Can Bush Supreme Court Appointments Lead To A Rollback Of The New Deal?

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I. Introduction

In anticipation of a conflict regarding nominations to the Supreme Court, some commentators have speculated that President Bush will use his power to appoint justices who will advance a supposed "growing campaign to undo the New Deal." Adam Cohen, "What's New in the Legal World? A Growing Campaign to Undo the New Deal", *New York Times,* at A32 (Dec. 14, 2004). According to these observers, the pre-New Deal "Supreme Court's understanding of the Constitution [was] obviously rooted in the justices' political convictions[.]" Cass Sunstein, "The Rehnquist Revolution*," The New Republic*, at 32 (Dec. 27, 2004) (reviewing Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005)). Such a purportedly partisan understanding "jeopardized maximum-hour legislation, minimum-wage legislation, the National Labor Relations Act, the Fair Labor Standards Act, and the Social Security Act—and would certainly have forbidden the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act." *Id.*

Commentators such as Professor Sunstein have suggested that future Bush appointees will similarly use their own political preferences to invalidate social welfare and civil rights legislation. "For many admirers of [Justices] Scalia and Thomas[, t]here is increasing talk of restoring what is being called the Constitution in Exile—the Constitution as of 1932, Herbert Hoover's Constitution, before Roosevelt's New Deal." *Id.; see also* Jeffrey Rosen, "Supreme Mistake*," The New Republic*, at 18 (Nov. 8, 2004) ("If Bush wins, his aides seem determined to select justices who would resurrect what they call 'the Constitution in Exile,' reimposing meaningful limits on federal power that could strike at the core of the regulatory state for the first time since the New Deal."); Cohen, *supra*.[1]

While some fear that a few justices might prompt the Court to invalidate countless economic and civil rights statutes, the pre-New Deal jurisprudence used to void these laws simply has no place in the modern Supreme Court and has little chance of gaining anything approaching a majority. The types of strict constructionists President Bush has indicated he would appoint to the bench—individuals in the mold of Justices Scalia and Thomas[2]—would not support the lines of argument employed by the pre-New Deal Court. Furthermore, to the extent that any justices have supported pre-New Deal lines of argument, they have employed those arguments to reach the preferred political outcomes of many of the President's opponents.

The pre-New Deal Court relied primarily on three constitutional theories to invalidate numerous economic regulations. First, it used an aggressive form

of "substantive due process" to strike down laws that interfered with the liberty to contract. Secondly, the Court narrowly construed the Commerce Clause to limit Congress's power to enact regulations. Thirdly, the Court strictly adhered to the nondelegation doctrine and refused to allow Congress to regulate economic and social affairs through administrative bodies.

This paper considers the history of these three constitutional theories, their role on the current Court, and how the appointment of a "strict constructionist" would impact their influence on the Court. Additionally, we address the justices' views of *stare decisis* and how those views would impact their interaction with established precedents—including those precedents with which they might disagree. Ultimately, we conclude that the President's appointment of strict constructionists to the bench would not awaken a pre-New Deal interpretation of the Constitution that would invalidate economic and civil rights legislation. The judicial philosophies of the Court's "strict constructionists," the reality of the state of current constitutional jurisprudence,[3] and the doctrine of *stare decisis* all suggest that the New Deal has little to fear from a Bush Supreme Court appointment.

II. Substantive Due Process

If the Court wanted to reanimate pre-New Deal jurisprudence, it could most directly do so by reviving the same economic substantive due process doctrine memorialized in *Lochner v. New York,* 198 U.S. 45 (1905). Such a doctrine recognized a fundamental right to contract within the Due Process Clause of the Fourteenth Amendment and struck down state and federal laws that interfered with that right. However, as discussed, *infra, Lochner's* time in the majority has long since passed, and no justice has shown a remarkable interest in applying substantive due process to economic regulations. While substantive due process remains a vibrant doctrine, its strongest applications have occurred in *non-economic contexts,* and its strongest critics have come from the "strict constructionist" or "conservative" wings of the Court.

A. *Lochner's* Birth

In *Lochner,* the Court invalidated a New York statute that limited the number of hours bakery employees could work per day and per week. After noting that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution," and conceding the existence of certain police powers that "relate to the safety, health, morals and general welfare of the public," Justice Peckham asked: "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 enter into those contracts . . . appropriate or necessary for the support of himself and his family?" *Id.* at 53-54, 56.

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The Court quickly decided that the regulation fell into the latter category. "The question whether this act is valid as a labor law . . . may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker." *Id.* at 57. In reaching this conclusion, the *Lochner* majority animated a broad view of the

Fourteenth Amendment and substantive due process that Justice Peckham outlined in *Algeyer v. Louisiana,* 165 U.S. 578, 589 (1897):

> The liberty mentioned in that 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.

Between the time of *Lochner* and the mid-1930s, the Court struck down nearly 200 economic regulations on substantive due process grounds.[5]

Interestingly, although Justices Harlan, White, and Day dissented in *Lochner,* they also agreed, "that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment." *Lochner,* 198 U.S. at 68 (Harlan, J., dissenting).[4] As discussed, *infra*, Justice Holmes dissented as to the general idea of an economic variant of substantive due process. Thus, in *Lochner,* Justice Peckham strongly applied *Algeyer's* discussion of economic and contractual liberties to invalidate state-enacted public-welfare legislation.

Between the time of *Lochner* and the mid-1930s, the Court struck down nearly 200 economic regulations on substantive due process grounds.[5] Gerald Gunther & Kathleen Sullivan, *Constitutional Law* 465-66 (13th ed. 1997). On two occasions, the Court invalidated state and federal laws directed at eliminating "yellow dog" contracts, whereby an employer would require, as a condition of employment, an employee to agree not to join a union. *Coppage v. Kansas,* 236 U.S. 1 (1915); *Adair v. United States,* 208 U.S. 161, 174 (1908) (the "right of a person to sell his labor upon such terms as he deems proper [is] the same as the right of the purchaser or labor to prescribe the conditions.") (Harlan, J.). In *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), the Court overturned regulations that mandated a minimum wage for women. The Court also rejected price regulations of private industries and allowed such regulations only for those industries "affected with a public interest." *Williams v. Standard Oil Co.,* 278 U.S. 235 (1929). Finally, the Court invalidated regulations limiting entry into a particular market or field of business. *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932) (rejecting a state law that required a party to complete utility-like licensing procedures before entering into the ice market); *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928) (law barred corporations from owning pharmacies).

B. *Lochner's* Death

Beginning with *Nebbia v. New York,* 291 U.S. 502 (1934), however, the Court began to lessen the strength of its review of economic legislation.[6] In *Nebbia*, the majority upheld a state agency's imposition of a minimum price on milk. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937), flatly overruled *Adkins* and affirmed a state-set minimum wage for women.[7] Chief Justice Hughes's majority opinion narrowed the reach of any purported freedom of contract. "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty." *Id*. at 391. In *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), Justice Stone upheld a federal prohibition on the interstate shipments of "filled milk" after applying a rational basis standard for economic legislation and relying on Congressional committee findings regarding the necessity for the regulation.

The Court subsequently upheld virtually every state and federal economic regulation challenged under the formerly vigorous Due Process Clause. By 1954, Justice Douglas stated how far the economic substantive due process of *Lochner* had fallen: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1954); see also *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) ("There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends bargaining . . . .").

In his *Lochner* dissent, Justice Holmes articulated the classic criticism of any substantive due process approach by distinguishing between a policy outcome and his judicial role: "If it were a question whether I agreed with [freedom of contract] I should desire to study it further . . . . But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." *Lochner,* 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Justice Holmes also derided the majority for incorporating "a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire,*" into the Fourteenth Amendment. *Id.* "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." See also *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting) ("it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.").

C. The Doctrine That Nobody Loves

The economic freedoms articulated in *Algeyer* and *Lochner* have failed to receive any kind of significant support from the members of the modern Supreme Court. Every current justice has directly or indirectly joined an opinion that referred to *Lochner* in the manner one might reference 1970s interior design.[8] Moreover, "Lochnerism" has taken on the form of an epithet or punchline to accuse a justice or justices of engaging in judicial legislation. *See, e.g., College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666 (1999) (addressing the proper bounds of state sovereign immunity).

In *Florida Prepaid,* Justice Scalia, writing on behalf of the Chief Justice and Justices O'Connor, Kennedy, and Thomas, felt compelled to "comment upon Justice Breyer's comparison of our decision today with the *discredited substantive-due-process case of Lochner*[.]" *Id.* at 690 (emphasis added). The majority took care to assert how *Lochner* differed from its opinion and promptly accused the dissent of engaging in that very behavior. "We had always thought that the distinctive feature of *Lochner,* nicely captured in Justice Holmes's dissenting remark about 'Mr. Herbert Spencer's Social Statics,' 198 U.S. at 75, was that it sought to impose a particular economic philosophy upon the Constitution. And we think that feature aptly characterizes, not our opinion, but Justice Breyer's dissent[.]" *Id.* at 691. Justice Breyer's dissent, which commanded the support of Justices Stevens, Ginsburg, and Souter, used *Lochner* to cast the majority's reliance on *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), in an extremely negative light: "*Seminole Tribe* threatens the Nation's ability to enact economic legislation needed for the future in much the way that

[*Lochner*] threatened the Nation's ability to enact social legislation over 90 years ago." *Id.* at 701. In essence, all nine justices used *Lochner* as a means of discrediting the opposing side.

Varying members of the current Court have written additional fairly blunt *Lochner* post-mortems. *See, e.g., E. Enters. v. Apfel,* 524 U.S. 498, 528 (1998) (plurality opinion of O'Connor, Rehnquist, C.J., Scalia, and Thomas) ("Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties.").

Remarkably, *eight of the nine current justices have written an opinion denouncing Lochner. See, e.g.,* Justice Scalia's majority opinion and Justice Breyer's dissenting opinion in *Florida Prepaid, supra; United States v. Lopez,* 514 U.S. 549, 601 n.9 (1995) (Thomas, J., concurring); *id.* at 605-06 (Souter, J., dissenting joined by three justices); *American Dredging Co. v. Miller,* 510 U.S. 443, 447 n.1 (1994) (Scalia, joined by Rehnquist, Blackmun, Souter, O'Connor, Ginsburg, and Stevens) ("Justice Stevens asserts that we should not test the Louisiana law against the standards of *Jensen,* a case which . . . is in his view as discredited as *Lochner*[.]"); *id*. at 458 (Stevens, J., concurring in judgment) ("In my view, *Jensen* is just as untrustworthy a guide in an admiralty case today as [*Lochner*] would be in a case under the Due Process Clause."); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 861-62 (1992) (plurality opinion of Justices O'Connor, Kennedy and Souter);[9] *id*. at 957 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part joined by three justices). As shown in *Florida Prepaid and American Dredging,* Justice Ginsburg has joined numerous opinions that critique *Lochner*. Thus, neither the substance nor the rhetoric of *Lochner* has survived at the Supreme Court.

Additionally, a number of prominent "conservative" judges on the Courts of Appeals have criticized *Lochner* and economic substantive due process for roughly the same reasons. According to then-Chief Judge Wilkinson, *Lochner* "has come to symbolize judicial activism taken to excess. The *Lochner* decision remains the foremost reproach to the activist impulse in federal judges. And the *Lochner* era is still widely disparaged for its mobilization of personal judicial preference in opposition to state and federal social welfare legislation." *Brzonkala v. Va. Polytechnic Inst. & State Univ.,* 169 F.3d 820, 890 (4th Cir. 1999) (Wilkinson, J., concurring). Judge Bork similarly viewed the invocation of *Lochner* as fighting words: "Unlimbering the ultimate malediction of legal debate, the dissent accuses us of regressing to the jurisprudence of [*Lochner*]. Had we committed any such enormity, we would of course deserve the anathema pronounced upon us."[10] *Jersey Cent. Power & Light Co. v. FERC,* 768 F.2d 1500, 1504 (D.C. Cir. 1985) (joined by Ruth Bader Ginsburg, J.) (petition for rehearing).[11] Judge Easterbrook has bluntly stated that, "'[s]ubstantive due process' has the distinct disadvantage, from plaintiffs' perspective, of having been abolished in the late 1930s[.] Economic substantive due process is not just embattled; it has been vanquished." *Gosnell v. City of Troy,* 59 F.3d 654, 657 (7th Cir. 1995). As these three individuals likely represent the full spectrum of statutory and constitutional interpretation that a Bush Supreme Court nominee will employ, their rejection of economic substantive due process undercuts the superficial notion that strict constructionists will, in knee-jerk fashion, invalidate economic and social legislation that its proponents believe benefit society.

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D. Modern (Non-Economic) Substantive Due Process

Despite the fears that the next Bush appointee—NECRONOMICON[12] in hand—would reawaken the spirit of Justice Sutherland,[13] at least with respect to substantive due process, Justices Scalia and Thomas have shown the *least* inclination to use the Fourteenth Amendment for broad, unenumerated purposes. Ironically, in the three most recent cases that aggressively applied substantive due process, these alleged warriors of economic liberty have not advanced an expansive, ends-based view of the Due Process Clause.

Although substantive due process has remained relevant in the last four decades of the Court, the Justices have most vigorously applied the Fourteenth Amendment in cases evaluating the reach of *non-economic* issues. "Though the doctrine fell into general disrepute after decisions such as *Allgeyer* and *Lochner*, it was revived by the Court, with a decidedly different content, in decisions such as *Griswold v. Connecticut* and *Roe v. Wade*." *Franz v. United States*, 712 F.2d 1428, 1438 (D.C. Cir. 1983) (Bork, J., concurring in part and dissenting in part) (full citations omitted). In *Griswold,* the Court invalidated a state statute making illegal the use of contraceptives. *Griswold v. Connecticut,* 381 U.S. 479 (1965).[14] The privacy interests referenced in Griswold eventually impacted a woman's right to obtain an abortion. *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.") (citing, *inter alia, Griswold)*.

The privacy rights advanced in *Griswold* and *Roe* have received even greater attention and discussion in two more recent decisions. *Lawrence v. Texas,* 539 U.S. 558, 578 (2003);[15] *Planned Parenthood, supra.*[16] Additionally, the Court has used the Due Process Clause to place restrictions on punitive damages. *See, e.g., State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003). While all three cases employed liberty-based analyses based on the Fourteenth Amendment[17] and although State Farm reached an outcome favorable to civil defendants, the most "conservative" jurists on the Court have used all three cases to levy general critiques of substantive due process.[18]

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Although substantive due process has received limited attention and application in cases addressing the Constitutional limitations on punitive tort damages, those cases do not parallel the economic regulations struck down in the *Lochner* era. Furthermore, the conventional political assumptions regarding "liberal" and "conservative" Justices and the interests they would support do not hold in this context. Presumably, "conservative" jurists who purportedly want to revive *Lochner* would welcome business-friendly limitations on tort damages, even if those damages came from the judiciary. In *TXO Prod. Corp. v. Alliance Resources Corp.,* however, Justice Scalia laid out a plain and direct rejection of economic substantive due process. "I do not accept the proposition that [the Due Process Clause] is the secret repository of all sorts of other, unenumerated, substantive rights—*however fashionable that proposition may have been (even as to economic rights of the sort involved here)* at the time of the *Lochner*—era cases the plurality relies upon[.]" *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 470-471 (1993) (Scalia, J., concurring) (emphasis added).

Additionally, the two more recent punitive damages cases have included curious alignments. *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003) (Kennedy, J., joined by Rehnquist, C.J., and Justices

Stevens, O'Connor, Souter, and Breyer); *BMW of N. Am. v. Gore,* 517 U.S. 559, 562-563 (1996) (applying TXO) (Stevens, J., joined by Justices O'Connor, Kennedy, Souter, and Breyer). In both cases, Justices Scalia and Thomas dissented. *State Farm,* 538 U.S. at 429 (Scalia, J., dissenting) ("the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."); *BMW*, 517 U.S. at 600 (Scalia, J., dissenting) ("Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court.").

Thus, Justices Thomas and Scalia—the individuals who purportedly would lead a revival of substantive due process, revitalize the freedom of contract, and overturn state economic regulations—have shown very little affection for an aggressive use of substantive due process. While non-economic rights obviously differ from the freedom of contract, the two have similarly refused to use the Fourteenth Amendment to benefit a largely corporate class of defendants. Moreover, Justice Scalia's *TXO* concurrence, which Justice Thomas joined, flatly rejects the use of the Due Process Clause to further economic rights. The two have remained consistent in this view in subsequent punitive damage cases. *State Farm*, 538 U.S. at 429 (Thomas, J., dissenting) ("'I continue to believe that the Constitution does not constrain the size of punitive damages awards.'" (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 443 (2001) (Thomas, J., concurring)).[19]

Although *Justice Kennedy* has shown a tendency to adopt certain libertarian ideas, nothing suggests that those tendencies would reach out to invalidate standard regulations regarding wages, working conditions, or the rights of minorities. While some have speculated that *Lawrence's* expansive view of "liberty" could impact a variety of economic laws and regulations,[20] the changing of one or even two justices would likely not impact economic regulations. As shown previously, neither Justice Thomas nor Justice Scalia has supported an aggressive application of substantive due process. Meanwhile, the Justices who supported Justice Kennedy in both *Lawrence* and *State Farm*—"moderate" Justice O'Connor and "liberal" Justices Souter, Breyer, and Stevens—have shown the same degree of disdain for *Lochnerian* economic activism as the conservatives. *See, e.g., Florida Prepaid, Planned Parenthood, and American Dredging.* Thus, as a descriptive matter, a Bush appointee to the Court will not revitalize the doctrine of *Lochner* and will not resuscitate economic substantive due process.

III. Commerce Clause

Under Article I, Section 8 of the Constitution, Congress has the power "[t]o regulate Commerce . . . among the several States . . . ." There can be little debate that the Commerce Clause has given Congress vast legislative authority to regulate both interstate and intrastate behavior. Nevertheless, some argue that recent Supreme Court decisions reveal a desire on the part of some justices to reign in this broad authority. Commentators further suggest that new additions to the Court will further erode the commerce power and jeopardize various New Deal enactments. As will be seen, whatever may be said about recent Commerce Clause jurisprudence with respect to the substantial effects test and aggregation, the Court's decisions in no way place New Deal-era economic statutes at risk. Rather, the Supreme Court has not engaged and will not engage in a reexamination of statutes that are plainly economic and commercial in nature.

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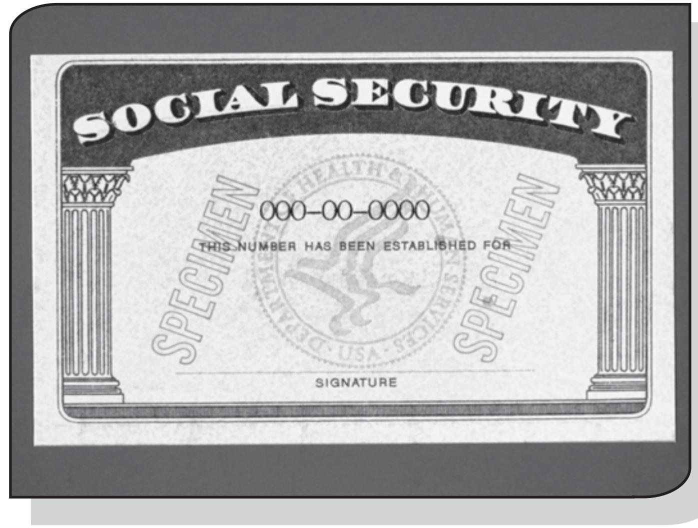
A. Background

Since the founding, scholars have debated the scope and reach of the federal commerce power. In

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall expressed the classical view of the reach of the authority: "A thing which is among others, is intermingled with them. Commerce, among the States, cannot stop at the external boundary line of each state, but may be introduced into the interior." Chief Justice Marshall further explained, however, that "[t]he phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description." *Id.* at 194-95; *see also United States v. E.C. Knight Co.,* 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it.").

In the years that followed *Gibbons,* this more narrow view changed such that, under certain conditions, intrastate commerce had effects on interstate commerce that could fall within Congress's commerce authority. The Court understood that "where interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such legislation." *United States v. Lopez,* 514 U.S. 549, 554 (1995). For instance, in 1903, the Court sustained congressional legislation regulating the intrastate sale of lottery tickets. *See Champion v. Ames,* 188 U.S. 321, 363 (1903); *see also Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding food labeling requirements "wherever found"); *Houston, East & West Ry. Co. v. United States,* 234 U.S. 342 (1914).

However, to be sure, the early part of the twentieth century produced a variety of cases striking down economic regulation under Congress's Commerce Clause authority. In *Hammer v. Dagenhart,* 247 U.S. 251, 276 (1918), the Court invalidated child labor laws because the Court did not view manufacturing as interstate commerce, whereas it could more easily envision



eggs and lottery tickets being carried in interstate commerce. Furthermore, in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 550 (1935), the court struck down fixed wage and hour laws because of the indirect relationship between intrastate business and interstate commerce.

B. The New Deal

In three subsequent New Deal-era cases, the Court sharpened its focus on intrastate economic matters that affected interstate commerce and expanded the realm of permissible economic regulation. In *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), only two years after the Court's Schechter Poultry decision, the Court upheld Congress's labor regulations as applied to the steel industry. In sustaining the rights of employees to self-organize and bargain collectively, the Court explained that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37 (citation omitted). Still, in construing the scope of the Commerce power, the Court cautioned that "the scope of this power must be considered in the light of our dual system of govern-

ment and may not be extended so as to embrace effects upon intrastate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.*

Seizing on *Jones & Laughlin Steel Corp.,* the Court upheld, in *United States v. Darby,* 312 U.S. 100 (1941), the constitutionality of the Fair Labor Standards Act ("FLSA"). The Court reiterated that the commerce power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* at 118-19 (citations omitted). In sum, Congress may through "appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce." *Id*. at 119; *see also United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942) (the Commerce Clause "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.").

Most notably, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court sustained the Agricultural Adjustment Act of 1938 ("AAA") by relying on the substantial effects test and on the aggregation principle. *Wickard* involved a challenge to a penalty issued by the Secretary of Agriculture, under the AAA, against a farmer, Roscoe Filburn, for harvesting more than his allotment of wheat. The Court found that federal regulation of an intrastate farmer's personal consumption of home-grown wheat under the AAA was permissible because, "his contribution, taken together with that of many others similarly situated, [was] far from trivial." *Id.* at 127-28. In the Court's view, the AAA's decidedly interstate purpose—"to increase the market price of wheat and to that end to limit the volume thereof that could affect the market"—was crucial to its determination. *Id.* at 90. ("Home grown wheat in this sense competes with wheat in commerce."). The Court thus

formally rejected a bright-line distinction between direct and indirect effects on interstate commerce:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this is irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."
>
> *Id.* at 125.

In the years following *Wickard,* the Court has consistently rejected Commerce Clause attacks, including challenges to purely intrastate activities, where the commercial character of the legislation was plain. *See Katzenbach v. McClung,* 379 U.S. 294 (1964) (restaurant service to interstate travelers); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964) (hotel accommodations to interstate travelers); *Maryland v. Wirtz,* 392 U.S. 183 (1968) (employee wage regulations); *Perez v. United States,* 402 U.S. 146 (1971) (loan sharking regulations); *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 246 (1981) (coal industry regulations).

C. The Rehnquist Court

In light of the New Deal-era cases, the Supreme Court now recognizes three discrete categories of Commerce Clause authority: (1) channels of interstate commerce; (2) articles of commerce; and (3) commercial activities "substantially affecting" interstate commerce. *See United States v. Lopez,* 514 U.S. 549, 558 (1995); *United States v. Morrison,* 529 U.S. 598 (2000). The third category referred to as the "substantial effects test" has emerged as the primary source of Supreme Court Commerce Clause jurisprudence.

In *Lopez,* the Court confronted the Gun Free School Zones Act, which forbade gun possession within 1,000 feet of a school zone. *See Lopez,* 514 U.S. at 558-59. The Court found the principle argument in favor of the statute—that gun possession near schools, in the aggregate, substantially affected interstate commerce—unavailing. First, and most importantly, the Gun Free School Zone Act did not regulate economic or commercial activity. *See id*. at 565-66. "The possession of a gun in a local school zone is in sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. Without a sufficient link to commerce, the Court therefore was unwilling to employ aggregation.

In *Morrison*, the Court examined the Violence Against Women Act ("VAWA"), which provided a federal forum to victims of gender-motivated physical attacks. *See* 529 U.S. at 601-02. The Court rejected VAWA because it relied on the same attenuated chain of inferences rejected in *Lopez*. Again, the Court recognized that the underlying conduct—gender-based violence—was non-economic in character. See *id.* at 610-11. In the end, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

Recently, the federal courts have brought the Commerce Clause to the fore by embracing challenges to federal legislation of arguably non-economic intrastate state activity. In a series of cases, one of which is currently pending before the Supreme Court, the Ninth Circuit has overturned congressional enactments as exceeding the limits of the Commerce Clause. *See Raich v. Ashcroft,* 352 F.3d 1222 (9th Cir. 2003), *cert. granted* 124 S. Ct. 2909 (June 28, 2004); *United States v. Stewart,* 348 F.3d 1132 (9th Cir. 2003); *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003). *Raich* involves a challenge to the federal Controlled Substance Act on the ground that the use and growth of marijuana for personal consumption has an insufficient connection to interstate commerce. *Raich,* 352 F.3d at 1227-28. The Ninth Circuit, relying on *Lopez* and *Morrison,* concluded that "'[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce.'" *Id*. at 1233 (quoting *Conant v. Walters,* 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring)). The Supreme Court has not yet issued an opinion in this case. Likewise, in *Stewart,* the Ninth Circuit held that the federal firearms ban on machineguns exceeded Commerce Clause bounds when applied to the mere possession of weapons. *Stewart,* 348 F.3d at 1140 ("Based on . . . *Morrison* . . . section 922(o) cannot be viewed as having a substantial effect on interstate commerce."). Last, the Ninth Circuit, in *McCoy*, found that a federal statute criminalizing possession of child pornography was unconstitutional as applied to a woman who posed nude with her child. *McCoy,* 323 F.3d at 1125.

D. Summary

A change in the Supreme Court's makeup will not reverse New Deal era statutes under a commerce clause rationale. The Court is focused on congressional legislation that suffers from an attenuated connection to commerce. Recent Supreme Court cases are focused on two principal inquires: (1) whether a particular activity is economic or commercial in character; and (2) whether discrete intrastate activity, when aggregated, has a substantial affect on interstate commerce.

Neither question will draw New Deal economic legislation into the Court's crosshairs. New Deal workplace laws are plainly economic. In fact, the *Lopez* and *Morrison* Courts quite carefully distinguished those rulings from the New Deal era cases:

> *Jones & Laughlin Steel, Darby,* and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

Bush Supreme Court appointments will not lead to a restoration of a strong nondelegation doctrine.

Lopez, 514 U.S. at 557; *see also id*. at 560 ("Even *Wickard,* which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."); *Morrison*, 529 U.S. at 607-08 (citations omitted) ("In the years since . . . *Jones & Laughlin Steel* . . . Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.").

Lopez and *Morrison* make clear that the attenuated concerns expressed in those opinions did not cut back on *Jones & Laughlin Steel or Wickard;* rather the Court declined to expand the substantial affects doctrine beyond constitutional limits. *Lopez* and *Morrison* have little to do with enactments that regulate overtly economic activities and wage and hour and child labor laws do not suffer from the dramatic attenuation problems evident in the Gun Free School Zone Act and VAWA.[21] Furthermore, the Court has expressed no desire to retreat from *Wickard*. The Court had such ample opportunities in *Lopez* and *Morrison* but chose to protect *Wickard* instead. Further still, in its *Raich* brief, the Bush Administration has made clear that *Wickard* should remain the governing standard. *See Brief for the Petitioners, Ashcroft v. Raich,* 2003 U.S. Briefs 1454, at *15-16 (2004) ("Wickard thus establishes that Congress may regulate intrastate activity which itself may not be overtly commercial in nature . . . if regulation of the activity is reasonably necessary to achieve the effective regulation of a market that is interstate in nature.").

Lastly, it is erroneous to assume that a robust Commerce Clause jurisprudence is by nature uniquely conservative. The recent Ninth Circuit decisions reveal that concern over the scope of federal authority is present on both ends of the jurisprudential spectrum. The reach of the Commerce Clause has been, and will continue to be, a hotly debated topic. However, the debate has moved beyond the fidelity of New Deal-era economic legislation and has shown no indication that it will return.

IV. Nondelegation Doctrine

Bush Supreme Court appointments will not lead to a restoration of a strong nondelegation doctrine. At its extremely short-lived peak, the doctrine limited

Congressional power to implement economic policy through broad delegations of authority to regulatory agencies. A look at the historical evolution of the nondelegation doctrine demonstrates that the doctrine only briefly limited Congress's powers to delegate to regulatory agencies the authority to promulgate regulations for the public welfare. Moreover, the Supreme Court recently laid to rest any speculation that it (or any other Supreme Court) might (or even could) restore the doctrine as such a limit on Congressional power.

The nondelegation doctrine is a doctrine with pre-constitutional roots that the Framers built into our Constitution through its structural principle of the separation of powers. The Supreme Court has long recognized the doctrine and its constitutional foundation, yet the nondelegation doctrine has seen varying treatment by the Supreme Court throughout its history. Indeed, its evolution demonstrates that it operated as a powerful check on Congressional power only for a brief time in 1935. Since that time, the doctrine has failed to provide a meaningful limit on Congressional authority to delegate powers to regulatory agencies to provide for and to protect the public welfare.

A. The Origins of the Nondelegation Doctrine

The nondelegation doctrine is often said to have originated in Locke's Second Treatise on Civil Government. Locke took a principle from agency law—*delegatus non potest delegare:* "a delegated authority cannot be delegated"—and applied it to political theory. He explained that the because the People delegated the power to make laws to the legislature, the legislature could not then delegate its power to make laws to another. The Framers, who feared the concentration of too much power in one branch of government, took this principle and constitutionalized it as a part of the Constitutional structure of the separation of powers. Thus, they wrote: "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Constitution, Article I, Section 1. The Supreme Court recognized the nondelegation doctrine at least as far back as 1825 in *Wayman v. Southard*, 23 U.S. 1. In *Wayman,* Chief Justice Marshall, writing for the Court, permitted the delegation of authority to the federal judiciary to create rules of practice for the federal courts. Although he permitted this delegation, Chief Justice Marshall stated: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals [those] powers which are strictly and exclusively legislative." *Id.* at 42. The Court provided little guidance as to which powers were strictly and exclusively legislative, but it did explain that if Congress should delegate powers to another body, it must establish general provisions to "direct those who are to act under such general provisions to fill up the details." *Id.* at 43.

The Court again recognized the legitimacy of the nondelegation doctrine in *Field v. Clark,* 143 U.S. 649 (1892), explaining the doctrine as "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692. In *Field,* the Court upheld the delegation to the President of power to impose tariffs on another country when that country imposed "reciprocally unequal and unreasonable" duties on the United States. *Id.* The Court found this delegation of authority permissible because it "related only to the enforcement of the policy established by Congress." *Id.* at 693. Yet the Court still did not articulate a standard for determining when delegated authority was "exclusively legislative" or "related only to the enforcement of the policy established by Congress" until *J.W. Hampton Jr. Co. v. United States,* 276 U.S. 394 (1928).

In *J.W. Hampton,* the Court set out the now-familiar "intelligible principle" standard that has guided nondelegation doctrine jurisprudence through the years. In *J.W. Hampton,* the Court upheld the delegation to the President of the authority to revise tariffs on specific goods where necessary to equalize the production costs in the United States and the chief competing country. The Court explained that in those situations where Congress is unable to determine "exactly when its exercise of the legislative power

should become effective," it properly may leave that determination to another so long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform." *Id.* at 409.

B. The Strong Nondelegation Doctrine

The nondelegation doctrine was at its strongest in 1935 when the Court used it to strike down portions of the National Industrial Recovery Act ("NIRA"), a centerpiece of the New Deal. Section 9(c) of NIRA authorized the President to exclude from interstate commerce any petroleum products that were "produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation." The Court struck down this provision, with Chief Justice Hughes explaining that "the Congress has declared no policy, has established no standard, has laid down no rule." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 430 (1935). Section 3 of NIRA authorized the President to approve "codes of fair competition" submitted by trade associations and other industry groups. The Court likewise struck down this provision of NIRA, finding "[s]uch a sweeping delegation of legislative power" "unknown to our law and utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 539, 537 (1935). These two cases established what is often referred to as the "strong" form of the nondelegation doctrine. But the era of the strong nondelegation doctrine was short lived.

C. The Era of Judicial Tolerance of Broad Delegations

Shortly after the heyday of the nondelegation doctrine, the growing administrative state led the Court to consider merely whether Congress had the "necessary resources of flexibility and practicality" to perform its function. *Yakus v. United States,* 321 U.S. 414, 425 (1944). In another case, the Court upheld the delegation of power from Congress to the FCC to regulate the composition of radio broadcasting in a manner consistent with "public interest, convenience, or necessity." *NBC Co. v. United States,* 319 U.S. 190, 215 (1943). In *Yakus,* the Court permitted the delegation of authority to the Office of Price Administration to set "generally fair and equitable" rent and price ceilings after consulting with industry representatives. *Yakus,* 321 U.S. at 420. *Yakus,* in particular, demonstrated the sea change in the Court's view of the nondelegation doctrine, as the approved delegation in *Yakus* closely resembled the same delegations to the President that the Court rejected in the aforementioned NIRA cases.

D. The Weak Nondelegation Doctrine

More recently, the Court has invoked the nondelegation doctrine, in what is known as its "weak" form, as a limiting tool of statutory construction. In this mode, the Court has narrowly construed statutes in order to prevent an unconstitutional delegation of authority to a particular agency. For example, *National Cable Television Association v. United States,* 415 U.S. 336 (1974), involved a delegation of authority to federal agencies under the Independent Offices Appropriation Act to prescribe fees for any work, service, benefit, license, or similar thing of value provided by the agency to any person. In setting the fee, the statute instructed that agencies could consider the cost

to the government, the value to the recipient, public policy and the interests served, as well as any other relevant facts. The Court found that this broad delegation was unconstitutional as a *de facto* taxation because it set the agency "in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341. Thus, the Court directed the FCC to consider only the value to the recipient in setting fees in order to avoid an unconstitutional construction of the statute. Similarly, the Court utilized the weak form of the doctrine in *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607 (1980) (the *"Benzene Case"*), to construe the Occupational Safety & Health Act to avoid nondelegation problems. Notable in the *Benzene Case* was the separate opinion of then-Justice Rehnquist who argued that the Court should have invalidated the relevant provision of the statute: "We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority." 448 U.S. at 686.

E. *American Trucking:* The Supreme Court Rejects A Potentially Revitalized Nondelegation Doctrine

The Supreme Court recently had the occasion to consider the nondelegation doctrine in the *American Trucking* case, which concerned the EPA's "national ambient air quality standards" ("NAAQS"). *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001). After the D.C. Circuit held that the EPA's construction of section 108 and 109 of the Clean Air Act violated the nondelegation doctrine, the Supreme Court took up the case. Many among the bar and academia noted the return and revitalization of the doctrine, but the Supreme Court refused to restore the doctrine to its New Deal era strength. In a virtually unanimous opinion written by Justice Scalia, the Supreme Court reversed the D.C. Circuit. Given that it was Justice Scalia leading the way, *American Trucking* demonstrates that the nondelegation doctrine is unlikely ever to return to its brief period of strength.

The Clean Air Act requires the EPA to promulgate and periodically revise the NAAQS for certain air pollutants. The NAAQS set out the maximum amount of air pollution that states may allow. Sections 108 and 109 of the Clean Air Act govern the process for setting NAAQS. Under these provisions, the EPA must list air pollutants that "may reasonably be anticipated to endanger public health or welfare" and issue "air quality criteria" for them. Clean Air Act Sections 108, 109. Based on the air quality criteria, the EPA must then promulgate "primary" standards that, "allowing an adequate margin of safety[,] are requisite to protect the public health." Clean Air Act Sections 108, 109. The American Trucking Association challenged the EPA's 1997 NAAQS for ozone (smog) and particulate matter (soot) in the D.C. Circuit, arguing that the EPA had interpreted sections 108 and 109 of the Clean Air Act so broadly as to render them unconstitutional under the nondelegation doctrine.

In a *per curiam* opinion, the D.C. Circuit held that the EPA's construction of sections 108 and 109 of the Clean Air Act violated the nondelegation doctrine. *American Trucking Association v. EPA,* 175 F.3d 1027 (D.C. Cir. 1999). The court found that "the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable," but held that the EPA failed to articulate an "'intelligible principle' to channel its application of these factors; nor is one apparent from the statute." 175 F.3d at 1034. The court explained that without any means of guiding its application of the various factors considered in setting NAAQS, the "EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." 175 F.3d at 1037. The court noted that an interpretation of the statute without the constitutional defect may be possible and remanded the case to the EPA to identify an intelligible principle in the statute. 175 F.3d at 1057.

The Supreme Court, in a virtually unanimous opinion (majority of 7 with 2 concurring), reversed the D.C. Circuit's holding that the EPA's construction of sections 108 and 109 of the Clean Air Act violated the nondelegation doctrine. *Whitman v. American Trucking*

Association, 531 U.S. 457 (2001). The Court found that the EPA had sufficiently articulated an intelligible principle: "[F]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." *Id*. at 473 (internal quotation omitted) (second alteration in original). The Court reasoned that, given this limiting construction, the statute was "well within the outer limits of our nondelegation precedents." *Id*. at 474. The Court observed the history of the nondelegation doctrine, explaining that it had "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id*.

Notably, the Court's opinion was written by Justice Scalia, who had formerly criticized the Court's nondelegation doctrine jurisprudence. In *Mistretta v. United States,* 488 U.S. 361 (1989), the Court had upheld the Sentencing Reform Act's establishment of the United States Sentencing Commission and delegation of authority to that entity to establish binding sentencing guidelines for the federal courts. Justice Scalia was the lone dissenter in that case and criticized the weakness of the intelligible principle standard: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Id*. at 416 (Scalia, J., dissenting). Further, Chief Justice Rehnquist, who had previously criticized the Court's nondelegation doctrine jurisprudence in the Benzene Case, signed onto the majority opinion. Thus, not only did the Court refuse to revitalize the nondelegation doctrine, but also the Court's most conservative members, who formerly criticized the weakness of the Court's nondelegation jurisprudence, were instrumental in keeping the strong form of the doctrine dormant.

... it is highly unlikely that any new appointee(s) to the Court would (or even could) seek to restore the nondelegation doctrine and utilize it to curb Congress's ability to give agencies broad regulatory authority.

F. Summary

Given the nondelegation doctrine's brief period of strength—some have remarked that it has had only one good year (1935)—as well as the Supreme Court's unanimous refusal to reinvigorate the doctrine, it is highly unlikely that any new appointee(s) to the Court would (or even could) seek to restore the nondelegation doctrine and utilize it to curb Congress's ability to give agencies broad regulatory authority. Additionally, as Chief Justice Rehnquist and Justice Scalia—two of the Court's most conservative jurists—have shown almost no interest in revitalizing the doctrine, new nominations will not alter the Court's current approach to nondelegation matters.

V. Stare Decisis

Beyond all else, the Supreme Court's respect for *stare decisis* or "[t]o stand by matters that have been decided" will protect New Deal era legislation from abrupt reversal. *See* Dictionary of Foreign Phrases and Abbreviations 187 (Kevin Guinagh trans., 3d ed. 1983). *Stare decisis* traces back to our English roots. *See* Matthew Hale, *The History of the Common Law of England* 45-46 (Charles M. Gray ed., 1971). Not surprisingly, the Framers seized on this English tradition and expressly argued that judges must be guided by "strict rules and precedents" to avoid "arbitrary decisions in the courts." THE FEDERALIST No. 78, at 402 (Alexander Hamilton) (Basil Blackwell 2d ed., 1987). *Stare decisis,* as a jurisprudential doctrine, thus is designed to protect the Court's decisions and promote a number of laudable goals, including efficiency, equality of treatment, legitimacy of the Court and public reliance. In light of these important goals, the Court is hesitant to overturn precedent and does so quite infre-

quently. "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992).

A. Supreme Court's Traditional Framework

Over time, the Supreme Court has developed a rather elaborate *stare decisis* framework. *See Payne v. Tennessee,* 501 U.S. 808 (1991); *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989); *Webster v. Reproductive Health Services,* 492 U.S 490 (1989); *Casey,* 505 U.S. 833 (1992). This framework draws guidance from four primary factors: (1) workability; (2) reliance; (3) intervening developments in the law; and (4) changes in fact. *See Casey,* 505 U.S. at 854-55.

In *Patterson,* the Court explained that an unworkable rule is one that "poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson,* 491 U.S. at 173. In *Casey,* the Court added that a key factor in the workability calculus is whether the rule requires the Court to go beyond judicial competence. *Casey,* 505 U.S. at 855. No justice of the current Court has disputed the importance of workability.

Traditionally, reliance implicated economic considerations, such as contracts and property rights because "advance planning of great precision is most obviously a necessity" in these matters. *Casey*, 505 U.S. at 856. The Court will also look at reliance in less concrete areas, including procedural and evidentiary rules, and more recently generalized social issues as well. *See id.* at 856; *see also Payne,* 501 U.S. at 828. While all the current justices accept reliance in the commercial realm, there is disagreement about the pertinence of social reliance with respect to life or abortion issues. *Compare Casey,* 505 U.S. at 856 and *Casey,* 505 U.S. at 956 (Rehnquist, C.J., concurring in part and dissenting in part).

The Court will also look to whether the governing rule is "irreconcilable with competing legal doctrines or policies." *Patterson,* 491 U.S. at 173; *see also* Rafel Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis,* 60 U. Pitt. L. Rev. 89, 135-35 (1998) (noting that the Court looks to see whether changes in the law have "weakened the underpinnings of the precedential decision").

The last main factor, changes in fact, considers "whether facts have so changed, or have come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey,* 505 U.S. at 855. This factor invokes two different questions. "First, it requires an evaluation of the factual background supporting the prior ruling. Second, it goes further by permitting the decision-maker to evaluate not only factual changes but also society's perceptions of those changes." Gely, *supra,* at 136. In *Patterson,* the Court noted that "it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." *Patterson,* 491 U.S. at 174 (citations and quotations omitted).[22]

B. Analysis

Based on these factors, the Court is unlikely to reverse any New Deal-era enactments. There is no evidence that the New Deal legislation produced unworkable regimes or invited judges to make decisions that went beyond their judicial competence. Furthermore, even if the Court looks to traditional reliance considerations, there is ample support for the argument that individuals have predicated economic decisions on the existence of wage and hour laws, child labor restrictions and the like. Moreover, as this paper explains, there has been little or no intervening developments in the law that squarely call New Deal legislation into doubt; nor have the facts changed in any material respect.

The addition of strict constructionist or "conservative" justices to the Supreme Court will not undermine the basic tenets of the New Deal and will not sound a clarion call for the renewal of pre-New Deal jurisprudence.

Judicial "conservatives" or "strict constructionists"—again, the individuals whom the President has stated he will nominate—have strongly supported *stare decisis*, even when those individuals would have ruled differently as a matter of first impression. Justice Scalia has acknowledged that "[o]riginalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis;* it cannot remake the world anew." Antonin Scalia, *A Matter of Interpretation* 138-39 (Amy Gutmann ed., Princeton Univ. Press 1987). As Judge Robert Bork has explained:

> There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the Commerce Clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.

A Talk with Judge Robert H. Bork, District Law, May/June 1985, at 32; *see also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication,* 73 Cornell Law Rev. 401, 402 (1988) ("Surely a judge need not vote to overrule an erroneous precedent if to do so would pitch the country into the abyss—if to do so would cause such harm to the body politic that, in a relative sense, it would be on the order to killing the body to save a limb."). Whatever one may think of the myriad of laws passed during the New Deal, and whatever one may think of their constitutional fidelity as an original matter, it is inconceivable that the Court would overturn the entire federal bureaucracy at this late date.[23]

VII. Conclusion

The addition of strict constructionist or "conservative" justices to the Supreme Court will not undermine the basic tenets of the New Deal and will not sound a clarion call for the renewal of pre-New Deal jurisprudence. The primary means by which the pre-New Deal Court invalidated economic and social welfare legislation—an aggressive application of economic substantive due process, a narrow view of the Commerce Clause, and a narrower view of the nondelegation doctrine—have little currency in the current Court. To the extent that the current Court debates these doctrines, those debates center on questions unrelated to New Deal legislation. Even if certain justices might *want* to invalidate certain pieces of legislation, the Court's strong adherence to *stare decisis* further ensures that economic and civil rights laws will remain Constitutionally viable.

ENDNOTES

1 Although commentators such as Sunstein have used "Constitution in Exile" to describe the purported efforts of Bush aides, apparently only one conservative has actually used the phrase in print. While then-Judge Ginsburg apparently coined "Constitution in exile" in a 1995 book review, the phrase has mostly served as a rhetorical tool to characterize Bush staffers and judicial conservatives. Douglas H. Ginsburg, *Delegation Running Riot,* Regulation Magazine 83 (1995) (reviewing David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993)). For a greater discussion of the use of "Constitution in Exile," *see* Orin Kerr, *Is "The Constitution in Exile" a Myth?* at http://volokh.com/posts/1104346631.shtml (last accessed Jan. 25, 2005).

2 *See, e.g.,* Mike Dorning & Sarah Frank, *Senate Can Limit Bush Plans,* Chicago Tribune (Nov. 6, 2004) ("The president has repeatedly said he would like to appoint justices in the mold of Clarence Thomas and Antonin Scalia, both deeply conservative judges . . . .").

3 This paper only offers a descriptive analysis of the President's ability to shape Supreme Court jurisprudence. It does not intend to argue in favor or against New Deal legislation or pre or post New Deal jurisprudence.

4 In reaching the conclusion that the statute did not violate the Fourteenth Amendment, however, Justice Harlan balanced this liberty against the state's police power differently: "it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion." *Id.* at 72.

5 Although *Bunting v. Oregon,* 243 U.S. 426 (1917), overturned the specific holding of *Lochner* by upholding a maximum hours regulation, the Court continued to invoke the Fourteenth Amendment to invalidate economic regulations. *See, e.g., Adkins, infra.*

6 For the sake of the reader's eyes, this narrative omits a number of the analytical twists that moved the Court to and away from *Lochner.* For a thorough discussion of *Lochner's* development and of the trends in academic culture that have described that development, see David E. Bernstein, Lochner *Era Revisionism, Revised:* "Lochner" *and the Origins of Fundamental Rights Constitutionalism,* 82 Geo. L.J. 1 (2003).

7 Commentators have explained the Court's shift in its economic substantive due process jurisprudence thusly: "The conventional wisdom makes two distinct claims: first, that an examination of the cases decided in the spring of 1937 shows that the Supreme Court substantially reversed its foregoing position; and second, that this reversal was a political response to such external political pressures as the 1936 election and [President Roosevelt's] Court-packing plan." Barry Cushman, *Rethinking the New Deal Court,* 80 Va. L. Rev. 201, 207 (1994). For contrary historical accounts, *see, e.g., id.* at 257 ("The history of the Supreme Court during the New Deal is not a simple tale of the unmediated interplay of judicial purposes, external political events, and case outcomes."); Bernstein, *supra* note 6, at 6 n.18 (citing numerous works that argue against the conventional narrative).

8 *See, e.g.,* James Lileks, *Interior Desecrations* (Crown 2004).

9 The *Planned Parenthood* plurality explained that a change in the surrounding factual circumstances led the Court to abandon *Lochner.* "In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare." *Planned Parenthood,* 505 U.S. at

861-862 (opinion of O'Connor, Kennedy, and Souter, J.).

10 "Malediction" is defined as a "curse." MERRIAM Webster's Collegiate Dictionary 704 (10th ed. 1997) (footnote not in original opinion).

11 The D.C. Circuit took the *Jersey Cent. Power* case *en banc* and vacated Judge Bork's opinion. Ultimately, however, Judge Bork wrote for the majority and reached roughly the same result. *Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Com.,* 810 F.2d 1168, 1169 (D.C. Cir. 1987) *(en banc)*.

12 The Necronomicon is an alleged Sumerian text that contains passages and rites for demon resurrection. For an example of its use, *see, e.g., The Evil Dead* (Elite Entertainment 1983).

13 In spite of the Court's broad rejection of *Lochner,* certain interest groups have expressed concerns that a change in one or two Justices might bring back a pre-New Deal era. People for the American Way, for example, has made it quite clear that "justices like Scalia and Thomas" would, *inter alia,* "make it easier for corporations to refuse to bargain with elected union representatives and to suspend or fire workers to try to organize other employees," thereby reinstating *Coppage* and *Adair.* People for the American Way, Independent Judiciary, at http://www.pfaw.org/pfaw/general/default.aspx?oid=16627 (last accessed Jan. 24, 2005). Writing in *The Nation,* Ralph Neas, the President of People for the American Way, unveiled a broadside specifically against Justices Scalia and Thomas: "the Supreme Court is already dominated by conservative Justices who are aggressively promoting a troubling new theory of federalism and states' rights . . . . *But even this conservative activist majority* has frequently not been willing to go as far as Scalia and Thomas want." Ralph Neas, "Putting a Radical Right Team on the Bench," *The Nation* (Sept. 24, 2000) (emphasis in original).

14 Despite Justice Douglas's attempts to distinguish *Lochner,* his famous introduction of "penumbras [and] emanations" prompted three separate concurrences from the five other members of the majority. *Griswold,* 381 U.S. at 484. For a critical discussion of Justice Douglas's rationale, see Walter Dellinger, "The Indivisibility of Economic Rights and Personal Liberty," B. Kenneth Simon Lecture, Cato Supreme Court Review, at 17 (2004) ("*Griswold* . . . is one of the modern era's most important constitutional decisions. But it should never have rested on such an inadequate foundation as Douglas erected. Given the Court's repudiation of economic liberty, however, he must have felt that he had to distort otherwise important supporting decisions[.]").

In his dissent, Justice Stewart invoked language similar to Justice Holmes's opinion in *Lochner,* by distinguishing between policy outcomes and his conception of the judicial role: "this is an uncommonly silly law . . . . But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do." *Id.* at 527 (Stewart, J., dissenting).

15 *Lawrence* "involve[d] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. [The majority concluded that t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Lawrence,* 539 U.S. at 578 (overruling *Bowers v. Hardwick,* 478 U.S. 186 (1986)). Consequently, the majority invalidated a Texas statute that made certain intimate conduct between two individuals of the same sex a crime. Once again, Justices Scalia and Thomas dissented in this application of substantive due process. *Id.* at 605 (Scalia, J., dissenting); *id.* at 605 (Thomas, J., dissenting).

16 The most recent case to consider the general right to abortion, *Planned Parenthood,* included both a direct discussion of *Lochner's* demise and a general critique of substantive due process. At one point, the plurality had to argue why the repudiation of *Lochner* did not necessitate a similar reconsideration of *Roe. Supra* note 9. Justice Scalia, joined by the Chief Justice and Justices White and Thomas, provided a Holmes-like indictment of substantive due process. *Id.* (Scalia, J., dissenting).

17 "Indeed, it is hard to imagine either *State Farm* or *Lawrence* without the other, or without their precursors beginning with *Griswold.*" Dellinger, *supra* note 14, at 19.

18 In his dissent in *Lawrence,* Justice Thomas drew a distinction between policy outcomes and his conception of the judicial role and borrowed language from Justice Stewart's dissent in *Griswold*, *supra* note 14. *Lawrence,* 539 U.S. at 605 (Thomas, J., dissenting) (labeling the Texas statute as "'uncommonly silly,'" declaring that if "I were a member of the Texas Legislature, I would vote to repeal it[,]" and "recogniz[ing] that as a member of this Court I am not empowered to help petitioners and others similarly situated."). Justice Scalia levied a broad critique of substantive due process in his dissent in *Planned Parenthood.* 505 U.S. at 980 (Scalia, J., dissenting) (emphasizing that "the Constitution says absolutely nothing about" the right in question and citing to long-standing historical precedent).

19 Such a general reluctance to subscribe to substantive due process has generated some praise from the academic community. Stephen Presser, *The Scalias Court,* Legal Affairs (Sept./Oct. 2004) (criticizing the statement from *Planned Parenthood*, 505 U.S. at 851, that "[a]t the heart of liberty is the right to define one's own concept of existence, of the universe, and of the mystery of human life" thusly: "The mystery passage and decisions based on it give license to judges to make law or change the meaning of the Constitution at will, and thus to reduce American liberty. Antonin Scalia and Clarence Thomas understand this . . . .").

20 "If the Court is serious in its ruling, Justice Scalia is right to contend that the shift from privacy to liberty, and away from the New Deal induced tension between the presumption of constitutionality and fundamental rights, 'will have far-reaching implications beyond this case.'" Randy E. Barnett, "Justice Kennedy's Libertarian Revolution": Lawrence v. Texas, *Cato Supreme Court Review* 21, 41 (2003) (quoting *Lawrence,* 539 U.S. at 586 (Scalia, J., dissenting)).

21 Additionally, Section 5 of the Fourteenth Amendment represents an important and additional source of authority to uphold Congress's ability to enact legislation to ensure the fundamental guarantees of civil rights. No current member of the Supreme Court debates this fact. Furthermore, no nominee abiding by the principles of strict construction would be in a position ever to debate the existence of the authority expressly granted to Congress in Section 5. Section 5 of the Fourteenth Amendment enlarged the power of Congress, by permitting congressional action for the purposes of enforcing the prohibitions of that amendment. In other words, the drafters of the Fourteenth Amendment contemplated that federal legislative action may be necessary to make the civil rights protections embodied in the guarantees of due process and equal protection fully effective.

In *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the Court held that Congress properly exercised its authority under Section 5 to enact Title VII of the Civil Rights Act. In *Fitzpatrick,* then-Justice Rehnquist explained that because the states ratified the civil war amendments—including the grant of additional power to Congress to enforce those amendments—provisions such as Section 5 represent a limitation on State authority. As no one disputes this limitation, the only active questions center on the scope of that limitation. The Court in

Fitzpatrick discussed the shift in the federal-state balance effected by the civil war amendments and the new authority granted to Congress by those amendments. Specifically, the Court examined the impact of this shift on state sovereign immunity and the Eleventh Amendment. "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456. Thus, the Eleventh Amendment's principle of state sovereignty is necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. It is this interplay between the Eleventh and Fourteenth Amendments that has led to the erroneous assertion that recent cases that addressed Section 5 demonstrate some future threat to the existence of civil rights laws.

22 Beyond the traditional *stare decisis* factors, members of the Court have, at one time or another, looked to other considerations such as the margin of victory and the age of the decision. In *Payne,* a case in which the Court overturned decisions involving victim-impact statements, the Court found that previous cases were decided "by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." *Id.* at 829. Additionally, Justice Scalia has advanced a theory that older decisions should garner particular respect:

> Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.

South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting). Justice Scalia's argument may be rooted in the value of reliance. Thus, the older the decision, the greater the reliance, the more likely it is the decision should be retained.

23 As Judge Bork noted with respect to *The Legal Tender Cases,* "[w]hatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian." Robert H. Bork, *The Tempting of America* 57-58 (1990).

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