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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.” What LGBT activists and scholars did with queer, 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.

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

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2 Id. at 231, 232-33.
4 Galinsky, supra note 2, at 232.
Micro-Symposium: Sherry’s “Judicial Activism”

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,” 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.” 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. 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. Believers in vigorous judicial protection of constitutional liberties 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.”

5 Id.
6 Id.
7 Brown, supra note 3, at 1258.
9 Brown, supra note 3, at 1271.