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Eighty Years of Federalism Forbearance: Rationing, Resignation, and the Rule of Law

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EIGHTY YEARS OF FEDERALISM FORBEARANCE: RATIONING, RESIGNATION, AND THE RULE OF LAW

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INTRODUCTION

Andrew Coan's book, *Rationing the Constitution*,[1] offers a novel account of the forces that drive Supreme Court decisions across a wide array of highly controversial, vitally important areas of law. The project is ambitious. It endeavors to improve our understanding of forces that constrain the form and, ultimately, the substance of our constitutional law along each of its major axes: federalism, the separation of powers, and individual rights. I think it succeeds. The book's central claim—that familiar (but underexplored) institutional constraints and background norms sharply limit the range of choices available to the Court when it is called upon to enforce the Constitution—is almost certainly correct.

I am less confident, however, about the extent to which the precise contours of legal doctrine—at least in connection with federalism jurisprudence (and probably more broadly)—can be explained by reference to Coan's judicial capacity model, as opposed to other forces.[2] In that vein, this essay explores a hypothesis about the Court's post-1937 federalism jurisprudence that might explain the arc of the doctrine at least as well as the judicial capacity model does, and that I think deserves more attention than *Rationing the Constitution* provides. The hypothesis is that, during the relevant period, there has never been a critical mass of Justices on the Supreme Court with a genuine appetite for seriously constraining federal power. And this is not because the Justices worry about the Court's capacity to process the volume of cases that would arise if they established

* Robert A. Sullivan Professor of Law, University of Michigan Law School. Many thanks to the editors of the *Wisconsin Law Review* for inviting me to participate in this Symposium and, of course, to Andy Coan, for giving us all so much to think about.

1. ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

2. Coan appears to be less confident about this as well. *See id.* at 47–50 (discussing the phenomenon of observational equivalence, noting that other models of judicial decision-making might, across certain bodies of case law, yield the same predictions as the judicial capacity model, and acknowledging that it is difficult to determine how much explanatory power to assign to the forces on which each model focuses).

such constraints, but because doing so is unattractive in its own right. I am aware, of course, that many conservative jurists and commentators have vigorously lamented the explosion of federal power during and since the New Deal. Still, for a variety of reasons that I will explore in this essay, I am inclined to think this is more of a political talking point than the foundation for a genuine, actionable agenda for doctrinal change.[3]

In Part I, I briefly summarize the key features of Coan's judicial capacity model and describe its application to cases involving the scope of federal power. In Part II, I make the case that these cases are best understood by reference to considerations external to the judicial capacity model. These include conservative Justices' recognition of, and resignation to, the fact that the size of the national government and the scale of its regulatory activity are (to a significant extent) both necessary and non-negotiable. I will also argue that the contours of the doctrine are, in part, an outgrowth of the Justices' commitment to the rule of law (or, at least, squeamishness about being called out for failing to adhere to it).

I. THE JUDICIAL CAPACITY MODEL

The central thesis of *Rationing the Constitution* is that, in certain "high-stakes" and/or "high-volume" areas of constitutional law, constraints on the capacity of the federal judiciary (the Supreme Court of the United States in particular) will cause the Justices to embrace clear categorical rules and to defer to the constitutional judgments of other government actors.[4] They do so, Coan explains, because they effectively have no choice. Reliance on vague standards or on a non-deferential approach, the argument goes, would trigger a dramatic increase in the number of lawsuits challenging federal legislation and would cause a related spike in the number of lower federal court decisions invalidating federal statutes and regulations.[5] To avoid being confronted with a docket far beyond the Justices' capacity to process, the Court would then need to relax either its commitment to foundational norms of judicial professionalism or its commitments to preserving the uniformity of federal law and reviewing virtually every lower court decision that invalidates a federal enactment.[6] None of these options (*i.e.* drowning in cases, deciding cases in irresponsible haste, or tolerating disuniformity and the widespread invalidation of federal law by lower courts) is remotely tolerable to the Justices; and so, Coan argues, across many important areas of

3. It is possible that, with the appointments of Justices Gorsuch and Kavanaugh, this is no longer true. Time will tell.

4. COAN, *supra* note 1, at 31.

5. *Id.* at 19.

6. *Id.* at 23–24.

constitutional law, we see the Court rely on categorical rules and exhibit high levels of deference to the political branches of government.[7]

The relationship between judicial deference and reliance on rules, on the one hand, and the frequency of challenges to federal law, on the other, is fairly straightforward. As Coan points out, the incentive for parties who feel burdened by federal law or regulation to initiate a legal challenge is weaker if courts establish a pattern of strong deference to the political branches: the more likely courts are to defer (and thus uphold federal law), the less likely parties are to raise challenges, because the expected outcome of the litigation is less likely to be favorable.[8] Reliance on vague standards in suits challenging federal law, meanwhile, increases uncertainty with respect to outcomes; and uncertainty will, likewise, tend to drive parties into court, since adversaries are more likely to simultaneously see a path to victory when the legal landscape is hazy.[9] Where the stakes are high enough and the doctrinal framework is applicable to a large number of statutes and circumstances, then, reliance on standards and a non-deferential approach will trigger the docket pressures mentioned above.[10]

Coan argues that, at least since the New Deal, the key Supreme Court decisions relating to the scope of federal power under the Commerce and Spending Clauses closely follow this pattern. Thus, he points out that, from 1937 to 1995, the Justices adhered to a rigid rule of deference to congressional judgments relating to the scope of federal power to regulate interstate commerce.[11] And although the Court has, since 1995, exhibited some willingness to police the outer limits of this power, it has done so by way of rigid, categorical distinctions between what is subject to federal regulation (economic activity) and what is not (non-economic activity, inactivity).[12] Those limits, meanwhile, are exceedingly narrow in scope, so it remains fair to say that the longstanding tradition of deference continues to hold sway in connection with the commerce power.[13] The Supreme Court's Spending Clause jurisprudence from 1936 until the present day has a roughly similar shape, with something "approaching a rule of categorical deference"[14] at its core. That pattern of deference has been interrupted only by the Court's 2012 decision in *National Federation*

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7. *Id.* at 23.

8. *Id.*

9. *Id.* at 21–22.

10. Coan also emphasizes that, in many of these scenarios, at least some of the parties with strong incentives to challenge federal law will possess the resources necessary to mount such challenges and pursue them with vigor. *See, e.g.*, *id.* at 71–72, 84.

11. *Id.* at 62–63.

12. *Id.*; *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *United States v. Lopez*, 514 U.S. 549 (1995).

13. COAN, *supra* note 1, at 63–64.

14. *Id.* at 84.

of Independent Business v. Sebelius,[15] which, on Coan's telling, is highly unlikely to support the invalidation of other exercises of the spending power.[16] This suffices to show, at the very least, that the pattern of Supreme Court decisions in these areas is consistent with the expectations generated by the judicial capacity model.

As Coan acknowledges, however, it's one thing to say that the key cases in these areas are consistent with his model, and another to say that that model provides the best explanation as to why the case law has assumed its current form.[17] In the Section that follows, I explore an alternative explanation (really, it's a series of interlocking explanations) for the phenomena Coan observes in the Supreme Court's federalism decisions.

II. THE PATTERN OF DECISIONS: AN ALTERNATIVE EXPLANATION

As a general matter, we should expect Supreme Court Justices to eschew approaches toward constitutional interpretation that threaten serious upheaval with respect to important, deeply-entrenched governance practices—and this is true whether those practices relate to federal-state relations, the separation of powers, or individual rights. There are two principal reasons for this. One, which *Rationing the Constitution* mentions repeatedly, is fear of the political backlash that is likely to accompany decisions that upset settled expectations with respect to matters of great importance.[18] The other, which Coan gestures at only briefly, is that even Justices who are deeply troubled by the prospect of a federal government with something approaching a general police power understand (and are resigned to the fact) that, along many different dimensions, responsible stewardship of American economic life requires a heavy federal hand.[19]

I'm reminded here of a quip Justice Scalia was known to trot out when describing his approach toward constitutional interpretation (and distinguishing that approach from the one favored by Justice Thomas): "I am an originalist," he liked to say, "but I am not a nut."[20] Interpretive

15. 567 U.S. 519 (2012).

16. *Id.* at 80–81 (describing what he believes are the limits on the reach of the standard articulated in *NFIB* and concluding "[i]f this is the case, it is difficult to imagine any federal spending legislation besides the Affordable Care Act that would be unconstitutional under [the] controlling approach").

17. *Id.* at 40.

18. *See, e.g.*, *id.* at 44, 67, 83.

19. *See id.* at 75 (acknowledging that certain "extreme results" might "give pause to many justices"); *id.* at 74 (noting that revival of the manufacturing/commerce distinction in Commerce Clause cases "would produce results that many Justices would find unpalatable").

20. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 103 (2007).

methods or doctrinal formulas that threaten to, say, undermine the legal foundation for the modern administrative state or disable the national government from regulating in spaces it has dominated for decades, seem to me to fall squarely on the "nut" side of the line. And whatever individual Justices (or conservative legal commentators) might say about how dreadfully out of balance our federalism has become, we should not expect their discomfort to yield doctrinal outcomes that threaten to dislodge well-established, highly consequential patterns of governance.[21]

This has significant implications for the Supreme Court's treatment of both the Commerce and Spending Clauses. The former, as Coan explains, supplies the textual hook for "the vast majority of federal criminal laws, as well as the vast majority of federal regulation on subjects ranging from environmental protection to food and drug safety to consumer protection to antitrust to banking and securities to national energy markets to aviation safety."[22] The latter, meanwhile, "underwrites an enormous quantity of legislation" including more than 800 federal programs distributing funds to the states in amounts exceeding half a trillion dollars a year.[23]

To be sure, it is not the case that each and every one of these laws and federal programs is sacrosanct, such that striking down one or more of them would necessarily qualify as nutty. But the imperative to eschew legal doctrine that casts doubt on the constitutionality of the true sacred cows among these statutes (and we can quibble over which, exactly, those are) is powerful and, I suspect, sufficient to explain the basic structure of modern federalism doctrine. So far as deference is concerned, Coan points out that abandonment of the deferential approach that characterizes modern Commerce Clause jurisprudence in favor of stringent limits like those that held sway during the early part of the 20th century would "probably require invalidation of large sections of the Controlled Substances Act, the Clean Air and Water Acts, federal antitrust law, federal labor law, federal employment discrimination law, and so on."[24] Similarly, if the Court were to rely on vague standards instead of categorical rules to police the limits of federal power under either the Commerce Clause or the Spending Clause, it would "call into question a

21. Again, it is possible that the confirmation of the two Trump nominees to the Supreme Court changes this calculus. *Cf.*, *e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (expressing openness to reconsidering the nondelegation doctrine); *id.* at 2148 (Gorsuch, J., dissenting) (reconsidering the contours of the nondelegation doctrine).

22. COAN, *supra* note 1, at 71; *see also id.* (noting that "[e]ach of these laws, in turn, contains innumerable discrete regulations of individual behavior that might be subject to constitutional challenge, depending on the Supreme Court's interpretation of the commerce power").

23. *Id.* at 83.

24. *Id.* at 74–75.

vast quantity of federal legislation"[25] touching on subjects ranging from education to public health to social security.

Rationing the Constitution sounds similar themes in connection with the separation of powers and individual rights. Coan observes, for example, that if the Court were to abandon its longstanding tradition of deferring to Congress when it comes to delegating power to administrative agencies, "it would call into question the entire regulatory state and its attendant laws and regulations."[26] Similarly, he notes, "[a] robust reading of the Equal Protection Clause, articulated in the form of a vague standard . . . would call into question much of the U.S. Code."[27]

At every turn, however, Coan pivots from these observations to the claim that the introduction of such threats to the established regulatory order is unattractive, not so much in its own right, but because it threatens to spawn caseload pressures that the Court simply cannot bear.[28] But as I read these segments of the book, I found myself casting about for the jurisprudential equivalent of "you had me at hello." Perhaps it's: "you had me at full-blown regulatory Armageddon." Once it becomes clear that a doctrinal framework raises doubts as to the constitutionality of significant swaths of federal law or deeply entrenched federal programs, one need not cast about for explanations as to why the Justices have consistently avoided that framework. To the contrary, this is just what you'd expect if you endorsed the (I think uncontroversial) premise that the Justices will not craft doctrine that threatens to shake the foundations of modern governance.

Indeed, to insist that the judicial capacity model is needed to solve the "doctrinal puzzles" Coan identifies is to imagine a cadre of Justices with a rather odd mix of risk aversion and recklessness. They're willing to

25. *Id.* at 73–74; *see also id.* at 85 (explaining that reliance on vague standards to mark the limits of the spending power would "call into question a large and uncertain fraction of spending-power legislation").

26. *Id.* at 96; *see also id.* at 97 (arguing that reliance on a vague standard to enforce the nondelegation principle would "cast a pall of uncertainty over all congressional delegations" and "threaten a large fraction of federal statutes"); *id.* at 107–08 ("Rigorous enforcement of the unitary executive theory would imperil the existence of independent agencies and would call into question every mechanism of congressional oversight, formal and informal, including the Administrative Procedure Act."); *id.* at 110 (noting that reviving a categorical prohibition on Congress limiting the president's power to remove high-level executive officials would mean "dismantl[ing] independent agencies, including the Federal Reserve").

27. *Id.* at 130; *see also id.* at 26 ("A robust reading of either the Equal Protection Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment, articulated in the form of a vague standard, would call into question a very large fraction of the U.S. Code. . . . This includes environmental, labor, workplace safety, consumer protection, securities, banking, and myriad other regulations at the federal level and similar regulations at the state and local levels, along with land use, zoning, licensing, and traffic regulations of every description . . . .").

28. *Id.* at 74, 85, 96, 108, 131.

consider doctrinal changes that might seriously destabilize longstanding and foundational regulatory practices, but they balk at the prospect of an overloaded Supreme Court docket or a diminished commitment to uniformity in the interpretation of federal law. I have difficulty making sense of that preference ordering.

Of course, one would think that there are options available to the Court that lie somewhere in between unrelenting, abject deference and full-blown regulatory Armageddon. For example, the Court might rely on categorical distinctions that do not raise questions about the constitutionality of the modern administrative state; or it might rely on flexible standards to carve out disfavored regulatory efforts without meaningfully undermining the tradition of federal empowerment we associate with New Deal constitutionalism. As Coan puts it, we might expect the Justices either to "impose meaningful across-the-board limits that would curb, but not overturn, the modern regulatory state"[29] or to "opportunistically invalidat[e] commerce-power legislation that they oppose on ideological grounds."[30]

But this turns out to be much easier said than done. To begin with, it's fair to ask what these "meaningful across-the-board limits"—limits that would "curb, but not overturn, the modern regulatory state"—might be. *Rationing the Constitution* does not say. The limits deployed by the Court in the late-nineteenth and early-twentieth centuries—in particular, the distinctions between manufacturing and commerce,[31] and between direct and indirect effects on interstate commerce[32]—surely do not qualify. By the 1930s and 40s, these devices were understood to serve as significant obstacles to responsible federal supervision of the national economy. Relying on them now, or on similar doctrinal tools, could only be more disruptive and destructive.

Moreover, neither the more recent case law in this area nor the attendant scholarly commentary offers many suggestions for alternative limits that would qualify as both meaningful and not untenably disruptive. Instead, both sets of sources are long on handwringing about the expansion of federal power and short on plausible ideas as to how the Court might

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29. *Id.* at 67; *see also id.* at 83 (arguing that fear of political backlash cannot explain "why the Court's conservatives have never been seriously tempted to impose more modest but still meaningful across-the-board limits" on the spending power).

30. *Id*. at 67; *see also id.* at 83 (arguing that fear of political backlash "does not explain why the Court's liberals and conservatives have both refrained from opportunistically invalidating the occasional spending-power statute").

31. *E.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and not a part of it.").

32. *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) ("In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.").

rein it in. For example, Justice Thomas's concurring opinion in *United States v. Lopez*[33] contemplates meaningful limits on federal power,[34] as do articles by Richard Epstein and Randy Barnett.[35] But the vision laid out in these sources (and there's a good deal of substantive overlap among them) would, as Epstein acknowledges, "require dismantling . . . large portions of the modern federal government."[36] The majority opinion in *Lopez*, meanwhile, along with cases like *United States v. Morrison*[37] and *NFIB v. Sebelius*, have the opposite character: they do not threaten the foundations of modern national governance, but the limits they announce are, as Coan explains, rather narrow in scope.[38]

The Court's failure to experiment with potential middle-ground categorical limits or with vague standards is best explained, I think, by reference to two considerations. First, even if we presume that ideologically conservative jurists would be pleased to scale back the modern regulatory state in meaningful ways (but ways that do not threaten to dismantle the whole thing), it's hard to do so by way of categorical rules without threatening at least some legislation that political conservatives would likely wish to preserve. Consider, for example, the Controlled Substances Act or the many federal statutes that preempt state tort law. Judges could, I suppose, attempt to gerrymander the relevant categories in order to avoid goring their own ox, but this will run headlong into a second consideration—the rule of law.

As Larry Lessig explained in his widely-cited article, *Translating Federalism*, the Court faces "constant pressure . . . to avoid rules that, in context, in their application, appear political."[39] Indeed, Lessig attributes the collapse of pre-New Deal Commerce Clause jurisprudence to precisely this concern. The formalisms the Court had been relying on at that time

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33. 514 U.S. 549 (1995).

34. *Id.* at 584–85 (Thomas, J., concurring) (advocating reconsideration of the "substantial effects" test and raising doubts about the soundness of the aggregation principle announced in *Wickard v. Filburn*).

35. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001) (arguing that Congress's power to regulate interstate commerce is the power "to specify rules to govern the manner by which people may exchange or trade goods from one state to another, [and] to remove obstructions to domestic trade erected by states"); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387, 1454 (1987) (arguing that "[t]he affirmative scope of the commerce power should be limited to . . . interstate transportation, navigation and sales, and the activities closely incident to them").

36. Epstein, *supra* note 35, at 1454–55.

37. 529 U.S. 598 (2000).

38. COAN, *supra* note 1, at 63–65.

39. Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 175. Lessig labels this the "Frankfurter constraint" because Felix Frankfurter expounded upon the idea in an article exploring the history of Commerce Clause jurisprudence. *See id.* at 174 n.142 (citing FELIX FRANKFURTER, THE COMMERCE CLAUSE: UNDER MARSHALL, TANEY AND WAITE 54 (1937)).

had, as Lessig explains, "been rendered political."[40] They "seemed more the result of extra-judicial judgments than entailed by the legal material,"[41] and so the Court had to abandon them. If this is right—if the Court is meaningfully constrained by the need to avoid the appearance of rendering nakedly political judgments (and I think it is)—then the Justices' consistent failure to "opportunistically" invalidate exercises of the commerce and spending powers—whether by way of categorical rules or vague standards—is entirely predictable. It's what we would expect if we presume that judges are committed to preserving the rule of law or, at least, to keeping up appearances about it.

CONCLUSION

I am confident that Coan had each of these concerns in view as he worked on *Rationing the Constitution*. Snippets of them (sometimes more than just snippets) appear in the text, especially where Coan acknowledges and explores the attitudinal and strategic models of judicial decision-making. My disagreement with Coan is, I think, more a matter of the weight we assign to the different forces that drive such decision-making than an outgrowth of our having different intuitions about what those forces are. If there's something provocative or perhaps controversial about my view, it's the notion that while the reach of federal power under prevailing doctrine sticks in the craw of many conservative jurists and commentators, most know it's something that cannot be undone, and most wouldn't want to anyway. If that's right, then what we see in the case law is not an exercise in rationing the Constitution, but in preserving its relevance.

40. *Id.* at 177.
41. *Id.*