



MICRO-  
SYMPOSIUM

Three generations of imbeciles are enough.

Oliver Wendell Holmes

*Buck v. Bell,*  
274 U.S. 200, 207 (1927)

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.

Robert H. Jackson

*West Virginia State Board of Education v. Barnette,*  
319 U.S. 624, 642 (1943)



INTRODUCTION TO SHERRY'S "JUDICIAL ACTIVISM"

IN PRAISE OF  
SUZANNA SHERRY  
AND JUDICIAL ACTIVISM

*Richard A. Epstein*

We are proud to present our micro-symposium on Professor Suzanna Sherry's *Why We Need More Judicial Activism*. We begin with this introduction by Professor Richard Epstein. It is followed by Sherry's summary of her argument, and then comments by Professors Aaron-Andrew P. Bruhl, Frank J. Colucci, Scott Dodson, Scott D. Gerber, Diane H. Mazur, Howard M. Wasserman, and Evan C. Zoldan. And then, of course, Sherry gets the last word in response.

– *The Editors*

**S**UZANNA SHERRY WAS MY STUDENT in my first year torts class at the University of Chicago in the fall of 1976, and even then her cheeky activism was evident both by her fierce independence in class, and her willingness to carry her battle against much of what I preached into her final examinations. These were, to be sure, blind-graded. But there was no error in guessing

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that Examination Number 555 was hers, given its gratuitous but witty condemnation of the entire tort system (to support automobile no-fault no less!) in answer to questions that did not even put the issue into play. That level of resolute independence showed itself when I asked her, in an exercise of my better judgment, to work with me as a research assistant, in which the attack of my heresies marked every aspect of her work. But it was always with the best sense of humor: How could the judge, she asked one day, be so crude as to write in an opinion on a insurance coverage case that “the spalling was appalling,” as well as being a covered insurable event? It was therefore with great affection that I wrote an honest letter of recommendation to the late and gentlemanly Judge John Godbold,<sup>1</sup> in which I urged him to hire Sherry notwithstanding her pronounced independent streak. She got an interview; he let it slip that one of her recommenders had written an unconventional letter, which could have only been me. She called me up; he called me up; we patched it over, and she received the job that she so richly deserved, and the Judge thanked me profusely thereafter. Never a dull moment in those days, I dare say.

That streak of independence has made itself felt in all sorts of ways. One of my favorite articles of recent, indeed any, years is Sherry's tour-de-force in the *Pepperdine Law Review*, modestly entitled *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*,<sup>2</sup> which contained a merciless dissection of Justice Louis Brandeis's ill-considered opinion in *Erie R.R. v. Tompkins*.<sup>3</sup> I had always thought that the decision was deeply flawed, on the simple but effective ground that it was odd in the extreme to say that the “judicial power in all cases in law and equity” in Article III does not give federal judges their independent power to make common law decisions. But reading her merciless dissection of Brandeis's opinion, I

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<sup>1</sup> For a summary of his life, see Chad E. Stewart, *The Finest Man I've Ever Known*, THE ALABAMA LAWYER 273 (July 2009), available at [www.alabar.org/publications/articles/July09/finest-man.pdf](http://www.alabar.org/publications/articles/July09/finest-man.pdf)

<sup>2</sup> Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP L. REV. 129 (2011)

<sup>3</sup> 304 U.S. 64 (1938).

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came to realize in just how many ways *Erie* abjectly failed. In fact, the conference that Michael Greve and I recently organized on the *Erie* doctrine got much of its momentum from her article. There true to form, with evident glee, she corrected me (correctly) once again. If I remember it correctly, she said that the suspect classification test did not originate in *Carolene Products v. United States*,<sup>4</sup> but in *Korematsu v. United States*.<sup>5</sup> Some things in life never change.

Now it appears that she is at it again with her recent article, *Why We Need More Judicial Activism*.<sup>6</sup> This title of this article was music to my ears. After all I declared the entire New Deal unconstitutional in 1985 in my *Takings* book<sup>7</sup> and think that events of the following 28 years have only confirmed the strength of that judgment.

On this point, however, there is a difference between Sherry and myself. When she develops her position she takes the consensus view of the worst decisions ever and notes that the clear majority of them allowed the Congress or the states to do things that sober-minded individuals have come to conclude are wrong. She does not include on her list *Kelo v. City of New London*,<sup>8</sup> which provoked a similar outrage with respect to a decision to allow the City of New London to condemn private homes for which it never had the slightest use. That five-to-four decision managed to unite right and left in an attack against a government program that in a single blow uprooted people from their homes while wasting taxpayer dollars on a senseless economic venture.

There is this more general difference between us as well. She relies on popular consensus and disdains any effort to use political theory to explain why these decisions are so bad. But there is a clear theoretical vision that links the dots. All of these decisions are

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<sup>4</sup> 304 U.S. 144 (1938).

<sup>5</sup> 323 U.S. 216 (1944). The term "suspect" appears on page 216.

<sup>6</sup> To be published in *CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT* (Giorgi Areshidze, Paul Carrese, & Suzanna Sherry, eds., SUNY Press, forthcoming 2014).

<sup>7</sup> Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 314 (1985).

<sup>8</sup> 545 U.S. 469 (2005).

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against the ordinary common law rights of individuals to speak their mind, observe their own faith, act in free association with other individuals, and participate in the ordinary affairs of government. Look down that list. *Bradwell v. State* upheld the unconscionable use of state power to prevent women from entering into a lawful profession.<sup>9</sup> *Minor v. Happersett* found that women had no constitutional right to vote.<sup>10</sup> *Plessy v. Ferguson* eventually sustained a rare trifecta of state-segregated trains and state-segregated schools, topped off by a ban on interracial marriage.<sup>11</sup> *Schenck v. United States*,<sup>12</sup> *Frohwerk v. United States*,<sup>13</sup> and *Debs v. United States* all supported the misguided prosecutions under Woodrow Wilson (surely our most overrated president) against political speech based on exaggerated threats that they posed to the social order.<sup>14</sup> *Buck v. Bell* dealt with an unpardonable invasion of individual rights of procreation<sup>15</sup>; *Minersville School Dist. v. Gobitis* with an overweening state that seeks to override individual religious conscience.<sup>16</sup> *Hirabayashi v. United States* and *Korematsu v. United States* ratified the manifest excesses of the Japanese internment program in World War II.<sup>17</sup>

It should not take genius to connect the dots. All of these cases attacked the core rights that belong to ordinary people under any theory that embraces limited government, individual liberty, and, yes, the protection of private property. The reason why other major disasters like *Village of Euclid v. Ambler Realty Co.*<sup>18</sup> arise is precisely because the claims of property, which are so intimately tied to those of liberty, get short shrift under narrow accounts of the basic right

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<sup>9</sup> 83 U.S. 130 (1873).

<sup>10</sup> 88 U.S. 162 (1874).

<sup>11</sup> 163 U.S. 537 (1896).

<sup>12</sup> 249 U.S. 47 (1919).

<sup>13</sup> 249 U.S. 204 (1919).

<sup>14</sup> 249 U.S. 47 (1919); 249 U.S. 204 (1919); 249 U.S. 211 (1919).

<sup>15</sup> 274 U.S. 200 (1927).

<sup>16</sup> 310 U.S. 586 (1940).

<sup>17</sup> 320 U.S. 81 (1943); 323 U.S. 214 (1944).

<sup>18</sup> 272 U.S. 365 (1926).

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of property, which is more than the right to exclude coupled with extravagant views of the police power, which is properly addressed to the threat or use of force, the control of fraud, and monopoly, none of which are raised in that misguided zoning case. So the larger question that I cannot address here, but which I do address in my forthcoming book *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*,<sup>19</sup> is whether one can make these judgments unaided by a comprehensive political theory. In my view it cannot be done, and the cases on Sherry's list make that point all too well.

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<sup>19</sup> Richard A. Epstein, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (forthcoming 2013).

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A SUMMARY OF

# WHY WE NEED MORE JUDICIAL ACTIVISM

*Suzanna Sherry*

**T**OO MUCH OF A GOOD THING can be bad, and democracy is no exception. In the United States, the antidote to what the drafters of the Constitution called “the excess of democracy” is judicial review: unelected, life-tenured federal judges with power to invalidate the actions of the more democratic branches of government. Lately, judicial review has come under fire. Many on both sides of the political aisle accuse the Supreme Court of being overly activist and insufficiently deferential to the elected representatives of the people. Taking the Constitution away from the courts – and giving it back to the people – has become a rallying cry. But those who criticize the courts on this ground misunderstand the proper role of the judiciary. The courts *should* stand in the way of democratic majorities, in order to keep majority rule from degenerating into majority tyranny. In doing so, the courts are bound to err on one side or the other from time to time. It is much better for the health of our constitutional democra-

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cy if they err on the side of activism, striking down too many laws rather than too few.

In this forthcoming essay defending judicial activism, I begin by defining two slippery and often misused concepts, judicial review and judicial activism, and briefly survey the recent attacks on judicial activism. I then turn to supporting my claim that we need more judicial activism, resting my argument on three grounds. First, constitutional *theory* suggests a need for judicial oversight of the popular branches. Second, our own constitutional *history* confirms that the founding generation – the drafters of our Constitution – saw a need for a strong bulwark against majority tyranny. Finally, an examination of constitutional *practice* shows that too little activism produces worse consequences than does too much. If we cannot assure that the judges tread the perfect middle ground (and we cannot), it is better to have an overly aggressive judiciary than an overly restrained one.

Judicial review is not judicial supremacy. Judicial review allows courts an equal say with the other branches, not the supreme word. Courts are the final arbiter of the Constitution only to the extent that they hold a law *unconstitutional*, and even then only because they act last in time, not because their will is supreme. If judicial review is simply the implementation of courts' equal participation in government, what, then, is judicial activism? To avoid becoming mired in political squabbles, we need a definition of judicial activism with no political valence. Judicial activism occurs any time the judiciary strikes down an action of the popular branches, whether state or federal, legislative or executive. Judicial review, in other words, produces one of two possible results: If the court invalidates the government action it is reviewing, then it is being activist; if it upholds the action, it is not.

Under that definition, and because the Court is not perfect, the question becomes whether we prefer a Supreme Court that strikes down too many laws or one that strikes down too few. Many contemporary constitutional scholars favor a deferential Court that invalidates too few. I suggest that we are better off with an activist Court that strikes down too many.

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As many scholars have previously argued, judicial review is a safeguard against the tyranny of the majority, ensuring that our Constitution protects liberty as well as democracy. And, indeed, the founding generation expected judicial review to operate as just such a protection against democratic majorities. A Court that is too deferential cannot fulfill that role.

More significant, however, is the historical record of judicial review. Although it is difficult to find consensus about much of what the Supreme Court does, there are some cases that are universally condemned. Those cases offer a unique lens through which we can evaluate the relative merits of deference and activism: Are most of those cases – the Court's greatest mistakes, as it were – overly activist or overly deferential? It turns out that virtually all of them are cases in which an overly deferential Court *failed* to invalidate a governmental action.<sup>1</sup>

When the Court fails to act – instead deferring to the elected branches – it abdicates its role as guardian of enduring principles against the temporary passions and prejudices of popular majorities. It is thus no surprise that with historical hindsight we sometimes come to regret those passions and prejudices and fault the Court for its passivity.

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<sup>1</sup> The essay lists the following as universally condemned cases (in chronological order): *Bradwell v. State*, 16 Wall. (83 U.S.) 130 (1873); *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1874); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Abrams v. U.S.*, 250 U.S. 616 (1919); *Schenck v. U.S.*, 249 U.S. 47 (1919); *Frohwerk v. U.S.*, 249 U.S. 204 (1919); *Debs v. U.S.*, 249 U.S. 211 (1919); *Buck v. Bell*, 274 U.S. 200 (1927); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); and *Korematsu v. U.S.*, 323 U.S. 214 (1944). Cases over which there is significant division, such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Lochner v. New York*, 198 U.S. 45 (1905), are excluded. *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and *Bush v. Gore*, 531 U.S. 98 (2000), are also excluded, on two grounds: they ultimately had little or no real-world effect; and they were products of a Court attempting to save the nation from constitutional crises, which is bound to increase the likelihood of an erroneous decision. Even if *Dred Scott* and *Bush v. Gore* are included, only two of thirteen reviled cases are activist while eleven are deferential.

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Ideally, of course, the Court should be like Baby Bear: It should get everything just right, engaging in activism when, and only when, We the People act in ways that we will later consider shameful or regrettable. But that perfection is impossible, and so we must choose between a Court that views its role narrowly and a Court that views its role broadly, between a more deferential Court and a more activist Court. Both kinds of Court will sometimes be controversial, and both will make mistakes. But history teaches us that the cases in which a deferential Court fails to invalidate governmental acts are worse. Only a Court inclined toward activism will vigilantly avoid such cases, and hence we need more judicial activism.





A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

## JUDICIAL ACTIVISM AND THE PROBLEM OF INDUCTION

*Aaron-Andrew P. Bruhl*

PROFESSOR SUZANNA SHERRY IS ONE of our best scholars of constitutional law and the federal courts. Her recent paper, the subject of this micro-symposium, advances the provocative prescription that "we should encourage more judicial activism, not less." My comments focus on the pragmatic portion of her argument, in which she contends that our actual experience with judicial review demonstrates the need for more activism. Although Professor Sherry's paper is enlightening throughout, I do not think this important portion succeeds in making the case for more activism.

One could quarrel with Professor Sherry's diagnosis of an activism deficiency on several grounds. One might question whether studying the worst-of-the-worst cases and isolating their common feature is the right method for reaching conclusions about broader patterns. (Compare: Suppose the worst outcomes in the treatment of prostate cancer occur when the doctor fails to remove a prostate harboring an aggressive tumor. Does it follow that doctors should, as a rule, bias their judgments in favor of more surgeries?) Further, one wonders whether her metric for discerning the worst of the

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worst – namely, universal condemnation – reliably discovers the worst decisions *qua* decisions or instead tends to identify old decisions emblematic of shameful social practices that, looking back, we wish *someone* had stopped.

If we set aside those kinds of worries, there remains one larger objection. Let us grant that the actual practice of judicial review shows that more activism would have been beneficial in the past. That does not necessarily make more activism the right prescription for the future. The conditions that will prevail in the future need not resemble those of the past. One is reminded of the Thanksgiving turkey, reliably fed each morning by the (seemingly) friendly farmer – until the day he wasn't.

There is, in fact, some reason to think that the greater risk going forward is judicial *hyper*activity. For decades now the Supreme Court has been plenty comfortable with its power of judicial review. Consider, just from the last few years: the invalidation of a critical portion of the Voting Rights Act, the invalidation of DOMA, the invalidation of the Medicaid expansion on Spending Clause grounds, *Citizens United*, *Boumediene*. (It is notable that Professor Sherry's last example of condemned inactivism is from the 1940s.) The Court, on both the right and the left, has already taken Professor Sherry's instructions to heart.

In addition to considering the non-deferential disposition of the modern Supreme Court, one should weigh other institutional circumstances. The parties are polarized. Congress is sclerotic, some say broken. Federal judges serve increasingly long terms. These and other factors suggest, in different ways, that our system is currently susceptible to experiencing, and not well tolerating, high doses of activism.

To be clear, whether we need more activism is a question I cannot definitively answer (certainly not here!). But the past, even if we have rightly evaluated it, cannot answer that question either.





A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

## SHERRY'S MODEL JUSTICE: ANTHONY KENNEDY

*Frank J. Colucci*

IF — AS PROFESSOR SHERRY CONCLUDES — “we should encourage more judicial activism, not less,”<sup>1</sup> then we should applaud Supreme Court Justice Anthony M. Kennedy. Kennedy has long been the Justice most likely to vote to invalidate government action.<sup>2</sup> Most recently, he alone voted to strike both the Defense of Marriage Act and Section 4 of the Voting Rights Act.<sup>3</sup> In the previous Term, he was the only vote both to invalidate state immigration regulations and to strike the Affordable Care Act in its entirety.<sup>4</sup>

Kennedy agrees with Sherry that “judicial protection from majority tyranny” is “the theory of *our* Constitution.”<sup>5</sup> Antonin Scalia

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<sup>1</sup> Suzanna Sherry, “Why We Need More Judicial Activism” (2013), papers.ssrn.com/sol3/papers.cfm?abstract\_id=2213372, p. 15.

<sup>2</sup> See Frank J. Colucci, *Justice Kennedy’s Jurisprudence: The Full and Necessary Meaning of Liberty* (Kansas 2009), pp. 182-183; Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago 2004), p. 252.

<sup>3</sup> *Shelby County v. Holder* (decided June 25, 2013); *U.S. v. Windsor* (decided June 26, 2013).

<sup>4</sup> *Arizona v. U.S.* 132 S.Ct. 2492 (2012); *National Federation of Independent Business et al. v. Sebelius* 132 S.Ct. 2566 (2012) (dissenting opinion of Justices Scalia, Kennedy, Thomas and Alito).

<sup>5</sup> Sherry, pp. 7, 9 (*italics in original*).

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defends originalism as “more compatible with the nature and purpose of a Constitution in a democratic system.”<sup>6</sup> Stephen Breyer places democracy promotion as central to the judicial role.<sup>7</sup> In contrast, Kennedy during his confirmation hearings testified “the enforcement power of the judiciary is to insure that the word *liberty* in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it.”<sup>8</sup>

It may be too soon to say whether any of Kennedy’s opinions will merit universal condemnation or support.<sup>9</sup> But, as Kennedy realizes, judges must act in the present while remaining accountable to future generations. “While it is unlikely that we will devise a conclusive formula for reasoning in constitutional cases,” he said before coming to the Court, “we have the obligation to confront the consequences of our interpretation, or the lack of it.”<sup>10</sup>

Consistent, aggressive activism in defense of constitutional liberty will encourage more false positives – and more justices like Anthony Kennedy. *Lawrence*<sup>11</sup> comes at the cost of *Citizens United*<sup>12</sup> (or vice versa). For Professor Sherry, that’s a trade-off we ought to accept.



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<sup>6</sup> Antonin Scalia, “Originalism: The Lesser Evil” 57 *University of Cincinnati Law Review* 849 (1989), p. 862.

<sup>7</sup> Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf, 2005); Breyer, *Making Our Democracy Work: A Judge’s View* (Vintage, 2011).

<sup>8</sup> U.S. Senate, Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States, 14-16 December 1987, p. 154.

<sup>9</sup> Sherry, pp. 12-14.

<sup>10</sup> Anthony M. Kennedy, “Unenumerated Rights and the Dictates of Judicial Restraint,” delivered at Palo Alto, California, 24 July- 1 August 1986, p. 22.

<sup>11</sup> *Lawrence v. Texas* 539 U.S. 558 (2003).

<sup>12</sup> *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).





A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"  
PARSING JUDICIAL ACTIVISM

*Scott Dodson*

PROFESSOR SUZANNA SHERRY ARGUES that judicial activism – which she defines as “any time the judiciary strikes down an action of the popular branches”<sup>1</sup> – is a valuable check on majority tyranny.<sup>2</sup> To the extent judicial activism invalidates governmental regulation of individuals – a “libertarian activism” if you will – then she may well be right. As I observed a few years ago, charges of “judicial tyranny” seem oddly misdirected when judges protect civil rights and liberties from political regulation.<sup>3</sup> And, as a counterweight to Sherry’s list of repugnant cases, some of the Court’s most widely celebrated cases – *Brown*, *Gideon*, *Sullivan*, *Milligan*, *Griswold*, *Loving* – reflect its willingness to invalidate laws or official acts in order to protect individual freedoms.

But not all judicial activism is libertarian. Sometimes, judicial activism – even as Sherry defines it – can aggrandize governmental power at the expense of individual freedoms. Take one doctrine routinely cited as activist, including by Sherry herself: state sovereign immunity.<sup>4</sup> In *Seminole Tribe*, a routinely (but probably not uni-

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<sup>1</sup> Suzanna Sherry, *Why We Need More Judicial Activism* 4 (2013), [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2213372](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213372).

<sup>2</sup> Sherry, *supra* note 1, at 1.

<sup>3</sup> See Scott Dodson, *Reconsider Old Taboo*, NAT’L L.J., Nov. 1, 2004, at 19.

<sup>4</sup> Sherry, *supra* note 1, at 5.

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versally) maligned case, the Supreme Court held that Congress could not, under its Indian Commerce Clause power, abrogate a State's sovereign immunity from private suit.<sup>5</sup> That case constitutionally enhanced, in a way unremediable by Congress, a State's ability to harm individuals without fear of private suit for damages. Such judicial activism ultimately *increases* governmental (in this case, State) power over individuals.

To be sure, this kind of judicial activism – when the Court strikes down laws that regulate officials rather than individuals – seems to occur far less frequently than the libertarian activism Sherry lauds. But it ought not be ignored. Sherry says that “perfection,” in assessing which activism is desirable and which is not, “is impossible,” and so we must decide only a first-order question: to be active or not to be.<sup>6</sup> But I wonder if that is the case. That perfection is impossible (as it usually is) does not mean second-order improvements are unworkable or unattainable. Perhaps it is time to parse judicial activism more closely to decide which activism is worthy and which is not.



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<sup>5</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>6</sup> Sherry, *supra* note 1, at 1, 16.



A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

# POLITICAL THEORY AND JUDICIAL ACTIVISM

*Scott D. Gerber*

**S**UZANNA SHERRY DOES A FINE JOB of explaining why *constitutional* theory, history, and practice justify judicial activism. An appeal to *political* theory would strengthen her otherwise strong case, not weaken it, as she seems to think. In fact, I included an Appendix in my recent Oxford University Press book on the origins of judicial independence in America for precisely this reason.<sup>1</sup>

Like Professor Sherry, I believe that popular constitutionalism is wrong and should be rejected. Unlike Professor Sherry, I spanned twenty-two centuries of political theory to explain why. What follows is a "micro" discourse on what I found.



**G**overnment institutions do not spring fully formed from the pen of constitutional framers like Athena from the brow of Zeus. They develop over time, and they are shaped by political theorists. The judicial institution embodied in the U.S. Constitution is

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*Professor of Law, Ohio Northern University. Copyright © 2013 Scott Douglas Gerber.*

<sup>1</sup> See SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787 at 345-61 (2011).

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no different. The political theory of an independent judiciary is the culmination of the work of eight political theorists writing over the span of twenty-two centuries, with each building on the contributions of the others. It all began with Aristotle's theory of a mixed constitution, a theory that divided government into three parts, with each part representing a political class of the regime. Next came Polybius, who emphasized the checking and balancing of government power, albeit power still divided along class, rather than institutional, lines. Marsilius of Padua was the initial political theorist to focus on the function of particular institutions, while Sir John Fortescue was the first to appreciate the unique role of the judiciary. Gasparo Contarini was responsible for marrying the Aristotelian theory of mixed government to the concept of checks and balances, and King Charles I took the pivotal step of committing Anglo-American constitutional theory to the notion of balance among political institutions, rather than dominance by one. Montesquieu contributed the most famous idea of all: that political power should be divided among the legislative, executive, and judicial branches of government so as to ensure the people's liberty. Finally, John Adams argued that judges, and not simply temporary juries (as Montesquieu had argued), need to be independent from the executive and legislative branches, and that this independence would be possible only if they were afforded tenure so long as they behaved well and were paid adequate and stable salaries. In sum, although political architecture is not solely the provenance of political theorists, without political theory America's constitutional framers could not have used the lessons of history to create a judicial branch whose independence plays such an essential role in the preservation of freedom.





A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

# JUDICIAL DEFERENCE BROKE THE MILITARY

*Diane H. Mazur*

**W**HY IS IT BETTER TO ERR on the side of too much judicial review? Because a system that makes mistakes when second-guessing is better for the institutions it reviews than a system that fails to second-guess. Judicial activism – a willingness to disagree – is a mechanism of accountability. It forces institutions to marshal facts, justify conclusions, and make better decisions. Even if courts sometimes rule incorrectly, the expectation of judicial accountability makes institutions stronger in the long run.

In *Rostker v. Goldberg*,<sup>1</sup> the Court introduced a new and extreme form of judicial deference on military issues when it decided government could exempt women from draft registration.<sup>2</sup> The Court declared itself incapable of playing any serious role in judging the constitutionality of military policy, whether congressional or executive. Instead, over the factual objections of generals, it created a fantasy military in which women were superfluous and equality was

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<sup>1</sup> 453 U.S. 57 (1981).

<sup>2</sup> For more on judicial deference and its effect on the military, see Diane H. Mazur, *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (2010).

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nothing more than an ineffectual gesture. It endorsed Congress's transparent uneasiness with the idea of women as defenders of the nation. Although there were no military reasons for refusing to register women, the Court rested on a "healthy" deference to the military decisions of others.

The Court's insistent inaction in *Rostker* turned out to be anything but healthy for the military. Both Congress and the military learned the unfortunate lesson that facts and reasons may not be as important when the military is involved. What mattered most was the simple assertion of military judgment, not whether it could be justified or proved. *Rostker* set the stage for a post-Vietnam military that grew accustomed to a standing exemption from constitutional expectation and explanation, especially in the areas of equal protection and individual liberty.

Deference is not a friend to the military, although the Court probably thought it was a sign of utmost respect. In *Rostker*, the harm was not only to the women, military and civilian, affected by the decision, but also to the military as a profession. The military culture that gave rise to the current crisis of sexual assault has its roots in a climate of unaccountability and deference from others. The assumption that you will not be asked to explain yourself in response to a challenge, constitutional or otherwise, causes professional rot. It invites flabby decisions. It encourages arrogance and hubris. It lets you be oblivious, for example, to the status and treatment of women in the military.

The problem is not that *Rostker* was wrongly decided, although it surely was. The problem is that *Rostker* announced a policy of judicial inaction that still undermines the military as an institution more than thirty years later.





A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

## REAPPROPRIATING JUDICIAL ACTIVISM

*Howard M. Wasserman*

SUZANNA SHERRY HAS REAPPROPRIATED the term judicial activism. That is, she “self-consciously” adopts an “externally imposed negative label” and “renegotiate[s] the meaning,” thereby imbuing the label with positive meaning and “changing it from something hurtful to something empowering.”<sup>1</sup> What LGBT activists and scholars did with queer,<sup>2</sup> Sherry now has done with judicial activism.

Like “queer,” judicial activism began as an externally imposed negative label, slapped onto Supreme Court decisions by critics as a way to undermine the precedential legitimacy or validity of those decisions, although objections typically reflect nothing more than disagreement with underlying results.<sup>3</sup>

Sherry now gives activism content, thereby normalizing it. She transforms the word’s denotative meaning<sup>4</sup> by establishing an objec-

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<sup>1</sup> Adam D. Galinsky, et al., *The Reappropriation of Stigmatizing Labels: Implications of Social Identity*, in IDENTITY ISSUES IN GROUPS 222 (2003).

<sup>2</sup> *Id.* at 231, 232-33.

<sup>3</sup> BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 343-44 (2009); KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM 14-15 (2006); Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1258 (2002).

<sup>4</sup> Galinsky, *supra* note 2, at 232.

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tive definition. Activism occurs any time courts exercise judicial review to invalidate the actions of another branch of government, regardless of methodology or the decision's political valence. She also transforms the words "connotative evaluative implications,"<sup>5</sup> turning the pejorative into something positive. As newly defined, activism simply becomes one ordinary, expected, widely accepted potential product of judicial review.

Critically, Sherry then identifies the eleven most universally reviled Supreme Court decisions, showing that all involved inactivism – that is, a refusal to be activist. The Court failed to invalidate government action that society subsequently came to see as warranting invalidation. That history demonstrates that courts should be vigorously activist precisely to avoid outcomes that society uniformly comes to regret. Activism now connotes something positive, its absence the negative.

Reversing the connotative meaning of a negative label allows people to take pride in that label, while "robbing name-callers of a previously potent weapon."<sup>6</sup> So it is with judicial activism. Reappropriating the term moves us past meaningless de-legitimizing epithets and pejoratives to actually focus on the substantive merits of constitutional arguments and analyses.<sup>7</sup> No longer should charges of activism shut down constitutional debate. No longer should charges of activism deter judicial nominees from speaking intelligently and coherently at confirmation hearings.<sup>8</sup> Believers in vigorous judicial protection of constitutional liberties<sup>9</sup> can emerge from the shadows, embrace a half-century (or more) of constitutional jurisprudence, and defend on the merits a vision of judicially enforced liberal constitutionalism.

And they can proudly declare "We're here. We're judicial activists. Get used to it."

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Brown, *supra* note 3, at 1258.

<sup>8</sup> Eric J. Segall, *What Elena Kagan Could Have and Should Have Said (And Still Have Been Confirmed)*, 88 WASH. U. L. REV. 535 (2011).

<sup>9</sup> Brown, *supra* note 3, at 1271.





A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

# TARGETED JUDICIAL ACTIVISM

*Evan C. Zoldan*

**A**S THE PEJORATIVE LABEL "judicial activism" implies, critics of judicial review disagree with what Professor Sherry's piece, "Why We Need More Judicial Activism," identifies as a major premise underlying our constitutional democracy: that, at least sometimes, we want unelected, politically unaccountable judges to review the constitutionality of laws enacted by the political branches. Adopting Sherry's premise that constitutional history helps explain our commitment to judicial review, I suggest that a closer look at this history reveals that the revolutionary generation was particularly concerned with one aspect of majoritarianism: the tendency of democratic majorities to act out of passion and prejudice rather than after deliberation.

As Madison described, democratically elected legislatures are apt to succumb to their passions and prejudices, using legislative power to enact "schemes of oppression" against those of different religious or political beliefs or from different social classes.<sup>1</sup> Similarly, Hamilton noted that "[n]othing is more common than for a free people, in times of heat and violence, to gratify momentary passions" by enact-

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<sup>1</sup> James Madison, Federalist Paper #10, in *The Federalist Papers*, ed. Isaac Kramnick (Penguin 1987), p. 123-126.

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ing ill-considered legislation.<sup>2</sup> The text and structure of the Constitution bear out this concern for oppression due to the elevation of passion over deliberation by providing for barriers to rash legislation. The bill of attainder and *ex post facto* clauses prohibit legislation resulting from, in the words of Chief Justice Marshall, "those sudden and strong passions to which men are exposed."<sup>3</sup> Bicameralism is designed to encourage deliberation in order to prevent "sudden and violent fits of despotism, injustice, and cruelty" by the majority.<sup>4</sup>

This historical evidence suggests that not all legislation is equally disfavored; rather, the Framers were most concerned with majoritarian overreaching resulting from the legislature's tendency to act out of passion and prejudice rather than after deliberation. Viewing judicial review in this light suggests that an increase in "judicial activism" may be most valuable when exercised over legislation implicating this concern. A "targeted judicial activism," concerned with reducing legislation enacted in passion rather than after considered deliberation, fits well not only with constitutional history but also comports largely with Sherry's examples of bad cases that should have been subjected to heightened scrutiny. *Hirabayashi*, *Korematsu*, and *Abrams* reflect the majority's fear of foreign influence so common during wartime. *Minersville* reflects the anti-Communist fervor of the mid-twentieth century. And *Plessy*, *Bradwell*, and *Minor* reflect racial and gender prejudices and, perhaps, the majority's fear of diluting its monopoly on social and political power. In sum, accepting Sherry's premise that the judiciary never can strike the perfect balance between deference and scrutiny, constitutional history suggests that targeted judicial activism over legislation that appears rooted in passion or prejudice comes closer to that balance.



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<sup>2</sup> Alexander Hamilton, Letters from Phocion, in 2 *The Works of Alexander Hamilton*, ed. John C. Hamilton (C.S. Francis & Co. 1850), p. 289.

<sup>3</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

<sup>4</sup> James Wilson, Of Government, in 1 *Collected Works of James Wilson*, ed. Kermit Hall (Liberty Fund, Inc. 2007), p. 697.



A RESPONSE TO COMMENTS ON “JUDICIAL ACTIVISM”

## LIBERTY’S SAFETY NET

*Suzanna Sherry*

I AM HONORED AND HUMBLLED by the breadth and depth of the responses to my essay on judicial activism, including Richard Epstein’s very generous introduction. Each of the contributors has packed a tremendous amount of insight and information into an impossibly limited number of words, and the comments will be extremely useful as I go forward with the project of turning the original essay into a book.

My essay might be characterized as a rhetorical call to arms, an undifferentiated embrace of judicial activism. Three of the commentators provide very helpful substantive support for the call to arms, and two others offer refinements that call into question the lack of differentiation. I consider all five to be friendly amendments to my motion for increased judicial activism, and will therefore consider them relatively briefly.

Both Scott Gerber and Diane Mazur write with expertise that I lack, each in a way that deepens and enriches my arguments. I plan to read both their books<sup>1</sup> and incorporate their arguments into my own, and I am grateful for their help.

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*Herman O. Loewenstein Professor of Law, Vanderbilt University. Copyright © 2013 Suzanna Sherry.*

<sup>1</sup> SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY* (2011); DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* (2010).

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Gerber makes the point that twenty-two centuries of political theory support judicial activism – and what a feat, to condense twenty-two centuries into five hundred words! I wholeheartedly agree with him that “without political theory America’s constitutional framers could not have used the lessons of history” to create an independent, liberty-preserving judiciary. He mistakes my point, however, if he understands me to argue that political theory weakens my case. My quarrel is not with political theory but with all-encompassing constitutional theories that aim to answer every constitutional question through simple algorithms, and with (some) political scientists, who reduce the discipline of constitutional law to the study of raw politics. As I have argued elsewhere, all-encompassing constitutional theories are both impractical and ineffective; they neither produce certainty nor constrain judges.<sup>2</sup> I also take issue with the “attitudinalist” political scientists who attribute every judicial vote to the judge’s political preferences, viewing judges as legislators in black robes and thereby impoverishing our constitutional discourse.<sup>3</sup> These political scientists, now joined by many constitutional scholars,<sup>4</sup> flatten and coarsen the insights of the legal realists into two binary oppositions – one between law and politics and another between liberals and conservatives. This worldview produces a crude practical skepticism that makes deference to the popular branches seem the only reasonable alternative to Hand’s bevy of Platonic Guardians.<sup>5</sup> Gerber and I both seek to provide a

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<sup>2</sup> See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

<sup>3</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

<sup>4</sup> See, e.g., Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004); Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

<sup>5</sup> LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958). For elaboration of the argument in the text, see Suzanna Sherry, *Democracy’s Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. F. 7 (2011), at [www.harvardlawreview.org/issues/125/november11/forum\\_738.php](http://www.harvardlawreview.org/issues/125/november11/forum_738.php).

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richer and more nuanced description of constitutional adjudication, in which judicial activism moderates the worst aspects of politics rather than replicating them.

Mazur focuses on how judicial deference leads to unaccountability and encourages “professional rot . . . arrogance, and hubris” in the institutions that are unaccountable. Her example is brilliant, moving, and persuasive: She argues that the Court’s extreme deference to the military over the past thirty years is at the root of the current crisis of sexual assaults in the military. All I can add to her analysis is to note the obvious: The military is not the only example – although it is surely one of the strongest – of unaccountability leading to excess and poor decision-making. From over-indulged children to an under-constrained Congress, those who know their actions will not be subject to effective oversight are prone to bad behavior. The founding generation knew this, and divided power accordingly; of particular relevance here, they tried to create both a judiciary independent of the elected branches and a military dependent on civilian leaders. As Mazur shows, we ignore their insights at our peril.

I read Howard Wasserman’s essay as providing additional support for my thesis, albeit more obliquely. I am delighted to be credited with “normalizing” judicial activism and reversing the negative connotations of the activist label. He is probably too optimistic when he claims that my essay will “rob[] name-callers of a previously potent weapon,” but, as the saying goes, from his mouth to God’s ear. And of course he is absolutely right that one reason to claim activism as a positive is to move us beyond epithets to a more substantive discussion of the correctness of particular constitutional decisions. All but the last paragraph of his comment, then, suggest that he is supportive of my call for more judicial activism. But he closes by saying that *they* (activists) can proudly declare “We’re judicial activists. Get used to it.” Shouldn’t that be *we*, Professor Wasserman?

Turning now to the two friendly amendments: Both Scott Dodson and Evan Zoldan take me to task for failing to differentiate among different types of activism. Both think that while increased activism is a good idea in principle, it should be focused on limited

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contexts. Dodson identifies a kind of judicial activism that might be uniformly – or at least mostly – bad, because it reduces liberty by increasing governmental power over individuals. He uses as an example the jurisprudence governing state sovereign immunity, which makes it exceedingly difficult for Congress to lift that immunity and thus makes it easier for states to do harm without fear of being sued. Zoldan points out that as a historical matter, judicial review was designed to remedy the “tendency of democratic majorities to act out of passion and prejudice rather than after deliberation.” He therefore suggests that judicial activism should be targeted at legislation that is rooted in passion or prejudice.

Both Dodson and Zoldan are right in their basic insight: Not all judicial activism is created equal. Dodson's concern about liberty-reducing activism is important, and it is certainly not limited to sovereign immunity doctrines. This past Term's decision in *Shelby County v. Holder*<sup>6</sup> – which invalidated the preclearance formula of the federal Voting Rights Act and thus as a practical matter eliminated the preclearance requirement altogether, freeing states to make electoral changes subject only to post-enactment lawsuits – may be another example of the problem (more on *Shelby County* later).

But that kind of activism is not only, as Dodson notes, less frequent, it is also qualitatively different. Both the sovereign immunity doctrines and *Shelby County* raise questions of federalism: questions not about *whether* government can act in a particular way, but about *which* government can act. Activism in the *whether* context always enhances someone's liberty because it always constrains government action, although there may often be conflicts that require the court to decide whose liberty will be increased and whose will be diminished. In the *which* context, by contrast, the Court confronts a choice between constraining state governments and constraining the federal government; it is not always easy to tell what counts as activism or whether that activism will be liberty-enhancing or liberty-reducing. (The same can be said about separation-of-powers questions.) Activism in the name of federalism, then, can and should be distinguished.

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<sup>6</sup> 133 S. Ct. 2612 (2013).

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Parsing activism in the way that Dodson suggests is also consistent with the Court's role as a counter-majoritarian institution protecting against majority tyranny. The states do not need the courts' protection. As Herbert Wechsler pointed out almost sixty years ago, the states are protected by the *political* safeguards of federalism.<sup>7</sup> And as Jesse Choper noted more than thirty years ago, Wechsler's insight suggests that there is little or no justification for the courts to police federalism boundaries, and thus that the Court should not review federalism-based challenges to congressional action at all, much less do so aggressively.<sup>8</sup> I take Dodson as reiterating both Wechsler's and Choper's points, and I have no quarrel with the idea in principle although I think it might be difficult to implement in practice because federalism principles and individual rights sometimes intersect.<sup>9</sup>

That last problem – of correctly identifying the particular context in order to determine the appropriateness of judicial activism – also besets Zoldan's suggestion. His historical point is exactly right, and well-illustrated by his quotations from various founding luminaries. Perhaps Madison put it best, defending the concept of an unelected body to “protect the people against the transient impressions into which they themselves might be led” as a result of “fickleness and passion” or “sudden impulses . . . to commit injustice on the minority.”<sup>10</sup> But how are we to identify which legislation implicates this concern with passion or prejudice? John Hart Ely tried, but his elegant and eloquent theory has run into multiple obstacles in the three decades since he proposed it.<sup>11</sup> If as brilliant a scholar as

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<sup>7</sup> Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).

<sup>8</sup> JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

<sup>9</sup> Consider *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated the federal Defense of Marriage Act. Justice Kennedy's majority opinion discussed both federalism and individual rights.

<sup>10</sup> JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 194-195 (Tuesday June 26) (Adrienne Koch ed. 1966).

<sup>11</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*

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Ely could not successfully distinguish between legislation engendered by passion or prejudice and legislation that results from reasoned deliberation, I am confident that no one can. One might also argue that the behavior of Congress over the past decade or so suggests that Congress is incapable of reasoned deliberation and thus that *no* federal legislation should be exempt from judicial activism.

In short, then, while I have no theoretical objection to the idea that there are many types of judicial activism, some more defensible than others, I do have practical objections. It is all well and good to propose that activism be confined so that it is either libertarian (as Dodson would have it) or targeted at legislation enacted in passion (as Zoldan urges). But we are no more likely to be able to identify and agree on which instances of judicial activism meet those constraints than we are to agree on which Supreme Court invalidations are good, wise, or constitutionally sound. We have to take the bitter with the sweet when it comes to choosing between deference and activism.

Aaron-Andrew Bruhl and Frank Colucci have more serious objections to my call for greater judicial activism. Each makes a somewhat different argument, but their bottom lines are similar: They would make the trade-off between too much activism and too much deference differently than I do. Colucci makes the point most explicitly, warning that an increase in activism will “encourage more false positives – and more Justices like Anthony Kennedy.” Both Colucci and Bruhl tell us just what that trade-off looks like. Colucci says “*Lawrence* comes at the cost of *Citizens United* (or vice versa)”<sup>12</sup>

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(1980). For critiques identifying the obstacles, see, e.g., Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 784-88 (1991); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). For further evidence that Zoldan’s restatement of Ely’s idea is equally problematic, one need only consider the debates about whether affirmative action helps or hurts minorities and whether it should be subjected to strict scrutiny.

<sup>12</sup> The references are to *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Citizens*



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and points out that the activist Justice Kennedy was the only Justice who was in the majority in both *Windsor* and *Shelby County*. Bruhl warns of the risk of “judicial *hyperactivity*,” which he illustrates by a laundry list of cases (including *Windsor*, *Shelby County*, and *Citizens United*), some deplored by conservatives and lauded by liberals and some exactly the reverse.

But that is precisely my point. We can't have *Lawrence* and *Windsor* without *Shelby County* and *Citizens United*. Fifty years from now we would be more ashamed of the Court having upheld sodomy statutes and DOMA than we will be of the Court having invalidated the preclearance formula of the VRA and campaign finance legislation. At least that's my prediction, based on a modern evaluation of the Court's past performance (I will consider later Bruhl's objection to using the past to predict the future). And I think my view would probably coincide with the judgment of most Americans on both sides of the political aisle, if they could be convinced that they can't have it both ways. Given a choice between upholding both DOMA and § 4 of the VRA (or campaign finance laws) or invalidating both, my guess is that a large majority of both liberals and conservatives would prefer to have the Court invalidate both. People cling to the belief that they can keep the cases they like and jettison the ones they don't only because our current political climate, our embrace of attitudinalist conceptions of judges as politically motivated, and our obsession with the illegitimacy of judicial activism allow pundits and politicians to simultaneously lambaste *Shelby County* as illegitimate activism and celebrate *Windsor* (or vice versa). Once we clear away the brush by showing that the cases are two sides of the same coin, both might be viewed as more acceptable.

Both Colucci and Bruhl also raise other questions about my argument that history suggests that we are better off with too much activism than with too little. Colucci is skeptical that preserving liberty – freedom from majority tyranny – is a primary goal of our constitutional regime. In response, I refer him to Scott Gerber's lesson on the political theory of the founding generation and How-

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United v. Federal Election Comm'n, 558 U.S. 310 (2010).

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ard Wasserman's comment that the Court has viewed its role that way for at least the last half-century.

Bruhl has a different objection: He suggests that the past may not be a good predictor of the future, given both "institutional circumstances" and the current Court's apparent willingness to invalidate federal statutes. I confess that I cannot prove that in the future we will regret today's deferential cases more than we regret the activist ones. But two fairly recent instances of deference have already been overruled or discredited and are, I think, on their way to universal condemnation. In *Bowers v. Hardwick*,<sup>13</sup> the Court upheld laws banning homosexual sodomy. A mere seventeen years later, the Court overruled *Bowers* in *Lawrence*, calling it "not correct when it was decided."<sup>14</sup> And as Diane Mazur points out, the extreme deference of *Rostker v. Goldberg*<sup>15</sup> produced a military in which sexual assault is common and acceptable. Not only is the nation dealing with that crisis, it has also changed its mind about women in combat; and, as Mazur argues more broadly, *Rostker* is an illustration of the more general point that deference corrupts decision-making institutions and makes them more likely to err. If Bruhl is right that "[f]or decades now the Supreme Court has been plenty comfortable with its power of judicial review," it is all the more telling that it is *still* deferential cases that are the most problematic.

As for institutional circumstances, I view party polarization and the "sclerotic, some say broken" Congress as reasons for placing more trust – not less – in an independent judiciary. And Bruhl's brief description of our political woes leads me to a broader point. Polarization and a broken Congress are symptoms of a deeper pathology: At least in the United States, *democracy* is broken. The founding generation anticipated that possibility, which is why they hoped judges would provide a backstop against tyranny. Judicial activism is liberty's safety net; we should not cabin it just when we need it most.

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<sup>13</sup> 478 U.S. 186 (1986).

<sup>14</sup> 539 U.S. at 578.

<sup>15</sup> 453 U.S. 57 (1981).

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Finally, a few words in praise of Richard Epstein (albeit not necessarily in agreement with him). Praise from him is high praise indeed, and means the world to me. And I return his affection (and admiration) a hundredfold. Reading his introduction brought tears to my eyes.

But I will not be adding either *Kelo* or a theory of property rights to my work on judicial activism. Perhaps it is just my independent streak again, but I have to take issue with Richard's points. *Kelo v. City of New London* does not make the list of universally condemned cases for the same reason that *Lochner v. New York*<sup>16</sup> does not: much as some scholars detest it, others agree with it.<sup>17</sup> As for his broader point, if anyone can successfully craft a comprehensive political theory of limited government that is both internally consistent and not vulnerable to obvious criticisms, it is Richard. But I have the same doubts about a comprehensive theory of limited government that I do about other comprehensive constitutional theories. In addition, my intuition is that any comprehensive theory that incorporates broad notions of a right of private property is likely to run into a major obstacle. The right to own property – especially as broadly conceived as Richard would have it – is different in several important ways from the rights at issue in the cases on my list. People usually do not place the same value on property as they do on liberty. Incursions on property usually do not provoke the same revulsion as incursions on people's bodies, ideas, or actions. And, as the continuing debate over cases like *Kelo* and *Lochner* shows, it seems unlikely that we will ever reach consensus about where the line should be drawn between property rights and the police power of the government. Richard's properly limited government is someone else's ineffective government; the same cannot be said about a government that refrains from, for example, imprisoning people based on their ancestry or sterilizing them based on pseudo-science. To the extent that my argument depends on a historical consensus

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<sup>16</sup> 198 U.S. 45 (1905).

<sup>17</sup> See, e.g., Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *TULSA L. REV.* 751, 761-64 (2009).

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about what kinds of government actions are most likely to be eventually perceived as erroneous, it is difficult to reconcile with a broad view of property rights. And so we are back where I began: If we cannot agree on what the Constitution means or should mean, how might we determine whether judicial activism is good or bad?

In the end, then, on the ultimate question of whether judicial activism is likely to do more good than harm, history and theory can take us only so far. Those who view judges as power-hungry, politically driven, or irrational will never be persuaded that they are our salvation. But I believe that federal judges as a group are among the most ethical, professional, and disinterested decision-makers we have. The circumstances under which they make decisions – including adversarial presentation of arguments, the transparency and reasoned elaboration of written opinions, and the incrementalism that is the concomitant of a precedent-based legal regime – further increase the likelihood of sound judicial decisions.<sup>18</sup> Why would we ever trust our liberty to a Congress (or a state legislature) that is at its best political and at its worst dysfunctional? Liberty is always endangered, but judicial activism gives it at least a fighting chance.



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<sup>18</sup> For elaboration, see DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009).