

Why Repeal of the Death Tax Means the Second Demise of Substantive Due Process

PAUL E. MCGREAL*

Death and taxes. For the first two centuries of American democracy, the former has been the province of Providence, the latter the concern of Congress. Congress has focused on the Internal Revenue Code, leaving death to the aging process, human folly, religion, and Darwinian forces. In a stunning power grab, Congress recently upset this order, asserting control over both domains. No longer satisfied to allow life to run its course, Congress has sought to hasten accrual of the Death Tax.¹ Put simply, Congress has sanctioned the killing of rich Baby Boomers.

You may be asking yourself, “I know I don’t keep up with the news as much as I like to, but how did I miss *that*?” Well, you did not actually miss it. You probably heard of the law that made this startling change—last year’s so-called tax reform legislation—but just did not read carefully between the lines.² For, after careful review of this legislation,

* Associate Professor, South Texas College of Law. The author can be reached at pmcgreal@stcl.edu. No research assistants were harmed in the writing of this Essay. Unfortunately, the same cannot be said for colleagues who endured prior drafts, including Bruce Burton, Tom Mayo, Val Ricks, Kevin Yamamoto, and Tim Zinnecker. All errors that remain are intended as a test of the reader’s knowledge.

1. Opponents of the tax must have coined the nickname “death tax,” for it would seem bad public relations to label anything you want the public to support as the “death [blank].” For example, it is probably no mistake that local governments have officials named “coroner” or “medical examiner” rather than “death doctor.”

2. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501, 115 Stat. 69. Granted, given the small font and tissue-like pages of the typical code compilation, it is impossible to even see between the lines of the text. But at a sufficient level of magnification, it is there. Trust me.

it seems clear that the 107th Congress has targeted wealthy Boomers for special tax treatment.

For those of you who still do not see it, let me explain. The Baby Boomer generation, defined loosely as those born between 1946 and 1964, poses a significant problem for the federal government. It is not that they are not nice people—I even have friends and relatives who are Baby Boomers.³ It is just that there are a lot of them. Ordinarily, this would not be a problem for Congress. After all, more people mean more taxpayers.

But, you see, some sixty-six years ago Congress made this pesky little promise⁴ of retirement benefits to future generations, known as Social Security.⁵ The basic structure of Social Security is that current wage earners (the “young”) fund a system of benefits for retired workers over a certain age (the “old”). This plan works fine as long as there are sufficient young to pay the taxes that fund the benefits of the old. But, when there are many more old than young, Congress must tax the young into bankruptcy to have enough funds to cover Social Security for the old.

That is why all those Baby Boomers are a problem. There are just too many of them for Social Security to work. In fact, when the Baby Boomers retire, Congress would have to tax Generation X⁶ at an estimated ninety percent marginal tax rate to cover the Boomers’ Social Security.⁷ Because such a tax increase would be politically infeasible, Social Security would collapse under the tremendous weight of the retiring Baby Boomer generation. And, given the enormous popularity

3. Also, my spouse technically qualifies under the above definition.

4. Paul Krugman, *Breaking the Contract*, N.Y. TIMES, Mar. 5, 2002, at A25 (stating that social security is “really a social contract: each generation pays taxes that support the *previous* generation’s retirement, and expects to receive the same treatment from the next generation”). Unlike a contractual promise, this political “promise” is enforceable only at the ballot box. However, organizations such as the American Association of Retired Persons (AARP) have made sure that this promise is harder to break than a standard form residential lease. (By the way, the name AARP must be a misnomer, as both of my parents are employed and yet members. Indeed, if you go to the AARP Web site, you will not find the word “retired” either on the front page or on the “about AARP” page. See AARP, at <http://www.aarp.org> (last visited Jan. 6, 2002); *About AARP*, at <http://www.aarp.org/aboutguide.html> (last visited Jan. 6, 2002). Perhaps this is because one only need be fifty years old to join the AARP, which suggests a grossly optimistic view of retirement savings in America.)

5. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397jj (1994 & Supp. 1999)).

6. Generation X is defined as “the group of people born between 1961 and 1981.” *What Is Generation X?*, at <http://www.cc.colorado.edu/Dept/EC/generationx96/genx/genx9.html> (last visited May 15, 2002).

7. See generally Jerry W. Markham, *Privatizing Social Security*, 38 SAN DIEGO L. REV. 747, 756 (2001) (suggesting an alternative to Social Security because the system is “bankrupt”).

of Social Security, its demise would mean ruin (at the ballot box) for the Congress there to witness the train wreck. The current Congress's logic, then, is impeccable—less Boomers mean no Social Security crisis.

You might ask whether Congress could do anything short of killing Baby Boomers to save Social Security. Some alternative solutions exist. For example, instead of using the former budget surplus for a tax cut, Congress could have allocated it to the Social Security trust fund. Or, we could raise the retirement age. Or, means testing⁸ could reduce (or eliminate) Social Security for wealthy taxpayers. Sadly, though, these solutions share a common flaw—they are political suicide for the federal lawmaker who advocates them. So the typical legislator's choice is, on the one hand, to solve the Social Security problem and get kicked out of office *now*, or, on the other hand, to ignore the problem and get kicked out of office *later*.⁹ For the rational, utility-maximizing (that is, reelection-maximizing) legislator, the choice is obvious.¹⁰

A clever legislator or staffer in the 107th Congress designed an elegant solution to this dilemma: downsize the Baby Boomer generation. Here is how it works. Currently, taxpayers who die with estates valued over \$1,000,000 pay a federal estate tax (also known as the death tax) at a forty-one percent marginal rate.¹¹ The current tax reform legislation phases out the death tax over the next ten years.¹² In 2010, the estate tax is completely repealed,¹³ with death finally achieving the elusive status of a nontaxable event. But, read on in the legislation and you will find that the death tax is automatically reinstated in 2011.¹⁴ So, here is the scenario: Generation X'er has rich Boomer parents. If said rich Boomer parents die in 2010, Generation X'er gets inheritance sans death tax. If

8. See *infra* text accompanying note 13.

9. Or, maybe never. See JOHN MAYNARD KEYNES, *MONETARY REFORM* 88 (1924) (“*In the long run we are all dead.*”).

10. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 22 (1991) (“The core of economic models is a jaundiced view of legislative motivation. [E]conomists . . . postulate that legislators are motivated solely by self-interest. In particular, legislators must maximize their likelihood of reelection. A legislator who is not reelected loses all the other possible benefits flowing from office.”) (footnotes omitted).

11. 26 U.S.C. §§ 2001, 2010 (1994 & Supp. 1999). The marginal rate increases incrementally with the size of the estate, ultimately reaching 50% for the portion of the taxable estate over \$2,500,000. *Id.*

12. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 69.

13. *Id.*

14. *Id.* § 901(a), 115 Stat. 150.

said rich Boomer parents die in 2011 or after, Generation X'er gets inheritance minus the death tax. The economic incentive is unmistakable.

The genius of this scheme is that it covertly implements a Social Security reform that currently faces significant political opposition: means testing. Under means testing, rich Baby Boomers would be allowed to live, but they would receive less (or no) Social Security. As noted above, interest groups have made sure that this proposal will not pass. Under the recent tax reform law, rich Baby Boomers are eligible for full Social Security benefits, but Congress has put a bounty on their heads, giving their heirs a powerful incentive to kill them in 2010. And, to borrow from an old movie title, "Dead Boomers Don't Collect Social Security."¹⁵

I never thought I would see the day that Congress sanctioned murder.¹⁶ Of course, Congress was not so bold as to do so expressly. For obvious reasons, a bill entitled, "Kill the Rich Boomers Act of 2001," would likely have met with political opposition. Instead, Congress hid its Social Security reform scheme in an elaborate tax bill, slipping it past the American public, who was blinded by its insatiable appetite for tax relief. In short, the recent federal tax law, and its repeal and reinstatement of the federal estate tax, is actually a federal law legalizing the killing of rich Boomers in the name of saving Social Security.¹⁷

At this point, perhaps somewhat skeptical of my claim, you may be formulating objections to my theory. One such objection would be that heirs who murder their testator cannot inherit. This old chestnut dates back to a famous nineteenth century case decided by the New York Court of Appeals.¹⁸ That court held, and many courts have followed the holding, that an heir cannot benefit from her criminal act by inheriting

15. DEAD MEN DON'T WEAR PLAID (Universal 1982). Perhaps not wishing to tip its hand, Congress rejected a provision that would have exempted from tax any income derived from the murder-for-hire of a rich Boomer.

16. Once, in an undergraduate Philosophy of Law class, I floated the hypothetical whether it would violate due process for a state to repeal its murder law. I was quickly shot down with the retort, "That would never happen." (Incidentally, this is the only known instance of such an objection being voiced in a philosophy class.) While some would note that this hypothetical presaged my entry into the academy, I now prefer to think back on it as evidence of my keen ability to foresee public policy trends.

17. Of course, precedent exists for such a public policy measure. See CHARLES DICKENS, A CHRISTMAS CAROL 12 (Thomas Y. Crowell Co. 1924) (speaking of the poor's aversion to their living conditions, Ebenezer Scrooge replies, "If they would rather die, . . . they had better do it, and decrease the surplus population"); JONATHAN SWIFT, A MODEST PROPOSAL 11, 12-13, 15 (Charles Beaumont ed., 1969) (proposing the somewhat more extreme measure that the Irish eat their children, as opposed to simply killing them).

18. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

from her murder victim.¹⁹ Many states have codified a similar prohibition.²⁰ Further, in all fifty states, murder is against the law and punishable by life imprisonment or death. So, some fairly formidable obstacles stand in the way of Congress's plan to thin the herd.

But, that ignores the simple fact that Congress, and *not* the states, is the fabled 800-pound gorilla of American government. Under the Supremacy Clause, federal law trumps state law.²¹ This trumping can occur in three circumstances. First, state law is preempted if it requires a person to do something that federal law forbids, or vice versa.²² For example, if federal law expressly required Generation X'ers to kill rich Boomers and state murder laws prohibited this, federal law would preempt state law.

Second, state law is preempted if Congress has "occup[ie]d the field" with federal legislation.²³ For example, if Congress had enacted a comprehensive statute that regulated all aspects of Baby Boomer hunting and capturing, this detailed legislation would occupy the field and preempt any state law that touched on the subject. Neither this nor the first type of preemption fit our case.

The third type of preemption, however, fits like a glove. In this last scenario, state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁴ For example, just last term, the Supreme Court held that Massachusetts could not bar state or local entities from dealing with companies that do business with Burma.²⁵ Massachusetts enacted the

19. *Id.* at 191.

20. *See, e.g.*, MISS. CODE ANN. § 91-1-25 (1994) ("If any person wilfully cause or procure the death of another in any way, he shall not inherit the property, real or personal, of such other; but the same shall descend as if the person so causing or procuring the death had predeceased the person whose death he perpetrated.").

21. U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

22. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

23. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *see also Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

24. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

25. *Crosby*, 530 U.S. at 373-74; *see also Seinfeld: The Foundation* (NBC television broadcast, Sept. 19, 1996), available at <http://www.middleenglish.org/spc/22.3/hersey.html> (last visited Apr. 20, 2002) (J. Peterman: "You'll most likely know it as Myanmar, but it'll always be Burma to me.").

ban because it objected to the Burmese Government's human rights record.²⁶ Federal law imposes similar (though not identical) economic sanctions on Burma, and grants the President power to increase, modify, or waive those sanctions on humanitarian or national security grounds.²⁷ The Supreme Court held that the federal sanctions law preempted Massachusetts law.²⁸ According to the Court, foreign relations is a subject committed largely to the discretion of Congress.²⁹ Further, the Court found that the federal sanctions statute and its grant of executive discretion was intended to allow the United States to speak with one voice on such issues.³⁰ Allowing states to exercise a similar power would fracture United States decision making in the area, diluting the Congressional purpose.

The same analysis applies here. Congress has passed a statute that creates clear incentives for certain heirs to kill their rich testators. Congress's purpose in doing so is to reduce the number of rich Baby Boomers by the year 2011, thereby saving the Social Security system. State laws that penalize killing, such as criminal murder prohibitions or wrongful death and survivor statutes, create exactly the opposite incentive of that intended by Congress. Consequently, such state laws pose a substantial obstacle to the achievement of Congress's purpose and are preempted.

Now, one might object that I have misidentified Congress's purpose for repealing the death tax in 2010 and then reinstating it in 2011. For example, one commentator claims that Congress did so simply to cook the federal books.³¹ According to this commentator, Congress's recent tax cut is a piece of feel-good legislation that cannot possibly keep pace with federal spending over the next decade. So, Congress hopes to reap immediate benefits by passing a tax cut today, and putting off the inevitable day of reckoning until 2011, when all bets are off and we return to the tax status quo ante.

26. See *Crosby*, 530 U.S. at 377.

27. *Id.* at 368.

28. *Id.* at 388.

29. See *id.* at 374–76.

30. See *id.*

31. Paul Krugman, *Bad Heir Day*, N.Y. TIMES, May 30, 2001, at A23.

In short, the tax bill is a joke. But if the administration has its way, the joke is on us. For the bill is absurd by design. The administration, knowing that its tax cut wouldn't fit into any responsible budget, pushed through a bill that contains the things it wanted most—big tax cuts for the very, very rich—and used whatever accounting gimmicks it could find to make the overall budget impact seem smaller than it is.

Id.; see also Paul Krugman, *The Big Lie: A Fraudulent Tax Bill*, N.Y. TIMES, May 27, 2001, at OP-ED WK 9 (claiming that Congress “lied” in “selling” its recent tax legislation to the American public).

This argument has one simple flaw. It improperly impugns the motives of Congress, accusing its members of a cynical ploy—an illusory tax cut that vanishes soon after it phases in—to fool the people for the legislators' own craven political benefit. Like the Supreme Court, I choose not to attribute such base motives to our federal representatives. In reviewing the constitutionality of legislation, the Supreme Court is loath to impute such crass, political motives to our representatives.³² Instead, if possible, the Court seeks some public policy justification for Congress's actions.³³ That is just what this Essay offers. Far from a calculated political ruse, the repeal and reinstatement of the death tax is a careful, if extreme, solution to the politically intractable problem of Social Security's solvency. That Congress's solution imposes more severely on some than others is inevitable. After all, you cannot make an omelette without breaking a few eggs.³⁴

Alas, despite Congress's earnest efforts, its attempt at Social Security reform may face the same fate as so many other promising political compromises. Just as with term limits,³⁵ the line item veto,³⁶ and federal campaign finance reform,³⁷ the current Social Security reform will likely meet an untimely constitutional demise. Rich Boomers, once they realize that they have invited a trojan horse into their midst, and once they find that they are unable to save themselves in the court of public opinion, will likely challenge the law's constitutionality.

Sadly, constitutional arguments are likely to be well founded. An Equal Protection Clause attack, however, is not the likely winner. Since rich Boomers do not constitute a suspect class, any law targeting that group, such as a law that confers upon them an unfavorable tax status, is subject to deferential "rational basis" review.³⁸ Under this standard, Congress need only show that a legitimate purpose lies behind the law and that the law is rationally related to that purpose.³⁹ Here, protecting

32. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981) ("We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry.").

33. *Id.* at 464.

34. Cf. *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 621 (1966) (Fortas, J., dissenting) ("[A]n omelette cannot be unscrambled.").

35. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

36. See *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

37. See *Buckley v. Valeo*, 424 U.S. 1, 51, 54, 58 (1976).

38. See *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 592–93 & n.39 (1979).

39. *Id.*; see *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177–79 (1980).

the solvency of Social Security is surely a legitimate purpose. Government has only limited resources, and the task of conserving those resources is an important one.⁴⁰

Also, eliminating Boomers is rationally related to Congress's purpose. If there are too many Boomers for Social Security to survive, reducing the number of Boomers should neatly achieve the desired end. Of course, there are other ways to achieve the same end, such as increasing the retirement age. However, rational basis review does not require the government to take the least discriminatory regulatory avenue.⁴¹ Rather, any rationally related thoroughfare will do.

If Boomers are to succeed, their primary constitutional argument will be substantive due process. Social Security reform that encourages Boomer removal violates Boomers' fundamental right to life.⁴² Consequently, the statute must survive what is known as "strict scrutiny," under which Congress must have a compelling governmental interest,⁴³ and the law must be necessary to achieve that compelling governmental interest.⁴⁴ Well, that is the ballgame. As anybody who is anybody in constitutional law knows, no law can survive strict scrutiny.⁴⁵ With one exception,⁴⁶ the government has never carried that burden and likely never will. Granted, the Supreme Court tempts us, holding out the

(stating that Congress had a legitimate interest in protecting the solvency of the railroad retirement system); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-38 (1973) (stating that Congress had a legitimate interest in protecting food stamp funds from fraud).

40. The careful reader will note that I slipped in the word "important" on the off-chance that the Court decides to apply some form of heightened protection (intermediate scrutiny) to Baby Boomers. Currently, only gender expressly receives such heightened protection, while other classes, such as the mentally retarded, hippies, and homosexuals, receive sporadic protection at intervals corresponding (as far as anyone can tell) to the mean high tide off the coast of northern Virginia. See *Romer v. Evans*, 517 U.S. 620, 631-33, 635-36 (1996) (discussing homosexuals); *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (discussing gender); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (discussing the mentally retarded); *Moreno*, 413 U.S. at 533-36 (discussing hippies). When such heightened scrutiny is invoked, the government can no longer rest on a merely legitimate interest, but rather must offer an important one. While this distinction may seem elusive, the main explanation seems to be that important governmental interests are those written in bold or italic type.

41. See *Beazer*, 440 U.S. at 592-93 & n. 39-40.

42. The Due Process Clause of the Fifth Amendment protects the triad of "life, liberty, [and] property." U.S. CONST. amend. V.

43. As for what differentiates a compelling interest from an important one, I am at a complete loss.

44. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (applying a strict scrutiny standard to federal affirmative action programs).

45. See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (noting that strict scrutiny is "strict in theory, but fatal in fact").

46. *Korematsu v. United States*, 323 U.S. 214, 216, 219-20 (1944).

possibility that some law, some day, might survive strict scrutiny.⁴⁷ But, like Ulysses lashed to the mast, we know that succumbing to their siren song can only lead to no good.

For those interested in analytical completeness, I will now review the strict scrutiny argument.⁴⁸ First, it is unlikely that saving Social Security is a compelling governmental interest. Other than saving the nation from imminent invasion,⁴⁹ or remedying identified instances of racial discrimination,⁵⁰ the Court has not found any such government interests compelling. Money, even retirement money, just does not have the intellectual cachet of those interests. Second, it simply is not necessary to offload Boomers to save Social Security. Other alternatives, such as means testing and raising the retirement age, exist. Congress's Social Security reform package is unconstitutional.

One constitutional Hail Mary pass may save the plan. One could argue that Baby Boomers are not "persons" within the meaning of the Fifth Amendment and thus are not entitled to the protections of due process. The Supreme Court accepted a similar argument in *Roe v. Wade*, holding that an unborn fetus is not a constitutional "person."⁵¹

47. See *Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). In doing so, the Court sounds no more convincing than my parents did when they dropped me off at little league tryouts: "Just go out there and try your best, and everything will work out fine." If by "fine" they meant, "And you won't make the team," they were right on the mark. See Interview with Fred, Author's Imaginary Childhood Friend, in Houston, Tex. (Oct. 21, 2001) (recounting vivid first person account of the Author's traumatic little league tryout).

48. Those who followed the preceding paragraph can skip this paragraph, which resembles the superfluous appendices found in many social science and science books. Those books often have a self-evident statement, such as, "Given that the world is round," followed by a margin note saying, "For those interested in proof of the preceding statement, see Appendix A." What the author really means is, "If you are smart enough to read this book, you really don't need Appendix A. But, since my publisher wants this book to appeal to a 'wider' (that is, less intelligent) audience, I have ceded to their wishes."

49. Apparently, "imminent danger to the public safety" at one time included "xenophobia." See *Korematsu*, 323 U.S. at 218.

50. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (noting that race-based laws should be "strictly reserved for remedial settings").

51. 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn."). *Roe* involved the Fourteenth Amendment because a state law was at issue. U.S. CONST. amend. XIV, § 1. The Court, wisely, has held that the same words in the Fifth and Fourteenth Amendments mean substantially the same thing. See *Adair v. United States*, 208 U.S. 161, 172-75 (1908) (applying Fourteenth Amendment substantive due process standards to Fifth Amendment scrutiny of a federal statute), *overruled on other grounds*, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 187 (1941) (overruling *Adair's* holding that substantive due process rights

One could make a similar argument for Baby Boomers, relying on popular antipathy toward that generation. Commentators have blamed all sorts of ills, from a greedy “me” culture to Lyme Disease, on Baby Boomers. Any group that has spread such plagues across the American landscape cannot possibly deserve those constitutional protections reserved for “persons.”

Before we (read, non-Boomers) get out our pitchforks and torches, a touch of legal realism: *All nine* Supreme Court justices are of the Baby Boomer, or preceding, generations.⁵² Also, such people compose a substantial portion of the federal judiciary.⁵³ How likely is it that this group is going to uphold a statute that puts their life tenure at risk? If they cannot suppress their preferences when deciding a Presidential election,⁵⁴ will they do so when their own lives may be at stake?

include employers’ freedom to contract). *But see* *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (attempting to get itself out of a tight spot, the Court held that although the Fifth Amendment Due Process Clause, unlike the Fourteenth Amendment Due Process Clause, does not contain an Equal Protection Clause, it does contain an equal protection component; otherwise, the Court would have had a tough time telling states they could not racially segregate their schools but the District of Columbia could).

Trying to distinguish the two clauses reminds me of an eventual oral argument I experienced in practice. In advocating a client’s motion, I had the happy, once-in-a-lifetime instance where unavoidable, four square precedent supported my argument. Apparently realizing this, opposing counsel’s only attempt to distinguish the case was, “Your honor, my client was not a party to the case cited by opposing counsel. Because the present lawsuit involves different parties from the precedent cited by opposing counsel, that precedent is not binding on this court.” After the judge and I exchanged quizzical glances, he said, “Motion granted.”

52. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* lxxi–lxxxviii (4th ed. 2001) (containing brief biographies with dates of birth of the current Justices).

53. Did you really think that I would document the ages of every federal judge just to make this point in this Essay?

54. *See generally* *Bush v. Gore*, 531 U.S. 98 (2000). The conventional wisdom seems to be that the five Justices who voted to stop the Florida recount, thereby giving Republican George Bush the election, are Republicans, while the four Justices who voted to allow the recount to go on, giving Democrat Al Gore one last bite at the electoral apple, are Democrats. *See* Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 14, 2000, at A1 (noting criticism that the justices’ votes were based on partisan support for a specific Presidential candidate and not jurisprudence). This view holds some water, as all five of the so-called Republican Justices were appointed by Republican Presidents (Chief Justice Rehnquist, and Justices O’Connor, Scalia, Kennedy, and Thomas), and two of the four so-called Democratic Justices were appointed by a Democratic President (Justices Ginsburg and Breyer). *See Members of the Supreme Court of the United States*, <http://www.supremecourt.us.gov/about/members.pdf> (last visited May 15, 2002). But a Republican President appointed two of the so-called Democratic Justices: Justice Souter was appointed by Bush the older, and Justice Stevens was appointed by President Ford. *Id.* So, what is up with that? The most likely explanation is that Justices Stevens and Souter are considered “liberal,” and everyone knows that no Republican in good standing is allowed to have a liberal thought. *See* Statement of Senator James Jeffords: Declaration of Independence (May 24, 2001), at <http://www.senate.gov/~jeffords/524statement.html> (stating that because his views have become less conservative than most Republicans, he is becoming an Independent). For

So, there you have it. Congress attempts an innovative solution to one of the thorniest public policy dilemmas of our time, and the Supreme Court is likely to interpose a constitutional objection. It is the New Deal all over again! My prediction: This unseemly episode will end with the second demise of substantive due process.⁵⁵ Once the Court strikes down the current law, Congress will become more bold, licensing bounty hunters to stalk and kill rich Baby Boomers. Eventually, a Generation X'er modeled on the FDR archetype will become President and threaten to pack the Court with Generation X'ers if the Court does not relent. In a moment of constitutional proportions,⁵⁶ the Court will repudiate the preceding decades of substantive due process and uphold "The Baby Boomer Selective Reduction Act of 2010." It will be, "The switch in time that saved the bottom line." And finally, we (read, America) will be free to kill our old.⁵⁷

example, only recently, Justice Stevens has written forcefully in support of core liberal causes such as Americans' right to golf, as well as the government's right to search your home with any and all advanced technology. See *Kyllo v. United States*, 533 U.S. 27, 41 (2001) (Stevens, J., dissenting) (arguing that police search of home with heat-sensing infrared technology is not a Fourth Amendment search); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (holding that PGA's failure to allow professional golfer to ride a cart during a golf event violated the Americans with Disabilities Act).

55. The first demise came at the close of the so-called *Lochner* Era, named for the infamous case, *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Court held that a New York law limiting the working hours of bakers violated the substantive due process right of bakers and their employers to bargain over working hours. *Id.* at 53–54, 58–59. The Court later discarded this "freedom of contract" version of substantive due process in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396 (1937), a decision heralded widely in bakeries across America. To this day, American bakers celebrate March 29, the date *Parrish* was decided in 1937, by offering customers a free danish with every purchase.

56. A constitutional "moment" should be distinguished from a constitutional "time out." Whereas a constitutional moment signifies a constitutional change that sticks around, a constitutional time out is when the Constitution takes a temporary holiday, returning at some later date. For example, some cite the New Deal's vast expansion of federal power as a constitutional moment that lingers to this day. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 47–50 (1991). Conversely, *Korematsu v. United States*, 323 U.S. 214, 219 (1944), where the Supreme Court signed off on the internment of all Japanese Americans on the West Coast, was a constitutional time out during which the Equal Protection Clause vacationed abroad, returning just in time for the Court to decide *Brown v. Board of Education*, 347 U.S. 483, 493, 495 (1954), and hold that racially segregated public schools violate the Equal Protection Clause.

57. Of course, the irony is that by repudiating substantive due process in this way we will finally get the ability to do what we once tried to achieve through that same doctrine. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280 (1990) (rejecting an unfettered substantive due process right to die); *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997) (rejecting an unfettered substantive due process right to die).