NOTICE AND THE NEW DEAL

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ABSTRACT

The New Deal Supreme Court revised a well-known set of constitutional doctrines. Legal scholarship has principally focused on the changes that occurred in three areas—federalism, delegation, and economic liberty. This Article identifies a new and important fourth element of New Deal constitutionalism: a change in the constitutional doctrine of due process notice, the doctrine that specifies the minimum standards for constitutionally adequate notice of the law. The law of due process notice—which includes the doctrines of vagueness, retroactivity, and the rule of lenity—evolved dramatically over the course of the New Deal to permit lesser clarity and to tolerate more retroactivity. The upshot has been the near-total elimination of successful notice-based challenges other than in the limited context of First Amendment vagueness attacks.

Unlike the more famous doctrinal changes of this period, changes to due process notice doctrine were not obviously necessary to accommodate the New Deal legislative agenda, either as a matter of jurisprudence or as a matter of politics. Due process notice doctrine nonetheless underwent a radical transformation in this era, as the Court came to regard its broader shift toward deferring to legislative and executive policy decisions as requiring the relaxation of due process notice doctrine. The link forged between deference and notice had significant functional effects on the most important audience for the Court's notice jurisprudence—Congress. By loosening the strictures of due process notice doctrine, the Court lowered sharply the enactment costs of federal legislation and thereby facilitated its proliferation. This is a distinct, and hitherto unacknowledged, mechanism by which the Court in this period enhanced national

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power and encouraged the flourishing of the emerging administrative state.

Like much of the New Deal "settlement," the New Deal reformulation of due process notice doctrine is today the subject of ferment in the courts. Recognizing the New Deal roots of due process notice doctrine is critical for understanding these ongoing judicial debates—and for beginning the conceptual work of mapping the future shape of this vital cluster of doctrines.

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INTRODUCTION

It is an oft-told tale. In the latter half of the 1930s, with the country in the grip of the Great Depression, the Supreme Court reversed course on three constitutional issues of vital significance to President Roosevelt's legislative agenda for economic recovery. The Court abandoned the doctrine of liberty of contract,[1] it approved congressional delegations to federal regulatory agencies,[2] and it embraced an expansive view of Congress's legislative powers under

1. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 406 (1937).

2. *See* Mistretta v. United States, 488 U.S. 361, 373 (1989) ("Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress' ability to delegate power under broad standards." (citations omitted)).

Article I.[3] By thus reformulating the rights of individuals, of the federal government, and of the states, New Deal constitutionalism upended the existing architecture of American government and laid the groundwork for the subsequent flourishing of the administrative state.[4]

On the list of doctrinal changes that make up New Deal constitutionalism, the most famous entries are the revisions to the doctrines of economic due process, delegation, and federalism.[5] A longer version of the list espoused by some scholars also includes the New Deal Court's emerging solicitude for civil and political rights,[6] its approval of augmented presidential powers over foreign affairs,[7] and its shifting treatment of common-law sources.[8] But another significant change that also occurred in this period has gone unremarked by courts and commentators: a transformation in the constitutional law of due process notice.

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3. *See* United States v. Darby, 312 U.S. 100, 114 (1941) ("The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.'" (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824))); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–37 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' . . . ." (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870))).

4. *See* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 (1996) (calling the New Deal a "substantial reformation of the original constitutional structure above all because it refashioned the three basic cornerstones of that structure: federalism, checks and balances, and individual rights").

5. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 64 (1991) ("After Roosevelt's court-packing threat, the Supreme Court retreated from its former role as the guardian of economic liberty. Economic regulations were given a very strong presumption of validity . . . ."); *id*. at 73–74 ("Before the New Deal, the commerce clause was given a relatively narrow reading. . . . Since 1937, the scope of congressional power under the commerce clause has steadily expanded."); *id*. at 78–79 ("In its abortive attack on the New Deal, one of the instruments used by the Court was the delegation doctrine. . . . The Court quickly retreated from the rigidity of the 1935 cases."); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 3 (2000) (describing the "standard areas" of New Deal constitutionalism); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 421–22, 425 (1987) (discussing "three aspects of New Deal constitutionalism: the rejection of the original constitutional commitment to checks and balances in favor of independent and insulated regulatory administration, the recognition of substantive entitlements beyond those protected at common law, and the abandonment of principles of federalism that vested regulatory authority in both the federal government and the state").

6. Barry Cushman, *The Great Depression and the New Deal*, *in* 3 CAMBRIDGE HISTORY OF LAW IN AMERICA 268, 309 (Michael Grossberg & Christopher Tomlins eds., 2008).

7. *Id.* at 283.

8. WHITE, *supra* note 5, at 3.

Due process notice doctrine addresses a simple, core question: What degree of notice of the law is constitutionally required? This issue has recently received attention in the context of vagueness challenges and in immigration cases addressing the retroactive effects of legislative amendments.[9] All areas of law, however, rest upon the predicate assumption that some constitutionally adequate notice exists.[10] The doctrine is the constitutional expression of the Anglo-American view that secret law is the essence of tyranny.[11]

This Article takes as its vantage point the doctrine of due process notice and recounts the story of New Deal constitutional change from this vantage point. Adopting this perspective brings into view several important and linked doctrinal developments that have, until now, remained either obscure or unconnected. Vagueness doctrine, retroactivity, and the key methods of statutory interpretation that relate to due process notice all changed during this period,[12] and they all changed in the same way: to permit less clarity and predictability in the law.

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9. *See* Vartelas v. Holder, 132 S. Ct. 1479, 1483–84 (2012); Skilling v. United States, 130 S. Ct. 2896, 2925 (2010).

10. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." (citations omitted)).

11. *See* LON FULLER, THE MORALITY OF LAW 39 (1964) (explaining that a secret law does "not simply result in a bad system of law; it results in something that is not properly called a legal system at all"). Jeremy Bentham, who not coincidentally invented the word "codification," supplied a famous exposition of this concept: "[W]e have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of." 5 JEREMY BENTHAM, *Justice and Codification Petitions*, *in* THE WORKS OF JEREMY BENTHAM 437, 547 (John Bowring ed., 1962); *see also* Screws v. United States, 325 U.S. 91, 96 (1945) (referring to "the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it'" (quoting SUETONIUS, LIVES OF THE TWELVE CAESARS 278 (121))); Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 779, 797 (1967) (calling secret law "an abomination" and "forbidden").

12. "[T]he New Deal was not an altogether sudden break; it should instead be understood as the culmination of a set of ideas with much earlier foundations." Sunstein, *supra* note 5, at 422 n.1. The full flowering of many of these ideas only occurred in the 1940s. *See* WHITE, *supra* note 5, at 165 (noting that "contemporaries in the 1940s remarked on the unusual magnitude of changes that were taking place" in Commerce Clause, due process, Contracts Clause, and separation-of-powers doctrines). Accordingly, this Article treats the New Deal era as encompassing the period between the early 1930s and the mid-1940s. This approach typifies much scholarship on New Deal constitutional change, both by historians and by legal scholars. *See, e.g.*, WHITE, *supra* note 5, at 199; Sunstein, *supra* note 5, at 438.

Interestingly—and perhaps surprisingly, considering the wealth of scholarship on the era—this insight is novel.[13] Consider one much-discussed aspect of constitutional due process notice doctrine: the doctrine of vagueness. In prominent accounts of New Deal constitutionalism, vagueness doctrine makes little or no appearance.[14] Conversely, scholars writing about vagueness do not give prominence to how the doctrine evolved in the New Deal era.[15] Yet it was in the New Deal era that key elements of modern vagueness doctrine were developed.

Three important aspects of the modern law of vagueness were settled during the New Deal period. First, the Court tightened its standards for sustaining facial vagueness challenges to laws outside the First Amendment context.[16] Second, it started to treat civil economic laws as categorically subject to relaxed scrutiny for vagueness.[17] Third, with respect to criminal laws, the Court adopted the practice of treating mens rea requirements as a substitute for clarity in legislative language.[18]

Viewed separately or in combination, these principles worked a considerable change in the substance and procedure of vagueness challenges. But the notice jurisprudence of this period did more than merely transform vagueness. The Court changed its treatment of the rules pertaining to retroactivity, another doctrine that serves values of

13. *Cf.* Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 502–03 (1994). Professor Post's article examines how one pre-New Deal vagueness decision revealed the Supreme Court's political proclivities at the time—in his characteristically vivid phrase, "the subterranean paths through which the ideological perspective that dominated the Court during the 1920s exercised its influence." *Id.* at 502. Put in these terms, the aim of this Article is to show how the New Deal Supreme Court dug up and repaved those "subterranean paths" as its ideological perspective altered over the span of the New Deal.

14. *See, e.g.*, WHITE, *supra* note 5; Cushman, *supra* note 6; Sunstein, *supra* note 5.

15. *See, e.g.*, Andrew E. Goldsmith, *The Void-For-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003); Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 268 (2010). The chief exception is the seminal fifty-year-old student note by Professor Anthony Amsterdam. *See* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Professor Amsterdam supported his view of the role of the vagueness doctrine as "chiefly an instrument of buffer-zone protection" by citing "the very pattern of incidence of the void-for-vagueness cases, first in the sphere of economics at a time when economics was the sphere where the Court rode tightest rein on legislative innovation, and today in the now most critical field of free expression." *Id.* at 84–85.

16. *See infra* Part II.A.1.

17. *See infra* Part II.A.2.

18. *See infra* Part II.A.3.

fair warning and notice.[19] Shifts of comparable heft occurred in the Court's application of the rule of lenity, a canon of statutory construction that likewise implicates notice.[20] In sum, while it famously used one aspect of vagueness doctrine to build a "buffer zone" of protection around the exercise of certain individual liberties,[21] the Court in this era also—less famously but no less critically—used the bulk of due process notice doctrine to create a "buffer zone" that would shield the exercise of government power from challenge by regulated individuals.

This reformulation of due process notice jurisprudence presents a puzzle. If the legislative agenda of the New Deal was going to go forward, certain changes in constitutional doctrine were inevitable. There *had* to be increased national power under the Commerce Clause. There *had* to be a generous understanding of congressional power to delegate. There *had* to be an erosion of constitutional protections for liberty of contract. In contrast, changes to due process notice doctrine have no self-evident connection to the fulfillment of the New Deal's institutional program.

Why, then, did due process notice doctrine change in this period? The timing of these doctrinal changes was not a coincidence. The Court's opinions reveal that the Justices debated how due process notice doctrine should be altered and ultimately came to embrace the view that a relaxed due process notice was a necessary component of the Court's larger project of establishing judicial deference to the political branches on matters of economic and social policy.

The forging of this link between notice and deference had notable consequences. By relaxing the constraints of due process notice doctrine, the Court sharply lowered the costs of enacting federal legislation and thus facilitated its proliferation. By thus boosting Congress's lawmaking capacity, the Court's reformulation of due process notice doctrine helped to pour the foundation upon which its coequal branches would build the modern regulatory state.

The Article proceeds in four parts. Part I introduces the main features of due process notice doctrine. Part II recounts how the

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19. *See infra* Part II.B.

20. *See infra* Part II.C.

21. *See* Amsterdam, *supra* note 15, at 75 ("The primary thesis advanced here is that the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.").

Court altered central aspects of this doctrine during the New Deal in a manner that permitted less clarity in legislative language and became more tolerant of retroactive changes in legislative language. Part III sets out opinions that reflect the Court's rationale for these changes and then discusses the functional effects of the Court's reformulation of due process notice doctrine on the enactment costs of federal legislation. Part IV explains that the New Deal reformulation of due process notice, like much of the New Deal "settlement," is today under pressure. In several noteworthy recent opinions, and in both criminal and civil contexts, the Supreme Court has rejoined battles over the bounds of notice doctrine fought during the New Deal. Interestingly, many of these opinions share a common feature: they concern confusing federal statutes and complex federal regulatory schemes, and the judicial demand for better notice appears to flow from the perception that statutory and regulatory complexity poses a threat to the values of notice. As these new considerations of legal complexity draw modern judges to reassess the protections necessary to secure adequate notice, the buffer zone of deference erected during the New Deal is showing signs of fragility. For the second time in a century, due process notice is in play as a tool for restraining the scope and reach of federal law.

I. THE FACETS OF DUE PROCESS NOTICE DOCTRINE

The most familiar aspect of the modern conception of due process notice is vagueness doctrine. To quote the conventional formulation of this rule, vagueness doctrine "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[22] "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment,"[23] and it thus applies to all laws, not merely those affecting expressive activity.[24]

Vague laws imperil two important values. First, vague laws are hard to follow and threaten to trap the innocent: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a

22. United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

23. United States v. Williams, 553 U.S. 285, 304 (2008).

24. *Id.*

reasonable opportunity to know what is prohibited, so that he may act accordingly."[25] Second, vague laws permit arbitrary and discriminatory enforcement: "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[26]

Application of modern vagueness doctrine depends in four important ways upon the nature of the enactment, whether statutory or regulatory, under attack for vagueness. First, "economic regulation is subject to a less strict vagueness test" than noneconomic regulation.[27] Second, enactments with civil penalties are subject to a less exacting test for precision than enactments carrying criminal penalties.[28] Third, a scienter requirement may "mitigate a law's vagueness" because such a requirement might provide some assurance of "the adequacy of notice to the complainant that his conduct is proscribed."[29] Finally, "perhaps the most important factor" affecting the vagueness analysis is the question whether the law "threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[30]

Apart from vagueness doctrine, the due process entitlement to "fair warning" and to an opportunity to comply with the law has other

25. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

26. *Id.* at 108–09. *Smith v. Goguen*, 415 U.S. 566 (1974), elevated this concern to "perhaps the most meaningful aspect of the vagueness doctrine," more meaningful than the value of notice, *id.* at 574; *see also* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting *Smith*, 415 U.S. at 574)).

27. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982). This is because the "subject matter" of economic regulation "is often more narrow," because "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action," and because "regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* at 498; *see also* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 48–49 (1966) (explaining that the statute was not vague in part because "the appellants will have access to the Authority for a ruling to clarify the issue"), *abrogated on other grounds by* Healy v. Beer Inst., Inc., 491 U.S. 324, 343 (1989).

28. *Vill. of Hoffman Estates*, 455 U.S. at 498–99.

29. *Id.* at 499.

30. *Id.*

"manifestations" as well.[31] Chief among them are the rule of lenity and the rules pertaining to retroactivity in the law. In the criminal context, the rule of lenity, which is "a sort of 'junior version of the vagueness doctrine,'" resolves ambiguity in a criminal statute so that the statute will apply "only to conduct clearly covered."[32] The conventional formulation of the rule of lenity is the maxim that "penal statutes should be strictly construed against the government."[33] By encouraging precision in the drafting of criminal statutes, this rule protects the criminal defendant's right to receive sufficient notice that she might be breaking the law.[34]

Limitations on the retroactive application of laws also protect the values of notice and fair warning that underlie constitutional due process notice. If a rule is applied retroactively, the targets of the rule will be subjected to a legal regime that they could not have anticipated. Retroactive application of a new rule thus has the potential to cause unfair surprise, thereby threatening the value of fairness that due process notice doctrine seeks to serve.[35] Animosity to retroactivity is "deeply rooted" in American law and "embodies a legal doctrine centuries older than our Republic": the notion that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[36]

The rules on retroactivity apply differently in the criminal and the civil contexts. The constitutional prohibition on *ex post facto* laws

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31. United States v. Lanier, 520 U.S. 259, 266 (1997) (identifying "three related manifestations of the fair warning requirement": vagueness doctrine, the rule of lenity, and the prohibition against retroactive application of statutes, including the rule that prohibits "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

32. *Id.* (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1968)).

33. 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59:3, at 125 (6th ed. 2001).

34. McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."). The fit between the rule and the value of notice may only be a partial one. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2425 (2006) (arguing that "fair notice is at most a partial justification for the rule of lenity").

35. *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 527–28 (1987) ("Prospectivity is an essential requirement of the rule of law because only prospective laws allow citizens to plan their conduct so as to conform to the law.").

36. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

bars legislatures from retroactively criminalizing conduct.[37] As a matter of due process, courts are likewise barred from applying "a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[38]

In the civil context, in contrast, no *per se* barrier exists to the retroactive application of statutes as such; the mere fact of retroactivity is not enough to require invalidation of a statute.[39] Courts do, however, interpret statutes in accordance with a presumption against retroactivity, which is in effect a clear-statement rule requiring Congress to state unambiguously when it wishes a statute to "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[40] If the language meets this clear-statement test, the Court will then consider whether the legislation has an impermissibly retroactive effect as a matter of substantive due process.[41] This inquiry can turn on a variety of factors, including whether the law affects procedural or substantive rights, whether it appears punitive, and whether it creates new liabilities where none

37. U.S. CONST. art. I, § 9, cl. 3; *see also* United States v. Tynen, 78 U.S. 88, 95 (1871) ("There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence.").

38. United States v. Lanier, 520 U.S. 259, 266 (1997); *see also* Bouie v. City of Columbia, 378 U.S. 347, 353–54 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred' must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." (citations omitted) (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 58–59 (2d ed. 1960))).

39. *See Landgraf*, 511 U.S. at 267 ("[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.").

40. *Id.* at 280 ("When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 237 (1995) ("[T]he traditional rule, confirmed only last Term, [is] that statutes do *not* apply retroactively *unless* Congress expressly states that they do.").

41. *See* INS v. St. Cyr, 533 U.S. 289, 321 (2001) (noting that the judgment as to whether a statute acts retroactively "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations" (quoting Martin v. Hadix, 527 U.S. 343, 358 (1999)) (internal quotation marks omitted)).

previously existed,[42] but the overarching inquiry focuses on "considerations of fair notice, reasonable reliance, and settled expectations."[43]

This (perhaps dry) mapping of the black-letter components of modern due process notice doctrine should not obscure the overarching and common significance of these rules. Supreme Court precedent protects the values of notice and fair warning both through substantive doctrines and through canons of construction and in both the civil and criminal contexts. Although these doctrines are not generally spoken of as a cluster, they are deeply interconnected. Part of the project of this Article is to show the links between these doctrines and how they move in concert. The next Part explains how the Court reshaped the chief contours of these doctrines over the span of the New Deal.

II. THE NEW DEAL REFORMULATION OF DUE PROCESS NOTICE DOCTRINE

Concerns about due process notice would have loomed much larger at the beginning of the New Deal than they do today. In the early 1930s, the possibility of secret law was not merely hypothetical. One of the capstone achievements of President Roosevelt's first New Deal, the National Industrial Recovery Act (NIRA)[44] resulted in the production of law at a rate that made it no mean feat merely to find applicable positive law. Hundreds of codes prohibiting thousands of practices were approved by the National Recovery Administration (NRA), the agency responsible for implementing the NIRA.[45] There

42. *Landgraf*, 511 U.S. at 282–83.

43. *Id.* at 270.

44. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (terminated by Exec. Order No. 7252 (Dec. 21, 1935), *reprinted in* 15 U.S.C. §§ 703–712 (2006)).

45. *See* GARY DEAN BEST, PRIDE, PREJUDICE, AND POLITICS: ROOSEVELT VERSUS RECOVERY, 1933–1938, at 79 (1991) (noting that "between 4,000 and 5,000 business practices were prohibited," roughly 3,000 administrative orders spanning over 10,000 pages were promulgated, and "innumerable opinions and directions from national, regional, and code boards" interpreted and enforced the NIRA's directives (quoting Raymond Clapper, *Between You and Me: Business Men To Protest NRA Arbitrary Legal System When Congress Meets*, WASH. POST, Dec. 4, 1934, at 2) (internal quotation mark omitted)); Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 199 (1934) ("In the first year of the National Recovery Administration, 2998 administrative orders were issued. In addition to these, the Recovery Administration has adopted numerous regulations and sets of regulations which are to be found scattered among 5991 press releases during this period. It has been estimated that the total amount of 'law'

was not yet a *Federal Register* to collect and disseminate such pronouncements.[46] The NRA "boasted" that it "would not be bound by 'legalisms'" or "legalistic requirements" in its lawmaking.[47] But the practical effect of the NRA's stance was that it "dispense[d] with one of the most basic elements of a fair legal system: notice through published laws."[48]

An explicit example of the New Deal Court's concerns about notice appears in a case that is famous for an entirely different reason: because it is one of just two instances in which the Supreme Court has struck down a statute as an unconstitutional delegation of power to the executive branch. *Panama Refining Co. v. Ryan*[49] addressed a section of the NIRA that prohibited transportation in commerce of oil produced or withdrawn in excess of state laws or regulations.[50] The portion of the Petroleum Code limiting oil production had been rescinded by executive order.[51] But because of a "failure to give appropriate public notice of the change in the section," this rescission was, for all intents and purposes, unknown even to "the persons affected, the prosecuting authorities, and the courts."[52] Lurking in the backdrop of the Court's invalidation of the challenged section of the NIRA as an unconstitutional delegation of legislative power[53] was the Court's jarring recognition that the vast executive power created by the NIRA could be wielded secretly—in a manner unbeknownst to litigants as sophisticated as those practicing before the nation's highest court. Even Justice Cardozo, though he would have upheld the NIRA's delegation of authority, wrote that

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evolved during the first year of the NRA's activities exceeds 10,000 pages, probably a greater volume than the total amount of statute law contained in the United States Code.").

46. *See* Griswold, *supra* note 45, at 198–99, 203–05.

47. Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1126–28 (1997).

48. *Id.* at 1127.

49. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

50. *Id.* at 405–06.

51. *Id.* at 412 ("The controversy with respect to the provision of § 4 of Article III of the Petroleum Code was initiated and proceeded in the courts below upon a false assumption. That assumption was that this section still contained the paragraph (eliminated by the Executive Order [6199] of Sept. 13, 1933) by which production in excess of assigned quotas was made an unfair practice and a violation of the Code."). *See also* PETER H. IRONS, THE NEW DEAL LAWYERS 70–71 (1982).

52. *Panama Ref.*, 293 U.S. at 412.

53. *See id.* at 415 ("[Section 9(c)] gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.").

"[o]ne must deplore the administrative methods that brought about uncertainty for a time as to the terms of executive orders intended to be law."[54]

Today, it is unthinkable that parties could litigate a case up to the Supreme Court without knowing whether or not the provisions they were arguing over still existed. But for the Court during the 1930s, the absence of notice of the law was a tangible possibility, not merely conjectural. Moreover, and this is perhaps the more important point, the lapse in notice of the law came to the Court wrapped in a challenge to the heart of the first New Deal agenda, with its centralized planning, its industrial codes of law, and its innovative administrative methods.

With this context in mind, the discussion below analyzes how the Court's stance on due process notice changed as the New Deal era unfolded.

A. Vagueness

The years between 1914 and 1932 saw the birth of the void-for-vagueness doctrine, which is to say, the transformation of vagueness doctrine from a canon of statutory construction into a substantive doctrine for invalidating statutes.[55] By *Connally v. General Construction Co.*,[56] in which it coined the still-current verbal formulation of the doctrine,[57] the Court had struck down criminal statutes as vague on several occasions.[58] By 1931, the requirement of definiteness in statutory standards had "rapidly crystallized into an imposing doctrine of constitutional law."[59] The Court during this period held that statutory standards for "'unreasonable prices,'

54. *Id.* at 434 (Cardozo, J., dissenting).

55. *See* Lockwood, *supra* note 15, at 268 ("Although it is not easy to pinpoint the genesis of the void for vagueness doctrine, at some point near the decision in *Nash* [*v. United States*, 229 U.S. 373 (1914)], a law's vagueness was seen as violating the right of due process. This determination allowed the United States Supreme Court to invalidate vague federal or state enactments in a variety of disciplines as unconstitutional." (footnote omitted)).

56. Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).

57. *See id.* at 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

58. Note, *Indefinite Criteria of Definiteness in Statutes*, 45 HARV. L. REV. 160, 160–61 (1931).

59. *Id.* at 160.

'reasonable profits,' 'real value' and 'current rate of wages'" were unconstitutionally vague.[60]

Considerations of vagueness formed a component or a backstop to many of the pre-New Deal Court's most notorious holdings. The most obvious examples are the nondelegation cases.[61] Both landmark nondelegation decisions from this era—*A.L.A. Schechter Poultry Corp. v. United States*[62] and *Panama Refining*—faulted the vagueness of the statutes under attack.[63] But vagueness also played a part in other important cases from this period with less evident connections to legislative clarity. The famous *Adkins v. Children's Hospital*,[64] in which the Court invalidated minimum-wage laws in Washington, D.C.,[65] was not just a case about liberty of contract, but a case about vagueness as well.[66] Likewise, *Morehead v. New York ex rel. Tipaldo*,[67]

60. *Id.* at 162–63 (footnotes omitted) (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 84 (1921); Cline v. Frink Dairy Co., 274 U.S. 445 (1927) *passim*; Int'l Harvester Co. v. Kentucky, 234 U.S. 216 (1914) *passim*; and *Connally*, 269 U.S. 385 *passim*); *see also, e.g.*, Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 243 (1932); Smith v. Cahoon, 283 U.S. 553, 567 (1931); *Connally*, 269 U.S. at 393–94; A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 238–42 (1925).

61. Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 320 (2000) (noting that the nondelegation doctrine is "closely connected to the void for vagueness doctrine, requiring that certain laws be clear rather than open-ended").

62. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

63. *Id.* at 530–31 ("As to the 'codes of fair competition,' . . . the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed. What is meant by 'fair competition' as the term is used in the act? . . . [I]s it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficient provisions . . . ?" (quoting National Industrial Recovery Act § 3, ch. 90, 48 Stat. 195, 196 (1933))); Panama Ref. Co. v. Ryan, 293 U.S. 388, 418 (1935) ("[The law] speaks, parenthetically, of a possible temporary restriction of production, but of what, or in what circumstances, it gives no suggestion. The section also speaks in general terms of the conservation of natural resources, but it prescribes no policy for the achievement of that end. It is manifest that this broad outline is simply an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections."). The Court's holdings in these cases, by the way, were not inevitable. Some theories of improper delegation do not turn on the clarity of the instructions given by Congress. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 420 (Scalia, J., dissenting) (contending that where "a pure delegation of legislative power" exists, it becomes "irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers" but instead "are, plainly and simply, standards for further legislation").

64. Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

65. *Id.* at 561.

66. *See id.* at 555 ("The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy.

which is more generally thought of as a liberty-of-contract case, held that the New York minimum-wage statute for women workers was unconstitutionally vague.[68]

After the New Deal, the Court showed much less concern with vagueness. The Court rejected vagueness challenges to a variety of statutes, both civil and criminal.[69] These holdings were occasionally joined with cases about federalism or liberty of contract. So, for example, when the Court famously rejected federalism challenges to

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What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so."); *see also* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 614 (1936) (noting that "an additional ground of subordinate consequence" in *Adkins* was its "ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid").

67. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

68. *Id.* at 608 ("The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer." (quoting People *ex rel.* Tipaldo v. Morehead, 200 N.E. 799, 801 (N.Y. 1936)) (internal quotation marks omitted)).

69. *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 579–80 (1973) (rejecting a vagueness challenge to the Hatch Act, ch. 410, 53. Stat. 1147 (1939) (amended), which prohibited federal employees from taking an active part in political management or in political campaigns); Boutilier v. INS, 387 U.S. 118, 119 (1967) (rejecting a vagueness attack to a statute making an alien who was homosexual subject to deportation for "sexual affliction"); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 48–49 (1966) (rejecting a vagueness attack to a state alcohol-control statute), *abrogated on other grounds by* Healy v. Beer Inst., Inc., 491 U.S. 324, 343 (1989); United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 33 (1963) (holding that the Robinson-Patman Act, ch. 592, 52 Stat. 1526 (1936), gave sufficient warning that selling below cost for the purpose of destroying competition is unlawful); Barsky v. Bd. of Regents, 347 U.S. 442, 443, 448 (1954) (holding that a New York statute authorizing disciplinary action against physicians was not unconstitutionally vague); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (noting that the scienter requirement of knowledge or willful neglect in a federal regulation did "much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid"); Jordan v. De George, 341 U.S. 223, 232 (1951) (holding that the phrase "crime involving moral turpitude" does not render a deportation statute unconstitutional for vagueness (internal quotation marks omitted)); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 385–86, 412–13 (1950) (rejecting a vagueness attack on a federal statute that conditioned recognition of a labor organization on affidavits by its officers that they do not belong to the Communist Party); United States v. Petrillo, 332 U.S. 1, 5–8 (1947) (rejecting a vagueness attack on a federal statute that criminalized featherbedding); United States v. Ragen, 314 U.S. 513, 523–24 (1942) (rejecting a vagueness attack on a provision of federal income tax law); Neblett v. Carpenter, 305 U.S. 297, 303 (1938) (holding that certain provisions of the California Insurance Code, ch. 145, 1935 Cal. Stat. 496, are not so vague that "no one can determine what powers are intended to be conferred upon the Commissioner"); *see also* Amsterdam, *supra* note 15, at 74 n.38 ("Since the advent of the New Deal Court, . . . there has been one economic vagueness case . . . .").

the Fair Labor Standards Act of 1938 (FLSA)[70] in *United States v. Darby*,[71] it also rejected the defendant's vagueness challenge to the provision of the act that criminalized the transportation in commerce of goods that had been produced in violation of the act.[72] And the newly loosened standards for clarity had important effects on cases addressing legislative delegations of authority to executive agencies because the Court was no longer inclined to void such delegations for impermissible vagueness.[73]

The Court's treatment of First Amendment vagueness attacks evolved in the opposite fashion. In the pre-New Deal period, the Court did not favorably regard vagueness challenges on First Amendment grounds; vagueness challenges "received short shrift" in free speech cases.[74] In contrast, First Amendment vagueness challenges began to gain traction by the late 1930s, and thereafter developed into a formidable edifice of law.[75]

Several distinct doctrinal shifts account for these tectonic changes in vagueness cases. First, the Court tightened its standards for sustaining facial attacks to the vagueness of laws. Second, the Court altered its pre-New Deal methods for determining the substantive vagueness of civil economic statutes. Third, the Court insulated criminal laws from vagueness attacks by starting to treat mens rea requirements as a substitute for legislative clarity.

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70. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006 & Supp. IV 2011)).

71. United States v. Darby, 312 U.S. 100 (1941).

72. *Id.* at 125–26 ("One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required.").

73. *See, e.g.*, United States v. Rock Royal Coop., 307 U.S. 533, 574 (1939) ("In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable.").

74. Amsterdam, *supra* note 15, at 74 n.38; *see also, e.g.*, Fox v. Washington, 236 U.S. 273, 277 (1915) (upholding the constitutionality of a law criminalizing the editing of printed matter advocating disrespect for the law); Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 247 (1915) (upholding the constitutionality of a law creating a board of censors for motion pictures).

75. *See generally* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938); Herndon v. Lowry, 301 U.S. 242 (1937); *see also* Amsterdam, *supra* note 15, at 74 n.38 (noting the proliferation of First Amendment vagueness cases in the post-New Deal era).

1. *Facial Challenges*. Before the New Deal and into the early New Deal period, the Court entertained and sustained numerous facial attacks to the vagueness of statutes, both civil and criminal, without establishing first whether the statute gave fair warning to the particular complainant before the Court.[76] As late as 1939, the Court in *Lanzetta v. New Jersey*[77] insisted that it was proper to rule on a facial attack to a New Jersey criminal statute that made it illegal for persons with a record of prior convictions and without a lawful occupation to consort in a "gang."[78] The Court's opinion made no reference to whether the challengers themselves had adequate notice that their conduct was prohibited.[79] The Court in this period took it "for granted that [facial] invalidation of a statute for vagueness was not precluded by a showing that the claimant or others had been fairly warned."[80] This was for a simple reason: "The certainty required by the Due Process Clause is not tested from the would-be violator's standpoint; the test is rather whether adequate guidance is given to those who would be law-abiding."[81]

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76. Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 242–43 (1932) (holding facially invalid a provision for the receivership of oil property in the case of an oil operator's violation of an act prohibiting waste on the ground that "it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law"); Smith v. Cahoon, 283 U.S. 553, 565 (1931) ("[A]ppellant has been held liable to the penalties of the Act for his disobedience to it as it stood when it was enacted. He was entitled at that time to assert his constitutional right by virtue of the invalidity of the statute upon its face."); Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927) (holding facially invalid a Colorado antitrust law because of its vagueness); Connally v. Gen. Constr. Co., 269 U.S. 385, 395 (1926) (holding facially invalid an Oklahoma statute regulating wages and hours because of its vagueness); A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 238–42 (1925) (holding facially invalid a statute prohibiting the exaction of unreasonable prices for necessaries because of its vagueness); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921) (holding facially invalid section 4 of the Lever Act, ch. 53, 40 Stat. 276 (1917) (amended), because of its vagueness); *see also* Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 223–24 (1914) (reversing convictions under vague Kentucky antitrust legislation using a rationale amounting to facial invalidation).

77. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

78. *Id.* at 452–53; *see also id.* at 453 ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." (citations omitted)).

79. *See id.*

80. Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289, 1295 (1999). Although odd exceptions to this practice existed, "the opinions in these cases show no awareness of departure from the general practice." *Id.* at 1295–96.

81. United States v. Five Gambling Devices, 346 U.S. 441, 458 (1953) (Clark, J., dissenting).

In 1940, the Court created First Amendment overbreadth doctrine in *Thornhill v. Alabama*,[82] which expressly singled out First Amendment cases as being a special context in which facial attacks were endorsed.[83] Perhaps not coincidentally, the Court thereafter began to inquire into whether a statute was vague as applied to the challenger as a prerequisite to addressing a facial vagueness attack on a statute that did *not* implicate the First Amendment.

This shift was gradual, not absolute. In *Robinson v. United States*,[84] for example, the Court rejected a facial attack on a federal criminal kidnapping statute by citing the fact that the particular conduct charged against the defendant unquestionably came within the statutory proscription.[85] Two years later, however, in *United States v. Petrillo*,[86] the Court considered and rejected a facial attack on an economic criminal statute *without* considering whether the particular defendant charged had received adequate notice that his conduct was criminal.[87] In *Williams v. United States*,[88] the Court reverted to the *Robinson* approach and rejected a facial attack on a federal statute that prohibited extracting confessions by force because it was "plain as a pikestaff" that the confessions at issue were inadmissible evidence.[89] In *United States v. Harriss*,[90] which concerned the Federal Regulation of Lobbying Act,[91] the Court rejected a facial vagueness attack on the statute without first determining whether the defendants' conduct was unambiguously prohibited by it.[92]

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82. Thornhill v. Alabama, 310 U.S. 88 (1940).

83. *Id.* at 98.

84. Robinson v. United States, 324 U.S. 282 (1945).

85. *See id.* at 286 ("[W]e cannot doubt that a kidnapper who violently struck the head of his victim with an iron bar, as evidence showed that this petitioner did, comes within the group Congress had in mind. This purpose to authorize a death penalty is clear even though Congress did not unmistakably mark some boundary between a pin prick and a permanently mutilated body. It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all.").

86. United States v. Petrillo, 332 U.S. 1 (1947).

87. *See id.* at 5–6, 12 ("[T]he motion to dismiss on the ground of vagueness and indefiniteness squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case.").

88. Williams v. United States, 341 U.S. 97 (1951).

89. *Id.* at 101.

90. United States v. Harriss, 347 U.S. 612 (1954).

91. Federal Regulation of Lobbying Act, ch. 753, tit. III, 60 Stat. 839 (1946) (repealed 1995).

92. *Harriss*, 347 U.S. at 627.

And so it went. The Court's vacillating approach, however, hides an underlying consistency. In the above cases, the Court entertained facial attacks to the vagueness of nonspeech statutes. But *Lanzetta* appears to be the last case to expressly endorse and actually *sustain* a facial vagueness attack outside the First Amendment context without any inquiry into whether the law was vague as applied to the challenger.[93]

In 1963, the Court in *United States v. National Dairy Products Corp.*[94] made it explicit: in nonspeech cases, the challenger had to show that the law was vague as applied to her before she could prevail on a facial challenge.[95] Put another way, the Court's treatment of facial challenges to the vagueness of nonspeech statutes would thereafter merge with its treatment of *any* facial challenge to a nonspeech statute.[96] At this point, "non-speech overbreadth" for vagueness cases was *formally* interred, even though it had been

93. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). For a discussion of the Court's rare and silent departures from this rule for statutes implicating other preferred constitutional rights, see *infra* notes 100–101 and accompanying text. *United States v. Evans*, 333 U.S. 483 (1948), is not to the contrary. *Evans* sustained a facial attack on a statute that prohibited concealing and harboring aliens because of a legislative drafting error that made the penalty provisions of the statute incomprehensible. *Id.* at 495. As Professor Amsterdam notes, this was a case "involving a statute found so unclear as to be unenforceable, despite no want of adequate warning." Amsterdam, *supra* note 15, at 86 n.92.

94. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29 (1963).

95. *See id.* at 33 ("In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." (citing Robinson v. United States, 324 U.S. 282 (1945))); *id.* at 36 ("[T]he approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct."); *id.* ("We are thus permitted to consider the warning provided by [the statute] not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied."); *id.* at 37 ("National Dairy and Wise were adequately forewarned of the illegal conduct charged against them . . . ."); *see also* Hill, *supra* note 80, at 1295–96 ("[P]rior to 1963 it was taken for granted that invalidation of a statute for vagueness was not precluded by a showing that the claimant or others had been fairly warned. . . . *United States v. National Dairy Products Corp.* was the first instance of a considered refusal to decide the vagueness issue by facial analysis." (footnotes omitted)).

96. Professor Richard Fallon has shown that the Court does not obey consistently its professed rule that as-applied challenges have priority over facial challenges. *See* Richard H. Fallon, *Fact and Fiction About As-Applied and Facial Challenges*, 99 CALIF. L. REV. 915, 946 (2011) ("Although the Supreme Court sometimes says the contrary, it by no means always, or even typically, prefers as-applied to facial challenges . . . . To the contrary, the Court frequently eschews opportunities to decide cases on narrow, as-applied bases even when such bases are available."). In the subcategory of cases addressing facial vagueness challenges, however, the Court has hewed to its announced approach except in rare circumstances involving certain preferred constitutional rights. *See infra* notes 100–101 and accompanying text.

effectively defunct since *Lanzetta*. Subsequent holdings, such as those in *Parker v. Levy*[97] and *United States v. Mazurie*,[98] entrenched this approach, which continues to be applied in modern cases.[99] In recent decades, the Court has sporadically departed from this practice by facially invalidating statutes as vague when constitutional values were potentially at issue,[100] but these cases are hardly ringing endorsements of the general propriety of facial vagueness attacks.[101] By thus curbing the availability of facial vagueness attacks outside the First Amendment context, the Court sharply raised the bar for bringing a successful vagueness challenge.

2. *Civil Economic Legislation.* Vagueness doctrine had traditionally treated a term's common-law meaning or the conventions of its usage in a trade as sources of semantic content that could clarify otherwise ambiguous statutory terminology.[102] Thus,

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97. Parker v. Levy, 417 U.S. 733 (1974).

98. United States v. Mazurie, 419 U.S. 544 (1975).

99. *See id.* at 550 ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." (citing *Nat'l Dairy*, 372 U.S. 29)); *Parker*, 417 U.S. at 756 ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); *see also* Chapman v. United States, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed by [the statute], so the vagueness claim must be evaluated as the statute is applied to the facts of this case." (citing United States v. Powell, 423 U.S. 87, 92 (1975))); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495–500 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. . . . Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside." (footnote omitted)); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 304 (1994) ("The substantive law of vagueness does not require an exception to the *Salerno* presumption; indeed, it contains its own version. It is well established that a litigant whose conduct is clearly proscribed by a statute cannot complain that the statute would be ambiguous as applied to a third party.").

100. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999) (involving a facial attack on a city ordinance criminalizing loitering); Kolender v. Lawson, 461 U.S. 352 (1983) (involving a facial attack on a criminal loitering statute); *see also* Goldsmith, *supra* note 15, at 310 & nn. 298–302 (noting decisions involving vagrancy, loitering, price fixing, and abortion).

101. *See* Goldsmith, *supra* note 15, at 310 (noting that when the Court has sustained facial attacks to vagrancy and abortion laws, it has done so "without acknowledging it was doing so or discussing the propriety of such action").

102. *See* Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 242–43 (1932) ("The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty."); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[I]t will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they

whereas the intelligibility of a generally applicable statute would be tested by reference to a person of "ordinary intelligence"[103] or by reference to "well-settled" meaning,[104] a statute regulating businesses would be assessed by reference to whether it was comprehensible to those engaged in the regulated trade.[105] Economic laws, then, were not subjected to a qualitatively *lesser* test for vagueness; rather, they were subject to the generally applicable rule that a law provided adequate notice when it was comprehensible to those whom it regulated.

This methodology largely disappeared after the New Deal. The precise moment is difficult to pinpoint. The turning point may simply have been the "switch in time" cases authorizing rational economic legislation.[106] Or it may have been a byproduct or offshoot of the new line of First Amendment cases that emphasized with fresh vigor how important it was to protect *speech* from vague laws.[107] The method that took its place was the rule that economic laws are subject to relaxed vagueness review simply *because* they are economic laws, just as they are subject to minimal review for policy purposes. In the decades following the New Deal, it became uncontroversial to announce that "purely economic regulation" was subject to a less stringent vagueness standard.[108]

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employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common-law meaning . . . ." (citations omitted)); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925) ("Furthermore, the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing.").

103. *Cf. Connally*, 269 U.S. at 391 (noting that vagueness cases often turn on judicial determinations of what "men of common intelligence" would comprehend).

104. *Id.* (noting the role of "a well-settled common-law meaning" in saving statutes from vagueness challenges).

105. *See, e.g.*, *supra* note 102.

106. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *cf.* United States v. Carolene Prods., 304 U.S. 144, 152–53 n.4 (1938) (contrasting the level of scrutiny that is applicable in categories of cases involving preferred liberties with the level of scrutiny that is appropriate to "regulatory legislation affecting ordinary commercial transactions").

107. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 103–04 (1940) (acknowledging that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist," but further noting that the state may not curtail "the effective exercise of the right to discuss freely industrial relations which are matters of public concern").

108. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 573 n.10 (1974) ("Compare the less stringent requirements of the modern vagueness cases dealing with purely economic regulation."); Papachristou v. City of Jacksonville, 405 U.S. 156, 162–63 (1972) ("In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater

Separately, the New Deal Court altered its treatment of civil laws *vis-à-vis* criminal laws. Prior to the New Deal, the Supreme Court had held that civil statutes and criminal statutes were equally subject to void-for-vagueness analysis. The case that presented this question, *A.B. Small v. American Sugar Refining Co.*,[109] involved a breach-of-contract action over two sugar contracts.[110] The petitioner contended that the contracts were unenforceable because they violated the provision of the Lever Act[111] that forbade "unreasonable" profits on such sales.[112] In response, the seller argued that an earlier criminal case, *United States v. L. Cohen Grocery Co.*,[113] required the Court to reject the petitioner's defense because that case had held that the standard of "unreasonable" profits was an unconstitutionally vague standard for criminal liability.[114] The *Small* Court agreed that the reasoning of *Cohen* governed in the civil context:

> The defendant attempts to distinguish [*Cohen* and its progeny] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.[115]

The Court went on to state that legislation "declaring the transaction unlawful or stripping a participant of his rights under it" would equally fall within the rule of *Cohen*, and it approved the reasoning of several lower courts that had similarly held that civil

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leeway is allowed. . . . The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them." (citations omitted)); United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36 (1963) ("[In cases arising under the First Amendment] we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. No such factor is present . . . where the statute is directed only at conduct designed to destroy competition . . . ." (citations omitted)).

109. A.B. Small v. Am. Sugar Ref. Co., 267 U.S. 233 (1925).

110. *Id.* at 239.

111. Lever Act, ch. 53, 40 Stat. 276 (1917) (repealed by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359).

112. *Small*, 267 U.S. at 238.

113. United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

114. *Small*, 267 U.S. at 238.

115. *Id.* at 239.

statutes could be void for vagueness.[116] Two years later, the Court reiterated that the principle of due process forbidding vague legislation "has application as well in civil as in criminal legislation."[117]

After the New Deal, the Court's stance on this issue shifted in a subtle way that would ultimately prove important. The Court started to emphasize that criminal statutes were subject to more rigorous review for vagueness than civil statutes. The Court stated that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."[118] By 1951, the differential treatment was entrenched still more deeply. In *Jordan v. De George*,[119] the Court strongly implied that noncriminal statutes were presumptively exempt from vagueness attack when it stated that it was only entertaining a vagueness challenge to the civil immigration statute because of the "grave nature" of deportation.[120] Indeed, the Court in *Jordan* went on to state that the "*essential purpose* of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct."[121] The distinction for the purposes of vagueness analysis between civil and criminal laws was subsequently reiterated on several occasions,[122] and the modern rule continues to reflect this analytical divide.[123]

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116. *Id.*

117. Cline v. Frink Dairy Co., 274 U.S. 445, 463 (1927). Other vagueness challenges to civil statutes during the same era were not successful, but the Court never rested its rejection of these challenges upon the civil nature of the legislation under attack. *See, e.g.*, Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 196 (1936) ("[T]he phrases complained of are sufficiently definite, considering the whole statute . . . ."); Balt. & Ohio R.R. Co. v. Groeger, 266 U.S. 521, 523–24 (1925) ("[The language in question] is as definite and certain as is the common law rule; and to hold that the duty imposed cannot be ascertained would be as unreasonable as it would be to declare that the common law rule . . . is too indefinite to be enforced or complied with."); Miller v. Strahl, 239 U.S. 426, 434 (1915) ("Rules of conduct must necessarily be expressed in general terms and depend for their application upon the circumstances, and circumstances vary.").

118. Winters v. New York, 333 U.S. 507, 515 (1948).

119. Jordan v. De George, 341 U.S. 223 (1951).

120. *Id.* at 230–31 ("It should be emphasized that this statute does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes. Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation.").

121. *Id.* at 230 (emphasis added) (citing Williams v. United States, 341 U.S. 97 (1951)).

122. *See* Boutilier v. INS, 387 U.S. 118, 123 (1967) ("It is true that this Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions. However, this is where 'the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all . . . .'" (last alteration in original) (citation omitted) (quoting A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925))); Barenblatt v. United States,

This shift in the verbal articulation of the formula may seem a slight one—a mere change in emphasis, or perhaps a statement of an unobjectionable or obvious fact in a system of laws that frequently, and without much ado, treats civil and criminal laws quite differently. But insofar as vagueness doctrine was concerned, the Court's emphasis on the civil-criminal divide appears to have had more than slight consequences. Since the New Deal, the Supreme Court has not struck down a federal civil statute regulating economic behavior as void for vagueness.[124] On more than one occasion, it has reversed decisions by lower federal courts that have struck federal civil statutes as vague.[125] State or local civil statutes that have been held void for vagueness have implicated First Amendment values.[126] Conversely, vagueness challenges have retained some potency when levied against criminal statutes, usually state or local,[127] but occasionally federal.[128]

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360 U.S. 109, 137 (1959) (Black, J., dissenting) ("It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes.").

123. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

124. *See* Jeffrey I. Tilden, Note, Big Mama Rag*: An Inquiry into Vagueness*, 67 VA. L. REV. 1543, 1543 (1981) ("[*Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980),] marks the first time since 1925 [*Small*] that a federal court has declared [a federal civil statute] to be void for vagueness."). In *Big Mama Rag*, the D.C. Circuit held a Treasury regulation's definition of the term "educational" to be unconstitutionally vague in violation of the First Amendment. *Id.* at 1032. When, on rare occasions, lower courts have held that federal statutes are vague, the Supreme Court has rebuffed them. *See infra* note 125.

125. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 159 (1974) ("[T]he standard of 'cause' set forth in the Lloyd-La Follette Act[, 5 U.S.C. § 7501 (1970),] as a limitation on the Government's authority to discharge federal employees is constitutionally sufficient against the charges both of overbreadth and of vagueness."); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 568 (1973) (sustaining over vagueness and overbreadth challenges the Hatch Act's prohibition against federal employees taking an active part in political management or in political campaigns).

126. Hynes v. Mayor of Oradell, 425 U.S. 610, 611, 622–23 (1976) (invalidating a local ordinance "regulat[ing] most forms of door-to-door canvassing and solicitation"); Keyishian v. Bd. of Regents, 385 U.S. 589, 593–94, 604 (1967) (invalidating New York statutory provisions that made treasonable or seditious words or acts a ground for removal from the public school system or state employment); Baggett v. Bullitt, 377 U.S. 360, 361, 379–80 (1964) (invalidating Washington statutes requiring loyalty oaths as a condition of employment for teachers and state employees); NAACP v. Button, 371 U.S. 415, 425–26, 428–29 (1963) (invalidating a Virginia statutory provision that restricted the practice of advising prospective litigants to seek particular attorneys); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497, 504–06 (1952) (invalidating a New York statutory provision concerning licensing of motion pictures).

127. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 568 (1974) (invalidating a state statute prohibiting "flag-misuse"); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (invalidating a city vagrancy ordinance); Coates v. City of Cincinnati, 402 U.S. 611, 615–16

Although the Court continued to describe its stance as one of "greater tolerance" to vagueness in civil economic statutes than in criminal statutes,[129] this understates the case. The doctrine of due process notice fell into such desuetude in the civil economic context that, in 1983, Justice Brennan noted with evident surprise that the Court of Appeals for the Second Circuit "apparently believed that, in cases not involving criminal sanctions, formal administrative rulemakings, or activities protected by the First Amendment, the Due Process Clause imposes virtually no requirement of fair warning."[130] In short, judicial enforcement of minimal standards for linguistic clarity for civil economic legislation evaporated after the New Deal.

3. *Criminal Legislation*. Although criminal legislation remained subject to scrutiny for vagueness, the vulnerability of criminal legislation to vagueness attack diminished during the New Deal. The reason for this was that the Court settled upon a novel doctrinal tool for deflecting vagueness challenges to criminal statutes: the principle that a mens rea element in a criminal statute could mitigate a lack of clarity in its language.

Before the New Deal, the Court had used statutory mens rea elements in a different fashion—as a means to *protect* the interests of accused defendants in having notice of complex laws. In 1933, in *United States v. Murdock*,[131] the Court held that in the criminal tax context, the term "willfully" meant an "evil motive";[132] only the errors of the "purposeful tax violator" would meet the standard of

(1971) (invalidating a city loitering ordinance); Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966) (invalidating a statute that allowed a jury to "impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him"); Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (invalidating a state antigang statute).

128. *See, e.g.*, United States v. Cardiff, 344 U.S. 174, 176 (1952). For one explanation why the Court might adopt a different approach to federal and state statutes, see Amsterdam, *supra* note 15, at 83 n.80, 86–87 & nn.92–97.

129. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

130. Whisenhunt v. Spradlin, 464 U.S. 965, 969 (1983) (Brennan, J.) (dissenting from denial of certiorari). Justice Brennan went on to state that the Court had "frequently *entertained* claims that regulations of economic and professional activity are unconstitutionally vague, even when the law at issue depends on civil enforcement and has no apparent effect on First Amendment rights." *Id.* at 970 (emphasis added). This characterization is somewhat loose; the post-New Deal cases he cites may have "entertained" such challenges, but none actually *sustained* them.

131. United States v. Murdock, 290 U.S. 389 (1933).

132. *Id.* at 396 ("Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.").

willfulness.[133] The special *Murdock* construction of willfulness in the tax context is an "exception to the traditional rule" that ignorance of the law is no excuse, and it applies "largely due to the complexity of the tax laws."[134] In other words, within the isolated context of federal criminal tax laws, the Court treated a statutory willfulness term as *tightening* the standard for criminal culpability by reading such a term as requiring the government to prove a knowing violation of the tax law by the accused.[135]

After the New Deal, however, the jurisprudence of mens rea took an interesting tack in the context of vagueness challenges. The Court began to rely on mens rea terms—initially willfulness terms, but eventually other intent terms too—as a reason to rebut or deflect vagueness attacks on criminal statutes.

This was a curious turn. Logically speaking, mens rea and clarity are apples and oranges, or nonfungible goods. The presence of a mens rea requirement in a criminal statute cannot make otherwise unclear statutory language clear as to what it prohibits. But after rebuffing—or, more accurately, ignoring—the possibility of equating mens rea with clarity in several cases,[136] the Court eventually seized upon this method for quelling vagueness attacks.

On three occasions between 1936 and 1942, the Court cited a statute's scienter requirement as its basis for rejecting a vagueness

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133. Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 366 (1998) (quoting United States v. Bishop, 412 U.S. 346, 361 (1973)) (internal quotation marks omitted).

134. Cheek v. United States, 498 U.S. 192, 200 (1991); Davies, *supra* note 133, at 363, 366 ("In a long line of cases beginning in 1933 with *United States v. Murdock*, the Supreme Court repeatedly rejected arguments by the government that the maxim should preclude violators of the federal tax code from claiming that their ignorance or misunderstanding of the tax provisions excused their violations. . . . Throughout the tax decisions that followed *Murdock*, the Court repeatedly stressed the complexity of the tax code as the basis for its construction of the willfulness term." (footnotes omitted)).

135. The *Murdock* line survived the New Deal intact and continues to be applied in modern cases. *See* Bryan v. United States, 524 U.S. 184, 191–92 (1998); *Cheek*, 498 U.S. at 200. This rule has also been applied to antistructuring. *See* Ratzlaf v. United States, 510 U.S. 135, 136–37 (1994).

136. *See, e.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921) (striking down a Lever Act provision as vague without discussing the willfulness term). Mens rea was also noted, though in dicta, in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502–03 (1925), and *Omaechevarria v. Idaho*, 246 U.S. 343, 348 (1918). In both of these cases, the Court found the challenged laws specific enough to be comprehensible to the individuals regulated even apart from the fact that only knowing violations were punished. *Hygrade Provision Co.*, 266 U.S. at 502; *Omaechevarria*, 246 U.S. at 348.

attack.[137] But the battle over this question was really only decisively joined in *Screws v. United States*.[138] As part of a New Deal initiative, President Roosevelt sought to invoke the criminal provisions of federal civil rights statutes to provide a federal response to the lynching of African Americans by white supremacists.[139] The statutes criminalized the deprivation of constitutional rights by officials acting under color of legal authority.[140] In one of the four separate opinions that would ultimately dispose of the case, the plurality recounted the "shocking and revolting" circumstances whereby an African American, Robert Hall, was brutally murdered by a Georgia sheriff who had a vendetta against him.[141] The sheriff, Screws, was alleged to have been acting under color of Georgia law to willfully deprive Hall of his rights to life, liberty, and due process of law and for conspiring to do the same.[142]

Upon conviction, the defendant appealed on vagueness grounds. He contended that the statute was unconstitutionally vague because the standard of due process incorporated by the statute created "no ascertainable standard of guilt."[143] As the plurality put it, the challenged act "would incorporate by reference a large body of changing and uncertain law. That law is not always reducible to specific rules, is expressible only in general terms, and turns many times on the facts of a particular case."[144] The defendant argued that "such a body of legal principles lacks the basic specificity necessary for criminal statutes under our system of government."[145]

While acknowledging the gravity of the vagueness attack, the plurality rejected this argument by citing the element of willfulness in

137. *See* United States v. Ragen, 314 U.S. 513, 524 (1942) (rejecting a vagueness challenge to a tax evasion statute in part because of a willfulness provision and stating that "[a] mind intent upon willful evasion is inconsistent with surprised innocence"); Gorin v. United States, 312 U.S. 19, 27–28 (1941) (rejecting a vagueness challenge in part because of the statute's scienter element, which required "intent or reason to believe that the information to be obtained is to be used to the injury of the United States"); Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 247 (1936) (rejecting a vagueness challenge to a Federal Communications Commission order because the act only punished knowing and willful padding of charges).

138. Screws v. United States, 325 U.S. 91, 101–02 (1945) (plurality opinion).

139. *See* John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 473–74 (2001).

140. 18 U.S.C. §§ 241–242 (2006).

141. *Screws*, 325 U.S. at 92 (plurality opinion).

142. *Id.* at 92–93.

143. *Id.* at 95.

144. *Id.* at 96.

145. *Id.*

the statute. The plurality reasoned that "willfully" as used in the challenged act "connot[ed] a purpose to deprive a person of a specific constitutional right."[146] On that reading, "[a]n evil motive to accomplish that which the statute condemns becomes a constituent element of the crime," an element that had to be submitted to a jury.[147] And because the willful intent described by the law meant only the intent to deprive a person of "a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them," the law was not indefinite.[148]

The dissent thought this reasoning was ludicrous, and said so:

> It is as novel as it is an inadmissible principle that a criminal statute of indefinite scope can be rendered definite by requiring that a person "willfully" commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed. . . . It has not been explained how all the considerations of unconstitutional vagueness which are laid bare in the early part of the Court's opinion evaporate by suggesting that what is otherwise too vaguely defined must be "willfully" committed.[149]

The dissenting Justices remarked that the plurality's reasoning "amount[ed] to saying that the black heart of the defendant" could enable him to know what deprivations of constitutional rights were forbidden, "although we as judges are not able to define their classes or their limits."[150]

Notwithstanding the odd combination of opinions that produced the outcome in *Screws*, the rule was thereafter settled.[151] In *American Communications Ass'n v. Douds*,[152] the Court addressed the provision

146. *Id.* at 101.

147. *Id.*

148. *Id.* at 104–05 ("Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.").

149. *Id.* at 153 (Roberts, Frankfurter & Jackson, JJ., dissenting).

150. *Id.* at 151.

151. *See* Amsterdam, *supra* note 15, at 87 n.98 (noting that "'scienter' has become a recognized element of the lore of vagueness").

152. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950).

of the Labor Management Relations Act of 1947[153] that, as a condition of recognition of a labor union, required officers of the union to file affidavits stating that they did not belong to the Communist Party and did not believe in the overthrow of the government by force.[154] The Court held that because criminal punishment under this provision would require proof of willfulness, the statute was not vague,[155] despite the "breadth of such [statutory] terms as 'affiliated,' 'supports' and 'illegal or unconstitutional methods.'"[156] The Court would thereafter frequently cite a statute's mens rea requirement as a factor in its decision to reject a vagueness challenge to it.[157]

Interestingly, the evolution of the Court's treatment of the mens rea requirement echoes the evolution of its stance toward as-applied

153. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C. (2006)).

154. *Douds*, 339 U.S. at 385–86.

155. *Id.* at 413 ("[S]ince the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection [of vagueness] untenable.").

156. *Id.* at 412. The statute at issue, section 9(h) of the Labor Management Relations Act of 1947, provided as follows:

> No investigation shall be made by the [National Labor Relations] Board of any question affecting commerce concerning the representation of employees, raised by a labor organization . . . unless there is on file with the Board an affidavit . . . by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Labor Management Relations Act of 1947 § 9(h), 29 U.S.C. § 159(h) (Supp. III 1950) (repealed 1959).

157. *See, e.g.*, United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 35 (1963) (observing that the Robinson-Patman Act prohibited making sales "at unreasonably low prices *for the purpose of* destroying competition" and stating that this "additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct" (emphasis added)); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) ("The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid."); United States v. Petrillo, 332 U.S. 1, 7 (1947) ("It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was willfully attempting to compel another to hire unneeded employees."); *cf.* Colautti v. Franklin, 439 U.S. 379, 395 (1979) (invalidating a state abortion-control statute as vague in part because of "the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable").

and facial vagueness challenges described above.[158] The Court's ultimate position is that a requirement that the defendant willfully, knowingly, or purposefully contravene the statute—a mens rea requirement—can save the whole statute from vagueness. This means, in essence, that a *facial* attack upon the vagueness of a criminal statute cannot succeed if a conviction under the statute requires some proof of culpable intent by the defendant. This approach resonates with the Court's post-New Deal adoption of the rule that as-applied vagueness must be shown before a facial attack on vagueness can prevail.[159] By thus relying upon scienter requirements as a substitute for statutory clarity, the Supreme Court lowered the constitutional threshold of clarity for the mine run of criminal laws.[160]

B. Retroactivity

Derived from the English common law and ultimately from Roman law,[161] the antiretroactivity principle was adopted into American law in the young days of the republic.[162] In the early nineteenth century, the Supreme Court expanded the rule by applying it to law whose prospective operation had the effect of divesting rights that were "vested" prior to the date of the law's enactment.[163] Thus expanded and entrenched, the concept of retroactivity and the related notion of vested rights "played a central role in the constitutional protection of property and contract rights

158. *See supra* Part II.A.1.

159. *See supra* Part II.A.1.

160. Professor Amsterdam puts the point sharply:

> Yet it is evident that, unless the Court has been fooling itself in these cases, the "scienter" meant must be some other kind of scienter than that traditionally known to the common law—the knowing performance of an act with intent to bring about that thing, whatever it is, which the statute proscribes, knowledge of the fact that it is so proscribed being immaterial. Such scienter would clarify nothing; a clarificatory "scienter" must envisage not only a knowing what is done but a knowing that what is done is unlawful or, at least, so "wrong" that it is probably unlawful.

Amsterdam, *supra* note 15, at 87 n.98 (citation omitted).

161. *See* Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775–76 (1936).

162. *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801); Smead, *supra* note 161, at 780–81 & n.22 (collecting cases).

163. *See* Smead, *supra* note 161, at 782. In its earlier formulation, the rule "had not included those laws which divested rights vested antecedently to enactment in applying to cases arising prospectively." *Id.*

before the late nineteenth century."[164] Through the start of the New Deal era, the Court continued to reiterate the presumption against retroactivity[165] and to hold statutes impermissibly retroactive.[166]

As the New Deal progressed, the Court's stance toward retroactivity evolved in conjunction with its treatment of the Contracts Clause. In Contracts Clause jurisprudence, a critical turning point was *Home Building & Loan Ass'n v. Blaisdell*.[167] The *Blaisdell* decision approved a scheme adopted by the state of Minnesota to provide emergency relief to debtors by extending the period in which the debtors could redeem property that would otherwise be foreclosed on—in other words, a mortgage moratorium.[168] A five-justice majority of the Court reasoned that the Contracts Clause posed no bar to legislation that was reasonably drawn to further an appropriate legislative end: "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[169]

Blaisdell did not mark a complete reversal of course in Contracts Clause jurisprudence. In the two years following *Blaisdell*, the Court did strike down statutes with similar effects to the Minnesota law in which the challenged statutes were not tethered to the existence of economic emergencies.[170] By 1940, however, the Court had relaxed

164. James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 103 (1993).

165. *See, e.g.*, Brewster v. Gage, 280 U.S. 327, 337 (1930) ("Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears."); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162–63 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."). But it appears that the presumption against retroactivity was not uniformly applied. *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1018 (2006) (citing two exceptions).

166. *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935) (holding invalid a Kentucky statute that applied retroactively to preexisting mortgages).

167. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

168. *Id.* at 416–18, 447–48.

169. *Id.* at 438.

170. *See* Woolhandler, *supra* note 165, at 1050 nn.195–200; *see also* Cushman, *supra* note 6, at 37 ("In the twenty-five months following the announcement of the *Blaisdell* decision, the Court heard three cases involving challenges to state debtor relief legislation under the Contract Clause. In each case, the Court invalidated the legislation by a unanimous vote.").

this limitation, holding in *Veix v. 6th Ward Building & Loan Ass'n*[171] that state legislation restricting sales of shares of building-and-loan associations was valid regardless of the existence of conditions of economic emergency.[172] Five years later, the Court in *East New York Savings Bank v. Hahn*[173] again upheld retroactive legislation continuing a mortgage moratorium, despite the fact that it had no link to conditions of economic emergency.[174] In rejecting a retroactivity challenge to a regulation some years later, the Court admonished that "[i]mmunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by 'prophetic discernment.'"[175]

The Court's shift on Contracts Clause doctrine influenced its treatment of retroactivity. With the demise of Contracts Clause jurisprudence, challenges to a law's substantive retroactivity came to be analyzed within the rubric of due process.[176] Under the categorical approach of post-1938 due process jurisprudence, economic legislation will withstand due process challenge if it bears some rational relationship to a legitimate legislative purpose. In this calculation, the retroactive effects of legislation do not constitute a reason for special scrutiny.[177] Rather, retroactivity is merely "a factor

171. Veix v. 6th Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940).

172. *Id.* at 39 ("Many of the enactments were temporary in character. We are here considering a permanent piece of legislation. So far as the contract clause is concerned, is this significant? We think not. 'Emergency does not create [constitutional] power, emergency may furnish the occasion for the exercise of power.'" (alteration in original) (quoting *Blaisdell*, 290 U.S. at 426)).

173. E.N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1945).

174. *See id.* at 232–34 (relying upon the "governing constitutional principle" that "the authority of the State 'to safeguard the vital interests of its people'" could not "be gainsaid by abstracting [a private contract] from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment" (quoting *Blaisdell*, 290 U.S. at 433)).

175. Fleming v. Rhodes, 331 U.S. 100, 107 (1947) (quoting Sproles v. Binford, 286 U.S. 374, 391 (1932)).

176. *See* Kainen, *supra* note 164, at 111–12 ("In contrast with the nineteenth century's emphasis on the vesting of rights, however, the typical modern approach considers the retroactive application of statutes to be no more than a factor to be weighed in deciding whether a particular interference with economic rights constitutes a violation of substantive due process. Moreover, retroactivity has virtually no independent significance as a factor of consideration." (footnotes omitted)); *see also* DANIEL E. TROY, RETROACTIVE LEGISLATION 64 (1998).

177. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063–64 (1997) (explaining how, after the New Deal, the "erosion of the doctrine of substantive due process curtailed any judicial inclination to subject retroactive legislation to intensive scrutiny").

to be weighed in deciding whether a particular interference with economic rights constitutes a violation of substantive due process."[178] And it is a factor with "virtually no independent significance."[179] Though the Court has occasionally implied that retroactive legislation may be harder to sustain in the face of a due process challenge than prospective legislation,[180] it has also emphatically disclaimed that any such greater burden exists.[181]

An additional change deserves mention. In 1940, the Court held that a past practice of regulation has relevance to the assessment of whether a new law has impermissibly retroactive effect.[182] This principle took root over time.[183] By holding that the *foreseeability* of

178. Kainen, *supra* note 164, at 111.

179. *Id.* at 111–12.

180. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976) ("It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.").

181. *See* United States v. Carlton, 512 U.S. 26, 30 (1994) ("The 'harsh and oppressive' formulation, however, 'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy." (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984))); *Pension Benefit*, 467 U.S. at 730 ("To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.").

182. Veix v. 6th Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940) ("It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."). *Veix* provides the clearest statement of this idea, though earlier cases contain perceptible hints at it. *See, e.g.*, Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240, 307–08 (1935) ("[W]hen contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

183. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 413 (1983) ("The threshold determination is whether the [Kansas Natural Gas Price Protection Act, 1979 Kan. Sess. Laws 841 (codified at KAN. STAT. ANN. §§ 55-1401 to 55-1415 (Supp. 1982))] has impaired substantially [the petitioner's] contractual rights. Significant here is the fact that the parties are operating in a heavily regulated industry."); Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 91 (1958) ("Congress by the [Housing Act of 1954 (1954 Act), ch. 649, 68 Stat. 610 (codified as amended in scattered sections of the U.S.C.),] was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); Chrysler Corp. v. Kolosso Auto Sales, Inc., 148 F.3d 892, 895 (7th Cir. 1998) ("The centrality of foreseeability explains the courts' emphasis, in deciding whether the application of a new regulation violates the contracts clause, on the degree to which the activity to which the contract pertains was already heavily regulated when the contract was made.").

regulation can, in essence, mitigate a law's retroactive effects, the Court has authorized a kind of regulatory piggybacking whereby the existence of regulations with prospective effects can justify the adoption of regulations with retroactive effects.[184] Retroactive legislation can thus follow most readily when prospective regulation can most readily be enacted—in the economic realm, where only rational-basis review applies.[185]

The Court would subsequently tie expressly its changing stance on retroactive legislation to the New Deal revolution in constitutional jurisprudence. In a 1958 case, in "what seemed almost a peroration,"[186] the Court rejected a retroactivity challenge on the grounds that finding the statute impermissibly retroactive would "make the ghost of *Lochner v. New York* walk again."[187] In *Landgraf v. USI Film Products*,[188] the Court similarly noted that the presumption against retroactivity "had special force in the era in which courts tended to view legislative interference with property and contract rights circumspectly."[189] The cumulative upshot has been predictable: an unbroken record since the New Deal of sustaining retroactive economic laws against due process challenges.[190]

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184. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 700 (1960) ("The justification given for this sweeping principle is that the parties are on notice that if the legislature has competence in a given field, it may well exercise its powers, and therefore there is no unfair surprise when these powers are exercised retroactively."). Hochman criticizes the rule because "it in effect makes retroactivity immaterial in determining the constitutionality of a statute; if the legislature could act as it did by a statute which had prospective application only, it can make the statute apply to past transactions." *Id.*

185. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (describing standards for rational-basis review of economic regulation).

186. Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1194 (1962).

187. *Darlington*, 358 U.S. at 91–92 (1958) (citations omitted); *see also id.* ("Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." (citation omitted)).

188. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

189. *Id.* at 272.

190. *See* Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1071–72 (1993) ("Significantly, since the origination of the tax deference doctrine in 1938, the Supreme Court not only has never sustained a due process challenge to the retroactive application of a tax law, but, more remarkably, has not sustained a due process challenge to *any* retroactive economic law." (footnotes omitted)). In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a four-Justice plurality of the Court invalidated the Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701–9722 (1994 & Supp. II 1997), as a regulatory taking, with Justice Kennedy concurring in

C. The Rule of Lenity

The rule of lenity is a canon of statutory construction rooted in common-law doctrine.[191] The rule "directs courts to construe statutory ambiguities in favor of criminal defendants."[192] One of the "classic rationales" for the rule is the notice theory.[193] On this theory, the rule of lenity provides a degree of "assurance that no criminal defendants will be caught off guard by broader statutory interpretations than they could reasonably anticipate."[194] Although some commentators have objected that "criminals do not read statutes,"[195] the principle of notice continues to be accepted as a chief reason for construing criminal statutes narrowly.[196]

At the time of the New Deal, commentators were less than enamored of the rule of lenity.[197] In 1935, one influential author wrote that the rule should be sharply limited.[198] Another author argued that the rule stood in the way of reform-oriented theories of punishment focused on incapacitation and deterrence.[199] On this view, the rule of lenity was one species of judicial "quibble" and "casuistry"[200] designed

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the judgment and dissenting in part, *Apfel*, 524 U.S. at 503–04, 539. Justice Kennedy would have invalidated the statute on due process retroactivity grounds. *Id.* at 547–50 (Kennedy, J., concurring in judgment and dissenting in part).

191. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 358 ("Although [*United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820),] was the first Supreme Court decision to apply strict construction [of penal statutes], the rule did have a well established history in English law.").

192. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

193. *Id.* at 886.

194. *Id.*

195. *E.g.*, *id.*

196. Narrowing prosecutorial discretion is another rationale sometimes advanced for the rule of lenity. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 952 (1988); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

197. This view would later change. *See* Kahan, *supra* note 191, at 349 ("Lenity is almost universally celebrated among commentators.").

198. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 762–63 (1935) ("[T]here is no sound reason for a general doctrine of strict construction of penal statutes, and *prima facie* all such should have as liberal a construction as statutes generally . . . .").

199. *See* JOHN BARKER WAITE, THE CRIMINAL LAW IN ACTION 320 (1934); *see also* Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385, 400 nn.59, 62 (1987) (citing WAITE, *supra*, at 16, 320).

200. WAITE, *supra* note 199, at 320.

to nullify legislative intent: "[F]or a century or more it has been the policy of the judiciary—a policy now gradually changing—to utilize casuistic plausibility or any dubiety of the situation for the benefit of the accused rather than for the immediate safety of society."[201]

These views ultimately found their way on the Court. As Professor Lawrence Solan has pointed out, the arrival of Justice Frankfurter to the Supreme Court in 1939 changed the Supreme Court's treatment of the rule of lenity.[202] The change occurred in an indirect way: by means of altering the rule of lenity's priority as an interpretive principle.[203]

Traditionally, the rule of lenity meant that "[c]ourts interpreted criminal statutes narrowly . . . , but to the extent that the dispute was over the meaning of a statutory word, limited investigation occurred into the legislature's intended meaning of that word."[204] But Justice Frankfurter did not agree with the long-honored rule coined by Chief Justice Marshall that "probability is not a guide which a court, in construing a penal statute, can safely take."[205] Rather, as Professor Solan puts it, Justice Frankfurter was functioning within a new "interpretive culture" under which courts considered legislative history and other materials beyond the text of the statute prior to determining that the statute was ambiguous and that the rule of lenity required invocation.[206] On Frankfurter's view, "lenity was not as much about language as it was about residual uncertainty after careful

201. *Id.* at 16; *see also id.* at 320 ("[I]f once the whole idea of punishment be discarded and the objective of every prosecution be recognized as the removal of a particular social danger, the public attitude must inevitably change. Indeed, the adoption of the new objective will be possible only when that attitude does change. In the light of that purpose, quibble, casuistry, technicality in the fabrication of 'rights', will no longer seem legitimate defenses in a contest, but must appear in their true character as obstacles to the progress of social prophylaxis.").

202. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 102–08 (1998).

203. *Id.*

204. *Id.* at 96.

205. *Id.* at 105 ("Marshall's position in *Wiltberger* that 'probability is not a guide which a court, in construing a penal statute, can safely take,' was reprehensible to Frankfurter, who had no interest in using lenity to thwart clear legislative intent." (citation omitted) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 105 (1820)) (internal quotation marks omitted)); *see also, e.g.*, United States v. Dotterweich, 320 U.S. 277, 283 (1943) (condemning "the notion that criminal statutes must be construed by some artificial and conventional rule" (quoting United States v. Union Supply Co., 215 U.S. 50, 55. (1909)) (internal quotation mark omitted)).

206. Solan, *supra* note 202, at 107.

study."[207] This "vision of lenity differed sharply from the traditional one."[208]

Thus reformulated, the rule of lenity began to lose its bite.[209] In *SEC v. C.M. Joiner Leasing Corp.*,[210] the Court characterized the rule of lenity as one of those rules of statutory construction that "come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass."[211] As the Court went on to admonish, such rules of statutory construction were

> subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[212]

The next year, the Court noted that the rule of lenity had no weight when its application would cause "distortion or nullification of

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207. *Id.*

208. *Id.*

209. *Compare, e.g.*, United States v. Harris, 177 U.S. 305, 309 (1900) (relying on the rule of lenity to reject an argument that a "company" included persons acting on that company's behalf (internal quotation marks omitted)), *with, e.g.*, *Dotterweich*, 320 U.S. at 283 (rejecting application of the rule of lenity and holding that a statute that imposed liability on a "corporation" imposed liability on that corporation's responsible officers).

210. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

211. *Id.* at 350.

212. *Id.* at 350–51. Another traditional rule of statutory construction—the rule that statutes in derogation of the common law will be strictly construed—was also criticized by contemporaneous observers as evincing judicial mistrust of legislatures. As one of these observers wrote, "The exemption of the time-honored common law from the requirement of definiteness indicates that, at bottom, the doctrine springs from a lack of confidence in the legislatures." *Indefinite Criteria of Definiteness in Statutes*, *supra* note 58, at 163; *see also id.* at 161–63 & nn.9, 20–23 (collecting cases). In 1936, in the heart of the legal controversies over the New Deal, Justice Harlan Stone criticized the strict construction rule as an "ancient shibboleth" that had no place in interpreting "statutes establishing administrative agencies and defining their powers." Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 18 (1936). The role of courts, he wrote, was to help agencies in carrying out legislative schemes, not to hamper them: "[T]he function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, wherever reasonably possible, effective instruments for law enforcement, and not to destroy them." *Id.* Sutherland, citing Stone, states that "[m]odern regulatory legislation" is not subject to the antiderogation rule and will instead "receive[] liberal construction," because such legislation creates "a newly conceived system of legal arrangements to deal with emergent problems in society." NORMAN J. SINGER & J.D. SHAMBIE SINGER, 3 SUTHERLAND ON STATUTORY CONSTRUCTION § 61:3 (6th ed. 2007).

the evident meaning and purpose of the legislation."[213] Soon thereafter, the Court again emphasized judicial deference, holding that the rule of lenity could override neither "common sense" nor "evident statutory purpose."[214]

These pronouncements eventually matured into the "doctrinal formulation that has now become dominant"—that "a court may properly conclude that a statute is 'ambiguous' for purposes of lenity only 'after seizing everything from which aid can be derived,' including 'the language and structure, legislative history, and motivating policies' of the statute."[215] As Professor Dan Kahan has pointed out, however, "[r]anking lenity 'last' among interpretive conventions all but guarantees its irrelevance."[216] The New Deal era commenced the line of cases that would demote the rule of lenity to this low point on the totem pole.[217]

D. Summary

As this Part has shown, the New Deal era saw the Court transform the standards for due process notice doctrine in a variety of ways. The Court altered its practices with respect to facial vagueness attacks, reduced the clarity it would demand of civil economic laws,

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213. United States v. Gaskin, 320 U.S. 527, 529–30 (1944) ("The appellee invokes the rule that criminal laws are to be strictly construed and defendants are not to be convicted under statutes too vague to apprise the citizen of the nature of the offense. That principle, however, does not require distortion or nullification of the evident meaning and purpose of the legislation.").

214. United States v. Brown, 333 U.S. 18, 25–26 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language.").

215. Kahan, *supra* note 191, at 386 (alterations omitted) (quoting United States v. Bass, 404 U.S. 336, 347 (1971)); *see also* Marie Gryphon, *The Better Part of Lenity*, 7 J.L. ECON. & POL'Y 717, 720–21 (2011) ("The current majority view [among courts] might appropriately be called the 'lenity last' view. . . . 'Lenity last' is a seldom used, last ditch tiebreaker, invoked only when every other clue to the legislature's intent has been examined without success.").

216. Kahan, *supra* note 191, at 386; *see also* Allen, *supra* note 199, at 398 (concluding that "the idea of strict interpretation has suffered significant erosion in the present century").

217. The current Court has tended to require a "grievous ambiguity" in the statute before the rule of lenity may apply. *See, e.g.*, Dean v. United States, 129 S. Ct. 1849, 1856 (2009) ("To invoke the rule [of lenity], we must conclude that there is a grievous ambiguity or uncertainty in the statute." (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998)) (internal quotation marks omitted)); United States v. Hayes, 129 S. Ct. 1079, 1089 (2009) (holding that the rule of lenity did not apply because the statute at issue was not "grievously ambiguous" (alterations omitted) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)) (internal quotation marks omitted)).

and began to treat mens rea requirements as a substitute for clarity in the legislative language of criminal statutes. In concert with these changes, it altered its treatment of retroactivity and the rule of lenity.

One curious fact about these changes is the rather *sub rosa* manner in which they have occurred, at least in comparison to other famous New Deal doctrinal changes. A quick-and-dirty demonstration of this discrepancy is easy to make. If one looks up on Westlaw the cases famously associated with the pre-New Deal doctrines—*Lochner v. New York*,[218] *Tipaldo*, *Adkins*, *Hammer v. Dagenhart*,[219] and so forth—they are for the most part "red flagged." The cases from the old regime are visibly acknowledged to be no longer good law, because they have been overturned by their counterparts after the "switch in time"—*NLRB v. Jones & Laughlin Steel Corp.*,[220] *West Coast Hotel Co. v. Parrish*,[221] and so forth. In contrast, many important pre-New Deal cases that stated principles of due process notice doctrine that are now effectively defunct—for example, *Connally* and *Small*—are not "red flagged" in Westlaw. They have not been branded as "bad law." But they have utterly different practical, real-world consequences from what they once had.

When due process notice doctrine is concerned, then, the New Deal's break with past practice is neither loudly proclaimed nor easily recognized, though it was quite as sharp. With apologies to T.S. Eliot,[222] sometimes the law changes not with a bang, but a whisper.

III. THE BUFFER'S SIGNIFICANCE

The New Deal was a multifaceted political project with a goal no less ambitious than the transformation of American society.[223] As such, the New Deal necessarily implicated certain central doctrines of constitutional law. The New Deal could not go forward without the Supreme Court's acquiescence in the federal government's increased power.[224] Nor could it go forward without the Court's acquiescence in

218. Lochner v. New York, 198 U.S. 45 (1905).

219. Hammer v. Dagenhart, 247 U.S. 251 (1918).

220. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

221. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

222. *Cf.* T.S. ELIOT, *The Hollow Men*, *in* POEMS: 1909–1925, at 123, 128 (Harcourt, Brace & Co. 1932) (1925) ("This is the way the world ends/Not with a bang but a whimper.").

223. *See* Sunstein, *supra* note 4, at 254.

224. *See id.* at 253–54 ("The original understanding of a sharply constrained central government was therefore repudiated by the nation. . . . [S]tate autonomy seemed an obstacle to

a generous understanding of the boundaries of congressional authority to delegate to federal administrative agencies.[225] Nor could it go forward without the Court's acquiescence in the erosion of the protections for liberty of contract.[226] The fact that these doctrines changed during the New Deal, then, is not hard to understand; these were all legal issues that the implementation of the New Deal, by necessity, staged for the Court's resolution.[227]

Against this backdrop, the changes in due process notice doctrine identified in the preceding discussion make a rather jarring appearance. In contrast to the more famous doctrinal changes that occurred in this period, alterations to due process notice were not *demanded* by the New Deal's political project—at least, not in any straightforward sense—either as a matter of jurisprudence or as a matter of politics.

Jurisprudentially, questions of due process notice operate on a different plane than the other elements of New Deal constitutional change. At the heart of due process notice doctrine sits the basic principle that individuals have the right to know the meaning of the

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democratic self-government, not a crucial part of it—especially in the midst of the Depression, when states were generally perceived as ineffectual entities buffeted by private factions.").

225. *See* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 132–33 (1st ed. 1969) (explaining the need for broad delegations as administrative components were added to the government).

226. *See* Sunstein, *supra* note 5, at 423 (describing the New Deal view that the common law accorded "excessive protection [to] established property interests and insufficient protection [to] the interests of the poor, the elderly, and the unemployed").

227. This Article does not take a position in the spirited academic exchange on whether these doctrinal changes occurred purely because of the Court-packing threat or for other reasons. The point is only that these constitutional issues were questions presented in straightforward fashion by the New Deal's political agenda. A wealth of scholarship addresses the empirical accuracy of the so-called "switch-in-time" narrative. *See, e.g.*, Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994); *see also* WHITE, *supra* note 5, at 203; Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 71 (2010). These debates "center on the question whether the Supreme Court shifted ground in response to the direct threat to its independence embodied in the Court-packing proposal, or whether there is another less political explanation for the Court's doctrinal change," a question that many of the debaters themselves concede "is probably unanswerable." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 976 (2000). For a persuasive argument that the Court-packing plan had no durable consequences upon the Court's performance as a majoritarian institution, see Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 132. According to Pildes, "[O]ne can read the 1937 experience as suggesting that, for better or worse, judicial independence and the authority of the Court have become so entrenched in America that even the most popular politicians play with fire if they seek too directly to take on the power of the Court." *Id.*

laws that govern them.[228] This is a rule-of-law value,[229] a value that can be honored or dishonored independently of the substantive shape of a legal regime. Logically speaking, vigorous protection of due process notice is compatible with many different patterns of substantive policy; there is no reason why judicial deference to the substance of the New Deal project should have demanded judicial deference on the acceptable degree of linguistic clarity of civil and criminal laws and regulations. Judicial review of legislative specificity and prospectivity need not move in rigid lockstep with judicial review of policy.

Politically, the link between due process notice and the New Deal project appears even more attenuated. Both elite and popular opinion at the time were riveted by the highly salient question of whether the New Deal's programs would stand or fall, not by the secondary question of how much specificity the Court was demanding of legislative language, much less by the tertiary question of what methods of statutory construction the Court was using to determine the presence or absence of legislative clarity.[230] The Court's habit of pairing its vagueness holdings with economic liberty or delegation holdings no doubt helped to obscure its notice jurisprudence;[231] then, and indeed now, readers of these opinions naturally train their fire on the more controversial substantive holdings rather than on the twinned vagueness holdings. When crowds in Ames, Iowa, hanged in effigy six sitting Supreme Court justices in 1936,[232] their anger was presumably not ignited by the Court's vagueness jurisprudence.

What, then, drove the changes in due process notice doctrine that occurred in this period? Why did the Court quietly cede so much of the terrain over which it was previously willing to enforce constitutional constraints?

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228. *See* United States v. Lanier, 520 U.S. 259, 265 (1997) (noting Justice Holmes's description of the constitutional necessity of "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed" (alteration in original) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)) (internal quotation mark omitted)).

229. *See* FULLER, *supra* note 11, at 39.

230. *See* ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT, THE POLITICS OF UPHEAVAL 490 (1960) ("If the New Deal legislation were all nullified, the President said somberly, there would be marching farmers and marching miners and marching workingmen throughout the land."); Friedman, *supra* note 227, at 980–82 (collecting sources describing the "tremendous popular engagement" provoked by "the New Deal fight").

231. *See supra* text accompanying notes 61–73.

232. SCHLESINGER, *supra* note 230, at 488.

The simple reason is that the Court ultimately came to the view that its newly emergent stance of judicial deference on matters of policy required deference on the facets of due process notice doctrine. This answer has been alluded to already, but it is worth setting out at length because this result was by no means a foregone conclusion.

The cases addressing vagueness best illustrate the choice faced by the Court. The battle between the Court's members centered on the question of whether vagueness doctrine should be ratcheted *up* in stringency, or ratcheted *down*, in response to the new sorts of laws being enacted in the New Deal period. One side took the view that the novelty of the New Deal's legislative program made it incumbent on the Court to police legislative drafting with extra vigilance to prevent unfair surprise to regulated parties. The other took the view that the degree of clarity or ambiguity in legislative drafting was itself a choice that the legislature has the prerogative to make and to which the Court must defer. Indeed, some members of the Court regarded the argument for legislative deference as so forceful that they believed it ought to apply even in the context of First Amendment vagueness challenges.

An elaboration of the first of these contrasting visions is the dissent in *Petrillo*, a case in which the Court rejected a vagueness challenge to a provision of the Communications Act of 1934[233] that made it unlawful to use or threaten force to coerce licensees to hire more employees than "needed by such licensee to perform actual services."[234] The defendant contended that there was no way to know how many employees were "needed" for a given job.[235] Although admitting that "[c]learer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed,'" the Court noted that "none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose."[236] The *Petrillo* dissent complained that the statute was part and parcel of a novel

233. Communications Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

234. United States v. Petrillo, 332 U.S. 1, 3 (1947) (quoting 47 U.S.C. § 506 (repealed 1980)) (quotation marks omitted).

235. *Id.* at 7.

236. *Id.*

legislative program that required stronger judicial enforcement of vagueness: the act was

> one of the many regulatory acts that legislative bodies have passed in recent years to make unlawful certain practices in the field of economics that seemed contrary to the public interest. These statutes made new crimes. . . . Common experience has not created a general understanding of their criminality. Consequently, . . . a more precise definition of the crime is necessary.[237]

In sum, the *Petrillo* dissent argued that the novelty of New Deal statutory law required the Court to adopt a *more* vigilant stance toward policing legislative draftsmanship to shield the rights to notice of individuals newly regulated by these laws.[238]

The second of these contrasting visions is most comprehensively elaborated in Justice Frankfurter's dissent in *Winters v. New York*,[239] a First Amendment vagueness case.[240] In *Winters*, the Court struck down as vague a New York statute that prohibited dissemination of obscene materials.[241] Justice Frankfurter's dissent complained that the Court was using vagueness as a ruse to supersede New York's valid policy choices:

> The painful experience which resulted from confusing economic dogmas with constitutional edicts ought not to be repeated by finding constitutional barriers to a State's policy regarding crime . . . . This Court is not ready, I assume, to pronounce on causative factors of mental disturbance and their relation to crime. Without formally professing to do so, it may actually do so by

237. *Id.* at 16–17 & n.1 (Reed, J., dissenting) (footnote omitted) (citing such measures as the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)), the FLSA, and the Emergency Price Control Act of 1942, ch. 25, 56 Stat. 33 (codified as amended at U.S.C. app. §§ 901–946 (Supp. V 1946))).

238. *Id.*; *see also* United States v. Harriss, 347 U.S. 612, 634 (1954) (Jackson, J., dissenting) ("Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such normal basis. The criminality of the conduct dealt with here depends entirely upon a purpose to influence legislation. . . . [I]t is an area where legal penalties should be applied only by formulae as precise and clear as our language will permit.").

239. Winters v. New York, 333 U.S. 507 (1948).

240. *Id.* at 527 (Frankfurter, J., dissenting).

241. *Id.* at 519 (majority opinion).

> invalidating legislation dealing with these problems as too "indefinite."[242]

On the dissent's view, legislative judgment on the clarity or specificity of language "involves an exercise of judgment which is at the heart of the legislative process."[243] The vagueness challenge amounted to a request for the Court to "declare void the law which expresses the balance so struck by the legislature, on the ground that the legislature has not expressed its policy clearly enough."[244] Evoking the specter of *Lochner*, he admonished against "subtly supplant[ing]" legislative judgment with judicial judgment.[245]

In the rule-of-lenity area, *United States v. Dotterweich*[246] offers a parallel example of these contrasting visions. *Dotterweich* was a case addressing the liability of corporate executives for regulatory offenses committed by the corporations for which they worked.[247] The Court's opinion was suffused with references to the need for courts to read the statute in light of the policy ends sought to be achieved by Congress, rather than in light of the rule of lenity:

> The purposes of [the Federal Food, Drug, and Cosmetic Act[248]] thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.[249]

The dissent objected strenuously to this approach, contending that the rule of lenity forbade reading the statute to extend liability to

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242. *Id.* at 527 (Frankfurter, J., dissenting).

243. *Id.* at 533.

244. *Id.*

245. *Id.* at 537.

246. United States v. Dotterweich, 320 U.S. 277 (1943).

247. *See* Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on* Dotterweich *and* Park, 28 UCLA L. REV. 463, 463 (1981). *Dotterweich* is frequently credited as the font of the "responsible corporate officer" doctrine, a theory of criminal liability that has caused much scholarly debate, in particular because modern federal and state environmental statutes have incorporated this theory in their provisions for criminal liability. *See* Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1264 (2006).

248. Federal Food, Drug, and Cosmetic Act, ch. 653, 52 Stat. 1040 (1938) (codified at 21 U.S.C. § 301–392 (1940)).

249. *Dotterweich*, 320 U.S. at 280.

the corporate officer. In the dissent's view, deference to legislative judgment instead required dismissing the indictment.[250]

With respect to one facet of retroactivity doctrine, the *Chenery* cases lucidly illustrate the same tug-of-war over the proper implementation of deference.[251] The *Chenery* lawsuits arose from a Securities and Exchange Commission (SEC) order concerning the approval of a reorganization plan for a public utilities company.[252] In the course of deciding whether to approve the reorganization plan proposed by the Chenerys for one such firm, the agency announced a new rule applicable to such reorganizations: that officers and directors of the company could not engage in stock purchases while the reorganization was pending.[253] After remanding once for the agency to state adequate grounds for its determination,[254] the Supreme Court sustained the SEC's order in the subsequent appeal.[255] In this second decision, *Chenery II*, the question of retroactivity was squarely posed: the agency had created and applied a new rule of law in the course of adjudicating the *Chenery* case, and the challengers contended that this maneuver exceeded the agency's authority.[256]

The *Chenery II* majority disagreed and sustained the order.[257] The Court based its holding nearly entirely on considerations of administrative "experience" and deference to "informed, expert judgment."[258] To the majority, "the argument of retroactivity" amounted to "nothing more than a claim that the [agency] lacks power to enforce the standards of the Act in this proceeding"[259]—a claim that could not prevail. On the majority's view, the Court was obliged to refrain from "stultify[ing] the administrative process" by

250. *See id.* at 292–93 (Murphy, J., dissenting) ("Reliance on the legislature to define crimes and criminals distinguishes our form of jurisprudence from certain less desirable ones.").

251. SEC v. Chenery Corp., 332 U.S. 194 (1947) (*Chenery II*); SEC v. Chenery Corp., 318 U.S. 80 (1943) (*Chenery I*). I am indebted to Ron Levin for this insight.

252. *See Chenery I*, 318 U.S. at 81–82.

253. *Id.* at 84–85.

254. *Id.* at 94–95 ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding.").

255. *Chenery II*, 332 U.S. at 209.

256. *Id.* at 199–200.

257. *Id.* at 200.

258. *Id.* at 199, 207.

259. *Id.* at 203–04.

imposing a "rigid requirement" that an agency formulate new standards of conduct prospectively, by rule.[260]

This result provoked an outraged dissent from Justice Jackson, who was joined by Justice Frankfurter.[261] Unmoved by the majority's repeated appeals to administrative deference,[262] the dissent excoriated the Court for adopting the position that "[t]he Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted!"[263] The argument for deference, the dissent wrote, can properly apply only where an agency is exercising discretion "under and within the law" and "cannot be invoked to support action outside of the law."[264] Asserting that the majority was condoning retroactive lawmaking,[265] the dissent concluded by accusing the Court of approving "administrative authoritarianism," or the "power to decide without law"—a result that "undervalue[d] and . . . belittle[d] the place of law, even in the system of administrative justice."[266]

As these judicial contests reflect, a struggle over how to implement the philosophy of judicial deference was being waged in the cases that drove the doctrinal evolution of due process notice during this era. The ethos that ultimately carried the day treats matters of notice as inherently political and treats judicial policing of

260. *Id.* at 202–03 ("[T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. . . . And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

261. *Id.* at 213 (Jackson, J., dissenting).

262. *See id.* at 212–13 ("[W]e peruse the Court's opinion diligently to find on what grounds it is now held that the Court of Appeals, on pain of being reversed for error, was required to stamp this order with its approval. We find but one. That is the principle of judicial deference to administrative experience. That argument is five times stressed in as many different contexts . . . .").

263. *Id.* at 213.

264. *Id.* at 215. To excuse an agency from the obligation to have an existing rule of law to support its order, the dissent complained, would render futile the process of judicial review. *See id.* at 214 ("If it is of no consequence that no rule of law be existent to support an administrative order, and the Court of Appeals is obliged to defer to administrative experience and to sustain a Commission's power merely because it has been asserted and exercised, of what use is it to print a record or briefs in the case, or to hear argument? Administrative experience always is present, at least to the degree that it is here, and would always dictate a like deference by this Court to an assertion of administrative power.").

265. *See id.* at 213 ("Of course, thus to uphold the Commission by professing to find that it has enunciated a 'new standard of conduct' brings the Court squarely against the invalidity of retroactive law-making. But the Court does not falter." (quoting *id.* at 203 (majority opinion)).

266. *Id.* at 216–17.

matters of notice as undemocratic judicial intrusion. An analogy can be drawn to Professor Cass Sunstein's oft-repeated (though sharply contested[267]) claim that a central insight of the New Deal Court was its recognition that common-law rights were not naturally determined, but were instead a result of legislative preferences.[268] Just as the Court came to regard allocations of rights as inherently matters of legislative choice rather than prepolitical entitlements, so did it come to embrace the view that legislative and regulatory clarity and prospectivity are inherently matters of legislative or administrative choice rather than abstract values that courts can reliably police in a vacuum. Under this "rational-basis style" review,[269] the degree of clarity or prospectivity of legislation and regulation was a matter appropriately left to legislative and administrative discretion, just as substantive policy choices in economic matters were to be left to legislative and administrative discretion—and judicial interference on either score was equally illegitimate.

Much has turned on the outcome of this contest. The most important consequence of the winners' approach has been its significant but underappreciated influence on the mechanics of lawmaking. Because the Constitution requires bicameralism and presentment,[270] enacting federal legislation is a resource-intensive affair. The bicameralism and presentment requirements "make it more difficult for factions to usurp legislative authority."[271] They "promote caution and deliberation[] by mandating that each piece of legislation clear an intricate process involving distinct constitutional

267. *See* David Bernstein, Lochner's Legacy*'s Legacy*, 82 TEX. L. REV. 1, 22–26 (2003) (criticizing Sunstein's conclusions).

268. *See* Cass Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (arguing that in the *Lochner* era "[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct"); *id.* at 903 ("But *Lochner* was wrongly decided, and one of the reasons that it was wrong is that it depended on baselines and consequent understandings of action and neutrality that were inappropriate for constitutional analysis. The New Deal to a large degree rejected those understandings . . . .").

269. The seminal cases on rational-basis review and equal protection handed down in the same period held that legislative solutions to economic problems were constitutionally valid, even if they were partial and imperfect. *See, e.g.*, Ry. Exp. Agency v. New York, 336 U.S. 106, 110 (1949) ("The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. . . . It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

270. U.S. CONST. art. I, § 7.

271. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708 (1997).

actors."[272] And, finally, they encourage "conflict and friction, enhancing the prospects for a full and open discussion of matters of public import."[273] These dynamics were intentional; the Founders deliberately "raise[d] the decision costs associated with lawmaking, safeguarding liberty through a deliberate sacrifice of governmental efficiency."[274]

In this calculus, stringent due process notice requirements operate to raise the costs of enacting legislation by requiring congressional lawmakers and the president to reach agreement on more precise legislative terms. For the same reason that rules are costlier to enact than standards,[275] precise laws are costlier to enact than vague laws. Professor Sunstein has made an overlapping point about nondelegation doctrine: "Simply by virtue of requiring legislators to agree on a relatively specific form of words, the nondelegation principle seems to raise the burdens and costs associated with the enactment of federal law."[276] Stringent requirements of clarity and specificity thus act as an across-the-board check on all legislative activity. Conversely, loosening the requirement of legislative specificity—as the Court did through its due process notice jurisprudence—has the opposite effect: it facilitates the exercise of legislative power by enabling the passage of more statutes as well as the passage of statutes that are more vaguely worded.[277]

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272. *Id.*

273. *Id.* at 709.

274. *Id.* at 709–10; *see also id.* at 710 (quoting Madison's view that "'the facility and excess of law-making' and not the converse, 'seem to be the diseases to which our governments are most liable'" and Hamilton's view that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones" (alteration in original) (quoting THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961); and *id.* NO. 73, at 444 (Alexander Hamilton)) (internal quotation marks omitted)).

275. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562–63 (1992) ("Rules are more costly to promulgate than standards because rules involve advance determinations of the law's content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law's content.").

276. *See* Sunstein, *supra* note 61, at 320.

277. *Cf.* Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) ("We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a

This is a distinct, and hitherto unacknowledged, means by which the Court in the New Deal era secured and enhanced legislative and executive power generally and federal power in particular. The New Deal reformulation of due process is thus not only a tale about how the Court retooled its attitude toward the rule-of-law values of statutory clarity and prospectivity. Rather, it is also a tale about how the Court's jurisprudence greased the gears of legislative compromise and made it easier to enact laws of almost any variety, thereby giving a diffuse boost to the project of building the modern regulatory state. The New Deal constitutionalism of due process notice renders visible a Court coming to embrace, and indeed manipulate, the principle that methods of policing language are methods of allocating political power among the branches. Understanding this dynamic is worthwhile in its own right; it is also helpful because—as the next Part will address—it contextualizes doctrinal disturbances that are presently in progress.

IV. THE BUFFER'S DURABILITY

Seventy-five years on, the New Deal is still very much a ripe source of controversy.[278] The Supreme Court's decision in June 2012 on the constitutionality of the Patient Protection and Affordable Care Act[279] is just the latest and most pointed reminder that core aspects of the New Deal "settlement" are today vulnerable.[280]

In all this ferment and flux, one can start with a basic question: What stature does the New Deal reformulation of due process notice have? In Professor Bruce Ackerman's provocative but convenient terminology, did the New Deal constitutional "amendment"

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national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.").

278. For some prominent and contrasting assessments, see, for example, 2 BRUCE ACKERMAN, WE THE PEOPLE 279 (1998); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 459 (1989); Richard Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5, 5 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); and Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1299 (1995).

279. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S.C.) (amended).

280. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (stating that the minimum-coverage provision of the Patient Protection and Affordable Care Act violated the Commerce Clause but could be sustained as a tax, and invalidating the conditional expansion of Medicare as impermissibly coercive under the Spending Clause).

encompass the law of due process notice?[281] What would it mean to say that such an amendment occurred, when its occurrence went unheralded by contemporaneous observers and unremarked in popular commentary?[282] Should these changes have the same indefinite doctrinal shelf life that (until recently) one has assumed that the other changes to constitutional doctrine made in this period will enjoy?

One cannot grapple with these questions without coming to terms with the possibility that these changes in due process jurisprudence were a kind of a jurisprudential accident. A grand social experiment—the administrative state—was incubating, and the newly arrived Justices were inclined to shield it. The Justices were under pressure to restore the institutional legitimacy of judicial review from allegations of lingering Lochnerism. In short, the Court in this era was bending over backward to accommodate legislative judgment. The sense is hard to avoid that in some respects the Court may have bent a bit further than was strictly necessary. The New Deal reformulation of due process notice jurisprudence might simply have been a kind of overcorrection of constitutional course.

Once a pendulum swings too far in one direction, it swings back. The plausibility of the overcorrection account is buttressed by current judicial contests over the boundaries of due process notice and over the appropriate role of federal courts in shielding notice values from impermissible exertions of legislative and executive power.

In criminal law, the rule of lenity has shown some recent signs of vitality after its extended period of quiescence.[283] On vagueness, a new and prominent example is *Skilling v. United States*.[284] *Skilling*

281. *See* ACKERMAN, *supra* note 278.

282. *Cf.* Sunstein, *supra* note 4, at 254 n.23 ("The idea of a constitutional moment should, I think, be seen as a metaphor, connoting large-scale change spurred by popular wishes, rather than as a genuine constitutional amendment.").

283. *See* United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion) (applying the rule of lenity to construe the term "proceeds" in the federal money-laundering statute to cover "profits," not "gross receipts"); *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 475–76 (2008) ("Many modern judges and scholars either write off lenity as a dormant doctrine or theorize that its scope has gradually condensed to preventing only the criminalization of innocent conduct. Last Term, in *United States v. Santos*, [128 S. Ct. 2020 (2008),] the Supreme Court began reversing that trend. . . . By turning to lenity as its first point of analysis and strictly construing a statutory term whose broader construction could only have added additional penalties to a preexisting conviction, the Court began reversing the contraction of lenity and revitalizing a crucial protection for defendants.").

284. Skilling v. United States, 130 S. Ct. 2896 (2010).

concerned the federal "honest services" statute, which expressly stated that the mail and wire fraud statutes prohibited efforts to deprive others of "the intangible right of honest services."[285] For decades, as hundreds of federal prosecutions proceeded under this provision, "the criminal defense bar, some academics, and some federal judges (who remained dissenters only) complained that the new statute did not provide constitutionally sufficient notice of what conduct it criminalized and that it criminalized nonblameworthy behavior."[286] After repeatedly denying certiorari on this question,[287] the Court agreed to hear Skilling's appeal in 2009.[288] In a decision that greatly narrowed the statute's scope, the Court held that the law had to be construed to prohibit only bribery and kickback schemes to avoid vagueness problems.[289] In addition, "the majority went so far as taking the extraordinary step of warning Congress in a footnote that any effort to expand the mail fraud statute further would have to navigate through perilous constitutional shoals"[290]—the shoals of vagueness.[291] The dissent, meanwhile, argued for striking the statute entirely, also on vagueness grounds.[292] All nine Justices, then, agreed that this federal criminal statute was too vague to be enforced as it was written.[293]

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285. *Id.* at 2907; *see also* 18 U.S.C. § 1346 (2006).

286. Samuel W. Buell, *The Court's Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL'Y 31, 34 (2011).

287. *See, e.g.*, United States v. Sorich, 523 F.3d 702 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1308 (2009).

288. Skilling v. United States, 130 S. Ct. 393 (2009).

289. *Skilling*, 130 S. Ct. at 2907 ("Construing the honest services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes.").

290. Buell, *supra* note 286, at 36.

291. *Skilling*, 130 S. Ct. at 2933 n.44 ("If Congress were to take up the enterprise of criminalizing 'undisclosed self-dealing by a public official or private employee,' it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns." (citation omitted) (quoting Brief for the United States at 43, *Skilling*, 130 S. Ct. 2896 (No. 08-1394), 2010 WL 302206, at *43)); *supra* note 289.

292. *Skilling*, 130 S. Ct. at 2935 (Scalia, J., dissenting).

293. The vagueness debate between the majority and the dissent in *Skilling* is a pure rehash of the debates that occurred during the New Deal period on how best to accommodate vagueness doctrine with deference to the legislature's choices. The *Skilling* majority channeled the attitude of Justice Frankfurter's dissent in *Winters v. New York*, 333 U.S. 507, 520 (1948) (Frankfurter, J., dissenting), by asserting that its narrow construction of the statute preserved the legislative prerogative: "[T]he Court does not *legislate*, but instead *respects the legislature*, by preserving a statute through a limiting interpretation." *Skilling*, 130 S. Ct. at 2931 n.43 (majority opinion). The *Skilling* dissent, echoing the *Dotterweich* dissent, *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (Murphy, J., dissenting), contended that true deference to legislative

Due process notice concerns have also played a noteworthy role in recent cases implicating civil laws. In two cases decided in 2012, both concerning administrative agencies, the Court has taken care to stress the importance of notice. In the first, addressing the degree of deference due to the Department of Labor in interpreting its rules, the Court declined to extend *Auer* deference[294] to that agency largely because of considerations of "unfair surprise" to regulated parties.[295] The Court's reasoning appears to make fair notice to regulated parties a prerequisite for the extension of *Auer* deference to agency interpretations of regulations.[296] In the second case, which addressed the Federal Communications Commission's shifting efforts to regulate indecency on television broadcasts, the Court stressed that notice problems would be created by "regulatory change this abrupt on *any* subject," en route to holding that such change "surely" posed a notice problem where protected speech might be chilled.[297] Other

judgment would require holding the statute vague: "The Court strikes a pose of judicial humility . . . . [But] it is wielding a power we long ago abjured: the power to define new federal crimes." *Skilling*, 130 S. Ct. at 2935 (Scalia, J., dissenting). Justice Scalia has long been a vocal advocate for placing some teeth back into the vagueness doctrine. *See, e.g.*, Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) (chastising Congress for enacting an "ever-increasing volume" of "imprecise laws"); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 255–56 (1989) (Scalia, J., concurring) (inviting a vagueness challenge to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (1982 & Supp. V 1988)).

294. *See* Auer v. Robbins, 519 U.S. 452, 462 (1997) (holding that an agency's interpretation of an ambiguous regulation merits deference even when the interpretation is offered in a legal brief, so long as it reflects the "agency's fair and considered judgment on the matter in question").

295. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012) ("[T]he pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations certainly do not provide clear notice of this. . . . [W]here, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."). *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1461–62 (2011) (noting the potential dangers of deference to agencies that promulgate their own rules and interpret them with few safeguards).

296. *See Christopher*, 132 S. Ct. at 2167 (holding that deference to the agency's interpretation "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires'") (alteration in original) (quoting Gates & Fox Co. v. OSHA, 790 F.2d 154, 156 (D.C. Cir. 1986))).

297. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2318 (2012) (emphasis added) ("The Commission's lack of notice to Fox and ABC that its interpretation had changed . . . 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.' This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon 'sensitive areas of basic First Amendment freedoms' . . . .") (second alteration in original) (citation omitted) (quoting United States v. Williams, 128 S. Ct. 1830, 1845 (2008); and Baggett v. Bullitt, 377 U.S. 360, 372 (1964))).

recent cases, such as *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,[298] likewise show the Justices debating the extent to which notice values require protection from complex federal civil regulations.[299]

Now, a cynic might take the view, *à la* the mid-1930s critics of judicial mistrust of legislatures noted in Part II,[300] that these contemporary invocations of due process notice values are merely driven by politics or ideology rather than by any deep-seated concern over constitutional values. Certainly, at least some of the recent opinions that most aggressively urge the importance of protecting notice—for example, the dissents in *Skilling* and *Jerman*—were not penned by jurists greatly enamored of the laws and regulations under review in those cases. Prominent scholars have mapped how the Court can use statutory construction and canons of interpretation to manipulate substantive outcomes.[301] It would be easy to dismiss these opinions as mere cumulative evidence of the fact that constitutional doctrines, particularly interpretive rules, are malleable instruments that conservative courts can wield to curb disliked exercises of regulatory power.

That view is certainly plausible. But it too sharply discounts the demonstrable appeal across the ideological spectrum of the various

298. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605 (2010).

299. The dissent in *Jerman* urged reading a "mistake[] of law" defense into a provision authorizing a defense to civil suits under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1962–1692p (2006), where the conduct violative of the act was the result of a "bona fide error," *Jerman*, 130 S. Ct. at 1629–30 (Kennedy, J., dissenting). Citing the quantity and complexity of federal consumer-protection legislation, Justice Kennedy, joined by Justice Alito, argued that individuals who acted on good-faith interpretations of what the law required ought not to be vulnerable to civil liability for their "technical violations." *Id.* at 1631. This is an argument that the rationale of the *Murdock* line of cases should be expanded to apply to the context of civil liability. *See id.* at 1630 ("The FDCPA is but one of many federal laws that Congress has enacted to protect consumers."); *id.* (collecting statutes); *id.* at 1632 (citing "the complexity of the FDCPA regime" and its implementing regulations); *cf.* United States v. Murdock, 290 U.S. 389, 396 (1933) (exempting from liability those who fail to pay taxes because of a good-faith misunderstanding of complex tax rules); *see supra* text accompanying notes 131–135.

300. *See supra* notes 58, 198–201.

301. *See, e.g.*, William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1512 n.9, 1542–47 (1998) (describing the "manipulable" nature of linguistic and text-based canons); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 433 (2002) ("Through equitable doctrines, interpretive canons, and other devices of statutory construction, the [Rehnquist] Court has conferred protections [upon state and local governments] that would be difficult if not impossible to derive directly from the Constitution.").

facets of due process notice doctrine. Consider, for example, the rule of lenity. As described in Part II.C, the rule of lenity was formerly decried as a proxy variable reflecting latent conservative judicial hostility toward progressive legislation—as a tool for undercutting positive law from the same toolbox as the rule that statutes in derogation of the common law should be narrowly construed.[302] But today, no single antiregulatory political agenda appears to unite the Justices who are inclined to reinvigorate judicial enforcement of the rule of lenity.[303] Of course, not everyone supports the rule of lenity,[304] but it would be odd to accuse those who do advocate its more aggressive use of being closet Lochnerists.

A somewhat similar tale can be told about retroactivity. Though historically a doctrine intimately linked to the idea of protection of traditional property rights, retroactivity challenges now often emerge in challenges to statutory and regulatory schemes that have nothing to do with property rights—notably, in the immigration context.[305] In these cases, the liberal members of the Court, not just the conservatives, have employed retroactivity doctrine—albeit only to construe a statute as prospective, not to void it for impermissible retroactivity.[306] The point is only that, as with lenity, a doctrine that was once reliably associated with a single political or ideological valence in one context (the regulation of economic matters) attracts a quite different set of supporters in another (the regulation of

302. *See supra* note 212 and accompanying text.

303. *See, e.g.*, United States v. Santos, 553 U.S. 507, 513–14 (2008) (Scalia, Souter, Thomas & Ginsburg, JJ.) (applying the rule of lenity to the federal money-laundering statute); *id.* at 524, 528 (Stevens, J., concurring in the judgment) (providing a different rationale for applying the rule of lenity); *see also* Price, *supra* note 192, at 886 (explaining the two main rationales for lenity, notice and legislative supremacy, and their flaws); *The New Rule of Lenity*, *supra* note 34, at 2420 (analyzing the Rehnquist Court's modified application of the rule of lenity).

304. *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198–200 (1985) (finding that the rule of lenity is only used now to provide outcomes that "seem right"); Kahan, *supra* note 191, at 396–425 (arguing against lenity and the notion lenity should be prioritized over other means of interpretation).

305. *See, e.g.*, Vartelas v. Holder, 132 S. Ct. 1479, 1483 (2012) (deciding whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 & 18 U.S.C.), is applicable to a crime that occurred before the law became effective); INS v. St. Cyr, 533 U.S. 289, 292–93 (2001) (inquiring whether the IIRIRA was intended to apply retroactively to past crimes).

306. *Compare, e.g.*, *Vartelas*, 132 S. Ct. at 1484 (Roberts, Kennedy, Ginsburg, Breyer, Sotomayor & Kagan, JJ.) (applying the presumption against retroactivity and construing the statute to have prospective effect only), *with id.* at 1492 (Scalia, Thomas & Alito, JJ.) (arguing that the statute was not retroactive).

immigration and deportation). In short, the jurisprudence of due process notice interacts in somewhat unpredictable ways with ideology; notice, like politics, makes strange bedfellows.[307]

Understanding this point might encourage one to approach recent cases in which the Court has played with due process notice with a less skeptical stance. Here is one possible take on these cases—an angle that is a bit more charitable and perhaps also more illuminating. The opinions just described emphasize the importance of due process notice, but they also share another feature in common: these cases involve confusing federal statutes and complex federal regulatory schemes. A persistent element of current legal and policy debate is the critique of federal "hyperlexis," or the complaint that there exist too many federal laws and regulations, both civil and criminal.[308] Not too difficult to perceive in these recent cases is a more fundamental and genuine strain of resistance to the statutory and regulatory complexity that characterizes federal law today, as well as a degree of sympathy with the regulated individual who, in plowing a path through the legal thicket, unwittingly crosses some forbidden line. Vagueness, retroactivity, and lenity offer a tempting array of tools for curbing the modern-day *bêtes noirs* of federal "overregulation" or "overcriminalization." Put differently, in today's mature administrative state, emphasis on due process notice is not so much a reliable stalking horse for conservative ideology, but rather for a more widely shared concern that courts have made too sharp a retreat from policing constitutional constraints on various kinds of legislative and executive action affecting individuals and businesses.

Whatever one's views on the judicial motives behind these opinions, however, the recent rumblings around due process notice may be safely read to reflect pressure building against the New Deal reformulation of due process notice doctrine. These cases increase the odds that the New Deal reformulation of due process notice doctrine was not a fundamental part of what the New Deal "settled," or settled permanently. They also pose a normative question that merits a

307. *Cf.* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 64 (2012) ("Across a broad range of cases, the Court expressed a suspicion of the political process—a suspicion that goes beyond skepticism toward the traditional *Carolene Products* categories . . . . And while the distrust was expressed more often by the more conservative members of the Court, it was not limited to them.").

308. *See* Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1587 (2012) (describing variants of "the claim that America suffers from 'hyperlexis,' or the existence of 'too much law,'" and its influence on governmental actors).

response: Is the New Deal reformulation of due process notice doctrine maladapted to the modern regulatory state?

Certainly, reasons for rethinking the lines drawn by the New Deal reformulation of due process notice jurisprudence are not hard to adduce. Statutes and regulations are far more extensive now than they were in that era,[309] and they probably affect the behavior of individuals as well as businesses to a greater extent now.[310] Businesses, much less individuals, are often unable to consult with regulators to determine in advance how the law may apply to them.[311] Civil regulations often impose consequences that are as severe in some respects as criminal sanctions,[312] a fact that undermines somewhat the rationale for differential scrutiny of these categories for vagueness purposes. The existence of mens rea requirements has not saved individuals from criminal convictions for conduct that it would be hard to suspect was civilly sanctioned, let alone criminally punishable.[313] A prima facie case can easily be made, then, that the

309. *APA at 65: Is Reform Needed To Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 12 fig.2 (2011) (statement of Susan Dudley, Director, George Washington University Regulatory Studies Center) (describing the increase in the number of pages in the *Federal Register* from 1940 to 2010); Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105 (2000) ("In 1928, the unannotated version of the United States Code appeared in two tall volumes that totaled six inches in width. The 1988 version of the unannotated Code included twenty-nine volumes that spanned six feet, a twelve-fold increase." (footnote omitted)).

310. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 409 (1989) (describing the continuing post-New Deal growth of the regulatory state during the "rights revolution" of the 1960s and 1970s, when the "national government substantially increased its regulatory responsibilities").

311. *See, e.g.*, Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1628, 1635 (2010) (Kennedy, J., dissenting) (criticizing the notion that "an attorney faced with legal uncertainty only needs to turn to the Federal Trade Commission (FTC) for an advisory opinion" as "misconceiv[ing] the practical realities of litigation" and concluding that this may partly account for "why, in the past decade, the FTC has issued only four opinions in response to just seven requests").

312. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1534 (1996) ("[S]ome justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations. Indeed, the answer to the question the title poses—'corporate criminal liability: what purpose does it serve?'—is 'almost none.'").

313. *See, e.g.*, United States v. Moore, 612 F.3d 698, 702 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("This case is novel: The Government has obtained a false statements conviction under 18 U.S.C. § 1001 against an individual who signed the wrong name on a postal delivery form.").

due process notice doctrine crafted in the New Deal era is maladapted to the shape and operation of the mature regulatory state.

When a system's premises "cease[] to be persuasive descriptive accounts of the world," it is time to "reassess and revise those premises."[314] It lies beyond the scope of this Article to perform a normative assessment of whether and how due process notice doctrine requires renovation in view of the statutory and regulatory complexity of modern-day American law. But without understanding the due process notice doctrine of the past, it is impossible to sketch the due process notice doctrine that society may want and need for the future. This Article has laid some necessary groundwork for that normative analysis.

CONCLUSION

John Pierpont Morgan is generally known as a financier, not a legal philosopher. He lived his life during the ascendancy of *Lochner*, at the zenith of the doctrine of liberty of contract.[315] And Morgan was speaking of people, not of courts, when he observed that a man generally has two reasons for doing something: a good reason and the real reason.[316] Still, it is hard to formulate a pithier summary of legal realism's view of how courts reason.[317]

The story of due process notice doctrine vividly illustrates how effectively good reasons can mask real reasons. The shifts in due process notice doctrine described in this Article mostly occurred with little fanfare, in the course of the Court's adjudication of constitutional and statutory cases across a wide and variegated legal terrain. The Court routinely packaged its reasons for rejecting a notice challenge, or for altering its interpretive techniques relevant to notice, as just an unobjectionable application of past precedents to new facts.

With a little digging, however, it becomes evident that during this period the Court was engaged in refashioning due process notice

314. Cushman, *supra* note 227, at 258.

315. *See* JEAN STROUSE, MORGAN: AMERICAN FINANCIER, at ix (2000) ("When Pierpont Morgan died in 1913 . . . he was the most powerful banker in the world.").

316. *Id.* at xiii.

317. *See* Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1237 (1931) (describing legal realism as involving "distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions").

doctrine to allow a wide judicial berth to the regulatory state. In this newly emerging constitutional regime, aggressive judicial review of matters of notice came to seem as unwelcome and as abnormal as aggressive judicial review of substantive policy questions. Hidden in plain view, the New Deal constitutionalism of due process notice encapsulates how the Court adapted the demands of rule-of-law values and the institution of judicial review to the changing constitutional and political convictions of American society.[318]

Thus reformulated, due process notice doctrine served an important purpose. Within the relaxed constraints of due process notice jurisprudence, Congress, state legislatures, and federal and state agencies have for seventy-five years wielded a largely free hand, at least from the standpoint of due process notice questions, in drafting the civil and criminal laws and regulations that would govern modern America in all its complexity.

But this relaxation may have stretched the doctrine to the snapping point. When modern judges survey the resultant morass of federal laws and regulations, some now perceive a threat to the fragile virtues of constitutionally adequate notice. These judges have once again started to toy with the idea of using due process notice doctrine as a tool for restraining legislation and regulation.

To be sure, judicial opinions invoking concepts of due process notice are few and far between. But, now and then, and perhaps with increasing assuredness, such opinions do come down. Though they make little splash, they strike the ear like the first few drops of a heavier rainfall. Before that rain starts in earnest, public law scholars must engage with the questions of whether and how due process notice doctrine should be adapted to respond to the demands of today's regulatory state.

318. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture").