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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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<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).

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

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).

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

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

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

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).

## *Micro-Symposium: Sherry's "Judicial Activism"*

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*

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

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*

## *Micro-Symposium: Sherry's "Judicial Activism"*

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).



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

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).

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

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).

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

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).