The debate concerning the manner in which judicial review is, and/or should be exercised by the United States judiciary – the U.S. Supreme Court in particular – is perennial, and continues to be mired in controversy. Numerous arguments and theories have been put forward, either in support of, or against ‘judicial activism’ (as opposed to ‘judicial restraint’), by lawyers, politicians, academics, the public and the media alike – with no logical conclusion to the debate in sight. In fact, commentators within the U.S., as well as observers outside the country, have noted with concern how this debate has been steadily politicized over the decades, possibly to the point where the terms ‘judicial activism’ and ‘restraint’ have lost any functional meaning. In the words of Rebecca Brown, ‘judicial activism’ has become one of those “-isms” hurled in anger, in frustration, in condemnation. Like any other slur it is intended to sting, to discredit. In truth, however, it has more of the ring of ‘your mother wears combat boots’ than of a genuine critique.

With Measuring Judicial Activism, Lindquist and Cross join an increasing number of scholars that are attempting to change the nature of the judicial activism/restraint debate through the development of more politically ‘neutral’ theories – moving the debate, in other words, from the strictly normative to the descriptive. As a point of departure, the authors make it explicit that ‘activism is best conceptualized in terms of a continuum between activism and restraint, with justices or courts compared in terms of gradations along that continuum’, and that they ‘make no claims about whether a position between the two poles of activism and restraint is normatively appropriate’ (at 31). What makes Measuring Judicial Activism of particular interest, however, is that its claims are supported by credible empirical legal research.

1 Dr. A. Naudé Fourie LL.M. works as an assistant professor at the Erasmus School of Law.
2 Quoted by the authors, at 29.
The book opens with a historical overview of the ‘political and academic debate over judicial activism’ in the U.S. Given how much has already been written about this subject, the chapter’s brevity is not altogether unwelcome. In Chapter 2, the authors set out the theoretical framework and methodology by which they intend to ‘measure’ the relative degree of judicial activism of individual U.S. Supreme Court Justices between 1954 and 2004. The authors analyse individual judicial voting data against various ‘dimensions of activism’ (at 32), which constitute a synthesis of existing theoretical work done by Canon, Young, Marshall, and Cohn and Kremnitzer. The bulk of the book is conveyed to the measurement of three specific dimensions, that is: ‘majoritarianism and deference to other branches / governments’ (Chapter 3: Judicial Review of Federal Statutes, Chapter 4: Judicial Review of State and Local Laws, and Chapter 5: Judicial Review of Executive Branch Actions); ‘institutional aggrandizement’ (Chapter 6: Justiciability and Judicial Activism); and ‘legal stability’ (Chapter 7: Overruling Supreme Court Precedents). The book concludes by summarizing the authors’ ‘multidimensional view of judicial activism’ in Chapter 8, including a few normative considerations in the context of the authors’ ‘empirical findings’ (at 134).

By electing to employ existing theories, the authors succeed in solidifying – and indeed simplifying – the theoretical basis of their analysis. In line with this methodological choice, the metrics devised to measure each of the three ‘dimensions of activism’ are also relatively straightforward and are based on readily attainable and verifiable data. For instance, ‘majoritarianism and deference to other government actors’ is measured by the frequency of individual votes that are meant to ‘strike down’ federal, state, local and executive decisions on ‘constitutional grounds’. In addition, this dimension is measured by assessing ‘the degree to which those votes were driven by the justices’ ideological preferences’ (at 47).

Yet, for all the benefits associated with simplification, a significant degree of essential theoretical nuance and complexity has, perhaps inevitably, to be sacrificed in an empirical analysis such as this – as the authors also acknowledge (e.g., at 34-35, 44-45). Clearly, the availability of reliable data has to be a primary driving force in the design of a credible empirical legal study of this nature. However, for readers familiar with the work of, for instance, Canon, Young, Marshall, and Cohn and Kremnitzer, the...
analytical limitations implicit in Measuring Judicial Activism (both reflected in the limited number of dimensions analysed, as well as the lack of theoretical nuance reflected in the measurements themselves). 10 may come as a disappointment.

The authors compensate for this shortcoming to some extent through the results of their analysis – which culminates in the presentation of the relative degree of judicial activism of various Supreme Court Justices, here synthesized as ‘ideological activism’ (on the one axis) and ‘institutional activism’ (on the other) (at 136). The results of an empirical legal study that, for instance, convincingly place Justices Scalia and Ginsburg at almost identical degrees of ideological and institutional activism, are bound to rejuvenate the debate – to say the least.

Since the book is clearly U.S.-centred, several of its more the detailed findings, concerning individual Supreme Court Justices in particular, might be of limited value to constitutional scholars outside the U.S. However, given the steady expansion of the ‘judicial activism/restraint’ debate outside U.S. constitutional circles, Measuring Judicial Activism, remains an interesting read – and, indeed, has much insight to offer non-U.S. lawyers with an interest in constitutional law and empirical legal studies. As such, the book is an excellent example of how an empirical legal study of this nature could be set up, although it might have offered more insight into its methodology and detailed analyses through an appendix. For scholars who believe the time may be ripe to conduct similar studies on, for example, the Dutch Raad van State or the European Court of Justice, 11 Measuring Judicial Activism will provide more than ample food for thought.

10 For instance, the authors note the difficulties associated with ‘evaluating whether the imposition of certain remedial measures reflects judicial activism’, since ‘the choice of remedial measures’ is often ‘based on the activities of the defendant’ (at 35).
11 As an aside, in doing background research for writing this book review, I have come across a database of ECJ decisions, compiled by Thomas L. Brunell, Carol Harlow, and Alec Stone Sweet, which can be accessed at http://www.eu-newgov.org/data-lists/deliverables_detail.asp?Project_ID=216.