

An Intellectual History of Judicial Activism

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[Despite best efforts, and with all apologies, this draft remains a work in early progress.
The footnotes are omitted because their present condition might distract from
the ideas presented. Thanks in advance for all comments or criticisms.]

The term “judicial activism” inspires two strong and opposite reactions. First, the public sees activism as an important, even predominant rhetorical framework for condemning judicial mistakes. This is why the term activism is strikingly prevalent in speeches, media analysis, and bestsellers, as well as congressional hearings, court opinions, and questionnaires for would-be judges.¹ Second, academics often dismiss activism-talk as an irretrievably vague “myth” or “cliche.”² For them, activism is just crude shorthand for undesired legal results, which merits no independent discussion.

This Article challenges both parts of this conventional wisdom, and invites readers to rethink both judicial activism’s meaning and its rhetorical value. My goal in reinterpreting activism is to reject many of the term’s scattershot applications, while also addressing issues of legal culture that have sustained its power. Given activism’s persistent importance in evaluating judges, close attention seems warranted to what the term should mean and how it should apply. This Article also seeks to narrow the gap between public and academic assessments of activism, thus yielding more informed and productive discussions of judicial role.

Part I presents a history of “judicial activism” that explains where the term came from, how it spread, and why it remains significant. “Judicial activism” first appeared in *Fortune* magazine as part of a 1947 sketch of contemporary Supreme Court Justices.³ The essay’s author, Arthur Schlesinger, Jr., attracted an immediate and influential readership, but in hindsight, the essay’s most remarkable feature is its mild and time-bound scope. Schlesinger did not offer a general theory of judicial conduct. Instead, he coined “judicial activist” to describe a particular bloc of four Justices—two of whom would soon be dead.⁴

The limited theoretical content of Schlesinger’s essay helps explain judicial activism’s semantic instability. What is less obvious is why the term caught fire as a means of criticizing judges. Plausible contributing factors include the dawn of federal courts scholarship in the 1950s and post-*Brown* battles over judicial power.⁵ Apart from these particular incidents, “judicial activism” also gained popularity because it encapsulated worries over judicial power that run throughout United States history.⁶ These deeper concerns about judicial authority explain why judicial activism debates remain powerful, and why the term may yet merit salvage.

Part II critiques modern scholarship concerning judicial activism, and offers a new conception of the term. Some academics have argued that judicial activism represents a mix of legal error, political mistake, and invalidations of statutes or prior decisions.⁷ Such definitions are incomplete. Indeed, if they were correct, then the term judicial activism would be undeniably obscurant. By contrast, I propose to reinterpret activism as the

violation of cultural standards concerning judicial role that are not formally enforced, and are only partially stated.

Such standards are important in a system of broad judicial discretion. In the federal court system, for example, many instances of judicial power are nearly impossible to remedy. Examples include constitutional decisions by the Supreme Court and criminal judgments of acquittal after a jury is seated.⁸ By definition, these decisions lie within judges' discretion, and I propose that "activism" is an appropriate term of cultural condemnation in contexts where such unreviewable authority is arguably abused.

My suggestion that judicial activism concerns cultural standards of judicial behavior has two consequences. First, my approach contradicts the popular idea that judicial activism always expands individual liberties, or denies deference to other governmental entities.⁹ Judicial decisions that decrease the power of presidents, states, or even courts can violate norms of judicial propriety; but this is also true of decisions that increase such power. Second, my analysis suggests that the term judicial activism cannot be dismissed as meaningless "fluff."¹⁰ Although protests against individual instances of judicial activism are often futile, the aggregate set of cultural discussions about good and bad decisions, good and bad judges, influence the expectations and performance of each generation's new lawyers and jurists. From this perspective, mature legal communities cannot eliminate activism debates. On the contrary, such analysis of judicial propriety offers support for the rule of law in circumstances of judicial independence.

Part III explains how debates over judicial activism should proceed and why they are complex. One serious problem in analyzing cultural standards for activism is that the most orthodox authorities—text and original history—and the most scholastic discussion of judges—jurisprudential theory—are deficient. None of these authorities accounts for the dynamic cultural expectations and judicial function that have marked American federal courts.

With respect to text and original history, for example, many eighteenth-century sources rest on assumptions about courts and judicial function that are heretical today. This is why even Justice Scalia cannot fully support his view of judicial role using textualism or originalism.¹¹ By similar token, abstract jurisprudential theories suffer insofar as their generality often overshadows cultural norms that vary by time and court. Because federal courts' function has changed and is now quite expansive, only a few prescriptive principles can claim timeless status, and even these are often stated at unworkably high levels of abstraction.

Setting substantive benchmarks to identify instances of judicial activism is difficult, but such complexity is not necessarily prohibitive. Modern legal culture uses a two-strand approach to construct norms of judicial role, applying interlocked techniques of narrative and prescription like cords in a rope. At the foundation of legal education and scholarship is a set of stories about heroic and villainous judges, and exemplary or condemnable cases. Such stories are in turn integrated into principled theories of judging, even though the same principles dissolve if pressed to high abstraction.¹² Simply put, prescriptive

generalizations about judging require illustrative stories, and narrative histories need synthetic principles.

Most analysis of judicial role does not proceed under the explicit banner “judicial activism.” Instead, many academics debate the role of courts in the context of articles about particular doctrines or constitutional values, without ever using that word. My claim is that large swaths of legal scholarship and education embody an unacknowledged, substantial link to activism debates. In particular, I suggest that a blend of judicial history and principle offers an especially credible way to identify judicial activism and to describe proper judicial behavior.

Because judicial role is a matter of perennial controversy, the most persuasive critiques of judicial activism must explain their supportive stories and principles, while also engaging stories and principles to the contrary. This is why the withdrawal of academics from activism debates is especially unfortunate. Legal scholars’ greatest skill is processing narratives and principles about judicial activity. And while the general public’s activism debates would profit from direct academic input, academics might also benefit from access to political power and discussion. The current schism between activism debates and scholarly analysis is unhelpful to all sides, and my reinterpretation of activism seeks a partial remedy.

Part IV concludes with two consequences of my analysis. First, I propose that meaningful activism debates are best directed toward errors in judicial role, rather than simple legal errors. For example, although a failure to follow precedent might violate rules of stare decisis, a disingenuous explanation of that departure might qualify as activism. This distinction between legal results and judicial role, however, opens the possibility that activism may sometimes be necessary to achieve legally proper results. Under my definition, judicial activism is always disfavored, but concern for judicial role is not the only decisive factor in judicial rulings.

Second, as a practical matter, I understand that any reformulation of the epithet “judicial activism” may seem impossible. Many public speakers who use activism will not follow my framework, and academics who dismiss judicial activism may ignore my approach. Nevertheless, even as this Article’s effort to refocus attention on judicial role offers a general groundwork for debates over judicial power, it also opens the door for discussing cultural constraints upon another American lawmaker: the Executive Branch. Although more detailed thoughts about “Executive Activism” will be presented elsewhere,¹³ this Article’s analysis of judicial activism may be a step toward developing a general theory of role-bound governmental activity.

I. A History of “Judicial Activism”

A. Schlesinger’s Windfall

Activism’s modern celebrity makes it easy to forget that the term has shallow historical and intellectual roots. Compare two catch phrases that Schlesinger made famous:

“Imperial Presidency” and “Judicial Activism.”¹⁴ When Schlesinger analyzed the former, he wrote a 500-page book that described Founders’ fears about King George Washington, and twentieth-century worries over Richard Nixon.¹⁵ By contrast, Schlesinger coined “judicial activism” in a fourteen-page *Fortune* article, with correspondingly little rigor and ambition. This Section describes Schlesinger’s largely forgotten essay, and explains how “judicial activism” rose to prominence. My thesis is that Schlesinger never offered a coherent account of judicial activism, and the subsequent events that fueled activism’s popularity have further confused the term’s meaning.

Schlesinger’s analysis of activism did not purport to offer a fully drawn theory of judicial role; its goal was simply to describe a moment in Supreme Court history. The year 1947 marked ten years after the “switch in time” that killed *Lochner*;¹⁶ and the intervening decade saw Franklin Delano Roosevelt fill seven seats on the high bench.¹⁷ Schlesinger’s first priority, especially given FDR’s legislative efforts at “court-packing,” was to deny that Roosevelt’s appointments had made the institution a homogenous “rubber stamp.”¹⁸ This was easily done. Divisions among the Justices ran deep, and some members of the Court displayed embarrassingly strong mutual antipathies.¹⁹ More than half of Schlesinger’s article (including his first use of the term “activist”) focused simply on describing the Justices’ personality traits, their non-jurisprudential conflicts, and predictions that Chief Justice Vinson might navigate internal fissures to preside over “one of the great creative Courts of history.”²⁰

In this context, Schlesinger’s failure to define “activism” is notable, but not altogether condemnable; after all, his essay offered news for a general audience to demystify the current Court.²¹ Perhaps the misfortune is that Schlesinger did not fully avoid deeper jurisprudential topics.²² In a half-dozen pages, Schlesinger grouped seven Justices into crude binary camps of “judicial activists” and “champions of self-restraint.” And even as Schlesinger noted that the “issues of principle” separating the two groups “may be described in several ways,”²³ his essay failed to offer any significant definition of activism or restraint.²⁴

Instead of principles, Schlesinger’s focus was people. He identified four Justices—especially Hugo Black and William O. Douglas—as exemplars of activism, and three others—particularly Felix Frankfurter and Robert Jackson—as embodying self-restraint.²⁵ Schlesinger never quite explained what characteristics had earned these Justices their titles. Indeed, his essay mentioned very few judicial decisions, and the ones he did mention blurred his typology.

Schlesinger’s longest doctrinal discussion, for example, concerned the flag salute cases. He endorsed as “a great democratic document” Frankfurter’s dissent in *West Virginia v. Barnette*,²⁶ which argued that public schools could force students to salute the American flag, despite offending their beliefs as Jehovah’s Witnesses.²⁷ Modern jurisprudence has rejected Schlesinger’s view of *Barnette* as a wrong-headed “freak case[].”²⁸ More important is Schlesinger’s failure to note that *Barnette*’s “activist” decision was authored by Jackson, a purported “champion of self-restraint.”²⁹ Schlesinger also ignored the three-year-old ruling in *Korematsu*,³⁰ which would have further confused his efforts at

naming “activists.” In *Korematsu*, the supposed activists Black and Douglas approved racist military orders that interned Japanese-Americans during World War II.³¹ Meanwhile, Jackson the “champion of self-restraint” was one of only three Justices to reject the President’s asserted authority.³²

Labor law was another of Schlesinger’s doctrinal topics. He derided the activists’ view that picketing was constitutionally protected speech,³³ and speculated that “the Black-Douglas group” might eviscerate a then-pending statute to outlaw closed union shops.³⁴ Schlesinger supposed that the activists “may well choose to override legal ‘niceties’ to emasculate or veto” such union-restrictive legislation.³⁵ These predictions proved quite wrong, however, suggests once more that Schlesinger misperceived his own activists’ activism. Because Schlesinger largely constructed his two categories from personal sketches, it is particularly unfortunate that his descriptions are so flawed.

Schlesinger’s missteps would hardly bear mention for their own sake, but they illustrate how his essay’s brevity, breeziness, and errors obscured any general standard for identifying activists beside the four named.³⁶ This was soon important, because two of Schlesinger’s activists—Wiley Rutledge and Frank Murphy—died in 1949. Were their successors, Sherman Minton and Tom Clark, activists? Champions of self-restraint? Middle-grounders? The vagueness of Schlesinger’s article leaves one free to wonder. The limitations of Schlesinger’s essay also raised serious doubts that “activism” could ever be a useful label for condemning judicial conduct; indeed, Schlesinger himself professed agnosticism about whether judicial activism was good or bad.³⁷

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.³⁸ The term was doubtless buoyed by Schlesinger’s Pulitzer-Prize-winning Harvard reputation.³⁹ And the personal details in his essay poked Justices who were already quite sensitive.⁴⁰ Most importantly, however, the three characters featured in Schlesinger’s story—Black, Douglas, and Frankfurter—proved to be extremely influential and long-lived, with almost 100 years of Court service among them.⁴¹ In different ways, Black and Douglas emerged after 1947 as advocates for expansive constitutional liberties,⁴² while Frankfurter was crucial to the emergence of federal courts as a coherent academic subject.⁴³ The fact that Schlesinger happened to pin his labels of “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 vague analysis of federal courts and social welfare appeared seven years later. In 1954, Warren replaced Vinson as Chief Justice, and *Brown v. Board of Education* struck down racial segregation.⁴⁴ Since then, the propriety of federal courts’ “activity” in addressing social issues has been of consistently dominant concern. Thus, whatever Schlesinger’s “activism” originally meant, the term emerged at an opportune moment in history.⁴⁵ The gloss of post-1947 history confirmed activism’s use as a negative epithet, and focused such critiques on the Supreme Court’s liberal wing.⁴⁶

B. Hamilton's Shadow

Although the popular ascent of “activism” owes much to the historical incidents discussed *supra*, the term also has indirect ties to anxieties about judicial action that pervade the American experience. Indeed, a famous rhetorical precursor of judicial activism debates is Federalist 78, where Hamilton wrote that federal courts have “no direction either of the strength or of the wealth of the society; and can take *no active resolution* whatever.”⁴⁷

This Section considers judicial activism's prehistory. My claim is that judicial critiques have changed so greatly over time that Hamilton's fears about judges cannot be easily equated with those of Schlesinger or others. Yet despite this substantive diversity, judicial criticism's persistence also suggests a thematic unity that animates activism-talk even today.

Let us start with Hamilton. On one hand, Federalist 78's reference to “no active resolution” may mean simply that courts lack freedom to set a working agenda outside their docket.⁴⁸ Or the quote could be exaggeration, like Montesquieu's bluster (also quoted in Federalist 78) that “the judiciary is next to nothing” in a government of separated powers.⁴⁹ It is absurd that federal courts would lack any role in determining social wealth and power, or that courts should eschew active projects of all kinds.⁵⁰ This canard surfaces in modern confusions between judicial “activity” and “activism.” The two are clearly different,⁵¹ but their etymological proximity leads careless speakers to think that all significant judicial decisions are activist.⁵² If Hamilton meant to condemn all judicial *activity* in Federalist 78, his statement must be ignored as overdrawn propaganda.⁵³

From a different perspective, however, Hamilton's ideas may seem doubly relevant to Schlesinger's article: both employ “activity” as a rhetorical basis for identifying judicial excess, and both question the degree to which courts should determine “the strength or . . . wealth of the society.”⁵⁴ These substantive intersections explain why modern judicial critics cite Federalist 78 as straightforward support for their position.⁵⁵

The truth is more complex. Although judicial skeptics have opposed federal courts' authority since the Founding, that opposition's basis and force have varied tremendously. For example, the Constitution's ratification debates focused on preserving jury trials and stopping jurisdictional growth.⁵⁶ Such fears were largely dissipated by the Seventh Amendment, the First Judiciary Act, and early practice.⁵⁷ Likewise, the Marshall Court sparked controversy in *Marbury* and elsewhere by fortifying the power of a life-tenured bench,⁵⁸ while Justice Samuel Chase's acquittal began our tradition of not removing Justices by impeachment.⁵⁹ However, neither the presence of judicial review nor the absence of impeachment is a featured element of modern activism debates. The context for early federal courts commentary has changed dramatically, and this has diluted the importance of such analysis to current critiques.⁶⁰

Moving forward in time, the deepest perils of judicial power remained largely theoretical until *Dred Scott* in 1857.⁶¹ Then after the Civil War, federal courts resisted important congressional efforts to implement Reconstruction.⁶² At the turn of the twentieth century, the *Lochner* era shielded private property from certain regulations, while pro-corporate “federal general common law” boosted federal courts’ reputation for preferring entrenched economic interests.⁶³

Each of these events drew criticism and support, and this sketch can only hint at the broad variety of judicial debates from the Founding forward. Sometimes federal courts were condemned for spurring 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.⁶⁴ Much of judicial activism’s popularity lies in its power to agglomerate concerns about judging without addressing specifics. And indeed, scholars have noted that activism debates’ greatest failure lies in identifying credible standards for critique.⁶⁵ This Article’s remainder will analyze that problem in detail.⁶⁶

II. Reconceiving Activism

The foregoing history sets the stage for a new approach. As an original matter, judicial activism lacked any coherent definition, yet its link to basic questions of judicial power has lent it unshaken importance. In principle, it may not matter whether debates over federal courts proceed in terms of “judicial activism,” “judicial legislation,” or some other rhetorical creature.⁶⁷ Yet the term “activism” has held political sway despite fifty years of intellectual attack; and this alone may justify a closer look.⁶⁸

Section A considers modern interpretations of activism. I propose that several popular definitions of judicial activism are analytically self-destructive; that is, if these interpretations of were correct, then judicial activism would be a term of unuseful distraction. Section B reinterprets activism and begins to explain why discussions of judicial excess remain important. Our constitutional democracy assigns federal judges great power and responsibility, yet many judicial decisions are effectively unreviewable. In such discretionary realms, the propriety of judicial activity ultimately depends on judges’ willingness to follow norms of judicial culture that cannot be formally enforced. The violation of such norms is, in my view, a proper basis for criticizing judicial activism. Section C addresses two details that separate my view of judicial activism from other modern interpretations.

A. Modern Interpretations

Before proposing to reinterpret “judicial activism,” let me consider four popular definitions of the term: (i) any serious legal error, (ii) any controversial and undesirable result, (iii) any decision that nullifies a statute, or (iv) a smorgasbord of these and other factors selected ad hoc.⁶⁹ In my opinion, each of these interpretations is unsatisfying, and if true, any of them would support assertions that activism is semantically unhelpful.

For example, if activism were defined to include any serious legal error, there would be no basis for applying such a broad label, and no reason to shortcut analysis of specific issues at stake. Misreading statutes, ignoring precedents, and botching inferences are all bases for concern about judicial decisionmaking. But even where errors are stark, and impacts are large, the bare fact of judicial mistake does not constitute activism. Incompetent judges are only sometimes activists.

Likewise, if activism were interpreted to mean any undesirable result, then the term would add nothing to straight talk about the policies in dispute. Indeed, an overly political criteria for evaluating judicial activity could only reduce the legal character of federal courts' decisionmaking.⁷⁰ Regardless of whether conservative or liberal results are preferred, directly political definitions of judicial activism only support efforts to abolish the term altogether.

Empirical scholars define activism to allow objective measurement; thus, they often interpret activism as any judicial decision that overrules a statute.⁷¹ This view is unlinked from what is most crucial in modern views of activism, namely its normative disfavor.⁷² And as many empiricists acknowledge, not every statutory overrule is activist.⁷³ If Congress passed a statute banning political sedition, or authorizing detention of a specific ethnic group of United States citizens, courts would not be "activist" to annul the result.⁷⁴ Many empirical studies of activism recognize this definitional problem, yet their focus on activism-as -overrule trades away any recognizable meaning of the term in exchange for a solid data set.⁷⁵ To study cases involving constitutional invalidation is useful in its own right,⁷⁶ but that approach does not offer an adequate definition of judicial activism.⁷⁷

The smorgasbord interpretation of activism may be the most prevalent.⁷⁸ Several scholars have offered taxonomies of different forms of activism, and have suggested that speakers should specify which meaning of the term they intend to use.⁷⁹ In principle, such scholarship typically recognizes the rhetorical importance of judicial activism, and seeks to clarify what the term means. In practice, however, these articles often allow a blend of many different views of activism, and endorse the possible addition of other definitions to the list, thus implying that the word means any or all of the above.⁸⁰ As a result, such flexible frameworks cannot dispel fears that activism is an incoherent Frankenstein, or worse, a mask for ulterior agendas. Like the political interpretation of activism, the smorgasbord approach is certainly plausible in describing the term's current use, but it offers no reason to think that the term offers a meaningful basis for judicial critique.

Although scholarly analysis of judicial activism is expansive and widely varied, these four examples illustrate current definitional flaws. Because none offers a coherent interpretation of judicial activism, they ultimately feed critiques of activism as semantically unstable.⁸¹ If the term judicial activism is to be salvaged, it needs redefinition.

B. Judicial Activism, Judicial Role

Contrary to my approach, some readers will question whether judicial activism needs any definition at all; perhaps the term should be left to its incoherent overuse. On the other hand, an intellectual decision to ignore judicial activism will not make the term disappear. Indeed, so long as activism is the public's dominant means of evaluating judges, legal experts who rhetorically demean the concept of "judicial activism" may be misread as endorsing limitless, freewheeled judging in practice.⁸² Instead of repeating flaws in current definitions of activism, with the hope that the term might vanish, this Article tries a more positive approach, seeking to redefine judicial activism in a way that is limited and coherent,⁸³ yet is also responsive to broader values underlying judicial critique.

To start with my conclusion, I propose that the term judicial activism concerns cultural standards of judicial role. Such norms of judicial conduct can be difficult to define,⁸⁴ and they are often unenforced. Yet I propose that debates over judicial activism—regardless of whether they proceed under that name—form a vital safeguard of constitutional government and rule of law.

Let me unpack this conclusion in two steps. First, I believe that the need for cultural standards of judicial role is linked to judicial discretion. Many instances of judicial activism involve decisions that are hard to reverse, such as Supreme Court rulings, and other unsupervised judicial decisionmaking. This issue is a pillar of our constitutional system. The Founders granted dramatic judicial independence through Article III's provision for life tenure and irreducible judicial salaries; our tradition of non-impeachment has further strengthened those guarantees.⁸⁵ Lower courts are thus accountable for their decisions to higher courts, but the judicial ladder's top rung—whether the Supreme Court or otherwise—is not directly accountable at all.

Second, although judicial activism may be inherent to judicial discretion, it is not the mere exercise of discretion. Thus, not every unreviewed judicial decision is activist, nor is every statutory overrule, nor even every mistake.⁸⁶ On the contrary, I propose that judicial activism is the exercise of unreviewed judicial power in a non-judicial way, beyond appropriate limits and in the absence of due restraint. The details of what this means are discussed in Part III,⁸⁷ but the basic issue can be sketched by separating "judicial independence" from "judicial autonomy."

Judicial independence under Article III provides that neither a litigant, a President, nor a public mob can force a judge to reach a decision contrary to her legal judgment. That insulation, however, does not seek to empower all aspects of a judge's preference. Therefore, the term "judicial autonomy" goes too far. It is not simply the judge's *self* that should govern—not her presumably personal preferences about particular litigants, lawyers, parties, or even results and principles. Judicial independence exists to empower judges *in their role as judges*, that is, as articulators of legal decisions. In my view, the term "judicial activism" represents the improper use of judicial power and discretion, in contravention of such cultural norms concerning judicial role.

Thus defined, the importance of judicial activism debates should be clear. The composition and structure of federal courts assure that judges will exercise unsupervised power, and the consequences of possible abuse are significant. In such circumstances, a judge's own beliefs about her work may be the only safeguard for democratic governance, and the only check against judicial usurpation.

Unlike many civil law countries, the United States lacks any professionalized "judges' school."⁸⁸ Also, the judicial "promotion" process is almost entirely political, with limited evaluation of job performance, and even less consensus on what criteria are most useful.⁸⁹ So how do judges learn their professional role? In much the same way that lawyers learn what to expect in a courtroom. Judicial role is neither human nature nor common sense, and it is only weakly codified in rules of judicial ethics.⁹⁰ For all participants in the legal system, ideas about judging stem mainly from education and informal discussions about experience. Although this process is detailed *infra*, certain basics may be evident from imagining a newly installed federal judge. New judges perform their job in large part by constructing their own view of judicial role, following principles they find applicable, and mimicking role models they find appropriate. Judges' ideas about judging may gradually change to accommodate new experiences, and the process continues.

As a legal community, we simply cannot stop ourselves from talking about what judges should do. From the most hardboiled practitioner to the most abstruse scholar, we ceaselessly dispute examples and principles of good judging. And even when such conversations do not explicitly use the term, they form the most important part of judicial activism debates. Each new class of students, lawyers, academics, and judges discusses judicial activism from a slightly different perspective; but it is a conversation that accommodates breadth. And these debates are indispensable to legal rule under conditions of judicial discretion.

Imagine, if it is even possible, a federal judge who has no experience with debates about judicial role. Such a judge would seem woefully uninformed about her job, and it is hard to imagine a judge worse suited to such employment, or less able to exercise the public trust vested in judicial office. In this respect, judicial activism debates are what allow judges to be good judges; and such debates form a vital mechanism for critique when judges do otherwise.

C. Tentative Consequences

To redefine judicial activism as departure from cultural standards of judicial role may seem compatible with prior scholarly analysis; and to some extent it is. Before discussing the substantive content of judicial role, however, let me note two unconventional consequences of my approach, and offer simplified examples as support.

First, if my analysis is correct, judicial activism does not necessarily increase individual rights. Departures from norms of judicial conduct can favor, disfavor, or not affect

individual liberty. For example, one period of commonly perceived activism is the *Lochner* era, during which federal courts stood up for individual property rights, and invalidated many federal and state laws.⁹¹ Depending on the word's definition, these decisions may have decreased "liberty" by undermining workers' freedom from exploitative harm.⁹² More important, as Edward Purcell has shown, *Lochner*-era decisions that favored private interests against the government were only partly separable from similar decisions that favored corporations over poorer individuals.⁹³ It is possible, but not persuasive, to suggest that the cases involving government entities can be categorically activist, but others involving merely private parties cannot.

The modern regulatory state supports similar conclusions, because the only necessary difference between private suits and governmental suits is their enforcement mechanism.⁹⁴ For example, environmental restrictions can be enforced by the government, in suits that arguably curtail polluters' liberty. Or ordinary citizens can be authorized to sue polluters, creating a conflict among mere private interests. Again, it is implausible that judges can only be activist if they affirm individual rights against the government.

A different example concerns decisions that expand judicial power, rather than individual liberty. If a judge enjoined individuals from a business practice based on the judge's own financial interest, without any legal explanation, that decision might qualify as activist, even though it would not increase individual liberty. Similarly, *Dred Scott* is often seen as the quintessence of activism.⁹⁵ Such activism arguably pervades: (i) the Court's rights-expansive holding supporting property rights, (ii) its rights-denying holding affirming slavery, and (iii) its categorical refusal to credit the state citizenship of African-Americans.⁹⁶ All of these examples suggest that judicial activism, analyzed as a departure from judicial role, has no direct link to increasing individual liberty.

A second unconventional consequence of my analysis is that non-deference to political entities does not provide necessary or sufficient proof of activism. The error of equating judicial activism with insufficient deference is that judicial role means much more than just getting out of the way. Thus, under my approach, judges can be activist by deferring too much, and judges can be non-activist despite a refusal to defer.

Examples of the first category arguably include *Korematsu* and *Yamashita*. *Korematsu* affirmed a criminal conviction for violating racially based military orders, which ultimately aimed to intern over 100,000 Japanese-Americans.⁹⁷ Under conventional analysis, *Korematsu* could not possibly be an activist decision, because it denied individual rights, and also because the Court "passively" declined to interfere with the President's military program. As discussed *supra*, however, the denial of rights is no guarantee against activism. And to describe *Korematsu*'s holding as "passive" may understate its significance. The Court upheld *Korematsu*'s conviction, confirmed his punishment in civilian court, and legitimated the racist military regime operating in the western United States. Thus, the Court directly authorized governmental violence against *Korematsu*, and the Court issued a legal precedent concerning executive detention that

“lies about like a loaded weapon”⁹⁸ The Court’s decision to endorse such massive executive power may not be “passive” after all.

By comparison, the *Yamashita* Court denied habeas to a Japanese general convicted by a military commission of various war crimes.⁹⁹ Again, traditional views of activism might characterize all denials of habeas relief as “passive,” because such decisions deny individual liberty, and because they defer to governmental entities such as prosecutors, military adjudicators, and prison staff. Instead, I suggest that federal courts can violate judicial role by inappropriately restricting executive power, or by unduly expanding it. For courts to side with the President is neither neutral nor passive. It is an exercise of judicial authority that, just like decisions favoring liberty and property, can be either consistent or inconsistent with cultural norms of judicial role. Accordingly, decisions to support presidential, congressional, state, or local governmental power may qualify as activist, regardless of whether a court characterizes its ruling as “deferential” and thus “passive,” or as “empowering” and thus “aggressive.”¹⁰⁰

III. Practical Applications: A Two-Part Approach

Having set forth my view of judicial activism, this Part tackles the practical question of how to identify cultural norms of judicial role. Sections A-C consider three authorities that are commonly used to answer such questions: text, history, and jurisprudential theory. I believe that these authorities can be helpful, but each is too inflexible to accommodate the radical transformations that federal courts have undergone over time. Section D proposes a two-part description of cultural mechanisms for establishing norms of judicial conduct and standards of judicial activism.

To be clear, my goal is not to persuade readers of any substantive vision of judicial activism. But the framework I propose hopes to channel discussion toward useful inquiries, and away from distractions, thereby rendering current discussions of judicial activism more transparent. To borrow Charles Black’s words from a different context, jurists applying my approach will likely 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.”¹⁰¹

A. Textual Vagueness

There are two textual authorities that might conceivably prescribe norms of judicial role: the Constitution and federal statutes. Neither gives much guidance. The Constitution vests “the Judicial power” in federal courts, but offers no explanation of what that phrase means.¹⁰² Although the constitutional choice to place federal judges in a separate branch of government was a novel experiment at the time, Article III drew remarkably little attention at the Convention.¹⁰³ Instead, the Framers left to Congress many of the judiciary’s details—including the existence of lower federal courts, the availability of juries in civil trials, and the pertinence of common law. Other basic questions like judicial review, and whether federal courts should be equal, lesser, or superior to other branches with respect to legal interpretation, were also unspecified.¹⁰⁴ Much less did the

Constitution prescribe how judges should judge, how they should reach their decisions, and how they should otherwise behave.

Alexander Hamilton's Federalist essays are perhaps the most extensive Framing-era discussion of federal courts. Federalist 78, for example, explains life tenure as a necessary predicate for the "steady, upright, and impartial administration of the laws."¹⁰⁵ The essay also explains that federal judges "have neither FORCE nor WILL, but merely judgment."¹⁰⁶ But it does not explain what constitutes such judicial "judgment," aside from knowledge of and conformity to "strict rules and precedents" of prior decisions.¹⁰⁷ Hamilton's ultimate response to the risk of judicial usurpation was that "if [judges] should be disposed to exercise WILL instead of JUDGMENT," that argument would "prove that there ought to be no judges distinct from [Congress]."¹⁰⁸ Hamilton thus realized that the possibility of judicial abuse is an inescapable part the Constitution's structure. Nevertheless, consistent with Article III's vague terms, the Constitution did not codify any particular vision of judicial role and judicial conduct.¹⁰⁹

The Judiciary Act of 1789 and subsequent judicial reforms are also uninformative regarding many aspects of judicial activism and role.¹¹⁰ The First Judiciary Act answered some Anti-Federalist fears by creating a small number of judgeships, in courts with limited jurisdiction, and with Supreme Court review only by writ of error (not retrial).¹¹¹ The statutory text, however, gave limited instruction about how judicial decisions should issue, how judicial activity should fit with other political actors, and how judges should generally conceive of their new office.¹¹² Perhaps such legislative micromanagement seemed unnecessary and improper, or consensus may have been impractical.¹¹³ Either way, Congress's statutory grants of "jurisdiction" offer relatively substantial guidance about how judges should exercise their statutorily authorized power.¹¹⁴

B. Originalist Shortfalls

Even if statutory or constitutional texts do not codify a specific vision of judicial activism, another possibility is that the judicial history accompanying those authorities did so. Under this originalist approach, modern federal courts should be evaluated using nontextual ideas of judicial role that were flash-frozen and incorporated into law at important points in judicial history, "federal courts moments," specifically including 1789 and the period following Reconstruction.¹¹⁵

Although I believe that judicial history is invaluable to establishing cultural norms of judicial activism,¹¹⁶ I doubt that the "original history" of federal courts after the First Judiciary Act or post-Reconstruction merits any privileged position in such discussions. These transformative moments radically altered the scope and exercise of federal judicial power, but they did not prescribe a preemptively dominant view of judicial activism and judicial role.¹¹⁷

Twentieth-century federal courts differ radically from their eighteenth- and nineteenth-century predecessors in terms of their dockets, structure, and function. Far from offering role models for modern courts, earlier periods of judicial history incorporated several

practices and ideas that are heretical today. This is why there are no true “originalists” with respect to judicial activism and judicial role.¹¹⁸ The judicial history of these federal courts moments, just like history from other periods, must be absorbed on a retail rather than a wholesale basis.

Structural and docket differences between modern and eighteenth-century federal courts are well known. Although district courts have existed from the start, the eighteenth-century judiciary relied heavily on circuit courts that lacked circuit judges.¹¹⁹ Instead, the nation’s three circuits were staffed by one district judge and two members of the Supreme Court, which is why there were six original Justices.¹²⁰ Circuit-riding greatly taxed the Justices’ energies and was initially as much a demonstration of federal political power as a means of adjudicating cases.¹²¹ Most federal opinions were not published, and the first Supreme Court issued seriatim opinions, which diminished federal courts’ capacity to proffer coherent, binding statements of law.¹²² To supply this deficiency, the Court’s hired reporters set forth the litigants’ arguments at length, so that readers could analyze which arguments succeeded and could infer how the Court’s holding might fit with other precedents.¹²³ Another important function of early Justices was to charge their circuit’s grand juries, and such speeches were sometimes elaborate legal and politically charged expositions.¹²⁴ In comparing the dockets of eighteenth- and twentieth-century courts, although there was some important overlap, many controversies decided in the early years would seem quite peripheral to modern federal courts’ business.¹²⁵

In the decades following Reconstruction, Congress enacted a series of structural reforms that made nineteenth-century federal courts more similar to their modern counterparts. In 1869, Congress created circuit judgeships; in 1875, Congress created general federal question jurisdiction; and in 1891, the Justices were finally relieved of circuit-riding.¹²⁶ Even so, this era’s courts managed to limit many statutory and constitutional rights’ application to local entities.¹²⁷ Also during this period, relationships among the courts, Congress, the President, the military, and the states were extremely complex, yielding many judicial decisions that were questionable at the time and remain so today.¹²⁸ In short, despite emerging similarities between post-Reconstruction courts and modern courts, that era does not present any obvious role model for a lasting and privileged conception of judicial role.

Let me conclude with one issue that may encapsulate changes in judicial function and role during these historical periods: the application of federal common law. As Justice Scalia has argued in his non-judicial writings, the availability of common law represents more than just a set of doctrines, it also manifests a potential “attitude” toward judging.¹²⁹ The latter is vital to analysis of judicial role and activism. Without delving into doctrinal details, discussions of common law illustrate why histories of Framing-era and post-Reconstruction courts are at best an incomplete guide to modern views of judicial activism.

In the eighteenth century, even more than today, there was a remarkable overlap between constitutional, statutory, and common-law judging.¹³⁰ Significant parts of the federal docket concerned admiralty, interstate disputes, or the Contract Clause, all of which

required significant judicial lawmaking.¹³¹ Yet none of this was thought surprising because many American judges and lawyers had forged their conceptions of judicial role based on examples from England and the colonies.¹³²

Similarly, the decades after Reconstruction reflect a high-water mark of *Swift v. Tyson*'s "federal general common law."¹³³ *Swift* and its successors allowed federal courts to craft common-law rules in diversity cases based on their own legal judgment, rather than state precedents applicable in state courts.¹³⁴ In the late nineteenth century, common-lawmaking under *Swift* expanded and was perceived as aiding corporate interests.¹³⁵ Thus, these post-Reconstruction rules of federal general common law, which sustained private property and interstate business, worked in close tandem with later *Lochner*-era constitutional rules that served similar ends.¹³⁶

In sharp contrast to our eighteenth- and nineteenth-century predecessors, modern jurists disfavor federal common-lawmaking.¹³⁷ In part, this changed attitude results from the late-twentieth century's process of statutorification, and the comparably significant growth of administrative law.¹³⁸ The legal terrain is more crowded than before, with political and bureaucratic actors playing many roles that were filled by common-law courts in centuries past. Other aspects of twentieth-century judicial history, from *Erie* to *Carolene Products* to *Brown* to *Gideon*, have also transformed cultural expectations of judicial conduct.¹³⁹

The examples discussed in this Section in no way suggest that everything done by Framing- and Reconstruction-era courts is irrelevant to current activism debates. My claim is simply that the 1780s and the 1870s do not provide any singular baseline for evaluating judicial role. As federal courts have changed, so has their function, and so have corresponding ideas of what is judicially proper. Modern courts confront federal legislation, a sprawled administrative state, and constitutional rights that are broadly applicable to state and local conduct across the country. Predictably, modern courts draw only partial guidance from a judicial past that knew none of these things.

C. Theorized Abstraction

In contrast to analyses of judicial activism that seek authority in legal language or history, another tool for analyzing judicial role is jurisprudential theory.¹⁴⁰ Prominent scholars of this school include Hans Kelsen, HLA Hart, Ronald Dworkin, and many others.¹⁴¹ In different ways, and to different degrees, the theories of these jurisprudences seek to abstract from particular cultures, time periods, and jurisdictions in order to describe judging and law as concepts that are identifiable through the exercise of informed reason. I have suggested that my culturally based definition of judicial activism does not typically incorporate such changeless notions.¹⁴² I would further add that my view of judicial role would not require identical norms in different jurisdictions, much less in different countries.

Consider state governments. Many state judges are elected, thereby immediately suggesting different ideas of judicial selection and independence.¹⁴³ Indeed, there is no

constitutional requirement that states follow separation-of-powers principles like those of the federal government.¹⁴⁴ In different contexts, with different workloads, and different expectations, there is every reason to think that states would be free to apply different cultural standards of activism. Of course, philosophical theories about judicial product may serve to inform these discussions, and some states' conceptions of judicial activism may track federal norms by default. But variations in ideas of judicial activism may also reflect different legal cultures, and some of those differences may not condemnably violate universalized theories of judging.¹⁴⁵

In a few contexts, attempts to invoke timeless principles seem appropriate. For example, judicial decisions based on political partisanship or personal gain represent improper activities in any epoch.¹⁴⁶ Yet other theoretical prescriptions concerning judicial conduct—from minimalism to democracy reinforcement to textualism to umpiring—may be only arguably and occasionally appropriate.¹⁴⁷ This is because federal courts, today and throughout history, have been tasked with deciding cases across incredibly varied contexts and circumstances. As a result, generalizing about how courts should handle all federal cases is often incomplete, with some risk of overgeneral platitudes that perhaps judges should simply use good judgment and be at all times judicious.¹⁴⁸

By way of transition, let me conclude this Section by discussing a hybrid jurist whose philosophical theory of judging incorporates at least nominal commitments to textualism and originalism: Justice Antonin Scalia. In a pair of essays, Justice Scalia set forth his view of federal judicial role, arguing that judges exceed their role by departing from the text and context of particular statutes and constitutional provisions.¹⁴⁹ Scalia's analysis cited certain historical sources, including Federalist 78.¹⁵⁰ But perhaps ironically, his core arguments against non-textual judicial interpretation relied on his own non-textual views about the nature of democracy and judicial lawmaking.¹⁵¹

Consistent with Gordon Wood's analysis, I would dispute the historical orthodoxy of Scalia's approach to judging.¹⁵² Not enough eighteenth-century judges shared Scalia's methodological commitments, and there is not enough collateral evidence that such ideas were silently incorporated into the relevant constitutional and statutory texts.¹⁵³ This does not prove that Scalia's view of judicial role is wrong; it simply means that his approach to judicial activism, like all others, needs support from non-originalist, non-textual authorities. And insofar as Scalia uses pure political theory—rather than text or Framing-era history—to condemn as activist a judge who might depart from textualism or originalism, his theory may raise concerns similar to other philosophical theorists. In short, there is nothing original, much less natural, about Scalia's conception of judicial role. And although Scalia's view is staunchly defended and vigorously attacked today, the next Section charts how such debates should proceed.

D. A Balanced Approach

Jack Balkin once criticized the notion that well-behaved judges are “prisoner[s] in chains.”¹⁵⁴ That metaphor, however, has important applications to discussions of judicial role and activism. The greatest flaw with textual, originalist, and theoretical analyses of

judicial activism is that they all characterize judicial role as “chaining” federal judges to a fixed spot, like shackles holding a prisoner in place.

By contrast, my approach views judicial role more as a chain attached to an anchor, which may move over time, depending on ambient conditions and the strength of any dislocating tug.¹⁵⁵ In less metaphorical terms, I suggest that standards of judicial activism are identified by a combination of historical examples and prescriptive principles, and that each of those two components is vital to the cultural construction of judicial norms.

On one hand, reliance on history in composing standards of judicial activism embodies a conservatism appropriate to our legal system. This means that the mere invocation of abstract principles—however grand and theoretically sound they might be—is not itself enough to counter allegations of activism. Consider Mark Tushnet’s claim that, if he were a Supreme Court Justice, he would vote “to advance the cause of socialism” but would write opinions “in some currently favored version of Grand Theory.”¹⁵⁶ Would such rulings be activist? I believe so.

Insofar as socialism represents only Tushnet’s own political philosophy, his judicial decisions to advance that cause would stretch beyond judicial independence into the culturally excessive realm of judicial autonomy.¹⁵⁷ But imagine a counter-argument that socialism is not just Tushnet’s personal preference; it is a universal principle that all federal judges have a duty to advance. Regardless of socialism’s theoretical or political merits, that debate over judicial role might focus on historical examples and counter-examples, which in turn might confirm or deny whether federal judicial decisions should advance socialism. (Or liberalism, or capitalism, or religious fundamentalism.) Absent some set of persuasive historical examples to support his pro-socialist principle of adjudication, Tushnet’s actions might well advance his movement, but they would also seem rightly criticized as activist.

On the other hand, historical examples alone cannot justify norms concerning judicial role without reference to underlying principles.¹⁵⁸ This is because raw examples of past conduct are not self-justifying. Some judges are heroes, others are villains, and most are in-between or both. The fact that some judge has done something in the past is not sufficient to justify modern endorsement or mimicry. Only the combination of fact and principle can explain why one historical case reflects good judging, and another does not. At a more subtle level, every instance of a proposed historical narrative, ‘this past case stands for *x*, not *y*,’ is reliant on guiding principle.¹⁵⁹ Cultural norms governing judicial activism require both history and precept.

Given my methodological proposal for how judicial activism debates should proceed, some readers might encourage this Article to take a final step and substantively explain what constitutes judicial activism and what judicial role requires. My reasons for declining this invitation run deeper than ordinarily evasions concerning “the scope of this Article.”¹⁶⁰ One of my premises is that all legally educated readers have their own set of heroes and villains, their own examples of good and bad judging, and their own

explanations therefor. Although my list of heroes is hardly a secret,¹⁶¹ this Article is concerned with charting a path for discussion, not with advancing my own jurisprudential commitments.¹⁶²

Scholars, judges, and lawyers disagree about judicial role because there is a great deal to disagree about. The federal judiciary has witnessed many different models of judging, with abundant theories and examples to support a variety of views. This Article also suggests that activism debates occur in many contexts where “judicial activism” is never mentioned. For example, discussions of judicial role are nearly endless in legal education and scholarship. Federal litigating positions and judicial opinions incorporate debates over judicial role. And in legal contexts ranging from news to conversation to mentoring, cultural ideas about judicial activism are built, fortified, challenged, undermined, and rehabilitated. At an immediately practical level, such conversations function to educate lawyers about what they may expect from federal judges. And at a systemic level, those same debates influence our next set of judges, lawyers, professors, and students.

Despite activism debates’ fundamental importance in channeling judicial power and preserving the rule of law, this Article has identified two flaws in current definitions of the term. First, with respect to the general public, the word activism is often used carelessly or manipulatively. Second, in academic circles, the term activism is often dismissed or misunderstood; thus, prior interpretations of activism have rarely mentioned judicial role, and the latter concept has never received its proper emphasis.

Neither the public’s overuse of activism nor the academy’s neglect thereof seems helpful to the broader project of constructing norms of judicial conduct. On one hand, the public’s undisciplined approach to judicial activism may foster a cynicism that all conceptions of judicial role are naive. If this position were adopted by a substantial minority of federal judges, it would encourage abuse of judicial independence, and might more broadly delegitimize federal adjudication. On the other hand, legal scholars’ withdrawal from activism debates has tended to sequester their insights from politically important discussions about judicial history and judicial theory to which they could greatly contribute. My analysis seeks to bridge this gap, by rejecting destructive applications of the term activism in the public sphere, and seeking a coherent basis for greater scholarly use of the term.

IV. Concluding Afterthoughts

Let me identify two secondary consequences of my approach. First, because my view of judicial activism is analytically separate from judicial error, not every judicial error is activism,¹⁶³ and not all activism is error. This yields the paradox that violating norms of judicial role may sometimes be necessary to obtain a legally correct result. The easiest examples appear in contexts involving multiple judicial actors.

Imagine that judges on a multimember court are evenly divided, and the swing vote risks committing legal error unless a colleague violates certain norms of judicial role. Or imagine a lower court, where the judge risks an erroneous reversal unless she resorts to

judicial activism. The hypothetical violations of judicial role I have in mind could include misstating facts or precedents, misrepresenting a doctrinal consequence, or some other departure from norms of judicial conduct. proposing any solid resolution to these dilemmas, I simply wish to acknowledge that judicial role may not be the only factor in judicial decisionmaking; avoiding legal error may be another. Therefore, even a determination that a judicial decision is activist under my approach may not render the decision also incorrect.

Second, this Article's description of judicial activism may support parallel intellectual analysis regarding other lawmakers. Recall that my account of judicial activism was supported by two features of judicial lawmaking.¹⁶⁴ First, judicial independence and discretion with respect to a range of crucial legal decisions. Second, a concern that unsupervised judicial independence might drift toward a category of excessive judicial autonomy, in which vested judicial discretion might be abused without apparent recourse.

Other lawmakers also fit this pattern, including some elements of the Executive Branch. Consider administrative lawmakers. Depending on their agency's organic statutes, administrators may be vested with significant discretion, and their judgments can be quite difficult to reverse.¹⁶⁵ To pick the easiest example, one might imagine administrative tribunals that function analogous to a trial court. Such a tribunal will never be structurally identical to an Article III court, but there may nonetheless be a sense in which an administrative tribunal could be "activist" if it departed from legal cultural norms concerning its discretionary authority. Because executive lawmakers operate in a different branch, with different procedures and organizational characteristics, many jurists have assumed that "Executive Activism" is an oxymoron. This Article's role-based analysis of judicial activism, however, implicitly questions that assumption, thereby opening the possibility for discussion (and formulation) of unenforced cultural norms that may govern some aspects of executive conduct.