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# The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making

Nancy Staudt\* & Yilei He\*\*

¶1 Upon striking down substantial portions of New Deal legislation, the Supreme Court, in 1937, reversed its thinking and sided with the government in a series of cases challenging regulation intended to bring about national economic recovery during the Great Depression. Not only did the Court begin upholding the laws adopted by Congress and the President, it also announced a significant—some say revolutionary—new understanding of judicial review<sup>1</sup>: it would henceforth *presume* the constitutionality of all economically-oriented statutes. This new view, formally pronounced in *United States v. Carolene Products Co.*,<sup>2</sup> is particularly noteworthy because the Court had long devoted substantial time and energy to the task of defining the boundaries of congressional authority to regulate commercial transactions. The holding and language of *Carolene Products*, along with several other contemporaneous cases,<sup>3</sup> however, virtually unleashed Congress and the President to regulate, and the Court all but guaranteed it would sanction economic policies and programs no matter how “preposterous” they might seem.<sup>4</sup>

¶2 Why the Court so drastically shifted its views—moving from an assumption that all economic regulation was unconstitutional, or at least suspect, to one that presumed

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<sup>1</sup> For the previous three decades, the Court had invalidated a broad range of economic legislation on the ground that it interfered with the freedom of contract. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>2</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). As noted by Justice Stone, irrespective of the stated motivation for adopting a law regulating commercial transactions, courts would henceforth assume legislators had legitimately exercised their constitutional authority:

There is no need to consider [legislative statements] here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. The present statutory findings affect appellee no more than the reports of the Congressional committees, and since, in the absence of the statutory findings, they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

*Id.* at 152–53.

<sup>3</sup> *See, e.g.,* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935); *Steward Machine Co. v. Collector of Internal Revenue*, 301 U.S. 548 (1937) (upholding the Social Security Act of 1935).

<sup>4</sup> A student note suggests that preposterous laws might be struck. *See* Note, *State Views on Economic Due Process: 1937–1953*, 53 COLUM. L. REV. 827, 830 (1953) (“Under the protection of such a presumption only the most preposterous of statutes can fall.”). For a law the Court upheld that is widely viewed as absurd, see *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (upholding Oklahoma law forbidding optician from fitting or duplicating lenses without prescription from an ophthalmologist or optometrist).

constitutionality—is, of course, a topic of widespread debate and controversy in the extant literature. The most widely accepted account argues that political factors, especially President Roosevelt’s Court-packing plans, best explain the doctrinal transformation that took place in the late 1930s.<sup>5</sup> A competing view of this juridical shift argues that the legal developments observed at that time began to materialize decades earlier, and thus the views set forth in *Carolene Products* (and the various other judicial opinions sanctioning economic regulation) simply mark the culmination of a natural, almost inevitable, progression of constitutional ideas.<sup>6</sup>

¶3 One of the most intriguing—and convincing—explanations in our view, and one that scholars and commentators have largely ignored, derives from the Court itself. As various Justices have noted, the declining state of the economy seriously challenged the logic of the early Court’s anti-regulation policies and doctrines, and this reality may have transformed the judicial calculus vis-à-vis the New Deal and economic legislation more generally. In a recent case, the Justices commented on the doctrinal shift that occurred decades earlier:

[T]he Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom . . . rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: “The older world of laissez-faire was recognized everywhere outside the Court to be dead.” . . . [T]he clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.<sup>7</sup>

Put differently, while political threats existed and legal developments took place, a desire to promote economic renewal in the face of the worst economic downturn in the country’s history is also likely to have played an important, if not dominant, role in the Court’s shift in the late 1930s with respect to economic legislation challenged in federal court.

¶4 The implications of this judicial change of heart seem clear: the Court would no longer attempt to shape the nation’s economic policy. In fact, the Court has stated as much:

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<sup>5</sup> Legal and historical scholars, including Laura Kalman, Edwin Corwin, and Robert McCloskey, for example, note that the Court systematically struck down New Deal legislation in 1935 and 1936. In 1936, however, FDR was enthusiastically reelected, indicating widespread and popular support for his efforts to aid the nation’s ailing economy. Angered by the Court’s interference and committed to the New Deal programs, FDR proposed a Court-packing plan in 1937 calling for fundamental (and to many, unwanted) changes to the Court’s make-up in order to assure a supportive panel of justices for future cases and controversies. To avoid this threat, the Court, it is argued, abruptly changed its judicial views to support FDR and his economic efforts. EDWARD CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 12, 64 (1941); Laura Kalman, *The Constitution, The Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1052–53 (2005); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 34–35 (1962).

<sup>6</sup> For an excellent summary of these two views, see Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L. J. 2165 (1999) (exploring the dispute between internalists, who attribute the constitutional change during the New Deal to doctrinal or intellectual causes, and externalists, who emphasize political reasons).

<sup>7</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 861–62 (1992) (citations omitted).

[T]he day is gone when this Court . . . [strikes down] laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . “For protection against abuses by legislatures, the people must resort to the polls, not the courts.”<sup>8</sup>

Rather than promoting their own economic theories and their own views on how best to promote a stable and prosperous economy via the judicial decision-making process, the Court in the late 1930s reached the conclusion that deference to the elected branches was the better way to go. The Court had come to believe that judicial oversight of the nation’s business and commercial strategies was not likely to advance the country’s interests and could impose unintended harm. This is the very point made by the Court in the language quoted above.

¶5 In this Article, we seek to contribute to the scholarly understanding of *why* the Court altered its constitutional course in the late 1930s and, at the same time, highlight the unexplored *implications* of that choice. With respect to our first goal, we argue (along with the Court itself) that the state of the economy is an important explanatory factor for understanding judicial behavior in the 1930s (as well as both prior to and after that time). We do not mean to suggest that economic factors solely explain judicial behavior, but we hope to highlight an important variable that scholars have largely ignored. With respect to our second aim, we argue that while the Court chose to presume the constitutionality of economic legislation, this choice did not signal an abandonment of judicial oversight of the economic policymaking emanating from the elected branches of government as is widely believed; as we explain below, oversight continues, but it now takes a different form.

¶6 To make our points, we note that the Court’s decisions throughout the first several decades of the twentieth century are filled with rhetoric, commentary, and dicta evincing considerable interest in the national economy, macroeconomic trends, and the economic effects of lawmaking more generally. Indeed, irrespective of individual judicial views on economic theory (that is, the preference for a free market or regulatory approach to policymaking), it is apparent that all hoped to advance economic prosperity; divisions across the Court laid with how best to achieve that goal, not with the propriety of the goal itself. While the rhetoric and dicta largely disappeared from the Court’s opinions beginning in the late 1930s with the *Carolene Products* decision, we believe it is highly improbable that the Court, from that time forward, chose to completely ignore economic conditions in their decision-making process. A more likely scenario is the one suggested by the legal and political scholars Thomas Brennan, Lee Epstein, and Nancy Staudt: the judicial strategy for promoting economic prosperity shifted, but not the underlying goal.<sup>9</sup>

¶7 To be sure, the Court in the late 1930s chose (perhaps rationally) to assume that all economic legislation would pass constitutional muster, but this choice should not be interpreted as an indication that the Justices would no longer be concerned with the nation’s economy *or* that they had completely abdicated all responsibility for economic policymaking to the elected branches of government. Prior to 1937–1938, the Court devoted considerable time and energy to economic issues and continually expressed

<sup>8</sup> *Lee Optical*, 348 U.S. at 488 (citing *Munn v. Illinois*, 94 U.S. 113 (1876)).

<sup>9</sup> See *infra* note 13 and accompanying text.

concern for viable market conditions.<sup>10</sup> While interfering with President Roosevelt's New Deal legislation on the grounds that an unregulated economy was the best means to promote economic prosperity was a colossal error in judgment given the depressionary conditions that existed,<sup>11</sup> and the Court has in fact supported economic legislation since that time, these events should not be viewed as a transformation of judicial preferences in terms of the economy. In fact, we argue that the choice in the late 1930s to presume the constitutionality of any and all commercial regulation was a judicial strategy to *improve* the nation's chances for economic growth and prosperity—a strategy that encompassed leaving substantive policymaking to the experts.

Deference on the constitutional dimension, however, is not the only means by which the Court can advance its economic preference for a growing and stable economy. As Brennan, Epstein, and Staudt have noted, the Court can assume a statute passes constitutional muster but this conclusion does not terminate the opportunity for judicial oversight.<sup>12</sup> The Court continues to be in a position to interpret the language and breadth of the law and thus its applicability to the particular cases and controversies that show up on its docket. This interpretive power enables the Court to promote or undermine the government's policymaking strategy, notwithstanding the presumption of constitutionality. To see this, consider the fact that a pro-government decision in the labor, taxation, or antitrust context advances existing policies while one that goes against the government weakens the regulatory objectives. In short, it is possible that while the Court relinquished its role in *substantive* economic policymaking in the late 1930s, they continued to have precisely the same economic goals and aims that they have had throughout history—a preference for growth and prosperity. And more importantly, for our purposes, they are able to continue promoting this interest with a two-pronged approach: 1) assume all economic laws and regulations are constitutional, but 2) interpret

<sup>10</sup> The Court's language in *Home Building & Loan Ass'n v. Blaisdell*, for example, evidenced its deep concern over the devastating effects of the Great Depression. There the Court considered the constitutionality of an extension of the foreclosure redemption period under a Minnesota Mortgage Moratorium Law. The Court upheld the statute on the grounds that the legislation was enacted to address an emergency economic crisis, a legitimate end; furthermore the Court opined that the extension was a reasonable exercise of state's policy power. Justice Hughes, writing for the Court, detailed the devastating economy in length:

The present nationwide and worldwide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people, in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises.

*Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 420–21 (1934).

<sup>11</sup> In *New State Ice Co. v. Liebmann*, Justice Brandeis, agreeing with the government that “[t]o stay experimentation in things social and economic is a grave responsibility[,]” worried that “[d]enial of the right to experiment may be fraught with serious consequences to the Nation . . . .” 285 U.S. 262, 310 (1932).

<sup>12</sup> See Thomas Brennan, Lee Epstein & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macro-Theory of the Court*, 58 DUKE L. REV. 1191, 1197 (2009) [hereinafter Brennan et al., *Macro-Theory*] (predicting that justices' voting behaviors will continue to comport with their interests in economic prosperity).

the law in a manner that strengthens or weakens extant policies depending on their ability to advance judicial economic goals and aims. As we note below, the Court looks to the state of the economy for purposes of deciding how it should pursue the second prong of this strategy.

¶9 This Article is organized as follows: Part I outlines Brennan, Epstein, and Staudt’s theory for why we should expect economic conditions to enter the judicial utility function, thereby affecting individual votes and case outcomes. Part II investigates a small collection of cases decided during the first three decades of the twentieth century, often called the *Lochner*-era due to the Court’s systematic attempt to shape the nation’s economic policy in a manner consistent with a laissez-faire theory of economics embodied in the *Lochner* case. Part III examines a collection of cases decided in the early and mid-1930s—the time when the Court began to shift back-and-forth in its views vis-à-vis economic regulation, ultimately reaching the decision to dispose of its laissez-faire theory altogether in 1937–1938. In this last part, we demonstrate that the judicial rhetoric and dicta throughout both periods consistently reflect a judicial concern for the nation’s economy as hypothesized by the theory set forth in Part I. Moreover, we show how the observed changes in judicial outcomes leading up to the constitutional revolution in the 1930s, and so widely discussed and analyzed in the literature, fit within Brennan, Epstein, and Staudt’s theory of judicial decision-making, offering surprisingly strong evidence for the plausibility of the theory.

¶10 This Article sets the stage for a subsequent and more in-depth scholarly challenge to the conventional wisdom that the federal judiciary has adopted a passive—perhaps even unthinking—role with regard to economic matters since the time of the Great Depression. It also challenges the widely held view that the constitutional revolution that took place in the 1930s can best be explained by politics and doctrinal developments, but not the economy itself. To be sure, substantial doctrinal transformations took place and politics were at play, but the judicial rhetoric and commentary that emerged at the time also highlight the notion that the Court was pursuing the best means to promote their economic goals which, given the persistent crisis-level conditions that then plagued the nation, called for dramatic changes in judicial review and oversight.

## I. THE JUDICIAL BUSINESS CYCLE: A THEORY OF JUDICIAL DECISION-MAKING

¶11 The judicial business cycle is grounded in a straightforward claim about the men and women appointed to the High Court: Justices prefer national prosperity to an economy plagued by high unemployment, high inflation, and low productivity.<sup>13</sup> It is possible that this preference emerges from the Court’s role in the development of law and legal policy, or perhaps it comes about from the Justices’ status as individuals who care

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<sup>13</sup> This Part summarizes the positions adopted in Brennan et al., *Macro-Theory*, *supra* note 12 (presenting an empirical study to support the argument that the state of macro-economy affects the Court’s decision-making), and Thomas Brennan, Lee Epstein & Nancy Staudt, *The Political Economy of Judging*, 93 MINN. L. REV. 1503 (2009) [hereinafter Brennan et al., *Political Economy*] (suggesting that macroeconomic state correlates with the Justices’ decision on whether to cooperate with the other branches of government in recessionary times to promote national economic development). Also, for a detailed discussion of the Court’s decision-making behavior in times of crisis, see generally NANCY STAUDT, *THE JUDICIAL POWER OF THE PURSE: HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS* (under contract with University of Chicago Press) [hereinafter STAUDT, *JUDICIAL POWER OF THE PURSE*].

very much about their own private investments and purchasing power. It is not necessary to explain *why* the Court prefers national economic success to failure, rather the point is this: the Justices gain utility from certain economic conditions and suffer disutility from others.

¶12 The theory does not stop with the simple claim that the Court prefers an expanding to a contracting economy, rather the theory posits that the Justices are instrumentally rational actors and thus will seek to advance their economic preferences through their Article III decision-making power. More specifically, members of the Court will seek to promote federal policies that encourage economic growth and development, but will attempt to deter policymaking perceived to steer the nation into economic stagnation, or worse, the serious economic decline associated with a depression.

¶13 The Court, of course, is not in a position to craft economic policy: the Framers of the Constitution formally placed economic policymaking power into the hands of the elected branches of government. Article I, section 8, for example, grants legislators the authority to “provide for the general welfare of the United States” and to “regulate commerce,”<sup>14</sup> and Article II, section 3 mandates the president “shall take care that the laws be faithfully executed.”<sup>15</sup> Just as federal courts have no foreign policymaking powers but are theoretically able to influence military strategizing via Article III decision-making power,<sup>16</sup> so too can we expect the Court to facilitate and impede the elected branches’ economic policy choices through judicial decision-making authority, thereby affecting the substance of these policies—at least at the margin.

¶14 To understand how and why the Court is in a position to influence economic policy, it is useful to recall that Congress and the President continually exercise their constitutional economic powers through a range of programs implemented in legal contexts such as taxation, bankruptcy, antitrust, securities regulation, transportation regulation, and so forth. Indeed, government action in the economic field is so widespread that it touches virtually every aspect of our daily lives in some form or another. Private parties, in turn, routinely challenge these policies in federal court, and it is through this line of cases and controversies that the Court is able to affect domestic economic issues. By systematically issuing votes and outcomes in favor of the government’s position, the Court effectively supports the elected branches’ policy preferences, while disfavoring the government in these disputes undermines the government’s economic aims and goals.

¶15 The theory is grounded in the idea that economic prosperity is more likely when policymaking rests in the hands of competent officials, and for this reason the Justices maximize their own utility by promoting the work of skilled decision-makers and deterring ineptitude when it emerges. At first cut, the idea that Supreme Court Justices—experts in law and constitutional matters—seek to distinguish economic competence from incompetence in the elected branches of government might seem peculiar and more than a bit unrealistic. After all, trained economists are often unable to agree upon or determine, as an empirical matter, the policies and programs that advance the nation’s

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<sup>14</sup> U.S. CONST. art. I, § 8.

<sup>15</sup> U.S. CONST. art. II, § 3.

<sup>16</sup> See generally NANCY STAUDT, JUDICIAL POWER OF THE PURSE, *supra* note 13 (noting formal and constitutional limits on the federal courts’ foreign policymaking powers, but highlighting judges’ ability to shape foreign policy nonetheless).

economic interests, and thus a theory of judicial behavior that rests on the assumption that the Justices are able to do so is entirely implausible. The Court need not rely on its own (limited) expertise, however, to advance its goals and aims in terms of economic policymaking. The Justices, being rational, will rely on credible cues and signals to determine how and when to use their decision-making powers to advance their preference for economic prosperity.

¶16 We expect the Court will interpret an expanding economy as a cue that the legislative and executive branches are doing a good job—or at least have not imposed unnecessary harm on the economy—and thus should be supported. Judicial interpretation of the cues associated with economic downturns, however, will be slightly more nuanced. Rather than assuming that the Court will treat each and every contraction equivalently, the theory posits that minimally informed Justices will understand that economic downturns are likely to be associated not only with the choices made by the nation’s leaders, but *also* with unrelated and unexpected shocks to the economy such as wars, oil price fluctuations, trade barriers imposed by foreign governments, harvest failures, and so forth.<sup>17</sup> This is a distinction with meaning: When the Court views the downturn as a product of substandard government policy choices—not of uncontrollable and exogenous shocks—they will punish the elected branches in courtroom proceedings as a means to deter incompetent policymaking. But, should the Court believe that negative economic conditions are the result of factors largely beyond the control of the government, they will not sanction federal policymakers, they will seek to work as a team with the other branches of government in order to remedy the nation’s economic problems.

¶17 Of course, in the context of economic planning, even experts cannot hope to distinguish precisely between different types of economic downturns—those caused by policymaking failures and those that emerge from outside forces—and the Court certainly does not have a higher level of economic proficiency than trained professionals. Economists Andrew Abel, Ben Bernanke, and Dean Croushore note that national economic conditions often materialize due to a complex amalgamation of factors both inside and outside the government’s control, making it extremely difficult for anyone to distinguish useful federal policies from those that impose harm across the nation.<sup>18</sup> Importantly, the theory does not hypothesize that the Court has skill and expertise with respect to the macroeconomy, but rather that it is possible that the Justices are able to distinguish economic downturns and recessions that are *typical* and recurrent from conditions associated with widespread poverty and hardship that are *atypical* and rare, such as those observed in the 1930s and described as a depression.<sup>19</sup> When it comes to

<sup>17</sup> ANDREW ABEL, BEN BERNANKE & DEAN CROUSHORE, *MACROECONOMICS* 282–306 (2008); *see generally* RAYMOND M. DUCH & RANDOLPH T. STEVENSON, *THE ECONOMIC VOTE: HOW POLITICAL AND ECONOMIC INSTITUTIONS CONDITION ELECTION RESULTS* (2008) (discussing a range of factors that can affect the state of the economy and identifying the role of economy conditions on voting behavior).

<sup>18</sup> ABEL, BERNANKE & CROUSHORE, *supra* note 17, at 282–306.

<sup>19</sup> As is widely understood, the U.S. economy has grown tremendously over the course of the last century, but as the macroeconomists widely note, even prosperous economies are periodically interrupted by episodes of declining production and income, and rising unemployment. *Id.* at 282–306. Sometimes these episodes are prolonged, severe, and harsh, and the downturn becomes a “depression,” but the downturns can also be relatively short and considerably less brutal, in which case the periods in which aggregate economic activity falls is a “contraction” or a “recession.” Irrespective of the nature and extent of the downturn, macroeconomists note they are almost invariably followed by a resumption of economic growth. In the words of Abel, et al.:

This repeated sequence of economic expansion giving way to temporary decline followed by



the typical upswings and downswings that routinely take place in the economy, the Court will assign blame (or credit) to Congress and the President out of a belief (right or wrong) that the economic peaks and troughs lie within the policymakers' control. In atypical catastrophic periods, the Court will view economic conditions as primarily attributable to a series of unexplained and exogenous shocks beyond the control of the government and so will not seek to hold policymakers accountable. When a catastrophe occurs that is not attributed to government action, the Court will join with the government, via decisions supporting the government's position, to fend off the crisis in an effort to return the nation to a state of prosperity.

¶18

That the economic downturns associated with the typical business cycle—the repeated sequence of recessions that give way to periods of prosperity, which are then followed again by recessions—serve as a judicial proxy for government policymaking failure is no mystery. Researchers such as Torsten Persson and Guido Tabellini, among others, have noted that elected officials, specifically the President and members of Congress, are often willing to ignore, tolerate, or even risk short-term national economic losses in off-election years for political gain.<sup>20</sup> When an election becomes imminent, however, politicians have an incentive to appear competent and perform well to assure reelection. At the same time, the literature suggests that elected officials will work hard to fend off protracted periods of (costly) economic distortion given that such conditions not only cause widespread and serious damage to citizens across the nation, but also long-term harm to the political reputations of incumbents. In fact, the idea that economic crises induce different types of policymaking choices than those observed during the typical business cycle is the “new orthodoxy.”<sup>21</sup> Researchers have proposed a number of theories to explain why crisis related policies are unique, including the weakened nature of ideological interests,<sup>22</sup> the short-term suspension of self-interested behavior,<sup>23</sup> and increased levels of teamwork in times of emergency.<sup>24</sup> For our purposes, the underlying theory of why elected officials respond differently under different economic conditions is less relevant than the twin ideas posited above: elected officials have an incentive to shirk responsibility in the short-term but work for the benefit of the nation in the long-term to avoid crises. If it is true they are willing to risk a series of minor recessions but not vast and widespread depressionary conditions, then it is perfectly reasonable for the Court to believe that the economic downturns that take place during the typical business cycle are the products of inept policies, while economic crises (i.e., precisely the economic conditions elected officials seek to avoid) are beyond the officials' control.

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recovery, is known as the *business cycle*. The business cycle is a central concern in macroeconomics because business cycle fluctuations—the ups and downs in overall economic activity—are felt throughout the economy. When the economy is growing strongly, prosperity is shared by most of the industries and their workers and owners of capital. When the economy weakens, many sectors of the economy experience declining sales and production, and workers are laid off or forced to work only part-time.

*Id.* at 282.

<sup>20</sup> TORSTEN PERSSON & GUIDO TABELLINI, POLITICAL ECONOMICS: EXPLAINING ECONOMIC POLICY 69–92 (2000); see also Kenneth Rogoff & Anne Sibert, *Elections and Macroeconomic Policy Cycles*, 55 REV. ECON. STUD. 1, 1–16 (1988).

<sup>21</sup> ALLAN DRAZEN, POLITICAL ECONOMY IN MACROECONOMICS 444 (2000).

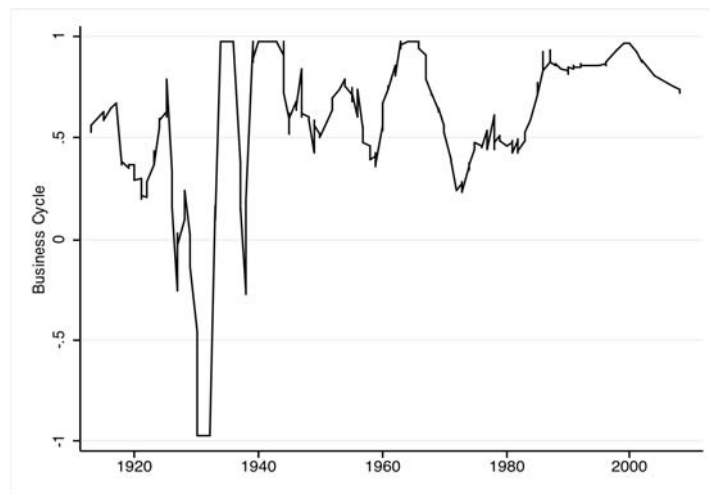
<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

¶19

Figure 1 provides historical data on the state of the nation's economy; the figure presents a lowess smoother of the business cycle, where periods of economic decline are coded as equal to -1, and periods of economic expansion are code as equal to +1. As indicated in the figure, the economy suffered a major setback in the early 1930s, followed by a short period of recovery from 1934–1936, and then a second major setback in the late 1930s. Although the conventional wisdom suggests that the entire decade of the 1930s exhibited one prolonged period of economic contraction, in fact, there appear to be two distinct periods of depression—as indicated in the figure—which is an important point for our discussion below.<sup>25</sup> Finally, while both before and after the 1930s the economy cycled through various expansions and contractions, they were relatively modest when compared to those observed in the 1930s.



**Figure 1: U.S. economy cycles through contractions and expansions**

Note: Lowess smoother of business cycles; economic expansions coded as equal to +1 and economic contractions coded as equal to -1. Depressions occurred only in the 1930s; all other economic downturns can be labeled recessions.

¶20

That the Court has information and knowledge of the general state of the economy and is willing to consider it in the decision-making process is well documented below. As we will see, judicial opinions, litigants' briefs, and clerks' memoranda are filled with rhetoric and commentary with regard to the economy, suggesting courtroom actors are continually apprised of the nation's economic conditions and believe they are relevant to the Justices' votes and to case outcomes. Whether the Court takes judicial notice of increasing and decreasing levels of economic prosperity and growth is one question of interest, but the more difficult and important question to answer is whether the Court accounts for these cyclical changes in their decision-making process. This Article presents numerous examples of cases in which the Justices take judicial notice of the economy and sets the stage for further investigation of how this notice affects outcomes.

¶21

If the judicial business cycle theory of decision-making accurately captures the Court's interest in promoting proficient policymaking, then its empirical implications are

<sup>25</sup> ABEL, BERNANKE & CROUSHORE, *supra* note 17, at 282–306.

clear.<sup>26</sup> Most obviously, the Court can be expected to reward the elected branches of government for periods of prosperity by adopting a pro-government position in litigation involving economic policy. Put another way: The government's win-rate should positively correlate with various economic indicators, such as employment rates, industrial production levels, GDP, and so forth. Conversely, when the economy turns sour and the Court holds elected actors responsible out of a belief that they have privileged their short-term electoral interests over national economic interests—that is, during recessionary periods—the Court can be expected to punish the bad policy choices by ruling against the government. If the Court believes, however, that Congress and the President could not have prevented the downturn, because the crisis worked against their electoral prospects—that is, became a deep depression—the Court is unlikely to hold them responsible or even to second-guess their policymaking choices. In fact, the theory suggests that the Court will support the national government in its attempt to stabilize the economy during severe economic downturns by deferring to its arguments in the economic cases that appear on the docket.

¶22 The empirical implications of the theory have been subject to preliminary investigation by Brennan, Epstein, and Staudt. The authors, both together and separately, have found substantial evidence supporting the theory, thereby suggesting that a judicial “business cycle” is at play in the decision-making process, as posited above.<sup>27</sup> The authors investigated the issues in a large-*N* study with the help of statistical methods, but did not explore individual cases or judicial rhetoric in any depth. The point of the analysis below, then, is to find answers to two questions: 1) is the Court aware of the state of the economy?; and 2) does their rhetoric and dicta suggest that they account for extant economic conditions in the decision-making process? The answer to both queries is unambiguously yes.

## II. LAISSEZ-FAIRE ECONOMICS AND THE RHETORIC OF THE *LOCHNER*-ERA

¶23 We begin the qualitative discussion of Supreme Court cases with a focus on *Lochner v. New York*,<sup>28</sup> a controversy decided in 1905 and widely viewed as the beginning of the Court's attempt to formally—and systematically—embed laissez-faire economics into constitutional doctrine.<sup>29</sup> *Lochner* is an important decision in part because the majority opinion sets forth its view on the dangers inherent in government

<sup>26</sup> Note that we recognize that elected officials have an incentive to shirk responsibility in the short term but work for the benefit of the nation in the long term to avoid crises, which are the twin ideas posited above. In such sense, the Court is expected to believe that the economic downturns that take place during the typical business cycle are the products of inept policies, while economic crises (i.e., precisely the economic conditions elected officials seek to avoid) are beyond the officials' control.

<sup>27</sup> Brennan et al., *Macro-Theory*, *supra* note 13, at 1195–97.

<sup>28</sup> 198 U.S. 45 (1905).

<sup>29</sup> *Lochner* has generated substantial attention over the course of the last century—and most of it is critical. In the words of the legal scholar David Strauss, *Lochner* “would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years.” David Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003). The legal and political scholar Bernard Schwartz argues that “[a]side from *Dred Scott* itself, *Lochner* . . . is now considered the most discredited decision in Supreme Court history.” BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 190 (1993). The important point for our purposes is not to be yet more critical of the decision, but to note that in advocating an interpretation of the Constitution that advanced a preferred theory of economics, the Justices sought to promote the nation's financial and commercial interests.

regulation.<sup>30</sup> Yet, as the legal historian David Strauss has noted, it is more than a case, “[i]t symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures, including minimum wage laws, laws designed to enable employees to unionize, and a federal statute establishing a pension system for railway workers” on the theory that any government interference with individual economic rights and liberties was suspect.<sup>31</sup>

¶24

The idea of economic liberty and freedom underlying the laissez-faire approach to constitutional doctrine has been subject to widespread criticism, but it is also grounded in widely accepted economic and political principles. To begin, the right to engage freely in contractual relations and commercial activity is undeniably valuable and worthy of some protection. As Strauss and many others have pointed out, when parties bargain and negotiate, it is reasonable to assume the agreements that emerge reflect choices that advance the interests of both sides.<sup>32</sup> Government interference with this freedom, then, is likely to reduce well-being by impeding access to the very goods each party seeks to obtain. Moreover, restrictions on economic freedom can legitimately be viewed as inconsistent with individual autonomy: they deny people the right to control important aspects of their lives in the manner they see fit.<sup>33</sup> The problem, of course, is that economic liberalism and unrestrained business activity also have drawbacks. Markets can be anticompetitive, biased, and abusive, leading many to argue that regulation is necessary to curb problems associated with commercial monopolies, child labor, unsafe working conditions, and so forth. Indeed, even scholars and commentators suspicious of government regulation have appreciation for its importance to individual and national success. As the economist Robert Higgs notes, “Without government to defend us from external aggression, preserve domestic order, define and enforce private property rights, few of us could achieve much.”<sup>34</sup> To be sure, the appropriate nature and optimal level of government action is widely debated, but few question the notion that national policymakers must protect our property and assure our safety and security from both internal and external threats.

¶25

These two views of economic theory—government regulation versus economic liberty—and the underlying goal of both (to promote wealth and prosperity) repeatedly emerge in judicial opinions in the early part of the twentieth century. Justices on both sides of the debate interpreted the Constitution in a manner that advanced their own theory of the economy, but all sought to enhance the nation’s economic welfare. Importantly, however, the judicial debate with respect to economic theory and its role in constitutional interpretation did not end with these two perspectives. Indeed, it was the third view, advanced primarily by Justice Holmes, which eventually won the day.<sup>35</sup> Holmes argued that the Court should not infuse the Constitution with *either* theory of economics, but instead should allow the experts in the elected branches of government to

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<sup>30</sup> *Lochner*, 198 U.S. at 54–65.

<sup>31</sup> Strauss, *supra* note 29, at 373.

<sup>32</sup> *Id.* at 383.

<sup>33</sup> *Id.*

<sup>34</sup> ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 3 (1987).

<sup>35</sup> *Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting).

pursue rational policymaking choices in a variety of ways and without judicial interference—irrespective of the Court’s own beliefs.<sup>36</sup>

¶26 As we will see, *Lochner*’s majority along with its two dissenting opinions together reflect these three divergent outlooks. The valuable point for our purposes is that each view encompassed ideas that would allegedly promote the nation’s financial and commercial interests, and, for this reason, all had similar underlying goals and aims. The *Lochner* majority, in short, may have attached itself to a flawed theory (although this is debated) and may have sought to shape the nation’s economic policies without the requisite knowledge and expertise (this is not debated),<sup>37</sup> but its underlying intentions were sound, and it is more than likely that the Court remains committed to advancing economic prosperity.

¶27 The *Lochner* case, one of the most infamous in the Court’s history, involved the following facts: Joseph Lochner was convicted of violating a New York law that clearly limited bakery employees to working no more than sixty hours a week or ten hours a day when he allowed, or required, his workers to exceed this limit.<sup>38</sup> Lochner appealed his conviction up the judicial hierarchy, eventually reaching the U.S. Supreme Court.<sup>39</sup> Justice Peckham, speaking for the majority, overturned the conviction, holding that New York’s bakery laws violated both Lochner’s and the employee’s right to contract, a right protected by the Fourteenth Amendment.<sup>40</sup> While noting that the states have legitimate police powers, the Court’s opinion is devoted to identifying the inherent dangers of those powers.<sup>41</sup> Sanctioning the regulations governing bakers, the Court suggested, would set precedent for allowing the government to interfere with virtually every aspect of our daily lives and in every trade, which in turn would undermine individual liberty and impede the contracts that an individual deems “appropriate or necessary for the support of himself and his family.”<sup>42</sup> Freedom of contract, in short, was essential for survival, and the argument that long hours harmed employees was not sufficient to interfere with this fundamental right to support themselves. In Justice Peckham’s words:

It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank’s, a lawyer’s, or a physician’s clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of

<sup>36</sup> *Id.*

<sup>37</sup> For some, there is an inherent difficulty to understand that justices are capable or willing to craft their arguments based on economic consequences. Particularly, justices are perceived as lacking the expertise in economics. Even for justices versed in law and economics, “macroeconomic performance, that is output, production, unemployment, and inflation, are ‘mysterious macroeconomic phenomena.’” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003).

<sup>38</sup> *Lochner*, 198 U.S. at 52.

<sup>39</sup> *People v. Lochner*, 76 N.Y.S. 396 (App. Div. 1902), *aff’d*, 69 N.E. 373 (N.Y. 1904), *rev’d*, *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>40</sup> *Lochner*, 198 U.S. at 63–65.

<sup>41</sup> *Id.* at 52–65.

<sup>42</sup> *Id.* at 56.

labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.<sup>43</sup>

¶28 The *Lochner* Court’s choice to infuse the Constitution with a laissez-faire view of economics was, of course, neither new nor novel. As the legal and political science scholar Bernard Schwartz has written, judicial opinions at the time of *Lochner* often advanced specific economic theories.<sup>44</sup> Indeed, Justice Peckham himself had previously issued opinions as a judge on the New York Court of Appeals critiquing the “paternalist” approach to government and favoring a regulation-free environment.<sup>45</sup> In *People ex rel. Annan v. Walsh*, for example, he argued that during the eighteenth and nineteenth centuries, the dominant view of economics held that the government “was to watch over and protect the individual at every moment, to dictate the quality of his food and the character of his clothes, his hours of labor, the amount of his wages, his attendance upon church, and generally to care for him in his private life.”<sup>46</sup> Fortunately, Peckham argued, economic theory had evolved by the early twentieth century, and the value of individual freedom and liberty were better understood as central to both an individual’s and the nation’s success. For example, in *Walsh* he argued the law should not “interfere with what seems to me the most sacred rights of property and the individual liberty of contract.”<sup>47</sup> Doing so can only “ruin or very greatly impair the value of the property of wholly innocent persons.”<sup>48</sup> Moreover, Peckham commented that “[I] firmly believe, the more correct, ideas . . . and a truer conception of the proper functions of government” call for a respect of the natural “law of supply and demand.”<sup>49</sup>

¶29 More than a few scholars and commentators have criticized Justice Peckham (along with the “four horsemen” who held similar viewpoints later in time)<sup>50</sup> as simply a self-interested decision-maker seeking to promote a theory of economics that would advance and empower the capitalist class to the disadvantage of the workers.<sup>51</sup> This political point may or may not be true, but what is undeniable is that many economists and policymakers did—and still do—share Peckham’s view, believing economic freedom and

<sup>43</sup> *Id.* at 59.

<sup>44</sup> SCHWARTZ, *supra* note 29, at 192–93.

<sup>45</sup> *Id.* at 199.

<sup>46</sup> 22 N.E. 682, 686 (N.Y. 1889) (Peckham, J., dissenting), *aff’d*, *Budd v. New York*, 143 U.S. 517 (1892).

<sup>47</sup> *Walsh*, 22 N.E. at 695 (Peckham, J., dissenting).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 687, 695. The case was appealed and Justice Brewer adopted a similar view to that taken by then Judge Peckham:

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property, which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And, if so, “Looking Backward” is nearer than a dream.

*Budd*, 143 U.S. at 550 (Brewer, J., dissenting).

<sup>50</sup> Justices Sutherland, Van Devanter, McReynolds, and Butler were often labeled the “four horsemen” because they continually voted as a block to strike down any and all commercial legislation.

<sup>51</sup> *See, e.g.*, Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997) (noting the criticisms, but arguing that the views of the conservative Justices were far more nuanced, complicated, and probably supportive of economic policies than generally understood).

liberty were—and are—crucial for a successful and prosperous nation.<sup>52</sup> Perhaps the experts espousing this view were fundamentally self-interested, but it is difficult to believe that all constitutional theorists with anti-government views were, or are, shamefully self-focused, while those with pro-government views are fundamentally beneficent and other-regarding. We take the view that all the Justices writing in the *Lochner*-era, irrespective of their underlying views on economic regulation, shared an interest in national economic success (along with their own individual prosperity), but disagreed as to the best means for achieving this goal.

¶30 The *Lochner* case generated two dissents. Justice Harlan, writing for himself and Justices White and Day, quoted extensive labor data and statistics supporting the idea that government regulation was essential for a healthy and viable workforce.<sup>53</sup> With respect to bakers specifically, Justice Harlan noted that the profession, while seemingly innocuous, was in fact riddled with danger:

The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer . . . [and] bakers are subjected [to] rheumatism, cramps, and swollen legs . . . . During periods of epidemic diseases the bakers are generally the first to succumb.<sup>54</sup>

The unregulated baking market, in Justice Harlan’s view, could lead to an ailing and diseased workforce, thereby undermining both individual well-being and the well-being of the entire labor force—an important component of the nation’s economic success.<sup>55</sup> Harlan, however, did not go so far as to suggest that government regulation was always necessary. Quoting the well-known political economist William Stanley Jevons, he noted, “[t]he manner, occasion, and degree in which the state may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science.”<sup>56</sup> Harlan went on to note, however, “I do not stop to consider whether any particular view of this economic question presents the sounder theory . . . . [Where] there is room for debate and for an honest difference of opinion,” the Court should uphold the regulation, especially given the reality that legislators were in the best position to protect their constituents.<sup>57</sup>

¶31 The most well-known dissent in *Lochner*, of course, belongs to Justice Holmes and addresses neither the importance of freedom of contract nor the value of government regulation to the success of the market. Instead, Justice Holmes picks up on the last part of Justice Harlan’s dissent, taking the position that the Court should defer to the experts in the legislative and executive branches of government and avoid infusing the Constitution with any of the Justices’ own pet theories of economics however plausible

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<sup>52</sup> See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (advancing a political and economic theory of the state that seriously questioned government regulations and privileges liberty and property in a manner similar to that of the *Lochner* Court).

<sup>53</sup> *Lochner v. New York*, 198 U.S. 45, 70–72 (1905) (Harlan, J., dissenting).

<sup>54</sup> *Id.* at 70–71 (citing language from an anonymous writer).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 72 (internal quotations omitted).

<sup>57</sup> *Id.*

or implausible they might be.<sup>58</sup> Given the importance of Holmes' view to the subsequent development of the law, it is worthwhile to quote it at length:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. 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 . . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>59</sup>

Justice Holmes' view, as indicated in the introduction to this Article, eventually became the majority view of the Court, which was a relief to many of his contemporaries, as well as to subsequently appointed Justices. As Justice Frankfurter noted nearly forty years after the Court decided *Lochner*, "Had not Mr. Justice Holmes' awareness of the impermanence of legislation as against the permanence of the Constitution gradually prevailed, there might indeed have been 'hardly any limit but the sky' to the embodiment of 'our economic or moral beliefs' in [the Fifth and Fourteenth Amendments'] 'prohibitions.'"<sup>60</sup>

¶32

Before Justice Holmes' view became the official view of the Court in the late 1930s, the intra-Court dispute over economic regulations waged on with each side continuing to advance its own theory as the best means to assure the nation's long-term prosperity. The Supreme Court reporters are filled with cases and controversies that illustrate the divergent viewpoints held by the Justices on the Court. We will offer just a few examples to make our point, which must by now be obvious: the Court was

<sup>58</sup> *Id.* at 74–76 (Holmes, J., dissenting).

<sup>59</sup> *Id.* at 75–76.

<sup>60</sup> *AFL v. American Sash & Door*, 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring) (quoting *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930)). Speaking of *Lochner* and other cases adhering to a *laissez faire* theory of economics, Justice Frankfurter noted:

[T]hese were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of "liberty" were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists and resulting disregard of the perduring reach of the Constitution led to Mr. Justice Holmes' famous protest in the *Lochner* case against measuring the Fourteenth Amendment by Mr. Herbert Spencer's Social Statics.

*Id.*



concerned with economic issues, and each one of the Justices sought to advance national economic prosperity, albeit with conflicting approaches and theories. For purposes of discussion, we will focus on the cases that have received substantial attention in the literature given their important doctrinal holdings, but not necessarily for the dicta and commentary contained in the opinions with respect to the economy. We focus on the rhetoric in order to highlight the underlying policy concerns that motivated the constitutional doctrines of the time.

¶33 Consider first *Hammer v. Dagenhart*,<sup>61</sup> a 1918 case involving the Keating-Owen Act, which banned transportation in interstate commerce of goods made at a factory in which children under the age of fourteen years were employed or permitted to work.<sup>62</sup> Congress apparently enacted the law not only to support the progressive idea that child labor was morally problematic, but also in response to the difficulty of adopting child labor laws at the state level. Apparently, states hoping to bar the production of child-made goods were deterred from doing so given the competitive disadvantage they would face compared to competitor states lacking age-specific labor laws.<sup>63</sup>

¶34 Roland Dagenhart, who worked with his two sons in a cotton mill in Charlotte, North Carolina, challenged the Keating-Owen Act as unconstitutional.<sup>64</sup> Justice Day, writing for the majority, agreed with the petitioner, holding that Congress had invaded the powers reserved for the states in the Tenth Amendment.<sup>65</sup> The majority argued that the legislation would not only interfere with states' rights and commerce generally, but would destroy the government as we know it:

The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.<sup>66</sup>

¶35 Justice Holmes, dissenting with Justices McKenna, Brandeis, and Clarke, argued that the Court's outcome in *Dagenhart* was inconsistent with earlier decisions that had sanctioned similar federal laws, and, more importantly, the Keating-Owen Act was clearly within the federal government's power to regulate interstate commerce.<sup>67</sup> Holmes further noted that the national government was uniquely able to adopt such regulation because it would not suffer the same consequences that would plague the states, namely corporate refusals to do business in a jurisdiction with child labor laws.<sup>68</sup> Holmes pointed out that "public policy of the United States is shaped with a view to the benefit of the nation as a whole."<sup>69</sup> The national government needs to be involved because it may understand

<sup>61</sup> 247 U.S. 251, 268–69 (1918).

<sup>62</sup> Act of Sept. 1, 1916, 39 Stat. 675.

<sup>63</sup> *Dagenhart*, 247 U.S. 268–69.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 269.

<sup>66</sup> *Id.* at 276.

<sup>67</sup> *Id.* at 278–81 (Holmes, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 281.

national needs better than “some self-seeking [s]tate” that is likely to embrace any regulation that is desirable to its interests of keeping business within its jurisdiction and away from competitor states, but nonetheless disadvantageous to the nation as a whole.<sup>70</sup>

¶36 The majority in *Dagenhart* argued that federal regulation would undermine commerce, while the minority took the position that regulation was necessary to ensure that nationwide benefits were obtained. This divide surfaced in case after case that showed up on the Court’s docket. Consider *Coppage v. Kansas*, which implicated a Kansas statute prohibiting employers from conditioning employment on an employee’s agreement to forgo membership in a labor organization.<sup>71</sup> The case involved the St. Louis & San Francisco Railway Company and T.B. Coppage, who discharged an employee after the employee refused to resign from a labor organization.<sup>72</sup> Coppage was found guilty in the lower courts of violating state law,<sup>73</sup> and Justice Pitney, for the majority, subsequently struck down the law on the grounds that it interfered with the freedom to contract—a freedom essential to the success of all individuals and businesses.<sup>74</sup> More specifically, as stated by the majority:

[This] right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money . . . . Indeed, a little reflection will show that . . . the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange.<sup>75</sup>

¶37 Like *Lochner* and *Dagenhart*, the *Coppage* case also generated dissenting opinions. Still questioning the Court’s ability to usefully opine on substantive economics, Justice Holmes argued that the Court should overrule *Lochner* and defer to the experts—the elected branches of government.<sup>76</sup> Justice Day, writing for himself and Justice Hughes, argued that individuals should not be forced to choose between employment and the exercise of free choice given that the two are so fundamentally related to the “welfare of society.”<sup>77</sup> Moreover, Day argued along with Holmes that it is not for the Court to interfere with the judgment of the Legislature on such important matters, especially considering “the existence of the conditions with which [the legislature] was dealing.”

Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power . . . . It would be difficult to select any subject more intimately related to good order and the

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<sup>70</sup> *Id.*

<sup>71</sup> 236 U.S. 1, 6 (1915) (referring to KAN. GEN. STAT. §§ 4674 & 4675 (1909)).

<sup>72</sup> *Id.* at 6–8.

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.* at 26.

<sup>75</sup> *Id.* at 14, 17.

<sup>76</sup> *Id.* at 27 (Holmes, J., dissenting).

<sup>77</sup> *Id.* at 38 (Day, J., dissenting).

security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse.<sup>78</sup>

¶38 One last case should suffice to make the point that the Court was motivated by the desire to advance the nation’s commercial and financial interests, along with individual freedom and autonomy, through the decision-making process. Or, put differently, constitutional doctrine was important in part because the Justices viewed it as a means to an end—economic prosperity. In *Adkins v. Children’s Hospital*, the Court considered a law providing women and children with a minimum wage in the District of Columbia.<sup>79</sup> The Court struck down the “price-fixing” regime, again taking the position that the regulation interfered with individual liberty and freedom of contract (i.e., government interference barred individuals from negotiating and bargaining for the best possible arrangement given their individual needs).<sup>80</sup> Not only did the Court worry about freedom to contract, it discussed extensively the ways in which the law would interfere with the supply and demand of labor, essentially guaranteeing certain laborers (i.e., women) a fixed wage whether or not they were capable of earning it and irrespective of the ability of the business to sustain the burden.<sup>81</sup> This scenario, the Court suggested, was neither fair nor economically sustainable over the long run.<sup>82</sup>

¶39 The Court was presented with expert reports and opinions claiming that wage laws enabled women to succeed in the workplace and to live in substantially better conditions than ever before.<sup>83</sup> Revealing a sophisticated understanding of econometrics, the majority responded to this empirical claim by noting that the country had been doing economically well with high levels of employment and, thus,

[n]o real test of the economic value of the law can be had during periods of maximum employment, when general causes keep wages up to or above the minimum; that will come in periods of depression and struggle for employment, when the efficient will be employed at the minimum rate, while the less capable may not be employed at all.<sup>84</sup>

In short, the Court was not convinced that it was the laws that aided women and suggested that the regulations could actually be costly to their interests in the long run if, in the face of an economic downturn, they were the first to lose their jobs given the high (and possibly unwarranted) pay scale mandated by the Legislature.<sup>85</sup>

¶40 In their dissenting opinions, both Justice Taft and Justice Holmes agreed that the causal link between women’s economic success and the law were disputable. Justice Holmes argued, “When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price it

<sup>78</sup> *Id.* at 38–39.

<sup>79</sup> 261 U.S. 525, 539 (1923) (referring to the Act of September 19, 1918, ch. 174, 40 Stat. 960).

<sup>80</sup> *Id.* at 539–40.

<sup>81</sup> *Id.* at 545–46, 554.

<sup>82</sup> *Id.* at 557–58.

<sup>83</sup> *Id.* at 560.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

seems to me impossible to deny that the belief reasonably may be held by reasonable men.”<sup>86</sup> And in Justice Taft’s words,

I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But 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.<sup>87</sup>

¶41 The *Lochner* era, which continued through the 1920s,<sup>88</sup> is widely associated with the anti-regulatory views espoused in cases such as *Dagenhart*, *Coppage*, and *Adkins*, but it is important to note that the Court did not uniformly strike down commercial regulation in this period. Indeed, fifteen years prior to *Adkins*, the Court upheld state legislation fixing a minimum wage for women in *Muller v. Oregon*.<sup>89</sup> Moreover, in the 1917 case *Bunting v. Oregon*, the Court upheld overtime wage laws,<sup>90</sup> which prompted some to argue the case was a sub silencio overruling of *Lochner*.<sup>91</sup> And, in the 1919 *Arizona Employers’ Liability Cases*, the Court considered a law imposing liability upon employers, without regard to fault, for compensatory damages in accidents resulting in injury or death not caused by the employees’ own negligence.<sup>92</sup> The Court upheld that law, noting that employers could adopt a wage rate accounting for this new liability and, thus, avoiding interference with the freedom to contract.<sup>93</sup> In the Court’s words,

The employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.<sup>94</sup>

Justice Holmes further argued, with the majority, that by adopting strict liability, the legislature would impose a cost on the employer, but that the employer would, in turn,

<sup>86</sup> *Id.* at 568 (Holmes, J., dissenting).

<sup>87</sup> *Id.* at 562 (Taft, J., dissenting).

<sup>88</sup> See David Currie, *The Constitution in the Supreme Court: the New Deal: 1931–1940*, 54 U. CHI. L. REV. 504, 504 (1987).

<sup>89</sup> 208 U.S. 412 (1908). There, Brandeis was counsel for the State of Oregon. Brief of Appellee at 24, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

<sup>90</sup> *Bunting v. Oregon*, 243 U.S. 426 (1917). Note that in this case, Justice-to-be-Frankfurter submitted an article concerning the constitutional and economic implications of labor laws: Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916).

<sup>91</sup> *Bunting*, 243 U.S. 426, 433–34 (referring to the relevant sections of the statute).

<sup>92</sup> 250 U.S. 400, 417 (1919) (referring to the Employers’ Liability Law Act, ARIZ. REV. STAT. §§ 3153–3162 (1913)).

<sup>93</sup> *Id.* at 439–40.

<sup>94</sup> *Id.* at 422.

pass it along to the consumers, thereby imposing increased costs on the public-at-large.<sup>95</sup> This economic reality was both sensible and justifiable in Holmes' view:

It is reasonable that the public should pay the whole cost of producing what it wants, and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance, we throw it upon the public in the long run, and that is just. If a legislature should reason in this way and act accordingly, it seems to me that it is within Constitutional bounds.<sup>96</sup>

¶42 Justice McKenna, however, strongly dissented, arguing that the majority had adopted a “specious” view of the world: “In justification of its discrimination between employer and employee, that the employer may, in relief from it and rescue from its burdens, pass them to the consumers of his products,” is seriously problematic.<sup>97</sup> He argued,

There is attractive speciousness in the argument. The individual employer seems to be divested of grievance and the problem the law presents to be one of economics and governmental policy; is a kind of taxation, an expense of government, the burden of which is properly laid upon the public and over which a court can have but limited power . . . What burden can be put upon industry or the activities of men that may not be justified by it?<sup>98</sup>

¶43 Thus, while the *Lochner* era is identified with the laissez-faire approach to constitutional interpretation, the time period was also peppered with judicial decisions supporting government regulation. Our point is not whether a specific doctrinal or economic view succeeded or failed in the Court between 1900–1930, but rather that the Justices—irrespective of their views—continued to issue opinions that contained substantial rhetoric and dicta addressing the importance of market transactions, economic conditions, and the law’s role in fostering economic prosperity to the greatest extent possible.

¶44 Of course, the questions that naturally arise are: (1) What caused the Court to veer from its anti-regulatory views during the early decades of the twentieth century?; and (2) Why did the *Lochner* view prevail in some but not all the cases that reached the Court? The facts and applicable law, along with the changing make-up of the Court, may help to explain the changes in the observed outcomes. But Brennan, Epstein, and Staudt offer an alternative explanation: As the economy cycled through periods of growth and contraction, the Court responded with pro- and anti-government outcomes as posited by the theory outlined above.<sup>99</sup> The authors have investigated this hypothesis and have found that the Court became substantially more pro-government when the economy was

<sup>95</sup> *Id.* at 431–34 (Holmes, J., concurring).

<sup>96</sup> *Id.* at 433.

<sup>97</sup> *Id.* at 439 (McKenna, J., dissenting).

<sup>98</sup> *Id.*

<sup>99</sup> See Brennan et al., *Macro-Theory*, *supra* note 12; see also *supra* note 13 and accompanying text.

flourishing, and more oppositional to the government's interests when the economy began to falter.<sup>100</sup> The votes and outcomes of every case, of course, do not fit this decision-making trend, but Brennan, Epstein, and Staudt have found convincing evidence that the Court appears, *on average*, to cycle with the economy. A judicial business cycle, in short, seems to exist.

¶45 We now turn to an investigation of the cases and controversies decided during the 1930s, a decade that experienced three distinct economic periods. As indicated in Figure 1, above, the country dropped into a depression between the years 1929–1934, which was then followed by a two-year period of economic growth, which itself was followed by a second depression beginning in 1937. These changing economic conditions, as we will see, appear to be correlated with the dramatic doctrinal changes that were simultaneously taking place on the Court. In our view, this correlation is not unexpected or surprising. Rather, we argue that it was the changing economic conditions that partially *caused* the Court to alter its course. To be sure, the Court did not immediately respond to the economic conditions that emerged—a time lag seemed to exist—but overall the level of correlation is surprisingly high.

### III. THE GREAT DEPRESSION AND THE CONSTITUTIONAL REVOLUTION

¶46 By late 1929, the nation had fallen into a serious economic decline and the Justices, like businesses and employees generally, understood this reality. Indeed, while the judicial opinions in the prior three decades identified economic prosperity as a general goal, by the early 1930s the Court began to address the proper role of the legislators in aiding the nation given the specific circumstances that had emerged. As in earlier decades, the Justices seemed to agree on the nation's underlying economic goal—recovery—but the means by which it should be achieved continued to divide the Court.

¶47 Before examining the Court's rhetoric and dicta addressing economic theory during the Great Depression, consider first *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, a 1932 case involving shipping rates set by the Interstate Commerce Commission (ICC) for the transportation of grain and grain products.<sup>101</sup> The chosen rates applied to post-1930 transactions but were grounded on data collected prior to the economic downturn, and, for this reason, the shippers sought to have the ICC reconsider its decision.<sup>102</sup> The petitioners did not challenge the ICC's authority, and Justice Hughes, writing for a unanimous Court, did not address that issue. Instead, he simply took judicial notice of the prevailing economic conditions, thereby illustrating the Court's attention to these realities in the decision-making process:

There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action

<sup>100</sup> See Brennan et al., *Macro-Theory*, *supra* note 12; see also *supra* note 13 and accompanying text.

<sup>101</sup> 284 U.S. 248 (1932).

<sup>102</sup> *Id.* at 255–57.

throughout the country . . . “a depression such as the country is now passing through is a new experience to the present generation.”<sup>103</sup>

In other words, the extraordinary and powerful macroeconomic factors, the Court held, justified a new hearing for the shippers with respect to the shipping rates they could legally charge.

¶48 That the Court took judicial notice of the massive economic downturn did not lead to a unified view on how to address it, or to a consensus on how the Court should respond to state and federal policymaking choices. In the 1932 case *New State Ice Co. v. Liebmann*, for example, the Court considered a state statute that forbid the manufacture, sale, or distribution of ice without a license on the theory that the nation’s problems were caused, in part, by heightened levels of competition.<sup>104</sup> The majority, however, refused to sanction legislation deterring business activity, indicating support for a laissez-faire approach to policymaking in the economic arena. Writing for the majority, Justice Sutherland noted:

The [legal] control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed.<sup>105</sup>

¶49 Justice Brandeis dissented, arguing that the economic conditions justified the very limits that the majority found problematic.<sup>106</sup> Indeed, he went so far as to note that “[t]he people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread in a time not of scarcity, but of over-abundance.”<sup>107</sup> The circumstances, in short, called for dramatic and new regulatory instruments that, while challenging the accepted wisdom of a free and competitive market, were nonetheless necessary to preserve the nation’s interests. In Justice Brandeis’ words,

The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder, and are reexamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute

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<sup>103</sup> *Id.* at 260.

<sup>104</sup> 285 U.S. 262, 307–08 (1932).

<sup>105</sup> *Id.* at 279.

<sup>106</sup> *Id.* at 306–09 (Brandeis, J., dissenting).

<sup>107</sup> *Id.* at 306.

widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity.<sup>108</sup>

¶50 As noted above, the economic downturns experienced during the *typical* business cycle are expected to cause the Court to issue anti-government opinions on the theory that the elected branches have pursued flawed policies and programs. Justice Brandeis, however, was convinced that the nation was not in a typical economic contraction, but had found itself in a crisis that required a different strategy altogether—judicial collaboration with Congress and the President. As it turns out, Brandeis’ views with respect to the crisis and the need for a pro-government strategy gained traction shortly after the Court issued its decision in *New State Ice Co.*; the Court began issuing anti-government decisions, thereby undermining the strategies pursued by the elected branches.

A. *The Turn Away from Lochner: Judicial Support for Regulation in an Economic Crisis*

¶51 As the depression continued to wage, the Court began to shift its views in favor of government intervention; the Court, in short, began to side with policymakers in their attempt to turn the economy around, rather than punish them for the problematic conditions plaguing the nation. The language in *Home Building & Loan Assoc. v. Blaisdell*, decided in 1934, vividly depicts the Court’s understanding of the devastating economic conditions, along with its view that policymakers were in a position to offset some of the misery, and, most importantly, that the Court should not block these legislative efforts.<sup>109</sup> *Blaisdell* involved the Minnesota Mortgage Moratorium Law, which sought to aid homeowners in a number of ways, including through the postponement of pending bank foreclosures, given the emergency at hand.<sup>110</sup> The Court upheld the statute noting that “[w]hile the emergency does not create power, emergency may furnish the occasion for the exercise of power.”<sup>111</sup> Analogizing to other types of emergencies the nation has faced and the need for a government response in those situations, Justice Hughes discussed the prevailing economic conditions at length.<sup>112</sup> Note in the passage below that his rhetoric makes the claim that the extant state of the economy is similar to an “Act of God” and, thus, was not caused by the ineptitude or incompetence of government decision-making. It is exactly in these circumstances that the theory posits the Court will seek to support and not undermine the nation’s financial managers.

The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their

<sup>108</sup> *Id.* at 306–08 (citing law reviews as well as economic literature).

<sup>109</sup> 290 U.S. 398 (1934).

<sup>110</sup> 1933 Minn. Laws ch. 339, 514.

<sup>111</sup> *Blaisdell*, 290 U.S. at 426.

<sup>112</sup> *Id.* at 420–21.



employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people, in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises.<sup>113</sup>

¶52 The distressed economy, in the majority's view, necessitated the legislation. The decision, however, was not unanimous. Justice Sutherland, writing for himself and Justices Van Devanter, McReynolds, and Butler—the “four horsemen”—argued that the Minnesota legislation unconstitutionally impaired the right to contract.<sup>114</sup> They took judicial notice of the economic conditions of the time, but argued that the “present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty.”<sup>115</sup> This rhetoric, like Justice Hughes', quoted above, is illustrative of the overall point of the theory—it indicates that the dissenters viewed the economic climate as no different from any other downturn. It was, in short, a typical downturn and thus most likely related to the inept decision-making of the elected branches of government. In these typical circumstances, the more rational approach would be for the Court to weaken—not bolster—the legislative choices being challenged in court.

¶53 Soon after the Court decided *Blaisdell*, it rendered a decision in *Nebbia v. New York*, again ruling in favor of government pricing rules found in New York's Milk Control Laws.<sup>116</sup> Writing for the Court, Justice Roberts considered the purpose behind the law and determined that “existing economic conditions” called for regulation, as such conditions “have largely destroyed the purchasing power of milk producers for industrial products, have broken down the orderly production and marketing of milk, and have seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions.”<sup>117</sup> The Court also noted that the legislature had studied the problem, thereby suggesting the elected officials were not only in a better position to address the serious issues at hand, but that the problems were not the typical evils faced by the nation:

The legislative investigation of 1932 was persuasive of the fact that . . . unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing

<sup>113</sup> *Id.* at 423 (internal citation omitted).

<sup>114</sup> *Id.* at 471 (Sutherland, J., dissenting).

<sup>115</sup> *Id.*

<sup>116</sup> 291 U.S. 502 (1934).

<sup>117</sup> *Id.* at 508 n.2.

competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production.<sup>118</sup>

¶54 Dissenting from the majority opinion, Justices McReynolds, Van Devanter, Sutherland, and Butler also assessed the macroeconomic effects of the regulation and noted that the argument for regulation was simply not convincing. Neither the Court nor the legislature, they argued, sought to indicate just how “higher charges at stores to impoverished customers when the output is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm.”<sup>119</sup> Moreover, they noted that to allow the legislature to regulate in these circumstances would eventually lead to greater disorder and chaos:

If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing—whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative, and the “anarchy and despotism” . . . are at the door.<sup>120</sup>

¶55 *Blaisdell* and *Nebbia*, both decided in 1934, indicated the Court’s increasing support for government regulation. Our point is not to identify doctrinal changes, although they are both intriguing and important, but to note that depressionary conditions had come to pervade the judicial mind and that, irrespective of one’s view on the specific legislation challenged in Court, many of the Justices sought to use their interpretive powers in a manner that advanced the nation’s interest in economic recovery. They sought not to undermine the financial strategies of the elected branches, at least for a short period of time. It should be pointed out that by 1934, the nation’s economic conditions had just begun to improve,<sup>121</sup> but judicial recognition of that improvement was not likely to coincide with the change in the economy—a time lag would exist given information delays and, thus, it is possible that 1934 was likely to be viewed as a crisis year for the majority of the Court. Importantly, our point here is to shed light on variables heretofore left unexplored which nonetheless are likely to have affected judicial votes and outcomes. If, how, and when these factors affected the Justices will be subject to further investigation in later work.

#### *B. Back to Lochner: Judicial Opposition to Regulation in a Period of Economic Recovery*

¶56 Many Court-watchers believed *Lochner* was put to rest in 1934.<sup>122</sup> Soon the Court disabused the nation of this idea by issuing a series of decisions in 1935 and 1936 striking down substantial portions of the New Deal legislation, thereby suggesting that laissez-

<sup>118</sup> *Id.* at 530.

<sup>119</sup> *Id.* at 556–57 (McReynolds, J., dissenting).

<sup>120</sup> *Id.* at 551.

<sup>121</sup> A short recovery occurred between March 1933 and May 1937 during the Great Depression.

<sup>122</sup> See, e.g., David J. Seipp, *Lochner Centennial Conference: Introduction*, 85 B.U. L. REV. 671, 675 (2005).

faire had not only returned, but had returned with a vengeance. For purposes of understanding the cases, the rhetoric, and the outcomes, keep in mind that the economy had begun to climb out of the depression and had prospered for more than a year by the time the Court issued the decisions discussed below.<sup>123</sup> The conditions that warranted New Deal legislation, in short, had arguably abated by the time the cases and controversies had reached the High Court; as noted above, a short-term economic recovery emerged between March 1933 and May 1937.

¶57 Consider first *Panama Refining Co. v. Ryan*,<sup>124</sup> a 1935 case in which the Court held that the National Industrial Recovery Act of 1933 (NIRA), which delegated to the President the authority to prohibit the transportation of petroleum oil,<sup>125</sup> “burden[ed] interstate and foreign commerce, affect[ed] public welfare, and undermine[d] the standards of living of the American people.”<sup>126</sup> The problem, according to the Court, was that the legislation provided no guidelines to the President in his regulation of the industry, nor did it require him to investigate the conditions that made prohibition of oil transportation necessary for economic recovery.<sup>127</sup> Congress, in short, had unlawfully delegated power to the President.<sup>128</sup> Notably, those Justices who typically advocated that government regulation was an answer to economic recovery, sided with the majority in *Panama Refining*. Specifically, Justices Brandeis, Stone, and Roberts agreed that an unconstitutional delegation of power had occurred.<sup>129</sup>

¶58 However, Justice Cardozo, the sole dissenter, seemed to believe the crisis had not abated and argued:

[It was] [b]eyond question prevailing conditions in the oil industry have brought about the need for temporary restriction in order to promote in the long run the fullest productive capacity of business in all its many branches, for the effect of present practices is to diminish that capacity by demoralizing prices and thus increasing unemployment.<sup>130</sup>

¶59 After the Court issued its decision in *Panama Refining*, it went on to issue anti-regulation opinions in *Schechter Poultry Corp. v. United States*,<sup>131</sup> *United States v. Butler*,<sup>132</sup> *Carter v. Carter Coal Co.*,<sup>133</sup> and various other cases, all of which struck down regulation intended to help the nation recover from the Great Depression. The problem, as noted above, is that the government adopted the policies and programs when the nation was unambiguously facing a major economic crisis, but by the time the controversy

<sup>123</sup> See *supra* Figure 1.

<sup>124</sup> 293 U.S. 388 (1935).

<sup>125</sup> Act of June 16, 1933, ch. 90, 48 Stat. 195 (repealed 1935). As background, the later-declared-unconstitutional National Industrial Recovery Act commanded mandatory self-regulation of virtually all of American business as a means to regulate free markets across a wide range of products. Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 535 (2003).

<sup>126</sup> *Panama Refining*, 293 U.S. at 416–17.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 436–37 (Cardozo, J., dissenting).

<sup>131</sup> 295 U.S. 495 (1935).

<sup>132</sup> 297 U.S. 1 (1935).

<sup>133</sup> 298 U.S. 238 (1936).

reached the Court, the state of the economy had notably improved, suggesting a dramatic legislative response was unnecessary and possibly counterproductive to the nation's interests.

¶60 Like *Panama Refining*, *Schechter Poultry* involved provisions of the NIRA intended to promote economic recovery via anti-competitive measures, this time in the context of the poultry industry, and included provisions addressing the number of hours for a workday, the number of employees, the volume of sales, and so forth.<sup>134</sup> Finding that the legislators had again unconstitutionally delegated power to the President, and that the legislation had exceeded Congress' commerce powers, the Court unanimously struck down the law.<sup>135</sup> In his opinion, Justice Hughes noted that "extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority."<sup>136</sup>

¶61 In 1934, the Court implied that economic crises necessitated legislation, but in *Panama Refining* and *Schechter*, the Court clearly established limits to what the elected branches could constitutionally do in pursuit of their goals.<sup>137</sup> Moreover, while they did not note the economic growth and prosperity that had begun to take place in these two cases, the reality was the nation had begun to recover, and in subsequent opinions the Court took on-the-record judicial notice of this fact.<sup>138</sup>

¶62 *United States v. Butler*<sup>139</sup> involved the Agricultural Adjustment Act of 1933, which levied a tax on agricultural products in order to defray the increasing costs of public expenditures during the economic emergency.<sup>140</sup> The majority struck down the levy noting that a "tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of the other."<sup>141</sup> Justices Stone, Brandeis, and Cardozo dissented, arguing that "a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money."<sup>142</sup>

¶63 Finally, our last illustration of the return to the *Lochner*-era involves *Carter v. Carter Coal Co.*,<sup>143</sup> a case challenging the Bituminous Coal Conservation Act of 1935, which contained various provisions intended to stabilize the coal mining industry and promote its interstate commerce.<sup>144</sup> The majority noted that Congress adopted the law to protect the general public interest, an object of "great worth," but went on to hold that Congress had no authority to act as it did.<sup>145</sup> In Justice Sutherland's words, the economic

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<sup>134</sup> 295 U.S. at 523.

<sup>135</sup> *Id.* at 550–51.

<sup>136</sup> *Id.* at 528.

<sup>137</sup> For *Panama Refining*, see *supra* notes 124, 126–130 and accompanying text; for *Schechter Poultry*, see *supra* notes 131, 134–136 and accompanying text.

<sup>138</sup> For *Panama Refining*, see *supra* notes 124, 126–130 and accompanying text; for *Schechter Poultry*, see *supra* notes 131, 134–137 and accompanying text.

<sup>139</sup> 297 U.S. 1 (1935).

<sup>140</sup> Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31.

<sup>141</sup> *Butler*, 297 U.S. at 61.

<sup>142</sup> *Id.* at 88 (Stone, J., dissenting).

<sup>143</sup> 298 U.S. 238 (1936).

<sup>144</sup> Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991.

<sup>145</sup> *Carter Coal*, 298 U.S. at 290–91.

evils that Congress sought to address were all local issues and, thus, only the States were constitutionally empowered to address them.<sup>146</sup> As the Court said,

[A]ll local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils which it is the object of the act to regulate and minimize are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.<sup>147</sup>

¶64 On the other hand, Justice Cardozo, in his dissenting opinion with Justices Brandeis and Stone, had a different perspective:

Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines. . . . The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. “When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.”<sup>148</sup>

¶65 The Court’s opinions in *Panama Refining*, *Schechter Poultry*, *Butler*, *Carter Coal*, and various other cases, generated more than a little outrage in the elected branches of government. Believing that the Court was standing in the way of the nation’s economic recovery (and not noting that it had already begun), President Roosevelt devised his notorious Court-packing plan to increase the size of the Court, thereby allowing additional appointments and effectively assuring judicial support for his New Deal legislation.<sup>149</sup> The Court’s anti-regulation position, along with the strong response by the President, seemed to indicate that the nation had descended into a constitutional crisis; this crisis, however, soon faded when the Court officially buried *Lochner*. Again,

<sup>146</sup> *Id.* at 308–09.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 330–33 (Cardozo, J., dissenting) (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933)). The dissenting opinion seems to be echoing an argument set forth in one of the briefs: “[O]verproduction, price slashing, wage cutting, all the results of unrestrained competition, cried aloud for regulation.” Brief of the State of Ohio as Amicus Curiae at 4, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (No. 649).

<sup>149</sup> See *supra* note 5 and accompanying text.

keep in mind that at the very time that the Court returned to its pro-government position, the depression had reappeared, which is in line with the theory outlined above that the Court would rationally respond to an economic crisis with a collaborate stance vis-à-vis the elected branches of government.

### C. *Lochner is Dead: Buried with the Return of the Economic Crisis*

¶66 In 1937, the Court issued a series of decisions supporting economic legislation and, as noted in the introduction to this Article, in 1938 the Court declared it would henceforth *presume* all commercial legislation would pass constitutional muster. The intra-Court debate with respect to the best means to promote economic prosperity—through a *laissez-faire* or pro-regulation approach—shifted to a decision-making strategy that called for complete deference to the policymakers.<sup>150</sup> The Court had finally and officially adopted the view of Justice Holmes’ dissenting opinion in *Lochner*: “[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”<sup>151</sup> For our purposes, it is important to note that, given the return of the depressionary conditions after just a short recovery, this judicial deference to the legislature was both justified and rational.

¶67 One of the first and most important decisions issued by the Court in 1937, during its so-called “switch in time,” was *West Coast Hotel Co. v. Parrish*.<sup>152</sup> In this case, the Court upheld a state law mandating a minimum wage for women, taking judicial notice of the “unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery that has been achieved.”<sup>153</sup> In sanctioning the law, the Court overruled *Adkins*, which had been decided two decades earlier in the *laissez-faire* era of decision-making.<sup>154</sup> Similarly, in *NLRB v. Jones & Laughlin Steep Corp.*, the Court upheld legislation barring employers from interfering with employees’ involvement in labor organizations, taking judicial notice of the fact that self-organization “is often an essential condition of industrial peace, and that refusal to confer and negotiate has been one of the most prolific causes of strife.”<sup>155</sup> The Court addressed the earlier case *Coppage*, which struck down similar legislation, by simply stating it was not relevant to the case.<sup>156</sup>

¶68 Also in 1937, in *Steward Machine Co. v. Davis*,<sup>157</sup> the Court considered the constitutionality of the Social Security Act of 1935, which imposed an employment tax on states in order to facilitate an unemployment trust fund to subsidize those who had lost their jobs.<sup>158</sup> Undermining the recently decided *Carter Coal* case, the Court upheld the legislation, noting the benefits of setting up a federal unemployment fund by the statute, as “[federal government’s] possession of the moneys and . . . control of investments will

<sup>150</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 75–76 (1904) (Holmes, J., dissenting).

<sup>151</sup> *Id.* at 75.

<sup>152</sup> 300 U.S. 379 (1937).

<sup>153</sup> *Id.* at 399.

<sup>154</sup> *Id.* at 400.

<sup>155</sup> 301 U.S. 1, 42 (1937).

<sup>156</sup> *Id.* at 45.

<sup>157</sup> 301 U.S. 548 (1937).

<sup>158</sup> Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

be an assurance of stability and safety in times of stress and strain.”<sup>159</sup> Indeed, the Court even suggested that federal action would not create constraints, but rather “a larger freedom” as “a cooperative endeavor to avert a common evil”—namely, unemployment.<sup>160</sup> Apparently, the need to address unemployment was the primary purpose for the Court to uphold the statute:

During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. . . . There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.<sup>161</sup>

¶169 The Court continued to sanction state and federal legislation and to overturn earlier decisions that struck regulations as unconstitutional.<sup>162</sup> The judicial decisions, in effect, adhered to the standard of review set out in *Carolene Products* indicating that the Court would presume the constitutionality of all economic legislation.<sup>163</sup>

#### IV. CONCLUDING THOUGHTS

¶170 In this Article, we first discussed Brennan, Epstein, and Staudt’s theory of judicial decision-making that posits a “judicial business cycle”: a theory of the Supreme Court that argues the Justices will account for macroeconomic trends in the context of economic cases and controversies. While Brennan, Epstein, and Staudt investigated the theory with a large-*N* empirical study, in this Article we focused on the rhetoric and dicta in Court opinions to determine whether the Court judicially noticed economic conditions and used this information to inform its decision-making calculus. While the analyses presented above cannot *prove* that the judicial business cycle exists, it does offer substantial support for the theory, thereby evidencing its plausibility. Specifically, we found that many of the Depression-era cases can be understood as judicial attempts to foster economic growth and prosperity and should not be viewed merely as illustrations

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<sup>159</sup> *Steward Machine*, 301 U.S. at 596. Noting the importance of the law for addressing unemployment issues, litigants argued:

[T]he adoption of unemployment compensation systems . . . would mitigate the severity of depressions and the drain on the federal treasury in two ways: first, they would prevent that exhaustion of the resources of workers, charities and local governments which now occurs in ordinary periods of occasional unemployment long before any cyclical depression, and second, such systems would prevent the onset, or lessen the destructive effect of, cyclical depressions by making available to meet the emergency a stored-up fund of consumer purchasing power.

Brief of Respondents at 24, *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (No. 837) (internal citations omitted).

<sup>160</sup> *Steward Machine*, 301 U.S. at 587.

<sup>161</sup> *Id.* at 586–87.

<sup>162</sup> *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941) (upholding child labor laws and striking down *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

<sup>163</sup> *See* discussion *supra* note 2.

of judicial flip-flopping due to political pressures or inexorable legal developments as conventionally argued in the extant literature.

¶71 The cases and controversies that reached the Court in the first three decades of the twentieth century were particularly useful for purposes of understanding the judicial mind. In this period, the Court continually set forth a variety of economic viewpoints and explicitly accounted for the national economic conditions, suggesting these factors were important components to the decision-making process. While this type of rhetoric and dicta largely disappeared from the Court's opinions with the 1938 decision in *Carolene Products*, we believe the Court continues to worry about economic issues, and sub silencio uses its statutory interpretation powers to achieve exactly the same aims and goals pursued in all the eras discussed in this Article. This belief is supported by the preliminary empirical findings set forth in prior work on the judicial business cycle,<sup>164</sup> but warrants quite a bit more qualitative and quantitative investigation.

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<sup>164</sup> See *supra* note 13 and accompanying text.