An Intellectual History of Judicial Activism

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

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1 According to Westlaw, the term “judicial activist” appeared in 3,815 law review articles during the 1990’s, and in 1,817 more articles between 2000 and 2004. See Keenan D. Kmiec, Note, The Origin and Current Meanings of "Judicial Activism, 92 CAL. L. REV. 1441, 1442 (2004); see also Bradley Canon, A Framework for the Analysis of Judicial Activism, in SUPREME COURT ACTIVISM AND RESTRAINT 386 (Stephen C. Halpern & Charles L. Lamb eds., 1982) (describing prevalent activism debates as “little more than a babel of loosely connected discussion”).

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 these issues in detail for the first time.

Today is an especially apt time to revisit judicial activism, as the next few years will bring transformative Supreme Court appointments, and will shift judicial activism debates again to the fore. 4 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,
yet most legal academics dismiss activism as an irretrievably vague “myth” or “cliché.”⁵ That disconnection is mutually counterproductive. When understood properly, debates over judicial activism are a vital part of public life, and they also represent the legal academy’s highest calling.

Confusion and disdain over 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 history is particular to a 1947 Fortune magazine article by Arthur Schlesinger.⁶ 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.” Despite their current popularity, none of these rests on a stable conception of activism. Indeed, if such definitions were the only possible interpretations of “judicial activism,” scholarly critics would be right that the term should vanish from educated discourse.

Part II tries 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 explicit. 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 most Supreme Court decisions, certain judgments of acquittal, and many civil settlements. I propose that “activism” is an appropriate, albeit 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’ts, 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. The scholarship of Justice Antonin Scalia also has not produced an

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authoritative answer, despite his privileged perspective on 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’ approach to 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 perhaps “The American Judicial Traditions.” Although cultural norms of judicial conduct are forever contestable, that must 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. 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, 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

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8 See Daniel T. Rodgers, Contested Truths: Keywords in American Politics Since Independence 16 (1998) (“Should someone try to sell you a piece of political goods as an authentic encapsulation of the American political faith, the wise course is to run for cover. . . . The keywords, the metaphors, the self-evident truths of our politics have mattered too deeply for us to use them in any but contested ways.”); id. at 80-111 (“The People”); id. at 112-143 (“Government”); see also Town v. Eisner, 245 U.S. 418, 425 (1918) (“A word is not a crystal, transparent and unchanged, it is the skin of a living thought . . . .”); J.M. Balkin, Ideological Drift, in ACTION AND AGENCY 13 (Roberta Kevelson ed., 1990) (“Styles of legal argument, theories of jurisprudence, and theories of constitutional interpretation do not have a fixed normative or political valence. Their valence varies over time as they are applied and understood repeatedly in new contexts and situations. I call this phenomenon ‘ideological drift.’”).
9 See, e.g., Frank B. Cross & Stefanie A. Lindquist, The Scientific Study of Judicial Activism, 91 Minn. L. Rev. 1752, 1753-1754 (2007) (“As calls to rein in the activist judiciary have entered popular discourse, . . . the term ‘activism’ has become devoid of meaningful content . . . .”); Kmiec, supra note 1, at 1443 (“Ironically, as the term has become more commonplace, its meaning has become increasingly unclear.”).
declined to say whether activism is good or bad. Flaws in Schlesinger’s account, however, did not stop the term from rising to power, largely due to 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 links 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 analyze certain details more closely, even a brief introduction shows that judicial activism was not just a catchy phrase. The term evoked hallowed traditions of judicial conduct as baselines, though Schlesinger did not himself analyze their 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 has commonly come to mean: (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. 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 fully incorporate 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.” With respect to the former, Schlesinger wrote a 500-page book that stretched from early American fears of a King George Washington to contemporary worries about Richard Nixon. By contrast, Schlesinger minted “judicial activism” in a fourteen-page Fortune article, tucked among advertisements for whisky and Aqua Velva. In describing activism’s rise to prominence, this Section argues that Schlesinger did not coherently define judicial activism,

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10 ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); cf. JACK GOLDSMITH, THE TERROR PRESIDENCY 218 (2007) (praising Schlesinger even today as “the person who seem[s] to have the most insightful things to say about the presidency by far”).

11 Fortune was perhaps a more serious forum for legal discourse in those days. See, e.g., Earl Warren, The Law and the Future, FORTUNE, Nov. 1955, at 106.
and that later events fueled the term’s popularity only by further confusing 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.12 The year 1947 marked ten years after the “switch in time” that killed *Lochner*; and during that decade, Franklin Delano Roosevelt filled seven seats on the high bench.13 Given FDR’s legislative efforts at “court-packing,” Schlesinger’s first goal was to deny that appointments from 1937-1947 had made the Supreme Court a homogenous “rubber stamp.”14 This was easily done. Divisions ran deep among the Justices, and some showed embarrassingly strong antipathies to one another.15 More than half of Schlesinger’s article, including his first use of “activist,” described the Justices’ personalities and non-jurisprudential conflicts.16 Schlesinger also claimed that any substantive issues dividing the Justices were closely tied to these interpersonal fissures.17

From this viewpoint, Schlesinger wrote a story for a lay audience to demystify the Court, like many comparable essays today.18 Perhaps the only misfortune is that Schlesinger also wandered toward deeper topics. In just five pages, he glibly bundled the sitting Justices into camps of “judicial activists” and “champions of self-restraint.”19 Yet even as

12 Schlesinger, supra note 6, at 212. Schlesinger’s essay was based on personal interviews with nearly all of the Justices, and most especially Felix Frankfurter. As a “pal” of Schlesinger’s parents, Frankfurter had been notably “kind to” and “fond of” Schlesinger and his wife; Schlesinger’s personal ties to Frankfurter were also bolstered by his “close friendship” with three Harvard students who were among Frankfurter’s first clerks. ARTHUR M. SCHLESINGER, JR., A LIFE IN THE 20TH CENTURY: INNOCENT BEGINnings, 1917-1950, at 418-19 (2002).
15 Schlesinger, supra note 6, at 78-79, 201; ROBERT STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT, 19 (1986) (describing 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 n.51 (2006) (surveying various conflicts on the court, one of which led Jackson to complain to the Senate Judiciary Committee that his fight with Black went beyond a “mere personal vendetta” and imperiled the very “reputation of the court for nonpartisan and unbiased decision”);
17 Schlesinger, supra note 6, at 73-78.
18 Id. at 201, 208.
19 See, e.g., Amy Davidson, *The Scalia Court*, THE NEW YORKER, March 28, 2005, at 2; Jeffrey Rosen, *Supreme Court*, Inc., N.Y. TIMES MAG., Mar. 16, 2008; Benjamin Wittes, *Whose Court is it Really?*, ATLANTIC MONTHLY, January/February 2006, at 48. Like other freelance writers, Schlesinger wrote articles like “The Supreme Court: 1947” in part for financial reward. See SCHLESINGER, supra note 12, at 418 (“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.

19 Schlesinger, supra note 6, at 201-02, 204, 206, 208. Although Schlesinger was aware that he had
Schlesinger noted that the “issues of principle” separating these two groups “may be described in several ways,” his essay offered no comprehensive definition of activism or restraint.20

Instead of articulating principles, Schlesinger’s focus was always 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.21 Schlesinger never explained, however, what exactly these Justices did to earn their titles. Indeed, Schlesinger’s preoccupation with the sitting Justices of 1947 undercut his analysis of broader judicial principles at every turn.

A few examples substantiate Schlesinger’s inability to explain his two categories. First, Schlesinger explained the “Black-Douglas [activist] view” as drawing from jurisprudential ideas “particularly dominant at the Yale Law School.”22 With a loyal Harvardian’s 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.”23

Putting aside the accuracy of Schlesinger’s admittedly “crude[]” portrait of legal realism, its asserted link to Black was indefensible.24 Schlesinger’s only doctrinal evidence against Black was a dramatic quote

popularized these terms, he also wrote that he “got the idea, and perhaps the terms too, from Reed Powell,” whom he had interviewed and knew from Harvard. SCHLESINGER, supra note 12, at 421; see also G. Edward White, Unpacking the Idea of the Judicial Center, 83 N.C. L. REV. 1089, 1112 n.109 (2005) (citing a personal conversation with Schlesinger that credited Powell as the origin of “activism” and “self-restraint”).

20 This is true despite – and also because of – Schlesinger’s multiple stabs at explaining his two categories. See Schlesinger, supra note 6, at 201, 202-04 (separating judges who would promote social welfare from those who would expand the power of legislatures); id. at 201-02 (distinguishing the legal philosophies of the Harvard and Yale Law Schools); id. at 204-06 (dividing the protection of personal liberties from the enhancement of majoritarian rule); id. at 206-08 (grouping the Justices based on their pro- and anti-labor inclinations); id. at 208 (emphasizing historical distinctions between Holmes and Brandeis).

21 Id. at 201.

22 Id.

23 Id. at 202.

24 For example, Schlesinger absurdly claimed that Black belonged to the Yale style of jurisprudence because his son had recently enrolled in law school there. See Schlesinger, supra note 6, at 201; see also http://www.martindale.com/Hugo-L-Black-Jr/806177-lawyer.htm (indicating that Hugo Black, Jr. was only a first-year student in the spring of 1947). By contrast, most modern scholars have very strongly dissociated Black from legal realism and “the Yale school.” See, e.g., 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”); Philip Bobbitt, Constitutional Fate, 58 TEX. L. REV. 695, 708 n.25 (1990) (claiming that Black led the American legal community “out of the wilderness of legal realism”); But cf. Mark Rahdert, Comparative Constitutional Advocacy, 56 AM. U. L. REV. 553, 598 (2007) (grouping both Black and Douglas as “realist Justices,” yet citing as support only dissenting opinions by Douglas in cases where Black joined the majority). For a superb account of the realist period, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 20-35 (1986).
that praised 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.” In context, however, Black’s language was neither activist nor realist; it came from the unanimous rejection of certain coerced confessions in a racially charged Florida death penalty case. Despite the Court’s heated rhetoric, this case was a terribly confused example for Schlesinger’s analysis of “activism.” Of course, many commentators have criticized the judicial work of Black and (more justifiably) Douglas as activist and on other grounds. But regardless of whether those substantive appraisals are correct, my simpler point is that Schlesinger’s loose talk about Yale and realism shed no light on what activism means or why Black and Douglas deserved that label.

Second, Schlesinger’s efforts at doctrinal analysis did not clarify his proposed typology. For example, Schlesinger discussed 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. Schlesinger’s own views of Barnette were deeply conflicted; on one hand, he celebrated Frankfurter’s dissent as a “great democratic document” and blamed the majority’s position on flip-flopping “activists.” Yet Schlesinger also explained that Carolene Products “furnish[ed] the activists with strong logical grounds for intervention on behalf of personal rights.” Insofar as Schlesinger ultimately denounced
Barnette as a wrong-headed “freak case[,]” modern authorities would strongly disagree. More important for evaluating Schlesinger’s analysis is the (unmentioned) fact that Barnette’s “activist” decision was authored by Justice Jackson, one of Schlesinger’s alleged “champions of self-restraint.”

Schlesinger likewise ignored the three-year-old Korematsu decision, which would have further confused his efforts to identify “activists.” In Korematsu, the supposed activists Black and Douglas approved certain racist military orders that oppressed Japanese-Americans during World War II, while Jackson, the “champion of self-restraint” voted to deny the President’s authority to enforce such orders. Again, Schlesinger’s doctrinal discussion left his efforts to define activism in a heavy fog.

Third, Schlesinger’s most vehement doctrinal analysis addressed an allegedly “explosive” field of judicial activism concerning labor law. Schlesinger speculated that “the Black-Douglas group” might undermine a then-pending statute to outlaw closed union shops, choosing “to override legal ‘niceties’ to emasculate or veto” such anti-union legislation. If such activism prevailed, wrote Schlesinger, “the political reprisals will be likely . . . sharp and disastrous.”

With hindsight, we can recognize Schlesinger’s statements as either failed predictions or successful advocacy. For although Congress did ban closed shops through the Taft-Hartley Act, the Supreme Court’s activists never did “emasculate” such legislation. On the contrary, both Black and

that targets religious, national, racial, or otherwise “discrete and insular” minorities). For further discussion of Schlesinger’s views about Carolene Products, see infra note 65 and accompanying text.

31 Schlesinger, supra note 6, at 204; see, e.g., Texas v. Johnson, 491 U.S. 397, 415 (1989) (“[The majority in Barnette, 319 U.S. at 642,] described one of our society’s defining principles in words deserving of their frequent repetition: ‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’”); Bruce Ackerman, Ackerman, J., concurring, in WHAT \"BROWN V. BOARD OF EDUCATION\" SHOULD HAVE SAID 111-12 (Jack M. Balkin ed., 2002) (characterizing Barnette as a “great precedent,” centered on “an understanding of the privileges of American citizenship”).

32 Barnette, 319 U.S. at 624.

33 Korematsu v. United States, 323 U.S. 214 (1944).

34 Justices Owen Roberts and Frank Murphy also filed dissents. Id. at 225 (Roberts, J., dissenting); id. at 233 (Murphy, J., dissenting). For further analysis of Korematsu and activism, see infra 122-126 and accompanying text. Perhaps Jackson qualified as a “champion of self-restraint” based mainly on his book, ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 37 (1941). See Schlesinger, supra note 6, at 77 (claiming that Jackson’s book, despite not using the term “judicial activism,” “sets forth the [historical] arguments . . . against judicial activism”); id. at 208 (endorsing Jackson’s claim that “in no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court”).

35 Schlesinger, supra note 6, at 206-08.

36 Id.

37 Id.

Douglas wrote majority opinions implicitly accepting such statutory provisions. Schlesinger again misperceived his own activist’s alleged activism. And because his categories were so firmly linked to accounts of particular Justices, such 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, errors, and personal focus 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.

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. The term was doubtless buoyed by Schlesinger’s Pulitzer-shops’ . . . in order to establish a sharp distinction between job rights and union membership.” (footnote omitted).

39 Ry. Employees’ Dep’t v. Hanson, 351 U.S. 225, 234 (1956) (Douglas, J.) (“[T]he question [of whether to allow closed shops] is one of policy with which the judiciary has no concern . . . . Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change.”); Lincoln Fed. Labor Union No. 19129 v. Nw. Metal & Iron Co., 335 U.S. 525, 531 (1949) (Black, J.) (“There cannot be wrung from a constitutional right of workers to assemble . . . a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies.”); id. at 537 (“Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.”).

40 To see Schlesinger’s ambivalence, compare his statement “Frankfurter and Jackson are surely right” about social and economic policy, Schlesinger, supra note 6, at 206, with his views about “the fundamental rights of political agitation,” which the activists sought to protect from legislative regulation, id. at 208. See also White, supra note 19, at 1113-14 (noting a similar tension in Schlesinger’s essay). Thirty-five years later, Schlesinger expressed less equipoise in describing his judicial preferences: “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.” SCHLESINGER, supra note 12, at 421.

41 E.g., Note, State Regulation of Pilotage: the Constitutionality of the Nepotic Apprenticeship Requirement, 56 YALE L.J. 1076, 1281 (1947) (borrowing Schlesinger’s term “activism,” without citation, six months after his article was issued); C. Herman Pritchett, The Roosevelt Court: Votes and Values, 42 AM. POL. SCI. REV. 53, 67 (1948) (characterizing “the present split” on the Court as “a battle of judicial activists against apostles of judicial restraint”); 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); Lester E. Mosher, Mr. Justice Rutledge’s Philosophy of Civil Rights, 24 N.Y.U. L.Q. REV 661, 667 (1949) (describing as “activist” Rutledge’s vision of constitutionally protected free speech and free thought); Alton P. Man, Jr., Mr. Justice Murphy and the Supreme Court, 36 VA. L. REV. 889, 916 (1950) (describing Murphy as “perhaps the outstanding activist on the Court”); Charles Alan Wright, Civil Liberties and the Vinson Court, 102 U. PA. L. REV. 822, 825 (1954) (questioning which Justices deserve the “activist” and “self-restraint” labels); ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57 (1955) (assailing the “cult of libertarian judicial activists”); Edward McWhinney, The Great Debate: Activism and Self-
Prize-winning Ivy-League reputation.\(^{42}\) And the personal details in his essay poked Justices who were already quite sensitive.\(^{43}\) Most importantly, 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.\(^{44}\) 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 field of scholarly interest.\(^{45}\) 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 \textit{Brown v. Board of Education} struck down racial segregation.\(^{46}\) Since then, federal courts’ “activity” in addressing social issues has been a consistently dominant concern. Thus, whatever Schlesinger’s “activism” might originally have meant, the term appeared at an opportune moment in history.\(^{47}\) The gloss of post-1947 history

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\(^{42}\) The \textit{Age of Jackson} won the Pulitzer Prize in 1946, while Schlesinger was professing history at Harvard. SCHLESINGER, \textit{ supra} note 12, at 373. For modern recognition of Schlesinger’s academic accomplishments in the 1940s see SEAN WILENTZ, \textit{The Rise of American Democracy} xix (2005) (claiming that the study of American democracy “owes the most to Arthur M. Schlesinger, Jr.’s \textit{Age of Jackson},” which helped foster a “revolution in historical studies”).

\(^{43}\) In a letter to his parents, Schlesinger wrote in abbreviated English: “[e]veryone is apparently mad at me—Douglas very hurt 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.” SCHLESINGER, \textit{ supra} note 12, at 425.

\(^{44}\) See KATHLEEN M. SULLIVAN & GERALD GUNThER, \textit{Constitutional Law} B-5 (16th ed. 2007).

\(^{45}\) See, e.g., JAMES F. SIMON, \textit{The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America} (1989); Drew S. Days III, \textit{William O. Douglas and Civil Rights, in He Shall Not Pass This Way Again: The Legacy of Justice William O. Douglas} 109-17 (Stephen L. Wasy ed., 1990) (analyzing Douglas’s numerous civil rights opinions); Ernest A. Young, \textit{Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption}, 95 \textit{Cal. L. Rev.} 1775, 1775 (2007) (calling Frankfurter, in his day, “the patron saint of the then-emerging field of Federal Courts”); see also HENRY HART & HERBERT WECHSLER, \textit{The Federal Courts and the Federal System} ix (1st ed. 1953) (dedicating their transformative work “to Felix Frankfurter, who first opened our minds to these problems”). As a law professor at Harvard, Frankfurter was especially known for sending his best pupils to Washington to fill various government positions, including Supreme Court clerkships. 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. These young men’s loyalty allowed Frankfurter to indirectly exert influence over a diverse range of government agencies and programs. \textit{A Place for Poppa}, \textit{Time Magazine}, Jan. 16, 1939 at 5; see SCHLESINGER, \textit{ supra} note 19, at 419.


\(^{47}\) I use the word “opportune” because Schlesinger’s specific predictions about the Court were quite inaccurate. Contrary to the introductory flourish of Schlesinger’s essay, the 1947 Court’s “nine young men, appointed by Democratic Press” were not the activist icons fated to make law “from the bench in
confirmed activism’s use as a negative epithet, and focused such critiques on the Supreme Court’s liberal wing. Yet such eclectic events did not yield a coherent definition of judicial activism; on the contrary, they only further complicated Schlesinger’s confused terminology.

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 from 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 controversial judicial conduct, with which Schlesinger was surely familiar. Some of these rulings were contested when they happened, while others acquired controversy over time. The element uniting these four is their common fear of alleged judicial abuse; thus, for each period, this Section describes the controversial behavior at issue and sketches possible lessons about judicial conduct generally. Insofar as these historical events convey vague or divergent prescriptions, they simply confirm the deep 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. 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. In fields of statutory law, such as antitrust and federal jurisdiction, the Court restricted labor interests and promoted industrial development. And the Court expanded a body of “federal general common law” that governed interstate disputes from commercial law to torts. Overall, these decisions sparked massive public, political, and scholarly criticism, culminating in statutory efforts to limit federal jurisdiction and “pack” the Supreme Court.

Because Schlesinger’s essay marked ten years after the “switch” that undermined *Lochner*, his audience would have clearly seen links between Black-Douglas activism and the Justices who were later maligned as the “Four Horsemen.” Indeed, Schlesinger cited pre-New Deal cases as an explicit benchmark, comparing the Black-Douglas solicitude for unions and disadvantaged persons to prior Justices’ concern for employers and the moneyed gentry. Regardless of whether such comparisons were apt, Schlesinger’s claimed contact between 1940s-era activism and prior judicial misconduct was vital to his analysis.

Although pre-New Deal decisions are undeniably part of judicial activism’s history, they leave unanswered questions about its definition. Most importantly, the modern consensus that *Lochner*-era decisions were wrong has not pinned down the nature of their mistake; this makes it hard to say just why the *Lochner* era was activist. One possibility is that Lochnerian jurisprudence spurred bad results, favoring powerful and

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53 Id.
54 Swift v. Tyson, 41 U.S. 1 (1842); see PURCELL, supra note 52, at 59-86; TONY FREYER, HARMONY & DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 45-100 (1981); EDWARD A. PURCELL, JR., BRANDIES AND THE PROGRESSIVE CONSTITUTION 39-94 (2000); cf. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 249 (1977) (noting that when *Swift* was decided, “both the United States Supreme Court and Mr. Justice Story had been performing similar [common-law] functions for quite some time, although they had never before crystallized into so grandiose a statement of legal theory”).
55 See, e.g., CUSHMAN, supra note 14, at 11-25; PURCELL, supra note 52, at 218-220.
56 Cf. SCHLESINGER, supra note 12, at 421 (“The memory of the judicial activism . . . by the Nine Old Men only a decade before was still vivid in mind . . . .”). Incidentally, Schlesinger was only a teenage college student when the “Nine Old Men” ceased their alleged activism. See West Coast Hotel v. Parrish, 300 U.S. 379 (1937). For evidence that the pre-1937 Court came to be vilified only gradually, see WHITE, supra note 51, at 290-98.
57 SCHLESINGER, supra note 6, at 208.
58 In fact, analogies between the Black-Douglas group and the pre-1937 Court are questionable on several substantive grounds. First, Schlesinger offered no evidence that the Black-Douglas group actually subverted congressional will. See supra notes 25-39 and accompanying text. Second, even Schlesinger’s indictment against the Black-Douglas group contained only claims of unwarranted statutory interpretation. Schlesinger, supra note 6, at 201 (“Since the questions at issue deal . . . with the interpretation of legislation, they do not involve the Court in decisions that a legislature cannot revise . . . .”). Thus, the pre-1937 Court’s constitutional rulings were arguably more damaging. Third, in cases where Schlesinger’s activists did address constitutional issues, Carolene Products would likely distinguish the Black-Douglas group’s approach from that of the Four Horsemen. See supra note 30.
established interests over progressive ones.\textsuperscript{59} Or the Court might have used improper methods, inferring constitutional rights and common-law powers without support from orthodox authorities.\textsuperscript{60} Or perhaps the Court’s errors were institutional, intruding on fields of policymaking that are best left to other governmental actors.\textsuperscript{61} All of these hypotheses may be partly correct, as other explanations might also. Thus, although Schlesinger certainly enriched his account of judicial activism by gesturing toward prior judicial misconduct, no simple reference to \textit{Lochner} can clarify what activism means.

A second period of judicial controversy involves the decades following the Civil War. In a series of decisions, the Court submerged individual rights to federal military power, eviscerated constitutional liberty and equality under the Reconstruction Amendments, reversed a constitutional ban on paper money, and, as members of an Electoral Commission, helped decide a presidential election.\textsuperscript{62} Some of the Court’s actions from 1865 to...

\textsuperscript{60} E.g., Laura Kalman, \textit{Eating Spaghetti With a Spoon}, 49 STAN. L. REV. 1547, 1559 (1997) (“Judicial formalism, . . . reflecting ‘the entrenched faith in laissez faire,’ emerged in cases such as \textit{Lochner v. New York} . . .”).
\textsuperscript{61} E.g., Rogers M. Smith, \textit{The Constitution and Autonomy}, 60 TEX. L. REV. 175, 182 (1982) (noting an historical trend “from the peak of activism in \textit{Lochner v. New York} to a period of considerable passivity and deference to legislative enactments . . . , which continued into the mid-1950’s”).
\textsuperscript{62} For an in-depth discussion of the Court’s opinions, see generally Barry Friedman, \textit{The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court}, 91 GEO. L. J. 1 (2002). During the Civil War, the Court upheld a blockade that Congress had not authorized. \textit{See The Prize Cases}, 67 U.S. (2 Black) 635, 671 (1863); \textit{see also CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888, PART I, at 1163-68, 1243-44 (1971) (indicating that the military, through the Freedmen’s Bureau and under a presidential directive, performed judicial functions in instances where rights available to whites were denied to African Americans). \textit{Compare Ex parte Milligan}, 71 U.S. (4 Wall.) 2, 120-21 (1866) (denying the President’s attempt to suspend habeas corpus), \textit{with Ex Parte McCord}, 74 U.S. 506 (1868) (allowing Congress to suspend habeas corpus over a military detainee’s habeas corpus petition). For additional analysis, \textit{see 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 225 (1998) (calling Congress’s actions preceding \textit{McCord} “a devastating counterattack” against the Court); id. at 242-43 (noting similar interbranch troubles in \textit{Ex Parte Yerger}, 75 U.S. 85 (1869), where the President ultimately averted a crisis over habeas corpus by transferring the detainee for state criminal prosecution).}


The Court reversed itself within a year in order to affirm federal “greenback” currency. \textit{Compare Hepburn v. Griswold}, 75 U.S. 603, 625 (1869) (concluding that congressional action to institute a national legal tender is constitutionally prohibited), \textit{with The Legal Tender Cases}, 79 U.S. 457, 553-54 (1870) (overruling \textit{Hepburn} and determining that Congress acted within constitutional authority when it issued a national legal tender).

In addition, members of the Waite Court received widespread attention, and in some circles condemnation, for participating in the 1876 Electoral Commission, which voted along party lines to resolve the election. \textit{See WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).}
1885 were stridently criticized in their day; others less so. Yet modern experts uniformly view this period as an exceedingly bleak chapter in judicial history.

Schlesinger’s use of the terms “activist” and “self-restraint” implicitly denounced the Court’s postbellum decisions. Like many modernists, Schlesinger espoused a Carolene Products view of constitutional law, which views individual rights as key safeguards for politically sensitive rights and “discrete and insular minorities.” Schlesinger also endorsed the application of individual rights to state and local governments. To protect broad-based affirmations of individual liberty and equality, these conclusions required a post-Civil War Constitution and a rejection of post-War judicial doctrine.

As we saw with Lochner, however, there is a big difference between recognizing decisions as improper and explaining why they are so. Like other controversial rulings, the Court’s mid-nineteenth-century cases might draw fire for: (i) their bad results, (ii) their improper methods, (iii) their affront to other actors, or (iv) some mix of misdeeds. An important

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63 See generally Edward A. Purcell, Jr., Originalism, Federalism, and the American Constitutional Enterprise 133 (2007) (“Challenges [to judicial power] regularly recurred, and during . . . the Civil War era the Court’s position seemed particularly vulnerable.”). The Slaughterhouse Cases were contested among the Justices themselves; one dissenter criticized the majority for rendering the Fourteenth Amendment “a vain and idle enactment, which accomplished nothing.” The Slaughterhouse Cases, 83 U.S. (16 Wall.) at 77-79 (Field, J., dissenting); Eric Foner, Reconstruction: America’s Unfinished Revolution 1863-1877, 529-30 (1988). Yet some decisions that are now widely hated were not the subject of widespread criticism at the time. See, e.g., Peter Irons, A People’s History of the United States Supreme Court 205 (2006) (suggesting that northerners had tired of prolonged political battles against the south); Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction 247 (2008) (noting the northern press’s favorable reaction to Cruikshank, which deflated federal power to enforce Reconstruction through criminal prosecutions). But cf. Fairman, supra note 62, at 1368-74 (criticizing Cruikshank and similar decisions). The Civil Rights Cases were subject to widespread criticism in the press. See Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-1888 Part II, 568-85 (1987) (analyzing every available newspaper editorial during the two weeks after the decision). These editorials ranged from praise for the decision to indignation at the Court’s invaliding federal law. Id. 64 See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008); Irons, supra note 63, at 205; Lane, supra note 63.

65 Schlesinger, supra note 6, at 202 (“The Court cannot escape politics; therefore, let it use its political power for wholesome social purposes.”); id. at 204, 206 (discussing civil liberties and Court’s role in protecting liberties or deferring to legislature based on principles of democracy).

66 Cf. Don E. Fehrenbacher, The Dred Scott Case 582 (1978). (“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 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.”).

67 Fairman, supra note 63, at 569-85 (recounting various criticisms of The Civil Rights Cases,
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 are composed at least equally of the Court’s unwillingness to respect other branches’ judgments and its unwillingness to defend individual rights.

A third example of pre-1947 activism, Dred Scott, is infamous; whether viewed as a divisive case, or a national disaster, it has no competitor in judicial history. 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. Public and political reaction was immediate and overwhelming.

Schlesinger’s essay did not mention Dred Scott, and this may surprise modern readers, as Dred Scott today represents the worst imaginable example of judicial activism, and perhaps the only one on which everyone agrees. A recent book by Schlesinger had tarred Chief Justice Roger Taney as a partisan exponent of “judicial imperialism,” with Dred Scott as his most grievous and characteristic error. And Dred Scott’s critics have throughout history been wont to stress the decision’s judicial overreaching, sometimes thereby overshadowing the decision’s legal merits.

So why did Schlesinger’s essay omit Dred Scott? Perhaps even mentioning Dred Scott in 1947 would have risked absurdity, given the mildness of Black-Douglas activism and its progressive political bent. Or
perhaps Schlesinger preferred not to inject race into his legal discussion. Whatever the historical reason for Schlesinger’s choice, Dred Scott has an important and over-determined place in modern activism debates. As a matter of consequences, the Court’s decision supporting slavery in the Minnesota Territory was deeply unsettling; the Court’s reasoning also implied severe oppression of all American blacks, and the decision’s historical assumptions cast the Constitution as an irretrievably “proslavery document.” As a matter of technique, the Court addressed issues that were not properly presented, rendered judgment without orthodox legal authority, and was influenced by two Justices’ secret and improper communications with President-elect James Buchanan. From an institutional perspective, Dred Scott upset a precarious sectional compromise concerning slavery, tossing the Court’s judicial authority into an implacable vortex of slaveholding politics. Accordingly, as with our other historical examples, Dred Scott offers context for judicial activism’s lasting significance, yet it does not specify what exactly the word means.

My fourth and last 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.

75 Schlesinger was also at least somewhat concerned not to alienate the Justices. Cf. Schlesinger, supra note 12, at 424-425. And to compare the Black-Douglas group with the Dred Scott Court, even loosely, would have burned all bridges beyond repair.
76 See sources cited supra note 69; see also DERRICK A. BELL, JR., EDUCATION, RACE, RACISM AND AMERICAN LAW 21 (1973) (calling Dred Scott “the most frequently overturned decision in history”); Jack M. Balkin & Sanford Levinson, Thirteen Ways of Looking at Dred Scott, 82 CHI-KENT L. REV. 49, 94 (2007) (“We blame Dred Scott today because it is a convenient symbol of what we don’t like about our past . . . . We blame Dred Scott because attacking foolish judges in the past is a good way to attack judges we think are foolish in the present.”).
77 FEHRENBACHER, supra note 67, at 419 (quoting a contemporary lament of Dred Scott as “the funeral sermon of Black Republicanism,” which “swe[pt] away every plank of their platform, and crushes into nothingness the whole theory upon which their party is founded”). See generally William Lloyd Garrison, LIBERATOR, May 6, 1842, at 3 (calling the Constitution a “covenant with death, an agreement in hell”).
79 See FEHRENBACHER, supra note 67, at 428-37.
80 Gerald Gunther, Unearthing John Marshall’s Major Out-of-Court Constitutional Commentary, 21 STAN. L. REV. 449, 453 (1969); G. Edward White, Recovering Coterminous Power Theory: The Lost Dimension of Marshall Sovereignty Cases, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 67-68 (Maeva Marcus ed., 1992) (noting that the Marshall Court’s most famous decisions “were severely criticized by so-called states’-rights advocates” and that “a pamphlet war of a kind was conducted between 1819 and 1822 on both sides”); see also PURCELL, supra note 63, at 145 (noting 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 oppose federal judicial interference in state matters); id. at 147 (“The constitutional debates grew so bitter that they drove the aging Marshall to the edge of despair. ‘I yield slowly and reluctantly to the conviction that our Constitution cannot last,’” he
“implied” congressional authority, the Marshall Court repeatedly adventured into contemporary channels of power, and its results were fought with corresponding vigor.

Schlesinger cited the Early Republic as context for his discussion of judicial activism; indeed, Schlesinger characterized Frankfurter as an emblem of Jeffersonian faith in democracy.81 Schlesinger did not, however, mention the fierce 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.

As with other examples of judicial controversy, Marshall’s judgments were derided for their consequences, such as fostering a sprawling federal monster.82 They were also criticized for using improper judicial methods, including weak textual analysis and reading the Constitution with partisan eyes.83 And they were rejected on institutional grounds, for disrespecting popular will and undermining democracy.84 The Marshall years thus confirm that: (i) judicial critique traces to the start of America’s judicial tradition, and (ii) the Court has earned harsh criticism both for decisions that decrease governmental power, as in Marbury and the Contract Clause cases, and for rulings that expand governmental power, as in McCulloch and Ogden.

Taken as a set, the foregoing examples illustrate that Schlesinger’s term “judicial activism” was written on 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.85 The term’s heft also owes a great

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81 Schlesinger, supra note 7, at 206, 208.
82 E.g., John Marshall’s Defense of McCulloch v. Maryland (Gerald Gunther ed., 1969) (denouncing “that legislative power which is everywhere extending the sphere of its acting and drawing all power into its impetuous vortex,” and “[t]hat judicial power which . . . has also deemed its interference necessary”) (Spencer Roane).
83 E.g., G. Edward White, The Marshall Court and Cultural Change, 1815-1835, at 521 (1991) (quoting Spencer Roane’s attack that Marshall’s decisions came from “that love of power, which . . . infects and corrupts all who possess it, and from which even the high and ermined judges, themselves, are not exempted”); id. at 561 (noting allegations that the McCulloch Court had behaved in an “extrajudicial manner” in order to establish an “abstract doctrine”).
84 E.g., id. at 561 (quoting Roane’s contention that McCulloch had given “congress an unbounded authority, and enable[d] them to shake off the limits imposed on them by the constitution”).
85 Cf. Rodgers, supra note 8, at 222 (describing how “[a] word which rose on the crest of its historic
deal to the broader history of American judicial critique, a history that even current uses of the term cannot fully escape.

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 the pre- and post-1947 concept of activism. Despite commentators’ understandable bewilderment at the diverse meanings applied to the term, I would arrange modern definitions of judicial 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. If any of these interpretations were correct, the term judicial activism might indeed be too confused to keep. The flaws in these four possibilities, however, illustrate the need for a new approach, and also indicate how my reformed analysis of activism should proceed.

First, if activism were defined to include any serious judicial error, there would be no reason for any overarching label, or for shortcutting analysis of the specific issues at stake. When courts misread statutes, ignore precedents, botch inferences, or mistake facts, such errors may cause great concern; but adjudicative flaws are too diverse and idiosyncratic to merit a generalized heading like “activism.” Indeed, even

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86 E.g., Kmiec, supra note 1, at 1443 (“Judicial activism is defined in a number of disparate, even contradictory, ways; scholars and judges recognize the problem, yet persist in speaking about the concept without defining it.”); Theodore A. McKee, Judges as Umpires, 35 Hofstra L. Rev. 1709, 1716 (2007) (“The phrase ‘judicial activism’ is itself as unfortunate as it is meaningless because it offers little more than reflexive criticism and convenient sound bites.”).

87 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,” such as striking down a statute); Young supra note 3, at 1144 (explaining activism as “(1) second-guessing the federal political branches or state governments; (2) departing from text and/or history; (3) departing from judicial precedent; (4) issuing broad or “maximalist” holdings rather than narrow or “minimalist” ones; (5) exercising broad remedial powers; and (6) deciding cases according to the partisan political preferences of the judges.”); Jack Wade Nowlin, Conceptualizing the Dangers of the “Least Dangerous” Branch: A Typology of Judicial Constitutional Violation, 39 Conn. L. Rev. 1211, 1225 (2007) (“One can . . . . characterize any constitutional mistake – any judicial decision misinterpreting the Constitution and (say) mistakenly upholding unconstitutional legislation or invalidating constitutional legislation – as a violation of the Constitution by the courts. One can hold this view because even the reasonable and good faith upholding of unconstitutional legislation can be thought to entail a violation of the judiciary’s structural duty under the separation of powers and the Supremacy Clause to invalidate unconstitutional legislation.”); Cross & Lindquist supra note 9, at 1756 (“Some complain that the activist judiciary is acting ‘like a legislature’ instead of a court. Exactly what it means for a court to ‘act like a legislature’ is less clear. Sometimes, the criticism seems to mean little more than an observation that the Court is deciding a controversial issue . . . .”).
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 some 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 Part III.

Second, the view that activism means any undesirable result is even less plausible. Yet when commentators use the term “activism” without any explanation, it may seem that judicial results drive their rhetoric. 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 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 tied not just to results, but also to appropriate 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. On the positive side, to define activism as invalidation would successfully link allegations of post-1947 activism, 

88 See generally Julian E. Zelizer, ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES 1948-2000, at 89 (2004) (describing the general phenomenon of political science after World War II, which “stimulated scholars to develop empirical studies – rather than just theoretical arguments – about how institutions worked,” based on the belief “that theories of human behavior could be identified that worked across time and space,” and using “sociological concepts as a means of understanding political systems and norms”). Robert McCloskely has expressed doubts about attitudinal quantitative studies regarding judges’ behavior: “[C]urrent political science writing on ‘jurimetrics’ is about 90% useless. . . . I believe that a constitutional scholar may sometimes find it valuable to count things, but as far as I can see, simple arithmetic which any eighth grade student can handle is about as sophisticated a tool as is required.” Michael Kammen, A MACHINE THAT WOULD GO OF ITSELF 374 n.46 (2006).

89 See, e.g., Frank B. Cross & Stefanie Lindquist, The Decisional Significance of the Chief Justice, 154 U. PA. L. REV. 1665, 1701-06 (2006) (“A commonly invoked measure of judicial activism is the Court’s willingness to invalidate statutes. While this is not a perfect or complete measure of activism, it surely has a rough accuracy, because striking down legislation is a clear flexing of judicial power at the expense of another branch of government... this measure has the advantages of being ideologically neutral and readily quantifiable and has been used as a proxy in other research.”) (footnotes omitted); Paul Gewirtz & Chad Golder, So Who Are the Activists?, N.Y. TIMES, July 6, 2005, at A19 (“In order to move beyond this labeling game, we’ve identified one reasonably objective and quantifiable measure of a judge’s activism, and we’ve used it to assess the records of the justices on the current Supreme Court. Here is the question we asked: How often has each justice voted to strike down a law passed by Congress?”); see also William S. Koski, The Politics of Judicial Decision-Making in Educational Policy Reform Litigation, 55 HAST. L.J. 1077, 1098 (2004) (“The political science literature on judicial activism provides little by way of a precise and universal definition of the term... . [T]hree of these definitions... [are] supreme courts: negation of policies that were democratically adopted, alteration of earlier court doctrine, and making of substantive policy.”).
which recognized an array of individual rights, with one strand of pre-
New-Deal activism, which applied a rigorous liberty of contract. But
there are two problems. First, a focus on examples of judicial review fails
to condemn judicial activism, because one key function of post-\textit{Marbury}
courts is to invalidate unconstitutional acts. Schlesinger originally claimed
neutrality about whether activism is desirable, but modern analysts find
nothing more obvious about activism than that it is bad. If activism
meant any statutory overrule, then such antipathy would be largely
misplaced. Second, even quantitative empiricists acknowledge that not
every statutory invalidation is activist. Yet without a more nuanced
definition at hand, no analyst can tell whether a few, many, or most
decisions striking down statutes truly qualify as activist.

An example will illustrate both points: If Congress banned political
sedition, or authorized the race-based execution of United States citizens,
courts would not be “activist” in annulling such statutes. 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
may be 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, and have responded with taxonomies of
activism, accompanied by the meek suggestion that speakers should
simply specify which meaning of the term they intend to use. In

\footnotesize{\textsuperscript{90}} See supra notes 51-61 and accompanying text.
\footnotesize{\textsuperscript{91}} \textsc{S}unstein, supra note 3, at 42 (observing that for many the “word ‘activist’ isn’t merely a
description” but is “always an insult”); Jim Chen, \textit{A Vision Softly Creeping: Congressional
Acquiescence and the Dormant Commerce Clause}, 88 \textsc{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.”); David Kairys, \textit{Book Review}, 91 \textsc{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.”)
\footnotesize{\textsuperscript{92}} See, e.g., Cross & Lindquist, supra note 9, at 1760 (“A standard of judicial activism that focuses
solely on statutory invalidation thus fails to account for the possibility that the exercise of judicial
review is justified on legal grounds.”).
\footnotesize{\textsuperscript{93}} See e.g., id. at 1773-1774 (“For purposes of constructing a more systematic measure of judicial
activism, we begin with the conventional measure reflecting the Justices’ propensity to invalidate
legislative enactments. As noted above, the simplest measure of activism involves the frequency with
which Justices vote to strike statutes. While incomplete, it provides relevant and valuable
information.”).
\footnotesize{\textsuperscript{94}} See, e.g., Young, supra note 3, 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
principle, such scholarship recognizes the importance of judicial activism, and seeks to clarify the term’s sophisticated meaning. In practice, however, such arguments often validate many varied definitions of activism, listing several options and thus also encouraging addition to the list of hybrid forms or other unexplored definitions. This approach is thus ultimately reducible to a definition of judicial activism as ‘any or all of the above.’ Such 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 without more, such interpretations implicitly undermine any notion that the term itself is useful.

The foregoing examples illustrate major definitional flaws in current analyses of judicial activism. Perhaps because no previous study 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 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 available options, I might agree. 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.) 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. Rather than simply restating flaws in

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See also Kmiec, supra note 1, at 1475.

See, e.g., Young, supra note 3, at 1164 (“Most interesting decisions – that is, those worth debating about in the law reviews – will be activist in some respects but not in others. In many instances, each of the options available to a court may be “activist” in some sense, and the court must choose the least troubling course.”).

See supra Section I.C.

See, e.g., ROOSEVELT, supra note 3, at 3; McKee supra note 88, at 1716; Posner, supra note 3, at 54 n.74.

Cf. WHITE, supra note 7, at 473 (“Oracular and mechanical jurisprudence have given way to various twentieth-century theories, but analytical soundness, intelligibility, and rationality have been continuously associated with competent judging. These minimum requirements . . . . will remain in the future unless the appellate judiciary adopts an approach in which institutional power utterly replaces rational analysis, the euphemism becomes the sole means of communication, and the tension between
modern definitions of activism, this Part experiments with an affirmative project: seeking to redefine activism as a limited concept that captures the values that animate our history of judicial critique. I believe that this approach has not been adequately tried, and may deserve some effort.

This Article offers two rather 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. If my analysis is right, then activism debates are indispensable, and this conceptual point remains true regardless of whether one prefers some other creature of rhetoric label like “judicial legislation,” “aggressive judging,” or some other rhetorical creature. The concept of judicial activism underlies them all.

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,” and such debates will only intensify under our next President. The question of how scholars participate may depend on their ability to understand and 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 independence and accountability accordingly evaporates. At that point the American judicial tradition will have lost its meaning.”; James E. Ryan, Does It Take a Theory? Originalism, Active Liberty, and Minimalism, 58 STAN. L. REV. 1623, 1636 (2006) (“For too long, Justice Scalia [and conservative politicians have] been allowed to paint a caricature of nonoriginalists as jurists who are dying to impose their personal preferences on an unwitting nation.”).

99 See LAWRENCE BAHM, JUDGES AND THEIR AUDIENCES 4 (2006) (“[J]udges care about the regard of salient audiences because they like that regard in itself . . . . [J]udges’ interest in what their audiences think of them has fundamental effects on their behavior as decision makers. Through their choices in cases, judges engage in self-presentation to audiences whose esteem is important to them.”); id. at 10 (“Socialized through their legal training and practice, judges gain satisfaction by interpreting the law as well as they can.”); id. at 100 (“As a segment of the legal profession, . . . legal scholars are especially relevant to judges on higher courts. . . . [T]hey are prominent evaluators of judges’ work. Because law professors have so much prestige [?], their evaluations of judges carry considerably weight.”).

100 These and other terms are sometimes offered as alternatives to “judicial activism.” See, e.g., Posner, supra note 3, at 54 n.74 (preferring the term “aggressive judge” because “judicial activism” has become a vague “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”). There is, however, no clear disadvantage to sticking with “judicial activism,” which may permeate public discourse much better than more specialized jargon.

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 alter or influence. But these are hardly the phenomenon’s most common or important examples. The high transactional costs of enacting legislation insulate Supreme Court interpretations of common law and statutes from outside review; trial courts and courts of appeals also make unsupervised decisions in particular contexts, as with certain judgments of acquittal, settlements, and cases that are clearly not certworthy.

The idea of unsupervised judging is carved into our constitutional bedrock. The Founders granted significant judicial independence through Article III’s provision for life tenure and irreducible salaries, and our tradition of non-impeachment has only strengthened these

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103 See, e.g., Roger A. Fairfax, Jr., Grand Jury Discretion and Constitutional Design, 93 CORNELL L. REV. 703, 741-742 (2008) (“[Many] dispositive exercises of discretion are . . . not reviewable in any meaningful sense. Attempts to review petit jury acquittals, judicial acquittals, and executive pardons are futile; the Constitution, by operation of the Double Jeopardy Clause and the pardon power, renders these decisions unreviewable.”); Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 GEO. L.J. 1487, 1538 (2008) (noting the Supreme Court’s “ever-shrinking docket and correspondingly heightened standards . . . to deem a case certworthy”); Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. REV. 1217, 1247 (2006) (“Whenever a member of Congress wants to pass certain legislation, she has to devote extensive resources to building coalitions and negotiating with dozens (if not hundreds) of other members, each of whom has her own interests, constituencies, and partisan commitments.”).
104 Unsupervised judging thus tracks Bickel’s concept of “countermajoritarian difficulty” only loosely. BICKEL, supra note 102, at 16. Bickel coined his term to refer to judicial review, which is not explicitly prescribed in the Constitution.
guarantees. 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. This dynamic is not just a feature of constitutionalized judicial review; indeed, the issue would still exist without judicial review. Unsupervised judging is inherent in any system that (like ours) leaves certain important decisions exclusively to judges.

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. In simplest terms, the fact of judicial might does not make right; and Justice Jackson was wrong that the Supreme Court is “infallible because [it is] final.” 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. Yet that insulation does not aim to empower all aspects of a judge’s preference. The term judicial autonomy 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.

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105 See U.S. CONST. art. III, § 1; WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 275-78 (1992) (characterizing judicial independence as one of the Founders’ most “original contributions,” and describing Chase’s acquittal as crucial to that concept’s success).


107 Compare the legitimate exercise of judicial review discussed supra, note 93 and accompanying text, with Dred Scott v. Sandford, 60 U.S. 393 (1856), discussed supra notes 69-79 and accompanying text.


109 Compare the legitimate exercise of judicial review discussed supra, note 93 and accompanying text, with Dred Scott v. Sandford, 60 U.S. 393 (1856), discussed supra notes 69-79 and accompanying text.

110 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 PAGE (2d ed. 1989).

111 CG: OED (CITE THAT DISCRETION MEANS FREEDOM & ALSO JUDGMENT)
This link between judicial activism and judicial role is also bolstered by the historical discussion presented in Section I.B. The four periods discussed—Lochner, Reconstruction, Dred Scott, and the Marshall Court—are plausible instances of judicial activism because the Court not only allegedly erred; each error was allegedly non-judicial in nature, beyond the limits of judicial propriety. The same is true for alleged activism with respect to Brown, Warren-era rights cases, and Schlesinger’s essay itself. Allegations of non-judicial decision-making are therefore the conceptual core of judicial activism, regardless of whether such critiques march under “judicial activism’s” terminological 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 significant. Thus, judges’ beliefs about their work are often the only operative check against judicial usurpation. Those beliefs, in turn, are influenced by cultural expectations that arise from education, experimentation, debate, and experience.

Unlike many civil law countries, the United States lacks a professionalized “judges’ school,” and judicial promotions are mainly political, with mild attention to performance and no consensus on useful criteria. 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. 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 lived experience, and so the wheel turns.

As a legal community, we cannot stop ourselves from talking about

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112 See supra Section I.B.
113 See sources cited supra note 99.
114 See WHITE, supra note 7, at 467-73 (analyzing the freedoms and limitations that judges face as a result of their culturally constructed political role).
116 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, 427-31 (promulgated rule 16(c), effective Dec. 1, 1993) (Rule 16(c)); see also Charles Fried, A Meditation on the First Principals of Judicial Ethics, 32 HOFSTRA L. REV. 1227, 1229 (2004) (arguing that the ultimate power held by the judiciary is "what makes the role of the judge distinct and generates the ethical restraints on those who inhabit that role").
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 are a key part of legal training, designed to create 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 judge less suitable, less able to exercise the trust vested in judicial office. In this sense, judicial activism debates are what allow judges to be good judges, and such discourse is 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 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 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 on the surface, but Dred Scott and Lochner stand to the contrary. Both activist decisions enhanced particular forms of liberty and property rights. Yet it is absurd to view Dred Scott’s pro-slavery judgment as promoting liberty, and it is at least debatable whether Lochner’s liberty of contract submerged the greater liberty of exploited workers to avoid

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unnecessary harm. The fact that many judicial cases involve competing liberties makes it hard to see the promotion of liberty as somehow decisive in defining judicial activism.

Another problem for liberty-based definitions of activism is deciding what liberty possibly means in this context. Even the most conventional aspect of liberty, its opposition to governmental power, creates 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. 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 allows enforcement either by private lawsuits or by governmental ones. Again, it is not credible that judicial decisions affirming individual rights versus the government can be activist, but identical decisions affirming those rights against private environmentalists cannot. 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. By contrast, I believe that judicial activism is not the mere absence of deference—any more than proper judicial role is simply getting out of the way. Under my approach, a judge can be activist by deferring too much, thereby authorizing excessive governmental power. And a judge can refuse to defer without being activist, thereby properly enforcing the law. A few examples may clarify these points.

Instances of excessive judicial deference include *Korematsu* and

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119 PURCELL, supra note 52, at 3-11.
120 See, e.g., Jeanette L. Austin, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 NW. U. L. REV. 220, n.3 (1987) (“The right of private individuals to enforce statutes, including statutes under which the government has enforcement authority, is not unique to environmental law.”); see also, e.g., Barlow v. Collins, 397 U.S. 159 (1970) (allowing tenant farmers to seek judicial review of a regulation disseminated by the Secretary of Agriculture); Scripps-Howard Radio, Inc v. FCC, 316 U.S. 4 (1942) (allowing private citizens to contest the FCC issuance of a radio license).
Yamashita. Korematsu affirmed a defendant’s conviction for violating certain racially based military orders, under which 100,000 Japanese-Americans were interned. 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. 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. The Court sanctioned executive violence against Korematsu, just as in other criminal cases, and the Court issued a precedent concerning executive detention that “lies about like a loaded weapon.” 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. 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 easily 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 category of violative cases qualifies as activist.

My final example concerns the judicial activism of Dred Scott. As a technical matter, the Court held that federal courts lacked diversity jurisdiction over Scott’s tort suit alleging slavery-based assault and false imprisonment. The Court ruled that under federal law neither slaves nor descendents of African slaves could qualify for federal or state citizenship;

123 For strong histories of Korematsu, see GEOFFREY R. STONE, PERILOUS TIMES 286-308 (2004); PETER IRONS, JUSTICE AT WAR 48-74 (1983); and FERREN, supra note 13, at 246-49.
124 See sources cited supra note 123.
125 Cf. Robert Cover, Violence and the Word, 95 Yale L.J. 1601, 1607-08 (1986) (“[I]t is unquestionably the case in the United States that most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk. They do not organize force against being dragged because they know that if they wage this kind of battle they will lose - very possibly lose their lives.”).
126 Korematsu, 323 U.S. at 246 (Jackson, J., concurring).
128 Dred Scott v. Sandford, 60 U.S. 393 (1856).
thus, Dred Scott could not be a “citizen” of a different state from the
defendant for purposes of diversity jurisdiction.\textsuperscript{129}

If judicial activism depended solely on political deference, \textit{Dred Scott’s}
activist status might be questionable. On one hand, to deny jurisdiction is
often viewed as a paradigmatic act of judicial restraint.\textsuperscript{130} \textit{Dred Scott} also
left slavery’s status exclusively in the hands of state law and state courts,
which also might seem inherently passive.\textsuperscript{131}

On the other hand, the Court’s two grounds for denying jurisdiction—
Scott’s African-slave heritage and his contemporary slave status—carried
explosive consequences. The Court’s holding about African slaves’
descendants stripped even free blacks and emancipated slaves of their
ability to access federal courts under diversity jurisdiction.\textsuperscript{132} The Court
also implied that the 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.\textsuperscript{133} Similarly, in
ruling that Scott remained a slave, the Court invalidated part of the
Missouri Compromise, and cast shadows on the authority of territorial
governments and even free states to restrict slavery.\textsuperscript{134} 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 \textit{Dred Scott} decision, my point is simply
that the case’s activist status does not turn on such split hairs, any more
than it requires a balancing of “liberties” or an estimate of progressive
politics.\textsuperscript{135} \textit{Dred Scott}’s activism, in a conceptually meaningful sense,

\textsuperscript{129} Under modern reasoning, the Court should have focused on the statute, rather than the Constitution.
This rule was made famous in \textit{Ashwander v. Tennessee Valley Authority}, 297 U.S. 288, 346-47 (1936)
(Brandeis J., concurring).

\textsuperscript{130} See Wis. Knife Works v. Nat’l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986) (Posner, J.)
(explaining that federal courts must investigate their own jurisdiction before reaching the merits of a
case “because federal judges are not subject to direct check by any other branch of government—
because the only restraint on our exercise of power is self-restraint”); Scott J. Idleman, \textit{The
Emergence of Jurisdictional Resequencing in the Federal Courts}, 87 \textit{CORNELL L. REV.} 1, 6 n.22

\textsuperscript{131} See Robert A. Schapiro, \textit{Polyphonic Federalism: State Constitutions in Federal Courts}, 87 \textit{CAL. L. REV.}
1409, 1447-48 & nn.172-76 (1999) (discussing and questioning this vision of federalism-based
self-restraint).

\textsuperscript{132} \textit{Scott}, 60 U.S. at 393.

\textsuperscript{133} The Court in \textit{Dred Scott} equated the word “citizen” with the term “the people.” \textit{Id.} at 411 (“The
words ‘people of the United States’ and ‘citizens’ are synonymous. . . . They both describe the political
body who, according to our republican institutions, form the sovereignty, and who hold the power and
conduct the Government through their representatives.”) Because several provisions of the Bill of
Rights use “the people,” U.S. \textit{CONST.} amends. I, II, IX, X, this raised a disturbing question whether, in
the Supreme Court’s eyes, all black people—slave, emancipated, and free-born—could solely because
of race be denied constitutional rights granted to all other citizens. \textit{See also FEHRENBACHER, supra
note 67, at 344-46 (describing similar concerns with respect to \textit{Dred Scott} and the Privileges and
Immunities Clause).}

\textsuperscript{134} \textit{FEHRENBACHER, supra note 67, at 391-92.}

\textsuperscript{135} \textit{See supra} notes 118-127 and accompanying text.
owes exclusively to the Court’s departure from cultural norms of judicial conduct.

This Part has outlined basic principles for reconceiving judicial activism, and has asserted a substantial need to do so. Yet I have tried to choose only uncontroversial examples of activism in order to delay explaining how to identify cultural norms of judging, and thereby determine whether a particular judge or decision is activist. These last tasks await.

III. STANDARDS OF JUDGING

Part II sketched a view of judicial activism defined by cultural norms of judicial decision-making. This Part takes the next step of analyzing how debates over judicial activism should proceed, and how standards of judicial role may be identified, constructed, or 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 only 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 differing on exactly the right thing, and that is no small gain in law.”

This Part 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, as 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 the 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 nearly 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. And these documents’ original history only complicates efforts to identify transhistorical guideposts, because the structure, function, and role of federal courts have changed so greatly. 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.137 Of course, the Constitution places federal judges in a distinct branch of government, which shows some commitment to a separation of powers. But the inference that judges are “not Congress” and “not the President” is no help.138 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

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137 See, e.g., Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence 41 (Wythe Holt & L.H. LaRue eds., 1990) (“The federal Constitution establishes “one supreme Court’ Neither England nor any American state provided a model for this court.”); Maeva Marcus, The Earliest Years (1790-1801): Laying Foundations, in THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 26 (Christopher Tomlins ed., 2005) (“The Supreme Court . . . is the Constitution’s most novel and least-defined creation. Everything the Constitution has to say on the matter appears in a single phase of one sentence in the first clause of Article III . . . As such, no one could predict how the institution might develop, least of all those in Congress called upon to put flesh on the constitutional bone.”).

138 See, e.g., Purcell, supra note 63, at 39-40 (“[T]he framers failed to attain any more precision in specifying the distinctive powers of the national branches than they achieved in allocating powers between state and central governments. Their failure was understandable, for the distinctions between the powers of the three branches were inherently murky and [individual] founders understood their natures differently.”) (footnotes omitted); Craig Green, Erie and Problems of Constitutional Structure, 96 CAL. L. REV. 661, 668 (2008) (similar).
determinations and those of other branches.\textsuperscript{139}

The Judiciary Act of 1789 and later legislative reforms also did not textually codify a specific vision of judicial activism or role. 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.”\textsuperscript{140} 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).\textsuperscript{141} Yet Congress gave no direct instruction about how judicial decisions should issue, how judicial activities should fit with those of other political actors, or how judges should generally conceive of their new office. 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.\textsuperscript{142}

\textbf{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, as originalism’s distinctive feature is its exclusive focus on particular periods accompanying legal enactments.\textsuperscript{143} 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.\textsuperscript{144} Two such “federal courts moments” are the constitutional

\textsuperscript{139} JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 246-47 (1971).

\textsuperscript{140} Cf. Maeve Marcus & Natalie Wexler, The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation? in ORIGINS OF THE FEDERAL JUDICIARY 13 (Maeve Marcus ed., 1992) ("In answering the large questions as well as in setting forth the details of the federal judiciary, the First Congress’s solutions reflected not so much the powers granted by the Framers in 1787 as the powers that were acceptable to the nation in 1789."). 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 an eclectic arsenal of legal sources, to pick and choose among them, and to impact the functioning of other areas of the law. See WHITE, supra note 83, at 113-14.

\textsuperscript{141} RICHARD FALLON, JR., DANIEL MELTZER & DAVID SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 321 (5th ed. 2003); RITZ, supra note 137, at 67-70.

\textsuperscript{142} See PETER CHARLES HOFER, THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA, 103 (1990) (explaining that the First Judiciary Act did not guide the Court in determining the source or character of the legal rules to be applied).

\textsuperscript{143} PURCELL, supra note 63, at 13; Rahdert, supra note 24, at 647.

\textsuperscript{144} The text’s evocative imagery is not intended to deride originalism as “wooden,” “unimaginative,”
Founding and the enactment of the First Judiciary Act.\textsuperscript{145}

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. Most 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.\textsuperscript{146} 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.

\textit{a. Framing-era History}

In analyzing the original history of constitutional notions of judicial role, two important sets of Framing-era materials are the essays of Alexander Hamilton and “Brutus,”\textsuperscript{147} 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.\textsuperscript{148} Hamilton explained that the Judiciary would have the least capacity to injure the Constitution’s political rights because it would have:

\begin{itemize}
  \item 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.\textsuperscript{149}
\end{itemize}

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

\textsuperscript{145} This idea is loosely borrowed from Bruce Ackerman’s innovative analysis of “constituential moments.” \textit{See generally} Bruce Ackerman, \textit{We The People}, TRANSFORMATIONS 5-8 (1998).


\textsuperscript{147} \textit{See generally} White, \textit{supra} note 80, at 103 n.33 (noting that the identity of Brutus “has been a subject of some debate,” but concluding that “he was Robert Yates, a New York lawyer and judge”).


\textsuperscript{149} \textit{Id. at 378.}
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.\textsuperscript{150}

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.\textsuperscript{151} 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 seem congenial but minor, if it means that courts must hear cases brought before them.\textsuperscript{152} Judicial docket controls are undeniably different from congressional and presidential discretion over their activities.\textsuperscript{153} 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,” or Montesquieu’s claim that “the judiciary is next to nothing.”\textsuperscript{154} Hamilton knew better, and perhaps this statement was pro-ratification propaganda to calm New Yorkers’ nerves. In any event, because Federalist 78 never truly confronts the realities of unsupervised judging, the essay is quite useless as a guide to judicial activism.\textsuperscript{155}

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


\textsuperscript{151} See supra text accompanying notes 109-111.

\textsuperscript{152} Hamilton, supra note 148, at 465-66; cf. GOEBEL, supra note 139, at 330 (quoting James Wilson’s claim that “[t]here should not only be what we call a passive but an active [judicial] power over [the legislature].” (emphasis original)).

\textsuperscript{153} 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) (declining to issue the Washington administration an advisory opinion concerning United States treaty obligations).

\textsuperscript{154} Hamilton, supra note 148, at 465 (quoting CHARLES MONTESQUIEU, SPIRIT OF LAWS 181 (1748)).

\textsuperscript{155} For example, Hamilton unhelpfully proposes that anyone who is concerned that judges will abuse their power must effectively argue against having any judges at all. See Hamilton, supra note 180, at 465; cf. Louis H. Pollak, The Constitutional and Historical Origins of Judicial Independence, St. JOHN’S J. OF L. COMM. 59, 60 (1996) (“[I]n laying out the basic propositions about permanency in office and the necessity for judges to be assured a compensation that would not be diminished, Hamilton addressed those issues . . . before he went on to tell his readers what it was that the federal judges were supposed to do, . . . a kind of intriguing way to make up a job description.”).
in the constitution, that can correct their errors, or contro[ll] their adjudications. From this court there is no appeal.\textsuperscript{156}

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.\textsuperscript{157} Thus, Brutus concluded that Supreme Court Justices, with their independence of governmental and public oversight, “will generally soon feel themselves independent of heaven itself.”\textsuperscript{158}

Despite Brutus’s clear recognition 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 interested only in criticizing, rather than containing, the constitutional phenomenon of unsupervised judging. Just as Hamilton exaggerated federal judges’ distance from social policymaking, Brutus 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.”\textsuperscript{159} Accordingly, although both Brutus and Hamilton indicated some awareness of unsupervised judging as a phenomenon, there is no evidence that they viewed the Constitution as an effective guide in channeling it.

A second set of Framing-era materials concerns eighteenth-century state courts, which were models near at hand when early Americans crafted their federal courts.\textsuperscript{160} During this period, however, state courts varied immensely in their composition, function, and role.\textsuperscript{161} And as one scholar observed: “In 1787-89 no state had a judicial system similar to a modern American judicial system. No state had a highest court . . . [whose principal] function was the exercise of an appellate-review function over

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\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.} at 296.

\textsuperscript{160} Cf. Goebel, supra note 139, at 96-97 ("Nowhere was the hand of the past more directing than in the treatment of the judicial. This is evident from the fact that in none of the [post-Revolutionary] constitutions was it dealt with much more explicitly than had been the case in the charters or royal commissions.").

\textsuperscript{161} Purcell, supra note 63, at 40 ("[C]olonial practices varied widely, and the three branches performed somewhat different functions in different states."); see also Goebel, supra note 98-99, 114-18 & nn.61-65 (noting variety among the states with respect to judicial independence and reception of English common law); Ritz, supra note 137, at 42 ("In 1787-89 there were almost as many different types of judicial systems in the American states as there were states."); \textit{Id.} at 37 ("Legislatures made frequent changes, adding new features, dropping old ones, and changing those retained. Sometimes legislation reorganizing a judicial system was never put into effect, but instead new legislation was passed establishing still a different kind of judicial system."); \textit{Id.} at 35 ("[In 1787,] the process of organizing the state judicial systems was in a state of flux.").
inferior courts.”

The main difference between existing state courts and the new federal system was that the former lacked modern notions of judicial hierarchy. “No state in 1789 had either judges who wrote opinions or reporters who published opinions, or courts that could instruct other courts about what state law was. The highest courts of many states were composed of neither judges nor lawyers.” In many states, although “superior courts” had more member judges, they were not limited to or capable of producing broad legal precedents. On the contrary, such courts often simply reheard “appealed” cases de novo and produced rulings that were just as factbound as those of trial courts.

The Framers largely rejected these state-court models in crafting the federal judiciary. Most importantly, the federal system’s capstone Supreme Court heard nearly all of its cases “by writ of error,” that is, on pure questions of law. Thus, it seems likely that eighteenth- and nineteenth-century state courts mimicked the federal judicial system, rather than federal courts mimicking state courts.

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 lesson from the diversity of state systems 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, and again, the Framers left matters almost entirely in the hands of Congress and the courts. 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

162 RITZ, supra note 137, at 27.
163 Id. at 51.
164 Id.
165 Id. at 27-28 (“[I]n the eighteenth century, successive trials, even successive jury trials were common. The final result of these successive trials would be to reach the . . . ‘correct’ result since each party had had the benefit of earlier ‘trial runs.’ It was the multiplicity of judges, and lawyers, and juries that would finally ensure the correct result.”).
166 Id. at 51-52 (explaining that this choice was prompted by respect for jury trials and by fears of an overly centralized and distant Supreme Court).
167 Even the Presidency was known (de facto) to be in the reliable hands of George Washington. By contrast, the Supreme Court in 1789 “was completely unformed. Washington did not even know the number of Justices he would be required to appoint.” Marcus, supra note 137, at 27.
wrote that the First Congress had entered “a wilderness without a single footstep to guide us.” Early federal judges 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.”

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. 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.

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. Chief Justice Jay remained continuously active in partisan politics while on the bench, until he finally quit in 1795 to run for governor. 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. Circuit-riding was the driving force for the Court’s original six-person membership, and the Justices’ local contacts were a large part of the Court’s “supreme” status during its first century. On the other hand, the strain of riding circuit hastened some Justices’ retirement and death, thereby decreasing both the job’s desirability and the

170 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).
171 The only possible exception is Section 34 of the First Judiciary Act, which has been the subject of endless twentieth-century debate. See Ritz, supra note 137, at 8-12, 25-26, 126-48. Section 34 very often appears in modern discussions of Erie Railroad v. Tompkins, 304 U.S. 64 (1938). See, e.g., Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 TEX. L. REV. 79 (1993); Stephen B. Burbank, Federal Judgments Law: Sources of Authority and Sources of Rules, 70 TEX. L. REV. 1551, 1559 n.51 (1992).
172 E.g., Goebel, supra note 139, at 457-508 (recounting process of drafting and adoption of First Judiciary Act of 1789); Ritz, supra note 137, at 22-24 (explaining congressional compromises and issues set aside).
173 Goebel, supra note 7, at 10.
174 Id.
175 Id. at 45.
176 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); Goebel, supra note 83, at 161-63.
pool of potential candidates. Because circuit court opinions often 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.

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. When the federal government’s capital moved to Washington in 1800, Congress neglected to give the Supreme Court its own home. 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 Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.”

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.”

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

177 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 236 (1973) (noting the great dearth of reported opinions in the Early Republic); CARL BRENT SWISHER, HISTORY OF THE SUPREME COURT: THE TANEY PERIOD 1836-64, at 262 (1974) (explaining that, even in the Taney era, “some [circuit opinions] were published, and others were not”); GOEBEL, supra note 139, at 553-54 & n.9 (noting various illnesses and retirements that were accelerated by the early Justices’ circuit riding). But cf. Steven G. Calabresi & David C. Presser, Reintroducing Circuit Riding: A Timely Proposal, 90 MICH. L. REV. 1386, 1412 (2006) (proposing, somewhat heartlessly, to thin the ranks of older less mobile Justices by reinstituting this practice).

178 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.”); cf. The Late Mr. Justice Catron, 23 LEGAL INTELLIGENCER 132 (1866) (“[Catron] was opposed to the publication of circuit opinions, because he thought the Justices of the Supreme Court should meet, in banc, with minds perfectly open to conviction.”).


180 JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 284 (1996) (“So lightly was the Court regarding, and so slight was its prestige, that when the government moved to Washington, no provision was made for it to be housed.”); James E. Pfander, Marbury, Original Jurisdiction, and the Supreme 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.”).

181 WHITE, supra note 7, at 11.

182 Id.; BICKEL, supra note 102, at 1 (“[T]he institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did.”).
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, early judges held different basic assumptions about what law meant, and how it should be discerned and applied.\textsuperscript{183}

An important example of these latter differences is common law’s role in federal adjudication. Jurists in the early nineteenth century recognized a more porous border between constitutional, statutory, and common-law judging than is orthodox today.\textsuperscript{184} For instance, large parts of the federal docket concerned admiralty and interstate disputes, which required expansive judicial lawmaking and often applied a wide variety of legal authorities, including customary international law and natural law.\textsuperscript{185} 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.\textsuperscript{186} 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.\textsuperscript{187} Today, however, the methodological 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.\textsuperscript{188}

Original history does not indicate that the First Congress, or any

\textsuperscript{183} \textsc{White, supra} note 7, at 4 (stating that the Founders viewed law as a “mystical body,” and judges as oracular figures who could find and interpret it).

\textsuperscript{184} \textit{See} \textsc{White, supra} note 7, at xii (“In the place of the premodern constraints incorporated within the oracular theory of judging, with their emphasis on 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.”).

\textsuperscript{185} \textsc{White, supra} note 83, at 451; \textsc{Ernest A. Young, Preemption at Sea, 67 Geo. Wash. L. Rev. 273, 284-85 (1999); \textit{see also} \textsc{Horwitz, supra} note 54, at 251 (“Before 1815, it should be emphasized, commercial law revolved almost completely around maritime transactions, . . . [thereby creating through admiralty jurisdiction] a federal commercial forum.”).

\textsuperscript{186} \textsc{White, supra} note 83, at 451; \textsc{Ernest A. Young, Preemption at Sea, 67 Geo. Wash. L. Rev. 273, 284-85 (1999); \textit{see also} \textsc{Horwitz, supra} note 54, at 251 (“Before 1815, it should be emphasized, commercial law revolved almost completely around maritime transactions, . . . [thereby creating through admiralty jurisdiction] a federal commercial forum.”).

\textsuperscript{187} \textit{See, e.g., Theodore F.T. Plunkett, A Concise History of the Common Law 350 (5th ed. 1956) (asserting that common law, as it existed during Framing-era, was built on customs with inherent flexibility for changing circumstances); \textsc{Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 770 n.367 (1988) (“The whole idea of just what precedent entailed was unclear. The relative uncertainty over precedent in 1789 also reflects the fact that many state courts were manned by laymen, and state law and procedure were frequently in unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication.””).

\textsuperscript{188} \textit{See White, supra} note 83, at 785-86 (“[T]he Marshall Court’s cases furnish additional evidence of the impressive discretion of the Justices to function as substantive rulemakers. No Court in American history was freer to make up its own rules of law. No Court had more first impression cases of constitutional interpretation; none had greater opportunities to fashion common law rules; none enjoyed to as great an extent the singular freedom that comes from pressing business and the absence of decisive precedent. . . . It is, of course, a puzzle to moderns how judges could simultaneously be granted the discretion to make substantive law and yet not fully be perceived as lawmakers. That puzzle . . . remains rooted in intellectual assumptions we no longer share.”).
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

Because legal texts and original history do not fully specify standards of judicial role and activism, another possible source of authority is legal theory or “jurisprudence,” including scholarship by Hans Kelsen, HLA Hart, John Austin, and others. Legal thinkers have for decades turned to such work as guidance in discussions of judicial role, with the idea of deriving a determinate notion of judicial activism from more general analysis of the nature of law. Examples of such “high legal theory” are extremely diverse, yet two characteristic problems arise in its application to activism debates.

First, jurisprudential theories tend to underemphasize law’s institutional character. For example, in contemplating the nature of law, jurisprudential scholarship might discuss whether law includes morality.

189 E.g., JOHNSON, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); HLA HART, A CONCEPT OF LAW (1961); HANS KELSEN, A PURE THEORY OF LAW (1934); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (1970).

190 See Randy E. Barnett, Foreword: Judicial Conservatism v. A Principled Judicial Activism, 10 HARV. J.L. & PUB. POL. 273, 291-92 (1987) (“The debate between judicial conservatives and those favoring a principled judicial activism reflects a longstanding jurisprudential debate. For many years, Professor Lon L. Fuller . . . persisted in reminding us that jurisprudence belonged at the ramparts.”); Stanley C. Brubaker, Reconsidering Dworkin’s Case for Judicial Activism, 46 J. POL., 503, 503 (1984) (“Dworkin’s argument in favor of judicial activism is original, influence, and apparently powerful. While Dworkin does avoid virtually all the weaknesses of other advocates of judicial activism, the strength of his argument is only apparent.”); see also Jeffery L. Johnson, Constitutional Privacy, 13 L. & PHIL. 161, 161 (1994) (arguing that judicial activism should be feared on democratic and jurisprudential grounds); Christopher J. Peters, 97 COLUM. L. REV. 312, 435 (1997) (analyzing how the author’s jurisprudential “theory of adjudication as representation” affects “the debate about judicial activism”); Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988) (discussing how theories of Legal Formalism serve to limit judicial activism); Christopher F. Zurn, Deliberative Democracy and Constitutional Review, 21 L. & PHIL. 467, 469 (2002) (“Tension between judicial review and democracy underlies several recent controversies in the philosophy of law and broader public debates: concerning, for instance, the proper level of judicial ‘activism’ with respect to other branches of government.”). But cf. Philip Soper, Why Theories of Law Have Little or Nothing To Do with Judicial Restraint, 74 U. COLO. L. REV. 1379, 1380 (2003) (disputing the “conventional wisdom [that] seems to link positivism with restraint and natural law with activism. Positivism’s insistence that law is exhausted by empirically determined conventions-by texts or precedents-seems to imply that judges who accept such a theory will be less likely to impose their own values on society than their counterparts. In contrast, judges who accept a natural law theory that makes “law” depend in part on moral and political theory, as well as on conventional texts, are more likely to reach decisions that ignore legislative or even Constitutional directives that conflict with the judge’s own values.”).

191 For a rare and recent exception to this generalization, see NEIL MACCORMICK, INSTITUTIONS OF LAW (2007).
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 latter institutional questions dominate discussions of judicial role and activism, but they are underemphasized in most discussions of high legal theory.192

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 variations’ theoretical significance.193 Thus, when jurisprudences 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.194 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.

I will elaborate the foregoing flaws by examining the influential scholarship of Ronald Dworkin, including his recent book Justice in
Robes. 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.” My choice to focus on Dworkin stems from more than his extraordinary reputation; for a variety of reasons, his work might be thought to present some defense to the foregoing concerns about abstraction. Despite Dworkin’s various contacts with real-world adjudication, however, his philosophy (like that of many other theorists) embodies an occasionally self-conscious detachment from institutional details and jurisdictional specifics, and this weakens its ability to inform discussions of judicial role. Two examples, chosen from the least abstract parts of Dworkin’s work, illustrate my critique.

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.” “[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.” 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.”

To revisit the foregoing critiques, Dworkin’s abstract question about
morals and law is non-institutional because it applies to all legal interpreters, including judges, scholars, legislators, and citizens. The question’s phrasing also minimizes the significance of cultural and historical context. Dworkin analyzes the role of morality in law as a matter of universal fact.\textsuperscript{202} He claims that morality is \textit{always} relevant to law, without regard for cultural contingencies or ad hoc particularities.\textsuperscript{203} Thus, even if Dworkin’s broad conclusions about the nature of law were satisfactory for philosophical ends, they are simply too abstract to inform the institutionally and historically contextualized view of judicial role described in Part II.

My second example involves a hypothetical that Dworkin uses to illuminate his theory of legal interpretation. Examining this scenario in detail will show why Dworkin’s approach, even in its most practical incarnations, cannot resolve debates over judicial activism. Dworkin imagines a “Mrs. Sorenson” who has suffered heart damage from certain medicine she took.\textsuperscript{204} 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.\textsuperscript{205} (Dworkin’s account mirrors a real-life California case, \textit{Sindell v. Abbott Laboratories}, to which we will soon return.\textsuperscript{206}) 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.\textsuperscript{207} 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.\textsuperscript{208}

The first problem in using Mrs. Sorenson’s example to inform judicial

\textsuperscript{202} Id. at 59 (comparing the objective reality of moral values to that of mountains, as things that “existed before human beings did, and . . . will probably continue to exist long after human beings perish”); see also Ronald Dworkin, \textit{Objectivity and Truth: You’d Better Believe It}, 25 PHIL. & PUB. AFF. 87, 89-94 (1996); Ronald Dworkin, \textit{In Praise of Theory}, 29 ARIZ. ST. L.J. 353, 357-60 (1997).

\textsuperscript{203} See supra note 194 (collecting sources).

\textsuperscript{204} DWORKIN, supra note 196, at 17.

\textsuperscript{205} Id. at 17-18.

\textsuperscript{206} 26 Cal.3d 588 (1980); see infra notes 218-227; see also DWORKIN, supra note 196, at 271 n.1 (acknowledging the link between Sindell and Mrs. Sorenson).

\textsuperscript{207} DWORKIN, supra note 196, at 13-18.

\textsuperscript{208} Id. at 21-25. Dworkin calls the initial 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 calls the use of more general theories and materials as “theoretical ascent.” Id. at 25.
activism debates is that, like other jurisprudential theories, Dworkin’s analysis inadequately considers the institutional character of judging. Dworkin views legal interpretation as an activity that anyone can perform in essentially the same way. Thus, although Dworkin sees legal results as “embedded” in networks of statutes and constitutional provisions, he does not notice any institutional distinction between the judiciary and attentive citizens or scholars. 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.

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. But Dworkin does not explain the extent to which judges should respect prior rulings, use particular interpretive methods, or 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.”

As Dworkin describes his own inquiry: “No matter what or who is given final interpretive responsibility, what does our Constitution really mean?” 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. Although 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, now or anytime. Dworkin acknowledges that different jurisdictions could have different precedents and statutes addressing a case like Mrs.

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209 See supra notes 191-192 and accompanying text.
210 “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 DWORIN, FREEDOM’S LAW 2 (1996). Indeed, Dworkin expressly separates his analysis of legal interpretation from appraisals of judges specifically: “It is a serious confusion to disguise your dislike of judges . . . , which can be remedied . . . by changing their jurisdictional power; as a false theory of legal reasoning.” DWORIN, supra note 194, at 57; see also FALCON, supra note 192, at 128 (“As thus conceived by Dworkin, the role of a Supreme Court Justice is very like that of a scholar, preferably a scholar of moral philosophy, whose mission is to discover the truth both about the theory that best explains our institutions and about the rights that people have.”)
211 FALCON, supra note 192, at 26-36.
212 DWORIN, supra note 194, at 16, 118-120.
213 Id. at 120.
214 Id. (emphasis added)
215 See supra notes 193-194.
Sorenson’s.  But he cannot accept that adjudication in different jurisdictions could have different functions for morality, or that judges’ proper role in deciding such cases could change over a jurisdiction’s history. Although Dworkin seldom says so, his approach thus 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 details of our judicial history appear supra, but a modern example tailored to Mrs. Sorenson’s case concerns Justice Roger Traynor, who served the California Supreme Court from 1940 to 1970. During Traynor’s tenure, California witnessed a redefinition of judicial role and activity more radical than had occurred in the United States for 150 years. Part of this transformation owed to the sheer speed of California’s economic and political development in its first century of statehood.

California’s liberal social policies also heightened the challenge, as “[a relatively sparse body of common law, inadequate to meet an apparent need for increased governmental planning, had created a climate favorable to legislative activity; and as legislation fostered problems in statutory interpretation, the California judiciary was forced to expand the range of its activity.”

The California judiciary thus “faced the recurrent task of defining its role as a contributing institution to the ‘welfare state’ system of government.”

Traynor described these challenges metaphorically, as “careful[ly] pruning” the law under conditions of “vigorous growth,” or as

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216 DWORKIN, supra note 194, at 16.
217 See Section I.B, and Section III.A.
218 Modern readers less familiar with Traynor’s reputation may consult G. Edward White, Roger Traynor, 69 VA. L. REV. 1381, 1383-84 (1983) (“Traynor’s preeminence as a judge came, quite simply, from his intellectual talent. . . . Traynor came to be regarded as one of the great judges of his time largely because of his instinct for the ‘big case’ and his skill for making the most of his opportunities.”); Warren Burger, A Tribute, 71 CAL. L. REV. 1037, 1038 (1983) ("one of the great contemporary figures of the law"); Henry Friendly, Ablest Judge of His Generation, 71 CAL. L. REV. 1039, 1039 (1983); Adrian A. Kragen, A Legacy of Accomplishments, 71 CAL. L. REV. 1055, 1055 (1983) (“one of the greatest jurists to serve on any court in the history of this nation”). Though Traynor’s early specialty was tax, he also wrote many scholarly works about judicial role. E.g., Roger Traynor, La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law, 29 U. CHI. L. REV. 223 (1964); Roger Traynor, Reasoning in a Circle of Law, 56 VA. L. REV. 739 (1970); Roger Traynor, Fact Skepticism and the Judicial Process, 106 U. PA. L. REV. 635 (1958); Roger Traynor, No Magic Words Could Do It Justice, 49 CAL. L. REV. 615 (1961); Roger Traynor, Better Days in Court for a New Day’s Problems, 17 VAND. L. REV. 109 (1963).
219 WHITE, supra note 7, at 245 (“The provincial state Supreme Court on which Field had served was but one step, at least in his person, from impressionistic frontier justice; Traynor’s Court confronted the complex litigations of a modern industrial and commercial society. Only about seventy-five years separated the two institutions. The earlier Court[s] legacy of case law to the later . . . dramatized the pressure placed on stare decisis by rapid social change.”).
220 Id. at 245.
221 Id. at 246.
“synchroniz[ing] . . . the unguided missiles launched by legislatures.” 222 In more direct terms, one scholar has characterized Traynor’s view of Californian politics as follows: “[C]ourts and legislatures had a symbiotic relationship, each drawing on the actions of the other. Legislatures passed statutes whose applicability to specific situations was uncertain; courts undertook the applications; legislatures revised [those decisions] if they found a specific application offensive.” 223

In Sindell v. Abbott Labs—the real-world Mrs. Sorenson’s case—Traynor’s assessments of judicial role were doubly important. Not only did Traynor write the first American opinion to endorse strict products liability. 224 The Justice who authored Sindell (itself the first case to apply market-share liability) celebrated Traynor’s tort precedents as a highly influential guide. 225 Thus, the answer to whether plaintiffs like Mrs. Sorenson should recover may turn on institutionally contextual background facts, including the availability of statutory change, ambient social expectations about judicial lawmaking, traditions of legislative drafting, and many other political circumstances.

Dworkin does not explicitly endorse Sindell’s result regarding market-share liability, and neither do I. 226 It might be that Traynor’s use of judicial power was, even for California of his day, activist and improper. 227
Regardless of whether the use of judicial power by Traynor and his successors was activist, however, I suggest only that his work should be appraised in light of the institutional circumstances and historical context facing California courts in the mid-twentieth century. And of course, if the distinctive features of mid-twentieth-century state courts in California matter to activism debates, so do 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 dismissing their intellectual importance. My simpler point is that philosophers’ transcendent and timeless theorizing about law, even when it is cast as a theory of interpretation, provides only limited help in constructing norms of judicial role that are culturally, temporally, and institutionally specific.

C. Scalian Limits

For some readers, no discussion of judicial activism would be complete without mentioning our most prominent living analyst of judicial role, Antonin Scalia. Throughout his quarter-century of judicial service, Scalia has raised his intellectual profile by stridently espousing a limited style of judging, producing numerous articles, lectures, and judicial opinions addressing such topics. As a result, Scalia has become a unique icon for political parties and the public on topics of judicial propriety.

constant a responsibility, involving such active thought, resists inclusion within so befuddled a term as activism.”).

Indeed, Scalia’s provocative approach was a main inspiration for this Article, as it has also been for many other scholars. Cf., e.g., Andrew Siegel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097, 1124 n.102 (2006) (observing that Scalia’s sometimes-bold arguments “have spurred not only the vigorous dissents of sitting judges but also a cottage industry of academic criticism”).


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,
No Justice is better known or more widely discussed.

This Section considers what Scalia has written as a commentator on judicial role, not what he has done as a judge. My main source is his 1995 Tanner lectures, which have been published in book form alongside scholarly responses. Scalia is well known as an originalist in constitutional law, and as a textualist in statutory interpretation. But his strongest analysis of federal courts appears as an attack on what he calls the “common-law attitude” of adjudication. Scalia encapsulates this attitude in the following question: “What is the most desirable resolution of [a case], and how can any impediments to the achievement of that result be evaded?” And although Scalia does not seek the elimination of all common-law adjudication (because he thinks common law is already a negligible component of modern federal dockets), he vigorously resists applying the common-law “Mr. Fix-it” attitude in cases of statutory or constitutional law.

Scalia does not favor the term “activism” in his analysis, yet his theory is clearly concerned with standards of judicial role. And although Scalia’s discussion might seem to mix elements of original history and theoretical jurisprudence, this Section claims that his analysis only confirms flaws that we have seen with each of those methods.

First, because Scalia endorses textualism and originalism in matters of substantive law, readers might assume (as this author did) that his view of judging might include some textual or original-historical justification.
Not so. Scalia offers no Framing-era evidence to explain Article III’s grant of “judicial power.”²³⁹ Nor do his lectures include any suggestion that textualist-originalist methodologies were imposed on federal courts through their statutory grants of “jurisdiction.”²⁴⁰

Indeed, Scalia’s exclusive focus on textualism and originalism would seem quite alien to eighteenth-century judges—as Gordon Wood, Ted White, and others have shown.²⁴¹ The first federal judges were not occupied with producing opinions in the modern sense, thus easing formalist also has to defend *rules about rules.*”); Sunstein, *supra* note 232, at 561 (same).

²³⁹ Instead, Scalia relies extensively on nineteenth-century materials that substantially post-date the Framing and the First Judiciary Act. See Scalia, *supra* note 144, at 11-12 (discussing the mid-nineteenth century’s movement toward law codification); id. at 15 (discussing late-nineteenth-century treatises on statutory interpretation); id. at 17 (relying on Joel Prentiss Bishop’s “old treatise” [?] from 1882). These materials say nothing at all about the Framing. Indeed, Scalia’s most prominent historical source is Robert Rantoul. Id. at 10-11, 38-39. Rantoul, however, was a Massachusetts state representative, and the year was 1836, a full generation after anything relevant for originalist analysis. *See generally* HORWITZ, *supra* note 54, at 30 (“By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier.”). Even if Scalia could justify using materials from the mid-nineteenth century as authoritative constructions of federal courts’ power, such materials must read in their historical context, where federal courts (contrary to Scalia’s “attitude”) had massive common-law powers, and used them much of the time. *See* PURCELL, *supra* note 51, at 59-60; *cf.* Swift *v.* Tyson, 41 U.S. 1 (1842) (articulating federal courts’ power to apply their own interpretation of “general common law”).

Scalia’s citation to Blackstone is on the separate point of whether courts could override statutes that violated the common law. Scalia, *supra* note 146, at 130. That does not speak to courts’ power to use common law methods in statutory interpretation. *See* Eskridge, *supra* note 231, at 1529-31 (collecting state court materials). And in any event, recent scholarship has questioned whether Blackstone is necessarily strong evidence of Framing-era understandings. *See* Bernadette Meyler, *Towards a Common Law Originalism,* 59 STAN. L. REV. 551, 562 (2006) (asserting that Blackstone’s commentaries were strategic interventions into the common law rather than sophisticated accounts of the English system).

Scalia also cites Article I to support his analysis, Scalia, *Common-Law Courts in a Civil-Law System,* *supra* note 144, at 35, but this point is difficult even to understand. The vital issue at stake is what the judicial power means, and what courts may legitimately do in “interpreting” and “applying” federal law; that issue intersects only very peripherally with any question of legislative power or what counts as a “law.” *See* Eskridge, *supra* note 231, at 1526-28.

²⁴⁰ Of course, it is not clear, whether Scalia would accept an originalist statutory argument that Congress sought to limit federal courts’ role, unless that limit were codified in some statutory text. *See* *supra* Subsection III.A.2.b.

²⁴¹ *See* Wood, *supra* note 145, at 49-65; WHITE, *supra* note 83 passim; RITZ, *supra* note 137 passim. Scalia offers two responses to such historical critiques. First, he claims that there have always been “willful judges who bend the law to their wishes,” but that “acknowledging evil is one thing, and embracing it is something else.” Scalia, *supra* note 144, at 131. This horribly understates the degree to which Early-Republic judges applied “common-law attitudes” as uncontroversial routine. Any Scalian list of willful (evil?) judges would include, as the iceberg’s smallest tip, such eminent judges Marshall, Story, Washington, Taney, Kent, and Shaw. *See, e.g.,* WHITE, *supra* note 7, at 9-85. It would be one thing for Scalia simply to condemn the past and urge us not to repeat it. But it is no argument at all for him to ignore large parts of the past that he happens to dislike.

Second, Scalia claims that colonial legislatures routinely offered adjudications, but he doubts whether colonial adjudicative tribunals ever felt free to legislate. Scalia, *supra* note 144, at 131 The historical objection to Scalia’s argument, however, is that the line between adjudication and lawmaking was blurred in the eighteenth century. *See, e.g.,* Eskridge, *supra* note 231, at 1529-31. That objection is not answered by speculating that perhaps that line was fuzzy on only one side.
worries about judicial “lawmaking.” 242 Such early judges often infused statutory and constitutional cases with common-law and natural-law concepts. 243 And they were charged with implementing a framework of federal law that was incomparably incomplete, which surely justified some unsupervised judicial activity that might be deemed unacceptable today. 244

In sum, if ever there was a Golden Age of Scalish judging, jurists in the 1780s saw nothing of it. 245 On the contrary, the fact that even Scalia’s analysis of judicial activism lacks a basis in statutory or constitutional language, or in originalist history, simply confirms (as suggested supra) that there truly are no originalists or textualists with respect to judicial role.

Second, Scalia’s arguments also illustrate the problems associated with abstract theorizing about judicial role. Insofar as Scalia grasps that text and original history cannot sustain his ideas about judging, he identifies “the reason” he approves textualism 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 lawgiver meant, rather than by what the lawgiver promulgated.” 246 Thus, Scalia repeatedly indicates that

242 See supra notes 160-167 and accompanying text.
243 See supra notes 183-188 and accompanying text.
244 See supra notes 179-189, and accompanying text for a discussion of how early federal judges adjudicated using common-law methods; cf. HORWITZ, supra note 54, at 5 (“The great danger of judicial discretion for the colonists arose not from common law adjudication, but in connection with judicial construction of statutes . . . .”).
245 See HORWITZ, supra note 54, at xii (“[T]he study of constitutional law focuses historians . . . on the rather special circumstances of judicial intervention into statutory control. Yet judicial promulgation and common law rules constituted an infinitely more typical pattern of the use of law throughout most of the nineteenth century.”); id. at 12 (“Although fear of judicial discretion had long been part of colonial political rhetoric, it is remarkable that before the last decade of the eighteenth century it was not associated with attacks on the common law jurisdiction of the judiciary.”); cf. Eskridge, supra note 231, at 1556 (“Textualism is, alas, an unknown ideal.”).
246 Scalia, supra note 146, at 17. Scalia offers a vivid historical example on this point, noting “the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not be easily read.” Id. Scalia claims by analogy that common-law judging effectively ‘hides the law,’ whereas textualism and originalism ‘brings the law down’ for all to see.

Scalia’s argument is absolutely right that adjudicative lawmaking can bring surprises, and may even seem unacceptably ad hoc or ex post facto. He is wrong, however, in attaching such features exclusively to common-law judging, as opposed to originalist, textualist, or other styles of judging. In any system of private and costly litigation, civil appeals mainly occur because the parties disagree on a perceived vagueness in the law. If the judges are originalist, litigants will pursue cases where the original history is unclear; if judges are textualist, cases will follow textual vagueness; and if judges are common-law, cases will involve vagueness in policy and precedent. To use Scalia’s Nero metaphor, appellate litigants are almost always urging the court to ‘read’ law that seems otherwise out of view.

Furthermore, Scalia’s own judicial method is not as populist as he implies. Focusing on clear text may be simple and transparent. But in actual cases and controversies, the application of interpretive canons, elite grammar, and subtle lexicography will be less clear. See Eskridge, supra note 231, at 1546-48 & n.142 (observing that even “dictionary-toting judges” may sometimes have great difficulty figuring out which dictionary they should tote). Nor are litigated debates over original constitutional history immediately transparent for public consumption. See Sunstein, supra note 232, at 547). On the contrary, the public-square virtue of Scalian judging is most thoroughly betrayed in
his judicial theory depends on a particular view of democratic theory and “principle,” rather than on undecorated historical facts. 247

This Article cannot fully evaluate Scalia’s view of democracy, or whether it actually supports his view of judging. 248 Instead, let us simply apply to Scalia prior critiques of abstract theories of judicial role. Readers may recall two general objections: that theoretical jurisprudence was not institutionally specific to judges, and that it abstracted from the cultural and historical contingencies of judicial function. 249 With respect to Scalia, he 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. On the other hand, despite periodic citation to historical sources, Scalia ultimately offers a theory of judging that is nearly as timeless and acontextual as Dworkin’s—aiming to cover at least 220 years of American judicial practice. As we have seen, however, the vast historical changes in governmental context and judicial capacity indicate a need for culturally and historically sensitive norms of judicial role and activism. 250

Accordingly, 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. 251 For Scalia, all federal judicial activity from Marshall’s to his own should be measured against unchanging assumptions about democracy and fairness. 252 Thus, 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

Scalia’s wonderful statement: “In textual interpretation, context is everything.” Scalia, supra note 146, at 37; Sosa, supra note 232, at 932, 936 (noting that “Scalia never explains the relevant notion of context” and that, “[i]n effect, the original meaning of the text of the Constitution, by contrast to its current meaning, is high up on a pillar”). 244 See Scalia, supra note 146, at 31, 40; Scalia, Response, supra note 146, at 131, 134; see also Sunstein, supra note 232, at 530 (“Justice Scalia intends . . . to defend a species of democratic formalism. We might even say that Justice Scalia is the clearest and most self-conscious expositor of democratic formalism in the long history of American law.”).

245 See generally Sunstein, supra note 232, at 533; Eskridge, supra note 231, at 1548-56.

246 See supra Section III.B.

250 See supra Sections I.B and I.C for an analysis of how the concept of judicial activism has changed over the course of history. Sunstein advances a similar argument by comparing United States courts to the experience of international civil-law courts. Sunstein, supra note 232, at 541.

251 See supra Section III.B.

252 Scalia might claim that his judicial methods are rooted in “a rock-solid, unchanging Constitution,” id. at 47, but that is hard to understand given the available textual and historical record. See supra Section I.B, Section III.A; cf. supra notes 218-227 (raising similar historical variations with respect to Roger Traynor, a state judge). See generally Sunstein, supra note 232, at 567 (“There is nothing wrong with Justice Scalia’s arguments in the abstract. . . . But there is also nothing right about Justice Scalia’s arguments in the abstract. Whether those arguments are convincing depends on a range of practical and predictive judgments about the capacities of different governmental institutions. Justice Scalia does not defend the necessary . . . judgments or even identify them as such. He writes instead as if his particular, sometimes radical, conclusions can be grounded in . . . high-sounding abstractions about democracy.”).
activism.

D. A Balanced Approach

The foregoing critiques suggest the path toward a new vision 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. Originalism and analytical jurisprudence both fail to produce workable standards of judicial role because each requires a timeless, transcendent definition of judicial activism. Such universal aspirations cannot reconcile current judicial practice with our shockingly different past, much less can they accommodate the likelihood of future institutional change.

Jack Balkin has attacked similarly inelastic judicial ideologies by denying that good judges are “prisoner[s] in chains.” Applying that metaphor to our discussion of originalism and analytical jurisprudence, both methods are flawed because they cast judicial role as “chaining” federal judges to a fixed spot, like shackles pinning a captive. Of course, the image of judges in chains did not start with Balkin, 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,” and he compared law to a floating dock, which stays firm in its moorings despite some movement with the tides.

By contrast, my proposed metaphor for judicial role is a rope tied to an anchor. Although the anchor holds judges in place, it can move significantly over time depending on ambient conditions and the strength of dislocating tugs. In less metaphorical terms, I believe that standards of judicial activism are built from a mix of historical examples and

253 J. M. Balkin, Review Essay, Ideology as Constraint, 43 STAN. L. REV. 1133, 1140 (1991). Balkin’s specific objection was that the judges embrace, and themselves help to construct, the chains that seemingly “bind” them.

254 JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES 151-52 (1922); see Schlesinger, supra note 8, at 76-78, 208 (celebrating “champions of self-restraint”). Beck did not use the term “activism,” but like Schlesinger, 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 (2001). Beck was also criticized by Thomas Reed Powell, who also by coincidence was Schlesinger’s chief inspiration in 1947. See supra note 19. Powell criticized Beck’s idea “that while [the Constitution] does not move forward or backward, it jiggles up and down,” claiming 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.

255 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 about the topography of our current judicial terrain. Thus, neither changing nor preserving current standards of judicial role is assured of being optimal or even safe.
prescriptive principles. This two-strand methodology solves apparent problems with originalism and jurisprudential theory. More importantly, it serviceably identifies limits to channel judicial decision-making, while also incorporating the reality of institutional change. In describing this dualist approach, I will consider its advantages relative to other methods of judging judges, and will then describe its consequences for the “common-law attitude” that Scalia so strongly derides.\footnote{256}{See supra Part III.C.}

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 depends on some 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 historically descriptive proof that court \( x \) decided \( y \) in the year \( z \). This is because although such analysis may accurately describe cases like \textit{Marbury}, \textit{Lochner}, and \textit{Bush v. Gore}, it cannot say whether those rulings should be mimicked or repudiated by modern courts.\footnote{257}{See supra Part I.B for illustrations that cases once “appropriate” in one period may fall out of favor. See also J.M. Balkin & Sanford Levinson, \textit{The Canons of Constitutional Law}, 111 HARV. L. REV. 963, 964 (1998) (analyzing precedential canons’ emergence and change); Bruce Ackerman, \textit{The Living Constitution}, 120 HARV. L. REV. 1737, 1751-53 (2007) (distinguishing the “official canon” of constitutional text from the “operational canon” that “promotes landmark statutes and superprecedents to a central role in constitutional argument”). I have deliberately included the controversial case \textit{Bush v. Gore}, 531 U.S. 98 (2000), because the legal community remains so intensely divided on whether the ruling departed from proper judicial norms. \textit{Compare Bush v. Gore: The Question of Legitimacy} (Bruce Ackerman ed., 2002), \textit{with} Richard A. Posner, \textit{Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts} (2001).}

We have likewise seen that standards of judicial role cannot be identified through the exercise of abstract reasoning about morality or democracy.\footnote{258}{See supra Parts III.B and III.C.} Questions of “role” by their very nature are institutional, and the institution of federal judging did not spring forth fully formed. Nor has the judiciary’s development traced any progressive unfolding of timeless principles.\footnote{259}{See supra Parts I.B and III.A.2.} 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.\footnote{260}{Cf. Green, supra note 15, at 175-77 (“A common step in law students’ acculturation is to identify their most and least favorite Justice, and cycles of debate and education develop such personalities into positive and negative role models. Some Justices’ opinions are read favorably and carefully, others skeptically or dismissively. Students often retain such impressions of “good” and “bad” judges long after their interest in Dworkin or Bickel has faded. And such ex-students fill the ranks of lawyers, judges, and professors, thereby explaining why judicial biography—the narrative mode’s highest form—remains an indispensable element of United States legal culture.”).}

Particular moments of judicial heroism and villainy are not self-
defining; indeed, they are not always self-conscious. 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 change. The 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 designed specifically 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 it is highly selective in doing so. Whereas originalists must derive notions of judicial role from all aspects of accepted judging in the 1780s and 1790s, jurists using my approach might draw judicial guidance from the Framing Era without accepting its broad-scale use of common law, might prefer certain 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 as formally preset “federal courts moments.”

Second, my analysis of judicial role differs from theoretical jurisprudence because it applies only 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.

261 Cf. Lopez v. United States, 514 U.S. 549, 614 (Souter, J., dissenting) (“Not every epochal case has come in epochal trappings.”).

262 Cf. Green, supra note 15, at 175-76 (footnotes omitted):

As a methodological matter, debates about judges and judicial role flow through two overlapping channels. First, a declarative mode seeks to state basic principles to define and limit judicial behavior. Ronald Dworkin’s work exemplifies such discussion at an abstract level. Alexander Bickel, Owen Fiss, Cass Sunstein, and many others strive to explain what judges should do in more particular circumstances. The declarative mode describes judicial role in explicit terms, but such precatory abstractions have drawn strong criticism, and they do not always have the cultural influence that one might expect.

The second mode of discussion is narrative or biographical. Many if not most debates about judges orbit a charted constellation of “heroes” and “villains.” Names like John Marshall, Benjamin Cardozo, William Brennan, Felix Frankfurter, Louis Brandeis, Roger Taney, Hugo Black, Antonin Scalia, Oliver Wendell Holmes, and a dozen more stand out in the popular imagination as different “types” of judges. Their lives and decisions are thought to stand for something. And even though that “something” is not precisely explained, when one name or another is invoked, listeners nod with understanding.
Consider Mark Tushnet’s bold assertion that, if he were a Justice, he would vote “to advance the cause of socialism.”

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. If Tushnet claimed that socialism is a broader principle that all federal judges should support, however, my approach would require an ensuing debate over historical examples and counter-examples to confirm or deny that federal judges should advance socialism. (Other arguments might similarly address whether federal judges should advance liberalism, capitalism, or religious fundamentalism.) If no persuasive historical examples could support Tushnet’s socialist agenda against its critics, his proposed judicial actions would merit the activist label, regardless of whether they advanced otherwise defensible political goals.

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. But such experiences must be used to illustrate domestic and judicial values, instead of the universal moral norms invoked under Dworkin’s jurisprudence. 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 my approach is to explain why this Article’s newly minted analysis of activism—with contextualized examples and synthetic principles—may seem to some readers so familiar or even natural. Although my approach is unique as applied to judicial activism, its techniques are absolutely ordinary in our legal system more generally. What this Section has outlined is a fundamentally common-law method of analyzing judicial role, thus demonstrating that despite “statutorification” in other contexts, the topic of unsupervised judging remains by default a matter of common law. Accordingly, the “common-law attitude” that Scalia seeks to 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.

264 See supra notes 120-21 and accompanying text (analyzing the difference between “judicial autonomy” and “judicial independence”).
265 DWORKIN, supra note 205, at 15.
266 See Scalia, supra note 143, at 13 (“[T]he greatest part of what . . . federal judges do is to interpret the meaning of federal statutes and federal agency regulations.”); see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 79 (1982) (noting that “statutorification has occurred at an increasing rate, despite the formidable obstacles our system . . . puts in its way”).
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 laid bare as a contestable view of judicial role, supported by non-originalist historical examples, and a purportedly derivative view of institutional democracy—just like every other contestable vision of judicial activism. This Article does not dispute the merits of Scalia’s approach; it suggests only that his 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. 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. 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.

What is less clear is whether the future will brand Scalia, or instead his opponents, with the epithet of “activism.” Scalia has repeatedly decried modern abortion rights as activist and ripe for reversal; other Justices

R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. PA. L. REV. 1245, 1264-72 (1996) (claiming that all or nearly all federal common law may be “constitutionally suspect”). One deep problem with Scalia’s analysis is his wild exaggeration that there are no constraints on common-law judging. Scalia, supra note 143, at 7 (“What intellectual fun all of this is! . . . [I]t consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting!”). As Scalia well knows, the reality is generally more quotidian. Cf. Sunstein, supra note 232, at 564-65 (“[Common-law] thinking should be seen as part of judicial modesty, not judicial hubris. Certainly it allows for a degree of flexibility. But it also comes with its own constraints on judicial power, brought about through the doctrine of stare decisis, close attention to the details of cases, and a general reluctance to issue rules that depart much from the facts of particular disputes.”). More specifically, I propose that the norms governing common-law judging (like those for other kinds of judging) are exactly what judicial activism debates, and other forms of legal education and professionalism, aim to inculcate: that all-too-apparent difference between a good judge and a judicial god.

Indeed, my approach implies that Scalia’s lack of textual and original-historical support is not ultimately very damaging, as all theories of judging are in that very same boat.

See supra Section III.C.

See supra note 255 and accompanying text.

Cf. Eskridge, supra note 231, at 1513 (“Scalia’s theory dominates debate about statutory interpretation, is gathering more defenders in academe, has [at least] one other fan on the Court . . . and influences the way all the other justices write their opinions . . . and has a strong allure for Generation X [and Y] law students. If most scholars and colleagues are still skeptical that the new textualism ‘gets it right,’ Scalia can boast a postmodern triumph: the new textualism has been agenda-setting and a public relations hit.”).


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
have claimed that modern federalism cases will be as discredited as *Lochner*. Only the sweep of history—with its accompanying judicial appointments, scholarship, dissenting opinions, and public reactions—will determine who is right. (And even that judgment may change.) As this Article makes clear, however, such fights over judicial activism are definitely not “fluff,” even though they may not 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 sometimes 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 concludes with certain practical consequences and research opportunities indicated by my approach to these 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 they match only some past examples of controversial judging. By contrast, I have proposed to reconceive judicial activism as any 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 implies that a great deal of 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

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274 *See supra Part I.C.*


276 *See supra* Part I.C.
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 blind alleys such as originalism and jurisprudential theory, while also offering an affirmative approach that blends historical events with broader normative principles. This two-strand structure should allow existing arguments about judicial role to be recognized for what they are, thereby sketching a blueprint for future struggles over judicial conduct, regardless of whether one aims to bolster, destroy, or supplant existing standards.

Consider Scalia 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. Yet to clarify the component parts of such debates may spur more focused, effective discussion.

Beyond this Article’s consequences for legal rhetoric and reasoning are two more implications. First, I have suggested that activism’s great rhetorical power has opened a schism in debates about judging, separating legal thinkers who use terms like “activism” from those who do not. This division seems doubly unfortunate. On one hand, scholars who avoid terms like activism—perhaps because such words seem indefinable—risk segregating from their research the largest part of public discussion about judges. The extent to which cultural standards should turn on public attitudes, rather than those of legal experts, may be debatable at the margins. But to bypass broader social attitudes

\[\text{\textsuperscript{277}} \text{Cf. Ryan, supra note 98, at 1658:}
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I certainly do not mean to suggest otherwise or to imply that there is a swirling national debate, akin to discussions over who should be the next American Idol, about how best to interpret the Constitution. That said, there is undoubtedly a much smaller but influential segment of the public that at least pretends to care about methodology. Columnists like George Will, Charles Krauthammer, and Dahlia Lithwick write about it; articles about methods of interpretation appear in major newspapers and magazines, from the New York Times to the Washington Times, and from the American Prospect to the National Review. Law professors certainly argue about it among themselves and with their students. They also write op-eds about the issue and testify before Congress about it. Members of Congress also engage in debates over methodology when considering whether to confirm judges.

In this smaller and rarefied world, there is a debate about methodology. Whether it is always informed or rarely so, always sincere or rarely so, it is a debate, and I think it is fair to say that the debate matters. Clearly, Justices Breyer and Scalia, along with Professor Sunstein and plenty of other academics,
over a simple matter of rhetoric seems unsound. In a democracy with increasingly public confirmation hearings, it may prove to be immensely important for 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.\textsuperscript{278}

If the lay public overlooks the judicial expectations cultivated among legal experts, and instead focuses predominantly on debates over “activism,” that is surely a recipe for surprise and disappointment.

If cultural norms of judicial role are ultimately a product of history and principle, it may also be crucial that scholarly views of judging gain currency. As a group, 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 tries to bridge the gap.

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.\textsuperscript{279}

Depending on an agency’s organic statute, administrators may be vested with significant lawmaking authority, and their judgments may be difficult to reverse. To pick the easiest example, one might imagine an administrative tribunal that functions analogous to a trial court.

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\item believe that the debate matters. It may only indirectly trickle down to influence who is nominated to become a judge and whether that nomination is successful.
\item Or its influence might only come through law students who eventually go on to become judges or participate in the process of confirming them. Regardless of its precise course of influence, we can be reasonably confident that the debate is sufficiently important that the right response to the question of interpretive methodology is not “Who cares?”
\item See generally Scalia, \textit{supra} note 143, at 1 (“The first year of law school makes an enormous impact up on the mind. . . . [Students experience a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking. Thereafter, even if they do not yet know much law, they do—as the expression goes—‘think like a lawyer.’”).
\item See Sunstein, \textit{supra} note 232, at 550-55.
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Despite many dissimilarities between such administrative tribunals and federal courts, there may nonetheless be a sense in which an 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.\footnote{See Craig Green, Executive Activism (unpublished manuscript on file with author).}