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Parsing Judicial Activism

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A COMMENT ON SHERRY'S "JUDICIAL ACTIVISM"

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PROFESSOR SUZANNA SHERRY ARGUES that judicial activism – which she defines as "any time the judiciary strikes down an action of the popular branches"[1] – is a valuable check on majority tyranny.[2] 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.[3] 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.[4] In *Seminole Tribe*, a routinely (but probably not uni-

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[1] Suzanna Sherry, *Why We Need More Judicial Activism* 4 (2013), papers.ssrn.com/sol3/papers.cfm?abstract_id=2213372.

[2] Sherry, *supra* note 1, at 1.

[3] *See* Scott Dodson, *Reconsider Old Taboo*, NAT'L L.J., Nov. 1, 2004, at 19.

[4] Sherry, *supra* note 1, at 5.

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.[5] 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.[6] 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.

[5] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[6] Sherry, *supra* note 1, at 1, 16.