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Aaron-Andrew P. Bruhl

William & Mary Law School, apbruhl@wm.edu

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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

Associate Professor, University of Houston Law Center.

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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.

