TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 34 | Number 1 Article 20

2018

Analyzing Justice Cardozo's Opinions on the Constitutionality of the New Deal

Robert J. Pushaw Jr

ANALYZING JUSTICE CARDOZO'S OPINIONS ON THE CONSTITUTIONALITY OF THE NEW DEAL

Robert J. Pushaw, Jr.[*]

INTRODUCTION

Benjamin Cardozo's appointment to the Supreme Court in 1932 capped a distinguished career as a lawyer, judge, and scholar.[1] During his lengthy service on New York's highest court, Cardozo responded to industrialization and mass immigration – and the resulting economic and social upheaval – by creatively adapting the common law and by allowing legislatures wide latitude in tackling novel problems.[2] As Cardozo explained in his groundbreaking book *The Nature of the Judicial Process*, judges must follow the legal principles embedded in statutes and precedent, but that law continually evolves to accommodate new circumstances and changing ideas about social welfare and morality.[3]

When Cardozo became a Justice, it is no surprise that he adopted a practical, case-by-case approach to reviewing New Deal legislation, which Congress had enacted shortly after Franklin D. Roosevelt (FDR) led the Democratic Party to a landslide victory in November 1932.[4] These statutes addressed the Great Depression by taking over areas formerly reserved to the states – particularly productive activities like labor, manufacturing, and agriculture.[5] Congress asserted unprecedented authority under Article I of the

---

[*]James Wilson Endowed Professor, Pepperdine University School of Law. Thanks to my fellow symposium participants for their insightful comments on this paper.

[1] The definitive study is ANDREW L. KAUFMAN, CARDOZO (1998).

[2] *See id.* at 130-36, 223-360, 416-25, 434-35, 451.

[3] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10-11, 14-15, 19-31, 34-36, 40-52, 58-59, 62-180 (1921).

[4] *See* KAUFMAN, *supra* note 1, at 491-565.

[5] *See* WILLIAM LEUCHTENBURG, FRANKLIN DELANO ROOSEVELT AND THE NEW DEAL, 1932-1940, 1-166 (1963) (describing the revolutionary New Deal program).

Constitution to (1) "regulate Commerce . . . among the several States;[6] (2) tax and spend "for the General Welfare;"[7] and (3) delegate its "legislative power" to the executive branch.[8]

Constitutional challenges to the New Deal in the Supreme Court initially succeeded.[9] Justice Cardozo joined some, but not all, of these decisions. He evaluated each statute by paying close attention to the economic and social realities faced by Congress, the facts of the case, precedent, and the need to maintain our constitutional system of government.[10] That last item proved to be especially tricky because the Constitution does not precisely delineate the extent of each branch's powers, the degree of their separation, or the scope of the federal government's authority vis-a-vis the states.[11]

Indeed, Justice Cardozo wrestled with a conundrum that inheres in the Constitution. On the one hand, it creates a democracy in which legislative acts signed by the President are presumptively valid.[12] On the other hand, the Constitution limits the federal government in two key ways. First, separation of powers prevents Congress from assigning its core "legislative power" – to make and amend laws – to the executive department.[13] Second, the Tenth Amendment embodies a federalism principle that precludes construing federal powers in a manner that would effectively make them unbounded and thereby displace the states' reserved jurisdiction over local matters.[14]

Justice Cardozo resolved this dilemma pragmatically by deferring to Congress's broad yet reasonable exercise of power, but

---

[6] *See* U.S. CONST. art. I, § 8, cl. 3.

[7] *See* U.S. CONST. art. I, § 8, cl. 1.

[8] *See* U.S. CONST. art. I, § 1, cl. 1.

[9] *See infra* notes 19-29, 36-41, 50-61 and accompanying text.

[10] *See infra* Part I (citing many of Cardozo's opinions illustrating this multifaceted method of adjudication).

[11] *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388, 440-44 (1935) (Cardozo, J., dissenting).

[12] *See* KAUFMAN, *supra* note 1, at 367, 389, 429, 435, 451, 571-76.

[13] *See infra* notes 50-61, 89 and accompanying text (citing the Court's repeated recognition of this "nondelegation" doctrine). For an examination of the historical development of the concept of "legislative power," see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 746, 808, 823, 829-31 (2001); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 412-19 (1996) (elaborating upon the fundamental constitutional distinction between "legislative" and "executive" power).

[14] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

striking down hastily drafted laws that either gave Congress unrestricted authority or the President total discretion.[15] I will analyze Cardozo's major opinions to illustrate his balanced approach, which the majority of his colleagues eventually adopted in 1937. I will then explain why, shortly after Cardozo died in 1938, the Court abandoned his effort to impose even minimal legal constraints on the federal government.

I. CARDOZO'S CONSTITUTIONAL OPINIONS

By coincidence, Cardozo became a Justice right before the explosion of New Deal legislation in 1933 triggered epochal constitutional controversies.[16] At FDR's urging, Congress invoked the Commerce and General Welfare Clauses to justify its sweeping economic and social reforms and also delegated massive "legislative power" to administrative agencies.[17] When such laws were challenged, the Court invalidated them in 1935 and 1936, but finally caved in after President Roosevelt and his Democratic comrades in Congress had been decisively reelected.[18]

A. Regulating Interstate Commerce

Initially, the Court rigorously applied its longstanding precedent that Congress could regulate only "commerce" (i.e., the sale and transportation of goods, but not their production) that either moved across state lines or had a "direct" effect on interstate commerce.[19] For example, *A.L.A. Schechter Poultry Corp. v. United States*[20] concerned

---

[15] *See* David N. Atkinson, *Mr. Justice Cardozo and the New Deal: An Appraisal*, 15 VILL. L. REV. 68, 69-70, 82 (1969). I will provide concrete examples in Part I.

[16] *See* WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1996).

[17] *See infra* notes 19-61 and accompanying text.

[18] *See infra* Part I, Sections A, B, and C.

[19] *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 68-77 (1999) [hereinafter Nelson & Pushaw, *Rethinking*] (summarizing and analyzing this precedent). In defining "commerce" to include only trade, the Court ignored this word's broader historical meaning: the sale of goods and services (including paid employment, banking, and insurance) and all related activities intended for the marketplace (such as commercial agriculture and manufacturing). *See id.* at 6-21, 35-42, 50-79, 107-10; Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002).

[20] 295 U.S. 495 (1935).

a New Deal centerpiece, the National Industrial Recovery Act (NIRA), which authorized the President to enact "codes of fair competition" for every American industry and trade.[21] The resulting regulations reached not only anticompetitive activities but also matters like wages, hours, and public health.[22] The federal government enforced one such code, governing the poultry business, against a small company that operated wholly within a state.[23] The Court struck down this code on the ground that Congress could not use the Commerce Clause to get at noncommercial activities (like labor relations) that were local and that had merely an "indirect" impact on interstate commerce.[24] Justice Cardozo concurred separately to stress that, although he was generally willing to defer to Congress's discretionary judgments about interstate commerce, upholding this specific statutory provision as applied to a tiny intrastate chicken seller "would obliterate the distinction between what is national and what is local."[25]

The Court reached a similar result in *Carter v. Carter Coal Co.*,[26] which involved a federal law that fixed prices on coal sales occurring in (or affecting) interstate commerce and that addressed labor relations between coal miners and their employers.[27] A majority of Justices ruled that Congress lacked power to regulate coal mining because this activity constituted production rather than "commerce" and exerted only an "indirect" effect on interstate commerce.[28] In dissent, Justice Cardozo maintained that (1) the sale of coal was "commerce," so Congress could regulate it by setting prices; (2) the transactions at issue either crossed state lines or directly and intimately affected interstate commerce; and (3) passing on the constitutional validity of the labor provisions was premature because they had not yet been enforced.[29]

In the first Commerce Clause case after FDR's reelection, *NLRB v. Jones & Laughlin Steel Corp.*,[30] Justice Cardozo's

---

[21] *Id.* at 521-27 (citing statute).

[22] *Id.*

[23] *Id.* at 519-21, 542-43.

[24] *Id.* at 542-50.

[25] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 554 (Cardozo, J., concurring) (citations omitted).

[26] 298 U.S. 238 (1936).

[27] *Id.* at 278-84 (citing statute).

[28] *Id.* at 297-310.

[29] *Id.* at 324-39 (Cardozo, J., dissenting).

[30] 301 U.S. 1 (1937).

conception of robust yet limited federal power triumphed when he and four colleagues sustained the National Labor Relations Act (NLRA).[31] In the majority's view, Congress had rationally concluded that it was necessary and proper to regulate certain noncommercial, intrastate activities (i.e., labor-management relations) because they had a "close" and "substantial" relation to interstate commerce.[32] The Court emphasized the steel company's large-scale national scope and suggested that, conversely, Congress would not be permitted to interfere with "local" activities that had merely an "indirect and remote" effect on interstate commerce.[33] Therefore, *Jones & Laughlin* can be characterized as a reasonable, albeit significant, extension of precedent allowing federal regulation of intrastate conduct that directly and substantially affected interstate commerce.[34]

In short, the Court's initial resistance to expansive Commerce Clause legislation had given way in 1937 to a deferential, but still meaningful, standard of review. The same pattern can be discerned as to Congress's power to tax and spend "for the . . . general Welfare."[35]

B. Taxing and Spending

The Court's approach dramatically shifted within the space of a single year. In 1936, the Court in *Butler v. United States*[36] invalidated a provision of the Agricultural Adjustment Act (AAA) that taxed processors of agricultural goods, with the revenue raised given to farmers who decreased their crop acreage – and thereby helped reverse a steep decline in prices.[37] This result reflected three rationales.[38] First, Congress could not take money from one private group of

---

[31] *Id.* at 34-43.

[32] *Id.* at 37, 40-43.

[33] *Id.* at 26-28, 41-43.

[34] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3-7, 11-43, 139-225 (1998); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1203-04 (2003).

[35] *See* U.S. CONST. art. I, § 8, cl. 1.

[36] 297 U.S. 1 (1936).

[37] *Id.* at 53-57 (citing statute).

[38] Interestingly, the Court began by rejecting James Madison's narrow interpretation of "general welfare" as encompassing only the other matters enumerated in Section 8 of Article I (e.g., borrowing money and regulating interstate commerce), and instead endorsed Alexander Hamilton's position that the General Welfare Clause was an independent grant that included any subject of national interest. *Id.* at 65-67, 77. Nonetheless, the Court ultimately found the agricultural tax unconstitutional even under Hamilton's broader view. *Id.* at 62-78.

citizens and hand it to another.[39] Second, the federal government could not regulate agriculture because it was a "local" subject that the Tenth Amendment entrusted exclusively to the states, and thus not a matter of "general" (i.e., national) welfare.[40] Third, Congress could not exercise its taxing and spending power coercively by bribing states or farmers to comply with its program.[41] Justice Cardozo joined Justice Stone's dissent, which argued that Congress had plenary authority in this area and could offer to pay citizens (here, farmers) if they voluntarily agreed to comply with reasonable federal conditions (such as reducing their crop acreage).[42]

The next year, the Court did an about-face in *Steward Machine Co. v. Davis*,[43] which concerned two Social Security Act (SSA) provisions. One levied a federal unemployment tax on employers, but credited them for taxes they had already deposited into a state unemployment fund that met federal standards.[44] The other SSA provision subsidized states' administration of their unemployment funds.[45] In his majority opinion, Justice Cardozo sustained these SSA provisions as promoting "the general welfare" because unemployment was a nationwide problem that the states could not resolve on their own.[46] He concluded that Congress had offered states the tax credit to voluntarily "induce" – rather than "coerce" – them to create and operate unemployment compensation systems that complied with federal conditions.[47] Justice Cardozo conceded that the difference between "inducement" and "coercion" might not always be clear, but maintained that this distinction could be worked out on a case-by-case basis.[48]

---

[39] *Id.* at 58-61, 70, 75-76.

[40] *Butler*, 297 U.S. at 61-70.

[41] *Id.* at 70-78.

[42] *Id.* at 79-88.

[43] 301 U.S. 548 (1937).

[44] *Id.* at 574-76 (citing statute).

[45] *Id.* at 577-78.

[46] *Id.* at 585-98.

[47] *Id.* at 585-91.

[48] *Steward Machine Co.*, 301 U.S. at 591; *but see id.* at 616-18 (Butler, J., dissenting) (claiming that this distinction was illusory because any state with an unemployment compensation system would have no real choice but to accept Congress's money and attached conditions, because state officials who declined to do so would be in the untenable political position of having to raise their constituents' state taxes to obtain the same benefit). In a companion case, Justice Cardozo wrote for the majority in approving the SSA employment tax provisions that funded retirement benefits. *See* Helvering v. Davis, 301 U.S. 619, 639-46 (1937).

In sum, the Court in 1937 adopted Justice Cardozo's position that Congress's power to tax and spend for the general welfare was comprehensive, but still subject to the limit that states could not be "coerced." He took a similar view of the nondelegation doctrine.

C. Delegating "Legislative Power"

New Deal laws enacted under the Commerce and General Welfare Clauses featured wholesale assignments of Congress's "legislative" (i.e., rulemaking) power to executive agencies.[49] In 1935, the Court struck down two such delegations and expressed extreme skepticism about the constitutionality of this practice in general, whereas Justice Cardozo endorsed delegations as long as Congress made the fundamental policy choices and genuinely cabined executive discretion.

The critical decision was *Panama Refining Co. v. Ryan*,[50] which involved a provision of the NIRA empowering the President to ban the interstate shipment of "hot oil" – petroleum that exceeded a state's production quota.[51] The Court held that Congress had violated the separation of powers by delegating its legislative power to the President without clearly articulating its policies and providing a legal standard to restrict his exercise of discretion.[52]

In a lone dissent, Justice Cardozo contended that the NIRA, read in its entirety, did set forth the required policy judgment and limiting standard.[53] He emphasized that the specific provision at issue confined the President to a particular action (prohibiting the interstate movement of "hot oil") rather than giving him *carte blanche* over either the petroleum industry or interstate transportation.[54] Moreover, other parts of the statute furnished concrete legal criteria by requiring the President to determine that banning "hot oil" would further Congress's express goals: eliminating obstacles to interstate commerce, ending unfair trade practices, stabilizing prices, lowering unemployment, and encouraging the best use of natural resources.[55]

---

[49] *See infra* notes 50-65 and accompanying text.

[50] 293 U.S. 388 (1935).

[51] *Id*. at 406, 418.

[52] *Id*. at 414-30.

[53] *Id*. at 434 (Cardozo, J., dissenting).

[54] *Id*. at 434-35.

[55] *Panama Refining Co.*, 293 U.S. at 435-39.

Therefore, Justice Cardozo found that Congress had appropriately circumscribed the President's discretion.[56] Finally, he urged the Justices to show greater deference by adopting a flexible view of separation of powers that would give the political branches more leeway to address pressing problems.[57] Yet even Justice Cardozo reached his breaking point in *Schechter*,[58] which (as previously discussed) concerned a law authorizing the President to promulgate industrial "fair competition" codes.[59] The Court invalidated this statute because Congress had both exceeded its Commerce Clause power and failed to lay down any legal principles to contain the President's discretion in determining "fair competition."[60] Justice Cardozo concurred and argued that, in contrast to the situation in *Panama Refining*, this statutory provision granted "a roving commission to inquire into evils and upon discovery correct them. . . . This is delegation running riot."[61]

As usual, then, Justice Cardozo adopted a careful, common law approach. He saw that the rapidly expanding administrative state required broad delegations to expert agencies, but insisted that Congress must make core policy decisions and formulate legal standards that restricted executive discretion. Nonetheless, even Cardozo's modest efforts at controlling legislative delegations – and his parallel attempts to impose certain outer limits on the Commerce and General Welfare Clauses – did not take root.

II. THE COLLAPSE OF CARDOZO'S "BROAD YET BOUNDED" VISION OF FEDERAL POWER

Justice Cardozo became gravely ill in late 1937 and died the following July.[62] Seven other Justices either passed away or retired between 1937 and 1943.[63] President Roosevelt remade the Court in his own image, stacking it with his staunch New Deal allies in politics

---

[56] *Id.* at 440.
[57] *Id.* at 440-48.
[58] 295 U.S. 495 (1935).
[59] *Id.* at 521-27 (citing statute).
[60] *Id.* at 529-42.
[61] *Id.* at 551-53.
[62] *See* KAUFMAN, *supra* note 1, at 566-67.
[63] *See* LEUCHTENBURG, *supra* note 16, at 154-56.

and academia rather than with experienced judges.[64] Unsurprisingly, FDR's Court swiftly ended serious judicial review and instead allowed virtually unbridled federal power.[65] This precedent became entrenched, and *stare decisis* has made it impossible for the more conservative Court over the past few decades to craft meaningful legal limits.[66]

A. The Commerce Clause

The year after Justice Cardozo died, the Court abandoned its longstanding, federalism-based doctrine (reaffirmed in *Jones & Laughlin*) that Congress could not regulate local, intrastate activities that only indirectly and remotely affected interstate commerce.[67] Perhaps most importantly, in 1942, the Court in *Wickard v. Filburn*[68] held that Congress could support the requisite finding of a "substantial effect" on interstate commerce by nationally aggregating the activities

---

[64] For instance, Hugo Black and James Byrnes were Senators; Frank Murphy was the Attorney General and former Michigan governor; Stanley Reed was the Solicitor General and had held various other executive posts; and Robert Jackson was the Attorney General and had also served as Solicitor General and in the Treasury Department. William Douglas was the Securities & Exchange Commissioner and had been a Yale Law professor. The other academics were Harvard's Felix Frankfurter and Iowa's Wiley Rutledge (who had briefly been a federal judge). *See* LEUCHTENBURG, *supra* note 16, at 154-56, 180-212, 220.

[65] *See* Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1280-81 (2002) (stressing that the new Justices did not hesitate to reject prior constitutional decisions).

Opening the floodgates of federal regulatory legislation threatened to swamp federal court dockets. The Court responded by creating a host of jurisdictional doctrines, such as standing, to stem the tide. *See, e.g.*, Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1324-28 (2005); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 450-57, 518-31 (1994). Such jurisdictional activism would have been unnecessary (or at least less pronounced) if the Court had imposed meaningful legal restrictions on congressional power.

[66] *See* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J. L. & PUB. POL'Y 519, 524 n.24 (2008) (emphasizing that *stare decisis* has special force as to New Deal-era cases approving the modern administrative and social welfare state, because overruling them after so many years would result in legal, political, and economic chaos).

[67] *See* NLRB v. Fainblatt, 306 U.S. 601, 604-09 (1939) (permitting the NLRA's extension to small and local employers); *see also* United States v. Darby, 312 U.S. 100, 113-24 (1941) (upholding the application of the Fair Labor Standards Act to a nondescript lumber company and dismissing the idea that the Tenth Amendment was an independent, judicially enforceable limit on Congress's power).

[68] 317 U.S. 111 (1942).

of any class of people.[69] Hence, the AAA could be applied to all wheat producers – even a poor Ohio farmer who had slightly exceeded his federal acreage quota and had used this wheat noncommercially for personal and home consumption.[70] Of course, nearly any activity, when added up across the country, will "substantially affect" interstate commerce. Consequently, this new standard had no real legal force.[71] Predictably, for many decades the Court rubber-stamped all challenged laws enacted under the Commerce Clause, including those designed to achieve social and moral objectives that had at best a tenuous connection to interstate commerce.[72]

The Court under Chief Justices Rehnquist (1986-2005) and Roberts (2005-present) has left this precedent intact and instead has attempted to devise limits on new federal legislation, which have proved to be almost worthless from a practical standpoint. Most notably, in 1995 the five conservative Republican Justices announced in *Lopez* that Congress could only reach activities that were "commercial," either of themselves or as "an essential part of a larger regulation of economic activity."[73] Accordingly, the Court invalidated as "noncommercial" a recently enacted federal statute that had banned firearm possession near schools,[74] and a few years later struck down a law granting a federal cause of action to victims of gender-motivated violence.[75] These two statutes, however, basically duplicated state laws and were symbolic – calculated to show that Congress cared about violence against students and women.[76]

By contrast, in 2005 the Court upheld a longstanding and important federal drug law that criminalized the noncommercial and

---

[69] *Id.* at 127-29.

[70] *Id.* at 118-29.

[71] *See* Nelson & Pushaw, *Rethinking*, *supra* note 19, at 82 (showing that the Justices understood this fact and were effectively granting Congress free rein).

[72] *See id.* at 83-88 (analyzing the relevant cases, which considered statutes covering matters such as crime and civil rights); Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 320, 327-29 (2005) (pointing out that this federal legislation often did not seem to have much to do with interstate commerce).

[73] *See* United States v. Lopez, 514 U.S. 549, 561 (1995). The Court repeated this quoted language in *United States v. Morrison*, 529 U.S. 598, 610 (2000).

[74] *Lopez*, 514 U.S. at 556-68.

[75] *Morrison*, 529 U.S. at 601-19.

[76] *See* Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress's Powers*, 2012 U. ILL. L. REV. 1703, 1737-39 [hereinafter Pushaw, *Obamacare*].

local growth, possession, and use of marijuana for medical purposes.[77] Logically, it makes little sense to say that mere possession of one item (a gun) is not "commerce," but possession of another item (marijuana) is.[78] The most plausible inference is that the Court does not have the will to apply its "noncommercial" standard to nullify any non-trivial, established statute.[79]

Similarly, the Roberts Court has proposed a "limit" on the Commerce Clause that will have negligible real-world impact. In *National Federation of Independent Businesses v. Sebelius*,[80] the Court held that Congress could regulate only existing commercial "activity" – and thus could not in the Affordable Care Act (ACA) compel citizens to enter into a commercial market by buying a product (health insurance) that they did not want.[81] Yet the ACA represents the only time that Congress has ever attempted to use the Commerce Clause to force inactive people to purchase something, so *National Federation* will likely be a "one shot" case.[82] Moreover, *National Federation* did not put a dent in Congress's overall regulatory power. That is because the Court later dubiously concluded that the insurance-purchase mandate, which Congress had clearly enacted as a regulation of interstate commerce, could also be construed as a "tax" on those who failed to comply – and hence sustained under Congress's plenary power to tax.[83]

In short, the Court created the "substantial effects" and "aggregation" standards to achieve the political goal of protecting the New Deal, then applied them for 57 years in a way that resulted in virtually absolute Commerce Clause power. Furthermore, the recent "limits" concocted by the Rehnquist and Roberts Courts will have almost no practical consequences.

---

[77] *See* Gonzales v. Raich, 545 U.S. 1, 5-33 (2005).

[78] *See* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 881-82, 885, 894-96, 899, 909-10, 913-14 (2005).

[79] *See* Pushaw, *Obamacare*, *supra* note 76, at 1737-38.

[80] 132 S. Ct. 2566 (2012).

[81] *See id.* at 2585-93 (Roberts, C.J.) (citing this Act); *id.* at 2644-50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[82] *See* Robert J. Pushaw, Jr. & Grant S. Nelson, *The Likely Impact of* National Federation *on Commerce Clause Jurisprudence*, 40 PEPP. L. REV. 975, 979-80, 990, 993-96 (2013).

[83] *See National Federation*, 132 S. Ct. at 2593-2601 (Roberts, C.J.); *id.* at 2609, 2629 (Ginsburg, J., concurring in part, dissenting in part, joined by Breyer, Sotomayor, and Kagan, JJ.).

B. Taxing and Spending for the "General Welfare"

Since 1937, the Court has upheld every federal tax law and has never found any subject to be beyond the scope of the "general welfare."[84] When Congress has exercised its power under the Spending Clause to grant states money if they comply with federal conditions, the Court has paid only lip service to Justice Cardozo's admonition that Congress may "induce" – but not "coerce" – states.[85] Instead of implementing his proposal to flesh out this distinction case-by-case by categorizing each challenged statute as falling on one or the other side of that line, the Court has sustained every such law as a mere "inducement."[86] The lone exception is that Congress cannot threaten to strip states of *all* of their funding as a prerequisite to receiving their share of federal money.[87] Beyond that extreme scenario, which has occurred exactly once and will almost certainly never be repeated, the Spending Power is all-embracing.[88]

Overall, Justice Cardozo favored expansive congressional authority to tax and spend for the general welfare, but with certain outer boundaries that would be clarified in common law fashion. The Court quickly gave up on the latter task of developing enforceable legal limits.

---

[84] The Court long ago admitted that taxation was really a political question not amenable to judicial review. *See* United States v. Kahriger, 345 U.S. 22, 28 (1953); *see also* Sabri v. United States, 541 U.S. 600, 604-08 (2004) (upholding a federal criminal law forbidding bribery of state and local officials of entities that received federal funds, even as applied to a defendant whose bribes were not linked to any specific funding); Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 2019-20, 2033-34, 2038 (2013) [hereinafter Pushaw, *Paradox*] (discussing the Court's longstanding supine deference).

[85] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211-12 (1987); Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947).

[86] In the leading case, the Court approved federal legislation that withheld five percent of a state's highway funding if it did not increase its minimum drinking age to 21, even though the Twenty-first Amendment expressly gives states total control over alcoholic beverages. *See Dole*, 483 U.S. at 206-12. The Court concluded that Congress had "encouraged" rather than "coerced" states because five percent was a relatively small amount. *See id.* at 211-12.

[87] The Court found "coercive" an ACA provision that compelled states to either expand Medicaid to include millions of new poor recipients or forfeit all of their existing Medicaid funding, which realistically forced states to comply because Medicaid consumed a whopping twenty percent of their average budget and the total funding involved was $100 billion. *See* National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566, 2601-08 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.) (citing statutory provision); *id.* at 2643, 2657-68, 2676-77 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (agreeing on this point).

[88] *See* Pushaw, *Paradox*, *supra* note 84, at 2038, 2042.

C. Delegation

In theory, the Court still adheres to the rule that Congress cannot delegate its "legislative power."[89] In practice, however, the Roosevelt appointees permanently buried this doctrine. For instance, in 1943, the Court found that Congress, by authorizing an executive agency to grant licenses in "the public interest," had articulated a sufficiently clear legal standard to guide the agency's determinations.[90] By contrast, Justice Cardozo would likely have insisted that Congress make a more detailed policy decision and set forth legal principles that curbed the agency's discretion.[91]

In any event, the nondelegation doctrine has not been invoked to strike down a federal statute in 83 years, and its prospects for resurrection appear to be nil.[92] The Court's blind deference has severely undermined separation of powers. Most notably, Congress can curry favor with voters by passing laws that declare popular goals in vague terms (such as a desire to reduce global warming), but evade political accountability by delegating difficult policy choices (manifested in burdensome regulations) on unelected bureaucrats.[93] This debilitation of our constitutional democracy is a heavy price to pay for the one benefit of wholesale delegation – to use the expertise of agencies to address specialized problems.

III. CONCLUSION

After 1937, the Court abandoned Justice Cardozo's attempt to interpret the Commerce and General Welfare Clauses (and Congress's attendant delegations of "legislative power") generously, but subject to genuine legal limits. Although this abject judicial deference has facilitated the development of the modern administrative and social

---

[89] *See, e.g.*, Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); Mistretta v. United States, 488 U.S. 361, 371-72 (1988).

[90] *See* NBC v. United States, 319 U.S. 190, 225-26 (1943).

[91] *See supra* notes 53-61 and accompanying text.

[92] *See* William Kelley, *Justice Scalia and the Nondelegation Doctrine*, 92 NOTRE DAME L. REV. 2107, 2117-18 (2017).

[93] *See* DAVID SCHOENBORD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

welfare state, Americans have lost the unique advantage of federalism and separation of powers.[94]

[94] In the Constitution, "We the People" granted only enumerated powers to our representatives in all three federal branches, but reserved most governmental power to the states. This diffusion of power, complemented by several specific checks (such as impeachment and the Presidential veto), was designed to promote individual liberty and the rule of law. *See* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1185-87 (2002). The modern administrative state threatens such basic constitutional principles and values.