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AN INTELLECTUAL HISTORY OF JUDICIAL ACTIVISM

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ABSTRACT

Over the past six decades, the term "judicial activism" has become an immensely popular tool for criticizing judges' behavior. Despite the term's prominence, however, its meaning is obscure, and its origins have been forgotten. This Article seeks to correct such deficiencies through a detailed conceptual and historical analysis of judicial activism.

First, the Article analyzes legal rhetoric, describing the post-war origins of the phrase "judicial activism," its eighteenth- and nineteenth-century prehistory, and its rise to prominence in the late twentieth-century. Second, the Article rejects as incoherent modern definitions of judicial activism, and instead describes a functional "concept" of activism based on unenforced norms of judicial propriety. Because judges make many decisions without supervision by other public officials, debates over judicial role are crucial to our legal system's operation. These debates—regardless of whether they use the word "activism"—illustrate why the concept of judicial activism remains inescapably important. Third, the Article offers a two-part, common-law method of determining whether particular decisions or judges are activist. This method contrasts with other ways of evaluating activism such as textualism, originalism, and jurisprudential theory. If widely adopted, the proposed approach to judicial activism might yield clearer perceptions of judicial behavior and might reduce destructive schisms between expert and non-expert discussions of judicial role.

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INTRODUCTION

The term "judicial activism," despite its wild popularity, is poorly understood.[1] For pundits, politicians, judges, and the public, activism-talk is so common that it masquerades as something natural and timeless.[2] Even among legal experts, few know whence the term came or why it has become mainstream, and despite frequent objections to its overuse, no scholar has

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[1] A Westlaw search revealed that the terms "judicial activist" and "judicial activism" appeared in 3,815 law review articles during the 1990s and in 1,817 more articles between 2000 and 2004. Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1442 (2004); *see also* Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 385, 386 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (describing prevalent activism debates as "little more than a babel of loosely connected discussion").

[2] *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2387 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("The odd thing is that—unlike any earlier time in American history—*both* sides of the political spectrum proclaim themselves unhappy with the courts. Charges of judicial 'activism,' once a staple of conservative critiques of the courts, now are heard as often from liberals and progressives."); Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18 ("The ubiquitous 'activist judges' who 'legislate from the bench' have become central villains on today's domestic political landscape."); *see also, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2282 (2008) (Roberts, C.J., dissenting) (implying that the majority might expose the Court to irrebuttable "charges of judicial activism"); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 48–49 (2005) (statement of Sen. Tom Coburn) ("I believe the people in our country . . . are interested and concerned with two main issues. One is this word of judicial activism that means such a different thing to so many different people. And the second is the polarization that has resulted from it . . . . Decades of judicial activism have created these huge rifts in the social fabric of our country."); *id.* at 30 (statement of Sen. Jeff Sessions) ("[A]ctivism by a growing number of judges threatens our judiciary."); MARK LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 11–12 (2005) ("Activist judges have taken over school systems, prisons, private-sector hiring and firing practices, and farm quotas; they have ordered local governments to raise property taxes and states to grant benefits to illegal immigrants; they have expelled God, prayer, and the Ten Commandments from the public square; they've endorsed severe limits on political speech; and they've protected virtual child pornography, racial discrimination in law school admissions, flag burning, the seizure of private property without compensation, and partial-birth abortion."); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) ("Everyone scorns judicial 'activism,' that notoriously slippery term."); Kmiec, *supra* note 1, at 1443 n.8 (performing a Lexis search to show that "judicial activism" and related terms appeared 163 times in the *Washington Post* and 135 times in the *New York Times* from 1994 to 2004); *cf.* FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE 8 (1999) (stating misleadingly that "[f]rom the earliest days of the Republic, the United States Supreme Court has been accused of judicial activism"); Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 586–87 (2002) (stating incorrectly that "[t]he terms that constitute the bulk of this rhetoric— . . . [including] 'judicial activist'—have been fixtures in the lexicon of judicial critique throughout the past one hundred years. The usage of these terms has been constant . . . .").

adequately explained what (if anything) the term ought to mean.[3] This Article explores these issues in detail.

Today is an especially apt time to revisit judicial activism, as the Obama Administration will produce transformative judicial appointments during the next few years, thus shifting judicial activism debates 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 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

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[3] For a few especially strong works that address judicial activism without fully defining the term, see CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005) (positing that the best measure of judicial activism may be how often courts strike down the actions of other branches of government); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 122 (2005) ("[T]he primary danger associated with the judicial branch bears a name—'judicial activism'—that invokes imagery of courts doing more than they should."); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 54 n.74 (2005) (choosing to use the term "aggressive judge" rather than "judicial activism" because the latter term too often expresses mere political preference); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1077 (2002) ("Very little attention has been paid to the meaning of the term activism. The term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging."); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002) ("'Activism' is a helpful category in that it focuses attention on the judiciary's institutional role rather than the merits of particular decisions. Its usefulness depends, however, on the recognition that while we may plausibly describe different *aspects* of judicial acts as either 'activist' or 'restrained,' such terminology will rarely yield persuasive on-balance characterizations of decisions, much less of particular judges or courts.").

[4] *See, e.g.*, Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 882 (2008) (explaining that a one-term Democratic President could interrupt the current trend of conservative appointments); David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1044 (2008) (book review) (observing that appointments made in the near future will determine the amount of influence Bush's appointments—Roberts and Alito—have on the Court).

[5] *Compare* sources cited *supra* note 2 (indicating the power and currency of "judicial activism"), *with* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 3 (2006) ("[I]n practice 'activist' turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with."), *and* Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 493 (2008) (deriding "judicial activism" as irretrievably trite).

the term's scattershot applications and seeks to uncover cultural issues that have sustained the concept's longstanding relevance.

This Article has three parts. Part I offers a history of "judicial activism" to explain whence 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 be exiled from educated discourse.

Part II attempts a different approach. Contrary to conventional wisdom, I propose that judicial activism has no inherent link to boosting individual liberty or curbing governmental power. Instead, the "activist" label is useful only where a judge has violated cultural standards of judicial role. Such standards are not formally enforced and are only partly 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 when 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 methods of constructing 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 failed to produce an authoritative answer, despite his privileged perspective on such issues.

Standards of judicial activism cannot be deduced from a simple page of text, history, or abstract reasoning. On the contrary, imperfections in applying orthodox sources to activism debates clarify the need for a more nuanced approach. I argue that our legal culture currently uses a two-strand approach in constructing judicial role—applying interlocked techniques of narrative and

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

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 efforts to build what G. Edward White called "The American Judicial Tradition,"[7] or perhaps more accurately "The American Judicial Traditions." Although cultural norms of judicial conduct are forever contestable, that cannot counsel despair. Even as American political life has 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.[8] 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,[9] the opposite is nearer the truth. Schlesinger's original introduction of judicial activism was doubly blurred: not only did he fail to explain what counts as activism, he also declined to say whether activism is good or bad. Flaws in Schlesinger's account, however, did not stop

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[7] *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 1 (3d ed. 2007) (arguing that the American judicial tradition did not begin with the Constitution, but rather with Justice John Marshall's interpretation of it).

[8] *See* DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 16 (1987) ("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 (discussing "the People"); *id.* at 112–43 (discussing "Government"); *see also* Towne 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 and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993) ("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, 1753–54 (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.").

the term from rising to power, largely through unanticipated events like school desegregation and the birth of federal courts scholarship. Such eclectic beginnings explain why "judicial activism" is hard to define, but they do not explain why the term holds continued attention.

Section B offers a prehistory of "judicial activism" that links Schlesinger's terminology with deeper concepts of proper 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 analyzes certain details more closely, even a brief introduction shows that "judicial activism" was more than a catchy phrase. The term evoked hallowed judicial traditions as baselines, even though Schlesinger did not himself examine such traditions' content.

Section C shifts to the present, identifying four uses of "judicial activism" that are popular today. For modern scholars who define and analyze activism, the term has 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 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.[10] By contrast, Schlesinger minted "judicial activism" in a fourteen-page *Fortune* article, tucked among advertisements for whisky and Aqua Velva.[11] In

[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 seemed 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.

describing activism's rise to prominence, this section argues that Schlesinger did not coherently define judicial activism, 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 recent appointments had made the Court a homogenous "rubber stamp."[14] This was easily done. Divisions ran deep among the Justices, and some showed embarrassing 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

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[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 TWENTIETH CENTURY: INNOCENT BEGINNINGS, 1917–1950, at 418–19 (2000).

[13] *See, e.g.*, JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 131–70, 208–21 (2004) (describing these appointments' impact).

[14] Schlesinger, *supra* note 6, at 73. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 11–25 (1998) (explaining the details of FDR's legislative proposal and why it did not succeed).

[15] Schlesinger, *supra* note 6, at 78–79, 201; *see also* ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 19 (1986) (describing the Vinson Court as "nine scorpions in a bottle"); 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"); Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203; Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71.

[16] *See* Schlesinger, *supra* note 6, at 73–78.

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

[18] *See, e.g.*, Amy Davidson, *The Scalia Court*, NEW YORKER, Mar. 28, 2005, at 2; Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES, Mar. 16, 2008, (Magazine), at 38; Benjamin Wittes, *Whose Court Is It Really?*, ATLANTIC MONTHLY, Jan.–Feb. 2006, at 48. Like other freelance writers, Schlesinger wrote articles

misfortune is that Schlesinger also wandered toward deeper topics. In just five pages, he bundled the sitting Justices into camps of "judicial activists" and "champions of self-restraint."[19] Yet even as Schlesinger noted that the issues 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—particularly Hugo Black and William O. Douglas—and three others as heroes of self-restraint—especially Felix Frankfurter and Robert Jackson.[21] Schlesinger never explained 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 illustrate Schlesinger's failure to explain his categories. First, Schlesinger described the "Black-Douglas [activist] view" as originating in jurisprudential ideas "particularly dominant at the Yale Law School."[22] With a Harvardian's zeal, Schlesinger painted the Black–Douglas–Yale view as a lawless blend of "cynicism about . . . an objective judiciary" and a tendency to favor "immediate results [over] a system of law" and political interests over legal doctrines.[23]

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like *The Supreme Court: 1947* partly 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 popularized these terms, he also wrote that he "got the idea, and perhaps the terms too, from [Thomas] 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 originator of the terms "judicial activism" and "judicial self-restraint").

[20] This is true despite—and also because of—Schlesinger's multiple efforts to explain his two categories. *See* Schlesinger, *supra* note 6, at 201–04 (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. Schlesinger's other activists were Frank Murphy and Wiley Rutledge, and his third "champion of self-restraint" was the recently appointed Harold Burton. *Id.*

[22] *Id.*

[23] *Id.* at 202.

Putting aside the accuracy of Schlesinger's "crude[]" portrait of legal realism, its asserted link to Black was indefensible.[24] Schlesinger's only cited evidence against Black was a quote praising federal courts as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[25] 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.[26] Despite the Court's heated rhetoric, that case represented a terribly confused example of Schlesinger's "activism." Many commentators have criticized the judicial work of Black and (more justifiably) Douglas as activist.[27] Regardless of those

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[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* Hugo L. Black, Jr., Lawyer Profile, http://www.martindale.com/Hugo-L-Black-Jr/806177-lawyer.htm (last visited Feb. 19, 2009) (indicating that Hugo Black, Jr. was only a first-year student in the spring of 1947). By contrast, most modern scholars have strongly *dissociated* Black from legal realism and "the Yale school." *See, e.g.*, Akhil Reed Amar, *The Supreme Court, 1999 Term—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 (1980) (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 in which 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).

[25] Schlesinger, *supra* note 6, at 202 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

[26] Four young men, on trial for murder, asserted that their confessions had been obtained by secret violence and coercion. The Court held that these police actions violated due process under the Fourteenth Amendment. *See Chambers*, 309 U.S. at 237 ("[R]ights and liberties . . . [can] not be safely entrusted to secret inquisitorial processes."); *id.* at 241 ("[W]e are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny."); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 335 n.143 (1998) (characterizing *Chambers* as one "of many confessions decisions handed down by the Supreme Court in the 1930s and 1940s involving brutality by southern whites against African Americans").

[27] *See, e.g.*, WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 118–24 (1961) (calling Black a judicial activist); Sanford Levinson, *Law as Literature*, *in* INTERPRETING LAW AND LITERATURE 158 (Sanford Levinson & Steven Mailloux eds., 1988) (criticizing Black's jurisprudential approach as "inevitably break[ing] down in the face of the reality of disagreement among equally competent speakers of the native language"); Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 133–34 (1991) ("Few Justices of the United States Supreme Court created as much controversy as did William O. Douglas. . . . [He] remains a figure surrounded by controversies concerned with his jurisprudence or lack of it."); G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 18 (1988) ("Douglas can be seen as an 'anti-judge' in that he rejected both of the principal twentieth-century devices designed to constrain subjective judicial lawmaking: fidelity to constitutional text or doctrine, and institutional deference.").

appraisals, however, 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 doctrinal analysis did not clarify his typology. Schlesinger discussed *West Virginia State Board of Education v. Barnette*, for example, which held that public schools had breached the First Amendment by making students salute the flag against their religious beliefs.[28] Schlesinger's own views of *Barnette* were conflicted; on one hand, he celebrated Frankfurter's dissent as a "great democratic document" and blamed the majority's position on flip-flopping "activists."[29] Yet Schlesinger also wrote that *Carolene Products Co. v. United States* "furnish[ed] the activists with strong logical grounds" for supporting the students' religious rights.[30] Insofar as Schlesinger denounced *Barnette* as a wrong-headed "freak case[]," modern authorities strongly disagree.[31] But more crucial for evaluating Schlesinger's analysis is the unmentioned fact that the *Barnette* majority's "activist" opinion was authored by Justice Jackson, one of Schlesinger's "champions of self-restraint."[32] Schlesinger's discussion of *Barnette* thus confounds, rather than clarifies, his description of activism.

Schlesinger fully ignored the three-year-old decision *Korematsu v. United States*, which would have also confused his efforts to identify "activists."[33] 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

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[28] 319 U.S. 624 (1943); Schlesinger, *supra* note 6, at 206.

[29] Schlesinger, *supra* note 6, at 206.

[30] *Id.*; *see* Carolene Prods. Co. v. United States, 304 U.S. 144, 152–53 n.4 (1938) (opening the possibility that, although social and economic legislation is presumed to be constitutionally valid, "more exacting judicial scrutiny" might apply to legislation that "restricts . . . political processes," or 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*] 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.'" (quoting *Barnette*, 319 U.S. at 642)); 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] 323 U.S. 214 (1944).

authority to enforce such orders.[34] Again, Schlesinger's doctrinal discussion left his definition of "activism" in a fog.

Third, Schlesinger's most trenchant doctrinal analysis addressed an "explosive" field of judicial activism concerning labor law.[35] Schlesinger speculated that "the Black-Douglas group" might undermine a then-pending statute to outlaw closed union shops, by choosing "to override legal 'niceties' to emasculate or veto" such anti-union legislation.[36] If such judicial activism prevailed, wrote Schlesinger, "the political reprisals will be likely . . . sharp and disastrous."[37]

As doctrinal predictions, Schlesinger's statements were failures. Although Congress did ban closed shops in the Taft–Hartley Act, the Court's activists never "emasculate[d]" such legislation.[38] Instead, both Black and Douglas wrote majority opinions implicitly accepting such statutory provisions.[39] Schlesinger again misperceived his own activists' alleged activism. And because his categories were so firmly linked to accounts of particular Justices, such flaws are quite damaging.

The missteps in Schlesinger's analysis would hardly bear mention for their own sake, except to show how his brevity, errors, and personal focus obscured any general standard for identifying activists. This was soon important,

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[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* notes 123–27 and accompanying text. Perhaps Jackson qualified as a "champion of self-restraint" based mainly on his book. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 37 (1941); *see also* 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.*

[38] Labor Management Relations (Taft–Hartley) Act, 29 U.S.C. §§ 141–187 (2006); *see also* Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 397 (1984) ("The Taft-Hartley Act imposed a sweeping ban on such 'closed shops' . . . in order to establish a sharp distinction between job rights and union membership.").

[39] Ry. Employes' 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 v. Nw. Iron & Metal 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.").

because two of Schlesinger's named 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.[40]

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.[41] The term was doubtless buoyed by Schlesinger's Pulitzer-Prize-winning Ivy-League reputation.[42] And the personal details in his essay poked Justices who were already quite sensitive.[43] Most importantly, the three

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[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.*, ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57 (1955) (assailing the "cult of libertarian judicial activists"); C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 186–227 (1954) (questioning which Justices deserve the "activist" and "self-restraint" labels); Albon P. Man, Jr., *Mr. Justice Murphy and the Supreme Court*, 36 VA. L. REV. 889, 916 (1950) (describing Murphy as "perhaps the outstanding judicial activist on the Court"); Edward McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, 33 N.Y.U. L. REV. 775, 777–78 (1958) (characterizing Frankfurter's opposition to judicial activism as an effort to "wear Holmes' mantle"); 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); Charles Alan Wright, *Civil Liberties and the Vinson Court*, 102 U. PA. L. REV. 823, 825 (1954) (reviewing PRITCHETT, *supra*) (criticizing the labels applied by Pritchett); E. Payson Clark, Jr., Note, *Administrative Law: Judicial Review Denied Attorney General's Order for Removal of Enemy Alien*, 34 CORNELL L.Q. 425, 429 (1948) (reading "activism" backward into scholarship from the early 1940s that did not use that terminology); Note, *State Regulation of Pilotage: Constitutionality of Nepotic Apprenticeship Requirement*, 56 YALE L.J. 1076, 1281 (1947) (borrowing Schlesinger's term "activism," without citation, six months after his article was issued).

[42] *The Age of Jackson* won the Pulitzer Prize in 1946, while Schlesinger was professing history at Harvard. SCHLESINGER, *supra* note 12, at 373. For modern recognition of Schlesinger's academic accomplishments in the 1940s, see SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY, at xix (2005) (claiming that the study of American democracy "owes the most to Arthur M. Schlesinger, Jr.'s *Age of Jackson*," which helped foster a "revolution in historical studies").

[43] In a letter to his parents, Schlesinger wrote in abbreviated English:

characters featured in Schlesinger's story—Black, Douglas, and Frankfurter—proved to be extremely influential and long-lived, with almost one hundred 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 the Court struck down racial segregation in *Brown v. Board of Education*.[46] Since then, federal courts' "activity" in addressing social issues has consistently been of dominant concern. Thus, whatever Schlesinger's "activism" might originally have meant, the term appeared at an opportune moment.[47] The gloss of post-1947 history confirmed activism's use as a

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> Everyone 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, *supra* note 12, at 425.

[44] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, at B-5 (16th ed. 2007).

[45] *See, e.g.*, JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 184–208 (1989) (discussing the evolution of the relationship between Frankfurter and Black and Douglas); Drew S. Days III, *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. Wasby ed., 1990) (analyzing Douglas's numerous civil rights opinions); Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775, 1775 (2007) (calling Frankfurter, in his day, "the patron saint of the then-emerging field of Federal Courts law"); *see also* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at 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* 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. *A Place for Poppa*, TIME, Jan. 16, 1939, at 5. Among them were Ben Cohen, Tom Corcoran, Phil Graham, Joe Rauh, and Ed Pritchard. *Id.* These young men's loyalty allowed Frankfurter to indirectly influence a diverse range of government agencies and programs. *See* SCHLESINGER, *supra* note 12, at 419.

[46] 347 U.S. 483 (1954); *see* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 292, 302 (2004) (discussing Warren's role in determining the outcome of, and securing unanimity in, *Brown*).

[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 Presidents" were not the activist icons fated to make law "on the bench in a Republican era." Schlesinger, *supra* note 6, at 73. Rather, it was Earl Warren and William Brennan who

negative epithet, and focused such critiques on the Supreme Court's liberal wing.[48] Yet such events still did not yield a coherent definition of judicial activism; on the contrary, they only complicated Schlesinger's confused terminology.[49]

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, the grounds for such criticism have differed widely. To illustrate such variety, I will discuss four episodes of controversial judicial conduct that would have been familiar to Schlesinger. Some of these rulings were contested when they happened, while others became controversial more gradually. The element uniting these four incidents is a fear of judicial abuse; thus, for each period, I will describe the controversial behavior at issue and will sketch their lessons for judicial conduct generally.[50] Insofar as these historical events support vague or divergent prescriptions, they only confirm the deep challenges that face any unified theory of judicial activism.

First, and closest in time to Schlesinger's essay, is the half-century before 1937 called the *Lochner* era.[51] During this period, the Court's alleged "activism" (had the word been known) took several forms. The Court invented

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would later play that "activist" role. *See* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

[48] *See, e.g.*, Philip K. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145 (1964) (describing several Warren Court opinions as disingenuous and as displaying an "absence of workmanlike product"); Kmiec, *supra* note 1, at 1451–52 ("By the mid-1950s, the term [activism] had taken on a generally negative connotation.").

[49] *See infra* Part I.C (discussing modern definitions of activism).

[50] Such descriptions are severely abbreviated, focusing only on each period's most basic insights about federal courts' historical role.

[51] For historical accounts of this era and its demise, see, for example, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 115–19 (1995); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 165–239 (2000). For a revisionist view, see David E. Bernstein, *Lochner*'s Legacy*'s Legacy*, 82 TEX. L. REV. 1, 53–60 (2003) (arguing that the end of the *Lochner* era was not a result of the rejection of a government inaction baseline); and David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1506–07 (2005) (discussing the impact of *Lochner* on labor reform).

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.[52] In fields of statutory law, such as antitrust and federal jurisdiction, the Court restricted labor interests and promoted industrial development.[53] The Court also expanded a body of "federal general common law" that governed interstate disputes from commercial law to torts.[54] Overall, these decisions sparked massive public, political, and scholarly criticism, culminating in statutory efforts to limit federal jurisdiction and "pack" the Supreme Court.[55]

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 later maligned as the "Four Horsemen."[56] 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.[57] Regardless of whether such comparisons were apt, Schlesinger's claimed connection between 1940s-era activism and prior judicial misconduct was vital to his analysis.[58]

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[52] EDWARD. A. PURCELL, JR., LITIGATION & INEQUALITY 282–83 (1992).

[53] *Id.*

[54] *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); *see* TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 45–100 (1981) (analyzing the postbellum development of *Swift* and federal law); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 39–94 (2000) (showing the growth of judicial power through the use of federal general common law); PURCELL, *supra* note 52, at 59–86 (discussing the development and history of federal general common law); *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 218–20.

[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 id.* at 18, 108 (indicating Schlesinger's birthday as October 15, 1917, and that he was part of the Harvard College class of 1938); *see also* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (decided in March 1937, when Schlesinger was nineteen). 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

Although pre-New Deal decisions are undeniably part of judicial activism's history, they do not resolve problems with the term's definition. The modern consensus rejecting *Lochner*-era rulings has not identified the precise nature of their mistake, which makes it hard to say exactly why the *Lochner* era was activist. One possibility is that Lochnerian jurisprudence caused bad *results*, favoring powerful and established interests over progressive ones.[59] Or the Court might have used improper *methods*, inferring constitutional rights and common-law powers without support from orthodox authorities.[60] Or perhaps the Court's errors were *institutional*, intruding on fields of policymaking that are best left to other governmental actors.[61] Each of these hypotheses may be partly correct, as might other explanations. Thus, although Schlesinger certainly enriched his account of judicial activism by gesturing toward prior judicial misconduct, no simple reference to *Lochner* can explain what activism means.

A second period of judicial controversy involves the decades after 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.[62] Some of the Court's actions from 1865 to 1885 were stridently

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constitutional issues, *Carolene Products* would likely distinguish the Black–Douglas group's approach from that of the Four Horsemen. *See supra* note 30.

[59] *E.g.*, Cass Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 882–83 (1987).

[60] *E.g.*, Laura Kalman, *Eating Spaghetti with a Spoon*, 49 STAN. L. REV. 1547, 1549 (1997) ("Judicial formalism . . . reflecting 'the entrenched faith in laissez faire,' emerged in cases such as *Lochner v. New York* . . . .").

[61] *E.g.*, Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 182 (1982) (noting an historical trend "from the peak of activism in *Lochner v. New York* to a period of considerable passivity and deference to legislative enactments . . . , which continued into the mid-1950's" (footnote omitted)).

[62] For an in-depth discussion of the Court's opinions, see generally Barry Friedman, *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 arguably had not authorized. *See* The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863); *see also* CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–1888, pt. 1, 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). *Compare Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) (denying the President's attempt to suspend habeas corpus), *with Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (allowing Congress to strip jurisdiction over a military detainee's habeas corpus petition). For additional analysis, see 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 225 (1998) (calling Congress's actions preceding *McCardle* "a devastating counterattack" against the Court); *id.* at 242–43 (noting similar interbranch troubles in *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869), where the President ultimately averted a crisis over habeas corpus by transferring the detainee for state criminal prosecution).

criticized in their day; others less so.[63] Yet modern experts uniformly view this period as an exceedingly bleak chapter in judicial history.[64]

From one perspective, Schlesinger's use of the terms "activist" and "self-restraint" would almost certainly denounce the Court's postbellum decisions. Like many modernists, Schlesinger espoused a *Carolene Products* view of constitutional law, which views judicial intervention as a key safeguard for politically sensitive rights and "discrete and insular minorities."[65] Schlesinger also endorsed the application of individual rights to state and local

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Cases from 1865 to 1885 limited individual liberties under the Reconstruction Amendments by reading the Amendments very narrowly. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11–12 (1883) (taking a limited view of the purpose of the Fourteenth Amendment); United States v. Harris, 106 U.S. 629, 639–40 (1883) (same); Virginia v. Rives, 100 U.S. 313, 318 (1879) (same); United States v. Cruikshank, 92 U.S. 542, 553–55 (1875) (same); United States v. Reese, 92 U.S. 214, 220–21 (1875) (same); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 77–79 (1872) (same).

The Court reversed itself within a year in order to affirm federal "greenback" currency. *Compare* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 625 (1869) (concluding that congressional action to institute a national legal tender is constitutionally prohibited), *with* The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553–54 (1870) (overruling *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. *See* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

[63] *See* 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, at 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 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, pt. 2, at 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 invalidating federal law. *Id.*

[64] *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 54 (1992); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 93 (2008); IRONS, *supra* note 63, at 205; LANE, *supra* note 63, at 261.

[65] Schlesinger, *supra* note 6, at 208; *see* Carolene Prods. Co. v. United States, 304 U.S. 144, 152 n.4 (1938) (noting certain "special conditions," like prejudice against minorities, that require searching constitutional inquiry); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76–77, 181 (1980) (advocating a broad theory of judicial review based on *Carolene Products*).

governments.[66] To support such broad-based views of liberty and equality required Schlesinger to implicitly reject post-Civil War judicial doctrine.[67]

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 be criticized for (i) their bad results, (ii) their improper methods, (iii) their institutional affront to other actors, or (iv) some mix of misdeeds.[68] In contrast to *Lochner*, however, the Reconstruction era reveals that judicial controversy and abuse are not limited to decisions that expand individual rights or undermine political power. Instances of 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.[69] *Dred Scott* struck down the Missouri Compromise provision that banned slavery in the northern territories, and the Court held that free descendants of African slaves could not be "citizens" under the federal

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[66] 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 the Court's role in protecting liberties or deferring to legislature based on principles of democracy).

[67] *Cf.* DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 581–82 (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.").

[68] FAIRMAN, *supra* note 63, at 569–85 (recounting various criticisms of the *Civil Rights Cases*, including the impropriety of delving into legislative matters, and comparisons to *Dred Scott*).

[69] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); *see, e.g.*, Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1113 (2005) ("[*Plessy*, *Dred Scott*, and *Lochner*] are cases that almost everyone agrees were wrongly decided and are examples of egregious judicial activism."); Michael J. Perry, *The Fourteenth Amendment, Same-Sex Unions, and the Supreme Court*, 38 LOY. U. CHI. L.J. 215, 226 (2007) ("[*Dred Scott* is] surely the single most infamous case in American constitutional law."); *cf.* DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 262 (2006) ("By the time of the infamous *Dred Scott* decision . . . , even a very moderate lawyer . . . like Abraham Lincoln became convinced there was a 'Slave Power' conspiracy uniting proslavery presidents, the Supreme Court and Southern Senators and congressmen, all intent on nationalizing the institution and overturning the Founders' dream of putting slavery on the path toward 'ultimate extinction.'").

Constitution.[70] Public and political reaction was immediate and overwhelming.[71]

Schlesinger's essay did not mention *Dred Scott*, which may surprise modern readers; *Dred Scott* today represents the worst imaginable case of judicial activism, and perhaps the only one on which everyone agrees.[72] A famous 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.[73] And *Dred Scott*'s critics have throughout history stressed the Court's extrajudicial overreaching, sometimes thereby overshadowing the decision's legal merits.[74]

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.[75] Whatever the historical reason was for Schlesinger's choice, *Dred Scott* holds an important and over-determined place in modern activism debates.[76] As a matter of *results*, the decision to support slavery in the Minnesota Territory was deeply unsettling; the Court's reasoning also implied oppression of all American blacks, and the decision's historical assumptions cast the Constitution as an irretrievably "proslavery document."[77] As a matter of *technique*, the Court addressed issues

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[70] *Dred Scott*, 60 U.S. (19 How.) at 452.

[71] FEHRENBACHER, *supra* note 67, at 417–27; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part I: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 416 (1998) ("It would be difficult to overstate the vituperative reaction that met the Court's decision in *Dred Scott*.").

[72] *See* sources cited *supra* note 69.

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

[74] FEHRENBACHER, *supra* note 67, at 439 ("'[*O*]*biter dictum*' became the Republican battle cry . . . . The Court's invalidation of the Missouri Compromise restriction should some day be formally overruled, but until then it could simply be ignored as without authority . . . . Historians of the next half-century would generally echo those same views."); *id.* at 321 (describing confusion of "several generations of historians and legal scholars" in determining what the Court actually decided).

[75] Schlesinger was also at least somewhat concerned not to alienate the Justices. *Cf.* SCHLESINGER, *supra* note 12, at 424–25. And to compare the Black–Douglas approach with *Dred Scott*, even loosely, would have burned bridges beyond repair.

[76] *See* sources cited *supra* note 69; *see also* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 21 (1st ed. 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 "sweeps away every plank of their platform, and crushes into

that were not properly presented, rendered judgment without legal authority, and was influenced by two Justices' improper communications with President-elect James Buchanan.[78] From an *institutional* perspective, *Dred Scott* upset a precarious sectional compromise concerning slavery, tossing the Court's judicial authority into the vortex of slaveholding politics.[79] As with our other historical examples, each of these aspects of *Dred Scott*'s activism is plausible. Thus, although *Dred Scott* offers context for judicial activism's durability, it does not specify exactly what the term means.

My fourth and last example of controversial judicial behavior concerns the Marshall Court. Although the Court's work from 1801–1835 is highly esteemed today, many of these decisions were intensely debated at the time.[80] From *Marbury*'s judicial review to *McCulloch*'s "implied" congressional authority, the Marshall Court repeatedly ventured into contemporary channels of power, and its results were fought with corresponding vigor.[81]

Schlesinger cited the Early Republic in his discussion of judicial activism; indeed, Schlesinger characterized Frankfurter as an emblem of Jeffersonian faith in democracy.[82] Schlesinger did not, however, mention the fierce battles between Jeffersonian democrats and Marshall's Court; nor did he name

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nothingness the whole theory upon which their party is founded"). William Lloyd Garrison famously referred to the Constitution as a "covenant with death, an agreement in hell." ROBERT FANUZZI, ABOLITION'S PUBLIC SPHERE 29 (2003).

[78] FEHRENBACHER, *supra* note 67, at 294, 302–04, 322–27, 439–43; Louis H. Pollak, *Race, Law & History: The Supreme Court from* Dred Scott *to* Grutter v. Bollinger, DAEDALUS, Winter 2005, at 29, 30–31.

[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 Court Sovereignty Cases*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 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 confessed privately to Story."); *cf.* WILENTZ, *supra* note 42, at 104–06 (claiming that in 1801 the "courts became a special focus of Federalist outrage," prompting retaliatory attacks on "the arbitrary power assumed by the courts" (emphasis omitted)); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1139–44 (2001) (discussing the public backlash to *McCulloch* and *Gibbons*).

[81] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); McCulloch v. Maryland 17 U.S. (4 Wheat.) 316 (1819).

[82] Schlesinger, *supra* note 6, at 206, 208.

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.[83] They were also criticized for using improper judicial methods, including weak textual analysis and a partisan approach to the Constitution.[84] And they were rejected on institutional grounds, for disrespecting popular will and undermining democracy.[85] 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 *Gibbons*.

Taken as a set, the foregoing examples show that Schlesinger's "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 catchphrases) derived only loosely from its author's exposition.[86] The term's heft also owes a great deal to the broader history of American judicial critique, a history that current uses of the term cannot fully escape.

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[83] *E.g.*, Spencer Roane, *Hampden Essays*, RICH. ENQUIRER (June 11–22, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 108 (Gerald Gunther ed., 1969) (denouncing "[t]hat legislative power which is every where extending the sphere of its activity and drawing all power into its impetuous vortex," and "[t]hat judicial power which . . . has also deemed its interference necessary").

[84] *E.g.*, G. EDWARD WHITE, 3–4 THE OLIVER WENDELL HOLMES DEVISE: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 521 (Abridged ed. 1991) (quoting 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").

[85] *E.g.*, *id.* at 561–62 (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").

[86] *Cf.* RODGERS, *supra* note 8, at 222 (describing how a different political word "rose on the crest of its historic moment, wrenched from purpose to purpose, fillable and refillable with meaning, tugged at by ever more hands, . . . reiterated in its career the central dynamics of our political talk").

C. Modern Interpretations

This Article has thus far argued that judicial activism is more than just 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' bewilderment at the diverse meanings applied to judicial activism,[87] I would arrange modern definitions as follows: (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.[88] If these four were the only possible interpretations of judicial activism, the term might indeed be too confused to keep. Flaws in existing definitions, however, illustrate the need for a new approach, and likewise indicate how a 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 when judicial errors are stark and consequential, they do not necessarily qualify as activism. Some mistakes

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[87] *E.g.*, 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."); Kmiec, *supra* note 1, at 1443 ("'[J]udicial 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.").

[88] *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); 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 . . . ."); 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."); 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").

result from judicial incompetence, for example, and it is clear that incompetents are only sometimes activists. Thus, despite some link between judicial errors and judicial activism, the two are not equivalent. 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 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.[89] In modern times, this definition appears everywhere from political science journals to law reviews to the *New York Times*.[90] On the

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[89] *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 McCloskey 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: THE CONSTITUTION IN AMERICAN CULTURE 374 (2006) (quoting McCloskey).

[90] *See, e.g.*, Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1701–02 (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 HASTINGS 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 . . . [apply to state] supreme courts: negation of policies that were democratically adopted, alteration of earlier court doctrine, and making of substantive policy.").

positive side, to define activism as invalidation would link pre-New Deal activism concerning liberty of contract with post-1947 activism concerning an array of individual rights.[91] But there are two problems. First, a focus on examples of judicial *review* fails to condemn judicial *activism*, because a key function of post-*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.[92] If activism meant any statutory overrule, then such antipathy would be largely misplaced. Second, even empiricists know that not every statutory invalidation is activist.[93] Yet without a more nuanced definition, no one can determine whether a few, many, or most judicial decisions striking down statutes are truly activist.

An example will illustrate both points: If Congress banned political sedition, or authorized the race-based punishment of American 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 impressionistic proxy for activism.[94] In so doing, empirical accounts implicitly exchange all plausible definitions of judicial activism for a solid data set. Although the quantitative study of judicial decisions invalidating statutes may be worthwhile in its own right, such analysis holds no adequate definition of 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 offered taxonomies of activism, accompanied

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[91] *See supra* notes 51–61 and accompanying text.

[92] SUNSTEIN, *supra* note 3, at 42 (observing that for many the "word 'activist' isn't merely a description" but is "always an insult"); Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1790 (2004) ("It is a standard constitutional trope to tar the Supreme Court with the charge of 'judicial activism!' whenever the Court does something a particular critic dislikes."); David Kairys, *Conservative Legal Thought Revisited*, 91 COLUM. L. REV. 1847, 1851 (1991) (book review) ("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.").

[93] *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.").

[94] *See, e.g.*, *id.* at 1773–74 ("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." (footnotes omitted)).

by a meek suggestion that speakers should specify which meaning of the term they intend to use.[95] In principle, such scholarship recognizes the importance of judicial activism, and seeks to clarify the term's sophisticated meaning. In practice, however, such arguments validate many definitions of activism, listing several options and encouraging consideration of hybrid forms or other unexplored definitions.[96] This approach thus reduces to defining "judicial activism" as "any or all of the above." Such frameworks only 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 a certainly plausible 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 previous studies of activism have not considered interactions among 1947, pre-1947, and post-1947 judicial history, no definition of "judicial activism" has emerged to describe a coherent concept of judicial activism. This shortfall explains why current efforts to define the term 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 further, let me address the plausible objection that "judicial activism" should *not* be salvaged, but should instead be unceremoniously interred or abandoned to incoherence. If the varied and conflicting current interpretations of "judicial activism" discussed above were the only available options, I might agree.[97] 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.[98]) And so long as judicial activism

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[95] *See, e.g.*, Young, *supra* note 3, at 1171–72 (suggesting that the terms "activism" and "restraint" are "useful only if careful attention is paid to their limitations as descriptors," but not as overarching concepts); *see also* Kmiec, *supra* note 1, at 1475.

[96] *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.").

[97] *See supra* Part I.C.

[98] *See, e.g.*, ROOSEVELT, *supra* note 5, at 3; McKee, *supra* note 87, at 1716; Posner, *supra* note 3, at 54 n.74.

remains the public's dominant means of evaluating judges, legal experts who dismiss the term may be misread as endorsing limitless, freewheeled judging.[99] Rather than simply restating flaws in modern definitions of activism, this Part experiments with an affirmative project: seeking to reconceive activism as a limited concept grounded in our history of judicial critique. I believe that this approach has not been adequately tried, and may deserve some effort.

This Article offers two specific reasons to care about judicial activism. First, I propose that judicial activism debates represent cultural discussions about judicial role. Such discussions are crucial to our legal system's operation, and legal scholars play a special role in developing unenforced "internal norms" of judicial behavior.[100] If my analysis is correct, then activism debates are indispensable, and this conceptual point remains true regardless of whether one prefers "judicial legislation," "aggressive judging," or some other rhetorical creature.[101] 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 it. As one study declared, "Americans are

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[99] *Cf.* WHITE, *supra* note 84, 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 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.").

[100] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 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 considerable weight.").

[101] 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 penetrate public discourse much better than specialized jargon.

arguing about the future of the federal judiciary," and such debates will only intensify under the Obama Administration.[102] The question of how scholars participate may depend on their ability to understand and reformulate activism-talk. Now is the time to probe gaps between public and scholarly discourse, especially if such schisms can be narrowed.

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

A. Judicial Activism, Judicial Role

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

1. Judging Without a Leash

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

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[102] CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?, at vii (2006). The retirement of Justice David Souter and the nomination of Judge Sonia Sotomayor have spurred a new rash of discussions about judicial activism, which Obama has sought to deflect with words like "empathy" and "justice." *See, e.g.*, Peter Baker, *Favorites of Left Don't Make Obama's Court List*, N.Y. TIMES, May 26, 2009, at A12 ("Mr. Obama is already taking heat from conservatives for saying he favors appointing someone who shows 'empathy,' a word the right views as code for judicial activism."); Warren Richey & Linda Feldmann, *Sotomayor Opponents in Weak Field Positions so Far*, CHRISTIAN SCI. MONITOR, May 26, 2009, at 2 (quoting President Obama as saying that life experience "can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live," and that such experience is "a necessary ingredient in the kind of justice we need on the Supreme Court"); Joseph Williams, *Obama May Break with Tradition for High Court Pick*, BOSTON GLOBE, May 2, 2009, at 8 (quoting President Obama as saying, "I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving as just decisions and outcomes"). It is not clear whether that strategy will succeed by encouraging the public to endorse broad ideas of judicial function, or will fail by provoking criticism that the President has effectively embraced "activist" judging. *Cf.* Editorial, *The ABA Plots a Judicial Coup*, WALL ST. J., Aug. 14, 2008, at A12 (admonishing that America should "keep the judicial nominating process democratically accountable and transparent," despite risks of "'really rancorous debates' in the confirmation process").

alter or influence.[103] But these are hardly the phenomenon's most common or important examples. The high transactional costs of enacting legislation also insulate Supreme Court interpretations of common law and statutes from outside review; even trial courts and courts of appeals make unsupervised decisions in particular contexts, as with certain judgments of acquittal, settlements, and cases that are clearly not certworthy.[104]

The idea of unsupervised judging is carved into our constitutional bedrock.[105] 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 guarantees.[106] 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.[107] This dynamic is not just the result of judicial review and constitutional law. Instead, 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-

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[103] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1986) (discussing legislative majorities' difficulty in overcoming judicial decisions that interpret the Constitution).

[104] *See, e.g.*, Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 741–42 (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.").

[105] Unsupervised judging thus tracks Bickel's concept of "countermajoritarian difficulty" only loosely. *See* BICKEL, *supra* note 103, at 16. Bickel coined his term to refer to judicial review, which is not explicitly prescribed in the Constitution.

[106] *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] The Framers and successive generations have repeatedly declined to provide for congressional review of judicial decisions. *E.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 29 (Sanford Levinson ed., 4th ed. 2005) (noting a failed proposal of this sort by John Marshall).

making are not systematically problematic, others certainly are.[108] In simplest terms, judicial might does not make right, and Justice Jackson was wrong to quip that the Court is "infallible because [it is] final."[109] An inability to reverse judicial decisions is not a conclusive justification, and certain judicial abuse deserves criticism as "activist" even though it retains full operative force.

As an illustration, consider the difference 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.[110] Yet that insulation does not empower all aspects of a judge's preference. The term judicial *autonomy*[111] goes too far, for it is not simply the judge's "self" that should govern—not her personal preferences about particular litigants, lawyers, parties, results, or even principles. Instead, judicial independence exists to empower judges in their role as judges, that is, as articulators of proper legal decisions. Fields of judicial discretion imply more than just a freedom to decide as one pleases; such discretion carries a responsibility to decide using the good judgment appropriate for a judge in such circumstances.[112] The concept of judicial activism likewise exists to delineate abuses of judicial power and discretion that countervene cultural norms regarding judicial role.

This link between judicial activism and judicial role is bolstered by the historical discussion in Part 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 because it went beyond the limits of judicial propriety.[113] The same is true for activism with respect to *Brown*, Warren-era rights cases, and Schlesinger's essay itself. Allegations of non-judicial decision-making are thus the *conceptual* core of judicial activism, regardless of whether such critiques march under judicial activism's rhetorical banner.

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[108] Compare the legitimate exercise of judicial review, discussed *supra* note 94 and accompanying text, with *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), discussed *supra* notes 69–79 and accompanying text.

[109] Brown v. Allen, 344 U.S. 443, 540 (1953).

[110] *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 299 (1996); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 319–20 (1999).

[111] Autonomy can be defined as "the condition of being controlled only by its own laws, and not subject to any higher ones." 1 OXFORD ENGLISH DICTIONARY 807 (2d ed. 1989).

[112] *Compare* 4 *id.* at 756 (defining "discretion" as the "uncontrolled power of disposal"), *with id.* (defining "discretion" as "discernment; prudence, sagacity, circumspection, sound judgement").

[113] *See supra* Part I.B.

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.[114] Those beliefs, in turn, are influenced by cultural expectations that arise from education, experimentation, debate, and experience.[115]

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.[116] 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.[117] 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 views 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 what judges should do. From hardboiled practitioners to abstruse scholars, we ceaselessly dispute examples and principles of good judging. Such conversations are the most important part of judicial activism debates, regardless of whether the word "activism" is actually used. Discussions of what could be called a "rule of law" ideology are a key part of legal training,

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[114] *See* sources cited *supra* note 100.

[115] *See* WHITE, *supra* note 84, at 467–73 (analyzing the freedoms and limitations that judges face as a result of their culturally constructed political role).

[116] *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 129–34 (2008).

[117] *See, e.g.*, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(1) (2000) ("A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism."), *available at* http://www.uscourts.gov/guide/vol2/ch1.html. This is as close as the Code comes to identifying judges' adjudicatory role, and the Commentaries to this Canon offer no guidance as to what "professional competence" might mean. *See also* Charles Fried, *A Meditation on the First Principles 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 judge distinct and generates the ethical restraints on those who inhabit that role").

designed to create lasting cultural norms of restraint and propriety.[118] 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 law's credibility 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 substantive knowledge and experience she might have about the law, such a judge would be horribly uninformed about her job. One can barely conceive of 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 are otherwise.

B. Self-Confessed Heterodoxy

The foregoing account of judicial activism 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 ideologies or 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 applying the label "judicial activism" only to progressive decisions. That approach might track Schlesinger's use of the term and its subsequent 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 boosts liberty might also seem superficially plausible, but *Dred Scott* and *Lochner* stand to the contrary. Though both activist decisions enhanced particular forms of liberty and property rights, it is absurd to view *Dred Scott*'s pro-slavery judgment as promoting liberty, and it is debatable whether *Lochner*'s liberty of contract

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[118] *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004); Richard H. Fallon, Jr., *'The Rule of Law' as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 2 (1997).

submerged the greater liberty of exploited workers to avoid harm.[119] The fact that so many judicial cases involve competing liberties makes it hard to see liberty-promotion as somehow decisive in defining judicial activism.

Another problem for liberty-based definitions of activism is deciding what liberty might mean in this context. Even liberty's most conventional aspect—its opposition to governmental power—creates difficulties. For example, Edward Purcell has shown that *Lochner*-era constitutional decisions, which favored business interests against the government, are closely tied to decisions that favored interstate corporations over poorer individuals.[120] It is implausible that cases against the government might be activist, but cases against private parties categorically are not. Much administrative law allows enforcement by either private lawsuits or governmental ones.[121] And it is not credible, for example, that judicial decisions affirming property rights against the EPA could be activist, but identical decisions against private environmental plaintiffs cannot. Contrary to most modern interpretations, I suggest that judicial activism lacks any essential link to progressive politics or liberty.

A second unconventional feature of my analysis is that judicial activism does not depend on a court's deference to other political entities. Many scholars have claimed that judicial activism is identified by inadequate respect for Congress or the executive branch.[122] 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. Indeed, under my approach a judge can be activist by deferring too much, thereby authorizing excessive governmental

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[119] *Cf.* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1856–1920, at ix–xii (2001) (describing how American conceptions of "liberty" changed in industrialized America).

[120] PURCELL, *supra* note 52, at 3–11.

[121] *See, e.g.*, Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 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 Federal Communications Commission's issuance of a radio license).

[122] *See, e.g.*, BICKEL, *supra* note 103, at 16–17; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 45 (1990); SUNSTEIN, *supra* note 3, at 42–43 ("[I]t is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government, especially those of Congress."); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87–105 (2001); Cross & Lindquist, *supra* note 90, at 1701–06; Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931, 1949 (2007).

power. And a judge can refuse to defer without being activist, thereby properly enforcing the law. A few examples will illustrate these points.

Cases of excessive judicial deference include *Korematsu* and *Yamashita*.[123] *Korematsu* affirmed a defendant's conviction for violating certain racially based military orders, under which 100,000 Japanese–Americans were interned.[124] Under conventional analysis, *Korematsu* could not qualify as activist because the Court's decision (i) denied individual rights and (ii) "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.[125] The Court sanctioned executive violence against Korematsu, just as in other criminal cases,[126] and the Court issued a precedent on executive detention that "lies about like a loaded weapon."[127] 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 with respect to 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 of war crimes by a military commission.[128] 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 favoring liberty or

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123 *In re* Yamashita, 327 U.S. 1 (1946); Korematsu v. United States, 323 U.S. 214 (1944).

124 For strong histories of *Korematsu*, see FERREN, *supra* note 13, at 246–49; PETER IRONS, JUSTICE AT WAR 48–74 (1983); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 286–308 (2004).

125 *See* sources cited *supra* note 124.

126 *Cf.* Robert M. 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.").

127 *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

128 *Yamashita*, 327 U.S. at 25–26.

property, can either follow or violate cultural norms of judicial role; under my approach, all of the norm-violative cases are activist.

My final example concerns *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.[129] The Court ruled that under federal constitutional law neither slaves nor descendants of African slaves could hold federal or state citizenship; thus, Scott was not a "citizen" of a different state from the defendant for purposes of diversity jurisdiction.[130]

If judicial activism turned solely on political deference, *Dred Scott*'s activist status might be questionable. On one hand, to deny jurisdiction is an arguably paradigmatic act of judicial restraint.[131] *Dred Scott* also left slavery's status in the hands of state law and state courts, which also might seem judicially passive.[132]

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 access to federal courts under diversity jurisdiction.[133] 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.[134] Similarly, in ruling that Scott was a slave, the

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[129] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[130] Under modern reasoning, the Court should have focused on the statute, rather than the Constitution. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).

[131] *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 "[b]ecause 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 C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 6 n.22 (2001) (proposing several connections between jurisdictional limits and judicial self-restraint).

[132] *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1447–48 & nn.172–76 (1999) (discussing and questioning this vision of federalism-based self-restraint).

[133] *Dred Scott*, 60 U.S. (19 How.) at 393.

[134] The Court in *Dred Scott* equated the word "citizen" with the term "the people." *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." *Id.* at 404. Because several provisions of the Bill of Rights use "the people," U.S. CONST. amends. I, II, IX, X, this raised a disturbing question whether, in the Supreme Court's view, all black people—slave, emancipated, and free-born—could solely because of race be denied

Court invalidated part of the Missouri Compromise, and cast doubts upon the authority of territorial governments and even free states to restrict slavery.[135] None of these determinations seems at all passive or deferential.

Regardless of how one might ultimately balance the "deferential" and "non-deferential" aspects of the *Dred Scott* decision, I propose that establishing the decision's activist status does not require such split hairs, any more than it requires promoting "liberty" or progressive politics.[136] *Dred Scott*'s activism, in a conceptually meaningful sense, 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. I have thus far chosen uncontroversial examples of activism to deliberately avoid explaining how to identify cultural norms of judging and 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 norms of judicial conduct, this Part seeks agreement on 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, this Article 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."[137]

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constitutional rights granted to all other citizens. *See also* FEHRENBACHER, *supra* note 67, at 344–46 (describing similar concerns with respect to *Dred Scott* and the Privileges and Immunities Clause).

135 *Dred Scott*, 60 U.S. (19 How.) at 391–92.

136 *See supra* notes 119–28 and accompanying text.

137 CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 48–49 (1969).

This Part considers 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 each is too inflexible to accommodate federal courts' dynamic history and potential. Section C discusses the academic work of Antonin Scalia, our most famous living analyst of judicial role. Though Scalia's scholarship cites historical sources, we shall see that his analysis of judicial role is nearly as abstract 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 maintain judicial conduct's long-term legitimacy and effectiveness.

A. Shortfalls of Text and History

To explore limits on judicial power, one starting place is the 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 any particular vision of judicial decision-making. As a textual matter, I conclude that 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.

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 applied.[138] Of course, the Constitution places federal judges in a distinct

[138] *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

branch of government, which shows at least some commitment to a separation of powers. But the inference that judges are "not Congress" and "not the President" is no help.[139] On the contrary, the Constitution's text shows that the Framers left almost all judicial details to Congress—including the existence of lower federal courts, the availability of juries in civil trials, the pertinence of common law, the existence of judicial review, and the relationship between courts' legal determinations and those of other branches.[140]

The Judiciary Act of 1789 and later legislative reforms also did not textually codify a specific vision of activism or judicial 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."[141] 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).[142] Congress gave no instructions, however, about how judicial decisions should issue, how judicial activities should fit those of other political actors, or how judges should generally

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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.").

[139] *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) (explaining difficulties in reaching specific constitutional conclusions based on broad structural premises).

[140] JULIUS GOEBEL, JR., 1 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 246–47 (1971) (explaining the Framers' intent).

[141] *Cf.* Maeve Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 80, at 13, 30 ("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 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 84, at 113–14 (discussing the various judicial powers that flowed from jurisdiction in this period).

[142] RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320–21 (5th ed. 2003); RITZ, *supra* note 138, at 67–70.

conceive of their new office. Such legislative micromanagement may have seemed unnecessary or improper; or perhaps 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.[143]

2. *Original Indeterminacy*

Just as statutory and constitutional texts do not specify a 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 that accompany legal enactments.[144] 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 flash-frozen and incorporated into law at important points in judicial history.[145] Two such "federal courts moments" are the constitutional Founding and the enactment of the First Judiciary Act.[146]

Neither of these periods 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. Prior generations of judges operated under practices and ideas that are heretical today. And this is why, despite originalism's adherents in other contexts, there are no originalists on topics of judicial role and judicial activism.[147] The history of federal courts moments,

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[143] *See* PETER CHARLES HOFFER, 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).

[144] PURCELL, *supra* note 63, at 13; Rahdert, *supra* note 24, at 647.

[145] The text's evocative imagery is not intended to deride originalism as "wooden," "unimaginative," or "pedestrian." *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts in a Civil-Law System*] (warning against such casual dismissiveness).

[146] This idea of "federal courts moments" is loosely borrowed from Bruce Ackerman's innovative analysis of "constitutional moments." *See generally* 2 ACKERMAN, *supra* note 62, at 5–8 (discussing dualism's relevance to the Constitution's Founding).

[147] *Compare* Gordon S. Wood, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 145, at 49–65 (discussing the historical role of judges during this period), *with* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 145, at 129–33 (discussing the author's own, comparatively strict view of judicial role).

just like other episodes of judicial history, must be absorbed on a translated and retail basis, not a simple or wholesale one.

a. Framing-Era History

In analyzing original constitutional notions of judicial role, two important sets of materials are the contrapuntal essays of Alexander Hamilton and "Brutus,"[148] and the eighteenth-century practice of state courts. Hamilton's *Federalist No. 78* is the Judiciary's greatest Framing-era defense, and it includes a particularly important characterization of federal courts as the "least dangerous" branch.[149] Hamilton explained that the federal Judiciary holds the least capacity to injure the Constitution's political rights because it has

> no influence over the [President's] sword or the [congressional] purse, no direction either of the strength or of 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.[150]

To careful readers, these familiar words are 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. Such lawless scenarios hardly seem palliative, and our tradition of federal loyalty to Supreme Court rulings has excised political disobedience from any mainstream defense of judicial power.[151]

Other parts of the quoted paragraph might seem more relevant to activism debates. For example, Hamilton's view that federal judges must use "judgment" not "will" tracks the uncontroversial difference between judicial independence and judicial autonomy.[152] To say that judges should not do literally whatever they like, but should instead use "judgment" and "discretion" is a good start, but it is nothing more. Hamilton's claim that courts "can take *no active resolution*" may also seem minor, if it means that courts must hear

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148 *See* White, *supra* note 80, at 103 n.33 (noting that the identity of Brutus "has been a subject of debate," but concluding that "he was Robert Yates, a New York lawyer and judge").

149 THE FEDERALIST NO. 78 (Alexander Hamilton), *in* THE FEDERALIST WITH LETTERS OF "BRUTUS" 378 (Terence Ball ed., 2003).

150 *Id.*

151 *See generally* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005).

152 *See supra* text accompanying notes 110–12 (discussing judicial independence and judicial autonomy).

cases brought before them.[153] Federal courts' docket controls are undeniably different from congressional and presidential discretion over their activities.[154] But this again says little about how courts should treat cases that are properly presented.

By contrast, Hamilton's claim 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 argument that "the judiciary is next to nothing."[155] Hamilton knew better, and his exaggeration was propaganda to calm New Yorkers' nerves. In any event, because *Federalist No. 78* never confronts the realities of unsupervised judging, the essay is quite unhelpful as a guide to judicial activism.[156]

Striking a very different tone, Brutus's essay was quite focused on the 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 may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or contro[l] their adjudications. From this court there is no appeal.[157]

Brutus further noted that the Constitution's sweeping language endorsed an expansively "equitable" rather than "legal" approach to judging, and he

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[153] HAMILTON, *supra* note 149, at 378. *But see* GOEBEL, *supra* note 140, 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]").

[154] *See, e.g.*, Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (Henry P. Johnston ed., 1970) (declining to issue the Washington administration an advisory opinion concerning U.S. treaty obligations).

[155] HAMILTON, *supra* note 149, at 378 (quoting CHARLES MONTESQUIEU, 1 SPIRIT OF LAWS 186 (n.p. 1748)).

[156] 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 149, at 465; *see also* Louis H. Pollak, *The Constitutional and Historical Origins of Judicial Independence: Testimony of Louis H. Pollak Before the Commission on Separation of Powers and Judicial Independence, October 11, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 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." (first ellipsis in original)).

[157] Robert Yates, *The Anti-Federalist No. 15*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 295 (Ralph Ketcham ed., Signet Classics 2003).

suggested that English precedents might support that result.[158] Thus, Brutus concluded that Supreme Court Justices, with their independence from governmental and public oversight, "will generally soon feel themselves independent of heaven itself."[159]

Despite Brutus's clear recognition of judicial activism's danger, his essay is hardly an authoritative Framing-era analysis of judicial power. He wrote for ratification's losing side, and was interested only in criticizing, rather than containing, the constitutional phenomenon of unsupervised judging.[160] Just as Hamilton overstated federal judges' distance from social policymaking, Brutus correspondingly blustered 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."[161] Accordingly, although Brutus and Hamilton indicated varying awareness of unsupervised judging, there is no evidence that either of them saw the Constitution as legally channeling it.

A second set of Framing-era materials concerns eighteenth-century state courts, which were models near at hand when early Americans crafted federal courts.[162] During this period, however, state courts varied immensely in their composition, function, and role.[163] 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 inferior courts."[164]

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158 *Id.*

159 *Id.*

160 *See* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 553 (2006) (summarizing Brutus's criticism of the amount of power given to judges).

161 Yates, *supra* note 157, at 297.

162 *Cf.* GOEBEL, *supra* note 140, 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.").

163 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 140, at 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 138, at 42 ("In 1787–89 there were almost as many different types of judicial systems in the American states as there were states."); *id.* at 37–38 ("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."); *id.* at 35 ("[In 1787,] the process of organizing the state judicial systems was in a state of flux.").

164 RITZ, *supra* note 138, at 27.

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."[165] In many states, although "superior courts" had more member judges than trial courts, they were not limited to or capable of producing broad legal precedents.[166] On the contrary, state "appellate" courts often simply reheard cases de novo and produced fact-bound rulings similar to trial courts.[167]

The Framers largely rejected these state-court models. Most importantly, the federal system's capstone Supreme Court almost always heard its cases "by writ of error," that is, on pure questions of law.[168] Thus, it seems likely that eighteenth- and nineteenth-century state courts mimicked the *federal judicial system*, rather than federal courts mimicking state courts.[169]

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,[170] and the Framers left matters almost entirely in the hands of Congress and the courts themselves. It would have seemed premature under such circumstances for the Constitution to hard-wire notions of judicial role, and there is no original history indicating that the Framers tried to do so.

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165 *Id.* at 51.

166 *Id.*

167 *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.").

168 *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).

169 *See infra* note 172 and accompanying text (quoting Chief Justice Jay's grand jury charge).

170 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 know even the number of Justices he would be required to appoint." Marcus, *supra* note 138, at 27.

b. The First Judiciary Act

When James Madison joined the House of Representatives in 1789, he wrote that the First Congress had entered "a wilderness without a single footstep to guide us."[171] Early federal judges felt the same. John Jay's first grand jury charge as Chief Justice declared that "the formation of the judicial department [was] particularly difficult. . . . No 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."[172]

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.[173] 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.[174]

Modernists can barely grasp how federal courts worked in 1790. The Judiciary was staffed by just nineteen judges, and in its first three years, the Supreme Court produced a total of only five decisions.[175] Chief Justice Jay remained continuously active in partisan politics while on the bench, until he quit in 1795 to run for governor.[176] 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.[177] Circuit

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171 Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 12 THE PAPERS OF JAMES MADISON 267, 268 (Charles F. Hobson et al. eds., 1992).

172 John Jay, The Charges of Chief Justice Jay to the Grand Juries on the Eastern Circuit at the Circuit Courts 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 (May 20, 1790), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 387, 390 (Henry P. Johnston ed., 1970).

173 The only possible exception is § 34 of the First Judiciary Act, which has been the subject of endless twentieth-century debate. *See* RITZ, *supra* note 138, at 8–12, 25–26, 126–48 (discussing the controversy). Section 34 often appears in modern discussions of federal common law and *Erie Railroad Co. 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) (discounting the statute's significance to such issues); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1559 n.51 (1992) (defending the statute's importance).

174 *E.g.*, GOEBEL, *supra* note 140, at 457–508 (recounting process of drafting and adoption of First Judiciary Act of 1789); RITZ, *supra* note 138, at 22–24 (explaining congressional compromises and issues set aside).

175 WHITE, *supra* note 7, at 10.

176 *Id.*

177 *Id.* at 45.

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.[178] On the other hand, the strain of riding circuit hastened some Justices' retirement and death, thereby decreasing the job's desirability and the pool of potential candidates.[179] Because circuit court opinions were mostly unpublished, the Justices' public influence was frequently exercised through grand jury charges, and such speeches were sometimes highly publicized, polemical commentaries on contemporary law and politics.[180]

Even when the Court sat in its collective capacity, the Justices issued *seriatim* opinions, which seemed appropriate in an era when a precedent's force derived from a decision's contextualized results rather than the Court's expressed views.[181] When the federal capital moved to Washington in 1800, Congress neglected to give the Court its own home.[182] 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

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[178] Two Supreme Court Justices were required for each of the three original circuits. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75; WHITE, *supra* note 84, at 161–63 (discussing the Court's circuit riding practices).

[179] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 323–26 (1973) (noting the great dearth of reported opinions in the Early Republic); GOEBEL, *supra* note 140, at 553–54 & n.9 (noting various illnesses and retirements that were accelerated by the early Justices' circuit riding); CARL B. SWISHER, 5 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 262 (1974) (explaining that, even in the Taney era, "some [circuit opinions] were published and others were not"). *But cf.* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1412 (2006) (proposing, somewhat heartlessly, to thin the ranks of older, less mobile Justices by reinstituting this practice).

[180] Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1453 (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.* SWISHER, *supra* note 179, at 262 ("[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." (quoting *The Late Mr. Justice Catron*, 23 LEGAL INTELLIGENCER 132 (1866)).

[181] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990) (describing John Marshall's effect on the Court when he became Chief Justice and significantly reduced the practice of issuing *seriatim* opinions).

[182] JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 284 (1996) ("So lightly was the Court regarded, 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.").

confidence and respect which, as the last resort of the justice of the nation, it should possess."[183] 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."[184]

All available legislative and judicial history suggests that the First Judiciary Act and other jurisdictional statutes did not codify any vision of judicial role or activism. Judicial practice in the Early Republic also shows that, even if there had been a dominant eighteenth-century view of judicial role, such antiquated norms would be unacceptable 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.[185]

An important example of the latter differences concerns common law's role in federal adjudication. Jurists in the early nineteenth century recognized a quite porous border between constitutional, statutory, and common-law judging.[186] 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.[187] Even constitutional rulings that did not explicitly cite such diverse authorities often plugged natural-law concepts into the Framers' gap-riddled text.[188] All of this seemed sensible at the time, because statutory sources were scarce, and American jurists had forged their views of judicial

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[183] WHITE, *supra* note 7, at 11.

[184] *Id.*; BICKEL, *supra* note 103, 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.").

[185] *See, e.g.*, 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).

[186] *See id.* 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.").

[187] WHITE, *supra* note 84, at 451 (discussing the Court's admiralty jurisdiction); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 284–85 (1999) (discussing admiralty lawsuits); *see also* 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.").

[188] WHITE, *supra* note 7, at xii.

role using common-law materials from England and the colonies.[189] Today, however, the methodological eclecticism that suited judges in the Early Republic would embarrass any modern effort to apply flash-frozen ideas of judicial propriety derived from eighteenth-century jurisdictional statutes.[190]

Original history does not indicate that the First Congress, or any successive Congress, prescribed specific standards of federal judicial role or judicial excess. When legislators established and organized the courts, they left judges to their own devices in discerning 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, H.L.A. Hart, John Austin, and others.[191] Legal thinkers have for decades turned to such work as guidance in discussions of judicial role, with the idea of deriving determinate notions of judicial activism from more general analysis of the nature of law.[192]

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[189] *See, e.g.*, THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 350 (5th ed. 1956) (asserting that common law, as it existed during the Framing-era, was built on customs with inherent flexibility for changing circumstances); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770 n.267 (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.'" (quoting ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 33 (1963))).

[190] *See* WHITE, *supra* note 84, 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.").

[191] *E.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); H.L.A. HART, THE CONCEPT OF LAW (1961) ; HANS KELSEN, PURE THEORY OF LAW (Max Knight ed., 2d ed. 1967) ; JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1970).

[192] *See* Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 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, influential, and apparently powerful. While Dworkin does avoid virtually

Examples of '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.[193] For example, in contemplating the nature of law, jurisprudential scholarship might discuss whether law includes morality, when legal propositions qualify as valid, or how law should be "interpreted." But it is less likely to discuss the practical details of lawyers, clients, remedies, and institutional prerequisites to exercising judicial power: how a President's legal interpretation might differ from that of a judge; when judges should defer to other entities' legal decisions; or how much weight stare decisis should carry. These institutional questions dominate discussions of judicial role and activism, but they are underemphasized in most high legal theory.[194]

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

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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 LAW & PHIL. 161, 163 (1994) (arguing that judicial activism should be feared on democratic and jurisprudential grounds); Christopher J. Peters, *Adjudication as Representation*, 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 LAW & PHIL. 467, 469 (2002) ("[T]ension 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, 1380–81 (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").

[193] For a rare and recent exception to this generalization, see NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY (2007) (highlighting law's institutional character).

[194] *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 4–5 (2001) ("[T]he Justices have an obligation to produce clear, workable law. . . . Especially in formulating [doctrinal] tests . . . , the Court does not characteristically engage in . . . moral philosophical analysis . . . . Rather, the Court devises and then implements strategies for enforcing constitutional values."); *id.* at 36 ("[A]lthough the Supreme Court is indeed a forum of principle, it is not *only* a forum of principle. The Court must perform a variety of distinctly practical, even tactical calculations in order to implement the Constitution effectively, especially under circumstances of uncertainty and reasonable disagreement.").

significance.[195] Thus, when jurisprudes analyze techniques of "judging," they tend to generalize about *all* judging, regardless of whether federal or state, Canadian or Cambodian, eighteenth- or twenty-first-century.[196] This Article's conception of judicial role has a more ostensibly relativist 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 an ambition to discover 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 scholarship of Ronald Dworkin, including his recent book *Justice in Robes*.[197] Dworkin once claimed that his view of "[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."[198] My choice to focus on Dworkin stems from more than his extraordinary reputation.[199] For a variety

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[195] For examples of this phenomenon in legal literature, see Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119 (2002); and Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985).

[196] *E.g.*, RONALD DWORKIN, JUSTICE IN ROBES 145 (2006) (noting that both Dworkin and H.L.A. Hart "believe that we will understand legal practice and phenomena better if we undertake to study, not law in some particular manifestation, like the law of product liability in Scotland, but the very concept of law"); *id.* at 163 ("We want, moreover, to answer these questions not just for a particular legal system, like English law, but for law in general, whether in Alabama or Afghanistan, or anywhere else."); *id.* at 185 ("[M]y account aims at very great generality, and how far it succeeds in that aim can only be assessed by a . . . painstaking exercise in comparative legal interpretation . . . .").

[197] *Id.*

[198] RONALD DWORKIN, LAW'S EMPIRE 378 (1986); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 137 (1977) ("The program of judicial activism holds that courts . . . should work out principles of legality, equality, and the rest, [and] revise those principles from time to time in the light of what seems to the court fresh moral insight . . . .").

[199] *E.g.*, Alan Hunt, *Reading Dworkin Critically*, *in* READING DWORKIN CRITICALLY 1 (Alan Hunt ed., 1992) (calling Dworkin "probably the most influential figure in contemporary legal theory"); Gregory Bassham, *Freedom's Politics: A Review Essay of Ronald Dworkin's* Freedom's Law: The Moral Reading of the American Constitution, 72 NOTRE DAME L. REV. 1235, 1235 (1997) ("Ronald Dworkin is America's leading philosopher of law—arguably the greatest philosopher of law this country has ever produced."); Himma, *supra* note 195, at 1187 ("The most famous critic of positivism is, of course, Ronald Dworkin, whose place in the history of philosophy and legal theory has been secured largely by his criticisms of positivism and his attempt to develop a viable alternative."); *see also* Neil MacCormick, *Mr Justice*, TIMES LITERARY SUPP., Dec. 7, 2007, at 3 (noting that Dworkin received the 2007 Holberg Prize, a "recently established Nobel-type prize for the Humanities").

of reasons, his work might be thought immune to the foregoing concerns about abstraction.[200] Despite Dworkin's attention to 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 these concerns.

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."[201] "[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."[202] 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."[203]

To revisit my general critique of high theory, Dworkin's question about morals and law is non-institutional because it applies to all legal interpreters, including judges, scholars, legislators, and citizens. The question also minimizes the significance of cultural and historical context. Dworkin analyzes the role of morality in law as a matter of universal fact,[204] and he claims that morality is *always* relevant to law, without regard for cultural contingencies or ad hoc particularities.[205] Thus, even if Dworkin's broad

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[200] After all, other theorists have criticized Dworkin's work as not really being a theory of law, but only one of adjudication, and as not being a general theory of law, but only one of law in the United States. *See, e.g.*, JOSEPH RAZ, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN 210, 219–21 (2001) (offering a critique of Dworkin's work); Michael Steven Green, *Does Dworkin Commit Dworkin's Fallacy? A Reply to* Justice in Robes, 28 OXFORD J. LEGAL STUD. 33, 33 (2008) (discussing Dworkin's counterarguments); Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEO. L.J. 393, 401 (2007) (describing the effects of Dworkin's work). As an incidental point of biography, Judge Learned Hand—that paragon for hard-nosed, practical legalists—once called Dworkin his best law clerk. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 671 (1994).

[201] DWORKIN, *supra* note 196, at 2.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 59–60 (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, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 357–60 (1997); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 89–94 (1996).

[205] *See* DWORKIN, *supra* note 196, *passim*.

conclusions about the nature of law were satisfactory for philosophical ends, they are too abstract to answer the institutionally and historically contextualized questions about judicial role described in Part II.

My second example involves a hypothetical that Dworkin uses to describe his theory of legal interpretation. Dworkin imagines a "Mrs. Sorenson" who has suffered heart damage from certain medicine she took.[206] 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.[207] (Dworkin's account mirrors a real-life California case, *Sindell v. Abbott Laboratories*, to which we will soon return.[208]) Rather than discussing whether Mrs. Sorenson should recover, Dworkin analyzes how that legal decision should be made as a matter of first impression.

For Dworkin, 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.[209] What matters is not simply to increase social welfare or yield predictable results. Instead, Dworkinian interpretation seeks to discover a 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.[210]

The first problem in applying Mrs. Sorenson's example to activism debates is that, like other jurisprudential theories, Dworkin's analysis inadequately considers the *institutional* character of judging.[211] 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 institutional distinctions between the judiciary and attentive citizens or scholars.[212] For

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206 *Id.* at 17.

207 *Id.* at 17–18.

208 607 P.2d 924 (Cal. 1980); *see infra* notes 220–29; *see also* DWORKIN, *supra* note 196, at 271 n.1 (acknowledging the link between *Sindell* and Mrs. Sorenson).

209 DWORKIN, *supra* note 196, at 13–18.

210 *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.

211 *See supra* notes 193–94 and accompanying text.

212 "The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice." RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996). Indeed,

Dworkin, the words "adjudication," "interpretation," and "morality" are so closely related that one scholar has wondered whether his analysis ignores law's implementation altogether.[213]

My concern is that Dworkin offers too little guidance about how judges should satisfy their thoroughly institutional role. According to Dworkin, judges should interpret the law and should thereby incorporate morality.[214] But Dworkin never explains the precise 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."[215] As Dworkin describes his own inquiry: "No matter what or who is given final interpretive responsibility, what does our Constitution really mean?"[216] By thus analyzing law and legal interpretation as non-institutional abstractions, Dworkin has increased the philosophical influence of his scholarship, but his work cannot resolve questions of judicial role.

A second problem in using Mrs. Sorenson's example to analyze judicial role is that Dworkin, like other high theorists, chooses to abstract from any particular jurisdiction in time or space.[217] 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. Sorenson's.[218] But he cannot accept that different jurisdictions could grant varying significance to morality itself, or that judges' role in deciding such cases could fundamentally change over time. Though Dworkin seldom says so, his approach implies that Mrs. Sorenson's case should be resolved using exactly the same approach, no matter when or where it might be decided. Such broad and sweeping inflexibility about judicial conduct does

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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." DWORKIN, *supra* note 196, at 57; *see also* FALLON, *supra* note 194, at 28 ("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.").

213 FALLON, *supra* note 194, at 26–36.

214 DWORKIN, *supra* note 196, at 16, 118–20.

215 *Id.* at 120.

216 *Id.*

217 *See supra* notes 195–96.

218 DWORKIN, *supra* note 196, at 16.

not match the United States' judicial history, or the variety in state and federal judiciaries.

Many details of our judicial history have already been discussed,[219] but an example tailored to Mrs. Sorenson's case concerns Justice Roger Traynor, who served the California Supreme Court from 1940 to 1970.[220] During Traynor's tenure, California witnessed a redefinition of judicial role and activity as radical as any in United States history. Part of this transformation owed to the speed of California's economic and political development in its first century of statehood.[221] California's liberal social policies also heightened the challenge because the "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."[222] The California judiciary thus "faced the recurrent task of defining its role as a contributing institution to the 'welfare state' system of government."[223]

Traynor described his approach to these challenges metaphorically, as "careful[ly] pruning" the law under conditions of "vigorous growth," or as

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219 *See supra* Parts I.B, III.A.

220 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."); *see also* Warren E. Burger, *A Tribute*, 71 CAL. L. REV. 1037, 1038 (1983) (noting that he is "one of the great contemporary figures of the law"); Henry J. 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) (referring to Traynor as "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 J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635 (1958); Roger J. Traynor, La Rude Vita, La Dolce Giustizia*; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962); Roger J. Traynor, *The Law's Response to the Demand for Both Stability and Change—The Judicial Response: Better Days in Court for a New Day's Problems*, 17 VAND. L. REV. 109 (1964); Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615 (1961); Roger J. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739 (1970).

221 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 . . . dramatiz[ed] the pressure placed on *stare decisis* by rapid social change.").

222 *Id.*

223 *Id.* at 246.

"synchroniz[ing] . . . the unguided missiles launched by legislatures."[224] In more direct terms, Traynor's view of judging has been described 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."[225]

In *Sindell*—the real-world version of Mrs. Sorenson's case—Traynor's assessments of judicial role were doubly important. Traynor wrote the first American opinion to endorse strict products liability,[226] and the Justice who authored *Sindell* (itself the first case to apply market-share liability) celebrated Traynor's tort precedents as an influential guide.[227] From Traynor's real-world perspective, the answer to whether plaintiffs like Mrs. Sorenson should recover thus depends 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.[228] It might be that Traynor's use of judicial power was, even for the California of his day, activist and improper.[229] Regardless of

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[224] Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 236; Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 402 (1968).

[225] WHITE, *supra* note 7, at 255; *id.* at 257 ("He rejected the image of the branches of government as 'those of a hatrack, fixed and therefore incapable of movement.'" (citation omitted)).

[226] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring); *see also* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963) (Traynor, J.) (unanimously adopting the *Escola* concurrence's analysis of strict products liability). A panel of experts in 1996 recognized *Greenman* as the most important tort-law development in fifty years. *See* J. Edward Johnson, *Roger J. Traynor*, *in* 2 HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA: 1900–1950, at 182, 193 (J. Edward Johnson ed., 1966) (discussing *Greenman*).

[227] Sindell v. Abbott Labs., 607 P.2d 924, 936 (Cal. 1980) ("Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Co.* recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances." (citation omitted)); Stanley Mosk, *A Retrospective*, 71 CAL. L. REV. 1045, 1048 (1983) ("The Traynor perception of tort liability has encouraged numerous disciples to adapt his principles to other circumstances. . . . Most recently I employed a comparable rationale for our court majority in finding a market share liability in *Sindell v. Abbott Laboratories*.").

[228] *See* DWORKIN, *supra* note 196, at 16–18 (discussing a hypothetical case that is deliberately similar to *Sindell*).

[229] *See* BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR, at xiv (2003); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST

whether certain decisions of Traynor and his successors were activist, however, it seems clear that such 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 Californian courts matter to activism debates, so do circumstances surrounding eighteenth- and twentieth-century federal 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 sure, this Article neither disagrees (nor agrees) with Dworkin's philosophical conclusions, nor does it diminish Dworkin's intellectual importance. My simpler point is that 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 our most prominent living analyst of judicial role, Antonin Scalia.[230] Throughout his quarter-century of judicial service, Scalia has raised his intellectual profile by stridently espousing a limited style of judging in articles, lectures, and judicial opinions.[231] As a result, Scalia has become a unique icon

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L. REV. 473, 490 (2003) ("John Marshall's great labors in establishing judicial review cannot be made to connect in any direct way to Holmes, Pound, Brandeis, Cardozo, and Llewellyn, and on to Traynor, Brennan, Warren, and the pragmatic judicial activism of the late twentieth century in this country."); L. Gordon Crovitz & Stephen Bates, *How Law Destroys Order*, NAT'L REV., Feb. 11, 1991, at 28–33 (decrying Traynor's activism); Steven Hayward, *Golden Lawsuits in the Golden State*, REGULATION, Summer 1994, at 28, 32–33 (criticizing Traynor for raising the costs of doing business in California). *But cf.* Roger J. Traynor, *The Limits of Judicial Creativity*, 29 HASTINGS L.J. 1025, 1032–33 (1978) ("Better the active pilot, sensitive to the currents of the river, than an armchair captain hidebound to a dated rulebook. . . . So constant a responsibility, involving such active thought, resists inclusion within so befuddled a term as activism.").

[230] 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 M. 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").

[231] *See, e.g.*, ANTONIN SCALIA & STEVEN G. CALABRESI, ORIGINALISM: A QUARTER-CENTURY OF DEBATE (2007); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990); Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 22–23; Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417 (2008); Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1 (1989); Antonin Scalia, *Review of Stephen D. Smith's* Law's Quandary, 55 CATH. U. L. REV. 687 (2006); Antonin Scalia, *The*

for political parties and the public on topics of judicial propriety.[232] No Justice is better known or more widely discussed.

This section considers what Scalia has written as a commenter on judicial role, not what he has done as a judge.[233] My main source is his 1995 Tanner lectures, which have been published alongside scholarly responses.[234] Scalia is well-known as an originalist in constitutional law, and as a textualist in statutory interpretation.[235] But his most sweeping analysis of federal courts appears as an attack on what he calls the "common-law attitude" of adjudication.[236] For Scalia, the common-law attitude leads judges to resolve cases by reference to a singularly inappropriate question: "What is the most desirable resolution of [a case], and how can any impediments to the achievement of that result be evaded?"[237] 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.[238] But he does vigorously

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Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989); Mark Morris, *Scalia Criticizes the 'Living Constitution,'* KAN. CITY STAR, Mar. 5, 2008, at B5 (recounting a recent Scalia lecture); Joshua Rozenberg, *Moral Judgments Have No Place in Court*, DAILY TELEGRAPH (UK), Feb. 4, 2008 (reporting on a Scalia lecture in Edinburgh), *available at* http://www.telegraph.co.uk/news/uknews/1573187/Moral-judgments-have-no-place-in-court.html; Associated Press, *Scalia the Traveler*, N.Y. TIMES, Aug. 30, 2006, at A18 (reporting that Scalia took twenty-four expense-paid trips in 2005); Eugene B. Meyer, Letter to the Editor, *What a Junket Is and Isn't*, N.Y. TIMES, Feb. 3, 2006, at A22 (explaining that one of Scalia's seminars included ten lecture-hours in a day and a half, and 481 pages of prepared reading material).

232 *See, e.g.*, Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. TIMES, Apr. 19, 2005, at A20 ("Conservatives . . . frequently point to Justice Antonin Scalia as a model of honest, 'strict constructionist' judging. And Justice Scalia has eagerly embraced the hero's role."); Scott Turow, *Scalia the Civil Libertarian?*, N.Y. TIMES, Nov. 26, 2006, (Magazine), 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.").

233 For an example of the latter form of analysis, see William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1543–47 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997)).

234 SCALIA, *supra* note 233. These lectures and responses seem unique in American judicial history. For although it is rare for modern Justices to write about recent cases, principles, and interpretive methods, *cf.* BREYER, *supra* note 2, it is quite unprecedented to match such work with replies from America's greatest legal philosopher (Ronald Dworkin), most accomplished Revolutionary historian (Gordon Wood), and most respected constitutional scholar (Laurence Tribe). In addition to the commentary included within *As a Matter of Interpretation*, the book also sparked several outstanding reviews. *See* Eskridge, *supra* note 233; David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919 (1998); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1998).

235 Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 23, 38.

236 *Id.* at 3.

237 *Id.* at 13.

238 *Id.* ("[I]n federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law.").

resist applying the common law's "Mr. Fix-it" attitude in cases of statutory or constitutional law.[239]

Scalia's analysis does not use the term "activism," yet his theory is clearly concerned with standards of judicial role. And although Scalia's discussion mixes elements of original history and theoretical jurisprudence, his analysis replicates flaws that we have seen with each of those methods.[240]

First, because Scalia endorses textualism and originalism in matters of substantive law, readers might assume (as I once did) that his view of judging includes some textual or original-historical justification.[241] Not at all. Scalia proffers no Framing-era evidence to explain Article III's grant of "judicial power."[242] Nor do his lectures suggest that textualist-originalist methodologies were imposed on federal courts through statutory grants of "jurisdiction."[243]

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[239] *Id.* at 14 (exclaiming that to undertake statutory interpretation "with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation"); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 576–77 (2004) (Scalia, J., dissenting) (applying Scalia's "Mr. Fix-it" epithet in a constitutional context).

[240] *See supra* Part III.A.2–B.

[241] Of course, it is possible that such originalist evidence would not, without more, offer a fully sufficient justification for Scalia's approach. *See* Eskridge, *supra* note 233, at 1532 ("A formalist not only has to defend *rules* that must be followed, but because rules do not apply themselves, the formalist also has to defend *rules about rules*."); *see also* Sunstein, *supra* note 234, at 561 (claiming that Scalia himself knows that "original understanding cannot be decisive simply because it *was* the original understanding").

[242] Instead, Scalia relies extensively on nineteenth-century materials that substantially post-date the Framing and the First Judiciary Act. *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, 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, JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57–58 (Boston, Little, Brown & Co. 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 any relevant originalist authority. *See* 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 that were used routinely. *See* PURCELL, *supra* note 52, at 59–60; *cf.* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (articulating federal courts' power to apply their own interpretation of "general common law").

Scalia cites Blackstone, but only on the separate point of whether courts could override statutes that violated the common law. Scalia, *supra* note 147, at 130. That does not speak to courts' power to use common-law methods in statutory interpretation. *See* Eskridge, *supra* note 233, 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 145, at 35, but this point is difficult to understand. The vital issue is what judicial power means, and what courts may legitimately do in "interpreting" and "applying" federal law; that issue intersects only

Indeed, Scalia's self-conscious focus on textualism and originalism would seem quite alien to eighteenth-century judges—as Gordon Wood, Ted White, and others have shown.[244] The first federal judges were not occupied with producing opinions in the modern sense, which reduced contemporary worries about judicial "lawmaking."[245] Such early judges often infused statutory and constitutional cases with common-law and natural-law concepts, and they were charged with implementing a framework of federal law that was incomparably incomplete.[246] These distinctive circumstances justified large areas of unsupervised judicial activity that might be deemed quite unacceptable today.[247]

In sum, if ever there was a Golden Age of Scalian judging, jurists in the 1780s saw nothing of it.[248] On the contrary, the fact that even Scalia's analysis of judicial activism lacks a basis in statutory or constitutional language, or in

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peripherally with questions of legislative power and what counts as a "law." *See* Eskridge, *supra* note 233, at 1526–28.

[243] 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* Part III.A.2.b.

[244] *See* RITZ, *supra* note 138, *passim*; WHITE, *supra* note 84, *passim*; Wood, *supra* note 147, at 49–65. 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 147, at 131. This indefensibly 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 just the iceberg's tip, such eminent judges as 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 commonly performed adjudications, but he doubts whether colonial adjudicative tribunals ever felt free to legislate. Scalia, *supra* note 147, 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 233, at 1529–31. That objection is not answered by Scalia's speculation that this line was somehow fuzzy on only one side (i.e., when legislatures adjudicated).

[245] *See supra* notes 162–69 and accompanying text.

[246] *See supra* notes 185–90 and accompanying text.

[247] See *supra* notes 181–91 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 . . . .").

[248] *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 enforcement of 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 233, at 1556 ("Textualism is, alas, an unknown ideal.").

originalist history, simply confirms that there are no true 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 understands 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."[249] Thus, Scalia repeatedly indicates that his ideas about judicial role depend on a particular view of democratic theory and "principle," rather than on undecorated historical facts.[250]

This Article cannot fully evaluate Scalia's view of democracy, much less whether it supports his view of judging.[251] Instead, let us simply apply to Scalia prior critiques of abstract theories of judicial role. Readers will recall that theoretical jurisprudence was not institutionally specific to judges, and that

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[249] Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 17 (emphasis added). 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 'bring the law down' for all to see.

Scalia is absolutely right that adjudicative lawmaking can produce surprising results, which may sometimes 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 judicial styles. In any system of private and costly litigation, civil appeals mainly occur because the parties disagree about some 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 cluster around 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 233, at 1546–48, 1548 n.142 (observing that even "dictionary-toting, grammar-minded 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 234, at 547. On the contrary, the public-square virtue of Scalian judging is most thoroughly betrayed in Scalia's wonderful statement: "In textual interpretation, context is everything . . . ." Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 37; *see* Sosa, *supra* note 234, 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").

[250] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 31, 40; Scalia, *supra* note 147, at 131, 134; *see also* Sunstein, *supra* note 234, 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.").

[251] *See generally* Eskridge, *supra* note 233, at 1548–56; Sunstein, *supra* note 234, at 533.

it abstracted from the cultural and historical contingencies of judicial function.[252] Scalia's work has satisfied any objection to "non-institutional" theorizing, as it 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 judicial theory that is nearly as timeless and acontextual as Dworkin's—aiming to cover at least 220 years of American federal 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.[253]

Even though Scalia and Dworkin may disagree about everything else in the law, Scalia's theory of judging is at least as conceptually inflexible as Dworkin's.[254] For Scalia, all federal judicial activity from the Marshall Court until the present should be measured against unchanging assumptions about democracy and fairness.[255] Despite Scalia's and Dworkin's different notions about how federal judges should decide cases, their theories of judicial role thus share a deep-seated abstraction that limits their arguments' effectiveness in analyzing judicial activism.

D. A Balanced Approach

The foregoing critiques suggest the path to a new vision of activism. Parts I and II showed that the concept of judicial activism pervades American history and that norms of judicial role are crucial to our system of unsupervised judging. In turn, this Part has noted problems with defining judicial standards through universal and fixed reference points. Originalism and analytical jurisprudence both fail to produce workable standards of judicial role because

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252 *See supra* Part III.B.

253 *See supra* Part I.B–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 U.S. courts to the experience of international civil law courts. Sunstein, *supra* note 234, at 541.

254 *See supra* Part III.B.

255 Scalia might claim that his judicial methods are rooted in "a rock-solid, unchanging Constitution," Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 47, but that is hard to understand given the available textual and historical record. *See supra* Parts I.B, III.A; *cf. supra* notes 220–29 (raising similar historical variations with respect to Roger Traynor, a state judge); *see also* Sunstein, *supra* note 234, 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.").

each requires a timeless, transcendent definition of judicial activism. Such efforts cannot reconcile current judicial practice with our radically different past, much less can they accommodate the chance of future change.

Jack Balkin has attacked inelastic judicial ideologies by denying that good judges are "prisoner[s] in chains."[256] Applying that metaphor to originalism and analytical jurisprudence, both methods fail because they view judicial role as "chaining" federal judges to a fixed spot, like shackles holding a captive. Of course, the image of judges in chains did not start with Balkin. Solicitor General James Beck wrote in 1922 that the Constitution embodies "a great spirit" of "conservative self-restraint"; he compared law to a floating dock, which stays firm in its moorings despite some movement with the tides.[257]

By contrast, my proposed metaphor for judicial role is a rope tied to a moveable anchor. Although the anchor holds judges in place, it can shift over time based on ambient conditions and the strength of dislocating tugs.[258] In less symbolic terms, I believe that standards of judicial activism are built from a mix of historical examples and prescriptive principles. This two-strand methodology solves apparent problems with originalism and jurisprudential theory. More importantly, it identifies limits that channel judicial decision-making, while allowing for 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 derides.[259]

First, a few words to clarify my proposal. If judges are activist only when they violate cultural norms of judicial role, any claim of activism depends on

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[256] J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1140 (1991) (reviewing ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990)). Balkin's main objection to this metaphor was that judges embrace, and themselves help to construct, the chains that seemingly "bind" them. *Id.*

[257] JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES 110, 151–52 (New York, George H. Doran Co. 1922); *see* SCHLESINGER, *supra* note 10, 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* WHITE, *supra* note 51, at 207. Beck was also criticized by Thomas Reed Powell, who also by coincidence was Schlesinger's chief inspiration in 1947. *See* sources cited *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 51, at 208.

[258] 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, there is no necessary guarantee of safe harbor either in changing or in preserving modern standards of judicial role.

[259] *See supra* Part III.C.

those standards' content—it is not enough to show legal error, or the invalidation of some statute or regulation. Such standards of judicial role cannot be deduced from historical proof that court *x* decided *y* in the year *z*. This is because such descriptions cannot determine whether modern courts should mimic or repudiate rulings like *Marbury*, *Lochner*, and *Bush v. Gore*.[260]

We have likewise seen that standards of judicial role cannot be identified through abstract reasoning about morality or democracy.[261] 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 followed any progressive unfolding of timeless principles.[262] 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 pilloried. The same goes for the Taney Court, Reconstruction, the Gilded Age, the New Deal, and all the rest.[263]

Moments of judicial heroism and villainy are not self-defining; indeed, they are not always self-conscious.[264] 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

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[260] *See supra* Part I.B for illustrations that cases once "appropriate" in one period may fall out of favor; *see also* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1750–53 (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"); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 964 (1998) (analyzing precedential canons' emergence and change). I have deliberately included the controversial case *Bush v. Gore*, 531 U.S. 98 (2000), because the legal community remains intensely divided on whether the ruling departed from proper judicial norms. *Compare* *BUSH V. GORE*: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002), *with* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

[261] *See supra* Part III.B–C.

[262] *See supra* Parts I.B, III.A.2.

[263] *Cf.* Green, *supra* note 15, at 176 ("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.").

[264] *Cf.* United States v. Lopez, 514 U.S. 549, 615 (1995) (Souter, J., dissenting) ("Not every epochal case has come in epochal trappings.").

battles over iconic cases and judges are forever waged with the same basic weapons: historical examples and asserted synthetic principles.[265]

This dualist approach to judicial role is designed to meet problems with originalism and abstract theorizing. First, in contrast to originalism, I propose using a varied and highly selective field of historical examples to construct judicial norms. For example, whereas originalists must derive notions of judicial role from *all aspects* of judging in the 1780s and 1790s, jurists under my approach might draw guidance from the Framing era without accepting its broad-scale use of common law, might endorse non-originalist practices of the Marshall Court, and might follow *Carolene Products* on economic policy, or the Warren Court's commitment to liberty or equality, even though these latter eras and principles do not match any enactment of statutory or constitutional law. Such flexibility allows judicial standards to incorporate institutional insights as they arise, not based on predetermined "federal courts moments."

Second, my analysis of judicial role differs from theoretical jurisprudence because it applies only principles with historical and institutional roots, as distinct from universal morality or logic. This infuses appropriate conservatism into judicial activism debates, such that abstract principles—however grand and theoretically sound—are not themselves enough to resolve questions about activism.

Consider Mark Tushnet's assertion that, if he were a Justice, he would vote "to advance the cause of socialism."[266] If Tushnet were following only his own personal will and preferences in promoting socialism, this would be pure

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265 *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.
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> 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.

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

judicial autonomy and easily branded as activism.[267] If Tushnet claimed that socialism is a broader principle that all federal judges should support, however, my approach would require a debate over historical examples and counter-examples to confirm or deny that federal judges should advance socialism. (More plausible debates might concern whether federal judges should advance liberalism, capitalism, or Christianity.) 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 his political goals were otherwise defensible.

Unlike abstract theories of judging, the historicism of my approach assures 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.[268] For my analysis, judicial role interacts with 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 so familiar or even natural. Although my approach is unique as applied to judicial activism, its techniques are absolutely ordinary in our legal system. What this Part has outlined is a *common-law* method of analyzing judicial role; despite substantial "statutorification" in other contexts, the topic of unsupervised judging remains by default a matter of common law.[269] The "common-law attitude" that Scalia would quarantine from federal judging (if not exterminate altogether) lies at the very core of judicial role and judicial activism. Wild overstatements like "there is no federal common law" are given the lie once more.[270]

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[267] *See supra* notes 110–11 (analyzing the difference between "judicial autonomy" and "judicial independence").

[268] DWORKIN, *supra* note 196, at 15.

[269] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 13–14 ("[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 pace, despite the formidable obstacles our system . . . puts in its way").

[270] *See* Green, *supra* note 139, at 690–96 (contrasting two alternative views of constitutional function and how they shape the role of federal courts); Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595, 622

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.[271] 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.[272] 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 alongside 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* standards of judging—to "drag the anchor," within my metaphor.[273] Since Scalia's appointment to the Court in 1986, battles surrounding his judicial work have escalated to a full war over the nature of federal courts.[274] For example, theories of textualism and originalism, which had largely wallowed in obscurity before Scalia's appointment, are now quite strong, with some of their doctrinal effects now in plain sight.[275]

(2008) (discussing the implications of the "new myth"). *But see* Bradford 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"). A deep problem with Scalia's analysis is his exaggeration that there are no constraints on common-law judging. Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, 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 more quotidian. *Cf.* Sunstein, *supra* note 234, 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.

[271] Indeed, my approach implies that Scalia's lack of textual and original-historical support cannot be fatal, because all theories of judging are in that very same boat.

[272] *See supra* Part III.C.

[273] *See supra* note 257–258 and accompanying text.

[274] *Cf.* Eskridge, *supra* note 233, at 1513–14 ("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." (footnotes omitted)).

[275] *See, e.g.*, Dist. of Columbia v. Heller, 128 S. Ct. 2783 (2008) (reviving the Second Amendment right to bear arms based almost exclusively on the Court's analysis of original history).

What is less clear is whether the future will brand Scalia, or instead his opponents, with the "activist" epithet. Scalia has decried modern abortion rights as activist and ripe for reversal;[276] other Justices have claimed that New Federalism jurisprudence will become as discredited as *Lochner*.[277] 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 over time.) What is already clear, however, is that such fights over judicial activism are definitely not "fluff,"[278] even though they may not be definitively resolved.

CONCLUSION

This Article's sustained discussion of judicial activism seeks to explain 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 norms governing judicial role, nor can it neglect methods of creating and attacking such cultural standards. This Article concludes with certain practical consequences and research opportunities indicated by my approach to judicial activism.

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.[279] By contrast, I have reconceived judicial activism as any departure

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

[277] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) ("The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 701–02 (1999) (Breyer, J., dissenting); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting); United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting).

[278] Charles Lane, *No Unanimity on Holding on to High Esteem*, WASH. POST, Apr. 1, 2002, at A13 (quoting Scalia).

[279] *See supra* Part I.C.

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 interpreting and reinterpreting judicial role. Such a broad view of activism discourse may lead to richer and more productive debates over judging.

Yet this Article's most basic effort is to identify the common elements of arguments about 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 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 wishes 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 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' validity). This Article does not predict or advocate that views like Scalia's should succeed, yet to clarify such debates' component parts may spur more focused, effective discussion.

Beyond issues of legal rhetoric appear two additional implications. First, activism's 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. To begin with, scholars who avoid seemingly undefinable terms like activism risk withdrawing their research from large public discussions about judicial conduct. The extent to which judicial standards should derive from public attitudes, rather than those of legal

experts, may be debatable.[280] But to ignore social attitudes over mere issues of rhetoric seems unsound. In a democracy with public confirmation hearings, it may be important for scholars to understand and perhaps even reform the language of "activism" if their views are to carry full weight.

Public discussion of judicial norms also suffers from the current segregation of expert and non-expert debate over judges. So long as federal judges are chosen from a pool of successful law-school graduates, the views of legal elites will deeply affect how new judges approach their posts.[281] For the public to overlook the expectations of legal experts, and instead focus on oversimplified debates about "activism," is a recipe for surprise and disappointment.

Because cultural norms of judicial role are a product of history and principle, it may be crucial that scholarly views of judging maintain their currency. As a group, law professors are more engaged than anyone in exploring and supervising the network of historical events and normative values that compose our legal system. Such expertise and insight could shed

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[280] *Cf.* Ryan, *supra* note 99, at 1658–59 (footnotes omitted):

> 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, 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. 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?"

[281] *See* Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 145, at 3 ("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.'").

measurable light if it were better integrated into public discussions about judicial role. As currently understood, the term "judicial activism" is an unwelcome hindrance to such integration, and my analysis tries to bridge the gap.

Second, although this Article has focused on judges and judicial role, its analytical approach may also raise questions about other areas of government. As we have seen, the two structural features that make judicial activism debates important are (i) significant lawmaking authority that (ii) is not supervised by other governmental entities. In the modern administrative state, however, judges are not the only federal entities that have unsupervised lawmaking power.[282] 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 can imagine an administrative tribunal that functions much like a trial court. Despite many dissimilarities between such administrative tribunals and federal courts, there may nonetheless be a sense in which an administrative agency would be "activist" if it departed from legal cultural norms concerning its discretionary authority.

Because executive lawmakers operate in a different branch from courts, with different procedures and organizational characteristics, some legal scholars will 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.[283]

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[282] *See* Sunstein, *supra* note 234, at 550–55.

[283] *See* Craig Green, Executive Activism (unpublished manuscript on file with author).