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JUDICIAL REVIEW: THE POLITICS OF SCHOLARSHIP

*Priscilla H. Machado**

*Wallace Mendelson***

There are tides and fashions in scholarship. Not so long ago, learned men taught that judicial review had been conceived in sin, served mainly the rich, and was incompatible with democracy. The prime proponents of these views—J. Allen Smith, Charles Beard, and Brooks Adams—have now lost much of their following. Today learned men—Charles Black, Eugene Rostow, and many others—have no qualms about the origins of the judicial veto, and consider it a vital handmaiden of democracy. What used to be called “judicial supremacy,” “the divine right of judges,” “judicial oligarchy,” and “the aristocracy of the robe” is now deemed harmonious with (and in some quarters even a “legitimizing” agent for) government by the people.¹ No one suggests this dramatic change springs from new primary source material or from fresh insights as to the meaning of democracy. Surely the catalyst was simply the rise of the Warren Court.

There had been earlier episodes, but modern judicial activism began in 1895. In that year the Supreme Court struck down the federal income tax;² severely restricted the Sherman Anti-trust Act;³ and legitimized the labor injunction.⁴ A year later it began an energetic campaign against the Interstate Commerce Commission.⁵ *Smyth v. Ames*⁶ in 1898 blocked effective utility and railroad rate regulation. *Lochner v. New York*⁷ in 1905 incorporated laissez-faire into the fourteenth amendment, and killed a maximum-ten-hour workday for bakers.

Two years later J. Allen Smith responded with *The Spirit of*

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1. C. BLACK, *THE PEOPLE AND THE COURT* 56-86 (1960).

2. *Pollock v. Farmers Loan and Trust Co.*, 158 U.S. 601 (1895).

3. *United States v. E. C. Knight Co.*, 165 U.S. 1 (1895).

4. *In re Debs*, 158 U.S. 564 (1895).

5. *Texas & Pacific Ry. v. ICC*, 162 U.S. 197 (1896).

6. 169 U.S. 466 (1898).

7. 198 U.S. 45 (1905).

American Government—a then radically new version of the origins of the Constitution. The Supreme Court, he found, had not gone wild, it was merely doing what it had been designed to do:

The Founding Fathers represented a reactionary movement against the idealism of the Revolution. Fearful for their privileges as representatives of a . . . “well-to-do” class, they constructed a document with checks and balances exquisitely designed to inhibit the popular will . . . Diluting for the sake of expediency and appearance the extreme centralized and undemocratic features of Hamilton’s plan . . . , the framers had, however, achieved his ends⁸

Of the four organs of the new government, only the House of Representatives was to be directly elected by the people. The terms of federal office were staggered (two, four, six years, and life). This would make popular capture of the whole extremely difficult—each of the three branches having “veto” or inhibiting powers vis-a-vis the others. A minority-controlled amending process would make improvements difficult. Finally, the crown jewel of the check-and-balance system: a judicial veto. In Smith’s view it was so blatantly anti-democratic that it could be included only implicitly—between the lines, so to speak.⁹ In due time judicial spokesmen for Hamilton’s “rich and the wellborn” would do what they were supposed to do; namely, provide a barrier against what Smith deemed the “only recognized source of legitimate authority,” majority rule.

As though to supplement Smith’s efforts, Charles Beard published *The Supreme Court and the Constitution* in 1912, and then his bombshell, *An Economic Interpretation of the Constitution of the United States* in 1913. The former was a response to “legal writers of respectable authority” who since 1895 had been arguing that judicial review was an illegitimate power. Beard examined the words and deeds of the framers of the Constitution, and as he later put it, “laid the ghost of judicial usurpation.”¹⁰ Then in *An Economic Interpretation*, having examined property holdings of the individual framers, Beard offered empirical “proof” of Smith’s thesis concerning the economic predilections of the Founding Fathers:

. . . not one [of them] represented in his immediate personal economic interests the small farming or mechanic classes. [More than 80 percent of the Founders] were immediately, directly and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the Constitution.¹¹

8. Stout, *Introduction* in J. SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* xxxii (1965).

9. J. SMITH, *supra* note 8, at 108-109, 167.

10. See C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Macmillan ed. 1937).

11. *Id.* at 150.

Simultaneously Brooks Adams—scion of a famous family of patriots—offered *The Theory of Social Revolutions*. Beginning with *Marbury*, as he saw it, our courts had assumed sovereign powers including “a supreme function which can only be compared to the Dispensing Power claimed by the Stuarts, or the [ancient] authority . . . in the Church to ‘grant Indulgences for reasonable causes.’” This power of granting immunity from the duty of obedience to legislation made the judiciary a political body, Adams thought, ever eager to reward its favorites, i.e. businessmen:

The capitalist . . . regards the constitutional form of government . . . in the United States, as a convenient method of obtaining his own way against a majority, but the lawyer has learned to worship it as a fetish. Nor is this astonishing, for, were written constitutions suppressed, he would lose most of his importance and much of his income. Quite honestly, therefore, the American lawyer has come to believe that a sheet of paper soiled with printers’ ink and interpreted by half-a-dozen elderly gentlemen. . . has some inherent and marvelous virtue by which it can arrest the march of omnipotent Nature.¹²

The Smith-Beard-Adams outlook reverberated throughout the academic world. Generations of students were trained in that tradition as old history and political science textbooks testify.¹³ As recently as 1943 Henry Steel Commager—a giant in the liberal tradition—repudiated judicial intrusion upon the political branches of government. In *Majority Rule and Minority Rights* he wasted few words on the usurpation issue: “. . . atop all this [checking and balancing] there developed—I would not say there was established—the practice of judicial review.”¹⁴ What was crucial for him was a principle repeatedly expressed “from the beginning to the end of Jefferson’s career . . . an untterrified and unflinching faith in majority rule.”¹⁵ As Commager shows, Jefferson expresses that confidence over and over. To those who objected, Jefferson’s response was clear:

1. If the people are led astray, they “will soon correct themselves.”
2. “[I]f we think them not enlightened enough to exercise their control [adequately], . . . the remedy is not to take it from them, but to inform their discretion by education”.
3. If the foundation of just power is not in the majority, “Will it be in the minority? Or in an individual of that minority?”

12. B. ADAMS, *THE THEORY OF SOCIAL REVOLUTIONS* 214-15 (1913).

13. On the eve of Earl Warren’s appointment to the bench a now famous political scientist, W. H. Riker, wrote for the benefit of undergraduates:

Judicial review was largely unanticipated. Its rationale reflects, therefore, experience, even historical accident, more than philosophy and constitutional plans. . . . *Marbury v. Madison* (1804) was . . . more a legal trick than a serious precedent.

W. RIKER, *DEMOCRACY IN THE UNITED STATES* 240-41 (1953).

14. H. COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 6 (1943).

15. *Id.* at 16.

4. If "man can not be trusted with the government of himself. . . . [c]an he, then, be trusted with the government of others?"¹⁶

Commager concluded with Jefferson that "men need no masters—not even judges."¹⁷

Only seventeen years later Charles Black's *The People and the Court* (1960) marked a watershed in liberal thinking—from Progressive and New Deal contempt for judicial activism to Warren-era glorification; from rejection, to acceptance, of major policymaking by judges. Black found "the preponderance of evidence" clearly indicates the founders intended judicial review.¹⁸ Then, undercutting Smith, Beard, Adams, and Commager (to say nothing of Jefferson), he insisted it "fits harmoniously into the democratic system."¹⁹ This seminal effort by a gifted advocate—along with another by Eugene Rostow in 1962—provided the groundwork for an outpouring of academic apologetics for Warrenism. Little if anything was added to the Black-Rostow rationale, but the magnitude of the effort suggests "thou dost protest too much." For it is no small matter to reconcile judicial paternalism with the bedrock premise of democratic government; namely, that policymaking belongs to those who are politically accountable. The reconciliation effort included suggestions that we need not be much concerned with judges, for the rest of government is not so kosher either.²⁰

Let us accept, as did Smith and Beard, the view that the framers probably intended the judicial veto. But what of Black's view that democracy and an activist judiciary are in harmony? His rationale was that: (1) "Congress and the President and the people could, if they wanted to, dismantle the institution"; and (2) "The premises of democracy are inarticulate and complex. But one proposition that is not among them . . . is the proposition that democracy requires that all decisions on policy be made by public opinion from day to day, or even by those departments that are most responsive to public opinion."²¹

We may concede Black's second proposition, noting that as an argument in support of judicial activism, it entails a *non sequitur*. His first proposition proves far too much. It equates toleration (even helplessness) with acquiescence; it means the Czarist government of Russia and the Bourbon government of France were demo-

16. *Id.* at 16-18.

17. *Id.* at 82.

18. C. BLACK, *supra* note 1, at 23.

19. *Id.* at 178-82.

20. See response of McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 345 (1966).

21. C. BLACK, *supra* note 1, at 178-79.

cratic. More immediately to the point, it means the judicial activism that prevailed in the four decades prior to 1937 was compatible with democracy.

Obviously most scholars in the Progressive-New Deal era would have ridiculed Black's effort to justify the Court, just as they had ridiculed analogous efforts by the American Liberty League.²² Conversely, Smith and Beard fared badly in the Age of Warren.²³ It would be incredible, if it were not true, that a scholar as capable as Charles Black could write a book on democracy and judicial review without discussing the decades of Court abuse that began in 1895—abuse that Black's academic predecessors (including surely his teachers) had roundly condemned. The fact is, one suggests, judicial review as we experienced it from 1895 to 1937 was blatantly in contempt of democracy. Our Blacks and Rostows simply do not face that difficulty. Nor did they (in the 1960's) recognize the possibility of massive lawmaking by a future conservative (or reactionary) Court. Their efforts are date-bound, tracts for the Age of Warren. They mistook benevolent oligarchy for democracy.

The Black-Rostow position now seems to have outlived its day, at least in law-school circles. There a new generation of *liberal* scholars is mining and sapping the foundations of Warrenism. The attack is two-pronged. One finds classic expression in John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review* (1980), which incidentally is dedicated to Earl Warren. Inspired by Stone's famous "footnote 4,"²⁴ Ely rejects court excursions (negatively or positively) into substantive policy. He would confine review to safeguarding the democratic processes (broadly conceived): "Policing the Process of Representation," "Clearing the Channels of Political Change," "Facilitating the Representation of Minorities."²⁵ The response to this "compromise" and to Jesse Choper's parallel effort, *Judicial Review and the National Political Process* (1980), suggests a more than passing interest in reform.

Still there are difficulties—exposed, for example, in Ely's treatment of the reapportionment cases.²⁶ He approves them wholeheartedly for helping to clear the channels of political change. One problem is that he starts with a questionable premise; namely, that

22. See, e.g., Powell, *Fifty-eight Lawyers Report*, THE NEW REPUBLIC, Dec. 11, 1935, at 119-121.

23. See C. Strout, *supra* note 8, at xxxviii et seq.; R. BROWN, CHARLES BEARD AND THE CONSTITUTION (1956); F. McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958).

24. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

25. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73, 105, 135 (1980).

26. *Reynolds v. Sims*, 377 U.S. 533 (1964), and companion cases.

the beneficiaries of malapportionment "have a vested interest in keeping things as they are," leaving the "victims" essentially helpless. Experience teaches a different lesson. The English got rid of their rotten boroughs through the political process. That, too, is how state after state repealed property qualifications on suffrage; how state after state rejected religious qualifications on suffrage; how state after state eliminated the poll tax (before the Court intervened); how women got the vote; how eighteen, nineteen, and twenty year olds got the vote; and how we abolished the old system of selecting United States Senators, and deprived the electoral college of its power to choose Presidents.

"We, the public," did not try much to kill malapportionment presumably because we did not find it much of a problem—just as we do not now consider gross malapportionment in the federal Senate much of a problem.²⁷ A key ploy of the Warrenites—on and off the bench—was a broad, unspoken (and unexamined) assumption that, if voters and legislatures did not adopt forthwith a reform deemed important by activists, there must be a flaw in the political system. Ergo judicial intervention (including wholesale policymaking) was justified. It seems never to have occurred to Court and campus activists that politics had not necessarily failed, but rather that the community simply did not want the reform in question.²⁸ In any event by the end of the Warren era the Supreme Court had reached its nadir of esteem in public opinion polls.²⁹

Another hitch in Ely's effort is revealed in his view that the malapportionment decisions merely freed the political process of an

27. Have we so soon forgotten that the purpose of the pre-Baker reapportionment "drive" was to free urban America from "rural domination"? Malapportioned state legislatures, we were told, were responsible for the growing ills of city life. See G. BAKER, 4 RURAL VERSUS URBAN POLITICAL POWER, 27-39 (1955); THE TWENTIETH CENTURY FUND, ONE MAN-ONE VOTE (1962); Kennedy, *The Shame of the States*, New York Times Magazine, May 18, 1958, at 12; Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1063 (1958). Yet we have long since reapportioned without a hint of the promised renaissance of the cities. They still look more and more to the federal government for help. The persistence of their difficulties despite one-person-one-vote suggests causes and cures that have little to do with the apportionment of any legislative body. Unlike numerous academicians, "We the people"—free of blinding ideology and the never-never-land Dauer-Kelsay Index of Representativeness—seem to have been correct in discounting the alleged rural sabotage of urban America. Incidentally the Dauer-Kelsay Index revealed that in 1962 the federal Senate was so malapportioned as to permit sixteen percent of the voters to elect a majority of its members. In that pre-*Reynolds* year, only six state senates, and three state houses of representatives were more severely "malapportioned." 17 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 66-67 (1969).

28. For example, consider the abortion issue. A Gallup Newsweek Poll, NEWSWEEK, Jan. 14, 1985, at 22, indicates fifty-eight percent support for a ban on all abortions except in the case of rape, incest, or when the mother's life is endangered. Only thirty-six percent opposed such a ban.

29. See New York Times, Aug. 17, 1969, § 1, at 42, col. 1.

impediment. But there is no unconstitutional "malapportionment" without a standard for determining what apportionments are mal. The Court simply selected and imposed upon us one of many theories of representation.³⁰ Ely approves. How easily in the name of process-purification he slips into substantive lawmaking! The constitutional scheme for electing Presidents and Senators is utterly at odds with the Court's "one-person-one-vote" theory. Those, then, who gave us the Constitution could hardly have objected to "malapportionment." For, as the Warren Court recognized in the state senate case,³¹ no matter how pure the representation in the house, the *legislature* will be impure, if the senate (a bottleneck) is impure. As Justices Frankfurter and Harlan observed in dissent, one-person-one vote

... was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the fourteenth amendment, it is not predominantly practiced by the States today.³²

The malapportionment decisions demonstrate the inadequacy of the judicial process in the face of the complex problem at issue. A catch-phrase (worthy of Madison Avenue) simply does not do the job. As Mr. Justice Douglas observed in dissent: "The question of the gerrymander is the other half of *Reynolds v. Sims*."³³ One-person-one-vote alone means merely that all gerrymandered and other voting districts in a given polity must be equal in population. This hardly gives protection against watered-down votes. Yet neither the Warren Court nor its successor has effectively challenged non-racial gerrymandering—apparently finding it beyond the capacity of courts.³⁴ The result is that today, though we have the comforting

30. If equal weight for *all* votes was the goal, proportional representation would have been a better choice.

31. *Lucas v. General Assembly of Colorado*, 377 U.S. 713 (1964).

32. *Baker v. Carr*, 369 U.S. 186, 301 (1962).

33. *Whitcomb v. Chaviz*, 403 U.S. 124, 176 (1971).

34. In *Whitcomb*, Mr. Justice Douglas observed in dissent:

It is said that if we prevent racial gerrymandering today, we must prevent gerrymandering of any special interest group tomorrow, whether it be social, economic, or ideological. I do not agree. Our constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right . . . to vote shall not be "abridged" on account of "race" . . .

Id. at 180.

Gaffney v. Cummings, 412 U.S. 735 (1973), promises little prospect for court involvement in non-racial gerrymandering. Post Script: *Davis v. Brandemer*, 106 S. Ct. 2797 (1986), indicates that when unconstitutional vote dilution is alleged in the form of statewide political gerrymandering the judiciary will not attempt to cure mere lack of proportional representation, but may intervene when an electoral system is intended to, and does, *consistently* degrade a voter's influence on the political process as a whole.

One problem is that to district is to gerrymander in the sense that, however, it is done, it

catch-phrase, we are far from controlling malapportionment. For example, in the 1984 election Democrats "won" a fifty-eight percent majority in the federal House of Representatives, though they received less than fifty-one percent of the total vote.³⁵ Their minimal victory at the polls gave them nearly a three-to-two lead in House seats. Most of the reapportioning, as it happens, had been done by Democratic state legislatures. Regardless of the reason, the fact remains: the minority party was underrepresented. The votes of its supporters had been (to borrow from Earl Warren) "diluted."³⁶

The second prong of the new, liberal reaction to Warrenism relates to form rather than substance. It does not reject activism, but rather make-believe in court opinions. There is no mystery in the fact that no Justice has ever tried in public to justify activism.³⁷ Wholesale lawmaking by judges is too utterly at odds with our long-settled understanding of the judicial function. Accordingly those who "adjudicate" big changes into the law always pretend they are not doing so. The Douglas opinion in *Griswold*³⁸ and the Warren opinions in *Reynolds* and *Miranda* are classic examples. What Thomas Reed Powell said years ago of the old activists is equally applicable to the new ones:

[They] seek to impress upon us in effect that it is not they who speak but the Constitution that speaketh in them It will ever remain a mystery to me how intelli-

will benefit some voters at the expense of others. One-person-one-vote might prevent diluted votes, if all interests were uniform in strength and spread uniformly throughout the polity. In the real world they are not thus homogenized. Some interest groups are large, some small; some are geographically compact, some widespread, and some spotty; some have advantages of prestige, some of organization, and some of dedication—others are correspondingly handicapped. The result is layered, crazy-quilt patterns of changing interests. Equal sized voting districts imposed on such an uneven base are bound to produce uneven results, i.e., "diluted" votes, or what might be called inadvertent gerrymandering. Consider, for example, a polity divided into equal sized districts first by north-south boundary lines, and then alternatively by east-west lines. Because of the uneven interest-base the former almost certainly would favor one set of voters; the latter another. Yet both satisfy the *Reynolds v. Sims* test of size equality.

When *Sims* was decided in 1964 perhaps it could be argued that the requirement of district size-equality would make gerrymandering difficult to achieve. The advent of districting by computer thoroughly undercut that proposition!

35. The Wall Street Journal, Nov. 26, 1984 at 34, col 1; Cf., Ornstein, *Genesis of a Gerrymander*, *id.* May 7, 1985, at 30, col. 3. See also note 27, *supra*.

36. It is ironic that, though the Supreme Court has shown scant interest in gerrymandering, it has been a martinet with respect to numbers-equality in congressional districting. *Karcher v. Daggett*, 462 U.S. 725 (1983), struck down as excessive a seven-tenths of one percent deviation.

37. Post Script: But see Justice Brennan's speech at Georgetown University on October 12, 1985 entitled "The Constitution of the United States: Contemporary Ratification." There, after a salute to "interpretivism," he goes far along the "non-interpretive" path. N.Y. Times, Oct. 13, 1985, § 1, at 1, col. 1, and 36, col. 4 (excerpts).

38. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

gent jurists can make these professions of nonparticipation in the judicial process.³⁹

Equally "perplexed," a new group of liberal critics calls—at least by implication—for candor in Court opinions.⁴⁰ The classic statement of this outlook is Thomas Grey's *Do We Have an Unwritten Constitution?* (1975). A few years earlier a respected historian had suggested in some detail that the Court's use of history to justify its results is often "illicit," simplistic, manipulative, and plainly misleading. So many others reached similar conclusions that at the end of the Warren regime a liberal, Pulitzer Prize-winning historian observed (with documentation):

By now we all know the notorious fact: the Supreme Court has flunked history. The justices stand censured for abusing historical evidence in a way that reflects adversely on their intellectual rectitude⁴¹

In the interest of integrity (vis-a-vis the open-ended provisions of the Constitution) Grey would abandon fairy-tale "interpretivism" in favor of open, candid "non-interpretivism." This dichotomy is now a major battle zone in legal literature. Its significance for present purposes is that it reveals a widespread disenchantment with activist make-believe as, for example, in *Griswold* and *Reynolds*.

Our concern here is not who is right or wrong, but rather: how can outstanding scholars derive such changing and conflicting conclusions from the same data? The question is perhaps naive. Still let Charles Black—panegyrist of Warrenism—suggests an answer, if only by implication. Deeply wounded by the Burger Court's "reinstatement" of the death penalty, he wonders lately "whether we liberals . . . may not be in part to blame for a . . . quite evident trend toward the point of view that reason doesn't matter much, and can be brushed aside, if only the result is thought desirable What if all this *is turned on us?* Have we not . . . asked for it?"⁴²

Earlier Edward S. Corwin—perhaps the leading political scien-

39. T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 28 (1956).

40. *Lochner v. New York*, 198 U.S. 45 (1905), is of course the classic case of early, laissez-faire judicial activism. In it the Court's innocence and *candor* are refreshing: "There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law . . ." *Id.* at 58. *Griswold v. Connecticut*, 381 U.S. 479 (1965), is *Lochner's* modern counterpart. Note there the Court's painful effort to find a privacy right to copulate with *contraceptives* implicit in "penumbras formed by emanations" from our eighteenth-century Bill of Rights allegedly made applicable to Connecticut by a fair-trial provision in a Civil-War-Reconstruction amendment. *Id.* at 480-86.

41. Levy, *The Right Against Self-Incrimination: History and Judicial History*, 84 *POL. SCI. Q.* 1 (1969).

42. "The Judicial Power as Guardian of Liberties" in a symposium on *The Supreme Court and Constitutional Liberties in Modern America*, Wayne State University, Detroit, Michigan, October 16, 1976. (*quoted in* R. BERGER, *GOVERNMENT BY JUDICIARY*, 346, 350 (1977)).

tist of his day—had a similar change of heart. In 1914 he had concluded (as had Beard in 1912) that the framers clearly intended a judicial veto over Congress: “. . . it cannot be reasonably doubted.”⁴³ But when longstanding liberal opposition to the Court produced the “Court fight” crisis of 1937, Corwin said, “The people who say the framers intended it are talking nonsense [as are those who claim the opposite.]”⁴⁴ So too, but conversely, Commager had second thoughts. In the heyday of Warrenism, twenty-three years after his *Majority Rule and Minority Rights*, he returned to the problem of judicial review in a democracy, he tells us, “with . . . a somewhat livelier concern for its complexities.”⁴⁵ The Court had become “liberal”!

The contradictory conclusions and vacillations of leading scholars suggest a large measure of “statesmanship” in their efforts. Their twistings and turnings are directly related to the shift of the Court from very “conservative” to very “liberal,” and now back again to “conservatism” (with a threat of more to come). Ely, Choper, and the new Black may be straws in an academic wind blowing away from activism on the bench. That wind may become a gale, if President Reagan has his way with the Court. If liberals should now embrace judicial restraint, that would be merely a return to their stance throughout American history—save the brief Warren-inspired lapse. It would spare us their make-believe of pretended “interpretivism.” It would spare us the embarrassment of tract-for-the-moment scholarship *a la* Smith, Beard, Black and Rostow. It would spare us the timely reconsiderations of our Corwins, Commagers, and Charles Blacks. We would not have to pretend that activism is democratic when it promotes liberal values (e.g., *Griswold* privacy), yet antidemocratic when it promotes conservative values (e.g., *Lochner* privacy).⁴⁶

43. E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 10 (1914).

44. *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Committee on the Judiciary, 75th Cong., 1st Sess., Part 2* (1937) (statement of Edward S. Corwin).

45. H. COMMAGER, *FREEDOM AND ORDER: A COMMENTARY ON THE AMERICAN POLITICAL SCENE* vii (1966).

46. The Court's rationalization in either of these cases will support the result in the other. Some may find in *Griswold* a less than candid approach that would support judicial veto, or judicial “enactment,” of virtually any legislative policy. For example, it “legitimizes” (Charles Black's term) *Roe v. Wade*, 410 U.S. 113 (1973), wherein, we are told, the Constitution divides the period of human gestation into trimesters and prescribes in some detail the varying scope of “privacy” appropriate to each.