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This work was originally published as Suzanna Sherry, Why We Need More
Judicial Activism, in 16 Green Bag 2d 449 2013.



A SUMMARY OF

WHY WE NEED MORE JUDICIAL ACTIVISM

Suzanna Sherry

TOO 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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Micro-Symposium: Sherry's "Judicial Activism"

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.¹

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.

¹ 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.

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