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Unenumerated Rights in Different Democratic Regimes *

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Unenumerated Rights in Different Democratic Regimes

Are *Lochner v. New York* and *Roe v. Wade* the same or different?¹ The Supreme Court based both decisions on unenumerated constitutional rights: *Lochner* on liberty to contract, and *Roe* on the right of privacy. While neither of these rights is expressly delineated in the constitutional text, both the *Lochner* and *Roe* Courts tied the respective rights to due process. Thus, these two landmark cases have been constantly linked for more than one-quarter century. The *Roe* Court justices themselves worried about analogies to *Lochner*. And since *Roe* was decided 1973, critics and defenders have been dancing a well-practiced minuet: critics charging that *Roe* is *Lochner* all over again; defenders distinguishing the two cases, castigating *Lochner* while celebrating *Roe*.

Most of the defenders and critics in this dance focus on the meaning of substantive due process. Some critics of both *Lochner* and *Roe* insist that substantive due process is an oxymoron. After all, the fifth and first amendments guarantee due “process,” not due substance. Should not the right to due process guarantee that the government follow certain procedures in appropriate circumstances, and nothing else, nothing substantive? Other critics, particularly of *Roe*, construct a syllogistic argument supposedly based on history. During the late-nineteenth and early-twentieth centuries, it is argued, the Court decided a series of cases, including *Lochner*, that interpreted due process to encompass the substantive right of liberty to contract. In the 1930s, when the New Dealers started passing economic and social welfare legislation to shake the nation from its Great Depression doldrums, the Court stubbornly continued to invalidate laws that violated due process (or were otherwise beyond congressional power). President Franklin Roosevelt responded with his court-packing plan, generating a constitutional crisis. Finally, in 1937, the Court capitulated with its “switch in time that saved nine,” repudiating *Lochner* and the

¹Roe v. Wade, 410 U.S. 113 (1973); *Lochner v. New York*, 198 U.S. 45 (1905).

substantive due process protection of liberty to contract.² Yet, in *Griswold v. Connecticut*, decided in 1965, and then in *Roe*, the Court resuscitated substantive due process and held that it protected a right of privacy, encompassing a woman's interest in choosing whether to have an abortion. Thus, the syllogism: *Lochner*-era liberty to contract cases were grounded on substantive due process; substantive due process was misguided; therefore, *Lochner*-era liberty to contract cases were wrongly decided; finally, *Roe*-era right to privacy cases, also grounded on substantive due process, must also be wrongly decided. In short, if liberty to contract is not constitutionally protected, then the right privacy likewise should not be protected.³

Defenders of *Roe*, at this point, typically pirouette and argue that not all substantive due process cases are alike. They underscore that, in the 1920s, the Court relied on its substantive due process precedents to invalidate state laws restricting the autonomy or privacy of parents deciding how to raise their children.⁴ In 1937, the defenders therefore argue, the Court did not repudiate all substantive due process decisions, only those protecting economic rights, particularly liberty to contract. The incipient right of privacy cases remained good law. *Roe*-era

²Thomas Reed Powell first called the Court's change the "switch in time that save nine." Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, at 8 (1993). For a discussion of various arguments concerning substantive due process, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *Const. Comment.* 315, 315-19 (1999). Sources helpful in understanding the Court's jurisprudence of the 1930s include the following: Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); Morton J. Horowitz, *The Transformation of American Law 1870-1960* (1992); Ken I. Kersch, *Constructing Civil Liberties* (2004); William E. Leuchtenburg, *The Supreme Court Reborn* (1995) [hereinafter Leuchtenburg, *Reborn*]; G. Edward White, *The Constitution and the New Deal* (2000); William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (1998); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943 (1987); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *Geo. L.J.* 1 (2003); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 *U. Pa. L. Rev.* 971 (2000).

³*E.g.*, Robert Bork, *The Tempting of America* 116 (1990) (arguing that *Roe* should be "relegated to the dustbin of history where *Dred Scott* and *Lochner* lie"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 937-43 (1973) (arguing that *Roe* is the same as *Lochner* and should be overruled). For a discussion of the various arguments concerning substantive due process, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *Const. Comment.* 315, 315-19 (1999).

⁴*Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

right of privacy cases do not manifest an atavistic and corrupt appearance of a repudiated constitutional doctrine, but rather rely on a judicial awareness that not all substantive due process cases are equivalent. The Court has correctly developed a nuanced understanding of liberty under due process. Quite simply, then, the right of privacy is properly protected, while liberty to contract is properly unprotected. *Lochner* and *Roe* are distinguishable.⁵

In this Article, I argue that this entire dance is out of beat with the historical music. The analogical link between *Lochner* and *Roe* is ahistorical and misleading. The key to understanding the relationship (or lack of relationship) between *Lochner* and *Roe* is not the definition of substantive due process. In fact, no Supreme Court justice even used the phrase, ‘substantive due process’ until 1948, when Justice Wiley B. Rutledge used it in dissent.⁶ To understand *Lochner* and *Roe* correctly, one must understand that each was decided under a different democratic regime: *Lochner* under republican democracy, and *Roe* under pluralist democracy. Because of the distinctive characteristics of republican and pluralist democracies, the practices of judicial review starkly differed under each. Put in different words, *Lochner* and *Roe* were decided within distinct paradigms of democracy and constitutional law, and as such, the cases are largely incommensurable.⁷

⁵E.g., Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 874-75 (1987) (distinguishing right of privacy cases from *Lochner*-era liberty to contract cases).

⁶Ely, *supra* note 2, at 319 (citing *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting)).

⁷My thesis builds on Howard Gillman’s reinterpretation of the *Lochner* era. Gillman argues that the Supreme Court justices of the *Lochner* era did not radically depart from previous constitutional decision making to decide in accordance with their conservative political views. Rather, the justices continued to interpret the Constitution to proscribe class legislation, a proscription with roots in the nineteenth century (and even earlier). Gillman, *supra* note 2. David E. Bernstein criticizes Gillman for misconstruing many *Lochner*-era cases. Bernstein, *supra* note 2. I find Gillman more persuasive than Bernstein, who seems to misunderstand the proscription on class legislation. In particular, Bernstein does not give enough weight to the fact that legislatures could infringe on individual liberties to promote the common good. See William J. Novak, *The People’s Welfare* (1996) (discussing at length nineteenth-century cases contrasting the common good and partial or private interests); White, *supra* note 2, at 246-51 (following Gillman’s approach).

Part I of this Article describes republican democracy, republican democratic judicial review, and the *Lochner* decision.⁸ Part II focuses on the development of pluralist democracy and the problem of recasting judicial review under this new democratic regime.⁹ Part III focuses on *Roe* as a definitive unenumerated rights case decided under pluralist democracy. Part IV, the Conclusion, explains why *Lochner* and *Roe* should be analogized only with extreme caution—if at all—and why such caution has rarely been exercised.¹⁰

I. Republican Democracy and Judicial Review

Republican democracy was grounded on three fundamental components. First, the people were sovereign; government supposedly rested on the consent of the governed. Second, the people as well as their elected officials were supposed to be imbued with civic virtue. Third, because they were virtuous, the people and the governmental officials were supposed to pursue the common good rather than “partial or private interests.”¹¹ The government, in theory, was to respect individual liberties but could always restrict them in pursuit of the common good.

During the nineteenth and early-twentieth centuries, innumerable legal disputes turned on the distinction between the common good and partial or private interests, or as it was sometimes phrased, the difference between reasonable and arbitrary (or class) legislation. Some judges, seeking precision, would equate reasonableness with a means-ends nexus: the governmental action must be a reasonable means for achieving the government’s purpose, which must constitute the common good.¹² For most judges, it should be added, the crucial distinction

⁸See *infra* text accompanying notes __-__.

⁹See *infra* text accompanying notes __-__.

¹⁰See *infra* text accompanying notes __-__.

¹¹Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 59 (1969). The 1780 Massachusetts Constitution, for example, stated: “Government is instituted for the common good, for the protection, safety, prosperity of the people, and not for the profit, honor, or private interest of any one man, family, or class of men.” Constitution of Massachusetts (1780), *reprinted in* 1 *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States* 956, 958 (Ben Perley Poore ed., 2d ed. 1878).

¹²Justice Brown, for instance, wrote:

between the categories of the common good, on the one hand, and partial or private interests, on the other, was formalistic. The line between the opposed categories, that is, might initially be obscure in any concrete dispute, but the demarcation was real and could be discerned through careful analysis. The key, then, to the judicial analysis was the categorization of the governmental purpose: was it for the common good or not? This analysis did not involve a weighing or balancing of the government's purpose or interest against countervailing interests; the judicial conclusion supposedly rested on the proper understanding of preexisting category-boundaries.¹³ Consequently, judges performed the task of "boundary pricking."¹⁴ Courts needed to place various legislative actions in either the public-good category or the private-interest category. In doing so, the courts traced a boundary between the common good, on the one side, and partial and private interests, on the other side, by pricking one point (or case) at a time.¹⁵ The result of this judicial boundary pricking was to sketch the contours of a protected private realm of individual liberty and property. Given the nature of republican democracy, however, the courts did not focus so much on the definition of individual rights and liberties as on the legislatures' actions and purposes. In each case, the question became whether the legislature, in the eyes of the court, had acted for the common good? If the legislature had acted for the

To justify the state in ... interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

¹³Gillman, *supra* note 2, at 54-55; G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 Brook. L. Rev. 87, 114-17 (1997).

¹⁴"Boundary pricking" is G. Edward White's felicitous phrase. White, *supra* note 2, at 36.

¹⁵"Boundary pricking, which consisted of a process by which new cases were placed in one or another essentialist category, and consequently in one sphere of authority or another, was the essence of guardian judicial review in constitutional law." *Id.*; see Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 Wash. & Lee L. Rev. 787, 806-09 (1999) (emphasizing how the courts separated law from politics to help justify judicial review).

common good, then the court would uphold the government's action. If the legislature had instead acted for the benefit of private or partial interests, then the court would invalidate the government's action. In the words of Chancellor James Kent, "private interest must be made subservient to the general interest of the community."¹⁶

The preeminent constitutional-law treatise of the late-nineteenth and early-twentieth centuries was Thomas Cooley's *Constitutional Limitations*, first published in 1868 and, by 1903, in a seventh edition.¹⁷ Cooley's elucidation of the judicial enforcement of constitutional limits relied heavily on republican democratic principles. Cooley began by declaring that the people are sovereign: "The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority."¹⁸ Cooley then explained how the requirement that legislation be for the common good both empowered and limited the government. According to Cooley, the government always retained the legislative power to enact any laws for the common good. When discussing the definition of due process or the law of the land, Cooley quoted approvingly from Daniel Webster: "The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society."¹⁹ Cooley observed that under the state police power "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State."²⁰ Indeed, at one point, Cooley stated that the

¹⁶James Kent, 2 *Commentaries on American Law* 276 (1827; Legal Classics Library Reprint).

¹⁷Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Da Capo Press ed. 1972) (reprint of 1st ed. 1868); Eben Moglen, *Holmes's Legacy and the New Constitutional History*, 108 *Harv. L. Rev.* 2027, 2033 (1995).

¹⁸Cooley, *supra* note 17, at 28.

¹⁹*Id.* at 353-54 (quoting Daniel Webster).

²⁰*Id.* at 573-74. Therefore, Cooley added:

All contracts and all rights, it is held, are subject to this [police] power; and regulations which affect them may not only be established by the State, but must also be subject to change from time to time, with reference to the general well-being of the community, as circumstances change, or as experience demonstrates the necessity.

legislative power “must be considered as practically absolute, whether it operate according to natural justice or not.”²¹ Not coincidentally, then, Cooley did not encourage judicial activism. Courts are not superior to legislatures, he reasoned, and therefore the courts’ power of judicial review over legislative acts should only “be entered upon with reluctance and hesitation.”²²

Even so, Cooley emphasized that the requirement that legislation be for the common good constrained the government; after all, the title of his treatise was *Constitutional Limitations*. It is “the very nature of free government,” he wrote, for the legislature “to make laws for the public good, and *not* for the benefit of individuals.”²³ Consequently, “[t]he bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man’s property over to another would nevertheless be void.”²⁴ More generally, Cooley explained, legislatures are restrained from enacting laws for partial or private interests.

[E]very one has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government. Mr. Locke has said of those who make the

Id. at 574.

²¹*Id.* at 168. The surrounding passage is worth noting:

The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance.

Id.

²²*Id.* at 160. “[I]t is only where [the courts] find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action.” *Id.* at 160.

²³*Id.* at 129 (emphasis added).

²⁴*Id.* at 175.

laws: ‘They are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough’; and this may be justly said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments.²⁵

This limit on legislative power translated into a demand for equality under the law: “Special privileges are obnoxious, and discriminations against persons or classes are still more so.”²⁶

The influence of Cooley’s *Constitutional Limitations*, in one edition after another, underscores the continuing importance of republican democratic principles. Yet, industrialization, immigration, and urbanization placed republican democracy under enormous pressures in the late-nineteenth and early-twentieth centuries. The meaning of the common good was constantly contested and subject to change.²⁷ During this time, the economic ideology of laissez faire became increasingly influential and thus shaped judges’ interpretations of the common good. Many judicial decisions seemed to shift the border between public goods and partial or private interests so as to expand the private realm of protected economic interests (despite the fact that, in theory, the category-boundaries were preexisting).

²⁵*Id.* at 391-92.

²⁶*Id.* at 393. In a case decided in 1870, Judge Cooley elaborated the nexus between equality and the prohibition against partial or private legislation.

But the discrimination by the State between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no further. Every honest employment is honorable, it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws.

People v. Salem, 20 Mich. 452 (1870).

²⁷See Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* 18-21 (1992) (discussing contested nineteenth-century meanings of republicanism).

Two Supreme Court decisions would, for future generations, epitomize this era: *Allgeyer v. Louisiana*, decided in 1897, and *Lochner v. New York*, decided in 1905. In holding that a state restriction on insurance contracts violated due process, the *Allgeyer* Court solidified the laissez-faire flavored transformation of free labor into “liberty to contract.”²⁸ The ideology of free labor, originating during the mid-nineteenth-century in opposition to slave labor, had provided a rallying cry for Abraham Lincoln’s Republican Party before, during, and after the Civil War. Justice Rufus Peckham’s unanimous *Allgeyer* opinion acknowledged the “right of the state to enact . . . legislation in the legitimate exercise of its police or other powers as to it may seem proper.”²⁹ But such exercises of the police power, the Court stressed, must be consistent with the individual rights and liberties protected by a republican democratic form of government. In particular, Peckham emphasized:

The ‘liberty’ mentioned in [the fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Quoting Justice John Marshall Harlan, Peckham explicitly linked liberty to contract with republican democratic equality: the individual should enjoy “upon terms of equality with all others in similar circumstances . . . the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property.”³⁰ Finally, it should be noted, liberty to contract was

²⁸165 U.S. 578, 591 (1897); see Bernstein, *supra* note 2, at 43 (discussing how Court continued to invoke “liberty of contract” language).

²⁹165 U.S. at 591.

³⁰*Id.* at 589-90 (quoting *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888)).

not expressly enumerated in the constitutional text, though it was tied to the enumerated right of due process.

Interestingly, during this Supreme Court era, the Court itself would cite *Allgeyer* far more often than it would cite the more renowned (or infamous) *Lochner*.³¹ Regardless, *Lochner* itself perfectly exemplifies the nature and difficulty of judicial review under republican democracy in this time of political strain. The case arose from a due process challenge to a state law that restricted the number of hours employees could work in bakeries (ten per day and sixty per week). In a five-to-four decision, the Court invalidated the law. Peckham's majority opinion began by acknowledging that the state could exercise its police power to regulate for "the safety, health, morals, and general welfare of the public."³² Moreover, Peckham added, "[b]oth property liberty are held on such reasonable conditions as may be imposed [pursuant to the police power]."³³ Yet, simultaneously, the fourteenth amendment prescribed "a limit to the valid exercise of the police power by the state."³⁴ The state cannot infringe on individual rights and liberties under the "mere pretext" of exercising its police powers for the common good.³⁵ Thus, the Court framed the issue: "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"³⁶

³¹Stephen M. Feldman, *American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage* 104 (2000).

³²198 U.S. 45, 53 (1905).

³³*Id.*

³⁴*Id.* at 56.

³⁵*Id.*

³⁶*Id.*

Put in different words, could the law be justified as pursuing the common good, or was it merely favoring partial or private interests? The Court considered two alternative justifications for the statute: as a regulation of labor relations, and as a regulation for health purposes. Given that bakers were equal “in intelligence and capacity to men in other trades or manual occupations,” Peckham readily concluded that the statute, if viewed as “a purely labor law,” did not promote the common good. “[A] law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and . . . the interest of the public is not in the slightest degree affected by such an act.”³⁷ Hence, if the law were to be upheld, it must be as a health regulation. But, Peckham reasoned, “there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor.”³⁸ Indeed, Peckham suspected that the New York legislature, similar to the legislatures of other states passing social welfare laws, had been disingenuous in its expression of purpose.³⁹ And when focused on the true legislative purpose, the Court saw the statute for what it was, impermissible class legislation. “It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.”⁴⁰

The dissenters agreed with the majority on the need to apply the fundamental principles of republican democracy. Disagreement arose over the application of those principles in this particular case. Harlan’s dissenting opinion, joined by Justices William R. Day and Edward D. White, began by focusing on the interplay between the state’s police power and individual rights

³⁷*Id.* at 57.

³⁸*Id.* at 59.

³⁹*Id.* at 63-64.

⁴⁰*Id.* at 64. Compare Gillman, *supra* note 2, at 127-29 (arguing that *Lochner* majority found the law to be impermissible class legislation) and White, *supra* note 2, at 246-51 (analyzing *Lochner* consistently with Gillman’s approach) with Bernstein, *supra* note 2, at 23-26 (criticizing Gillman’s argument).

and liberties: “liberty of contract [like other rights and liberties] is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society.”⁴¹ But was a restriction on bakers’ hours of employment in the common good? Harlan reviewed the evidence concerning the health of bakers and concluded that “there is room for debate and for an honest difference of opinion.”⁴² Unlike the majority, however, Harlan refused to presume that the legislature had been disingenuous; instead, given the uncertain connection between bakers’ hours and their health, Harlan deferred to the legislative judgment. “We are not to presume that the state of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good.”⁴³ Arguing similarly, Justice Oliver Wendell Holmes, Jr., also dissented. Quite simply, the Court should have deferred to the legislative judgment because “[a] reasonable man might think [the disputed statute] a proper measure on the score of health.”⁴⁴ Moreover, Holmes added, the majority’s demarcation between the common good and private or partial interests seemed to be unduly influenced by Social Darwinist or laissez-faire

⁴¹198 U.S. at 68 (Harlan, J., dissenting). Harlan wrote:

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. “The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import,” this court has recently said, “an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.”

Id. at 67 (Harlan, J., dissenting) (quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 26 (1905)).

⁴²*Id.* at 72 (Harlan, J., dissenting).

⁴³*Id.* at 73 (Harlan, J., dissenting). “Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument.” *Id.*

⁴⁴*Id.* at 76 (Holmes, J., dissenting). Holmes added: “Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.” *Id.*

ideology. In Holmes's terse prose, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."⁴⁵

II. Pluralist Democracy and the Problem of Judicial Review

During the 1920s and 1930s, numerous political, social, and cultural factors led to the downfall of republican democratic government. In its stead, by the early- to mid-1930s, the practice of pluralist democracy had taken hold. A full exploration of this transition is beyond the scope of this Article, but in short, republican democracy, originally built on agrarian economics, widespread land-ownership, and Protestant values, no longer fit the urban, industrial, and culturally diverse America that consolidated between the World Wars.⁴⁶ The new regime—pluralist democracy—was marked by a widespread opportunity to participate in politics. One did not need to qualify to participate by demonstrating civic virtue. In particular, during the thirties, many ethnic and immigrant urbanites who had previously been discouraged from participating in national politics became voters, supporting the New Deal. Moreover, pluralist democracy acknowledged that politics was about the pursuit of self-interest. Legislatures no longer supposedly pursued the common good. Instead, legislators responded to the requests, demands, and blandishments of interest groups. Legislation arose from interest-group battles and compromises. Thus, for example, legislation favoring labor unions was no longer condemned as class legislation, favoring partial or private interests. To be sure, labor constituted an interest group, but now, so did management; all societal groups concerned about politics were understood to be interest groups. Pursuing self-interest became normal and legitimate.

⁴⁵*Id.* at 75 (Holmes, J., dissenting). Holmes elaborated: "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Id.*

⁴⁶*See* Anthony J. Badger, *The New Deal: The Depression Years, 1933-1940*, at 58 (1989) (explaining divisions within American society); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* 332 (1963) (emphasizing the participation of former political outsiders in the New Deal coalition); Robert S. McElvaine, *The Great Depression 197-98* (1984) (discussing changing values in America).

While the practice of pluralist democracy had become entrenched by the mid-1930s, two important institutions still needed to adjust to the transition: the academy (particularly in law and political science), and the courts (especially the Supreme Court). By the mid- to late-1930s, academics and other intellectuals already were struggling to explain and legitimate the new democratic practices. By the early 1950s, the contours of a new theory of democracy—a theory of pluralist democracy—had already been developed. Eventually, the political scientist Robert A. Dahl would articulate the theory of pluralist democracy more comprehensively perhaps than any other scholar. Writing in 1956, Dahl explained that pluralist democracy, like republican democracy, rested on “popular sovereignty.” Yet, contrary to a republican democratic approach, Dahl acknowledged the primacy of self-interest: “If unrestrained by external checks, any given individual or group of individuals will tyrannize over others.” Thus, a democratic theory must encompass “processes” that effectuate legitimate interests while simultaneously controlling illegitimate interests. Legitimacy and illegitimacy, moreover, must be determined through the processes themselves. Dahl thus identified eight processes that were conditions or prerequisites for the operation of a democracy. For instance, in an election, the weight of each individual’s vote is “identical;” a candidate or policy alternative “with the greatest number of votes is declared the winning choice;” and “orders of elected officials [shall be] executed.” Dahl admitted that “no human organization . . . has ever met or is ever likely to meet [all] eight conditions.” Yet, some organizations, called “polyarchies,” came close; he included the United States in this group. Finally, Dahl maintained that American culture nurtured a needed consensus regarding democratic processes. Individuals and interest groups might clash in political struggles, but they shared certain elementary cultural norms that prevented the society from splintering into embittered fragments. “To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation,” Dahl wrote, “it is much more plausible to suppose that the Constitution has remained because our

society is essentially democratic.” And our democratic culture encouraged self-interested individuals to bargain and generally to accept moderate compromises.⁴⁷

Subsequently, Dahl elaborated his democratic theory, which was unequivocally pluralist. “[T]he ancient belief,” he explained “that citizens both could and should pursue the public good rather than their private ends became more difficult to sustain, and even impossible, as ‘the public good’ fragmented into individual and group interests.” Dahl continued to emphasize popular sovereignty and process. “Democracy means, literally, rule by the people. . . . In order to rule, the people must have some way of ruling, a *process* for ruling.” Thus, Dahl arrived at his central question: “What are the distinctive characteristics of a democratic process of government?” He specified five criteria that a “perfect democratic government” would satisfy. The first and foremost criterion or condition for democracy is “effective participation.” “Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome,” Dahl wrote. “They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.”⁴⁸

Put in different words, as Dahl explained, a right to self-government is a “general moral right”—“one of the most fundamental rights a person can possess”—which “translates into an array of moral *and* legal rights, many of which are specific and legally enforceable.” That is, the five criteria requisite to democracy require that participants possess certain enforceable rights, such as freedom of speech and freedom of the press. “[I]f the rights are absent, . . . the democratic process does not exist.” Well, then, Dahl asked, what happens “if a majority acting by perfectly democratic procedures deprives a minority of its freedom of speech?” Dahl’s answer: it’s impossible. “[I]n such a case the majority would not—could not—be acting by ‘perfectly democratic procedures’ [because these specific rights, like free speech] are integral to

⁴⁷Robert A. Dahl, *A Preface to Democratic Theory* 3-4, 6, 33-36, 67-75, 143, 150-51 (1956).

⁴⁸Robert A. Dahl, *Democracy and its Critics* 30, 106, 109 (1989).

the democratic process.” Although pluralist democratic theory focuses on process, the process requires the protection of certain substantive rights. Otherwise, individuals would be unable “to participate fully, as equal citizens, in the making of all the collective decisions by which they are bound.” Dahl concluded, therefore, that democracy has limits “built into the very nature of the process itself. If you exceed those limits, then you necessarily violate the democratic process.” Finally, Dahl returned to his emphasis on democratic culture. If a majority is bent on infringing the rights of a minority, Dahl admitted, the logic of the democratic process might not protect the minority. “In practice ... the democratic process isn’t likely to be preserved for very long unless the people of a country preponderantly believe that it’s desirable and unless their belief comes to be embedded in their habits, practices, and culture.” Without a supportive culture, courts and other governmental institutions will not be able to preserve democratic processes.⁴⁹

With regard to the judiciary vis-à-vis the emergence of pluralist democracy, the Court’s continued application in most scenarios of republican democratic principles lasted not only through the 1920s but also into the 1930s. The reasons for the persistence of republican democratic judicial review were threefold. First, while the practice of pluralist democracy began to emerge during the early 1930s, the theory did not crystallize until later in the decade. Living through the transformation of democracy, many observers did not immediately recognize or grasp the ramifications of the transition. Second, the institutional practice of adjudication, with its emphasis on *stare decisis*, has a natural reliance on the past, on tradition, on precedents. As such, one would expect the judiciary often to lag behind other institutions when change is afoot. Third, and related to the previous point, federal judges (including Supreme Court justices) receive lifetime appointments. In a time of critical transition, such as the 1930s, many judges would have nonetheless matured, learned their professional norms, and been appointed to the

⁴⁹*Id.* at 169-70, 172-73, 175 (1989). When Dahl uses the precise term, “pluralist democracy,” he refers to a democratic government where “[i]nstead of a single center of sovereign power there [are] multiple centers of power, none of which is or can be wholly sovereign.” Robert A. Dahl, *Pluralist Democracy in the United States* 24 (1967); *see* Robert A. Dahl, *Dilemmas of Pluralist Democracy* 4-5 (1982) (discussing elements of pluralist democracy).

federal bench during the prior democratic regime. Such judges would be apt to continue applying the principles and doctrines that they had become accustomed to earlier in their careers.

Thus, as had been true during the pre-World War I era, the Supreme Court continued to resolve numerous challenges to governmental actions by determining whether the action was either for the common good or for partial or private interests. For instance, in *Adkins v. Children's Hospital*, decided in 1923, the Court held that a District of Columbia law setting minimum wages for women and children violated due process. The Court identified several types of cases where it had previously found statutes promoting the common good or public welfare, but also emphasized that due process protected freedom of contract, including for employment contracts. The majority opinion bolstered this latter point by citing a long string of precedents, including *Allgeyer v. Louisiana* and *Lochner v. New York*. Then, examining the disputed statute setting minimum wages for employees, the Court reasoned that it favored partial or private interests: "The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum." In other words, the statute amounted to impermissible class legislation, "a naked, arbitrary exercise of power that ... cannot be allowed to stand under the Constitution of the United States." The Court acknowledged that "[t]he liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good." Yet, while the Court must give "great weight" to legislative assertions of the common good, the justices cannot accept such a legislative statement if it appears to be "a mere pretext." Holmes dissented, reasoning that when the common good or public welfare is unclear, as in this case, the Court should uphold the legislative determination so long as it was reasonable. But the majority found instead that it's "plain duty" was to invalidate this law; doing so was necessary to promote the common good. "To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members." To be sure, such judicial determinations of the common good varied with

the facts of each case. One year later, for example, in *Radice v. New York*, the Court held that a state law restricting the hours of employment for women in restaurants did not constitute impermissible class legislation. The legislature justifiably concluded that the law would “preserve and promote the public health and welfare.”⁵⁰

A. Crisis and Change

The Court’s application of the principles of republican democratic judicial review became more problematic when FDR and Congress began to implement the New Deal agenda. The national and state governments’ efforts to boost the country out of the Depression by regulating the economy and society to an unprecedented degree inevitably clashed with the Court’s traditional methods of judicial review. To be sure, the Court occasionally upheld legislation it found to promote the common good, and even hinted that it might respond favorably to the pull of pluralist democracy. In 1934, in *Home Building and Loan Association v. Blaisdell*, Chief Justice Charles E. Hughes’s majority opinion explained that the societal changes engendered by industrialization had produced “a growing appreciation of public needs.” Similarly, that same year, Justice Owen J. Roberts’s majority opinion in *Nebbia v. New York*, upholding state regulations of milk prices, reasoned that the “category of businesses affected with a public interest” was flexible and expandable. Both these cases suggested that the Court might be ready to enlarge the republican democratic common good to such a degree that the concept would become meaningless; any interests or values could, in theory, be deemed equivalent to the common good.⁵¹ Moreover, some justices elsewhere further signaled that they

⁵⁰*Adkins v. Children’s Hospital*, 261 U.S. 525, 544-45, 549, 557, 559, 561 (1923); *id.* at 570 (Holmes, J., dissenting); *Radice v. New York*, 264 U.S. 292, 294 (1924). In another case, the Court invalidated a zoning ordinance because it did “bear a substantial relation to the public health, safety, morals, or general welfare.” *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928).

⁵¹*Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *Nebbia v. New York*, 291 U.S. 502, 536 (1934); *cf.*, Aleinikoff, *supra* note 2, at 963-64 (characterizing *Blaisdell* as an early balancing case); Bernstein, *supra* note 2, at 51 (arguing that *Blaisdell* expanded public interest doctrine); Harry N. Scheiber, *Economic Liberty and the Modern State*, in *The State and Freedom of Contract* 122, 156-57 (Harry N. Scheiber ed., 1998) (arguing that *Nebbia* manifested significant change in contract clause doctrine).

were ready to turn the Court. Harlan F. Stone, in the early 1920s, while still Dean of Columbia Law School, expressed reservations about sociological jurisprudence. He worried that a judicial assessment of social interests would be lacking in methodology and thus lead to unprincipled decision making. Yet, in a 1936 address at Harvard Law School, now-Justice Stone advocated for a type of “judicial lawmaking” that, while ambiguous, suggested an openness to pluralist democratic processes. Emphasizing the common law, Stone denounced “mechanical” reliance on precedents that reduced the law to “a dry and sterile formalism.” Instead, a judge should recognize that sometimes “he performs essentially the function of the legislator, and in a real sense makes law.” In doing so, the judge should appraise and compare “social values,” or in other words, assess “relative weights of the social and economic advantages ... of one rule rather than another.” Thus, just as pluralist democracy was becoming entrenched in actual political practices, Stone was arguing that not only should legislators weigh competing interests and values, but that judges should do so as well. Indeed, though focused on the common law, Stone extended his comments to constitutional law, where “more often than in private law, [the issue] is between the conflicting interests of the individual and of society as a whole.”⁵²

Nonetheless, in 1935, the Court’s hinted readiness to embrace pluralist democracy seemed to vanish, like a will-o’-the-wisp. Both *Blaisdell* and *Nebbia* were close five-to-four decisions, with the same four conservative dissenters, sometimes disparaged as the “Four Horsemen”: James C. McReynolds, Willis Van Devanter, George Sutherland, and Pierce Butler. Moreover, despite Roberts’s *Nebbia* opinion, he generally adhered to republican democratic principles and often proved to be the swing vote in close cases, frequently joining the Four Horsemen though occasionally voting with the more progressive-liberal justices, Stone, Benjamin Cardozo, and Louis D. Brandeis—and quite often, Hughes, who was perhaps more of

⁵²Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 10, 19-22 (1936). For Stone’s criticisms of sociological jurisprudence, see Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 23 Colum. L. Rev. 319, 327-28 (1923); Harlan F. Stone, *Book Review*, 22 Colum. L. Rev. 382, 384 (1922) (reviewing Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921)).

a centrist, like Roberts. Then, in a spate of 1935- and 1936- cases invalidating key New Deal statutes, as well as a number of cases involving state social welfare enactments, Roberts repeatedly joined the conservatives. *Railroad Retirement Board v. Alton Railroad Company* struck down the Railroad Retirement Act of 1934 as being beyond Congress's power under the commerce clause. Reasoning that the statute contravened the common good, the Court categorized it as class legislation: "an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a *particular class* of employees against old age dependency." As such, the legislation did not foster "the railroads' duty to serve the public [good or interest] in interstate transportation." Furthering only "the social welfare of the worker," the Act constituted an impermissible regulation of commerce.⁵³ In short order, the Court invalidated the National Industrial Recovery Act, the Bituminous Coal Conservation Act, and provisions of the Agricultural Adjustment Act. In *Carter v. Carter Coal Company*, the Court clarified that acting for the common good was a necessary but not sufficient condition for establishing the constitutionality of congressional legislation. Not only must a statute be for the common good, but Congress must also act pursuant to one of its specifically enumerated powers. And the Court consistently resolved such issues of congressional power in accordance with a formal conceptualism similar to that used to determine whether a governmental action furthered only partial or private interests. For instance, in *Carter Coal*, the Court distinguished national and local activities as if they were preexisting a priori categories. Reasoning that mining, like manufacturing, growing crops, and other types of production, was "a purely local activity," the Court concluded that Congress's attempt to regulate bituminous coal mining exceeded its constitutional powers.⁵⁴

⁵³*Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 368, 374 (1935) (emphasis added).

⁵⁴*Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (invalidating Bituminous Coal Conservation Act); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating Agricultural Adjustment Act provisions). With regard to state laws, compare *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (upholding the

Even Stone and the other progressive-liberal justices most often analyzed cases in accord with the traditional structures of republican democratic judicial review. True, Stone's Harvard address had suggested he might be ready to move to a form of judicial review more consistent with pluralist democracy, but much of that ambiguous address had been more consistent with sociological jurisprudence—and hence republican democracy—than with the newer legal realist jurisprudence—which hewed more closely to the emerging pluralist democracy. Stone cited the renowned Roscoe Pound as well as other sociological jurists but did not cite a single leading realist author. More important, after suggesting that courts might need to weigh individual interests against societal interests to resolve constitutional issues, Stone retreated to republican democratic rhetoric by noting the “incalculable social worth” of individual rights. In other words, individual liberty was meaningful, it seemed, only insofar as it contributed to a common good: “Just where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage, is the perpetual question of constitutional law.”⁵⁵ Thus, unsurprisingly, in *A.L.A. Schechter Poultry Corporation v. United States*, the sick chicken case, Stone joined all of the other justices in unanimously invalidating the National Industrial Recovery Act; Hughes's opinion reasoned in part that Congress had exceeded its power. In *United States v. Butler*, Stone's dissenting opinion, joined by Brandeis and Cardozo, criticized the majority for invalidating Agricultural Adjustment Act provisions that promoted the “general welfare” and fulfilled a “public purpose.” In *Alton Railroad*, Hughes wrote a dissenting and concurring opinion, joined by Cardozo, Brandeis, and Stone. Concluding

Minnesota Mortgage Moratorium Law) with *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating state minimum wage law for women).

⁵⁵Stone, *Common Law*, *supra* note 52, at 13 n.13, 14 n.16, 22. Stone discussed Justice Cardozo's 1921 book in which he argued that a judge's most important consideration when deciding a case should be “the method of sociology”—that is, an evaluation of “the welfare of society.” Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (1921); Stone, *Common Law*, *supra* 52, at 20.

contrary to the majority (the Four Horsemen plus Roberts) that one of the disputed sections of the Railroad Retirement Act should be upheld, Hughes reasoned that the provision did not constitute impermissible class legislation because it promoted the common good, even if it also imposed “unequal burdens” on railroads. These same justices, in fact, concurred with the majority’s conclusion that another statutory section was beyond congressional power, though the liberals believed the invalid section could be severed from the rest of the statute, thus preserving the gist of the congressional program.⁵⁶

The Court’s adherence to republican democratic principles provoked the ire of many intellectuals. Robert Hale, a political scientist associated with the legal realist movement, and Morris Cohen, a legal philosopher, each published articles in the mid-1930s exemplifying these critiques. As described by Cohen, the Court subscribed to a “cult of freedom.” From the justices’ perspective, “an ideally desirable system of law” would recognize legal obligations as arising “only out of the will of the individual contracting freely.” Any restraint on such freedom would necessarily be detrimental. Both Cohen and Hale criticized this vision of an ideal legal system in three ways. First, one party to a contract typically lacks true freedom, especially in the employment context. While the Supreme Court rhapsodized about the public value of liberty to contract, most employees either accepted the employer’s offer or starved. As Hale elaborated,

⁵⁶A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). In *Schechter*, Cardozo wrote a concurring opinion joined by Stone. *Id.* at 551-55 (Cardozo, J., concurring). *United States v. Butler*, 297 U.S. 1, 78-88 (1936) (Stone, J., dissenting). In *Alton Railroad*, Hughes wrote: “this Court has directly sustained the grouping of railroads for the purpose of regulation in enforcing a common policy deemed to be essential to an adequate national system of transportation, even though it resulted in taking earnings of a strong road to help a weak one.” *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 386 (1935) (Hughes, C.J., dissenting and concurring). Hughes, however, also used language suggestive of pluralist democracy: “Congress was entitled to weigh the advantages of such a system, as against inequalities which it would inevitably produce, and reach a conclusion as to the policy best suited to the needs of the country.” *Id.* at 387. With regard to Hughes’s reasoning regarding the invalid but severable provision, see *id.* at 389. In *Carter Coal*, Hughes dissented, but only in part. He agreed with the majority (the Four Horsemen plus Roberts) that production, particularly mining, was not commerce and, therefore, in some instances, beyond congressional control. *Carter v. Carter Coal Co.*, 298 U.S. 238, 317-24 (1936) (Hughes, C.J., dissenting and concurring) (reasoning that unconstitutional provisions should be severed from constitutional ones). On the Four Horsemen, see Leuchtenburg, Reborn, *supra* note 2, at 214-15. While Leuchtenburg emphasizes the political underpinnings of the Court’s jurisprudence in the 1930s, Barry Cushman emphasizes legal doctrine and lawyering. Cushman, *supra* note 2.

private entities (individuals or corporations) often exert coercive power over other individuals who, lacking reasonable alternatives, are forced to accept inequitable contracts. The justices' laissez-faire-inspired interpretation of the common good, in which the absence of governmental regulation supposedly maximized individual liberty, contravened social reality. Second, Cohen and Hale questioned the justices' republican democratic assumption that there existed a private sphere of individual freedom distinct from a public sphere of governmental action, with the border between the spheres demarcated by the the common good. Cohen and Hale argued that duties and obligations in the so-called private realm exist only because of governmental support; property and contract rights arise and are enforceable only if the courts recognize and sanction them. In Hale's words, governmental officials, including judges, effectively carry "out the mandates of property owners." Third, and following from their first two arguments, both Cohen and Hale suggested that the Court should modify its approach to judicial review in accordance with the realities of democracy—that is, in accordance with the emergent pluralist democracy. Cohen explained that Americans had never strictly followed the "cult of freedom." Even those who celebrated it in the 1930s still sought governmental assistance for their *own* businesses. The true question, Cohen declared, was not how to minimize governmental interference in some ostensibly private sphere of freedom; rather the question was what interests should be protected and who should control the government. In a similar vein, Hale maintained that when Congress enacted economic or social welfare legislation, it did not infringe liberty. Instead, Congress chose among the competing interests of different individuals and groups.⁵⁷

Other realists denounced the *Lochner*-era justices for their ostensible reliance on formal doctrinal categories. The justices wrote opinions suggesting that these doctrinal categories, including the distinction between the common good and partial or private interests, mandated the

⁵⁷Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 168, 198-99, 200-01 (1935); Morris Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 558-62, 565, 585-87 (1933); see Robert Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 Pol. Sci. Q. 470, 470 (1923) (emphasizing coercion). Some critics argued that the Supreme Court was frustrating the democratic will. Louis Boudin, *Government by Judiciary* (1932).

case outcomes. The justices claimed, in short, to decide in accordance with the rule of law. But from the realist perspective, judges were no more rational than were other humans. They were subject to the same irrational impulses and displayed the same idiosyncratic behaviors. Thurman Arnold explained that the legal system, like other human institutions, embodied “all sorts of contradictory ideals going in different directions.” Therefore, judges and legal scholars constituted, in effect, “a priesthood devoted to the task of proving that which is necessarily false”—that the legal system was rational and coherent and that judicial disputes were decided pursuant to legal rules. Judicial opinions and jurisprudential theories aimed “to make rational in appearance the operation of an institution which is actually mystical and dramatic.” To Arnold, the absurd theater of the legal system stood out in stark relief as soon as one contemplated the adversary system, where partisan opponents engaged in a bitter “trial by combat” that was bizarrely “supposed to bring out the truth.”⁵⁸

While intellectuals like Arnold and Hale constructed complex theoretical arguments, other critics were more decidedly political. And once the Court began bulldozing the New Deal in 1935 and 1936, such critics intensified their harangues of the justices. After *Butler* invalidated Agricultural Adjustment Act provisions, the *New York Times* reported that Iowa State students hung the six majority justices in effigy. A standard critique became that the justices were a group of crotchety old men out-of-step with modern times; one newspaper called them “nine old back-number owls (appointed by by-gone Presidents) who sit on the leafless, fruitless limb of an old dead tree.” Among the Four Horsemen, in particular, Van Devanter had been appointed in 1910, McReynolds in 1914, and Sutherland and Butler in 1922. Only McReynolds had not been a Republican appointee; Wilson had nominated him. In a bestselling 1936 book, Drew Pearson and Robert S. Allen denounced the justices as “Nine Old Men” who refused “to take cognizance of the speed of modern civilization in industrial and economic development, and [denied] posterity the right to express itself in regard to social and economic reform in its own way.” The

⁵⁸Thurman Arnold, *Trial By Combat and the New Deal*, 47 Harv. L. Rev. 913, 919-22 (1934).

problem, that is, was not that the justices were acting politically, but rather that their politics contravened the desires of a vast American majority. And the 1936 election seemed to prove the validity of this critique. FDR received close to twenty-eight million popular votes compared with Alf Landon's total of less than seventeen million.⁵⁹

In the wake of his landslide victory, Roosevelt pressed for change. If the Court, as an institution, insisted on politically opposing the New Deal, Roosevelt would change its politics. He could not force the Four Horsemen to retire and to open spots for new appointees, so he decided to ask Congress to add new positions to the Court. Roosevelt would then be able to appoint New Deal supporters to counterbalance the Four Horsemen. FDR, to be clear, did not hatch his so-called court-packing plan on his own. Congress had previously enacted legislation to restrict federal court jurisdiction in response to judicial decisions interfering with congressional objectives. And Roosevelt's Attorney General, Homer S. Cummings, had developed the idea that a statute, rather than a constitutional amendment, might be the best way to alter the makeup and politics of the Court.⁶⁰ Regardless of its sources, on February 5, 1937, Roosevelt revealed his proposal in a message to the Senate. Early the next month, on March 9, Roosevelt pleaded his case for reform to the American people in one of his radio Fireside Chats. He lamented that "chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy." These justices had created a "crisis" by casting "doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern

⁵⁹Leuchtenburg, *Reborn*, *supra* note 2, at 96-97, 119; Drew Pearson & Robert S. Allen, *The Nine Old Men* 2-3, 28-32, 36-37, 40 (1936); Austin, *supra* note 2, at 94, 97 (Table: National Electoral and Popular Vote Cast for President); Friedman, *supra* note 2, at 1011-19; *Triple A Plowed Under*, *New York Times*, Jan. 12, 1936, at E1 (discussing decision in and reactions to *United States v. Butler*, 297 U.S. 1 (1936)); Russell Owen Washington, *Nine Justices—and Nine Personalities*, *New York Times*, Jan. 5, 1936, at SM3 (referring to justices as "nine old men in black"). On the importance of Pearson and Allen's book and its status as a best-seller, see *Guffey Asks Inquiry of 'The Nine Old Men,'* *New York Times*, Jan. 27, 1937, at 5.

⁶⁰Leuchtenburg, *Reborn*, *supra* note 2, at 114-31; Friedman, *supra* note 2, at 1019, 1021-22, 1022-23; *see* Wiecek, *supra* note 2, at 200-01 (discussing congressional modifications of federal court jurisdiction).

social and economic conditions.” Roosevelt thus sketched the following proposal: “Whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.” The Court, under this proposed legislation, could have anywhere between a minimum of nine and a maximum of fifteen justices. If implemented, this plan would render judicial decision making “speedier and therefore less costly” and would “bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances.”⁶¹

FDR’s court-packing plan sparked immediate controversy. Even many of Roosevelt’s congressional supporters questioned the wisdom of the proposal, which they claimed would unduly skew the balance of power among the three national branches, endanger individual liberties, and diminish state sovereignty. Nonetheless, while Congress debated the court-packing plan, its fate still uncertain, the Supreme Court announced two decisions—*West Coast Hotel Company v. Parrish*, and *NLRB v. Jones and Laughlin Steel Corporation*—that revealed a new willingness to uphold economic and social welfare statutes. For the most part, Roberts was responsible for the so-called “switch in time that saved nine” because he abandoned the Four Horsemen and began to vote consistently with the more liberal justices. Yet, these two 1937 decisions not only had enormous political ramifications—because of Roberts’s switch—but also marked the Court’s acceptance of the new regime of pluralist democracy. In the words of Yale law professor Eugene V. Rostow, the Court “died and was reborn in 1937.”⁶²

⁶¹81 Cong. Rec., Appendix at 469-71, 75th Cong., 1st Sess. (March 10, 1937); 81 Cong. Rec., 75th Cong., 1st Sess. 877-79 (Feb. 5, 1937).

⁶²Eugene V. Rostow, *Book Review*, 56 Yale L.J. 1469, 1472 (1947) (punctuation modified). On Roberts’s switch and his denial that he had changed, see Leuchtenburg, *Reborn*, *supra* note 2, at 142-44, 177. For an example of Democratic criticisms of the court-packing plan, see *Three Senators Score Court Plan Here as Peril to Nation*, New York Times, March 13, 1937, at 1; see Friedman, *supra* note 2, at 1038-44 (on criticisms of court-packing plan); Thomas Reed Powell, *Authority and Freedom in a Democratic Society*, 44 Colum. L. Rev. 473, 484 (1944) (explaining that the court-packing plan had aroused concerns about the protection of civil liberties). For a report on

West Coast Hotel, decided March 29, arose from a challenge to a state law setting minimum wages for women. The employer argued *Adkins* had already established that such a statute violated freedom of contract as protected by due process. The *West Coast Hotel* dissenters—the Four Horsemen—in an opinion written by Justice Sutherland, agreed. They concluded that this minimum wage law, applicable only to women, constituted “arbitrary” class legislation. “There is no longer any reason why [women] should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept.”⁶³ The five-justice majority, with an opinion written by Chief Justice Hughes, overruled *Adkins* and upheld the law. Much of the opinion invoked concepts familiar from earlier cases, concepts echoing republican democratic government. The Court referred to the common good with various iterations, explaining that liberty can be restrained to promote “the health, safety, morals, and welfare of the people” and that, more specifically, freedom of contract could be infringed “in the public interest.” Yet, near the end of the opinion, Hughes appeared to accept the realist-inspired criticisms of the formalist distinction between public and private spheres.

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and

Senate support of the proposal, see *Labor Strife Laid to Supreme Court*, New York Times, March 25, 1937, at 21 (discussing views of Wisconsin Senator Robert M. La Follette).

⁶³300 U.S. 379, 411-12 (1937) (Sutherland, J., dissenting). Sutherland added: “Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance.” *Id.* at 413.

still continue to an alarming extent despite the degree of economic recovery which has been achieved. ... The community is not bound to provide what is in effect a subsidy for unconscionable employers.⁶⁴

In this passage, Hughes reasoned that, without statutory regulation, the operation of the economic marketplace did not maximize employees' liberty. To the contrary, employers exploited workers by coercing them to work for unreasonable wages. Moreover, if the government did not act to correct these inequities, it would, in effect, be subsidizing employers because it would no longer allow indigents to starve. If employers refused to pay a living wage, the government would need to provide relief. By questioning the separateness of the public and private spheres, Hughes implicitly doubted the republican democratic conceptual distinction between a common good and partial or private interests. The Court might still be using terms resonant with earlier cases decided under republican democracy, but such terms, such as "the public interest," now apparently meant something different. Thus, the majority refused to invalidate the law as class legislation, even though it extended protection only to women and not to men. Instead, the justices emphasized that the legislature can choose the manner and the degree to which it responds to social problems.⁶⁵

NLRB v. Jones and Laughlin Steel Corporation, decided two weeks later, erased remaining doubts about whether the Court had truly changed its approach to judicial review. Again, in a five-to-four decision, with the same majority and dissenters, the Court upheld legislation that likely would have been invalidated under the strictures of republican democratic judicial review. Significantly, this legislation was not only federal, it was the National Labor Relations Act (NLRA), the statute that ushered in an era of dramatically expanding union rolls and nurtured the transformation of ethnic political outsiders into active voting citizens. The National Labor Relations Board (NLRB) had found that Jones and Laughlin had engaged in

⁶⁴*West Coast Hotel*, 300 U.S. at 391-92, 398-400.

⁶⁵*Id.* at 400.

statutorily proscribed unfair labor practices. Jones and Laughlin responded by arguing, among other things, that Congress had exceeded its power by passing the NLRA. In sustaining the law, the Court articulated two points crucial to the transition to pluralist democracy. First, the Court refused to restrict Congress's commerce power by reference to formal doctrinal categories. Jones and Laughlin argued that manufacturing was, by definition, a form of production rather than a type of interstate commerce and, therefore, beyond congressional control. In the past, such ostensibly non-commercial activities could be regulated only if they could be categorized as an "essential part" of "a 'stream' or 'flow' of commerce." In this case, though, the justices repudiated such formal categories as limits on Congress. Likewise, when Jones and Laughlin argued that the regulated activities had only an indirect rather than direct effect on interstate commerce—a categorization that previously would have judicially doomed legislation—the Court declared: "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum." Instead of resolving the case in such a vacuum, pursuant to formal categories like direct and indirect, the justices insisted that it must understand interstate commerce as a "practical conception." And whether particular activities bore a sufficiently "close and substantial relation to interstate commerce" to justify legislative regulation was now, according to the Court, "primarily for Congress to consider and decide."⁶⁶

Second, the Court refused to classify employees or labor unions as illegitimate factions who could not pursue their interests in the political process. In the past, the Court had consistently deemed any statute that benefited unions to be impermissible class legislation furthering a partial or private interest rather than the common good. Labor relations therefore had largely been governed by the common law, which had typically been interpreted favorably to employers.⁶⁷ Meanwhile, courts had consistently concluded that statutes promoting business or

⁶⁶NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34-37, 41-42 (1937).

⁶⁷Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (1991) (emphasizing that labor relations moved from being governed by the common law to being governed by legislation).

commerce promoted the common good. In other words, pro-business legislation manifested a virtuous pursuit of the public interest, while pro-labor legislation manifested a corrupt pursuit of partial interests. Now, the justices abjured such a distinction between employers and employees. “Employees have as clear a right to organize and select their representatives for lawful purposes as the [manufacturer-employer] has to organize its business and select its own officers and agents.” Employees and employers stood on equal footing: each group had its respective interests and values. True, a manufacturer has a “right to conduct its business in an orderly manner,” but employees also have a “correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work.” Indeed, the Court explained that even if the legislation were “one-sided”—subjecting “the employer to supervision and restraint” while leaving “untouched the abuses for which employees may be responsible”—the statute would still be constitutional. As a matter of policy, Congress could choose which “evils” it would seek to remedy and in what manner it would do so.⁶⁸

After this case, the traditional structure of republican democratic judicial review was defunct. If all legislation were a product of competing interests, pressed by opposed groups, then the courts could no longer invalidate a statute as class legislation promoting partial or private interests. The Court might still explain that a particular statute furthered the general welfare, the public interest, or the common good, but these terms had different connotations under the new pluralist democratic regime. Insofar as there was a common good under pluralist democracy, it was no more than an aggregation of private interests and values; the common good no longer signified the virtuous transcendence of self-interest. Congress, at its discretion, could legitimately and openly act in response to the entreaties of the most powerful or persuasive interest groups.⁶⁹

⁶⁸301 U.S. at 33, 43-44, 46.

⁶⁹Later in 1937, after the Court had decided *West Coast Hotel* and *Jones and Laughlin*, the Court upheld sections of the Social Security Act of 1935 providing for unemployment benefits. In the past, the justices likely

The Court's commitment to a form of judicial review consistent with pluralist democracy was nowhere clearer than in *Wickard v. Filburn*, decided in 1942. Filburn challenged the constitutionality of the Agricultural Adjustment Act of 1938, which subjected his production of wheat to regulation even if raised "wholly for consumption on [his] farm." In upholding the congressional action, a unanimous Court emphasized three points. First, it would not rely on formalist categories to restrict congressional power. "[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." Second, the Court would not invalidate legislation merely because Congress had apparently favored one class or interest group over another; such class-based legislation typified (pluralist) democratic processes. "It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process." Third, and related to the prior point, the justices stressed that politics, not the judiciary, constrained Congress's power under the commerce clause. Congress, to be sure, did not possess unbounded power, but the "effective restraints" on congressional power arose "from political rather than from judicial processes."⁷⁰

would have held that a provision benefiting the unemployed amounted to class legislation favoring only partial or private interests. But now the Court reasoned that Congress must be allowed the "discretion" to pursue the "general welfare" as it deemed fit. *Steward Machine Co. v. Davis*, 301 U.S. 548, 583-89, 594 (1937). The Court also soon decided another labor case that reinforced the right of workers to unionize and to press their claims. *Senn v. Tile Layers Union*, 301 U.S. 468 (1937) (upholding state labor law); *see also* *Lauf v. Shinner*, 303 U.S. 323 (1938) (interpreting pre-New Deal Norris-LaGuardia Act). For additional examples of Court using language reminiscent of the republican democratic era, *see Thomas v. Collins*, 323 U.S. 516, 532 (1945) (states can regulate to protect "the public interest"), and *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) (invoking "the public interest").

⁷⁰317 U.S. 111, 118, 120, 129 (1942); *see, e.g., United States v. Darby*, 312 U.S. 100 (1941) (reasoning that the tenth amendment was "a truism" and did not create judicially enforceable boundaries between national and state power).

In 1937, the Court's switch was conspicuous enough to be recognized by contemporary observers; a *New York Times* banner headline "hailed [the] bench change." Yet, the change was not precisely revolutionary, nor for that matter, evolutionary. The switch was not revolutionary—in the sense of being sudden and unanticipated—because the constitutional system had been undergoing a gradual transition from republican to pluralist democracy. This transition started with demographic, economic, and cultural pressures that traced back to before the 1920s. These pressures built over the years until a transition in democracy became a *fait accompli*; a reversal of direction became near-impossible. Hence, with hindsight, one might reasonably conclude that, at some point, the Court's alteration of judicial review, acknowledging the new system of pluralist democracy, became foreordained, a corollary to systemic changes already in place. From this perspective, the *Blaisdell* and *Nebbia* decisions might be characterized not as mere will-o'-the-wisps, but rather as early manifestations of a gradual transition. Yet, the 1937 Court switch should still not be depicted as merely an inevitable moment in a long process of evolutionary change. True, the democratic structure for the switch had been developing over the prior few years, but Roberts might not have switched his posture. Not only had he previously resisted doing so, but in 1936, in one of the cases invalidating New Deal legislation, he articulated a quintessential statement of mechanistic formalism: "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." Moreover, FDR was not guaranteed the opportunity to replace the Four Horsemen with new justices more sympathetic to the New Deal and pluralist democracy. Hence *West Coast Hotel* and *Jones and Laughlin* did mark a distinct change in judicial direction. Pressures may have been building for years, but the two weeks in 1937 marked the time when the earth quaked and a new terrain emerged.⁷¹

⁷¹*Supreme Court Upholds Wagner Labor Law; Hailed by Friends and Foes of Bench Change; Unions See Sweeping Progress Within A Year*, *New York Times*, April 13, 1917, at 1; *United States v. Butler*, 297 U.S. 1, 62

Regardless of how the 1937 switch is characterized, the question arises: why did the Court and particularly Roberts change direction at that point? No single clear answer is apparent, though several factors seem pertinent. First, political pressure undoubtedly played a role. The Four Horsemen remained too intransigent to respond to pressure, but Roberts and the liberal justices were flexible enough to care that many of the Court's decisions were being met with widespread opprobrium. True, Roberts had already cast his vote in *West Coast Hotel* before Roosevelt publicly announced his court-packing plan (though the Court's decision was not announced until afterward). Even so, in response to the Court's series of anti-New Deal decisions, administration insiders had been discussing for more than two months several possible solutions, including a constitutional amendment. While details had not been publicly divulged, administration leaks had created a buzz in Washington by the end of January 1937: Roosevelt was preparing a major announcement about the Court.⁷²

Second, by this time, not only was the practice of pluralist democracy well-established, but intellectuals had been questioning the theoretical underpinnings of republican democracy for more than a decade. In fact, the first threads of a pluralist democratic theory were already being spun. While the justices may not have read, let's say, Charles Merriam's latest political science tome, they would not have been oblivious to such intellectual rumblings. The Court was still applying principles of democracy that had for years been under intellectual (as well as political) attack; the Court's concept of judicial review was an anachronism.⁷³

(1936). Compare Leuchtenburg, Reborn, *supra* note 2, at 231 (defending the characterization of the 1937 switch as revolutionary) with Cushman, *supra* note 2, at 105 (arguing that the switch was not revolutionary). See Ackerman, *supra* note 2, at 290-92 (mediating between the realist-revolutionary outlook and the legalist-evolutionary outlook). On contemporary views of the Court's 1937 decisions, see Leuchtenburg, Reborn, *supra* note 2, at 142-43; Friedman, *supra* note 2, at 1050-51.

⁷²Leuchtenburg, Reborn, *supra* note 2, at 114-31, 143, 310-11 n.17.

⁷³Gillman, *supra* note 2, at 147-93. Barry Cushman argues that the New Deal transformation culminated developments in which the premises of a "system of constitutional thought" had weakened over the first forty years of the twentieth century until they no longer made sense. In turn, "the structural relationships among its constituent premises, which gave the system the appearance of symmetry and internal coherence," no longer fit together. Cushman, *supra* note 2, at 42. For early theoretical supports for pluralist democracy, see Walter Lippmann, The

Finally, whatever factors prompted the Court's switch in early 1937, personnel changes on the Court would soon solidify its embrace of pluralist democracy. In May 1937, during the heated congressional debates over the court-packing plan, which eventually would be defeated, Justice Van Devanter resigned. Roosevelt finally had his first opportunity to name a new justice. In August, after more than two months of procrastinating, FDR nominated Senator Hugo Black of Alabama, a die-hard New Dealer. This first opening on the Court broke the dam, and Supreme Court vacancies came rushing at Roosevelt. In 1938, he appointed Stanley F. Reed, his solicitor general, to replace Sutherland, another of the Four Horsemen. The next year, FDR appointed both his confidant, Felix Frankfurter, and then-chair of the Securities and Exchange Commission, William O. Douglas to the Court. In 1940, it was attorney general Frank Murphy's turn. In 1941, Stone was promoted to Chief Justice, and Roosevelt appointed Robert H. Jackson, who had been Murphy's successor as attorney general, and South Carolina Senator James F. Byrnes, who filled the seat of the last of the Four Horsemen, McReynolds. FDR made his final appointment in 1943, naming Wiley B. Rutledge, whom Roosevelt had previously appointed to the District of Columbia Court of Appeals. Hence, although FDR had been locked in a constitutional confrontation with the Supreme Court from 1935 to 1937, by the end of his presidency, he had created the "Roosevelt Court," as political scientist C. Herman Pritchett would call it in 1948.⁷⁴

B. The Puzzle of Pluralist Democratic Judicial Review

Once the Court had accepted the structures of pluralist democracy, then judicial review itself became problematic. Under republican democracy, courts had determined whether governmental actions promoted either the common good or partial and private interests.

Good Society (1937); Charles E. Merriam, *The New Democracy and the New Despotism* (1939); Charles E. Merriam, *Political Power* (1934).

⁷⁴C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (1948); Leuchtenburg, *Reborn*, *supra* note 2, at 180-85. For information on the Supreme Court justices, see *The Oxford Companion to the Supreme Court of the United States* (Kermit L. Hall ed., 1992).

Through this judicial process, courts demarcated a conceptual boundary between the public and private realms. But when the Court stopped distinguishing between the common good and partial or private interests—when the Court repudiated republican democracy—then the purpose of judicial review blurred. The judicial function of limiting the government to acting within the public sphere and therefore (supposedly) maximizing individual liberty within the private sphere no longer seemed sensible. Moreover, if the structures of pluralist democracy logically implied a new framework for exercising the power of judicial review, it was not readily apparent. How were pluralist democratic courts to review the legitimacy—the constitutionality—of governmental actions? From an intellectual standpoint, the justices confronted a typical modernist dilemma. Under republican democracy, with its roots tracing back to a premodern worldview, the foundation for objective judicial decision making was, in theory, indubitable: it was the categorical specification of the common good and the consequent division between the public and private realms. But now with the Court’s movement into the world of modernity, with the Court accepting pluralist democracy, the firm republican foundation for decision making had crumbled. The justices, it seemed, needed to find a new foundation to ground their decisions.⁷⁵

With the Court confronting the uncertainties of pluralist democracy and the puzzle of judicial review, scholars and justices began worrying that judicial review itself was inconsistent with democratic government—what Alexander Bickel would call the “counter-majoritarian difficulty.”⁷⁶ Soon after Congress rejected FDR’s court-packing plan, then-Assistant Attorney General Robert Jackson gave a speech acknowledging the significance of the Court’s switch: it “cleared the way toward improving the functioning of the United States.” Yet, he brooded that

⁷⁵Stephen M. Feldman, *American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage* 91 (2000) (discussing modernist epistemological difficulties); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 Va. L. Rev. 485, 536-37 (2002) (discussing how epistemological developments of early-twentieth century threatened the coherence of judicial decision making).

⁷⁶Alexander M. Bickel, *The Least Dangerous Branch* 16 (2d ed. 1986; 1st ed. 1962); see Wiecek, *supra* note 2, at 241 (emphasizing the difficulties confronting the Court after the 1937 switch).

potential “friction” between the Supreme Court, on the one hand, and Congress and the executive, on the other hand, still “presents the most vexing problem.” Indeed, given that the justices (and other federal judges) received lifetime appointments and thus were insulated from political-democratic pressures—they could not be voted out of office—he insisted that “[e]ither democracy must surrender to the judges or the judges must yield to democracy.” As Thomas Reed Powell would explain, the “primary requisite of a democratic society is a fairly wide popular participation,” so the Court, “not democratically organized and ... least subject to democratic pressure,” is inherently not “a democratic agency.”⁷⁷

If Jackson presented the choice—the countermajoritarian dilemma, so to speak, where either elected legislative representatives or unelected judges rule—then Judge Learned Hand became one of the most articulate advocates for the legislative representatives—for democracy, as he saw it. In a 1942 speech published by the Massachusetts Bar Association, Hand described “enacted law” from a distinctly pluralist democratic vantage: legislation is enacted in response “to the pressure of the interests affected” and “ordinarily [manifests] a compromise of conflicts.” The success of such a law “depends upon how far mutual concessions result in an adjustment which brings in its train the most satisfaction and leaves the least acrimony.” What about judicial review of such laws? Hand insisted that judges must restrain their own powers with a “self-denying ordinance.” Courts “should not have the last word in those basic conflicts of ‘right and wrong,’” even in cases involving Bill of Rights’ guarantees. Such constitutional rights must “serve merely as counsels of moderation.” They are precatory, and their specific implementation and effect must depend on the people and their elected representatives. Hand realized that many critics would fume that civil liberties could not survive without judicial protection. He responded: “[A] society so riven that the spirit of moderation is gone, no court can save; ... a society where that spirit flourishes, no court need save; ... in a society which evades its

⁷⁷*Jackson Calls Court Curb on Democracy; Says Law Reviews Block United Functioning*, New York Times, Oct. 13, 1937, at 6; Powell, *supra* note 62, at 484; Friedman, *supra* note 2, at 1000-01.

responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.”⁷⁸

Yet, other scholars were not as quick to abandon the Court’s power of judicial review on the shoals of pluralist democracy, even if the Court acted in a counter-democratic fashion. And to be sure, not all supporters of judicial review admitted that it contravened democracy. Eugene Rostow, for one, argued that judicial review constituted an important part of pluralist democracy, properly understood. “The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected *or appointed*.” That is, Rostow maintained that while federal judges might be politically insulated, they are not politically isolated. The electorate bears “responsibility for the quality of the judges and for the substance of their instructions, never a responsibility for [judicial] decisions in particular cases.” Explicitly criticizing Hand’s position, Rostow attributed the desire to straitjacket the Court’s power of judicial review to the lingering “dark shadows thrown upon the judiciary by the Court-packing fight of 1937.”⁷⁹

Why did the countermajoritarian difficulty become so central to judicial and scholarly thinking in the pluralist democratic regime? To be sure, under republican democracy, the judicial categorization of governmental actions as promoting either the common good or partial or private interests sometimes provoked critics to charge that judges exercised too much discretion. Moreover, judges could easily be denounced for thwarting legislative desires, as was most evident during the New Deal. Yet, the potential for countermajoritarian judicial decision making rarely seemed as distinct or momentous in the old (republican) democratic regime as it would in the new (pluralist) one. Unsurprisingly, the respective characteristics of the two types

⁷⁸Learned Hand, *The Contribution of an Independent Judiciary to Civilization* (1942), reprinted in *The Spirit of Liberty* 118, 119, 121, 125 (Irving Dilliard ed., 1959 ed.) [hereinafter Hand, Contribution]. Hand would elaborate these views in *Learned Hand, The Bill of Rights* (1958).

⁷⁹Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 205 (1952) (emphasis added). Thomas Reed Powell also emphasized the importance of political controls on the Court. Powell, *supra* note 62, at 484.

of democracy structured the problems (or difficulties) that seemed to inhere within judicial review. Unlike pluralist democracy, republican democracy did not stress widespread participation and political pursuit of self-interest. The fact that judicial decisions might not accord with the sentiments of the majority, thus, did not seem too problematic. Indeed, under republican democracy, politics supposedly demanded the virtuous pursuit of the common good. Even a judge, then, could be political without arousing indignation. If a judge were to decide in a *partisan* fashion, however—in pursuit of self-interest (or a faction’s interests)—then the judge’s decision would be corrupt.⁸⁰

Under the new pluralist democratic regime, however, politics equaled partisanship; the pursuit of self-interest had become legitimate and normal. Consequently, a judge who appeared to be political was necessarily partisan, or so it seemed. Most important, then, many observers had begun to view the Court through the prism of pluralist democratic interest group struggles. The realist-inspired critiques of the rule of law, so predominant during the 1930s, had led many to fear that adjudication was rudderless. Then after the 1937 switch, the justices themselves added fuel to this fear. Starting in the early 1940s, they began writing an increasing number of dissents and concurrences. By the 1946-1947 term, the percentage of unanimous opinions had fallen to a then-record low of thirty-six percent.⁸¹ While the explanation for this development remained obscure, one implication—suggested by political scientist C. Herman Pritchett—was that the justices used their opinions to assert their respective interests and values.⁸² And even if the justices were not crassly pursuing their own political preferences, they seemed, at best,

⁸⁰G. Edward White argues that Barry Friedman mischaracterizes criticisms of judicial decision making under republican democracy as countermajoritarian. White, *Arrival*, *supra* note 75, at 527-28 & n.94; Friedman, *supra* note 2, at 998-99.

⁸¹Wilfred Binkley & Malcolm Moos, *A Grammar of American Politics* 525-26 (1949).

⁸²Pritchett attempted to explain the growing number of dissents by analyzing the political positions of the justices. C. Herman Pritchett, *Dissent on the Supreme Court, 1943-44*, 39 *Am. Pol. Sci. Rev.* 42 (1945); see David M. O’Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in *Supreme Court Decision-Making: New Institutional Approaches* 91, 97, 102 (Cornell W. Clayton & Howard Gillman eds., 1999) (suggesting other reasons for the increasing number of dissents and concurrences).

merely to referee among contesting interest groups. Indeed, led by Pritchett, post-war political scientists largely accepted the realist critique of the rule of law and argued that the Supreme Court was “a political institution performing a political function.”⁸³ If true, if the Court functioned to adjudicate among competing interests and values—if the Court, in fact, made law that would gratify certain societal groups and disappoint others—then interest groups, it seemed, ought to begin pressing their claims to the Court. Predictably, then, aided by changes in Supreme Court rules, the number of amicus curiae briefs began to increase dramatically. By 1953, more than ten percent of the cases had at least one amicus. That year, Fowler V. Harper and Edwin D. Etherington wrote that “[m]ore and more the Court was being treated as if it were a political-legislative body, amenable and responsive to mass pressures from any source.” And while Harper and Etherington fretted about this development, the number of amici continued to grow; by 1993, more than ninety percent of the cases had at least one.⁸⁴

While scholars buzzed about the Court’s countermajoritarian difficulty in a pluralist democratic system, the justices themselves confronted the puzzle of judicial review in the most practical of contexts: deciding cases. In the shadow of the *Lochner*-era Court’s aggressive review of New Deal statutes, which had engendered the court-packing crisis, the Roosevelt Court justices’ solution to this conundrum was clear in at least one realm. They were to presume the constitutionality of any economic or social welfare legislation. In fact, for the next several decades, courts would, in effect, rubber stamp all reasonable economic and social welfare regulations (rather than questioning whether the action was for the common good). The

⁸³Pritchett, *supra* note 74, at xiii; see Binkley & Moos, *supra* note 81, at 525-26 (following Pritchett in describing the justices as displaying “a pattern of opposing ideologies”); White, Arrival, *supra* note 75, at 561-62 (discussing Pritchett). The historian Henry Steele Commager wrote that constitutional issues were almost always determined by ““considerations of policy.”” Henry Steele Commager, *Majority Rule and Minority Rights* 43 (1943; 1950 reprint) [hereinafter Commager, *Majority Rule*].

⁸⁴Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. Pa. L. Rev. 1172, 1173 (1953); Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae, in* *Supreme Court Decision-Making: New Institutional Approaches* 215, 221-22 (Cornell W. Clayton & Howard Gillman eds., 1999); Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 713-17 (1963).

quintessence of the Court's 1937 switch, judicial deference to economic and social welfare statutes was integral to the New Deal expansion of governmental power. Without the Court's extreme respect for such legislative actions, the government's wide-reaching regulations of the economy and society would constantly be called into doubt (as they had been during the *Lochner* era). In 1938, the Court explained: "[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."⁸⁵

But was the Court ever to review any governmental actions more closely, or had judicial review transformed into one long series of rubber stamps? If the Court was to defer to economic and social welfare statutes, should the Court defer as well to all other legislative actions, which after all were now understood to be nothing more than the product of interest group competitions and compromises? While the justices would disagree among themselves about the degree of deference owed non-economic legislative actions, and while scholars, like Hand, might recommend deference regardless of context, neither the Supreme Court justices nor the lower federal court judges were likely to abrogate their power over other governmental actors. The power of judicial review, particularly at the Supreme Court level, was too well-entrenched in the structures and institutions of American government to fade to nothingness.⁸⁶ Moreover, the

⁸⁵United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The Court's repudiation of the non-delegation doctrine in the 1940s further facilitated the expansion of national power, particularly executive and administrative authority. Howard Gillman, *Reconnecting the Modern Supreme Court to the Historical Evolution of American Capitalism*, in *The Supreme Court in American Politics: New Institutional Interpretations* 235, 244-45 (Howard Gillman & Cornell Clayton eds., 1999). The Court's acquiescence in a more expansive national power did not necessarily diminish state power. Gardbaum, *supra* note 2, at 483-91. Leuchtenburg notes that the Court allowed not only national but also state power to expand. Leuchtenburg, *Reborn*, *supra* note 2, at 225-27. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), was merely one manifestation of this judicial respect for state power.

⁸⁶*Cf.*, James L Gibson; Gregory A Caldeira; Vanessa A Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998) (describing the longterm public acceptance of Supreme Court decisions as legitimate).

sanctity of individual rights and liberties had become part of the American creed. In the realm of free expression, the deeply entrenched tradition of dissent had long manifested an American ethos of liberty. Then, if anything, the desire to protect individual liberties in general had intensified between the two World Wars. The ACLU, forged in 1920 in the crucible of the post-World War I Red Scare, had actively sought to stiffen Americans' resolve to protect civil liberties through an integrated campaign of education and litigation. Not incidentally, an enhanced protection of individual liberty harmonized with the rise of the mass-consumer culture during the 1920s. Mass-consumerism intensified the American individualist ethos by portraying the person as a bundle of desires. Civil rights and liberties then became especially beneficial, it seemed, to protect the individual's legitimate quest for self-fulfillment.⁸⁷

Two congressional developments from the mid-1930s illustrate how important the cause of civil liberties had become in national politics. The first arose from the labor movement. After Congress had passed the NLRA in July 1935, many employers fought compliance and thwarted unionization through an assortment of strategies, such as industrial espionage. Generally frustrated with such concerted efforts to oppose the law, and specifically outraged over the treatment of Arkansas sharecroppers, Wisconsin Senator Robert M. La Follette, Jr., spearheaded the formation of a subcommittee, the La Follette Civil Liberties Committee, which conducted over a four-year period "the most extensive investigation of civil liberties infractions ever undertaken by a congressional committee." Focusing on "the relation between civil liberty and labor's drive to organize," the Committee reported startling and violent transgressions of liberty. During the 1930s, the "principal private purchasers" of munitions and tear gas were employers anticipating or resisting a strike. For instance, the Committee found that, during one month, the Youngstown Sheet and Tube Company had "bought, in addition to \$8,500 worth of [tear] gas

⁸⁷See Wiebe, *supra* note 2, at 223 (arguing that "rights were hooked to the urge for individual fulfillment"). Consistent with this growing emphasis on individual liberties, the Supreme Court itself had allowed its *Lochner*-era solicitude for economic rights to begin spreading to other individual rights. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

equipment, 424 police clubs, six 12-gauge repeating shotguns, 11,500 rounds of .38 caliber pistol ammunition and 300 shotgun shells.”⁸⁸ The second congressional development was in reaction against FDR’s court-packing plan. Much of the debate revolved around whether the plan, if implemented, would enfeeble the judicial protection of civil liberties. In fact, the adverse report from the Committee of the Judiciary identified as primary reasons for rejecting the proposal that it would undermine “the protection our constitutional system gives to minorities” and would subvert “the rights of individuals.” To assure that the Court remain as a “defense of the liberties of the people,” it must not be pressured to decide cases “out of fear or sense of obligation to the appointing power.”⁸⁹

Given such encomiums to civil liberties, the Court would not likely relinquish its power of judicial review, especially in the contexts of the World War II and Cold War eras, as the nation confronted the external menace of totalitarian governments. Fascists and Nazis authoritatively dictated to their populaces, arbitrarily imposed punishments, and suppressed religious, racial, and other minorities. In opposition, Americans stressed democracy, the rule of law, including constitutional rights, and the protection of minorities—or so Americans now wanted to believe. These ostensible components of American life and government separated *us* from *them*. Thus, in *Martin v. City of Struthers*, decided during World War II, the Court struck down the conviction of a Jehovah's Witness under an ordinance proscribing door-to-door distributions of written materials.⁹⁰ In reasoning that the application of this ordinance violated the first amendment, Black’s majority opinion stressed that “[f]reedom to distribute information ... is so clearly vital to the preservation of a free society that ... it must be fully preserved.”⁹¹

⁸⁸Jerold S. Auerbach, *Labor and Liberty* 1, 75 (1966); *Industrial Munitions*, reprinted in *American Labor: The Twentieth Century* 254, 258 (Jerold S. Auerbach ed. 1969) (reprint of U.S. Committee on Education and Labor, 76th Cong., 1st Sess. Report No. 6, Part 3 (1939)).

⁸⁹*Reform of the Federal Judiciary* (Adverse Report from the Committee of the Judiciary, June 7, 1937), reprinted in *Commager*, *supra* note 2, at 382, 387, 390; Friedman, *supra* note 2, at 1038-44.

⁹⁰*Martin v. City of Struthers*, 319 U.S. 141 (1943).

⁹¹319 U.S. 141, 146-47 (1943).

Murphy's concurrence, joined by Douglas and Rutledge, accentuated the difference between American and totalitarian governments. "Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."⁹²

Finally, one more factor, central to pluralist democracy itself, ensured that the Court would not cede its power of judicial review. Pluralist democracy had emerged partly because of the actual expanding political power of outsider or peripheral groups, such as Irish Catholics, Eastern European Jews, and laborers in general—a burgeoning power that undergirded the New Deal. The flowering of this outsider political power, within the framework of the pluralist democratic regime, threatened the status and influence of old-stock Americans, the dominant elites. This threat was magnified because, under pluralist democracy, governmental power expanded dramatically, especially at the national level. Thus, Protestant old-stock elites were forced to retreat from their former hegemonic position, in which their interests and values were often effectively translated into the republican democratic common good. Even as the dominant elites necessarily acquiesced to the emergent pluralist democracy, they nonetheless refused to abandon completely their long-held prerogatives of power and wealth. Rather, they sought to retrench: forced to retreat, they searched for positions where they could fortify and thus protect their dominant (though no longer hegemonic) interests and values. One such position of fortification was in the courts.

After the 1937 switch, dominant elites implicitly understood that the judicial enforcement of constitutional rights could provide a potential bulwark against the majoritarian threat posed by the (pluralist) democratic empowerment of peripheral groups. Old-stock Americans thus sought

⁹²*Id.* at 150 (Murphy, J., concurring). Murphy added: "In these days free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance." *Id.* at 152; *see West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 641 (1943) (contrasting United States with its "present totalitarian enemies").

“the constitutionalization” of their own interests and values—the designation of their interests and values as constitutional rights enforceable through the courts.⁹³ When constitutionalized as judicially sanctioned rights, their interests and values were effectively protected from the vagaries of the democratic processes—democratic processes that now included peripheral groups and that therefore dangerously encompassed the interests and values of previously excluded outsiders.⁹⁴ Of course, dominant elites had long-understood the potential benefits of judicial power. Throughout the *Lochner* era, they had protected their economic interests through the mechanisms of the courts by seeking labor injunctions, the invalidation of labor laws as contrary to the common good, and similar favorable judicial rulings. But even when the dominant elites retreated in 1937—when economic regulation became subject to mere rational basis review—they still sought to protect their interests and values through the judicial enforcement of non-economic rights, including free expression and religious freedom.⁹⁵

This strategy contributed especially to the judicial invigoration of first-amendment freedoms. For instance, in a 1941 labor case, the Court reviewed whether an employer had engaged in proscribed unfair labor practices under the NLRA. The employer, meanwhile,

⁹³Ran Hirschl, *The Political Origins Of Judicial Empowerment Through Constitutionalization: Lessons From Four Constitutional Revolutions*, 25 *Law & Soc. Inquiry* 91, 96, 99, 103 (2000).

⁹⁴Hirschl writes:

[T]he process of judicial empowerment through the constitutionalization of rights may accelerate when the hegemony of ruling elites in majoritarian decision-making arenas is threatened by “peripheral” groups. As such threats become severe, hegemonic elites who possess disproportionate access to and influence upon the legal arena may initiate a constitutional entrenchment of rights in order to transfer power to the courts. This process of conscious judicial empowerment in relatively open, rule-of-law polities is likely to occur when the judiciary's public reputation for political impartiality and rectitude is relatively high and when the courts are likely to rule, by and large, in accordance with the cultural propensities of the hegemonic community. In other words, judicial empowerment through the constitutional fortification of rights may provide an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage.

Id. at 95.

⁹⁵*Cf.*, Kersch, *supra* note 2, at 112-17 (arguing that judicial protection of civil liberties was conservative reaction to demands for expanded national power).

pressed a first-amendment free-expression claim. Remanding for additional proceedings, the Court decided that the NLRB had made insufficient findings. The Court could not ascertain whether the Board had concluded that either the employer's utterances alone or the utterances combined with other employer actions had constituted coercion, and hence an unfair labor practice. The former possibility would be problematic. The first amendment, the Court explained, protected the employer, who remained free to express "its view on labor policies or problems."⁹⁶ Put in different words, because of first-amendment protections, "the utterances of an employer, in themselves, may not constitutionally be considered to constitute an unfair labor practice."⁹⁷ As this case suggests, the Court's post-1937 protection of civil liberties was not necessarily favorable to disempowered peripheral groups: it was partly a conservative reaction against pluralist democracy, with its inclusion of former outsiders and its expansive governmental power.⁹⁸ In a similar vein, the Court would subsequently hold that the first amendment protected corporations seeking to spend money to influence voters and also limited congressional power to restrict expenditures on political campaigns.⁹⁹

For numerous reasons, then, the Court would continue to exercise its power of judicial review, most significantly in cases involving civil liberties. But a doctrinal framework for resolving such cases remained elusive, for the justices as well as for others. As Jackson would understatedly lament: "[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete

⁹⁶NLRB v. Virginia Electric & Power Comp., 314 U.S. 469, 477 (1941).

⁹⁷Editors, *Employers' Right of Free Speech*, 2 Bill Rts. Rev. 144, 144 (1941-1942).

⁹⁸Kersch, *supra* note 2, at 112-17 (arguing that the judicial protection of civil liberties was a conservative reaction against expanded national power). For a discussion of how the constitutionalization of dominant interests and values influenced religious-freedom cases, see Stephen M. Feldman, *The Theory and Politics of First-Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, _ U. Pa. J. Const. L. _ (forthcoming).

⁹⁹McConnell v. Federal Election Commission, 540 U.S. 93 (2003) (campaign spending); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (corporate spending); Buckley v. Valeo, 424 U.S. 1 (1976) (campaign spending).

restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.” Consequently, in a sense, the justices experimented, developing over the years three primary approaches to pluralist democratic judicial review.¹⁰⁰

The first approach began to emerge almost immediately after the Court’s 1937 switch. In *United States v. Carolene Products Company*, decided in 1938, the Court upheld an economic regulation that restricted the interstate shipment of certain types of milk. Stone’s majority opinion showed great deference to Congress, as typified pluralist democratic judicial review of economic and social welfare laws, but he added a footnote explaining that such deference might sometimes be inappropriate. His famous footnote four, initially drafted by one of his clerks, suggested that a “presumption of constitutionality” would be inappropriate if the democratic process itself had been defective. Pluralist democracy, as the justices were just coming to understand, required an open and free-wheeling legislative process. A legislative outcome was legitimate not because it promoted the common good but because it arose from interest-group competition and compromise. If the processes of competition and compromise were closed to certain groups or otherwise defective—if the government had restricted, in Stone’s words, “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”—then the legitimacy of the legislative outcome was called into question. If legislation, for instance, had prevented some groups from voting or organizing politically, then Stone suggested it should “be subjected to more exacting judicial scrutiny;” the enactment did not manifest a truly pluralist democratic process. Likewise, if the government intentionally discriminated against a “discrete and insular” minority, like African Americans, then judicial deference would be inappropriate. In a pluralist democratic regime, societal groups supposedly could press their interests and values in a fair competition with other groups. But when the

¹⁰⁰West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 639 (1943); White, *supra* note 2, at 149-52 (describing preferred freedoms approach as experiment). Ken Kersch notes that the judicial protection of civil liberties can be understood as part of the state building project itself. That is, if the Court protects civil liberties, then that judicial action is itself an assertion of governmental power (through the institution of the Court). See Kersch, *supra* note 2, at 283-87 (emphasizing the role of the Court in education as part of state building).

government intentionally discriminated against a group—against a discrete and insular minority—then “the operation of those political processes ordinarily to be relied upon to protect minorities” would be undermined.¹⁰¹

Consistent with Stone’s footnote, almost all post-1937 justices agreed that the Court should support pluralist democratic processes. Even so, the justices often disagreed about how to achieve that judicial goal: how precisely could the Court best nurture pluralist democracy? One group of justices, led by Frankfurter and Jackson, placed extraordinary trust in the self-corrective powers of pluralist democracy. From their perspective, the Court generally ought to allow pluralist democracy to rectify its own problems. The other group of justices, including Stone, Douglas, and Black, insisted that the Court must be more vigilant in monitoring pluralist democracy. Otherwise, it could too easily deteriorate into tyranny. The tension between these two judicial camps animated the 1946 case of *Colegrove v. Green*, in which a plurality held that the drawing of congressional district lines in Illinois presented a nonjusticiable political question. Writing for the plurality, Frankfurter emphasized that the point of pluralist democracy, including congressional districting, was to assure widespread participation in political processes. Yet, Frankfurter added, pluralist democracy was inherently partisan, and the drawing of district lines reflected “party contests and party interests.” The Court, Frankfurter concluded, should avoid entering “this political thicket.” If a state legislature drew unfair district lines, the proper remedy lay not in the courts but in the partisan democratic process itself: “to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”¹⁰²

Black, joined by Douglas and Murphy, dissented. Black agreed with Frankfurter that a pluralist democratic system should promote widespread participation. He disagreed, however, with Frankfurter’s reasoning that the best way to promote participation was to allow the further

¹⁰¹United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). On footnote four, see Feldman, *supra* note 75, at 242 n.103; Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093 (1982).

¹⁰²328 U.S. 549, 553-56 (1946).

operation of legislative processes, particularly in the midst of a districting dispute. Instead, Black underscored that the current district lines in Illinois engendered grossly disparate representation. Some districts had fewer than 200,000 people, while one district had more than 900,000, yet each district, regardless of population, could elect one representative. Consequently, each vote was not accorded “equal weight;” a vote in a high-population district was worth less than a vote in a low-population district. According to Black, “[a]ll groups, classes, and individuals shall to the extent that it is practically feasible be given equal representation in the House of Representatives, which, in conjunction with the Senate, writes the laws affecting the life, liberty, and property of all the people.”¹⁰³ Thus, the Court could not trust the pluralist democratic process to self-correct in this instance precisely because the challenged legislation prevented certain groups from fully participating, from having adequate opportunity to influence future legislative actions.

Despite such disagreements among the justices, John Hart Ely would eventually develop Stone’s footnote-four approach into a full-fledged theory of judicial review: representation reinforcement. Other approaches to pluralist democratic judicial review foundered on the countermajoritarian difficulty, but Ely explained why representation reinforcement (or Stone’s footnote-four approach) was different—and why it would persistently appeal to the Court and scholars. Properly understood, representation reinforcement theory dissolved the countermajoritarian difficulty because it promoted and bolstered rather than undermining democracy. The Court, Ely argued, should generally presume the constitutionality of legislative decisions. Regardless of the outcome of the legislative process, the Court should not disapprove legislation as contravening some substantive criterion, like the common good, because no such criterion existed (or, at least, the justices could not reliably identify such a criterion). Legislative

¹⁰³*Id.* at 569-71 (Black, J., dissenting). This passage from Black accentuated a key difference between republican and pluralist democratic judicial review. Under republican democracy, the Court questioned whether legislation substantively favored a particular class (or a partial or private interest). Under pluralist democracy, as explained by Black, the court questioned whether a particular class had insufficient opportunity to participate in the legislative process, to influence the writing of laws.

goals supposedly manifested no more than the interests and values of the democratic winners. As the Court explained in 1955, “[t]he day is gone when this Court [strikes down] laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”¹⁰⁴ Yet, Ely reasoned, the Court could review the *processes* that had led the legislature to take aim at one substantive goal rather than another. If those processes were fair and open, then the Court must defer to the legislative choice. But if the processes appeared skewed, then the Court should scrutinize the legislation more closely. Judicial invalidation of legislation that had arisen from a defective or malfunctioning democratic process would not be countermajoritarian. It would be the very opposite: it would foster fair and open pluralist democracy. The Court’s role, in short, was to police the democratic process.¹⁰⁵

A second approach to judicial review in the pluralist democratic regime required the justices to balance competing interests. Throughout the 1930s, legal realists had criticized the a priori formalism characteristic of *Lochner*-era judicial decisions. Judges could not resolve cases by mechanically applying abstract doctrinal categories, like the common good, to clear and certain facts. In any particular dispute, they argued, opposed parties asserted competing interests and values, which courts should balance or weigh against each other. No higher criteria existed for resolving disputes.¹⁰⁶ Starting in the late 1930s, even as the realists’ broadside critique of the rule of law fell into disfavor, the Court followed this cue and resolved an increasing number of constitutional issues by balancing interests. In the balancing calculus, constitutional rights were treated as political interests to be weighed against other interests, particularly governmental or

¹⁰⁴Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955).

¹⁰⁵John H. Ely, Democracy and Distrust 1-104 (1980); see Jesse Choper, Judicial Review and the National Political Process 2, 127-28 (1980); Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54, 72-74 (1962).

¹⁰⁶*E.g.*, Jerome Frank, Law and the Modern Mind (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

state interests. For instance, in *Schneider v. State*, decided in 1939, the Court invalidated a conviction under an ordinance prohibiting the distribution of hand-bills. Roberts's opinion, for an eight-justice majority, explained:

In every case ... where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In this case, then, the Court concluded that the individual's first amendment interest in distributing literature outweighed the government's interest in preventing littering.¹⁰⁷

Such balancing tests soon became commonplace in numerous contexts, not only in individual-rights cases but in others as well. For example, in *Pike v. Bruce Church, Incorporated*, the Court held that a state law regulating the shipment of fresh fruit violated the negative implications of the commerce clause (or, in other words, the dormant commerce clause). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The Court elaborated the balance: "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."¹⁰⁸

¹⁰⁷308 U.S. 147, 161 (1939); see Aleinikoff, *supra* note 2, at 963-64.

¹⁰⁸397 U.S. 137, 142 (1970) (quoted in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); see, e.g., *Parker v. Brown*, 317 U.S. 341, 362 (1943) (allowing state regulation that burdened interstate commerce if a

The Court's third approach to pluralist democratic judicial review had also been suggested by Stone in his *Carolene Products* footnote four. Besides emphasizing the protection of democracy, he wrote: "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments." Stone cited two first-amendment cases that had invalidated restrictions on free expression.¹⁰⁹ For a brief period afterward, the Court called these protected liberties "preferred freedoms"—freedoms or rights that deserved special judicial protection. For example, in *Murdock v. Pennsylvania*, decided in 1943, the Court stated that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." While suggested by Stone in footnote four, the preferred-freedoms doctrine had historical roots winding back even earlier to the so-called incorporation doctrine. Early in the twentieth century, the Court had begun to hold that the fourteenth amendment due process clause incorporated or implicitly included various Bill of Rights' guarantees, which then applied against state and local governments just as they applied against the national government. As recently as 1937, in *Palko v. Connecticut*, Cardozo had reasoned that due process encompassed Bill of Rights' protections integral to "the very essence of a scheme of ordered liberty." Such rights rested within "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" During the 1940s, some of these incorporated (fundamental) rights were denominated preferred freedoms, distinguishing them from economic liberties. The government could regulate economic relations whenever reasonable, but it could not so readily restrict the

reasonable accommodation of "the competing demands of the state and national interests involved"); see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 439 (1982) (explaining the negative implications of the commerce clause). Ronald Dworkin has argued from a philosophical standpoint that rights and interests are distinct concepts. Ronald Dworkin, *Taking Rights Seriously* 194, 269 (1978); Aleinikoff, *supra* note 2, at 986-87. However valid that argument might be philosophically, it does not undermine the historical argument concerning constitutional rights and the use of balancing tests.

¹⁰⁹304 U.S. at 152-53 n.4. The two free-expression cases cited by Stone were *Stromberg v. California*, 283 U.S. 359 (1931), and *Lovell v. Griffin*, 303 U.S. 444 (1938). According to Stone's clerk, Louis Lusky, Stone added this part of the footnote in response to Chief Justice Hughes's request. Ely, *supra* note 105, at 76.

preferred liberties. Hence, the *Murdock* Court invalidated a regulation on the sale of religious literature by emphasizing that the government sought to restrict a preferred freedom (religious freedom) rather than a commercial transaction (the sale of literature). After the 1940s, however, the justices rarely invoked the preferred-freedoms doctrine.¹¹⁰

While the preferred-freedoms doctrine per se fell into desuetude, the underlying principle did not. The point was to protect certain liberties or interests from the pluralist democratic process itself, regardless of whether the liberties were called preferred freedoms. Thus, justices and scholars would occasionally assert that the Constitution carved certain areas out of the pluralist democratic process, placing them beyond the majoritarian reach. During World War II, Jackson wrote: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹¹¹ And subsequently, Black and Douglas suggested that the absolute protection of free expression was warranted. According to Black, when the first amendment declares that “Congress shall make no law,” it means that “Congress shall make no law.”¹¹² This judicial

¹¹⁰*Murdock v. Pennsylvania*, 319 U.S. 105, 111, 115 (1943); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, supra, 291 U.S. 97, 105 (1934)); see *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (using preferred freedoms language); *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) (same); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 478-86 (2d ed. 2002) (discussing incorporation controversy); White, *Arrival*, supra note 75, at 144, 157-58 (relating incorporation and preferred freedoms); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 Pol. Res. Q. 623, 640-45 (1994) (discussing the rise of the preferred freedoms approach). Frankfurter questioned the doctrine in *Kovacs v. Cooper*, 336 U.S. 77, 89-97 (1949) (Frankfurter, J., concurring); see White, supra note 2, at 149-52 (discussing the demise of the preferred freedoms terminology).

¹¹¹*West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). Henry Steele Commager wrote: “there are things no government may do, rights no government may impair, powers no government may exercise.” Commager, *Majority Rule*, supra note 83, at 5.

¹¹²Mark A. Graber, *Transforming Free Speech* 181 (1991) (quoting Black); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentieth-century America*, 95 Mich. L. Rev. 299, 351-52 (1996).

approach rested on a key assumption: that certain liberties and interests are so important they should not be exposed to the vagaries of the pluralist democratic process—which, after all, encourages individuals and groups to pursue their own interests to the disregard of others. The pluralist admonition to pursue self-interest engenders possibilities too dangerous to abide. To take an obvious example, a democratic majority might decide to satisfy its interests by forcing a particular minority into slavery. To be sure, one might argue that such a slavery law would necessarily undermine pluralist democratic processes by excluding the would-be slaves from political participation (thus triggering heightened judicial scrutiny under representation reinforcement). Yet, what if the courts were to disagree? What if a defect in the process of enacting the slavery law could not be proven in court? The crux of the third judicial approach—the protection from pluralist democracy—is that some liberties and interests simply should not depend on such uncertainties.¹¹³

Even so, a majority of justices rarely agreed that any right, free speech or otherwise, should be absolutely protected, regardless of context. Instead, they allowed the government to argue that infringement of the right was, in the circumstances, appropriate. This flexibility typically led back to a balancing test. The justices weighed the constitutional rights-interests against competing interests. The Court, though, would often put its collective thumb on one side

¹¹³See William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2376-77 (2002) [hereinafter Eskridge, *Some Effects*] (arguing that theories of judicial review arose because “judicial deference to the political process seemed risky from the perspective of the pluralist system as a whole”). Scholars on opposite sides of the political spectrum can support this approach to judicial review, though they will disagree strongly about which liberties and interests should be protected. Archibald Cox explained that he would be irked “if the Supreme Court were to void an ordinance adopted in the open Town Meeting in the New England town in which I live—a meeting in which all citizens can participate.” Yet, Cox added that he would “have little such feeling about a statute enacted by the Massachusetts legislature in the normal political pattern, and none about a law made in that pattern by the Congress of the United States.” Archibald Cox, *The Role of the Supreme Court in American Government* 116 (1976); see Charles L. Black, Jr., *The People and the Court* 87-119, 223 (1960) [hereinafter Black, *People*] (arguing, from a liberal viewpoint, that the Court must check more political governmental institutions). Robert Bork has agreed that certain rights are beyond the reach of democratic majorities, but unlike Cox, Bork seeks to limit the number of such rights severely. He would protect only those rights either “specified” in the constitutional text or intent of the framers, or necessary to preserve our governmental processes. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 17 (1971).

of the scale: the justices generally accorded individual rights, especially those expressly enumerated in the constitutional text, like free speech and equal protection, extra weight in the balance. The Court, in a sense, created no-fly zones (where pluralist majorities could not go), but simultaneously acknowledged that the zones could be infringed for sufficiently important or compelling reasons. During World War II, for instance, the Court upheld the national government's internment of Japanese-Americans in the face of an equal protection challenge. The Court found that equal protection effectively created a no-fly zone, but the Court allowed the government to justify infringement pursuant to a balancing test, albeit one supposedly skewed strongly toward the protection of individual rights. "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional," the Court explained. "It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." Thus, the so-called strict scrutiny test, a refined balancing test, originated in the Court's post-1937 struggle to solve the riddle of pluralist democratic judicial review. The Court has used strict scrutiny in a variety of circumstances, ranging from equal protection to religious freedom. For years, the Court required the government to grant exemptions from generally applicable laws that burdened the free exercise of religion unless the government could show that the law was necessary to achieve a compelling state interest. The Court, it should be added, did not use strict scrutiny in every individual rights case. Sometimes, the Court would put its thumb on the scale, but apply less pressure. Hence, the justices might apply heightened but less than strict scrutiny. In this manner, the Court has upheld governmental regulations on commercial expression if the restrictions advance a "substantial" governmental interest.¹¹⁴

¹¹⁴Korematsu v. United States, 323 U.S. 214, 216 (1944); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (commercial speech case); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise case); see Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny in equal protection case). As Charles Black explained, the weighted or skewed balancing tests, like strict scrutiny, obviated the need to identify specific rights as "preferred freedoms." The so-called preferred freedoms, like free speech, were those rights that the Constitution specified as having greater weight. "An elephant weighs more than a rabbit," Black wrote, "not

Two of the Court's approaches to judicial review—balancing of interests, and removal from pluralist democracy (creating no-fly zones)—exacerbated the hand-wringing over the countermajoritarian difficulty. Critics condemned balancing as a subterfuge for judicial decision making without principles, without law. To instruct courts to balance interests does not adequately specify what qualifies as an interest (and thus becomes part of the balancing calculus), what weight should be accorded to different interests, or even how different kinds of interests can be weighed or compared. How, for instance, would one weigh an interest in economic prosperity against an interest in speaking freely? They are the proverbial apples and oranges (though it would be easier to balance apples and oranges). Constitutional issues often “demand the appraisal and balancing of human values which there are no scales to weigh,” Learned Hand observed. “Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their powers?” As Hand elucidated, the problem “does not come from ignorance, but from the absence of any standard, for values are incommensurable.” Even more important, given the omnipresent worries about the countermajoritarian difficulty, if legislatures enacted laws in response to competing interests, and the Court resolved disputes by balancing countervailing interests, then what was the difference between legislative and judicial decision making? Legislatures and courts, the critics charged, should do more than provide different forums for competing interest groups to do battle. And if the Court lacked some better justification for invalidating legislative actions, other than that the Court's assessment of the parties' interests differed from the legislature's assessment, then the Court should defer to the people's elected legislative representatives.¹¹⁵

because he has a ‘preferred position’ on the scale, but because his mass is greater.” Black, *People*, *supra* note 113, at 220.

¹¹⁵Hand, *Contribution*, *supra* note 78, at 123. For one criticism of balancing in free speech cases, see Thomas I. Emerson, *The System of Freedom of Expression* 717-18 (1970). For a summary of the many criticisms of balancing, see Aleinikoff, *supra* note 2, at 972-95.

To be sure, the justices seemed concerned that balancing provided only a makeshift solution to the problem of pluralist democratic judicial review, but it was a solution that persisted, perhaps because of the lack of adequate alternatives. After the 1937 switch, it seemed, the justices realized the mechanism of judicial review needed repair, but they were uncertain how to fix it. So they dug down into the bottom of the toolbox, pulled out the electrical tape, started wrapping it around, and tried to fix the problem as best as possible. The sociological (Progressive) jurists had recommended that the Court assess social interests, but for the purpose of more accurately discerning the republican democratic common good. For what purpose now, under the new democratic regime, was the Court to weigh competing interests—other than to repeat the pluralist legislative process? Regardless, the tape-job held the judicial mechanism together, though the justices brooded over their flimsy patchwork. At times, they seemed defensive, attempting to justify balancing as truly principled. “[S]triking the balance implies the exercise of judgment,” Frankfurter wrote. “It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed.”¹¹⁶

As problematic as balancing seemed, the judicial removal protection of certain liberties and interests from the reach of pluralist democratic majorities proved even more so. This approach to judicial review had to confront the countermajoritarian whammy twice: first, in the creation of the no-fly zones; and second, in the application of balancing tests to determine, in any particular case, whether infringement of a zone was appropriate. While some critics argued that the Court should never recognize no-fly zones, a larger number insisted the zones should cover only those rights expressly enumerated in the constitutional text, such as free speech in the first amendment. To these latter critics, like Robert Bork, the justices were obligated to uphold

¹¹⁶*Sweezy v. New Hampshire*, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in result); Aleinikoff, *supra* note 2, at 962-63.

legislative actions unless clearly contravened by the Constitution, which at least in theory also manifested the will of the people. Bork and like-minded scholars thus became especially vitriolic when the Court began to invoke the right of privacy, an unenumerated right.¹¹⁷

III. *Roe* and Judicial Review Under Pluralist Democracy

Just as *Allgeyer* and *Lochner* epitomized the methods and problems of judicial review under republican democracy, *Griswold v. Connecticut* and *Roe v. Wade* embodied the methods and problems of judicial review under pluralist democracy. In *Griswold*, decided in 1965, the Court invalidated a Connecticut statute proscribing the use of contraceptives, even by married couples. Douglas wrote a majority opinion joined by four other justices. Two additional justices, John M. Harlan and Byron White, concurred in the judgment while writing their own opinions. Given that Douglas's opinion relied on a constitutionally protected right of privacy—a right nowhere expressly enumerated in the Constitution—all of the justices worried that the decision would appear analogous to *Lochner*, which had relied on the unenumerated liberty to contract.¹¹⁸

As Douglas prepared his opinion for the *Griswold* majority, he was pressured to contemplate the potential link with *Lochner*. Douglas initially circulated a draft opinion relying on the first amendment right of association, but Justice William J. Brennan responded with a letter encouraging Douglas to beware the ghost of *Lochner*. Brennan explained that while Douglas's draft did not invoke substantive due process, his reasoning “may come back to haunt us just as *Lochner* did.” Douglas rarely revised his opinions, yet this time he did so, attempting to deflect the analogy to *Lochner*. In his final opinion, Douglas insisted that the *Lochner* Court had exercised political discretion, but the *Griswold* Court would not: “We do not sit as a super-

¹¹⁷*E.g.*, Learned Hand, *The Bill of Rights* (1958); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971).

¹¹⁸*Griswold v. Connecticut*, 381 U.S. 479 (1965); see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade** 1-269 (1994) (discussing *Griswold* extensively); Bernard Schwartz, *A History of the Supreme Court* (1993) 337-39 (discussing *Griswold*).

legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."¹¹⁹

Moreover, while Douglas retained his original discussion of the right of association, he added an extensive discussion of privacy. He reasoned that the first amendment as well as several other Bill of Rights' guarantees produce or emanate "penumbras" of privacy.¹²⁰ These various penumbras, Douglas explained, combine to generate a "zone of privacy"—a whole greater than the sum of its parts (the respective penumbras).¹²¹ He then concluded that the anti-contraception law infringed the protected zone of privacy. Returning to his original focus on association, he emphasized that if the law were not invalidated, it would burden the marital relationship (or association).¹²²

¹¹⁹381 U.S. at 482; *see* Garrow, *supra* note 118, at 246 (Brennan's letter).

¹²⁰381 U.S. at 484. Douglas wrote:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 484 (citations omitted).

¹²¹*Id.* at 485.

¹²²Douglas wrote:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. ... Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Id. at 485-86.

As was true of Douglas, the other justices wrote their opinions in the shadow of *Lochner*. Black's and Stewart's dissents accentuated the countermajoritarian difficulty and the seeming similarity between the *Griswold* and *Lochner* decisions. "My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational," wrote an exasperated Black. "The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country."¹²³ Numerous constitutional scholars similarly attacked the *Griswold* decision. Bork and Raoul Berger declared that the Court had undermined the democratic process, while Paul Kauper and Alfred Kelly insisted that the Court, like in *Lochner*, had illegitimately relied on substantive due process.¹²⁴

Nonetheless, *Griswold* served as the springboard for *Roe v. Wade*, decided in 1973. *Roe* invalidated the Texas anti-abortion laws, which prohibited abortions except "for the purpose of saving the life of the mother." After the initial oral argument, a five-to-two majority favored striking down the Texas statutes as unconstitutionally void for vagueness (two new justices, Lewis F. Powell and William H. Rehnquist, had been confirmed by the Senate but had not yet

¹²³381 U.S. at 520-21 (Black, J., dissenting); *see id.* at 511-18 (Black, J., dissenting); *id.* at 527-31 (Stewart, J., dissenting). Only Justice White's concurring opinion did not expressly react to the institutional critique of *Lochner*. Goldberg reasoned that the fourteenth amendment protects fundamental personal rights, but he wrote circumspectly about the relevance of the ninth amendment to the Court's holding. *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Justice Harlan most clearly accepted a substantive due process approach, closely resembling *Lochner*, but he stressed that the Court was nonetheless constrained in constitutional adjudication. *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

¹²⁴Raoul Berger, *Government By Judiciary* 265 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 5-6 (1971); Paul G. Kauper, *Penumbrae, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 *Mich. L. Rev.* 235 (1965); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *S. Ct. Rev.* 119.

joined the Court). Justice Harry Blackmun circulated a draft opinion, which did not reach the merits of the underlying substantive constitutional claim, but the justices then decided to have the case reargued the following term before a full Court.¹²⁵ After reargument, the majority now favored invalidating the anti-abortion laws on the merits. Blackmun circulated a new draft opinion that would permit states to proscribe abortions after the first trimester of a woman's pregnancy. Justices Brennan and Thurgood Marshall suggested expanding the protected right so that states would not be allowed to prohibit abortions until viability, after the second trimester. Blackmun's final opinion followed this recommendation.¹²⁶

Unlike Douglas's *Griswold* opinion, Blackmun's *Roe* opinion explicitly relied on substantive due process, thus openly risking comparisons to *Lochner*. Recognizing this danger, he immediately sought to deflect it by insisting that the Court had decided *Roe* objectively, "by constitutional measurement, free of emotion and of predilection." To support this claim to objectivity, Blackmun extensively reviewed the history of anti-abortion laws. He argued that the history demonstrated abortion had traditionally been legal; anti-abortion laws were an anomaly introduced mostly in the late-nineteenth century.¹²⁷ Blackmun then focused on the right of privacy. He admitted that it was an unenumerated right, not express in the constitutional text, but he reasoned that its existence had been clearly settled in earlier judicial precedents, particularly *Griswold*. Most important, Blackmun wrote, the right of privacy included a woman's interest in choosing whether to have an abortion: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's

¹²⁵Roe v. Wade, 410 U.S. 113 (1973); Garrow, *supra* note 118, at 521-22, 537-38, 547-59; *see also* Schwartz, *supra* note 118, at 337-61 (discussing *Roe*).

¹²⁶Marshall's clerk, Mark Tushnet, initially drafted a letter to Blackmun recommending the focus on viability. Garrow, *supra* note 118, at 580-86.

¹²⁷*Roe*, 410 U.S. at 129-47.

reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹²⁸

Putting this in different words, Blackmun reasoned that the right of privacy established a no-fly zone encompassing a right to choose. State anti-abortion laws could infringe that zone only if necessary to achieve a compelling governmental interest. Thus, the Court balanced the competing interests, as it so often does in pluralist democratic judicial review. In weighing the various state interests against a woman's interest in choosing, Blackmun developed the *Roe* trimester framework. During the first trimester of a pregnancy, the state is prohibited from restricting abortions in any manner. During the second trimester, the state's interest in protecting the health of pregnant women justified state regulations of abortions but solely for the purpose of protecting pregnant women. Finally, after viability and during the third trimester, the state's "interest in protecting the potentiality of human life" is so strong as to justify state prohibitions of abortions, unless "necessary to preserve the life or health" of the pregnant woman.¹²⁹

With the exception of Chief Justice Burger's brief concurrence, all of the concurring and dissenting opinions revolved around the countermajoritarian difficulty and the ghost of *Lochner*. Justices Rehnquist's and White's dissents denounced Blackmun's claim to objectivity. *Roe* was, quite simply, *Lochner* all over again: the Court illegitimately engaged in "judicial legislation" to protect an unenumerated right under the guise of substantive due process.¹³⁰ Naturally, many constitutional scholars raised similar criticisms to the *Roe* decision. John Hart Ely, for instance, insisted that the *Roe* Court had exceeded its institutional limitations by balancing interests in a legislative manner. Moreover, Ely added, *Roe* had followed "the philosophy of *Lochner*;" *Roe* and *Lochner* were "twins to be sure."¹³¹ Bork, too, rode to the attack. The Court had once again

¹²⁸*Id.* at 152-53.

¹²⁹*Id.* at 154-55, 162-64.

¹³⁰*Id.* at 174 (Rehnquist, J., dissenting).

¹³¹John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 927, 933-35, 939-40 (1973). David Garrow calls Ely's article "[f]ar and away the most important critique" of *Roe*. Garrow,

undermined democracy by assuming legislative prerogatives: “[N]ot one sentence [in *Roe*] qualifies as legal argument,” Bork fumed. Whatever one might think of “the right to abort, [it] is not to be found in the Constitution.” The Court had “legislated the rules [it] considered appropriate for abortions by balancing the interests of the woman and those of the state.” *Roe*, consequently, manifested “the assumption of illegitimate judicial power and a usurpation of the democratic authority of the American people.”¹³²

In the face of such criticisms of *Roe* and *Griswold*, as no-fly-zone cases based on unenumerated rights, numerous scholars stepped forward to defend the Court’s decisions. Many scholars rejected the constrained originalist vision of judicial review proffered by Bork and his ilk. They argued, first, that even expressly protected rights, such as free speech, were ambiguous and required judicial interpretation, and second, that the constitutional text itself did not suggest the Court should be limited to recognizing only enumerated rights. The ninth amendment— “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”—suggested that the framers themselves did not believe in an originalist approach to constitutional interpretation. Moreover, numerous scholars insisted that, regardless of the precise language of the Constitution or the intentions of the framers, the Court’s function in constitutional cases was to articulate our society’s fundamental values—to identify them as no-fly zones—whether based on neutral principles, moral philosophy, tradition, societal consensus, or some other source of value and meaning (like natural law). For some

supra note 118, at 609. Ely, it should be noted, claimed that his representation-reinforcement theory of judicial review “was intended to be as compatible with ‘republican’ legislative and community behavior as with a ‘pluralist’ model.” John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts are No Different From Legislatures*, 77 Va. L. Rev. 833, 840 n.15 (1991). On the one hand, Ely is correct insofar as he is suggesting that a republican democratic Court can be concerned with the functioning of democracy. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). On the other hand, Ely is surely wrong if he is suggesting that the constitutional and democratic system of the late-twentieth century was essentially the same as that of, let’s say, the early-nineteenth century. Plus, he is wrong insofar as he suggests that the framers of the original document fully adopted a pluralist system. Ely, *supra* note 105, at 80-82, 135.

¹³²Robert Bork, *The Tempting of America* 112, 114-16 (1990).

scholars, the right of privacy manifested a societal commitment to individual autonomy and integrity: no woman should be forced to carry a pregnancy through to birth if she did not wish to do so. Other scholars argued that the abortion issue presented a prototypical question of equality. Regardless of Ely's arguments, anti-abortion laws manifested purposeful discrimination against women because the government forced only women, not men, to relinquish control of their bodies for the good of another being.¹³³

IV. Conclusion: Comparing *Lochner* with *Roe*?

Lochner was decided under republican democracy, while *Roe* was decided under pluralist democracy. Having been decided under different democratic regimes, the two cases should not be analogized as if they were of the same kind. To be sure, both cases can be criticized and praised, but to do so sensibly, each must be criticized and praised separately. Each case must be understood in accordance with the proper background context, in accordance with the appropriate democratic regime. To criticize *Lochner* based on the tenets of pluralist democracy is ahistorical and misleading. To criticize *Roe* as being *Lochner* all over again, as if there were no difference between unenumerated rights cases decided under pluralist democracy and republican democracy is likewise ahistorical and misleading.

¹³³For examples of scholars who argued that the Court must do more than police the democratic process, see Alexander M. Bickel, *The Least Dangerous Branch* 25-26 (2d ed. 1986; 1st ed. 1962) (enduring principles); Ronald Dworkin, *Freedom's Law* 1-12 (1996) (moral values); Ronald Dworkin, *Taking Rights Seriously* 131-49 (1978) (principles derived from morality); Michael J. Perry, *The Constitution, the Courts, and Human Rights* (1982) 91-93 (prophetic morality); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063 (1980) (arguing that the Court must make substantive value choices). For express defenses of *Roe*, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. Rev.* 375 (1985); Sylvia Law, *Rethinking Sex and the Constitution*, 132 *U. Penn. L. Rev.* 955 (1984); Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 *Law & Contemp. Probs.* 83 (1980); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 *B.U. L. Rev.* 765 (1973); see Eskridge, *Some Effects*, *supra* note 113, at 2113-15 (construing *Roe* as based on equality).

Other scholars criticized Ely's claim that representation-reinforcement theory was pure process-based. To these scholars, the Court could not even in theory limit itself to doing no more than policing the democratic process. The Court necessarily articulated or protected certain substantive values. *E.g.*, Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 *Ohio St. L.J.* 223 (1981); Paul Brest, *The Substance of Process*, 42 *Ohio St. L.J.* 131 (1981); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *Yale L.J.* 1037 (1980).

True, the *Roe* Court justices themselves worried about potential similarities between *Roe* and *Lochner* (as was also true of the *Griswold* Court justices). Yet, the justices' attitudes do not diminish the importance of the basic point: that the two cases were decided in fundamentally different democratic regimes. The justices' concerns about the potential case comparisons do not establish the validity of the ostensible analogy. Rather, their concerns suggest the state of the *Roe*-era legal culture vis-à-vis *Lochner*. The legal community had forgotten republican democracy; it had erased from memory the structures of republican democratic judicial review. Why? For one reason, this effacement of republican democracy facilitated the condemnation of *Lochner*-era cases as pure political decisions. In the story of the *Lochner*-era that was being told circa 1973, when *Roe* was decided, the *Lochner* Court justices were arch-conservatives who corruptly twisted judicial review so they could impose their political values on a people overwhelmingly favoring the liberal New Deal. This story justified post-1937 Supreme Court decision making as harmonious with the traditional structures of judicial review, which the *Lochner*-era justices had supposedly disregarded.¹³⁴

This story also facilitated the promotion of the nation's interests during the Cold War. Coming on the heels of the country's World War II confrontation with the Nazis, the Cold War locked the United States in a struggle with the Soviet Union for the allegiance of emerging Third World nations. Given the now-condemned racist practices of the Nazis, and given the need to appeal to people of color in Third World countries, the nation sought to claim that American democracy stood for liberty and equality for all, regardless of race, color, creed, or gender. To make such a claim, Americans needed to forget how the nation had systematically excluded blacks, women, and other religious and racial outsiders from participating in politics for most of the nation's history.¹³⁵ In other words, the nation needed to forget its republican democratic past,

¹³⁴See Gillman, *supra* note 2, at 3-4 (describing the political interpretation of the *Lochner* era); Horwitz, *supra* note 2, at 7 (describing standard Progressive history of the *Lochner* Court and its demise).

¹³⁵For discussions about Cold War imperatives and the Civil Rights Movement, see Mary L. Dudziak, *Cold War Civil Rights* (2000); Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

when the principles of civic virtue and the common good justified political exclusion and subjugation. Thus, in the 1950s, we find books like *The Liberal Tradition in America*, where Louis Hartz argues that the United States was born liberal. Its lack of a feudal past, according to Hartz, ensured its initial commitment to freedom, equality, and property. As Hartz phrased it, “Burke equaled Locke in America.”¹³⁶

Roe's critics, it should be added, found this effacement of the republican democratic past advantageous (though I do not mean to suggest that this collective amnesia was some type of conscious conspiracy). It was far easier to condemn *Roe* as being *Lochner* all over again if one disregarded (or was unaware of) the significant differences between the pluralist and republican democratic regimes. Each regime had its own unique tenets or principles, and because of those differences, each also had distinctive structures for (and problems of) judicial review. In short, *Lochner* and *Roe* are incommensurable, decided within different paradigms of democracy. *Lochner* should be evaluated within the parameters of republican democracy, while *Roe* should be evaluated within the parameters of pluralist democracy. Thus, one might ask whether the *Lochner* Court correctly distinguished the common good from partial or private interests within the context of that case. And one might ask whether the *Roe* Court correctly identified the right of privacy as a no-fly zone as well as correctly weighing the state's interests against a woman's interest in choice. But one should not reverse these questions, asking for instance whether the *Roe* Court correctly identified the common good. This question would be no more coherent within the pluralist democratic regime than asking whether the Court properly balanced competing interests within the republican democratic regime.

¹³⁶Louis Hartz, *The Liberal Tradition in America* 156 (1955).