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An Intellectual History of Judicial Activism

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AN INTELLECTUAL HISTORY OF JUDICIAL ACTIVISM

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The term "judicial activism," despite its wild popularity, is poorly understood.[1] For pundits, politicians, judges, and the public, activism-talk is so commonplace that it masquerades as something natural and timeless.[2]

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[1] 3,815 journal and law policymaking articles used the terms "judicial activism" or "judicial activist" during the 1990's; these terms surfaced in another 1,817 articles between 2000 and 2004. Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,* 92 CAL. L. REV. 1441, 1442 (2004).

[2] *See, e.g.*, Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, Jul. 9, 2007 at A16 (pointing to the Supreme Court's decisions about the McCain-Feingold campaign finance law, the Civil Rights Act of 1964, antitrust, the Partial-Birth Abortion Act, and school integration); E.J. Dionne, Jr., *The D.C. Handgun Ruling: Originalism Goes Out the Window*, WASHINGTON POST, June 27, 2008 at A17 (stating that "judicial activism is now a habit of the right, not the left, and that 'originalism' is too often a sophisticated cover for ideological decision-making by conservative judges"); *ADA Restoration Act of 2007*: Hearing on *H.R. 3195* Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. (statement of Ala. Rep. Arthur Davis); U.S. Senator John Thune, Remarks on the Nomination of Judge John Roberts to be Chief Justice of the United States Supreme Court (Sep. 28, 2005); Boumediene v. Bush, 128 S.Ct. 2229, 2282 (2008) (Roberts, C.J., dissenting) (accusing the majority of activism for "merely replac[ing] a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date" in an attempt to control federal policy

Even among legal experts, few know whence the term came or why it has become mainstream, and despite frequent objections to activism's overuse, no scholar has adequately explained what (if anything) the term ought to mean.[3] This Article explores such issues in detail for the first time.

Today is an especially apt time to revisit judicial activism, as the next few years will yield transformative Supreme Court appointments,[4] which will shift judicial activism debates again to the fore. By advancing current knowledge about judicial activism, this Article hopes also to address a persistent schism in modern discourse. On one hand, the public sees judicial activism as a key framework for criticizing judges' conduct,[5] yet most legal academics dismiss activism as an irretrievably vague "myth" or "cliché."[6] This disconnection is mutually counterproductive. When properly understood, debates over judicial activism are a vital part public life, and they represent the legal academy's highest calling, to which professional scholars are uniquely suited. Modern confusion and disdain concerning the *term* "judicial activism" have obscured a deeper *concept* of judicial activism that is a pillar of our legal system. By analyzing both the rhetoric and the idea of judicial activism, this Article rejects the term's scattershot applications and seeks to uncover cultural issues that have sustained the concept's continued relevance.

This Article has three parts. Part I offers a history of "judicial activism" to explain where the term originated and why it spread. Some of this

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on enemy combatants); U.S. v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) (stating that the court is falling into "old pitfalls" by failing to exercise proper judicial self-restraint).

[3] See, e.g. Kmiec, *supra* note 1; Joseph Isenbergh, *Activists Vote Twice*, 70 U. CHI. L. REV. 159 (2003) (analyzing the cumulative weight of activist votes against those of self-restrained judges, and positing that the relatively greater influence of activist votes tilts self-restrained judges into activism); David E. Klein, *Modesty, of a Sort, in the Setting of Precedents*, 86 N.C. L. REV. 1213 (2008); Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 837 (1955); Edward McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy*-Making, 33 N.Y.U. L. REV. 775 (1958).

[4] The winner of the 2008 Presidential election will almost certainly have the opportunity to shape the court by appointing one or more Justices. *See, e.g.*, David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1044 (2008) ("The amount of influence that Roberts and Alito can exercise over the Court during the next several years depends on . . . . the outcome of the 2008 election. . . . [T]he replacement of Justices Souter, Ginsburg, and Stevens with liberal nominees will leave the Court's status quo essentially unchanged—a Court heavily dependent on the leanings of Justice Kennedy, who . . . is not a conservative in the mold of Justices Roberts and Alito, much less Scalia and Thomas.").

[5] *See, e.g.*, Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 383 (2008); Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1753 (2007); Editorial, *A Rush to Judgment*, AMERICAN JUDICATURE SOCIETY, January 30, 2002, *available at* http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=15; Terry Frieden, *Ashcroft: 'Activist' Judges can put Nation's Security at Risk*, CNN, November 12, 2004, *available at* http://www.cnn.com/2004/ALLPOLITICS/11/12/ashcroft.judges/index.html.

[6] KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS (2006); Richard Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L. J. 1 (1983); Randy Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J. L. & PUB. POL'Y 273 (1987).

history is particular to a 1947 *Fortune* magazine article by Arthur Schlesinger.[7] But to explain why "judicial activism" caught Schlesinger's ear and the public's imagination requires a broader view of American judging. After surveying such judicial history, I criticize several modern uses of the term "judicial activism." Although each has plausible ties to Schlesinger's article, none presents a supportable definition of activism. Indeed, if these modern definitions were the only possible interpretations of "judicial activism," scholarly critics might be right that the term should vanish from educated discourse.

Part II attempts a different approach. Contrary to conventional wisdom, I propose that judicial activism has no inherent link to boosting individual liberty or curbing governmental power. Instead, the activist label is useful only where a judge has violated cultural standards of judicial role. Such standards are not formally enforced and are only partly stated. Yet they are vital to any legal system that (like ours) contains broad judicial discretion. Many applications of judicial power are nearly impossible to supervise, including for example Supreme Court decisions and some trial courts' judgments of acquittal. I propose that "activism" is an appropriate, though limited, term of condemnation where such unreviewable authority is abused.

Part III considers practical problems in defining and debating standards of judicial activism. My goal is not to sketch a specific list of do's and don't's, but rather to chart basic methods of constructing cultural norms of judicial conduct. This is harder than it seems. As I will show, neither our most orthodox legal authorities – text and original history – nor our most scholastic discussion of judging – jurisprudential theory – meets the task. Nor has the scholarship of Justice Antonin Scalia produced an authoritative answer, despite his privileged vantage point for addressing such issues. Defensible standards of judicial activism cannot be deduced from a simple page of history or an exercise in abstract reasoning. On the contrary, imperfections in orthodox sources' analysis of judicial activism clarify the need for a more nuanced analysis. I propose that our legal culture uses a two-strand approach to judicial role—applying interlocked techniques of narrative and prescription like cords in a rope. Normative generalizations about judging require illustrative stories, and precedential examples need justificatory principles.

At bottom, this Article suggests that debates over judicial activism represent ongoing efforts to build what G. Edward White called "The American Judicial Tradition," or what I might call "The American Judicial Traditions."[8] Although cultural norms of judicial conduct are forever

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[7] Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73.

[8] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (3d. ed. 2007).

contestable, that does not counsel despair. Even as American political life has long wrestled with protean words like "the People" and "Government," each set of American lawyers, scholars, and students must confront for themselves questions about judicial power and limits.[9] The term "judicial activism," properly understood, is as good a home for such debates as any.

I. A HISTORY OF JUDICIAL ACTIVISM

This study's first step is to distinguish the *term* judicial activism, which was coined by Arthur Schlesinger in 1947, from the *concept* of judicial activism, which has older foundations. Section A starts with Schlesinger. Although some commentary implies that judicial activism's meaning was once clear and is only now clouded,[10] the opposite is nearer the truth. Schlesinger's original introduction of judicial activism was doubly blurred: not only did he fail to explain what counts as activism, he also declined to say whether activism is good or bad. Flaws in Schlesinger's account, however, did not stop the term judicial activism from rising to power, buoyed by unanticipated post-1947 events such as the desegregation cases and the birth of federal courts scholarship. Such events help explain why "judicial activism" is so hard to define, but they do not fully capture why the term draws continued attention.

Section B offers a prehistory of "judicial activism" that connects Schlesinger's terminology with deeper concepts of judging. Schlesinger was partly conscious of such connections; one reason he cut explanatory corners was his belief that the term incorporated traditions traceable to the eighteenth century. These founding-era references mark a perceived continuity between Schlesinger's "activism" and anxieties about judging throughout history. Although Part III will more closely analyze certain historical details, even a brief introduction shows that judicial activism was not just a catchy word. The term evoked as baselines certain hallowed traditions of judicial conduct, even though Schlesinger did not analyze these traditions' content.

Section C shifts to the present, identifying four uses of "judicial activism" that are popular today. For modern scholars who define and analyze activism, the term most commonly means: (i) any serious judicial error, (ii) any undesirable result, (iii) any decision to nullify a statute, or (iv) a smorgasbord of these and other factors chosen ad hoc. All of these interpretations have colorable claims as genealogically "true" variants of

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[9] *See* DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE (1998).

[10] *E.g.,* Kmiec, *supra* note 1, at 1442, 1451; Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1079 (2002).

judicial activism, and each surpasses Schlesinger's breezy essay. Yet I will argue that these definitions are analytically self-destructive; that is, if such modern interpretations were correct, then the term judicial activism would be a useless distraction. Accordingly, neither Schlesinger's exposition of judicial activism nor prevalent modern analyses captures the underlying values that animate the term.

A. Schlesinger's Windfall

Judicial activism's celebrity makes it easy to forget the term's shallow roots. Compare two phrases that Schlesinger made famous: "Imperial Presidency" and "Judicial Activism." When Schlesinger analyzed the former, he wrote a 500-page book that described early Americans' fears of a King George Washington along with contemporary fears about Richard Nixon.[11] By contrast, Schlesinger minted "judicial activism" in a fourteen-page *Fortune* article, tucked among advertisements for whisky and Aqua Velva.[12] In describing Schlesinger's essay and activism's rise to prominence, this Section argues that Schlesinger did not coherently define judicial activism, and that later events have fueled the term's popularity but have further confused its meaning.

In its original context, the casual tone of Schlesinger's article is notable but not surprising. Per its title, Schlesinger's "The Supreme Court: 1947" did not offer a fully drawn theory of judicial role; it described a moment in history.[13] The year 1947 marked ten years after the "switch in time" that killed *Lochner*; and in the next decade, Franklin Delano Roosevelt filled seven seats on the high bench.[14] Given FDR's legislative efforts at "court-packing," Schlesinger's first goal was to deny that appointments from 1937-47 made the Supreme Court a homogenous "rubber stamp."[15] This was easily done. Divisions ran deep among the Justices, and some showed embarrassingly strong antipathies to one another.[16] More than half of

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[11] ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

[12] On the other hand, *Fortune* magazine was a more serious forum for legal discourse in those days. For example, Chief Justice Earl Warren also wrote a *Fortune* article in 1955. Earl Warren, *The Law and the Future*, FORTUNE, November 1955, at 106.

[13] Schlesinger, *The Supreme Court, supra* note 7, at 212; ARTHUR M. SCHLESINGER, JR., A LIFE IN THE 20TH CENTURY: INNOCENT BEGINNINGS, 1917-1950, 418-19 (2002).

[14] For a contemporaneous perspective on some of these appointments, *see* Romeyn Berry, *Comment*, THE NEW YORKER, October 23, 1937, at 11. For a more in-depth exploration, *see generally* JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE (2004) (describing the impact of the appointments).

[15] Schlesinger, *supra* note 7, at 73.

[16] *Id*. at 78-79, 201; ROBERT STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT, 19 (1986) (referring to the Vinson Court as "nine scorpions in a bottle")'; *see also* Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 110 fn. 51 (2006) (describing the various conflicts on the court, one of which was a "terrible dispute" between Justices Black and Jackson about whether Black should recuse himself when his former law partner argued a case before the Court); JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT

Schlesinger's article, including his first use of "activist," described the Justices' personalities and non-jurisprudential conflicts.[17] Schlesinger also claimed that any substantive issues dividing the Justices were closely tied to these interpersonal fissures.[18]

From this viewpoint, Schlesinger wrote a story for a lay audience to demystify the Court, like many comparable essays today.[19] Perhaps the misfortune is that Schlesinger also wandered toward deeper topics. In only five pages, he glibly bundled the sitting Justices into camps of "judicial activists" and "champions of self-restraint."[20] Yet even as Schlesinger noted that the "issues of principle" separating these two groups "may be described in several ways," his essay offered no significant definition of activism or restraint.[21]

Instead of principled definitions, Schlesinger's focus was consistently personal. He identified four Justices as exemplars of activism—especially Hugo Black and William O. Douglas—and three others as heroes of self-restraint—particularly Felix Frankfurter and Robert Jackson.[22] Schlesinger never explained, however, what exactly these Justices did to earn their titles. Schlesinger's drive to analyze the sitting Justices of 1947 undercut at every turn his efforts to invoke broader principles of judging.

Consider three examples. First, Schlesinger explained the "Black-Douglas [activist] view" as drawing from jurisprudential ideas

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272-283, 328 (2004) (same).

[17] Schlesinger, *supra* note 7, at 73-78.

[18] *Id*. at 201, 208.

[19] *See, e.g.*, Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, March 28, 2005, at 40; Benjamin Wittes, *Whose Court is it Really?*, ATLANTIC MONTHLY, January/February 2006, at 48; Amy Davidson, *The Scalia Court*, THE NEW YORKER, March 28, 2005, at 2; Stuart Taylor Jr., *The Supreme Court: Place Your Bets*, ATLANTIC MONTHLY, March 6, 2007; Glenn Greenwald's column, "Unclaimed Territory," on Salon.com; Dalia Lithwick's articles in the "Jurisprudence" section of Slate.com.. Schlesinger was like most freelance writers in that he wrote articles, including "The Supreme Court: 1947," primarily for the money. Indeed, as he later reflected, "I rejoiced in the opportunity to write about a variety of issues and people (and also, with a growing family, to make more money in 1947 than Harvard would pay me in 1948)."). SCHLESINGER, *supra* note 13, at 418.

[20] Schlesinger, *supra* note 7, at 201-208. Schlesinger was aware that he popularized these terms, however, he wrote in his autobiography that he "got the idea, and perhaps the terms too, from Reed Powell . . . . " SCHLESINGER, *supra* note 11, at 421.

[21] This is true despite the fact that Schlesinger uses these words repeatedly in his article, and takes several unsuccessful stabs at defining the terms. *See* Schlesinger, *supra* note 7, at 201 and 202-204 (finding a distinction between using the judicial role to promote social welfare and using it to expand the power or legislatures); 201-202 (finding a distinction between the philosophies of the Harvard and Yale Law Schools); 204-206 (distinguishing between the promotion of personal liberties or majoritarian rule); 206-208 (distinguishing between the justices who are pro-labor unions and those who are anti-labor unions); 208 (looking at historical distinctions between Holmes and Brandeis).

[22] Schlesinger, *supra* note 7, at 201. Edward McWhinney drew from Schlesinger's characterizations a decade later, when he strongly portrayed Frankfurter as being both an enemy of judicial activism, and closer to the aspired-for position of "wear[ing] Holmes' mantle" than Black and Douglas. Edward McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, 33 N.Y.U. L. REV. 775, 777-778 (1958).

"particularly dominant at the Yale Law School."[23] With true Harvardian zeal, Schlesinger painted the Black-Douglas-Yale view as a somewhat lawless blend of "basic cynicism about . . . an objective judiciary" and a tendency to favor "immediate results [over] a system of law" and political "interests" over legal "doctrines."[24]

Putting aside the accuracy of Schlesinger's admittedly "crude[]" portrait of legal realism,[25] its asserted link to Black was indefensible.[26] Schlesinger's only doctrinal evidence was a dramatic quote from Black praising federal courts as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."[27] In context, however, Black's language was neither activism nor realism; it was a unanimous rejection of coerced confessions in a racially charged Florida death penalty case.[28] Many scholars have over time criticized Black's judicial work—and much more often that of Douglas—on activist grounds and otherwise.[29] Regardless of these appraisals, however, the point here is that Schlesinger's talk about Yale and realism shed no light on what

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[23] *Id*. Schlesinger writes that Black belongs to the "Yale" school of thought because he sent his son to law school there; the categorization is even more ridiculous given that Black's son was only a first-year student in 1947. See http://www.martindale.com/Hugo-L-Black-Jr/806177-lawyer.htm.

[24] Schlesinger, *supra* note 7, at 202.

[25] LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, 20-35 (1986) (discussing the characteristics of legal realism).

[26] Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 708 n. 25 (1980) (asserting that Black led us "out of the wilderness of legal realism"); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000) (calling Black a "documentarian," who sought "inspiration and discipline in the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document"). *But cf.* Mark Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 598 (2007) (grouping Black and Douglas as "realist Justices," but citing as support only dissenting opinions by Douglas in cases where Black joined the majority).

[27] Schlesinger, *supra* note 7, at 202.

[28] Chambers v. State of Florida, 309 U.S. 227 (1940). Four young men, on trial for murder, asserted that their confessions had been obtained by violence and coercion. The Court held that these police actions violated due process under the Fourteenth Amendment.

[29] *See, e.g.*, J. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 312 (1980); Michael Parrish, *Cold War Justice: the Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805, 826 (1977). Richard K. Willard, *Changing the Law: The Role of Lawyers, Judges and Legislators Concerning Social Engineering and the Common Law*, 11 HARV. J.L. & PUB. POL'Y 23, 31 (1988); Robert F. Nagle, *Meeting the Enemy*, 57 U. CHI. L. REV. 663, 656 (Spring 1990). White, for instance, called Douglas an "anti-judge," who failed to take seriously his work as a Supreme Court Justice. White, *supra* note 8, at 317. White notes that "Douglas's opinions, even his majority opinions, appeared to be almost indistinguishable from his nonjudicial writings," and that when Douglas reached analytical difficulties and doctrinal barriers in his reasoning, he "simply disregarded those barriers and created some new doctrine." *Id.* at 351-352, 356. White also states that, although Douglas based his opinions generally on authoritative sources, "he treated those sources cavalierly, and adopted or discarded a particular source whimsically." *Id* at 362. Black, on the other hand, largely escapes such scathing criticism and is mainly portrayed in *The American Judicial Tradition* as a foil to Frankfurter. *Id*. at 275-294. At worst, White states rather prosaically that Black reveled in the rigidity of his constitutional interpretations, and that he was more concerned with preserving his own theories than producing sound results. *Id*. at 310.

activism means or why Black and Douglas deserved that label.

Second, Schlesinger discussed the Court's "divergence" of opinion in *West Virginia v. Barnette*, which held that public schools had breached the First Amendment by making students salute the flag in violation of their religious beliefs.[30] Schlesinger's own views of *Barnette* were conflicted. On one hand, he celebrated Frankfurter's dissent as a "great democratic document" and blamed the majority's position on flip-flopping "activists."[31] Yet Schlesinger also explained that *Carolene Products* "furnish[ed] the activists with strong logical grounds for intervention on behalf of personal rights."[32] Insofar as Schlesinger ultimately denounced *Barnette* as a wrong-headed "freak case[]," modern authorities strongly disagree.[33] More important for analyzing Schlesinger's activism is the fact that *Barnette*'s "activist" decision was authored by Jackson, one of Schlesinger's "champions of self-restraint."[34] Schlesinger likewise ignored the three-year-old *Korematsu* decision,[35] which also would have confused his efforts to identify "activists." In *Korematsu*, the supposed activists Black and Douglas approved racist military orders that interned Japanese-Americans during World War II, while Jackson, the "champion of self-restraint" was one of only three Justices to deny the President's assertion of authority.[36] Again, Schlesinger's doctrinal discussion leaves efforts to define activism in a heavy fog.

Third, Schlesinger suggested that an "explosive" field of judicial activism involved "social and economic legislation," especially labor law.[37] In this area, Schlesinger derided the activists' view that picketing is constitutionally protected speech.[38] And he speculated that "the Black-Douglas group" might eviscerate a then-pending statute to outlaw closed union shops.[39] Schlesinger supposed that the activists "may well choose to override legal 'niceties' to emasculate or veto" such union-restrictive legislation.[40] If such activism prevailed, wrote Schlesinger, "the political

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[30] Schlesinger, *supra* note 7, at 206; West Virginia State Board of Education v. Barnette, 319 U.S. 624.
[31] Schlesinger, *supra* note 7, at 206.
[32] *Id*.; Carolene Products Co. v. United States, 304 U.S. 144, fn. 4 (1938).
[33] *See, e.g.*, WHAT "BROWN V. BOARD OF EDUCATION" SHOULD HAVE SAID 59, 111-12 (Jack M. Balkin, ed. 2002); Schlesinger, *supra* note 7, at 204; Board of Education v. Pico, 457 U.S. 853 (1982) (following *Barnette)*. Seana Valentine Shiffrin, *What is Really Wrong With Compelled Association?*, 99 NW. U. L. REV. 839, 852-53 (2005).
[34] West Virginia State Board of Education v. Barnette, 319 U.S. 624.
[35] Korematsu v. U.S., 323 U.S. 214 (1944).
[36] One gets the impression that Jackson qualified as a "champion" mainly because of his book; Schlesinger noted that "Justice Jackson observed in his *Struggle for Judicial Supremacy*, 'in no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court.'" Schlesinger, *supra* note 7, at 208.
[37] Schlesinger, *supra* note 7, at 206-208.
[38] *Id*. Schlesinger conveniently did not cite *Carolene Products* here.
[39] *Id*. The statute did pass as the Taft-Hartley Act on June 23, 1947.
[40] *Id*.

reprisals will be likely to be sharp and disastrous."[41]

With hindsight, we can see that Schlesinger's statements were either failed predictions or successful advocacy. Although Congress did ban closed shops through the Taft-Hartley Act, the Supreme Court's "activists" never "emasculated" such legislation. On the contrary, Black wrote strong majority opinions enforcing such statutory provisions.[42] Schlesinger again misperceived his own activist's alleged activism. And because his categories were so firmly linked to accounts of particular Justices, these flaws are especially discouraging.

The missteps in Schlesinger's analysis would hardly bear mention for their own sake, except that they show how his brevity and errors obscured any general standard for identifying activists beside the four named. This was soon important, because two of Schlesinger's activists—Wiley Rutledge and Frank Murphy—died in 1949. Were their successors, Sherman Minton and Tom Clark, activists? Champions of self-restraint? Middle-grounders? Schlesinger's vagueness leaves one to wonder. His essay's limitations also raised doubts that "activism" could ever be useful in condemning judicial conduct, as Schlesinger himself professed agnosticism about whether judicial activism was good or bad. [43]

History is as history does, however; and despite activism's spare introduction, the term sprang to immediate use at the highest levels of legal debate.[44] The term was doubtless buoyed by Schlesinger's Pulitzer-Prize-winning Harvard reputation.[45] And the personal details in his essay poked Justices who were already quite sensitive.[46] Most importantly,

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[41] *Id*.

[42] *See, e.g.*, Lincoln Federal Labor Union No. 19129 v. Northwestern Metal & Iron Co., 335 U.S. 525 (1949) (Black, J.)

[43] In the *Fortune* article, Schlesinger concluded that, on the issue of social and economic policy, "Frankfurter and Jackson are surely right" in contracting the power of the Court. Yet he makes an exception for "the fundamental rights of political agitation." These fundamental rights, he indicates, may not be safe in the hands of legislatures. *The Supreme Court*, *supra* note 7, at 206, 208.Schlesinger later wrote that, "I tried to state each side as fairly as I could, though I came out in the end for judicial self-restraint. The memory of the judicial activism practiced in favor of business by the Nine Old Men only a decade before was still vivid in mind, and one did not want to make activism the routine philosophy of the court." ARTHUR M. SCHLESINGER, JR., A LIFE IN THE 20TH CENTURY: INNOCENT BEGINNINGS, 1917-1950, 421 (2002).

[44] *E.g.*, C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT (1954); ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57-58 (1955); Albon P. Man, Jr., *Mr. Justice Murphy and the Supreme Court*, 36 VA. L. REV. 889, 916 (1950); Lester E. Mosher, *Mr. Justice Rutledge's Philosophy of Civil Rights*, 24 N.Y.U. L.Q. REV. 661, 667-668; Note, *State Regulation of Pilotage: the Constitutionality of the Nepotic Apprenticeship Requirement*, 56 YALE L.J. 1076, 1281 (1947) (borrowing Schlesinger's terminology without citation, six months after his article went to press); Charles Alan Wright, *Civil Liberties and the Vinson Court*, 102 U. PA. L. REV. 822, 825 (1954); Alfred L. Scanlan, *The Passing of Justice Murphy—The Conscience of a Court*, 25 NOTRE DAME L. REV. 7, 38 (1949); E. Payson Clark, Jr., *Notes*, 34 CORNELL L. Q. 425, 429 (1948) (reading "activism" backward into scholarship from the early 1940s that did not use that terminology).

[45] Schlesinger had won a Pulitzer Prize in history for *The Age of Jackson* in the spring of 1946. Schlesinger, *supra* note 43, at 373.

[46] In a letter to his parents, Schlesinger wrote, "[e]veryone is apparently mad at me—Douglas very hurt

however, the three characters featured in Schlesinger's story—Black, Douglas, and Frankfurter—proved to be extremely influential and long-lived, with almost 100 years of Court service among them.[47] In different ways, Black and Douglas emerged after 1947 as advocates for expansive constitutional liberties, while Frankfurter was crucial to the emergence of federal courts as a defined academic subject.[48] The fact that Schlesinger pinned his labels "Judicial Activist" and "Champion of Self-Restraint" to such monumental figures helped sustain those terms' lasting currency.

Another factor that refocused attention on Schlesinger's terminology appeared seven years later. In 1954, Warren replaced Vinson as Chief Justice, and *Brown v. Board of Education* struck down racial segregation.[49] Since then, the propriety of federal courts' "activity" in addressing social issues has been of consistently dominant concern. Thus, whatever Schlesinger's "activism" originally meant, the term emerged at an opportune moment in history.[50] The gloss of post-1947 history confirmed activism's use as a negative epithet, and focused such critiques on the Supreme Court's liberal wing.

B. Activism Before Schlesinger

Although judicial activism's prominence owes much to events after 1947, the term also crystallized anxieties about judging that are much older than Schlesinger's essay. This Section explores activism's prehistory as a backdrop for modern debates. My aim is to show that the term emerged as part of a complex tradition of judicial critique. Not only have Americans repeatedly criticized federal courts' behavior, their grounds for objection have greatly differed. To illustrate such historical variety, I will discuss four well known episodes, of which Schlesinger was certainly

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and very mad, because he thought I was on his side; Black, resigned; Murphy, furious and wanting to sue me for libel; Jackson, mad; Frankfurter, annoyed because he is credited with having inspired the piece; Reed, annoyed because of the way he was brushed off; etc. It is much simpler to write about dead people." *Id*. at 425.

[47] Black was appointed in 1937 and retired in 1971; Frankfurter served from 1939 until 1962; Douglas, also appointed in 1939, retired in 1975. KATHLEEN SULLIVAN, ED., CONSTITUTIONAL LAW B-5 (16th ed., 2007).

[48] As a law professor at Harvard, Frankfurter was known for sending his best pupils to Washington to fill various government positions, especially as Supreme Court law clerks. Time Magazine noted in 1939 that there were already 125 of Frankfurter's protégés, whimsically referred to as "the Happy Hot Dogs," in government service at that time. Among them were Ben Cohen, Tom Corcoran, Phil Graham, Joe Rauh, and Ed Pritchard. The fierce loyalty of these young men allowed Frankfurter to indirectly exert influence over a diverse range of government agencies and programs. *A Place for Poppa*, TIME MAGAZINE, Jan. 16, 1939 at ; Schlesinger, *supra* note 43, at 419.

[49] Balkin, *supra* note 37, at 37-39.

[50] I say "opportune" because Schlesinger's own predictions were wrong. The "young Democrats" described in Schlesinger's essay were not the ones who made liberal law during republican presidencies. On the contrary, it was the much later "activists," Earl Warren and William Brennan, who were destined to play the role Schlesinger had envisioned in 1947.

aware, describing for each period the controversial behavior at issue, and sketching possible lessons about judicial conduct generally.[51] Insofar as these historical events convey vague or divergent prescriptions, they indicate the substantial challenges facing any conceptual analysis of judicial activism.

First, and closest in time to Schlesinger's essay, is the half-century before 1937 called the *Lochner* era.[52] During this period, the Court's alleged "activism" (had the word been known) took several forms. The Court invented a constitutional right to contract and granted full-faith-and-credit protection to interstate corporations, which allowed large-scale business to operate with relatively few regulatory constraints.[53] In fields of statutory law, such as antitrust and federal jurisdiction, the Court restricted labor interests and promoted industrial development.[54] And the Court expanded a body of "federal general common law" that governed interstate disputes from commercial law to torts.[55] Overall, these decisions sparked massive public, political, and scholarly criticism, culminating in statutory efforts to limit federal jurisdiction and "pack" the Supreme Court.[56]

Because Schlesinger's essay marked ten years after the "switch" that undermined *Lochner*, his audience would have easily seen links between Black-Douglas activism and the Justices who would be later maligned as the "Four Horsemen."[57] Indeed, Schlesinger cited pre-New Deal Court cases as a benchmark, comparing Black-Douglas solicitude for unions and disadvantaged persons to prior Justices' concern for employers and the propertied gentry.[58] Regardless of whether such comparisons were apt,[59] Schlesinger's claimed contact between activism in the 1940s and prior

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[51] These discussions, however, are necessarily brief. Each era has independently provided enough material to fill many books. This Article will discuss them only insofar as they provide background and insight into the historical role of the judiciary and retrospective discussions of judicial activism.

[52] For a heterodox view of this period and the term "Lochner era," *see* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 Tex. L. Rev. 1, 53-60 (2003); David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 Wash. U. L.Q. 1469, 1506-1507 (2005).

[53] EDWARD. A. PURCELL, JR., LITIGATION & INEQUALITY, 282-283 (1992).

[54] *Id*.

[55] *Id*. at 59-86 (in a chapter titled "The Federal Common Law," Purcell explores Swift v. Tyson and its impact on federal courts in depth); Tony A. Freyer, *A Precarious Path: The Bill of Rights After 200 Years*, 47 VAND. L. REV. 757, 770-771 (1994) (tracing the expansion of the Commerce Clause by the Marshall Court and the Taney Court).

[56] Purcell, *supra* note 53, at 218-220.

[57] *See generally* Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47 (October 2006). Incidentally, Schlesinger was only 20 years old when the sea changed in 1937 with West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[58] Schlesinger, *supra* note 7, at 208 (suggesting that "the activist Justices will intervene to save the New Deal as their conservative predecessors intervened to stop it" by thwarting Congressional intent behind the Fair Labor Standards Act).

[59] These comparisons can be criticized as being unfair because (i) Schlesinger offered no evidence that the Black-Douglas group subverted congressional will; (ii) the accusation against the Black-Douglas group was only subconstitutional; (iii) *Carolene Products* would differentiate the Black-Douglas group from the Horsemen.

judicial misconduct was vital to his analysis.

Although pre-New Deal history offers useful perspective, key questions about judicial activism remain unanswered. Most importantly, a modern consensus that *Lochner*-era decisions were wrong has not pinned down the nature of their mistake. One possibility is that Lochnerian jurisprudence spurred bad results, favoring powerful and established interests over progressive ones.[60] Or the Court might have used improper methods, inferring constitutional rights and common-law powers without support from orthodox authorities.[61] Or perhaps the Court's errors were institutional, intruding on fields of policymaking that would have been best left to other governmental actors.[62] All of these hypotheses may be partly correct, as other explanations might also. Thus, although Schlesinger enriched his account of judicial activism by linking it to prior judicial misconduct, no simple reference to *Lochner* can clarify what activism truly means.

A second period of judicial controversy involves the decades following the Civil War. In a series of contested decisions, the Court submerged individual rights to federal military power, and eviscerated the Reconstruction Amendments' steps toward constitutional liberty and equality.[63] Although the Court's decisions from 1865 to 1885 are today

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[60] *See generally* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 882-883 (1987); Bernstein, *Lochner's Legacy's Legacy*, *supra* note 52, at 53-60; Bernstein, *Lochner v. New York: A Centennial Retrospective*, *supra* note 52, at 1506-1507.

[61] Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 AM. U. L. REV. 457, 465 n.34 (2005)

[62] John E. Nowak & Ronald D. Rotunda, *Constitutional Law 101*, 375-376 (5th ed. 1995); Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 N.Y.U. J. L. & LIBERTY 515 (2005); Daniela Caruso, *Lochner in Europe: A Comment on Keith Whittington's "Congress Before the Lochner Court,"* 85 B.U. L. REV. 867, 878 (2005).

[63] For an in-depth discussion of some of these rulings, see generally, Barry Friedman, The *History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L. J. 1 (2002) The decision in The Slaughterhouse Cases was contested by members of the Court itself, with one dissenting Justice decrying the majority opinion as rendering the Fourteenth Amendment "a vain and idle enactment, which accomplished nothing." The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 77-79 (1872) (Field, J., dissenting); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, 529-30 (1988). Although the arguments in the cases were strongly contested by both sides, the Court's decisions were not always the subject of wide-spread criticism. *See, e.g.*, CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 247 (2008) (noting northern press's generally favorable reviews of Cruikshank decision, which deflated strength of federal government's attempt to enforce Reconstruction Amendments through criminal prosecutions). One scholar even suggests that northerners were tiring of the prolonged political battles against the southern states. PETER IRONS, A PEOPLE'S HISTORY OF THE UNITED STATES SUPREME COURT 205 (2006). Nevertheless, the Court's opinion was the subject of debate among legal scholars and other commentators. CHARLES FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME VI: RECONSTRUCTION AND REUNION 1864-1888 PART I, 1368-74 (1st prtg. 1971). See, e.g., FAIRMAN, supra note 1, at 1163-68, 1243-44 (indicating that military, through Freedmen's Bureau and under presidential directive, performed judicial functions in instances where rights available to whites are denied to African Americans). Just prior to this time period, the Court approved executive conduct

less often criticized than *Lochner*-era cases, many experts view both periods as exceedingly bleak chapters in judicial history.[64]

Schlesinger's his use of "activist" and "self-restraint" implicitly denounced the Court's postbellum decisions. Like many modernists, Schlesinger endorsed a *Carolene Products* view of constitutional law, which views individual rights as key safeguards for politically sensitive rights and "discrete and insular minorities."[65] Schlesinger also endorsed the application of individual rights to state and local governments.[66] These conclusions required a post-Civil War Constitution, which protected broad-based affirmations of individual liberty and equality,[67] yet they also required a rejection of post-War judicial doctrine.[68]

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that held military actions superior to individual rights. See The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863) (concluding that President Lincoln was entitled to institute military blockade of ports in possession of rebellious states). *But see Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866) (denying President's attempt to suspend writ of habeas corpus despite ongoing Civil War, where courts were open and functioning in area where military confined defendant). *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11-12 (1883) (concluding that Section 5 of Fourteenth Amendment empowers Congress to regulate state laws which violate protections of Amendment, but does not authorize Congress to regulate individual conduct); United States v. Harris, 106 U.S. 629, 639-40 (1883) (invalidating federal statute because it attempted to regulate individual conduct that violated privileges and immunities of citizens, whereas Fourteenth Amendment regulates only state action); Virginia v. Rives, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment . . . all have reference to State action exclusively, and not to any action of private individuals."); United States v. Cruikshank, 92 U.S. 542, 553-55 (1875) (dismissing indictment of individuals accused of hindering African Americans in exercise of new rights on basis that conduct charged falls within purview of state's power, not federal purview, and failure to specify racial motive); United States v. Reese, 92 U.S. 214, 220-21 (1875) (invalidating statute seeking to enforce Fifteenth Amendment because it does not require discrimination on basis of race, color, or previous condition of servitude, which is the only function of Fifteenth Amendment); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 77-79 (1872) (holding that privileges and immunities clause of Fourteenth Amendment does not countenance privileges and immunities of state citizens, but rather those of United States citizens, and conduct alleged violates privileges and immunities of state citizens, which are not protected by Fourteenth Amendment). Members of the Waite Court, Justice Bradley in particular, received widespread public attention and, in parts, condemnation for their participation in the 1876 Electoral Commission. Originally slotted for five members from the Supreme Court, two Republicans, two Democrats and one Independent (Mr. Justice Davis); when Justice Davis was unwilling to attend due to being elected to the Senate, a third Republican (Justice Bradley) was put in his place. The 8-7 Commission voted along party lines for every vote placed before them. *See generally* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

[64] CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 78 (2000) ("The Chase Court explicitly declared more laws unconstitutional than the Taney Court in part because Chase Court justices were more willing to interpret statutes as violating agreed-upon constitutional limits."); IRONS, *supra* note 63, at 205.

[65] Schlesinger, *supra* note 7, at 208; *Carolene Products*, *supra* note 32.

[66] Schlesinger, *supra* note 7, at 202, 204, 206.

[67] For example, before the Civil War, "much of the [Southern] security legislation laid restrictions on white behavior considered subversive in its influence on slaves." This included not only educating slaves and entering into business transactions with then, but also speaking in favor of abolition and "circulation of abolitionist propaganda." DON E. FEHRENBACHER, THE DRED SCOTT CASE, 35 (1978).

[68] "In a string of decisions extending from the 1880s to the end of the century, the Court virtually stripped the Negro of federal protection against private acts of oppression and against public

As we saw with *Lochner*, there is a big difference between recognizing decisions as errors and explaining why they are so. Like other controversial rulings, the Court's mid-nineteenth-century cases might have drawn fire for: (i) their bad results, (ii) their improper methods, (iii) their affront to other actors, or (iv) some mix of misdeeds.[69] An important insight from the Reconstruction era, however, is that judicial controversy and abuse are not historically limited to decisions that expand individual rights or undermine political power. Instances of great judicial controversy after the Civil War were composed at least equally of the Court's unwillingness to respect other branches' judgments and its unwillingness to defend individual rights.[70]

My third example of judicial conduct, *Dred Scott*, is infamous; whether viewed as a divisive case, or a national disaster, it has no competitor in judicial history.[71] *Dred Scott* struck down the Missouri Compromise provision that banned slavery in the northern territories, and held that free descendants of African slaves could not be "citizens" under the federal Constitution.[72] Public and political reaction was immediate and overwhelming.[73]

Schlesinger's essay did not mention *Dred Scott*, and this may surprise modern readers, as *Dred Scott* is today seen as the worst imaginable example of judicial activism, perhaps the only one on which everyone can agree.[74] Furthermore, Schlesinger's 1946 book had tarred Chief Justice Roger Taney as a partisan exponent of "judicial imperialism," with *Dred Scott* as a grievous and characteristic error.[75] And *Dred Scott*'s critics have been consistently strident in stressing the decision's judicial overreaching, sometimes with less precision about its technical legal reasoning.[76]

So why did Schlesinger's essay omit *Dred Scott*? Perhaps even mentioning *Dred Scott* in 1947 would have risked absurdity, given the

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discrimination indirectly imposed. It upheld laws and procedures that effectively disenfranchised him and excluded him from jury service. It also placed a federal stamp of approval upon segregation as public policy." *Id*. at 582.

[69] Fairman, *supra* note 63, at 569-585.

[70] Fairman, *supra* note 63, at 586-589.

[71] *See* Fehrenbacher, *supra* note 67, at 568-595 (in a chapter titled, "In the Stream of History," tracing *Dred Scott's* heavy impact on American law for nearly a century and a half); Michael J. Perry, *The Fourteenth Amendment, Same-Sex Unions, and the Supreme Court*, 38 LOY. U. CHI. L.J. 215, 226 (calling *Dred Scott* "surely the single most infamous case in American constitutional law).

[72] Dred Scott v. Sandford, 60 U.S. 393 (1856).

[73] Fehrenbacher, *supra* note 67, at 417; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part I: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 416 (1998).

[74] Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1113 (2005) ("These [Dred Scott v. Sandford] are cases that almost everyone agrees were wrongly decided and are examples of egregious judicial activism").

[75] ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON, 486 (1945).

[76] DERRICK A. BELL, JR., ED., RACE, RACISM AND AMERICAN LAW, 21 (1973) (calling *Dred Scott* "the most frequently overturned decision in history"); Charles, *supra* note 74.

meekness of Douglas-Black activism and its progressive political bent.[77] Or perhaps Schlesinger preferred not to inject race into his legal discussion. Whatever the historical reason for Schlesinger's choice, *Dred Scott* holds an important and over-determined place in modern activism debates.[78] As a matter of consequences, the Court's immediate decision supporting slavery in the Minnesota Territory was deeply unsettling; more importantly, the Court's doctrinal logic implied severe oppression of all American blacks, and the decision's historical assumptions cast the Constitution as an irretrievably "proslavery document."[79] As a matter of judicial technique, the Court addressed issues that were not properly presented,[80] rendered judgment without orthodox legal authority,[81] and was influenced by two Justices' communications with President-elect James Buchanan.[82] From an institutional perspective, *Dred Scott* upset a precarious sectional compromise concerning slavery, tossing the Court's judicial authority into an implacable vortex of mid-century racial politics.[83] Accordingly, as with our other historical examples, *Dred Scott* offers context for judicial activism's abiding significance, yet it does not specify what exactly the word connotes.

My final example of controversial judicial behavior concerns the Marshall Court. Although the Court's well known work from 1801-1835 is today highly esteemed, many of these decisions were intensely debated at the time.[84] From *Marbury*'s judicial review to *McCulloch*'s "implied" congressional authority, Marshall's Court repeatedly adventured into contemporary channels of power, and the Court's results were contested

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[77] Furthermore, Schlesinger's goal was not to alienate any of the Justices; he felt "badly about the Supreme Court repercussions," when each Justice expressed feelings of anger or betrayal after publication. Schlesinger, *supra* note 13, at 424-425. A comparison of the Black-Douglas group to the authors of *Dred Scott*, one of the most reviled decisions in history (see Friedman, *supra* note 73, at 415) would surely have burned bridges irreparably.

[78] Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 Cal. L. Rev. 283, 298 (2008).

[79] *See* Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, March 26, 1860 in ANTISLAVERY POLITICAL WRITINGS, 1833-1860, 144 (C. Bradley Thompson, ed., 2004) William Lloyd Garrison, the prominent abolitionist, called the Constitution a "covenant with death, an agreement in hell." Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 Chi.-Kent L. Rev. 325, 358 (1994).

[80] Fehrenbacher, *supra* note 67, at 294, 302-304, 322-327.

[81] *Id*. at 439-443.

[82] Louis H. Pollak, *Race, Law & History: The Supreme Court From "Dred Scott" to Grutter v. Bollinger,"* DAEDLUS, Winter 2005, at 30-31.

[83] *See* Fehrenbacher, *supra* note 67, at 428-437.

[84] Purcell presents a vivid picture of this volatile point in history, writing that "[b]y 1819 when Spencer Roane, a judge on the Virginia Court of Appeals, attacked Marshall's nationalist opinion in McCulloch v. Maryland, he was able to draw on an overflowing reservoir of arguments and a quotations from a range of commentators—including Brutus, Madison, Jefferson, and even Hamilton . . ." to support his position against federal judicial interference in state matters. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE, 145 (2007). He further describes the increasing bitterness of the debates, which "drove the aging Marshall to the edge of despair" and escalated for the three decades preceding the Civil War. *Id*. at 149-150.

with corresponding vigor.[85]

Schlesinger cited the Early Republic as offering important context for discussing judicial activism; indeed, Schlesinger characterized Frankfurter as an emblem of Jeffersonian faith in democracy.[86] Schlesinger did not mention, however, the perennial battles that split Jeffersonian democrats from Marshall's Court; nor did he name Marshall as a potential role model for twentieth-century activists. Given Marshall's lustrous status, doing so would have shifted Schlesinger's narrative in the activists' favor.

Just as with our other examples of judicial controversy, Marshall's judgments were derided for their consequences, especially for fostering a sprawling federal monster.[87] The Court's rulings were also criticized for their improper judicial methods, for weak textual analysis and reading the Constitution with partisan eyes. And they were rejected on institutional grounds, for disrespecting popular will and undermining democracy.[88] As an endpoint for my quick trip through judicial history, the Marshall years confirm that: (i) judicial critique traces to the very start of America's judicial tradition, and (ii) the Court has earned harsh criticism both through decisions that decrease governmental power, as in *Marbury* and the Contract Clause cases, and through decisions that expand governmental power, as in *McCulloch* and *Ogden*.

The foregoing examples illustrate that Schlesinger's term "judicial activism" was written upon a heavily chalked slate. Sometimes federal courts have been condemned for spurring social change, other times for squelching it; sometimes for preferring moneyed interests, other times for hurting them; and sometimes for invalidating too much political law, other times too little. As the term "judicial activism" entered this fray in 1947, its meaning (like that of other political keywords) derived only loosely from its author's exposition.[89] The term's heft also owes a great deal to the broader history of American judicial critique, a history that even current uses of the term cannot fully escape.

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[85] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 139-144 (2001) (discussing the public backlash resulting from the McCulloch v. Maryland and Gibbons v. Ogden decisions).

[86] Schlesinger, *The Supreme Court: 1947* at 206, 208.

[87] *Id*. at 208; 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 144 (1917); citing Jefferson to Mrs. Adams, Sept. 11, 1804, *Works:* Ford, XII, 162 ("The opinion which gives to the judges the right to decide what laws are constitutional, and what not not only for themselves in their own sphere of action, but for the Legislatiure & Executive also, in their spheres, would make the judiciary a despotic branch."

[88] *See* JAMES M. O'FALLON, THE POLITICS OF MARBURY, IN MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 17, 17-39 (Mark A. Graber & Michael Perhac eds., 2002) (arguing that Marshall acted principally on the basis of short term, partisan motives).

[89] RODGERS, *supra* note 9, at 3-16 (introducing his theories on the importance of keywords in political discourse, the methods by which words become ideological tools, and positing that consistent, prolonged use and discussion is the central difference between mere words and keywords).

C. Modern Interpretations

This Article has thus far argued that judicial activism is more than a term that Schlesinger invented; it is a concept with its own intellectual history. The next step is to consider modern definitions of judicial activism, to see how well they capture this phenomenon. Although some commentators have expressed bewilderment at the diverse meanings applied to "judicial activism,"[90] I would arrange modern interpretations in four main groups, which define activism as: (i) any serious legal error, (ii) any controversial or undesirable result, (iii) any decision that nullifies a statute, or (iv) a smorgasbord of these and other factors.[91] If any of these interpretations were correct, the term judicial activism might indeed be too semantically confused to keep. By criticizing these four possibilities, however, I aim to illustrate the need for a new approach, and thereby uncover clues about how a reformed analysis of activism might proceed.

First, if activism were defined to include any serious judicial error, there would be no basis for an overarching label, and no reason to shortcut analysis of specific issues at stake. When courts misread statutes, ignore precedents, botch inferences, or mistake facts, such errors may cause great concern; but such flaws are far too diverse and idiosyncratic to merit a generalized heading like "activism." Indeed, even where judicial errors are stark and consequential, they do not necessarily qualify as activism. Some big mistakes owe simply to judicial incompetence, for example, and it is clear that incompetents are only sometimes activists. Thus, despite an indirect connection between judicial errors and judicial activism, the link is not one of equivalence. The question of determining which errors should qualify as activism—and under what circumstances—reappears in

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[90] *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2399 (2006) ("Sometimes, 'activism' appears to be nothing but an all-purpose epithet, meaning 'a decision I disagree with.'"); Edward A. Hartnett, *Congress Clears its Throat*, 22 CONST. COMMENT 553, 555 (2005) ("For some, the term "judicial activism" is an empty epithet, meaning little more than that the one who hurls the term disagrees with a particular decision or line of decisions.").

[91] *See, e.g.,* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM, 320 (1996) (suggesting that a basic element of judicial activism is the willingness to act "contrary to the will of the other branches of government," for example, striking down a statute); CASS R. SUNSTEIN, RADICALS IN ROBES, 42-43 (2005) (positing that the best measure of judicial activism is how often a court strikes down the actions of other branches of government, especially Congress); Jeffrey A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 413 (2002) (contending that "the most dramatic instances of a lack of judicial restraint--or, conversely, the manifestation of judicial activism--are decisions that declare acts of Congress and, to a lesser extent, those of state and local governments unconstitutional"); Steven G. Calabresi, *Substantive Due Process after* Gonzalez v. Carhart, 106 MICH. L. REV. 1517, 1522-1523 (2008) (questioning whether Kennedy favored activism or self-restraint, but never defining the criteria by which he was assessing Kennedy's views); Nancy Staudt, Barry Friedman, & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 373 (2008) (stating that "it is nonetheless true that since 1937 liberal activism has more frequently taken the form of expanding constitutional meaning").

Part III.

Second, the view that activism means any undesirable judicial result is even less plausible.[92] Yet when commentators use the term "activism" without any explanation, it may seem that judicial results drive their rhetoric.[93] If activism were defined to mean undesirable consequences, then the term would add nothing to straightforward conversation about the policies at stake. If judges were evaluated solely on their decisions' political desirability, then the entire concept of *judicial* activism might be irrelevant. Whatever else judicial activism means, it is tied to the practice of judging; thus, the term must be connected not just to particular results, but also to appropriately judicial methods.

Third, the definition of judicial activism as any decision invalidating a statute is popular among quantitative empiricists, largely because such activity is easy to count.[94] In modern times, this definition appears everywhere from the pages of law reviews to political science journals to the *New York Times*.[95] On the positive side, activism-as-invalidation successfully links allegations of post-1947 activism, which recognized an array of individual rights, with one strand of pre-New-Deal activism, which applied a rigorous liberty of contract.[96] But there are two problems. First, a focus on numerical examples of judicial *review* fails to condemn judicial *activism*, because a key function of post-*Marbury* federal courts is to invalidate unconstitutional acts. Schlesinger originally professed neutrality about activism's desirability, but modern analysts find nothing more obvious about activism than that it is bad.[97] If activism meant any

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[92] McConnell, *supra* note 90; Hartnett, *supra* note 90; Cross & Lindquist, *supra* note 6, at 1753-1754.

[93] See Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1039 (2007).

[94] *See* JULIAN E. ZELIZER, ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES 1948-2000 (89) (describing the theory and methodology behind the use of empirical studies to understand political systems and norms); Rodgers, *supra* note 9, at 148-149 (looking at the relative "activism" of Courts at various points in time based on the number of statutes they invalidated).

[95] See Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1701-1706 (2006); Steven G. Ca;abresi, *The Congressional Roots of Judicial Activism*, 20 J. L. & POL. 577 (2004); Paul Gewirtz and Chad Golder, *So Who Are the Activists?*, NY TIMES A19 (July 6, 2005).

[96] Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. REV. 99 (2007)

[97] David Kairys, *Book Review*, 91 COLUM. L. REV. 1847, 1851 (1991) ("The hated judicial activism is seldom described specifically; the mere utterance of these words is usually sufficient to provoke an immediate and intense dislike that requires no explanation."); Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1790 (2004) ("It is a standard constitutional trope to tar the Supreme Court with the charge of 'judicial activism!' whenever the Court does something a particular critic dislikes"); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 600 (2007) ("'judicial activism' is often nothing more than code for decisions we dislike"). For the alternate perspective, *see* Charles Harr, *Public Choice Theory: A Unifying Framework for Judicial Activism*, 110 HARV. L. REV. 1161 (1997) (advocating intense judicial activism in cases involving institutional reform litigation, and concluding that state judiciaries can be effective agents of

statutory overrule, then such antipathy would be largely misplaced. Second, even quantitative empiricists acknowledge that not every statutory invalidation is activist.[98] Yet without some more nuanced definition at hand, it is impossible to tell whether a few, many, or most decisions striking down statutes truly qualify as activist.

Consider an example illustrating both points: If Congress passed a statute banning political sedition, or authorizing race-based detention of United States citizens, courts would not in any sense be "activist" to annul that result. And although quantitative studies often recognize this problem, they nonetheless accept statutory invalidation as an undefended, impressionistic proxy for activism. In so doing, empirical accounts implicitly trade away all plausible definitions of judicial activism in exchange for a solid data set. Although the quantitative study of judicial decisions invalidating statutes is surely worthwhile in its own right, such analysis fails to offer an adequate definition of judicial activism.

A fourth "smorgasbord" interpretation of judicial activism may be the most prevalent today. Some scholars, after surveying the mixture of meanings applied to judicial activism, have despaired of constructing any single definition of the term,[99] and have responded with taxonomies of activism, with the meek suggestion that speakers should simply specify which meaning of the term they intend to use.[100] In principle, such scholarship recognizes the importance of judicial activism, and seeks to clarify the term's nuanced and sophisticated meaning. In practice, however, such arguments often validate many varied views, listing several options and encouraging the possible addition to the list of hybrid forms or other unexplored definitions.[101] This approach is thus ultimately reducible to a view of judicial activism as 'any or all of the above.' Such flexible frameworks tend only to bolster concerns that judicial activism is an incoherent Frankenstein, or worse, a mask for ulterior agendas. Like other interpretations of judicial activism, the smorgasbord approach is certainly plausible as a description of how the term is used today; but such interpretations implicitly undermine any possibility that the term itself is useful.

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institutional reform through intense activism).

[98] MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AM EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982); Cross & Lindquist, *supra* note 6, at 1760 (citing Randy Barnett and Michael Stokes Paulsen).

[99] See Ernest Young, Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139 (2002); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J., 121, 121 n.2 (2005); Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 939-940 (2007).

[100] Young, supra note 99, at 1171-1172 (suggesting that the terms "activism" and "restraint" are "useful only if careful attention is paid to their limitations as descriptors," but not as overarching concepts); Kmiec, *supra* note 3, at 1475.

[101] Kmiec, *supra* at 1477.

Although scholarly references to judicial activism are themselves expansive and varied, the foregoing examples illustrate major definitional flaws. Perhaps because no prior analysis of activism has considered the dynamic interaction of 1947, pre-1947, and post-1947 judicial history, no definition of the word "judicial activism" has emerged that matches a coherent concept of judicial activism. This shortfall explains why current efforts to define the term only feed critiques of activism as unstable and useless. For "judicial activism" to be salvaged, it needs a fundamentally different kind of definition.

II. RECONCEIVING ACTIVISM

Before proceeding farther, let me address the plausible objection that judicial activism should *not* be salvaged; instead, the term should be unceremoniously interred or left to its incoherence. If the varied and conflicting current interpretations of judicial activism discussed above were the only ones possible, even I might agree.[102] On the other hand, an academic choice to decry or ignore activism-talk will not make the term disappear. (Six decades of scholars have tried as much.[103]) And so long as judicial activism remains the public's dominant means of evaluating judges, legal experts who dismiss the term may be misread as endorsing limitless, freewheeled judging.[104] Rather than simply restating flaws in modern definitions of activism, this Part experiments with an affirmative project: seeking to redefine activism as a limited concept that responds to the values that animate our history of judicial critique. I believe that this approach has not been adequately tried, and may deserve some effort.

My analysis offers two specific reasons to care about judicial activism. First, I propose that judicial activism debates represent cultural discussions about judicial role. Such discussions are crucial to our legal system's operation, and legal scholars play a special role in developing unenforced "internal norms" of judicial behavior.[105] If my analysis is right, then activism debates are indispensable, and this conceptual point remains true regardless of whether one prefers some trivially different label like "judicial legislation," "aggressive judging," or some other rhetorical

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[102] *See supra*.

[103] *Supra* note **Error! Bookmark not defined.**, the effort to discredit the distinctions between "judicial activists" and "champions of self-restraint" began almost immediately upon publication of Schlesinger's article, and has continued, without any measurable degree of success, until the present day.

[104] *See* White, *supra* note 8, at 304.

[105] LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES (2006) (analyzing the behavior of judges before particular audiences and in particular situations, and examining the influence those audiences and situations have on case law); White, *supra* note 9, at 467-473 (describing both freedoms judges have and limitations they face as a result of their culturally constructed role in American government and politics).

creature.[106] At root, I suggest that the concept of judicial activism underlies all of these terms.

Second, it seems unhelpful for public and scholarly debates over judges to remain segregated, with the former predominantly using the term "judicial activism" and the latter eschewing or misapplying it. As one study declared, "Americans are arguing about the future of the federal judiciary,"[107] and such debates will only intensify under our next President.[108] The question of how scholars participate may depend on their ability to understand and perhaps reformulate activism-talk. Now is thus a useful time to probe the gap between public and scholarly discourse, especially if that schism can be somewhat narrowed.

To pursue these ends, Section A develops a new definition of judicial activism, as a corollary of judicial role, and explains why unenforced cultural norms of judging are crucial to our legal system. Section B contrasts my conception of judicial activism with modern orthodoxy, suggesting that judicial activism has no essential link to individual rights or deference to other governmental judgments.

A. Judicial Activism, Judicial Role

This Section starts with the core premise that many judicial decisions in our legal system are not effectively supervised by other governmental agents. I propose that judicial activism should be reconceived as the abuse of such unsupervised power, exercised outside the bounds of judicial role. First, I will explain what it means for judicial decisions to be unsupervised. Then, I will analyze why debates over unsupervised judging are so important.

1. Judging Without a Leash

The most familiar instances of unsupervised judicial decisions are constitutional rulings by the Supreme Court, which can be very difficult to

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[106] These terms, along with other rhetorical creatures, are sometimes used as alternatives to "judicial activism." *See* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 54 n.74 (explaining that he uses the term "aggressive judge" because "judicial activism" has become a "term of abuse for a decision that the abuser does not like, rather than a description of decisions that expand the judicial role relative to that of other branches of government") (2005). There is, however, no clear disadvantage to sticking with "judicial activism," which may permeate public discourse somewhat better than more specialized jargon.

[107] CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?, vii (2006).

[108] *Id*. at 148 (four phenomena are increasingly pervasive among both judges and the general public: ideological voting, collegial concurrence, group polarization, and a whistleblower effect). *See also* Editorial, *The ABA Plots a Judicial Coup*, WALL STREET JOURNAL, Aug. 14, 2008 at A12.

alter or influence.[109] But these are hardly the phenomenon's most common or important examples. The high transactional costs of enacting legislation shelter Supreme Court interpretations of statutes or common law from outside review;[110] and trial courts and courts of appeals also make unsupervised decisions in particular contexts, as with certain judgments of acquittal and cases that are clearly not cert-worthy.[111]

The concept of unsupervised judging loosely tracks Bickel's "countermajoritarian difficulty," but the latter term is incomplete because the "difficulty" in this context rests on constitutional bedrock.[112] The Founders granted significant judicial independence through Article III's provision for life tenure and irreducible salaries,[113] and our tradition of non-impeachment has only strengthened these guarantees.[114] As a result, lower federal courts are accountable for their decisions to higher courts, but the judicial ladder's top rung—whether the Supreme Court or otherwise—is hardly accountable at all.[115] This dynamic is not just a feature of constitutionalized judicial review; indeed, the issue would still exist without judicial review. Unsupervised judging is inherent by nature in any system that (like ours) leaves certain judicial decisions exclusively to judges.[116]

Such mechanics of judicial decision-making raise correlate questions of judicial role. Although some instances of unsupervised judicial decision-making are not systematically "difficult" or problematic, others certainly are.[117] In simplest terms, the fact of judicial might does not make right; and Justice Jackson was wrong that the Supreme Court is "infallible

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[109] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); David Cole, *The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 61-62 (1997).

[110] Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2105 (2002); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[111] Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 741-742 (2008); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 369-370 (2005). The impact of these unsupervised decisions is obviously lower for local federal tribunals.

[112] Bickel, *supra* note 109, at 16. Bickel coined his term to refer to judicial review, which is not explicitly prescribed in the Constitution.

[113] U.S. CONST. art. III, § 1.

[114] Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 74 (2006) ("It is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge.") However, since Congress failed to convict Supreme Court Justice Samuel Chase, impeachment has been an empty threat.

[115] Framers and successive generations have repeatedly declined congressional review of judicial decisions. See Eskridge, *supra* note 110, at 1523.

[116] Id. at 1524-1525. In the American legal system, a large number of judicial decisions are left exclusively to judges, without any type of oversight, on the idea that "judicial lawmaking is justified by 'the subservience of courts to principles, to rational decisionmaking, and to the whole fabric of the law.'" *Id*. at 526, citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 96 (1982).

[117] Compare the hypothetical discussed *supra* with, for example, *Dred Scott*, as discussed *infra*.

because [it is] final."[118] The inability to reverse a judicial decision is not a conclusive justification, and certain judicial abuse deserves criticism as "activist" even though it retains full operative force.

Consider an illustrative distinction between "judicial independence" and "judicial autonomy." Judicial independence under Article III provides that neither a litigant, nor a President, nor a public mob can force judges to reach decisions contrary to their legal judgment.[119] Yet that insulation does not aim to empower all aspects of a judge's preference. The term judicial *autonomy*[120] goes too far, for it is not simply the judge's "self" that should govern—not her personal preferences about particular litigants, lawyers, parties, or even results and principles. Judicial independence exists to empower judges in their role as judges, that is, as articulators of proper legal decisions. Phrased differently, fields of judicial discretion require more than just freedom to decide as one pleases; such discretion implies a responsibility to decide using the measure of good judgment appropriate for a judge in such circumstances. The concept of judicial activism likewise exists to delineate improper uses of judicial power and discretion that countervene cultural norms regarding judicial role.

This link between judicial activism and judicial role is also bolstered by Part I's historical discussion.[121] The four periods discussed—*Lochner*, Reconstruction, *Dred Scott*, and the Marshall Court—are plausible instances of judicial activism only because the Court not only allegedly erred in each instance; the alleged error was *non-judicial* in nature, beyond the limits of judicial propriety.[122] The same is true for alleged activism with respect to *Brown*, Warren-era rights cases, and (less clearly) Schlesinger's essay itself. Allegations of non-judicial decision-making are the *conceptual core* of judicial activism, regardless of whether such allegations nominally march under "judicial activism's" popular banner.

2. The Need for Judicial Activism Debates

With this interpretation in place, the importance of discussing judicial activism is clear. The structure of federal courts assures that judges will exercise unsupervised power, and the consequences of possible abuse are

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[118] Brown v. Allen, 344 U.S. 443, 540 (1953).
[119] Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 672, 691 (1980).
[120] Autonomy can be defined as "the condition of being controlled only by its own laws, and not subject to any higher ones." OXFORD ENGLISH DICTIONARY (2d ed. 1989).
[121] Schlesinger initially separated out his "judicial activists" from his "champions of self-restraint" based on his understanding of the role each Justice envisioned as proper for judges (Schlesinger, *supra* note 7, at 201-108); my analysis in Part I of other historical periods in which the judiciary arguably acted in an "activist" manner further breaks down the differences between our modern concept of what constitutes an activist judge as opposed to a judge who exercises self-restraint, and what was viewed as the proper exercise of judicial power at those particular points in history.
[122] *Supra*.

significant. Thus, judges' beliefs about their work are often the only operative check against judicial usurpation.[123] Those beliefs, in turn, are influenced by cultural expectations that arise from education, experimentation, debate, and experience.[124]

Unlike many civil law countries, the United States lacks a professionalized "judges' school,"[125] and judicial promotions are mainly political, with mild attention to performance and no consensus on useful criteria.[126] Accordingly, judges learn their professional role in the same eclectic, experimental way that lawyers learn what they should expect from courts. Judicial role is neither human nature nor common sense, and it is at most weakly codified in rules of ethics and practice.[127] For all participants in the legal system, ideas about judging stem mainly from experience, education, and informal discussions. New judges do their job by applying their own view of judicial role, following whatever principles they find applicable, and mimicking whatever role models they find appropriate. Over time, judges' ideas about judging morph to accommodate their lived experience, and so the wheel turns.

As a legal community, we cannot stop ourselves from talking about what judges should do. From hardboiled practitioners to abstruse scholars, we ceaselessly dispute examples and principles of good judging. And such conversations are the most important part of judicial activism debates, regardless of whether they explicitly use the term. These discussions of what could be called a "rule of law" ideology is a key part of legal training, designed to created lasting cultural norms of restraint and propriety. Each new class of students, lawyers, academics, and judges discusses judicial activism from a slightly different perspective. Yet it is a conversation that accommodates breadth; and these debates are indispensable to legal rule under conditions of unsupervised judicial decision-making.

To be concrete, imagine a new federal judge—fresh from Mars perhaps—who has absolutely no experience with discussions of judicial role. Regardless of any other knowledge and experience, such a judge would be horribly uninformed about her job. One can barely conceive a

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[123] Baum, *supra* note 105, at 10-11.
[124] *See, generally,* Baum, *supra* note 105; Sunstein, *supra* note 107.
[125] Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363, 370-383 (2007) (analyzing the highly specialized judicial training and merit-based selection processes found in France, Spain, Germany, the Netherlands, and Italy).
[126] *See generally*, Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004) (suggesting that a competitive, tournament-style approach to judicial selection would be a more beneficial approach than the current, haphazard system).
[127] *See, e.g.*, the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. V 1993); United States Supreme Court, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 427-431 (promulgated rule 16(c), effective Dec. 1, 1993) (Rule 16(c)). Something about the irrelevance of ethics rules.

judge worse suited to such employment, and less able to exercise the public trust vested in judicial office. In this sense, judicial activism debates are what allow judges to be good judges, and such discourse is also a vital mode of critique when judges do otherwise.

B. Self-Confessed Heterodoxy

The foregoing account may seem familiar, as it blends commonplace intuitions with well known history. Yet my characterization of activism as a departure from cultural standards of judicial role differs from conventional analysis in at least two respects.

First, under my approach, judicial activism does not necessarily promote progressive ideology or increase individual rights. On the contrary, breaches of judicial norms may favor, disfavor, or have no effect on equality or liberty. To see this point, imagine if one were to apply the label "judicial activism" only to progressive decisions. That approach might accurately track Schlesinger's use of the term and its application to Warren- and Burger-era cases. But it would improperly exclude *Lochner*-era decisions that favored corporate and propertied interests.

The notion that judicial activism necessarily boosts liberty might seem more plausible, but *Dred Scott* and *Lochner* stand to the contrary. Both of these arguably activist decisions enhanced a particular form of liberty and property rights. Yet it is absurd to characterize *Dred Scott* as promoting liberty, [128] and it is at least debatable whether *Lochner*'s liberty of contract submerged the greater liberty of exploited workers to avoid unnecessary harm.[129] The fact that many judicial cases involve competing liberties makes it hard to see the promotion of liberty as decisive in defining judicial activism.

Another problem for liberty-based definitions of activism is determining what liberty could possibly mean in this context. Even the most conventional aspect of liberty, its opposition to governmental power, creates significant difficulties. For example, Edward Purcell has shown that the *Lochner* era's constitutional decisions, which favored business interests against the government, are closely tied to decisions that favored interstate corporations over poorer individuals.[130] It is implausible that cases against the government might be activist, but cases with only private parties categorically are not. Likewise, much modern regulatory law

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[128] Rodgers, *supra* note 9, at 134-135 (describing the effects of tighter fugitive slave laws on the rhetoric of "higher law").

[129] BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1856-1920 (2001).

[130] EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, AT 3-11 (1992).

allows enforcement either by private lawsuits or by governmental ones.[131] Again, it is not credible that judicial decisions affirming individual rights versus the government may be activist, but decisions affirming those same rights against private environmentalists cannot.[132] Contrary to most modern interpretations, I suggest that judicial activism lacks any solid link to progressive politics or promoting liberty.

A second unconventional feature of my analysis is that judicial activism does not turn on a court's deference to other political entities. Many scholars have claimed that judicial activism is identified by inadequate deference to Congress or the executive branch.[133] By contrast, I believe that judicial activism is not the mere absence of deference—any more than proper judicial role is just to get out of the way. Under my approach, a judge can be activist by deferring too much, thereby authorizing excessive governmental power. A judge can also refuse to defer without being activist, thereby properly enforcing the law. A few examples may clarify these points.

Instances of arguably excessive judicial deference include *Korematsu* and *Yamashita*.[134] *Korematsu* affirmed a defendant's conviction for violating certain racially based military orders, under which 100,000 Japanese-Americans were interned.[135] Under conventional analysis, *Korematsu* could not qualify as activist (a) because the Court denied individual rights and (b) because it "passively" approved the President's military program.[136] To describe *Korematsu* as passive, however, understates its significance. By upholding Korematsu's conviction, the Court confirmed his punishment's compatibility with the Constitution, and thereby legitimated a racist military regime throughout the western United States.[137] The Court sanctioned executive violence against Korematsu, just like any other criminal case,[138] and the Court issued a precedent concerning executive detention that "lies about like a loaded weapon."[139]

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[131] Well known examples include environmental statutes comprising the Clean Air and Clean Water Acts, or federal antitrust laws comprising the Sherman, Wilson, Clayton, and Robinson-Patman Acts.
[132] Easy examples include cases of polluters or disputes over intellectual property.
[133] *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42-43 (2005); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 45 (1990); Bickel, *supra* note 109, at 16-17; Cross & Lindquist, supra note 95, 101-106; Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87-105 (2001); Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. Rev. 1931, 1949 (2007).
[134] *Korematsu*, *supra* note 38; Application of Yamashita, 327 U.S. 1 (1946).
[135] *Korematsu*, *supra* note 38.
[136] The denial of individual rights extended not just to Korematsu, but to thousands of Japanese-Americans. The court passively deferred to the military who ordered the detention of these citizens on national security grounds.
[137] *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES 286-308 (2004); PETER IRONS, JUSTICE AT WAR 48-74 (1983).
[138] *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).
[139] *Korematsu*, *supra* note 38, at 246.

The Court did not merely deny rights, it also approved power. And if this latter result was (as some have argued) an abdication of judicial responsibility regarding executive power, then I see no reason for withholding the "activist" label.

Similarly, *Yamashita* involved the denial of habeas corpus to a Japanese general convicted by a military commission of various war crimes.[140] Again, traditional views of activism might characterize all denials of habeas as passive, because they subordinate individual liberty and show deference to governmental entities such as prosecutors, military adjudicators, and prison staff. By contrast, I suggest that federal courts can just as readily violate their judicial role by inappropriately increasing executive power as by inappropriately limiting it. For federal courts to side with the President, or other governmental entities, is neither neutral nor passive. Such rulings are an exercise of judicial authority that, just like decisions that favor liberty or property, can either follow or violate cultural norms of judicial role; under my approach, the latter category of cases would qualify as activist.

My final example is the arguable judicial activism of *Dred Scott*. As a technical matter, the Court held that federal courts lacked diversity jurisdiction over Scott's tort suit concerning slavery-based assault and false imprisonment.[141] The Court ruled that for purposes of federal law neither slaves nor descendents of African slaves could qualify for federal or state citizenship; thus, Dred Scott could not be a "citizen" of a different state from the defendant for purposes of diversity jurisdiction.[142]

If judicial activism depended solely on political deference, *Dred Scott*'s activist status might be questionable. On one hand, to deny jurisdiction is often viewed as a paradigmatic act of judicial restraint.[143] Also, *Dred Scott* left slavery's status exclusively in the hands of state statutes and state courts, which also might seem inherently passive.[144]

On the other hand, the Court's two grounds for denying jurisdiction—Scott's African-slave heritage and his contemporary slave status—carried potentially explosive consequences. The Court's holding about African slaves' descendants stripped even free blacks and emancipated slaves of their ability to access federal courts.[145] The Court also implied that the

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[140] *Yamashita*, *supra* note 135.
[141] *Dred Scott*, *supra* note 70.
[142] Under modern reasoning, the Court should have focused on the statute, rather than the Constitution. This rule, among others, was formally established in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).
[143] *Ashwander*, *supra* note 142 at 341-356 (Brandeis, J. dissenting); Cesare P.R. Romano, *The Shift From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 801 (2007).
[144] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).
[145] *Dred Scott*.

Constitution gave such persons "no rights which the white man was bound to respect," including privileges and immunities under Article IV and at least some of the Bill of Rights.[146] Similarly, in ruling that Scott remained a slave, the Court invalidated part of Congress's Missouri Compromise of 1820, and cast shadows on the authority of territorial governments and even free states to restrict slavery.[147] None of these collateral determinations seems at all passive or deferential.

Regardless of how one might ultimately balance the "deferential" and "non-deferential" aspects of the *Dred Scott* decision, my point is simply that the case's activist status requires no such hair-splitting, any more than it requires a balancing of "liberties" or an estimate of progressive politics. If *Dred Scott* is activist in any meaningful sense, it is because—and only because—the Court departed from cultural norms of judicial conduct.[148]

Although this Part has outlined basic principles for reconceiving judicial activism, and has asserted a need to do so, I have chosen only uncontroversial examples of activism in order to delay explaining how to identify cultural norms of judging, and thereby how to determine whether any particular judge or decision is activist. These last tasks are addressed in Part III.

III. STANDARDS OF JUDGING

Part II outlined a distinctive view of judicial activism, defined by reference to cultural norms of judicial decision-making. This Part takes the next step of analyzing how debates over judicial activism should proceed, particularly addressing how standards of judicial role may be identified, constructed, and disputed. Although there is well known dissensus over many cultural norms of judicial conduct, this Part seeks agreement on certain basic methods of debate.

My goal is not to persuade readers to accept any substantive vision of activism, much less any list of activist or non-activist decisions and judges. Instead, my framework seeks to channel ongoing discussions toward more useful inquiries and away from distractions, rendering activism debates more transparent and accessible. To borrow Charles Black's words, jurists pursuing my approach may continue to differ over particular instances of judicial activism, but "at least they would be

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[146] Taney's opinion in *Dred Scott* equated the word "citizen" with the term "the people," which appears in several Amendments: I, II, IX, and X. This raised the disturbing question of whether, in the eyes of the Supreme Court, any black person—whether slave, freedman, or free-born—could be denied rights granted to all citizens, such as the right to bring suit or the right to vote, solely because of race.

[147] Fehrenbacher, supra note 67, 391-392.

[148] *Supra*.

differing on exactly the right thing, and that is no small gain in law."[149]

First, I will consider three popular sources of authority in describing judicial role. Section A addresses the text and original history of the Constitution and certain federal statutes, while Section B considers abstract philosophical theories of law, exemplified by the work of Ronald Dworkin. Each of these approaches—textual originalism and analytical jurisprudence—can be somewhat helpful in evaluating judicial activism. But I believe that each is too inflexible to accommodate federal courts' transformative history and potential. Section C discusses most famous living analyst of judicial role, Antonin Scalia. Though Scalia's academic work cites historical sources, we shall see that his analysis of judicial role is almost as abstractly theoretical as Dworkin's, and it suffers similar flaws.

Section D offers my own two-part framework for analyzing judicial activism, with roots in history and theory alike. The most basic feature of my proposal is its view of judicial role as a semi-solid, semi-fixed network of ideas that binds judges in the medium term, even though it may bend and yield over the course of generations. Under this approach, legal experts must continue debating judicial activism because these cultural debates are all that maintain judicial conduct's long-term legitimacy and effectiveness.

A. Shortfalls of Text and History

To explore limits on judicial power, one place to start is the legal grant of judicial authority. For federal courts, this means the Constitution and federal jurisdictional statutes. Insofar as federal courts are authorized by the Constitution, and are created by federal statutes, this Section investigates whether such documents prescribe a particular vision of judicial decision-making.

As a textual matter, neither the Constitution nor jurisdictional statutes offer much guidance. These documents' original history shows only that the structure, function, and role of federal courts have greatly changed over time, which complicates efforts to identify transhistorical guideposts. I will consider these points in turn.

1. Textual Vagueness

Starting with the Constitution, Article III grants federal courts "judicial Power," but offers no clear vision of what this power means or how it should be exercised.[150] Of course, the Constitution places federal judges in

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[149] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 48-49 (1969).

[150] *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE,

a distinct branch of government, which shows some commitment to a separation of powers. But the simple inference that judges are "not Congress" and "not the President" is no real help.[151] On the contrary, the Constitution's text shows that the Framers' dominant choice was to leave almost all judicial details to Congress—including the existence of lower federal courts, the availability of juries in civil trials, the pertinence of common law, the existence of judicial review, and the relationship between courts' legal determinations and those of other branches.[152]

The Judiciary Act of 1789 and later legislative reforms also did not textually codify any specific vision of judicial activism. Instead, Congress addressed issues of judicial role only indirectly, by creating the structural context in which federal courts operate, and granting federal courts the largely unspecified power of "jurisdiction."[153] For example, the First Judiciary Act answered some Anti-Federalist fears by creating only a small number of judgeships, in courts of limited jurisdiction, with Supreme Court review only by writ of error (rather than retrial).[154] Yet Congress gave no direct instruction about how judicial decisions should issue, how judicial acts should fit with other political actors and activities, or how judges should generally conceive of their new office.[155] Such legislative micromanagement may have seemed unnecessary or improper; or perhaps legislative consensus on these points was not feasible. Either way, Congress's jurisdictional grants gave little textual guidance about how judges should exercise their statutorily authorized power.[156]

THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

[151] *See* Purcell, *supra* note 84, at 111 (stating that, while the titles of "Congress," "the President," and the "Supreme Court" remained unchanged at the start of the twenty-first century, the institutions themselves, and the roles people filled within them, had changed drastically); Craig Green, *Erie and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 668 (2008).

[152] JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 246-47 (1971).

[153]During this era, debates over the limits of federal court jurisdiction and the substantive law to be applied were intense and vitally important. If a court had jurisdiction, then it had the power to utilize all kinds of eclectic legal sources, to pick and choose among them, and to impact the functioning of other areas of the law. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, 113-114 (1991). *See generally*, Maeve Marcus and Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation? in* ORIGINS OF THE FEDERAL JUDICIARY 13 (Maeve Marcus ed., 1992).

[154] RICHARD FALLON, JR., DANIEL MELTZER & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 321 (5th ed. 2003).

[155] *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 395-402 (2002); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997); Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 200 (2001).

[156] *See* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA, 103 (1990) (stating that the Act did not guide the Court in determining the source or character of the rules it set out for them, but rather left it up to the Court's discretion); David J. Sharpe, *Admiralty Jurisdiction: The Power Over Cases*, 79 TUL. L. REV. 1149, 1154-1155 (2005) (calling the

2. Originalism's Shortcomings

Just as statutory and constitutional texts do not specify any determinate vision of judicial activism, the "original history" accompanying those authorities does not either. Originalist inquiries must be carefully separated from more general attention to history, because originalism's distinctive feature is its focus on particular periods accompanying legal enactments.[157] Thus, an originalist view of judicial activism might claim that modern federal courts should be evaluated using nontextual ideas of judicial role. but only if those ideas were implicitly flash-frozen and incorporated into law at important points in judicial history.[158] Two such "federal courts moments" are the constitutional Founding and the enactment of the First Judiciary Act.[159]

This Subsection concludes that neither of these periods in judicial history deserves a dominant position in debates over judicial role. As we shall see, the structure, dockets, and function of twenty-first-century federal courts are radically different from their eighteenth- and nineteenth-century counterparts. More importantly, prior generations of judges operated under practices and ideas that are heretical today. This is why, despite originalism's adherents in other contexts, there are no originalists on topics of judicial role and judicial activism.[160] The history of federal courts moments, just like other judicial history, must be absorbed on a translated and retail basis, not a simple or wholesale one.

a. Framing-era History

With respect to original history concerning constitutional notions of judicial role, two illustrative sets of Framing-era materials include the essays of Alexander Hamilton and "Brutus," and eighteenth-century practice in state courts. Hamilton's Federalist 78 is the Judiciary's greatest Framing-era defense, and it includes a particularly important paragraph characterizing the Judiciary as the "least dangerous" branch.[161] Hamilton explained that the Judiciary would have the least capacity to injure the

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First Judiciary Act a "hodgepodge of federal subject matter topics"); Harrington, *supra* note 169.

[157] Purcell, *supra* note 84, at 13; Mark C. Rahdert, *Comparative Constitutional Advocacy,* 56 AM. U.L. REV. 553, 647 (2007).

[158] This is not, of course, to deride originalism as "wooden," "unimaginative," or "pedestrian." *See* Scalia, *supra*, note __ at 23.

[159] This idea is loosely borrowed from Bruce Ackerman's innovative analysis of "constitutional moments." *See generally* BRUCE ACKERMAN, WE THE PEOPLE, TRANSFORMATIONS 5-8 (1998).

[160] Gordon Wood, *Response*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49-63 (Amy Gutmann ed., 1997).

[161] Alexander Hamilton, *Federalist 78*, THE FEDERALIST WITH LETTERS OF BRUTUS, 377 (Terence Ball, ed., Cam. Univ. Press 2003). *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 994 n. 131 (2002).

Constitution's political rights because it would have:

> no influence over the [President's] sword or the [congressional] purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[162]

To careful readers, these familiar words may seem frightening, insofar as Hamilton seems to "reassure" readers with speculation that the President and Congress might disobey judicial edicts, leaving judges impotent even to enforce their judgments. Regardless of whether such lawless scenarios were palliative in the 1780s, our tradition of federal loyalty to Supreme Court rulings has displaced the possibility of political disobedience from any defense of modern judicial power.[163]

Other parts of Hamilton's analysis seem more relevant to current debates. For example, Hamilton's view that federal judges must use "judgment" not "will" tracks the uncontroversial difference between judicial independence and judicial autonomy.[164] To say that judges should not do literally whatever they like, but should instead use "judgment" and "discretion" is a good start, but nothing more.

Hamilton's claim that courts "can take *no active resolution*" may also be congenial but minor, if it means that courts must hear cases brought before them.[165] Judicial docket controls are undeniably different from congressional and presidential discretion over their activities.[166] But this again says little about how courts should treat those cases that are properly presented.

On the other hand, Hamilton's bold argument that federal courts have "no direction either of the strength or the wealth of the society" is overstatement, much like the modern canard that all judicial "activity" is condemnable "activism,"[167] or Montesquieu's claim that "the judiciary is next to nothing."[168] Hamilton knew better, and perhaps this statement was merely pro-ratification propaganda to calm New Yorkers' nerves. In any event, Federalist 78 never truly confronts the realities of unsupervised judging, and this greatly lessens the essay's usefulness as a guide to

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[162] *Id*. at 378.
[163] *See generally* William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).
[164] *See supra* text accompanying notes _____ & _____.
[165] Hamilton, *supra* note 180, at 465-66.
[166] *See, e.g.*, *Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices*, *in* THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486, 486 (Henry P. Johnston ed., 1970).
[167] Hamilton, *supra* note 180, at 465.
[168] CHARLES MONTESQUIEU, SPIRIT OF LAWS 181 (1748).

judicial activism.[169]

By contrast, Brutus's essay was tightly focused on Article III's risks of unsupervised judging:

> [The federal courts] in their decisions . . . will not confine themselves to any fixed or established rules, but will determine . . . the reason and spirit of the constitution. The opinions of the supreme court, whatever they maybe, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or contro[l] their adjudications. From this court there is no appeal.

Brutus further noted that the Constitution's sweeping language endorsed an expansively "equitable" rather than "legal" approach to judging, and he suggested that English precedents might support that result.[170] Thus, Brutus famously concluded that Supreme Court Justices, with their independence of government and populace, "will generally soon feel themselves independent of heaven itself."[171]

Despite Brutus's clear vision of judicial activism's possibility, his essay is hardly an authoritative Framing-era analysis of judicial power. He wrote for the losing side of ratification, and was criticizing, not containing, the phenomenon of unsupervised judging. Just as Hamilton exaggerated federal judges' distance from social policymaking, Brutus also puffed that Article III judges would produce "an entire subversion of the legislative, executive and judicial powers of the individual states" through their great "latitude of interpretation."[172] Accordingly, although both Brutus and Hamilton indicated some awareness of unsupervised judging, there is no evidence that they viewed the Constitution as yielding any effective guidance in channeling it.

A second set of Framing-era materials stems from eighteenth-century state courts, which were models near at hand for the Framers' new federal courts.[173] In reality, however, the state courts varied immensely in their composition, function, and role. Most notably, Framing-era state courts did not track modern conceptions of judicial hierarchy. No state had a "supreme" court to exercise recognizable appellate review over inferior

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[169] For example, Hamilton suggests that if one is concerned that judges might abuse their discretion, we may as well not have them. Hamilton, *supra* note 180, at 465.

[170] Robert Yates, *The Anti-Federalist No. 15, in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 304, 305 (Ralph Ketcham ed., 1965).

[171] *Id.*

[172] *Id.* at 296.

[173] *See* White, *supra* note , at 51-52 (describing the trans-Atlantic migration of the tradition of "natural rights" and "natural law," as well as the influence English common law had on the newly formed courts. Nevertheless, the desire to be unique and to break with English ideology and government led American judges to disregard "distasteful English common law precedents.").

courts, which was an integral part of the new federal judiciary.[174] Accordingly, state judges from the Framing era—regardless of what court they served—did not "make law" in the modern sense, but rather were charged to "find law" through fact-specific trials.[175] It was more important to arrive at the correct result, even if that required multiple trials in multiple courts. To achieve this goal, multiple judges typically heard even the most insignificant cases, under the assumption that more judges improved the ability to "find the law."[176] State courts during the framing era also used juries to "find the law," whereas the modern jury's role is limited to finding facts.[177]

Furthermore, each state provided a different example of judicial structure, such as the opportunity for multiple trials in inferior and superior courts,[178] inferior court judges exercising appellate review on their own,[179] and judicial review of legislative action outside the scope of litigation.[180] Despite this background available to instruct the structure and role of federal courts, the framers established an entirely new system.[181]

State governments also lacked a key structural component of the new federal government, separation of powers. In some states, such as New York, New Jersey, and Connecticut, the executive and legislative branches performed some of the appellate review function that today is considered the exclusive province of superior courts.[182] For these reasons and many more, new federal judges could not rely on state judiciaries as a source for understanding their institutional role.[183]

It is unsurprising that the Framers did not embed a firm vision of judicial role in Article III's "judicial Power." First, the Constitution's judicial powers were so novel that the prudent course was surely to allow standards of judicial performance to develop experimentally. Second, one

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[174] WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 27 (Wythe Holt & L.H. LaRue eds., 1990). Goebel posited that the early state judiciaries did not establish original versus appellate jurisdiction because the pre-existing colonial systems ultimately were subject to King's Bench review in England. JULIUS GOEBEL, JR., THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME I: ANTECEDENTS AND BEGINNINGS TO 1801, 10 (2d prtg. 1974).

[175] RITZ, *supra* note 1, at 28.

[176] *Id.* at 28-29.

[177] *Id.* at 30.

[178] GOEBEL, *supra* note 1, at 317 ("'[A]ppellate' . . . meant no more than the power of one tribunal to review the proceedings of another either as to law or fact, or both.").

[179] *See, e.g.*, GOEBEL, *supra* note 1, at 26-35 (providing survey of colonies' structures for appellate reviews); RITZ, *supra* note 1, at 42-44 (reviewing structure of state judiciaries as they existed at time of framing).

[180] GOEBEL, *supra* note 1, at 104.

[181] RITZ, *supra* note 1, at 35. Goebel asserts that "no belief was more ingrained in this country than that courts were properly to be ordered in terms of inferior and superior jurisdiction." GOEBEL, *supra* note 1, at 468.

[182] GOEBEL, *supra* note 1, at 15; RITZ, *supra* note 1, at 42-44.

[183] *See infra* text accompanying footnotes 202 & 203 (quoting Chief Justice Jay's grand-jury charge).

lesson from the highly diverse state courts is that judicial role turns on judicial function, and both depend on the governmental context in which a court operates. At the Constitution's Framing, the judicial power was more uncertain than the power of any other branch.[184] Again, the Framers left matters almost entirely in the hands of Congress and the courts.[185] It would have seemed premature under such circumstances for the Constitution to prescribe notions of judicial role, and there is no original history indicating that the Framers tried to do so.

b. The First Judiciary Act

When James Madison joined the House of Representatives in 1789, he wrote that the First Congress had entered "a wilderness without a single footstep to guide us."[186] Early federal judges much felt the same. In his first grand jury charge as Chief Justice, John Jay declared that "the formation of the judicial Department [was] particularly difficult. . . . [N]o Tribunals of the like kind and Extent had heretofore existed in this Country—from such therefore no Light of Experience, nor Facilities of usage and Habit were to be derived."[187]

Although the First Judiciary Act had created these federal judges' posts, and the Constitution had endorsed their selection, nothing specified how they should decide cases, what materials they should use, or how the judicial power should relate to other governmental entities' authority.[188] Indeed, the Judiciary Act of 1789 was a work of compromise, which solved a discrete number of truly pressing issues concerning the federal courts, but left a vast majority of issues unaddressed.[189]

Modernists can barely grasp how federal courts worked in 1790. The Judiciary was staffed by just nineteen judges, and in the Constitution's first three years, the Supreme Court produced a total of five decisions.[190]

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[184] Even the Presidency was de facto known to be in the capable hands of George Washington

[185] Harrington, supra note 169.

[186]Letter from James Madison to Thomas Jefferson (June 30, 1789), in 12 THE PAPERS OF JAMES MADISON 267, 268 (Charles F. Hobson et al. eds., 1979).

[187]John Jay, The charges of Chief Justice Jay to the Grand Juries on the Eastern circuit at the circuit Court's held in the Districts of New York on the 4th, of Connecticut on the 22nd days of April, of Massachusetts on the 4th, and of New Hampshire on the 20th days of May, 1790, *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 387-95 (Henry P. Johnston ed., 1890).

[188] The only possible exception is Section 34 of the First Judiciary Act, which was the subject of endless debate. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 8-12, 25-26, 126-48 (Wythe Holt & L.H. LaRue eds., 1990). Section 34 was the provision at the root of one of the most infamous cases of Supreme Court history, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

[189] *See* JULIUS GOEBEL, JR., THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME I: ANTECEDENTS AND BEGINNINGS TO 1801, at 457-508 (1st prtg. 1971) (recounting process of drafting and adoption of First Judiciary Act of 1789); RITZ, *supra* note 180, at 22-24 (acknowledging compromises and several unaddressed issues).

[190] White, *supra* note 8, at 10.

Chief Justice Jay remained continuously active in partisan politics while on the bench, until he finally quit in 1795 to run for governor.[191] Indeed, the Justices' main duty was not serving the Court itself, but riding circuit, where they put a public face on federal power and were exposed to local practice and customs.[192] Circuit-riding was the driving force for the Court's original six-person membership,[193] and the Justices' local contacts were a large part of the Court's "supreme" status during its first century.[194] On the other hand, the strain of riding circuit hastened some Justices' retirement and death, thereby decreasing both the job's desirability and the pool of potential candidates.[195] Because most circuit court opinions were not published, the Justices' greatest public influence was often exercised through grand-jury charges, and such speeches were sometimes highly publicized, polemical commentaries on contemporary law and politics.[196]

Even when the Court sat in its collective capacity, the Justices issued seriatim opinions, which seemed appropriate in an era where precedents appeared from the Court's contextualized results rather than its expressed views.[197] When the federal government's capital moved to Washington in 1800, Congress neglected to give the Supreme Court its own home.[198] And when Jay declined to rejoin the Court in 1800, he complained that the hobbled institution would never "obtain the energy, weight, and dignity which were essential to its affording due support to the national

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[191] *Id*.

[192] *Id*. at 45.

[193] Two Supreme Court Justices were required for each of the three original circuits. An Act to establish the Judicial Courts of the United States, ch.20, § 4, 1 Stat. 73, 74-75 (1789).

[194] G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, 161-163 (1991)

[195] Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1391 (2006).

[196] Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1453-54 (2006) ("During the 1790s, federal grand jury charges had been occasions for circuit-riding Supreme Court Justices to make major speeches that not only instructed the jurors concerning the criminal law but also addressed broader issues of law and politics. The Justices regarded it as their solemn duty to inculcate political virtue among the people, to act as 'republican schoolmasters' by teaching the principles of patriotism and good citizenship. It was customary for their charges to be published in the newspapers. As party conflicts between Federalists and Republicans heated up during that decade, however, federal grand jury charges began to cross the line from defense of government to defense of the administration in power and denunciation of its political opponents.").

[197] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990) (describing the effect of the changes John Marshall made when he became Chief Justice of the Supreme Court, abolishing seriatim opinions and issuing instead a single opinion of the court).

[198] Purcell, *supra* note 130, at 133. CARL BRENT SWISHER, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD 1836-64 (2d prtg. 1974); James E. Pfander, *Marbury, Original Jurisdiction, and the Sureme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1536 (2001) ("After moving from Philadelphia to Washington in the Fall of 1800, the Court was given quarters for the February 1801 term in the Senate's Committee Room No. 2, in the Capitol Building, where it remained until 1808."); Barton H. Thompson, Jr., *Chief Justice William H. Rehnquist: Prizing People, Place, and History*, 58 STAN. L. REV. 1695, 1701 (2006) (noting Chief Justice Rehnquist's description of Supreme Court's housing in committee room in U.S. Capitol); *see also* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 21-26 (1987).

Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[199] For these reasons and others, one scholar has said that the "genesis of the American judicial tradition" occurred, not with the First Judiciary Act of 1789, but with the "transformation of the office of appellate judge under John Marshall."[200]

All available legislative and judicial history suggests that the First Judiciary Act and other early jurisdictional statutes did not codify any vision of judicial role or activism. Judicial practice in the Early Republic also shows that, even if there had been a dominant eighteenth-century view of judicial role, many norms of that era would be highly inapt today. Not only did the operational details affecting early federal courts differ from those of modern times,[201] early judges held different basic assumptions about what law meant, and how it should be discerned and applied.[202]

An important example of these latter differences concerns common law in federal adjudication.[203] Jurists in the early nineteenth century recognized a more porous border between constitutional, statutory, and common-law judging than is orthodox today.[204] For instance, large parts of the federal docket concerned admiralty and interstate disputes, which required expansive judicial lawmaking and often applied an eclectic range of legal authorities, including customary international law and natural law.[205] Even constitutional rulings that did not explicitly rely upon such diverse authorities nonetheless slipped natural-law conceptions of justice into the Framers' gap-riddled text.[206] All of this seemed understandable at the time, because statutory sources were scarce, and American jurists had forged their conceptions of judicial role using common-law materials from England and the colonies.[207] Today, however, the methodological

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[199] White, *supra* note 8, at 11.
[200] *Id*.
[201] Rahdert, *supra* note 172.
[202] White, *supra* note 9, at 4 (stating that the Founders saw law as a "mystical body" and judges as oracle-like figures who could find and interpret the law).
[203] As used here, common law is an "attitude" toward judging, which can also affect constitutional decision-making.
[204] *See* White, *supra* note 8, at xii ("In the place of the premodern constraints incorporated within the oracular theory of judging, with their emphasis n the nature of "law" as an external, immanent, timeless causal agent in the universe, judges for most of the twentieth century have emphasized modernist-driven institutional constraints.").
[205] White, *supra* note 194, at 451; Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 284-285 (1999).
[206] White, *supra* note 9, at xii.
[207] *See, e.g.*, R. Ben Brown, *Juding in the Days of the Early Republic: A Critique of Judge Richard arnold's Use of History in* Anastasoff v. United States, 3 J. APP. PRAC. & PROCESS 355, ### (2001) ("[L]awyers, judges, and legal commentators contested the question of just what body of law judges should use to decide cases in the early Republic."). Further, early republic judges would pick and choose which English statutes and common law would be binding in their states and judges relied on

eclecticism that suited judges in the Early Republic would embarrass any modern effort to insert flash-frozen ideas of judicial propriety from the eighteenth century into federal jurisdictional statutes that remain applicable today.[208]

Original history does not indicate that the First Congress, or any successive Congress, prescribed specific standards of federal judicial role or judicial excess. When legislators established and organized the courts, they left judges to their own devices in discerning how to serve their proper function. Accordingly, the original history of the First Judiciary Act offers no more guidance than the Constitution itself on issues of judicial role and judicial activism.

B. Theoretical Abstractions

In contrast to analysis of activism through legal texts or original history, a second common authority used to analyze judicial role is "jurisprudence." Scholars in this field include Hans Kelsen, HLA Hart, John Austin, and others.[209] Although such theorists' work varies widely, two general problems arise in its application to activism debates.

First, jurisprudential theories tend to underemphasize law's institutional character.[210] For example, in contemplating the nature of law, jurisprudential scholarship might discuss whether law includes morality, when legal propositions qualify as valid, or how law should be "interpreted." But it is less likely to discuss the practical details of lawyers, clients, remedies, and other institutional prerequisites to exercising judicial power. 'How might a President's legal interpretation differ from that of a judge? When should judges defer to other entities' legal decisions? How much weight should stare decisis carry?' These institutional questions dominate discussions of judicial role and activism, but they are underemphasized in most schools of high legal theory.

Second, even when legal philosophy does address institutional concerns, it tends to abstract from particular cultures, time periods, and geographies. Although jurisprudential scholars are obviously aware of historical and inter-jurisdictional differences, they minimize such

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the customs of citizens as an alternative source of law. *Id.* at 359. Thus there was no clear vision of what body of law judges were to use when rendering decisions. *Id.* at 360. *See generally* Kathryn Preyer, *United States v Callender: Judge and Jury in a Republican Society*, *in* ORIGINS OF THE FEDERAL JUDICIARY 173, 173 (Maeve Marcus, ed. 1992).

[208] *See* WHITE, *supra* note 9, at 2 (opining that oracular theory of judging, finding the law, gave way in the twentieth century to the judge as lawmaker).

[209] *E.g.,* HANS KELSEN, A PURE THEORY OF LAW (1934); HLA HART, A CONCEPT OF LAW (1961); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (1970).

[210] An outstanding and very rare exception to this generalization is Neil MacCormick, *Institutions of Law* (2007).

variations' theoretical significance.[211] Thus, when jurisprudes analyze techniques of "judging," they tend to generalize about *all* judging, regardless of whether federal or state, Canadian or Cambodian, eighteenth-century or twenty-first-century.[212] This Article's conception of judicial role is more relativist in its approach; thus I believe that some past instances of judicial activity might well have been proper when they occurred, though they would not be deemed so today.

In some respects, the dual abstractions of jurisprudential theory simply reflect scholastic ambitions to uncover foundational, trans-contextual principles. Yet as Part II proposed, judicial role and activism are linked to judicial function, and the latter depends on context and details. Accordingly, despite jurisprudential theorists' philosophical rigor, their work cannot yield comprehensive guidance about norms of judicial conduct.

This Section considers the work of Ronald Dworkin, including his aptly titled book *Justice in Robes*.[213] In an earlier work, Dworkin claimed that "[l]aw as integrity condemns judicial activism, and any practice of constitutional adjudication close to it. It insists that justices enforce the Constitution through interpretation, not fiat,"[214] My focus on Dworkin stems from more than his outstanding reputation;[215] his work presents an arguable defense to the foregoing concerns about abstraction.[216] Despite various contacts with real-world adjudication, however, Dworkin's philosophy (like that of many other theorists) embodies an occasionally

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[211] *See* Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119 (2002); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985); William Twining, *General Jurisprudence*, 15 U. MIAMI INT'L & COMP. L. REV. 1 (2007).

[212] Dworkin, *supra* note 229, at 145, 163.

[213] RONALD DWORKIN, JUSTICE IN ROBES (2006).The choice of Dworkin is not coincidence. He is prolific, internationally renowned, arguably the most eminent living legal philosopher, and has been described as "probably the most influential figure in contemporary Anglo-American legal theory." ALAN HUNT, ED., READING DWORKIN CRITICALLY (1992).

[214] RONALD DWORKIN, LAW'S EMPIRE 378 (1986); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 137 (1977) ("The program of judicial activism holds that courts . . . should work out principles of legality, equality and the rest, [and] revise those principles from time to time in the light of what seems to the court fresh moral insight."). Dworkin also acknowledges that judicial activism allows courts to "serve as the citadel of public justice." Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1753 (2007).

[215] The choice of Dworkin is not coincidence. He is prolific, internationally renowned, arguably the most eminent living legal philosopher, and has been described as "probably the most influential figure in contemporary Anglo-American legal theory." ALAN HUNT, ED., READING DWORKIN CRITICALLY (1992).

[216] After all, other theorists have criticized Dworkin's work as not really a theory of law, but only one of adjudication; as not a general theory of law, but only one of law in the United States. *See, e.g.,* Joseph Raz, *Authority, Law, and Morality, in* ETHICS IN THE PUBLIC DOMAIN 210, 220-230 (2001); Michael Steven Green, *Does Dworkin Commit Dworkin's Fallacy? A Reply to Justice in Robes*, 28 OXFORD J. LEGAL STUD. 33 (2008); Robin Bradley Kar, 95 GEO. L.J. 393, 401 (2007). Judge Learned Hand called Dworkin his best law clerk. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 671 (1994).

self-conscious detachment from institutional details and jurisdictional specifics, and this weakens its ability to inform discussions of judicial role.[217] Two examples, chosen from the least abstract parts of Dworkin's work, may be sufficient.

First, Dworkin distinguishes his work from that of other theorists by focusing on a "doctrinal concept" of law, which he explains is related to "'the law' of some place or entity being to a particular effect."[218] "[W]e use that doctrinal concept when we say, for example, that under Rhode Island law a contract signed by someone under the age of twelve is invalid."[219] Even as Dworkin introduces his "doctrinal" concept of law, however, he drifts toward generalities. For example, rather than inquiring whether Rhode Island law affirms underage contracts, or whether state judges should enforce them, Dworkin instead asks "whether moral tests . . . are among the tests that judges and others should use in deciding when [legal] propositions are true."[220]

This abstract question about morals and law, which receives attention throughout Dworkin's book, is non-institutional because it applies to all legal interpreters, including judges, scholars, legislators, and citizens. Relatedly, that question also minimizes the significance of cultural and historical context. Dworkin analyzes the role of morality in law as a matter of universal fact.[221] Indeed, he claims that morality is *always* relevant to law, without regard for cultural contingencies or ad hoc particularities.[222] Even if Dworkin's broad conclusions about the nature of law were somehow correct, they are simply too broad-based to inform the institutionally and historically contextual view of judicial role outlined in Part II.

My second example concerns a hypothetical that Dworkin uses to illustrate his points about legal interpretation. Examining this scenario in some detail will show why Dworkin's theories, even in their most practical incarnations, cannot illuminate debates over judicial activism.

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[217] Dworkin says that it would be a "mistake" to suppose "that the 'law of a community consists of a finite body of rules, principles, and other standards." *Supra* note 229, at 239. However, in a practical sense, these rules and principles are the primary, daily tools of a judge, without which they cannot adequately perform their role in the judicial system.

[218] Dworkin, *supra* note 213, at 2.

[219] *Id*.

[220] *Id*.

[221] This echoes his long-running debate about the nature of mountains—whether they would have existed even if human beings never had, and if they exist in "Reality As It Really Is." Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 89-94 (1996); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 357-60 (1997); Dworkin, *supra* note 229, at 59-60.

[222] Positivists, on the other hand, think that morality's relevance is contingent. *See* Posner, *The Problematics of Moral Legal Theory*, 111 HARV. L. REV. 1637 (1998); H.L.A. Hart, Positivism and the Separation of Laws and Morals, 71 Harv. L. Rev. 593 (1958). Accordingly, Dworkin expresses great concern about the repercussions when legal culture rejects morality, or is unclear on the point. Dworkin, *supra* note 229, at 76-81.

Dworkin imagines a "Mrs. Sorenson" who suffered heart damage from certain medicine she took.[223] Just a few companies made the drugs that Mrs. Sorenson took, yet she cannot say who made her pills, so she sues all the manufacturers for a percentage of her injuries.[224] Rather than discussing whether Mrs. Sorenson should recover, Dworkin analyzes how that legal decision should be made as a matter of first impression.

Under Dworkin's jurisprudential approach, the dominant value in any legal theory should be "integrity," which commands that particular decisions should be justifiable by their coherence with deeper moral values.[225] What matters is not simply to increase social welfare or yield predictable results. Instead, Dworkinian interpretation seeks to discover any moral principle within the legal system that would resolve Mrs. Sorenson's case—whether that principle appears in a specific precedent or statute, a broader precept of products liability or tort law, or an unstated conception of justice.[226]

The first problem in using Mrs. Sorenson's example to inform judicial activism debates is that, like other jurisprudential theories, Dworkin's analysis inadequately considers the institutional character of judging.[227] Dworkin views legal interpretation as an activity that anyone can perform in essentially the same way.[228] Thus, although Dworkin sees legal results as institutionally "embedded" in networks of statutes and constitutional provisions, he does not notice any institutional distinction between the judiciary and attentive citizens or scholars.[229] For Dworkin's approach, the words "adjudication," "interpretation," and "morality" are so closely related that one scholar has wondered whether his analysis ignores law's implementation altogether.[230]

My more specific concern is that Dworkin offers little guidance about how judges should satisfy their thoroughly institutionalized role. According to Dworkin, judges should interpret the law, and their interpretation should incorporate morality.[231] But Dworkin does not

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[223] Dworkin, supra note 213, at17.
[224] *Id*. at 17-18. This hypothetical is drawn from an actual case, Sindell v. Abbott Laboratories, 26 Cal.3d 588, in which a class action suit was brought against numerous drug companies for injuries sustained as result of administration of drug DES to their mothers during pregnancy.
[225] *Id*. at 13-18.
[226] *Id*. at 21-25. Dworkin calls the method by which judges use materials from only their own jurisdiction, directed toward only the problem at hand, to reach competent conclusions, "local priority"; he refers to the use of more general theories and materials as "theoretical ascent." *Id*. at 25.
[227] Supra
[228] Law's Empire.
[229] "The moral reading presupposes that we all--judges, lawyers, citizens--interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice." RONALD DWORKIN, FREEDOM'S LAW 2 (1996).
[230] Susan P. Koniak, The Chosen People in Our Wilderness, 95 Mich. L. Rev. 1761, 1783 fn. 92 (1997).
[231] Dworkin, *supra* note 229,at 16, 118-120.

answer questions such as when judges should respect prior rulings, or should use particular interpretive methods, or should defer to other entities' decisions. To be sure, these latter issues may have moral implications, but they also implicate what Dworkin dismisses as mere questions of "institutional design."[232] As Dworkin describes his own inquiry: "No matter what or who is given final interpretive responsibility, what does our Constitution really mean?"[233] By thus analyzing law and legal interpretation as non-institutional abstractions, Dworkin has increased the philosophical influence of his scholarship, but such work cannot resolve questions of judicial role.

The second problem in using Mrs. Sorenson's example to analyze judicial role is that Dworkin's discussion, like those of other theorists, abstracts from any particular jurisdiction in time or space.[234] Dworkin acknowledges that different jurisdictions could have different precedents and statutes addressing a case like Mrs. Sorenson's. But he cannot accept that different jurisdictions could have different roles for morality in adjudication, or that judges' proper role in deciding such cases could change over a jurisdiction's history. Although Dworkin seldom says so, his approach implies that Mrs. Sorenson's case should be resolved using exactly the same approach, no matter when or where it might be decided. Such broad and sweeping inflexibility about judicial conduct does not match the United States' judicial history, or the variety in state and federal judiciaries.

Many aspects of American judicial history have been discussed *supra*.[235] But a modern example that is peculiarly tailored to Mrs. Sorenson's case concerns Justice Roger Traynor of the California Supreme Court.[236] Traynor served from 1940 to 1970,[237] a period of unprecedented change for the California Supreme Court, as it saw a redefinition of its role and an expansion of its activities.[238] Rapid urbanization in the state led to increased social legislation, and Traynor's view of judge as lawmaker shaped the Court's docket and decisions.[239] One of Traynor's most notable contributions concerned strict products liability, and such opinions deeply influenced the California Supreme Court when it confronted the real-world

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[232] Dworkin, *supra* note 229, at 120.
[233] *Id.* (emphasis added)
[234] While Mrs. Sorenson's case is based on real events, Dworkin's hypothetical is not set in any particular place, at any particular time, or subject to any particular laws. Mrs. Sorenson could be suing everywhere or nowhere; there is no indication that the case might be decided differently if any of these circumstances were changed.
[235] *See supra* Parts II.A and III.A.
[236]
[237] White, *supra* note 8, at 245.
[238] *Id*. at 245-24.
[239] *Id*. at 246.

case that inspired Dworkin's hypothetical concerning Mrs. Sorenson.[240]

Regardless of whether Traynor's use of judicial power was ultimately proper or otherwise, I suggest only that any appraisal of his work must take careful account of the legal circumstances and context facing California courts in the mid-twentieth century.[241] As a judge, Traynor relied on his intuitions, and "believing that he could articulate reasoned justifications for them."[242] While some commentators would seize on this description as merely another definition of activism, other scholars has suggested that Traynor "was able to achieve a delicate fusion of substantive change and methodological consistency, of intuition and rationality" that other judges—namely those of the Warren Court—were unable to replicate.[243]

The availability of statutory change, ambient social expectations about judicial lawmaking, traditions of legislative drafting, and many other political circumstances may be important to such evaluations. And of course, if the distinctive features of mid-twentieth-century state courts in California are important, so too are circumstances surrounding eighteenth- and twentieth-century judges. These issues of institutional, historical, and jurisdictional context are what Dworkin's work soft-pedals, and what my view of judicial activism finds indispensable.

To be clear, this Article has no interest in disagreeing (or agreeing) with Dworkin's philosophical conclusions, nor in dismissinig its intellectual importance. My simpler point is that philosophers' timeless and transcendent legal theorizing, even when they are cast as theories of judicial interpretation, are of limited help in constructing norms of judicial role that are culturally, temporally, and institutionally specific.

C. Scalian Limits

To make my critiques of original history and analytical jurisprudence more concrete, let me address today's most prominent analyst of judicial role, Justice Antonin Scalia. Throughout twenty-six years of judicial service, Scalia has boosted his intellectual profile by vehemently espousing a limited style of judging.[244] Scalia has given dozens of lectures

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[240] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57 (1963),
a 1996 panel of tort law experts subsequently ranked as the top development in tort law of the past 50 years J. Edward Johnson, "Roger J. Traynor," in History of the Supreme Court Justices of California: Volume II, 1900-1950, ed. J. Edward Johnson
concurrence in Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453 (1944);
Sindell v. Abbott Labs is the post-Traynor opinion, which Dworkin cites, and Traynor's role is described both in the opinion, and in Cal L Rev. by Mosk, the authoring Justice in Sindell.

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[242] White, *supra* note 8, at 245.

[243] *Id*. at 265-266.

[244] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States*

about judicial role, he has written many judicial opinions addressing such themes, and he participated in a symposium with other legal stars, including Dworkin.[245] For these and other reasons, Scalia has become a unique icon for political parties and the public on topics of judicial propriety.[246] This Section considers what Scalia has written as a commentator on these topics, (not what he has done as a judge), and concludes that although his discussion of judicial role seems to mix elements of original history and theoretical jurisprudence, it only confirms the flaws we have discussed concerning each of those methods.[247]

Scalia is well known as an originalist in constitutional law, and a textualist in statutory interpretation.[248] But Scalia's most extensive federal courts analysis appears as an attack on what he calls the common-law "attitude" of judging.[249] Scalia describes this attitude as asking, "What is the most desirable resolution of [a case], and how can any impediments to the achievement of that result be evaded?"[250] Although Scalia does not advocate the elimination of all common-law judging, he claims that traditional common law is a negligible feature of modern federal dockets, and he vigorously resists the influence of common-law attitudes in cases of statutory or constitutional law.[251]

Despite Scalia's endorsement of textualism and originalism in fields of substantive law, his view of judging does not have a textual or original-historical justification. For example, Scalia offers no Framing-era evidence of what Article III's grant of "judicial power" originally meant.[252] Nor

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Federal Courts in Interpreting the Constitution and Laws, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22-23 (Amy Gutmann ed., 1997) (quoting Justice Holmes, "I don't care what their intention was. I only want to know what the words mean" and Justice Jackson, "[w]e do not inquire what the legislature meant; we ask only what the statute means"). In this respect and others, Scalia has self-consciously modeled himself after Frankfurter and Jackson.

[245] *See, e.g.*, SCALIA, A MATTER OF INTERPRETATION, *supra* note 240 (offering collection of essays based on symposium including Scalia, Dworkin, Gordon S. Wood, Laurence H. Tribe, and Mary Ann Glendon).

[246] *See, e.g.*, Scott Turow, *Scalia the Civil Libertarian?*, N.Y. TIMES MAGAZINE, Nov. 26, 2006, at 22 ("Justice Scalia's flamethrowing rhetoric and his hostility to whole chapters of 20th-century jurisprudence have made him a conservative icon and a favorite face on liberal dart boards."); Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. Times, Apr. 19, 2005, at A20 ("Conservatives . . . frequently point to Justice Antonin Scalia as a model of honest, "strict constructionist" judging. And Justice Scalia has eagerly embarced the hero's role.").

[247] *See supra* Parts III.A.2 and III.B for a critique of originalism and jurisprudence, respectively, as evaluative methods for judicial activism.

[248] Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 23, 38.

[249] *See, e.g.*, *id.* at 3.

[250] *Id.* at 13.

[251] *See id.* ("[I]n federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law."); *id.* at 14 ("[A]ttacking the enterprise [of statutory interpretation] with the . . . mentality of the common-law judge is a sure recipe for incompetence and usurpation.").

[252] Shockingly, Scalia relies extensively on nineteenth-century materials, which clearly post-date framing-era understanding of Article III. *E.g.*, *id.* at 10-11 (regarding law-codification movement); 15 (identifying treatises on statutory interpretation); 17 (discussing reliance on legislative intent in statutory interpretation). Obviously, these materials say nothing about the Framing. Alternatively, in

does Scalia provide evidence that his preferred textualist-originalist methodologies were applied to federal courts through congressional grants of "jurisdiction."[253]

On the contrary, Scalia's judicial orthodoxy is quite alien to eighteenth-century ideas about judging—as scholarship by Gordon Wood, G. Edward White, and others has shown.[254] The first federal judges did not issue opinions in the modern sense; they often infused statutory and constitutional cases with common-law and natural-law concepts; and they were charged with implementing a framework of federal law that was incomparably incomplete.[255] Simply put, if ever there was a Golden Age of Scalian judging, jurists in the 1780s saw nothing of it. And the fact that even Scalia's analysis of judicial activism lacks a basis in statutory or constitutional language, or in originalist history, simply confirms that (as suggested *supra*) there are truly no originalists or textualists with respect to judicial role.

Perhaps Scalia himself grasps that text and original history cannot sustain his ideas about judging. Thus, instead of citing such authorities, he declares that "the reason" he adopts statutory textualism is as follows: "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the

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criticizing individuals who rely on legislative intent, but disregard the framers' intent when interpreting the Constitution, Scalia acknowledges he will read Federalist papers for constitutional context with respect to substantive constitutional law, but nevertheless cites Rantoul (at the time a Massachusetts state representative) as authority in construing federal courts' powers. *Id.* at 38, 39. In any event, these materials must be read in their historical context, wherein federal courts had massive common-law powers. PURCELL, *supra* note 51, at 59-60. Citation to Blackstone is on a different point, *e.g.* Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 240, at 130, and Blackstone cites are in any event controversial, *see* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 562 (2006) (asserting that Blackstone's commentaries were strategic intervention into common law rather than sophisticated accounts of English common law). Scalia's Article I analysis is similarly inapt. *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 35. The question at hand only peripherally concerns legislative power, or what is a "law"; the main issue is what the judicial power means, and what courts may legitimately do in "interpreting" and "applying" federal law.

[253] Such *statutory* interpretation might be especially hard for Scalia, insofar as he might categorically decline to cite legislative history in this context. *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 37-47 (discussing interpreting constitutional texts, but only individual rights as expressed through amendments, not powers of government). In addition, when addressing separation of powers, Scalia does not invoke framing-era materials to explore the judicial role. *Id.* at 35.

[254] Scalia offers two responses to this criticism. First, Scalia asserts that there have always been "willful judges who bend the law to their wishes." Scalia, *Response*, *supra* note 248, at 131. Second, Scalia asserts that colonial legislatures routinely offered adjudications, but that no evidence exists that colonial adjudicative tribunals felt free to legislate. *Id.* These responses, however, (i) understate the fact that judges *were* common-lawmaking; (ii) ignores the whole point is that courts were fluid and uncertain divisions—not beaten by examples of judges more constrained; and (iii) overstates the proposition that legislators adjudicate, rather than vice versa, based on an example which proves that lawmaking and adjudicating is fuzzy.

[255] *See supra* notes 196-201 and accompanying text for a discussion of how initial federal judges adjudicated using common-law methods.

lawgiver meant, rather than by what the lawgiver promulgated."[256] As Scalia repeatedly indicates, his judicial theory depends on a particular view of democratic theory and "principle,"[257] rather than on undecorated historical facts.

Scalia's analysis of judicial role thus resembles other jurisprudential theories, at least in part. Consider the two objections mentioned in Section B: that Dworkin's work was not institutionally specific to judges, and that it abstracted from the cultural and historical contingencies of judicial function.[258] Scalia has certainly satisfied any objection to "non-institutional" theorizing, as his work is focused tightly on how judges should act and what they should do.[259] On the other hand, despite Scalia's periodic citation to historical sources, he ultimately offers a theory of judging that is nearly as timeless and transcendent as Dworkin's—aiming to cover at least 220 years of American judicial practice.[260] We have seen, however, that changes in governmental context and judicial capacity indicate a need for correspondingly flexible norms of judicial role and activism.[261]

At bottom, even though Scalia and Dworkin may disagree about most everything else in the law, Scalia's theory of judging is at least as conceptually inflexible as Dworkin's.[262] For Scalia, all federal judicial activity from Marshall's to his own should be measured against unchanging assumptions about democracy and fairness. Accordingly, despite Scalia's and Dworkin's different notions about how federal judges should decide cases, their theories of judicial role share a deep-seated abstraction that limits their arguments' effectiveness as general analyses of judicial activism.

D. A Balanced Approach

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[256] Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 17. The ire of Scalia's Nero example is cooled by his reliance on "context," which similarly is not so easy for laypeople to read. *See id.* (likening use of legislative intent to Nero's practice of posting edicts high on pillars, out of laws' subjects' sight); *see also id.* at 37 ("In textual interpretation, context is everything.")."

[257] *See, e.g.*, *id.* at 31, 40; Scalia, *Response*, *supra* note 248, at 131, 134.

[258] *See supra* Part III.B for a discussion of Dworkin's shortcomings in identifying evaluative criterion for the judicial role.

[259] *See generally* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 23-47 (assessing role of judges in interpreting statutory and constitutional language). There may be a few exceptions to this statement in the context of the "rule of law," but Scalia's criticisms are most often specific to judges.

[260] *See, e.g.*, *id.* at 18-23 (applying espoused interpretation principles to nineteenth century case without accommodating context).

[261] *See supra* Parts I.B and I.C for an analysis of how the concept of judicial activism has changed over the course of history.

[262] Probably even more so. Dworkin at least takes into account the rest of a legal system, though he also thinks one should rely on a legal system's authorities (legislation, precedent, etcc.) based on their moral weight, which for him would not vary over time or territory. *See supra* Part III.B for a discussion of Dworkin's theory of jurisprudence.

The foregoing critiques indicate the path to a new view of activism. Parts I and II showed that the concept of judicial activism runs throughout American history and that norms of judicial role are vital to our system of unsupervised judging. In turn, this Part has noted problems with defining judicial standards through universally "fixed" points of evaluation. Both originalism and analytical jurisprudence failed to produce workable standards of judicial role because each requires a timeless, transcendent definition of judicial activism. Such universal aspirations falter because they cannot reconcile current judicial practice with our shockingly different past, much less accommodate institutional transformations in the future.[263]

Jack Balkin has attacked similarly inelastic judicial ideologies by denying that good judges are "prisoner[s] in chains."[264] Applying that metaphor to originalism and analytical jurisprudence, these methods are wrong because they characterize judicial role as "chaining" federal judges to a fixed spot, like shackles pinning a captive. The image of judges in chains did not start with Balkin, of course, any more than activism began with Schlesinger. Indeed, Solicitor General James Beck wrote in a 1922 book that the Constitution embodies "a great spirit" of "conservative *self-restraint*,"[265] and he compared law to a floating dock, which stays firm in its moorings despite some movement with the tides.[266]

By contrast, my proposed metaphor for judicial role is a rope tied to an anchor. Although the anchor holds judges place, it can move significantly over time depending on ambient conditions and the strength of dislocating tugs.[267] In less metaphorical terms, I suggest that standards of judicial activism are built from a mix of historical examples and prescriptive principles. This two-strand methodology solves apparent problems with

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[263] *See supra* Part III.A.2 for a review of the context in which the earliest American judiciaries performed their functions.

[264] Balkin's objection was that the judges like, and themselves construct, the chains that "bind" them. J. M. Balkin, Review Essay, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1140 (1991).

[265] JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES 151-52 (1922). *Cf.* Schlesinger, *supra* note 8, at 76-78, 208 (identifying then-current justices who could be identified as "champions of self-restraint" and acknowledging judiciary's statement that only source of restraint is self-imposed). Beck did not use the term "activism," but he did have an immediate and high-level influence on Washington, earning praise from President Coolidge and Senator Borah. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 207 (2d prtg. 2001).

[266] Beck was criticized by Thomas Reed Powell, who inspired Schlesinger. Powell said that Beck's idea was "that while [the Constitution] does not move forward or backward, it jiggles up and down," and that "[h]ere is a new kind of book about the Constitution. You can read it without thinking." WHITE, *supra* note 261, at 207-08. Other criticisms of Beck's theory considered his idea that constitutional principles existed independently of the document's interpreters was "jurisprudential naivete." *Id.* at 208.

[267] Following this metaphor through, there is no assurance that every change in position will be progress, or even sustainable. Anchors that slip out of their depth cease to function, for example, and I make no assumption that the topography of our judicial terrain safely allows for limitless movement.

originalism and jurisprudential theory; more importantly, it offers a serviceable balance between prescribing limits to channel judicial decision-making and adapting to the reality of institutional change. This Section starts by describing my dualist approach; after considering its advantages relative to other methods of judging judges, I will describe the consequences of my approach for the "common-law" attitude that Scalia and others so strongly deride.[268]

First a few words to clarify my proposal. Under my suggestion that judges are activist only when they violate cultural norms of judicial role, any charge of activism must begin with an account of those standards—it is not enough to allege legal error, or the invalidation of some statute or regulation. Standards of judicial role cannot be deduced from a mere description of history, from simple proof that court *x* decided *y* in the year *z*. This is because although such analysis may accurately describe cases like *Marbury*, *Lochner*, and *Bush v. Gore*, it cannot say whether any or all of those rulings should be mimicked or repudiated.[269]

We have likewise seen that standards of judicial role cannot be identified through the exercise of abstract reasoning concerning morality or democracy.[270] Questions of "role" are institutional by nature, and the institution of federal judging did not spring forth fully formed. Nor has the judiciary's development tracked a progressive realization of unchanging principles.[271] On the contrary, institutional norms of federal judging have emerged in fits and starts. Certain figures and events from the Early Republic are celebrated as foundational; others are ignored or even decried. The same goes for the Taney Court, Reconstruction, the Gilded Age, the New Deal, and all the rest.

Particular moments of judicial heroism and villainy are not self-defining; indeed, they are not always self-conscious.[272] Yet the legal community (judges, lawyers, scholars, commentators, and the public) continuously sifts the stream of judicial activity to gather examples of good and bad judging. The normative charge that determines whether particular examples are good or bad can be controversial, and can even

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[268] *See supra* Part III.C for a discussion of Scalia's standards for evaluating judicial conduct and criticism of a federal common-law approach.

[269] *See supra* Part I.B for a summary of controversial eras in Supreme Court history, illustrating that decisions which were "appropriate" at one point in time may fall out of favor; *see also* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 964 (1998) (analyzing precedential canons' emergence and change).

[270] *See supra* Parts III.B and III.C evaluating the potential for these principles to serve as criteria for evaluating judicial conduct.

[271] *See supra* Parts I.B and III.A.2 for a discussion of successive controversial periods of Supreme Court history and history's failure to instruct judges as to proper judicial roles.

[272] *Cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 117 (1996) (Souter, J., dissenting) ("[T]he Court's further step today . . . magnifies the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law.").

change.[273] The common underlying pattern, however, is that battles over iconic cases and judges are forever waged with the same basic weapons: historical examples and asserted synthetic principles.

My dualist approach to judicial role is specifically tailored to meet problems with originalism and abstract theorizing. First, in contrast to originalism, my proposal draws on a broad field of historical examples in constructing judicial norms, and is highly selective in doing so. Whereas originalists must derive notions of judicial role from *all aspects* of judging practices in the 1780s or 1790s, jurists using my approach might draw judicial guidance from the Framing Era without accepting its broad-scale use of common law, might prefer the transformatively non-originalist practices of the Marshall Court, and might endorse a *Carolene Products* perspective on social and economic policy or the Warren Court's commitment to liberty or equality, even though these latter eras and principles do not match any accompanying enactment of statutory or constitutional law. Such flexibility allows judicial standards to incorporate institutional insights as they arise, not at formally preset "federal courts moments."

Second, my analysis of judicial role differs from theoretical jurisprudence because it requires principles with historical and institutional roots, as opposed to universal morality or logic. This infuses an appropriate conservatism into discussions of judicial activism, such that the abstract principles—however grand and theoretically sound—are not themselves enough to rebut charges of activism.

Consider Mark Tushnet's bold assertion that, if he were a Justice, he would vote "to advance the cause of socialism."[274] If Tushnet were following only his own personal will and preferences in promoting socialism, this would be pure judicial autonomy and easily branded as activism.[275] Even if Tushnet claimed that socialism is a broader principle that all federal judges should advance, my approach would propose an ensuing debate over historical examples and counter-examples to confirm or deny that federal judges should advance socialism. (Structurally similar arguments might consider whether federal judges should advance liberalism, capitalism, or religious fundamentalism.) If no persuasive historical examples could sufficiently support Tushnet's socialist agenda against its critics, his actions would merit the activist label, regardless of

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[273] *See supra* notes 83-88 and accompanying text discussing the changing sentiment regarding Marshall Court decisions, including *Marbury* and *McCulloch*; *see also supra* notes 124, 136-40 for similar discussions of the decisions rendered in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), and *Korematsu v. United States*, 323 U.S. 507 (1944), respectively.

[274] Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

[275] *See supra* notes 120-21 and accompanying text for an analysis of the difference between judicial autonomy and judicial independence.

whether they advanced otherwise defensible political goals.[276]

Unlike abstract theories of judging, the historicism of my approach assures its institutional sensitivity and cultural relativism. As a side note, this is not to say that the experience of non-judicial actors or international courts is irrelevant to judicial practice in the United States.[277] But such experiences must be used to illustrate domestic and judicial values, instead of the universal moral norms invoked under Dworkin's jurisprudence.[278] A core element of my analysis is the claim that judicial role turns on the history and principles applicable to a particular jurisdiction, and this poses corresponding problems for any fixed-point theory of judicial role.

A final step in describing my approach is to explain why this Article's newly minted analysis of activism—with contextualized examples and synthetic principles—will seem so familiar or even natural to some readers. Although my approach is unique as applied to judicial activism, its techniques are absolutely ordinary with respect to our legal system generally. What this Section has outlined is a fundamentally *common-law* method of analyzing judicial role, demonstrating that despite "statutorification" in other contexts,[279] the topic of unsupervised judging remains by default a matter of common law. Accordingly, the "common-law attitude" that Scalia would quarantine from federal judging (if not exterminate altogether) lies at the very core of judicial role and judicial activism. Ridiculous claims like "there is no federal common law" are given the lie once more.[280]

The prevalence of common-law reasoning in analysis of judicial activism does not necessarily mean that Scalia's enthusiasm for originalism and textualism is misplaced. On the contrary, Scalia's proposal that judges should be originalist and textualist is simply laid bare as a

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[276] *See supra* Part II.B outlining this Article's proposal for evaluating whether judges have exceeded their role and become judicial activists.

[277] *See supra* Part II.A explaining this Article's conception of "judicial activism" and Parts III.B and III.C demonstrating the importance of context in defining the judicial role.

[278] DWORKIN, *supra* note 205, at 15; *see supra* Part III.B recounting Dworkin's morality-based theory of jurisprudence.

[279] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 13 ("[T]he greatest part of what . . . federal judges do is to interpret the meaning of federal statutes and federal agency regulations.").

[280] Scalia assumes that there are no constraints on how judges develop common law, attributing a maverick attitude to common-law judges. *Id.* (criticizing common-law judges who seek to implement desired result regardless of impediment); *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1264-72 (1996) (asserting that all federal common law may be "constitutionally suspect"). This assumption, however, is mistaken. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595, 622 (2008) (arguing that *Erie* did not prohibit *all* federal common law, but delineated realms wherein federal common law was not permissible and, thus, outside proper judicial role); *see also* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 690-96 (2008) (stating that common-law judging has some limits, but Constitution does not prohibit common-law role in federal judiciary). Because Scalia mischaracterizes the nature of common-law judging, he overstates the need to avoid it and miscasts its perils.

contestable view of judicial role, supported by non-originalist historical examples,[281] and a purportedly derivative view of institutional democracy.[282] This Article suggests only that Scalia's effort to circumscribe proper judicial role should be evaluated and disputed like other theories of activism: on the strength of its examples and principles.

What makes Scalia's arguments uniquely interesting are his self-conscious efforts as a Justice to transform current standards of judging—to "drag the anchor," within my metaphor.[283] Since Scalia's appointment to the Court in 1986, the battles surrounding his judicial work have escalated to a full war over the nature of federal courts.[284] For example, theories of textualism and originalism, which had largely wallowed in academic obscurity before Scalia's appointment, are now quite strong, with some of their doctrinal effects now in plain sight.[285]

What is less clear is whether Scalia, or his opponents, will ultimately earn the "activist" epithet. Scalia has repeatedly decried modern abortion rights as activist and ripe for reversal,[286] while other Justices have claimed that modern federalism cases will soon be as discredited as *Lochner*.[287] Only the sweep of history—with its accompanying judicial appointments, scholarship, dissenting opinions, and public reactions—will determine who is right.[288] (And even that judgment may change over time.[289]) As this

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[281] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 23-25, 37-41 (espousing virtues of textualism and originalism approaches to statutory and constitutional interpretation, respectively).

[282] *See id.* at 35 ("Whatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch. That is the very essence of the separation of powers.").

[283] *See, e.g.*, Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 240, at 23-25, 37-47 (arguing for textualist and originalist interpretations of statutes and Constitution and denouncing "Living Constitution").

[284] *Compare, e,g.*, *id.* at 37-47 (promoting originalist approach to constitutional interpretation, without regard for modern needs), *with, e.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 247 (2002) (advocating consequentialist approach to constitutional interpretation rather than legalistic approach relying on language and history).

[285] *See* Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1946 (2005) (noting that Scalia's presence on court accelerated trend toward textualism, though he did not technically initiate the practice).

[286] *E.g.* Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) (asserting that "neither constitutional text nor accepted tradition" can resolve abortion debate and demanding that "*Casey* must be overruled"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 983 (1992) (Scalia, J., concurring in part and dissenting in part) ("*Roe* was plainly wrong-even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.").

[287] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) ("The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 701-02 (1999) (Breyer, J., dissenting) (asserting similarity between majority decision and *Lochner*); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (comparing majority's ruling to "nadir of competence that we identify with *Lochner*"); United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (likening Court's refusal to return to formalistic Commerce Clause jurisprudence to its refusal to return to *Lochner*-era substantive due process).

[288] *See supra* Part II.A.2 arguing the importance of debates about judicial conduct to help regulate

Article makes clear, however, such fights over judicial activism are definitely not "fluff,"[290] despite the fact that they may never be definitively resolved.

IV. CONCLUSION

This Article offers the most sustained discussion of judicial activism in sixty years, with the main goal of explaining that, beneath distractive and often thoughtless banter over the words "judicial activism," lies a concept near the heart of our legal system. Given the prevalence of unsupervised judging, our legal community cannot ignore the norms governing judicial role, nor can it neglect methods of creating and attacking such cultural standards. This Part outlines consequences and research opportunities produced by this Article's approach to such issues.

First, efforts to demystify activism debates may affect how such discussions occur. In particular, I have claimed that current uses of the term "judicial activism" are mistaken. Judicial decisions that invalidate statutes or regulations, for example, have no link to Schlesinger's original use of "activism," and have only incidental links to any breach of judicial role.[291] By contrast, I have said that judicial activism should be reconceived as a departure from cultural norms of judicial role; if that is correct, then this driftingly vague and complex term may finally have a rudder.

My analysis also suggests that substantial scholarly and informal discussion, which is not often thought of as analyzing "judicial activism," could easily operate under that label. From first-year class discussions, to media profiles, to informal conversation, to biographies, to judicial histories, I believe that our legal community is endlessly interpreting and reinterpreting judicial role. Such a broad view of activism discourse may lead to richer and more productive debates over judging.

Yet perhaps this Article's most basic contribution is to dissect the common elements of arguments about judicial activism. I have sought to wall off such blind alleys of inquiry such as originalism and jurisprudential theory, and have also offered an affirmative approach that blends historical events with broader normative principles. This two-strand structure may allow jurists to recognize existing arguments about judicial role for what they are, and it also charts a blueprint for fully engaging in the struggle over judicial conduct, regardless of whether one's aim is to

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unsupervised judicial decision-making.

[289] *See supra* Part I.B illustrating changing perceptions of "right" decisions in Supreme Court's history.

[290] Charles Lane, *No Unanimity on Holding on to High Esteem*, WASH. POST, Apr. 1, 2002, at A13 (quoting Justice Scalia as stating that judicial activism is "fluff").

[291] *See supra* Part I.C codifying and criticizing modern definitions of activism as unhelpful and simply confusing.

bolster, destroy, or supplant existing standards.

Consider Scalia's work once more. Under this Article's framework, one may recharacterize his work as addressing the concept of judicial activism (though he prefers to use a different term), and may reinterpret his thesis as relying on non-originalist history and non-universal theoretical principles (though he would not accept such authorities as valid). This Article does not predict or advocate that views like Scalia's should succeed or fail.[292] But to clarify the component parts of such debates may spur more focused, effective debates.

Beyond this Article's consequences for legal rhetoric and reasoning are two further implications. First, I have suggested that activism's great rhetorical power has produced a deep schism in debates about judging, separating legal thinkers who use terms like "activism" from those who reject them. This division seems mutually unhelpful. On one hand, scholars who avoid terms like activism—perhaps because such words seem hopelessly indefinable—risk segregating from their research the largest part of public discussion about judges. One could debate the extent to which cultural standards should turn on public attitudes, rather than those of legal experts, but to bypass broader social attitudes over a simple matter of rhetoric seems unsound. In a democracy with increasingly public confirmation hearings, it may be incredibly important for legal scholars to understand and perhaps even reform the language of "activism" if their views are to carry full weight.

On the other hand, public discussion of judicial norms suffers even more from the current segregation of expert and non-expert debate over judges. So long as federal judges are chosen from a pool of highly successful law-school graduates, the views of legal elites will necessarily affect the way that such new judges approach their posts. If the lay public overlooks the judicial expectations cultivated among legal experts, and instead focuses predominantly on debates over "activism," that could become a recipe for surprise and disappointment. By contrast, if cultural norms of judicial role are ultimately a product of history and principle, it may be exceedingly important that scholarly views of judging gain wider currency. For example, law professors are more engaged than anyone in exploring and supervising the massive network of historical events and normative values that are thought to compose our legal system. Such expertise and insight would shed measurable light if it could be better integrated into public discussion of judicial role. As currently understood, the word "judicial activism" is an unwelcome hindrance to such integration; my approach offers to help bridge the gap.

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[292] Instead, this Article seeks only to establish a common definition of "judicial activism" so that individuals who, like Scalia, advocate varying views of proper judicial role can engage in a constructive debate with a common understanding of the concept at the fore.

Second, although this Article has focused tightly on judges and judicial role, it may also raise questions affecting other areas of government. As we have seen, the two structural features that make judicial role so vital are: (i) significant lawmaking authority that (ii) is not supervised by other governmental entities. In the modern administrative state, however, it is quite clear that judges are not the only federal entities that have unsupervised lawmaking power. Depending on an agency's organic statute, administrators may be vested with significant lawmaking authority, and their judgments may be quite difficult to reverse. To pick the easiest example, one might imagine an administrative tribunal that functions analogous to a trial court. Despite many dissimilarities between such an administrative tribunal and a federal court, there may nonetheless be a sense in which the administrative agency could be "activist" if it departed from legal cultural norms concerning its discretionary authority.

Because executive lawmakers operate in a different branch, with different procedures and organizational characteristics, many legal scholars may assume that "Executive Activism" is a contradiction in terms. Yet this Article's approach to judicial role and activism implicitly questions that assumption. Future scholarship may thus open the possibility for discussion and formulation of unenforced cultural norms that govern some instances of executive conduct as well.