability allows for new and increased levels of human rights protections without judicial activism.

Judicial Activism and Civil Rights Movements

This section will focus on reviewing various social movements and how the courts have reacted to them, with the goal of understanding the role of public opinion in decision-making. While there are institutional constraints based on the set up of different court systems (Kagan, 2019), there are external public pressures that should be taken into consideration. Specific cases in this section will include immigration, environmental, and sexuality issues that have been prevalent in the media.

Immigration and migration of refugees have been a contentious issue with one side pushing for increased volume while the other side pushes for a more nationalistic stance. Immigration politics play an important role in the way their laws are applied. Case decisions pertaining to this topic are a product of broader political values, agendas, and identities (Kawar, 2012). This is best seen in a comparison between the different general viewpoints in the United States and France. The United States tends to frame immigration rights through a pluralism lens that focuses on racial proportionality in the country. France frames immigration through a commitment of social rights. In both instances, immigrants can enjoy legal protection; in the United States this is in the context of struggles on behalf of African Americans and in France this

is in the context of colonial racism and working groups, so there are different considerations for judicial activism (Kawar, 2012). Activism in the United States is more race based, whereas activism in France is more class based. Judicial decision-making can be influenced by the amici curiae briefs, as both countries have grassroots advocates working to lobby for increased rights (Kawar, 2012). In a multinational organization like the European Union (EU), these issues are more complex. The EU handles a large amount of migration from North Africa and the Middle East through the Mediterranean Sea and Turkey. The prevailing view of anti-immigration in Member States has prevented the legislative arm from making progress in immigration laws. The European Court of Justice (ECJ) has been able to take a more progressive stance by pushing for less limitations in how Member States can take in migrants, as it is less affected by popular opinion. However, this has brought into question whether the ECJ is overreaching their powers and taking on a legislative role (Wiesbrock, 2013). In these examples, it is clear that immigrants and refugees are highly dependent on public opinion to gain more rights and protections.

Environmental issues are usually debated on a national level, as issues tend to be more localized. There have been many class action lawsuits to reform the way countries have viewed the environment, but they are often not successful. This is illustrated in a study on the anti-GMO movement in both France and the United Kingdom, which failed in the courts. The authors advocate for the use of a judicial opportunity structure where activists are more aware of the organization and operation of the judicial system. While this does not deal with judicial decision-making, the ability of certain cases to reach a court can be an important factor in many social movements and civil rights cases (Doherty & Hayes, 2014). It could be that judges are hearing the shift in public perception and want to make change, however the obstacles in pursuing litigation are too large for environmentalists to overcome. Levels of judicial activism, then, also stem from the ability of certain social movements and organizations' abilities to get cases heard.

Another major group of civil rights litigation that has seen success across the world deals with homosexuality and the LGBTQ+ movement. Judges in the United States have faced major public pressure from protests and other forms of social movements to protect minority rights. As public opinion has increased in favor of these issues, more judicial decisions have mirrored this sentiment. This could be due to the social movement and protests that come with certain cases (Lewis et al., 2014). Judicial empowerment of social movements has had substantial positive effects on public policy because it expands the role of courts. One such instance is on the lesbian and gay rights movement in Canada. The courts have activist-influenced decisions that encourage the legislative branch to pursue similar policies, putting Canada in the forefront in this area of human rights (Smith, 2005). Judicial activism is not necessarily directly influenced by public movements and demonstrations, but the consequential change in public perception and opinions play a role in decision-making.

The literature has examined the historical trajectory and definitions of judicial activism, methods of judicial decision-making and how judicial activism works within different countries and movements. Judicial activism is prevalent in certain social movements and legal systems, all of which are dependent on the differing methods of judicial decision-making and contexts. Higher levels of activism come from attitudinal models and when there is a larger social movement. However, there are still some levels of activism in civil law and localized movements, which stem from other sources of authority.

METHODOLOGY

This research utilizes a qualitative research design to determine the levels of judicial activism in common versus civil law systems in civil liberty cases. A comparative case study method examining two cases with different systems and circumstances is used to examine each country's judicial system on a deeper level. In this case, it is a country with common law;

the United States, and a country representing civil law; Germany. These countries were chosen as they are the most popular and common examples of their respective court systems, with both countries showing the same social movement sweep. The research question focuses on the process of judicial decision making, so case studies allow for a better understanding of each process, especially due to the multiple contexts being considered. However, this design allows only for a narrow look at the cases and the results may not be applicable on a broader level. Comparative case studies are the preferred methodology as they can provide an in-depth analysis on the civil or common law systems and social movements in individual countries; it can also help emphasize the similarities and differences across the different contexts of each legal system.

For each country, the general history surrounding the civil liberty issue and the principles used in deciding those cases will be looked at. The court opinions examined will focus on the specific social issues, which are search and seizure and LGBTQ+ rights. Search and seizure were chosen because there have been small waves of social movements regarding racialization in these policies. LGBTQ+ cases were chosen because they experienced a large social movement in the early 2000s. Additional information on the social movements will be found through media outlets and websites. The history of these cases will provide an explanatory backdrop against general decision-making methods that judges generally employ and how that varies between civil and common law systems.

The next step is to look into case decisions and opinions surrounding these cases; the dates range from January 1st, 2010, to January 1st, 2022. The Supreme Court opinions were found on the website https://lp.findlaw.com/ and the German cases were found on the Bundesverfassungsgericht website. Specifically, for the search and seizure cases, I used the key words "search and seizure" while for the LGTBQ+ cases, I used the key words "same sex marriage." In every case, I perform a content analysis where I code the text in each case, scoring the case either 1 for yes or 2 for no. The categories include in favor of the movement, strays from precedent, judicial legislation, result-oriented judging, deferring to another branch, and references to public opinion, social movements or groups and media attention. The following definitions of the categories are as follows: 'in favor of the movement' is defined as a case that is in favor of the movement. 'Strays from precedent' is defined as a case overturning precedent or mentioning a precedent that they will not adhere to. 'Judicial legislation' is defined as attempting to create policy or to promote a certain new policy or program. 'Result-oriented judging' is defined as the justices wanting a certain result and creating an opinion from there. Lastly, 'deferring to another branch' is defined as the courts pointing the case to another branch to resolve. If there is mention of public opinion, social movements, or media attention, this will be noted as well.

After gathering this data, the data analysis method being used will be pattern matching with the descriptive data collected. Each decision will be compared to similar ones within a country to see if there are any general patterns that can affect judicial decision making in common law and civil law. Then, these larger themes will be compared to the themes of the other judicial system to get the similarities and differences. These numbers and patterns are then matched with an in-depth content analysis, which pulls quotes from certain judicial opinions that will either confirm or reject my hypothesis.

DESCRIPTION OF CASES

The research paper looks at the federal courts in both the United States and Germany. The highest federal court in the United States, known as the Supreme Court, is made up of nine Justices, eight of which are associate Justices and one acting as the Chief Justice. Justices are nominated by the president and confirmed by the Senate; after this, they enjoy a life tenure on the bench ("Supreme Court of the United States", n.d). Germany's federal court is called the Bundesverfassungsgerictht

(BverfG), with 18 total judges. There are two tiers to the BverfG, with the "First Senate" dealing with cases concerning human rights and the "Second Senate" handling cases with constitutional disputes. Judges are voted in by the legislative branch, with eight judges chosen by the Bundestag and the other eight chosen by the Bundesrat. At least three of the judges must be from a federal supreme court (e.g., the Federal Administrative Court or the Federal Finance Court). After being voted in, judges are on the bench for either 12 years or must retire after reaching 68 years in age ("Bundesverfassungsgericht", n.d).

With these two courts, the paper will hone in on specific social movements and issues. Social movements are defined as a loosely organized but sustained campaign in support of a social goal, typically either the implementation or the prevention of a change in society's structure or values (Encyclopedia Britannica, n.d). The following will be a background on each social movement and how the court has traditionally ruled in such cases.

Search and Seizure in the United States

Search and seizure fall under the Fourth Amendment, which states that people have the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (U.S. Const. amend. 4). Within this, there is the Exclusionary Rule, which allows for the ability to suppress evidence if it is deemed to violate the Constitution. This rule is controversial, as critics argue that this protects criminals while supporters argue that it serves as an effective deterrent to police misconduct (Arbetman, Perry, n.d). The Supreme Court has traditionally defined a "search" as an intrusion into an area covered by a reasonable expectation of privacy and does not require a physical entry (Katz v. United States, 1967). A search is considered reasonable when it is either based on a warrant, fits into an exception to the warrant requirement or delivers a new exception to the warrant requirement. The Court tends to employ a case-by-case approach, which allows for more flexibility (Arbetman, Perry, n.d). Another way of looking at cases is determining if police enforcement has probable cause, the fair probability that contraband or evidence of a crime will be found (United States v. Sokolow, 1989), to issue a search or seizure. In this case, the Court uses the "totality of circumstances" test, which is a method of analysis where decisions are based on all available information and looks to all circumstances of a case rather than any one specific factor (Arbetman, Perry, n.d).

It is in the gray area of warrant exclusions that raises debates in racial issues. One warrant exception is a stop and frisk, where an officer can pat-down an individual for weapons when they believe the person is acting suspiciously (Arbetman, Perry, n.d). Many claim that stop and frisk uses racial profiling, targeting minority racial groups. In 2009, African American and Latino people in the New York area were nine times more likely to be stopped and frisked by police compared to Caucasian residents, though their white counterparts are twice as likely to have a gun on them (Gold & Southall, 2020). In 2016, it was found that 90% of the people stopped and frisked were people of color (Jones & Stolper, 2018). Evidence continues to mount that race and ethnicity remain determining factors for police enforcement of low-level crimes in New York city, which points towards racial profiling(Jones & Stolper, 2018). Another exception that has caused a lot of social mobility is through automobile searches during traffic stops. Police can search a car when they have probable cause, due to the inherent mobility of the car (Arbetman, Perry, n.d). However, the issue of racial profiling arises, as data has shown that searches are most likely to occur in Black, Hispanic and Native American drivers relative to White or Asian drivers (Pickerill & Pratt, 2009). Many critics of traffic stops contend that this allows for racial profiling, because officers use racial stereotypes and profiles to draw conclusions of criminal activity. They often

act under the assumption that certain races are more likely to commit crimes than other races (Pelic, 2003). Police activity, especially regarding search and seizure and traffic stops, have come under fire in the summer of 2020, where there was a resurgence in the #BlackLivesMatter (BLM) Movement. This movement mobilized protests worldwide to try to change the police enforcement system.

Search and Seizure in Germany

Search and seizure in Germany come from the Basic Law for the Federal Republic of Germany, stating that the home is inviolable. Searches are only allowed when they are authorized by a judge via a warrant or when time is of the essence. The German Code of Criminal Procedure also includes statutes specifying the ability to secure and seize objects for evidentiary purposes when not voluntarily given (German Code of Criminal Procedure). Some exceptions for obtaining a warrant are when it is necessary "to avert danger to the public or the life of an individual…to confront an acute danger to public safety and order…[or] to combat the danger of an epidemic or protect young persons at risk" (German Code of Criminal Procedure). The German Code of Criminal Procedure (CCP) gives certain additional exceptions to obtaining a warrant, such as in cases of "hot pursuit" or "danger in delay" (Slobogin, 2001). The Court strives to balance the degree of intrusion and bad faith on part of the police against the importance of the evidence and the seriousness of the offense. If the intrusion is great enough, exclusion occurs, even if no illegality has happened. However, exclusion of crucial evidence, such as contraband or instrumentalities of a crime, is very unlikely (Slobogin, 2001).

One type of stop that an officer can do is an ID check, as it is required by law for citizens to carry a national ID card (Kambhampati, 2016). In the BLM movement, many spoke against the ID stops, mentioning that an officer can start with an ID check but can also end in the death of an individual. While most citizens are not checked, police sometimes employ racial profiling. Gohou, a Black man in his late 20s, claims to have lost count of how many times he's been stopped for an ID check (Pohlers, 2020). Similarly, an Indian tourist in Germany received 23 identification checks in the span of nine months. She believes that it is because officers think that she is "just another 'brown' person who could be a terrorist or a criminal" (Kambhampati, 2016). After speaking with Thomas Neuendorf, a police chief, she realized that these checks could be seen as illegal, since police officers only perform checks on areas where there is a suspicion of crime. Police only perform checks on suspicious looking people (Kambhampati, 2016), which could result in racial profiling. Officers also tend to use the internal term "NAFRI," an acronym for "North African repeat offenders," which increases the likelihood of stops and searches for North Africans (Knight, 2020). Germany has participated in the global BLM movement, but to a lesser scale.

Same-sex Marriage in the United States

Same-sex marriage falls under the Fourteenth Amendment's guarantee of equal protection of laws. Under the Fourteenth Amendment, there is the due process clause, where "no State shall deprive any person of life, liberty, or property, without due process of law" and the equal protection clause, requiring "states to practice equal protection" and to govern impartially without drawing distinctions between individuals based on irrelevant differences (U.S. Const. amend. XIV). Substantive due process aims to protect substantive rights not enumerated in the Constitution or the Bill of Rights, as certain liberties are so important that they cannot be infringed upon (Chapman & Yoshino, n.d.). In same-sex marriage cases, there is often a conflict between the Fourteenth Amendment's equal protection and due processes clauses and the First Amendment's guarantee to the freedom of religion (U.S. Const. amend. I).

The LGBTQ+ movement started after the Stonewall riots, where a group of gay costumers in Greenwich Village took a stand and rioted against police harassment. Subsequent

demonstrations organized in support of gay rights eventually led to many gay rights groups being started in every major city in the United States (Human Rights News, 2009). By the 1990s, the movement moved towards the fight for legal and civil rights through institutional channels. Significant victories in legalizing marriage rights were seen within each state, such as Good-ridge v. Department of Health in Massachusetts and Hollingsworth v. Perry in California (Li, 2021). These legal victories, paired with the movement's social media activism, like celebrity endorsements and public relations campaigns, successfully swayed public opinion and contributed towards the rapid progress (Li, 2021). Later, same-sex marriage was legalized federally in Obergefell v. Hodges. Beyond same-sex marriage, a significant trans-rights victory came during the court case Bostock v. Clayton County, establishing that sexual orientation and gender identity were protected in the Civil Rights Act of 1964 (Li, 2021).

Same-sex Marriage in Germany

Articles 5, 8 and 9 of the German Constitution protect the general rights of "freedom of expression, association and assembly" (Art. 5, 8, 9, GG), and this applies to everyone, including the LGBTQ+ community. Despite this, they had a law named Paragraph 175, which made sodomy, the criminalization of any act perceived to be homosexual, illegal; this law was repealed in 1994.

In the 1800s, the first gay rights activists began their movements in repealing Paragraph 175. However, their progress was thwarted by the two World Wars. After World War II, West Germany retained the same strict Nazi-era sodomy laws, prosecuting over 100,000 gay men, of whom over 50,000 were convicted in the span of twenty years (Shashkevich, 2018). East Germany, on the other hand, were more liberal with gay rights, repealing Paragraph 175 earlier. The changes to the law led to 4,000 being convicted in the same span of years (Dilley, 2019); a far cry from their western counterpart.

In 2001, Germany recognized same-sex relationships, granting greater rights to tax, inheritance, and provided many other benefits. Same-sex marriage finally became legal in 2017, despite stiff opposition from conservative politicians and the Catholic Church (Nair, 2019). The court cases examined in the study will fall directly in this window, showing how the judiciary branch may or may not have played a role in the legalization of same-sex marriages and overall LGBTQ+ rights.

RESULTS

Description of Table 1 (see Appendix A)

In the United States, there were 30 total cases relating to search and seizure from January 1, 2010to January 1, 2020. Of these posts, 53.33% were in favor of the larger movement in search and seizure, with 23.33% straying from precedent, 30% using judicial legislation, 33.33% being result-oriented and 3.33% deferring to another branch. Within each opinion, 6.67% had references to public opinion and there were no references to social movements, groups, or any media attention. In Germany, there were six total cases relating to search and seizure from January 1, 2010, to January 1, 2020. Of these six, 83.33% were in favor of the movement, with 66.67% using judicial legislation, 50% being result-oriented, and none deferring to another branch. 16.67% of these posts referenced either public opinion, social movements, groups, or media attention. With this being said, my argument that the United States employs more judicial activism is disproved, while the argument that public opinion and social movements play a large role is proved. It is clear in the data that Germany has displayed higher levels of judicial activism, which is surprising, as it is a civil law country.

United States Search and Seizure

In the United States, there were some instances of judicial legislation that stemmedfromthe changing times and advancements in technology. The Fourth Amendment has typically been applied to searches and seizures in car stops and evidence searching in houses, but the increase in surveillance technology has rendered

these methods of interpretation antiquated and useless. In the case of Carpenter v. United States, Justice Roberts, in the majority opinion, called out the Court for their tendencies of using "Founding-era understandings in mind when applying the Fourth Amendment" (Carpenter v. United States, 2018), which cannot be used for new phenomena, such as the ability to "chronicle a person's past movements through the record of his cell phone signals" (Carpenter v. United States, 2018). Because of the newer technology, the Court had to adapt a more activist method of interpretation for search and seizure, allowing for more leniency. For example, in Rodriguez v. United States, the dissent claims that the "majority constructed a test of its own that is inconsistent with our precedents" (Rodriguez v. United States, 2015). This is an indicator that the majority pursued judicial activism via judicial legislation, as they created a new test for interpretation, and did not follow precedent. The creation of this new test was explained as a something that could help the Court's decisions be more relevant in today's world. Birchfield v. North Dakota follows the same principles, where the dissent states that "today's decision chips away at a well-established exception to the warrant requirement" and the Court rejects a "bright-line rule and instead adopted a totality-of-the-circumstances test examining whether the facts of a particular case presented exigent circumstances justifying a warrantless search" (Birchfield v. North Dakota, 2016). In rejecting the warrant test that has long stood the test of time, the Court uses judicial activism via deterring from precedents.

Despite the small levels of activism, the pushback from the dissenters in many cases illustrated the Court's rigidity in judicial interpretations, following the judicial self-restraint camp. Dissenters have called out the Court's use of activism in newer technology, such as Justices Kennedy, Thomas, and Alito in Carpenter v. United States. They stated that the "Court rejects a straightforward application of Miller and Smith…[and] concludes instead that applying those cases to cell-site record would work as a 'significant extension' of the principles underlying them" (Carpenter v. United States, 2018). Another dissent from Torres v. Madrid stated that "until today, a Fourth Amendment 'seizure' has required taking possession of someone or something…[and] there is a reason why, in two centuries filled with litigation over the Fourth Amendment's meaning, this Court has never before adopted the majority's definition of a 'seizure'" (Torres v. Madrid, 2021). This quote directly shows how the dissent was unhappy with the majority potentially adopting a more relevant and nuanced definition for 'seizure', especially in the context of new technology.

The lack of references to public opinion, social movements or media attention could be because the Fourth Amendment is loosely tied to the Black Lives Matter movement. The Fourth Amendment does deal with searches and seizures, which are particularly issues in areas where stop-and-frisk policies were more prevalent but does not have as large of a link to the social movement as something like the LGBTQ+ movement. This somewhat proves my theory that a smaller movement, which can be more limited in scope and time, contributes to lower levels of activism. While there were a couple of references to public opinion, this usually came in the form of amici curiae briefs. For example, in Birchfield v. North Dakota, Justice Alito referenced respondents and their amici briefs. Racial issues nor the BLM movement were never directly referenced.

Germany Search & Seizure

Germany displayed higher levels of activism compared to the United States, despite their decisions quoting the various charters and laws. This could be because the Basic Law, which sets fundamental rights and protections, is more progressive and activist in nature. Their laws have adapted alongside technology and search and seizure laws. In 1 BvR 370/07, the Justices acknowledged the "recent developments in information technology [that] have led to a situation where technology systems are omnipresent and their use is central to the lives of many citizens" (1 BvR 370/07, 2008). Accepting

the changing times and the vulnerabilities of technology in search and seizure pushes the German court to pursue judicial activism. The Court uses judicial legislation when they ask the other branches to create laws that "protects against encroachment on information technology systems, insofar as the protection is not guaranteed by other fundamental rights" (1 BvR 370/07, 2008). In this case, the BverfG uses other tools, like the legislature, to pursue activism and judicial legislation. Another way that the BverfG displays activism is through striking down legislation that does not align with the Basic Law. 1 BvR 1299/05 is an example of this, as the Court strikes down §§ 112 and 113 TKG, which "violate the fundamental right to informational self-determination and to preservation of the secrecy of telecommunications" guaranteed under "Article 2.1 in conjunction with Article 1.1 of the Basic Law" (1 BvR 1299/05, 2012). The judges use the Basic Law as a framework in which legislation and practices must adhere to, and since the Basic Law is already progressive and protects individuals in search and seizure cases, this in turn allows the courts to participate in judicial activism as well.

Like the United States, there are not as many references to public opinion, social movements, or media attention. The cases in Germany are focused on unconstitutional searches on technology or the press, so it does not really deal with racial issues. Germany also does not have a deep history of racism against Black people, nor does it have strong ties with the Black Lives Matter movement. This could account for the reason why there are not as many references.

Comparison in Search & Seizure

In the United States, activism for search and seizure came from judges overturning precedent and pushing for a different method of interpretation. However, these instances were still limited by many Justices that fall under the judicial self-restraint camp, seeking to maintain a limited judiciary. This is clear in the language of the dissents. On the other hand, judicial activism in Germany stems from a progressive code of law and the ability for the Court to work within that structure to suggest legislation to other branches. This could help account for the reason why activism is more prevalent in Germany's case. It should be noted that Germany's opinions did not show any dissenting or concurring opinions, so it is not possible to see if there were also those who disagreed with the Court's stance.

Since search and seizure cases had less strong ties to a social movement, it could account for the lack of references or impact of public opinion. In the case of the United States, there are stronger ties to the recent BLM protests, but the efforts are more localized. In Germany, there were some BLM protests, but it was not as strong, and there is less of a history of racism against Africans.

Description of Table 2 (see Appendix A)

In the United States, there were eight total cases relating to same-sex marriage from January 1, 2000, to January 1, 2020. Of these posts, 62.50% were in favor of the LGBTQ+ rights, with 37.5% straying from precedent, 50% using judicial legislation, 50% being result-oriented and 12.5% deferring to another branch. Within each opinion, 12.5% referenced public opinion, 12.5% referenced social movements or groups and none referenced media attention. In the Germany, there were four cases relating to same-sex marriage from January 1, 2000, to January 1, 2020. Of these posts, 100% were in favor of the LGBTQ+ rights, with 25% using judicial legislation, 25% being result-oriented and none deferring to another branch. 50% of these cases referenced public opinion and none referenced social movements, groups, or media attention. Based on these statistics, my argument that social movements play a critical role in judicial activism is proven in both countries, despite having lower percentages in precedent, judicial legislation, and results-oriented judging.

Based on these results, the United States has a higher level of judicial activism, despite Germany's court's ruling more in favor of same sex marriage. There are higher levels of judicial legislation (50% in the U.S. as opposed to 25%

in Germany) and result-oriented judging (50% in the U.S. as opposed to 25% in Germany). The U.S. also had instances of overturning precedent, which is an indicator of judicial activism. Germany, however, did reference more public opinion, at 50% whereas the U.S. just did it 12.5% of the time.

United States LGBTQ+ Rights

Many court opinions in the United States had references towards judicial activism through judicial legislation and the overturning of precedent. In the majority opinion ofUnited States v. Windsor, Justice Kennedyoverturned the Defense of Marriage Act (DOMA) (1996). The legislation states that the words 'marriage' and 'spouse' are limited to legal unions between one woman and one man (Defense of Marriage Act, 2020). By overturning this key piece of legislation that was blocking same-sex marriage, Justice Kennedy acknowledges DOMA's violation of "basic due process and equal protection principles applicable to the Federal Government," stating that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution" (United States v. Windsor, 2013). Striking down this piece of legislation implies that the Supreme Court accepts the shift in times, where LGBTQ+ rights are being normalized, and shows that the Justices are willing to pursue activist measures, such as striking down legislation, as a method of increasing social good. The dissent, from Justice Scalia and Thomas, brings into question the ability of the Court to strike down DOMA, as they argue that "this case is about power in several respects. It is about the power of our people to govern themselves, and the power of this court to pronounce the law" (United States v. Windsor, 2013). The dissent mentions that the Court oversteps in its powerwhen invalidatingDOMA, which was adopted through democratic means. In the dissent, they state that the majority's actions "envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role" (United States v. Windsor, 2013). This line clearly implies that the dissenters believe that the Court has pursued too much judicial activism and has expanded the power of the Court in an unforeseen manner. United States v. Windsor is the primary example of Justices pushing for a result that they want, which is to have marriage equality and to provide more rights to the LGBTQ+ community, while using the Court's power to strike down legislation.

Another key case is Obergefell v. Hodges, which legalized same-sex marriage under the Fourteenth Amendment. In the majority opinion, Justice Kennedy recognizes the new "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process" (Obergefell v. Hodges, 2015). This decision came after pivotal protests over legalizing same-sex marriage and follows other lower federal courts that have pursued such an agenda. Justice Kennedy mentions the protests and the substantial cultural and political developments in the opinion, which indicates that the Supreme Court is somewhat affected by public opinion, social movements, and cultural shifts. The majority opinion is self-aware that they are using an activist standpoint, as it states, "there may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate [but] the respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage" (Obergefell v. Hodges, 2015). However, they justify their judicial legislation and result-oriented judging by saying that the Courts are open to those who can "invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act" (Obergefell v. Hodges, 2015). This sort of justification ticks off all the boxes of judicial activism, such as overturning precedent, not conforming to past methods of judicial interpretation and using

judicial legislation and results-based thinking. The dissenting opinion, from Justice Roberts, Thomas, and Scalia, points out that "this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be" (Obergefell v. Hodges, 2015). They go on to state that the dissent is not over whether same-sex marriage should be legalized, but rather about "whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law" (Obergefell v. Hodges, 2015). Once again, these Justices follow the self-restraint camp, pushing for democratic discourse and legislation through other branches instead of the judiciary. Though the decision paves way for positive social change and increased rights for a historically disadvantaged community, the ruling also extends power to the courts that has not been generally held by them, as courts were initially created to resolve controversies and disputes.

However, an important note when it comes to same-sex marriage is that when it is pitted against religion and the First Amendment, religion always trumps. This could be the reason why the number of cases in favor of same-sex marriage is 62.5% compared to Germany's 100%. One of such cases is Masterpiece Cakeshop v. Colorado Civil Rights Commission, in which a cake shop owner did not want to create a wedding cake for a gay couple based on religious freedom. Another case, Fulton v. City of Philadelphia, Pennsylvania, also illustrates the tension between religion and LGBTQ+ rights. The Catholic Social Services (CSS) sued the city of Philadelphia for barring them from placing children in foster homes because of their policy of not licensing same-sex couples as foster parents. The Court ruled in favor of the cake shop and CSS in both cases; this is because the First Amendment has been long enshrined into American identity and is inviolable, even in the context of social change. It could also be because the judges use an attitudinal model, where their ideological beliefs (Segal & Spaeth, 2002; Meernik, King & Dancy, 2005; Perino, 2006) of religion play a large role in their decision-making.

Germany LGBTQ+ Rights

While Germany has less judicial activism in its rulings, all the cases are in favor of increasing LGBTQ+ rights. They use references towards the Constitution, Basic Law, and other codified laws to justify their rulings. The general principle that is used is Article 3.1 of the Basic Law, which "demands that all persons be treated equally before the law" and "prohibits the exclusion of favorable treatment that violates the principle of equality in which favorable treatment is granted to one group of persons while it is denied to another group of persons" (Art. 3§1, GG). Since this legislation is in place and pushes for social change and equality, it allows for judges to have an activist stance. For example, in 1 BvF 1/01, the justification for allowing the introduction of the legal institution of the registered civil partnership for same-sex couples is that it does not infringe on the Basic Law. The judges state that "the Basic Law itself contains no definition of marriage but presupposes it as a special form of human cohabitation" (1 BvF 1/01, 2002), thus allowing the legislature "considerable freedom of drafting in determining the form and content of marriage" (1 BvF 1/01, 2002). Like in Japan or Indonesia, where they can enact activist rulings when there is a change in party legislation or cultural norms (Sanders, 2013), the Bundesverfassungsgericht can only do activist rulings if there are the right laws in place. However, there is also one instance of judicial legislation in which the Courts push for a social change in the legislature, by ruling that "the legislature has to enact a provision that is in accordance with the Constitution until 30 June 2014" (1 BvF 1/01, 2002) as a way to increase LGBTQ+ rights in adoption.

There are also more apparent activist rulings that refer to public opinion and perceptions as well. In 1 BvR 1164/07, the Court notes that the "image of the family has fundamentally changed" (1 BvR 1164/07, 2009), and because of this shift in the way families are perceived, more rights are

added to individuals. Similarly, in 1 BvL 1/11, the Court acknowledges that "homosexuality was a criminal offence and socially unacceptable at the time that the Basic Law was drafted," however this is due to the fact that "the idea of same-sex parents was completely beyond imagination at the time" (1 BvL 1/11, 2013). In today's day and age, especially with the sweep of the LGBTQ+ movement that led to resulting changes in the legal status of homosexuals, the Court notes that "not only the law in respect of same-sex couples that has changed considerably but also society's attitude to homosexuality and the life of same-sex couples" (1 BvL 1/11, 2013). It is because of this shift in the way the public views homosexuals that pushes the Court to uphold activist laws and to push for further rulings that increase social rights.

Comparison in LGBTQ Rights

As previously noted, the statistics point towards the United States having more activist rulings and wording in their opinions, while Germany does have a higher rate of rulings in favor of the movement and references towards public opinion. This is due to the fact that the United States deals a lot with religious freedom when deciding LGBTQ+ cases. One source of similarity is the fact that both countries acknowledge the changing times and the increasing rights that come with this. In both Courts, judges have stated that the institution of marriage has shifted towards being more inclusive, and that the public's views on this have changed as well. This reference towards public opinion may be to a larger degree in Germany, but confirms that a larger social movement, which has lasted a longer period, with more media attention could contribute to higher levels of judicial activism.

Where these countries really differ is their sources of judicial activism. Judicial activism in the United States comes in forms of overturning precedent, such as Obergefell v. Hodges, and judicial legislation or results-oriented judging, such as United States v. Windsor. The United States relies on federal laws, the Bill of Rights and the Constitution, precedent, and previous methods of interpreting law to enable activist rulings. On the other hand, Germany's judicial activism stems from the text in the Basic Law, along with new legislation that is created as times change. Germany, as a member of the European Union, also derives some of the authority for judicial activism from EU laws. By referencing some of the EU's laws and ruling, Germany has another venue that the Court can use when justifying their rulings.

Another major difference is in the content of the opinions. While Germany's opinions follow the legal model in listing out several codes that the case either complies with or does not (Perino, 2006; Moyer, 2012), the United States opinions reference a lot of precedent and customs. The text in the United States opinions also shows the divide between the two camps of judicial decision making, where one group aims to enact social change while the other aims to maintain the position of the Court relative to the other branches. Germany's opinions do not contain dissenting or concurring opinions, which makes it hard to see if there is a similar struggle over the place that the Court holds in the overall government structure.

Overall Findings

The findings as to which legal system has higher levels of judicial activism are inconclusive. The United States displayed higher activism in LGBTQ+ cases, which was expected, but Germany displayed higher levels of activism in search and seizure cases. This is surprising, as civil law systems are supposedly rigid and unable to really pursue that activism, especially in a topic that is less popularized in the media. There are many reasons that could help explain this disparity; how ideology is measured in Europe and the history of racial relations, and the BLM movement may account for this. Political ideology in Europe is not as bipartisan as it is in the United States because they do not adhere to a two-party system. Instead, Germany has a diverse pool of parties that range from socialist to conservative, where more political viewpoints are accounted for. Since there is a lack of strong bipartisanship between parties,

the BVerfG is much less political with more aggregated political views that may play a role in their decision-making. On the other hand, the Supreme Court decisions can be more partisan in nature, with judges voting along party or ideological lines, which contributes to the lack of judicial activism. Another explanation would be the history of racial relations in Germany compared to the United States. The United States faces more of an impact from a history in slavery and Jim Crow laws, while Germany has largely assimilated. Having the increased tensions in race in the United States makes search and seizure a more complicated and tense issue that may prevent judges from ruling in an activist manner.

On the other hand, the findings for social movements or public perception playing a role in judicial activism are proved. It is found that LGBTQ+ cases have more references to public opinion compared to search and seizure cases, and thus display more activism. This could be because the LGBTQ+ movement has been around for a longer period, with a very widespread movement globally. The cases started in the early 2000s, which coincided with the peak of the movement. The search and seizure cases examined range from 2010 to 2022, which spans before and after the rise of the BLM movement, which could be the reason why there are less references to the movement and public opinion. Beyond the day range, the BLM movement is also smaller in scope and not as strongly linked to search and seizure cases. BLM protests were more localized in the United States, so that can help account for why Germany has fewer references. Search and seizure cases also have a less direct link to race than LGBTQ+ cases due to the movement, so that can account for the reason why the BLM movement did not play a large role in impacting decision-making.

CONCLUSION

In this paper, I have examined the impacts of popular opinion on judicial activism in civil versus common law systems. I believed that common law systems would have more activism and that both legal systems would have activism if there was a large social movement or shift in public perception. Through a comparative case study matched with content analysis, the results were unexpected. The first aspect of the argument, where I hypothesized that common law has more judicial activism than civil law, is inconclusive. Germany has higher levels of judicial activism in search and seizure cases while the United States has higher levels of activism in LGBTQ+ cases. The inconclusive results indicate that legal systems may not have as much of an impact than originally thought. The second aspect of the argument, where I hypothesized that topics with a larger scope in social movements and major perspective shifts have more impact on judicial activism, is proven. The homosexuality movement has a direct link to the LGBTQ+ cases and is a global phenomenon that lasted many years did contribute to more judicial activism in both countries. Search and seizure cases are less tied with race and experienced a smaller BLM movement, so there was less of an impact. These results indicate that there is a level of impact that public perception and social movements play. The LGBTQ+ movement really changed the way the public understand sexual orientation and identity, which in turn pushed the courts to have a more nuanced view on these issues as well.

These results may be skewed due to the small sample size, as there under ten cases reviewed in Germany for both topics. Future studies can remedy this by looking into further topics with more cases or by doing a deeper dive in these cases over a longer period. The results are also limited because they are restricted to just the LGBTQ+ and BLM movements in Germany and the United States. While the results can be the start of a pattern, future studies should examine other social movements or even look at totally different countries and topics to see if the comparison still holds. An interesting investigation would be for non-western countries as well, as their circumstances are totally different.

APPENDIX A
Descriptive analysis tables from content analysis

Table 1

	Search and Seizure Cases			
	United States		Germany	
Total number of cases	30		6	
	Number of posts:	Percentage of total:	Number of posts:	Percentage of total:
Opinion Content:				
In favor of movement	16	53.33%	5	83.33%
Strays from precedent	7	23.33%	n/a	n/a
Judicial legislation	9	30%	4	66.67%
Results-oriented judging	10	33.33%	3	50%
Defer to another branch	1	3.33%	0	0%
References in opinion:				
Public opinion	2	6.67%	1	16.67%
Social movement or group	0	0%	1	16.67%
Media attention	0	0%	1	16.67%

Table 2

	Same-sex Marriage Cases			
	United States		Germany	
Total number of posts	8		4	
	Number of posts:	Percentage of total:	Number of posts:	Percentage of total:
Opinion content:				
In favor of movement	5	62.50%	4	100%
Strays from precedent	3	37.50%	n/a	n/a
Judicial legislation	4	50%	1	25%
Results-oriented judging	4	50%	1	25%
Defer to another branch	1	12.50%	0	0%
References in opinion:				
Public opinion	1	12.50%	2	50%
Social movement or group	1	12.50%	0	0%
Media attention	0	0%	0	0%

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