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Enforcing Principled Constitutional Limits on Federal Power: A Neo-Federalist Refinement of Justice Cardozo's Jurisprudence

Robert J. Pushaw Jr.

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ENFORCING PRINCIPLED CONSTITUTIONAL LIMITS ON
FEDERAL POWER: A NEO-FEDERALIST REFINEMENT OF
JUSTICE CARDOZO'S JURISPRUDENCE

ROBERT J. PUSHAW, JR.*

ABSTRACT

Since the New Deal of the mid-1930s, Congress has asserted virtually absolute power to (1) "regulate Commerce ... among the States," (2) tax and spend for the "general Welfare," and (3) delegate "legislative Power[]" to the executive branch. From 1937 until 1994, the Supreme Court rejected every claim that such statutes had exceeded Congress's Article I authority and usurped the states' reserved powers under the Tenth Amendment. Over the past quarter century, conservative Justices have tried, and failed, to develop principled constitutional limits on the federal government while keeping the modern administrative and social welfare state largely intact.

The conservatives' attempt to legally restrict, but not unduly hamstring, federal power would benefit from a close study of Benjamin Cardozo's opinions from 1934 to 1938. In constitutional challenges to expansive New Deal laws, Justice Cardozo carefully evaluated each statute's text, the economic and social considerations that prompted its enactment, the facts presented, precedent, and the need to maintain the Constitution's basic structure. That last factor proved to be especially complicated because the Constitution creates a democracy in which legislative acts are presumptively valid, but prohibits Congress from either delegating its legislative power to the

* James Wilson Endowed Professor, Pepperdine University School of Law. J.D., Yale, 1988. This Article benefitted greatly from critiques by participants in the "Federalism Now" symposium at the University of California-Berkeley School of Law in November 2017. Thanks also to Bill Kelley, Kurt Lash, Grant Nelson, and Jim Pfander for their helpful comments.

executive department or invading the states' jurisdiction over local matters. Cardozo balanced these constitutional concerns by deferring to the federal government's broad but reasonable exercise of authority, while invalidating merely expedient laws that either gave Congress untrammelled power or the executive unbridled discretion.

Although Justice Cardozo witnessed the triumph of his generally deferential approach to judicial review in 1937, his effort to craft modest legal restraints on Congress died along with him the next year. President Roosevelt appointed nine Justices between 1937 and 1943—all ardently pro-New Deal politicians or academics who quickly abandoned the previously established constitutional limits on federal power.

The Court under Chief Justices Warren and Burger entrenched this precedent, which has left the conservative majority on the Rehnquist and Roberts Courts with a dilemma. On the one hand, they value stability and hence seek to respect stare decisis and preserve the existing government structure. On the other hand, they strive to expound constitutional provisions according to their original meaning. The conservative Justices have struck a strange compromise: reciting the originalist mantra that the federal government is confined to its enumerated powers, yet identifying only a few (and ineffective) limits based not on historical constitutional materials, but rather on a strained reading of cases decided between 1937 and 1994.

As it turns out, however, the results of many of those cases can be grounded in authentic originalist principles, even though the Court's proffered rationales cannot be. Therefore, the conservative Justices need not continue to distort that precedent to discover previously unnoticed "limits" that are then fleshed out in pure common law fashion, Cardozo-style. Rather, these Justices should adopt a "Neo-Federalist" approach: formulating legal rules, rooted in the Constitution's text and structure as historically understood, that can be consistently applied to allow the kind of generous yet circumscribed federal power that Cardozo endorsed. This Article sets forth such concrete legal principles to guide judicial review under the Commerce Clause, the Taxing and Spending Power, and the nondelegation doctrine. My analysis demonstrates that, contrary to the assertions

of many judges and scholars, such a genuinely legal framework is neither unworkable nor simplistic.

TABLE OF CONTENTS

INTRODUCTION	941
I. CARDOZO'S STATE JUDICIAL EXPERIENCE	945
II. CARDOZO'S WORK AS A JUSTICE	946
A. <i>The Commerce Clause</i>	947
B. <i>Taxing and Spending for the "General Welfare"</i>	950
C. <i>The Nondelegation Doctrine</i>	955
III. REVIVING CARDOZO'S "BROAD BUT LIMITED" APPROACH TO FEDERAL POWER, WITH A NEO-FEDERALIST TWIST	959
A. <i>The Commerce Clause</i>	961
1. <i>Modern Case Law</i>	961
2. <i>The Neo-Federalist Alternative</i>	966
B. <i>The Taxing and Spending Power</i>	967
1. <i>The Court's Blind Deference to Congress</i>	967
2. <i>Some Neo-Federalist Limitations</i>	973
C. <i>The Nondelegation Doctrine</i>	980
CONCLUSION	984

INTRODUCTION

Since 1937, the Supreme Court has not consistently developed and applied principles of constitutional law that allow robust, but genuinely limited, federal regulatory power. Liberal Justices have had little interest in such an intellectual project because they favor political, rather than judicial, review of the gargantuan administrative state.¹ Meanwhile, conservative Justices for the past three decades have repeatedly tried, without success, to devise meaningful legal restrictions on federal authority that would preserve state control over local matters.² Despite this failure, the three veteran conservatives (Chief Justice Roberts and Justices Thomas and Alito) will likely continue their efforts, especially since they have been joined by Neil Gorsuch and Brett Kavanaugh, two avowed defenders of traditional constitutional federalism.³

The Court's attempt to legally confine, but not unduly hamper, federal power would benefit from a close study of the opinions of Benjamin Cardozo, who became a Justice in 1932.⁴ Justice Cardozo approved most of the progressive New Deal economic and social welfare legislation championed by Democratic President Franklin D. Roosevelt (FDR), but identified and enforced certain constitutional boundaries.⁵ Cardozo's method consisted of carefully interpreting and applying challenged statutory provisions in light of

1. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465-81 (2014) (Breyer, J., dissenting, joined by Ginsburg, Sotomayor & Kagan, JJ.) (assailing the majority for striking down aggregate contribution limits in campaign finance statutes instead of deferring to Congress's policy determination that such laws help prevent corruption); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 589, 599-646 (2012) (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor & Kagan, JJ.) (rejecting various constitutional challenges to the Affordable Care Act and suggesting that any disputes over it should be resolved through the political process).

2. *See infra* notes 136-39, 153-76, 194-224, 270-74 and accompanying text.

3. *See* Ilya Shapiro & Frank Garrison, *Neil Gorsuch and the Structural Constitution*, NAT'L REV. (Feb. 22, 2017, 3:45 PM), <https://www.nationalreview.com/2017/02/neil-gorsuch-limited-government-constitutionalist/> [<https://perma.cc/CY5U-GQFA>]; Elaine S. Povich & Alayna Alvarez, *What Trump's Pick for Supreme Court Could Mean for States' Rights*, PEW CHARITABLE TRUST STATELINE BLOG (July 11, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/11/what-trumps-pick-for-supreme-court-could-mean-for-states-rights> [<https://perma.cc/L59F-HWRC>].

4. ANDREW L. KAUFMAN, *CARDOZO* 471 (1998).

5. *See infra* Part II.

Congress's overall purposes and policies, the particular facts presented, precedent, and the necessity of preserving the Constitution's basic structure.⁶ He set forth constitutional standards that could be fleshed out and adapted on a case-by-case basis, rather than fixed legal rules rooted in the historical Constitution that would more concretely curb the discretion of federal judges (and the coordinate branches).⁷

Cardozo's common law approach sought to reconcile two fundamental constitutional tenets that sometimes pull in different directions. First, the Constitution establishes a democratic system in which legislative acts are presumptively valid.⁸ Second, the Constitution limits the federal government. Separation of powers prohibits Congress from transferring its Article I "legislative Power[]"⁹ to the executive department, and federalism forecloses any interpretation of federal powers that would effectively make them absolute and thereby destroy states' jurisdiction over local matters.¹⁰ Justice Cardozo resolved such tensions by deferring to the federal government's broad but reasonable exercise of authority to address the Depression, while invalidating merely expedient laws that either gave Congress untrammelled power or the executive unbridled discretion, or both.¹¹

Although Justice Cardozo lived long enough to witness the triumph of his generally deferential style of judicial review in 1937, his quest to impose modest restrictions on Congress died along with him the next year.¹² In hindsight, Cardozo's case-sensitive approach likely could have worked only on a Court staffed by common law masters like him. Alas, President Roosevelt appointed nine Justices between 1937 and 1943 who were not experienced judicial crafts-

6. See *infra* Part II.

7. Cardozo believed that statutes had to be evaluated against the benchmark of a Constitution that does not contain clear legal rules which can be applied to decide controversies about the scope of governmental powers. See, e.g., *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 440-44 (1935) (Cardozo, J., dissenting).

8. See KAUFMAN, *supra* note 4, at 367, 389, 429, 435, 451, 572, 575 (describing Cardozo's view that judges in a constitutional democracy must generally respect legislative decisions).

9. U.S. CONST. art. I, § 1, cl. 1.

10. See, e.g., *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 554 (1935) (Cardozo, J., concurring).

11. See *infra* Part II.

12. See *infra* notes 61, 98-99, 129-33 and accompanying text.

men, but rather ardently pro-New Deal politicians (Hugo Black, Stanley Reed, Frank Murphy, Harlan Stone, James Byrnes, and Robert Jackson) or academics (Felix Frankfurter and Wiley Rutledge), or both (William Douglas, the SEC chair and former Yale Law professor).¹³ These Justices had neither the expertise nor the inclination to incrementally develop doctrines that would balance the federal government's desire to expand its regulatory scope against the need to respect constitutional constraints on federal power.¹⁴ Instead, FDR's Court swiftly abandoned any such limits.¹⁵

Chief Justices Warren (1954-1969) and Burger (1969-1986) and their colleagues entrenched this precedent,¹⁶ which has left the conservative majority on the Rehnquist and Roberts Courts with a dilemma. On the one hand, they value stability and hence seek to honor *stare decisis* and to protect the basic modern governmental framework (a practical necessity, however unpalatable in theory).¹⁷ On the other hand, the professed aim of these Justices has been to expound constitutional provisions in light of their original meaning and understanding.¹⁸ The conservatives have struck an odd compromise. They have recited the originalist mantra that the federal government is confined to its enumerated powers, yet identified only a few (and ineffective) restraints that are not based on historical constitutional materials but rather on an extremely strained reading of cases decided from 1937 to 1994.¹⁹

As it turns out, however, the *results* of many (albeit not all) of those cases can be justified on bona fide originalist principles, even

13. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 154-56, 210-12, 220 (1995). Rutledge alone had ever been a judge, and even he had served only briefly after a distinguished career as a law professor and dean. *Id.* at 212; BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 248 (1993).

14. See LEUCHTENBURG, *supra* note 13, at 216-19, 228.

15. See *id.*; see also *infra* notes 128-34, 145-50, 188, 192-93, 268-70 and accompanying text (analyzing the relevant cases).

16. See *infra* notes 100, 135-37, 151-52, 192-93, 270-71 and accompanying text.

17. See *infra* note 137 and accompanying text.

18. Justice Scalia nicely encapsulated this dilemma by admitting that he was a "faint-hearted originalist" who would not enforce the Constitution's original meaning if established precedent and practical considerations dictated otherwise. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-64 (1989).

19. See *infra* Part III.

though the Court's proffered *rationales* cannot be.²⁰ Therefore, the conservative Justices need not continue to distort that precedent to discover previously unnoticed "limits" that are then developed in pure common law fashion à la Cardozo. Rather, these Justices can formulate legal rules, grounded in the Constitution's text and structure as historically understood, that can be consistently applied today to permit the kind of generous yet circumscribed federal power that Cardozo endorsed.²¹ This "Neo-Federalist" approach would help the conservatives resolve their conundrum.²²

The foregoing themes will be explored in three Parts. Part I provides a brief account of the jurisprudential philosophy that Cardozo followed as a state judge, which carried over into his work as a Justice. Part II examines the Court's holdings, and Justice Cardozo's separate opinions, concerning Congress's authority to (1) "regulate Commerce ... among the several States";²³ (2) tax and spend "for the ... general Welfare";²⁴ and (3) delegate its "legislative Power[]"²⁵ to the executive branch. Part III criticizes FDR's appointees for eliminating legal constraints on the federal government and suggests that today's conservative Justices, in attempting to revive such limits without hamstringing the federal government, look to Cardozo's opinions for reassurance that such a balance is possible. Instead of using his pure common law methodology, however, the Court should employ Neo-Federalism to develop legal principles that are actually derived from the Constitution's text, structure, and history.

20. See *infra* Part III.

21. See *infra* Parts III.A.2, III.B.2, III.C.

22. Neo-Federalism seeks to (1) recapture "the original meaning, intent, and understanding of constitutional provisions," and (2) analyze those historical principles in light of the intervening 230 years of legislative and judicial precedent to develop legal rules that can be applied today in a way that will not be unduly disruptive. See Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1516, 1541-42 (2007); 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, 1289, 1311-24, 1328-41 (2005).

23. U.S. CONST. art. I, § 8, cl. 3.

24. *Id.* art. I, § 8, cl. 1.

25. *Id.* art. I, § 1, cl. 1.

I. CARDOZO'S STATE JUDICIAL EXPERIENCE

Cardozo ascended to the Supreme Court after earning a reputation as America's greatest judge during his service on New York's highest court.²⁶ Four of his achievements were especially relevant to his later work as a Justice.

First, Cardozo brilliantly synthesized and adapted New York's common law to meet shifting industrial, commercial, and social conditions.²⁷ He elaborated on his approach in *The Nature of the Judicial Process* by acknowledging the inherent uncertainty of law—and its evolution to reflect changing ideas about social welfare and morality—without succumbing to the notion that legal judgments reflect mere political or ideological will.²⁸ Rather, Cardozo argued that statutes and precedent yielded legal principles that genuinely constricted judges' range of decisionmaking, but with room to adjust the law to new circumstances.²⁹

Second, and relatedly, he asserted that courts had more freedom to account for public policy considerations in constitutional—as contrasted with common law—cases.³⁰ Cardozo interpreted the Constitution and its implementing precedent as creating legal doctrines that were stable, yet could be modified based on the facts of each case in light of political, economic, and social realities.³¹ He applied this same approach when he became a Justice.³²

Third, Cardozo questioned the idea that federal and state constitutional provisions prohibiting states from depriving persons of “liberty” or “property” without “due process of law” implicitly enshrined a substantive rule of freedom of contract based on *laissez faire* economics.³³ Rather, he urged judicial deference to reasonable

26. See KAUFMAN, *supra* note 4, at 4, 455-56, 461-71 (detailing the national consensus that Cardozo was the only legal figure with the stature to replace the retiring Justice Holmes).

27. For an excellent summary and analysis of these cases, see *id.* at 130-36, 223-360, 416-25, 434-35, 451.

28. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14, 24-25 (1921).

29. *Id.* at 10-11, 14-15, 19-31, 34-36, 40-52, 58-59, 62-180.

30. See *id.* at 17-18, 76-84, 169-70; KAUFMAN, *supra* note 4, at 366-67, 389, 500-02.

31. See, e.g., *Klein v. Maravelas*, 114 N.E. 809, 810-11 (N.Y. 1916).

32. See *infra* Part II.

33. See KAUFMAN, *supra* note 4, at 362-70 (discussing Judge Cardozo's key opinions and those of his state court colleagues).

state regulations designed to promote the public good (for example, by protecting workers and consumers from the negative effects of industrialization), even if doing so interfered with the previously unfettered economic rights of employers and businesses.³⁴ Not surprisingly, when Cardozo became a Justice, he eventually helped persuade a majority of the Court to repudiate its substantive due process jurisprudence.³⁵ Relatedly, Justice Cardozo challenged the laissez faire notion that Congress's regulation of interstate commerce was innately suspect because it interfered with market forces.³⁶

Fourth, Judge Cardozo held that state legislatures could delegate their legislative (rulemaking) power to expert executive agencies or private parties, as long as the legislature sought to achieve a valid public purpose and set forth the basic policy and legal standards to guide the executive's exercise of discretion.³⁷ As a Justice, he applied the same reasoning to congressional delegations.³⁸

In short, Cardozo had developed a sophisticated approach to adjudication by the time he arrived on the Supreme Court.³⁹ During his brief tenure, he emerged as a key figure in transforming constitutional law.⁴⁰

II. CARDOZO'S WORK AS A JUSTICE

Cardozo joined the Court shortly before FDR spearheaded the Democrats' sweeping victories in both the presidential and congress-

34. *Id.*

35. The landmark case was *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which established that courts would sustain state economic legislation (such as the minimum wage law at issue) as long as it had a rational basis—as virtually all such laws do. *See id.* at 386-400; *see also* KAUFMAN, *supra* note 4, at 491-507 (describing Cardozo's influence in reversing the Court's substantive due process jurisprudence as well as its prior rigid interpretation of Article I's Contracts Clause as strictly prohibiting states from any impairment of contract obligations). This Article will not delve into substantive due process analysis of state law, but rather will focus on federal legislation.

36. *See infra* Part II.A.

37. *See* KAUFMAN, *supra* note 4, at 370-75 (examining cases involving delegation and related separation-of-powers issues).

38. *See infra* Part II.C.

39. *See supra* notes 27-38 and accompanying text.

40. *See* KAUFMAN, *supra* note 4, at 568-72.

sional elections of November 1932.⁴¹ The ensuing avalanche of New Deal legislation raised three critical issues about the breadth of federal power. First, Congress asserted unprecedented regulatory authority under the Commerce Clause, often in tandem with its power to enact laws “necessary and proper” to carry into effect its other enumerated powers.⁴² Second, Congress claimed that it could tax and spend to achieve breathtakingly ambitious economic and social “general Welfare”⁴³ goals. Third, these Commerce Clause and General Welfare statutes delegated extraordinary rulemaking discretion to the executive department. These three issues will be examined in turn.

A. *The Commerce Clause*

Before 1937, the Court had long interpreted the Commerce Clause as imposing two requirements. First, Congress could regulate only “commerce” (defined as the sale of goods and transportation), not antecedent productive activities such as farming, manufacturing, mining, and labor.⁴⁴ Second, such commerce either had to cross state lines or have “direct” interstate effects (such as a local railroad that was connected to an interstate one).⁴⁵ Applying this precedent, the Court invalidated most federal New Deal legislation.⁴⁶

The key case, *A. L. A. Schechter Poultry Corp. v. United States*, involved a provision of the National Industrial Recovery Act (NIRA) authorizing the President to promulgate “codes of fair competition” for all industries and trades, which he invoked to regulate not merely unfair competitive practices but also matters such as wages and

41. See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 3, 17 (1963).

42. U.S. CONST. art. I, § 8, cl. 18.

43. *Id.* art. I, § 8, cl. 1.

44. See, e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1, 11-18 (1895) (holding that, because manufacturing was not “commerce,” Congress could not extend its antitrust laws to a national corporation’s purchase of sugar refineries that gave it a monopoly of the sugar market). For a summary and analysis of these cases, 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, 68-71 (1999).

45. See Nelson & Pushaw, *supra* note 44, at 71-77 (examining relevant precedent).

46. See LEUCHTENBURG, *supra* note 13, at 85, 89, 96.

hours.⁴⁷ Pursuant to the NIRA, the President (through his subordinates) enacted a Poultry Code and enforced it even against enterprises that operated entirely within a state—including the defendant, a small company that slaughtered and sold chickens in a small area in New York.⁴⁸ The Court ruled that, even if the statute regulated “commerce” (the poultry business), Congress could not reach local trade that had at most an “indirect” effect on interstate commerce.⁴⁹ In a concurrence, Justice Cardozo emphasized that, although Congress had broad power under the Commerce Clause, sustaining this particular law regulating labor transactions within a state

would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours “is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.” The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions.... To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.⁵⁰

The Court reaffirmed *Schechter* in *Carter v. Carter Coal Co.*⁵¹ That case addressed the Bituminous Coal Conservation Act, which (1) set prices on coal sales that took place either in interstate commerce or within a state but affected such commerce, and (2) governed labor relations in coal mining.⁵² The Court invalidated this law on the ground that Congress could not regulate productive activities such as labor because they are not “commerce” and have only an “indirect” impact on commerce among the states.⁵³ In dissent,

47. 295 U.S. 495, 521-27 (1935).

48. *Id.* at 519-22, 542-43.

49. *Id.* at 542-50.

50. *Id.* at 554 (Cardozo, J., concurring) (citations omitted).

51. 298 U.S. 238 (1936).

52. *Id.* at 278-84.

53. *Id.* at 297-310.

Justice Cardozo (joined by Justices Brandeis and Stone) contended that precedent did not necessarily dictate this result.⁵⁴ Rather, he argued that the particular price-fixing provisions, as applied to the facts, were legitimate because they concerned coal sales that were either interstate or “directly or intimately” affected interstate commerce.⁵⁵

Justice Cardozo’s generous, but still limited, interpretation of the Commerce Clause prevailed the very next year (1937). In *NLRB v. Jones & Laughlin Steel Corp.*, he joined a bare majority in sustaining the National Labor Relations Act (NLRA), which had been applied to a huge steel company.⁵⁶ The Court held that Congress had reasonably determined that it was necessary and proper to implement its Commerce Clause power by sweeping in even non-commercial, intrastate activity (such as labor relations) that bore a “close and substantial” relation to interstate commerce.⁵⁷ The Court documented the steel corporation’s extensive national operations to support the conclusion that labor disputes at its plants could seriously disrupt interstate commerce,⁵⁸ but cautioned that Congress could not reach “local” activities that had merely an “indirect and remote” effect on such commerce.⁵⁹

Jones & Laughlin Steel might be defended as an extension of precedent allowing Congress to regulate intrastate activities that had a direct, intimate, and significant impact on interstate commerce, while still reserving a slice of state power over wholly local commerce.⁶⁰ Shortly after Cardozo’s death, however, FDR’s appointees eliminated all Commerce Clause limits.⁶¹

54. *Id.* at 324-41 (Cardozo, J., dissenting).

55. *Id.* at 324-30.

56. 301 U.S. 1, 34-43 (1937).

57. *Id.* at 37, 40-43.

58. *Id.* at 26-28.

59. *Id.* at 41-43.

60. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3-7, 11-43, 139-225 (1998). Most other scholars, however, characterize *Jones & Laughlin Steel* and other 1937 cases as a radical break. See, e.g., LEUCHTENBURG, *supra* note 13, at 213-36.

61. See *infra* notes 142-52 and accompanying text.

B. Taxing and Spending for the “General Welfare”

Article I authorizes Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁶² The power to tax contains two express limitations. First, duties, impost, and excises (known as “indirect” taxes) “shall be uniform throughout the United States.”⁶³ Second, all other taxes (labeled “direct”) must be apportioned by population, except those levied on income.⁶⁴ Moreover, “taxes” have always been defined as enforced contributions to support the government—as distinguished from “penalties,” which are exactions designed to punish an illegal act (usually a violation of a regulatory law).⁶⁵ In short, Congress could only impose “taxes” and had to ensure uniformity and apportionment when those requirements applied.

In contrast to taxation, Congress’s power to spend for the “general Welfare” does not import a clear definition or contain any explicit textual restrictions, beyond a common sense understanding that “general” welfare does not include specific individuals or states.⁶⁶ Because most Framers and Ratifiers envisioned a relatively small federal government, they likely expected that Congress would have the ability to raise a modest amount of revenue sufficient to honor America’s debts, pay for the military, and further the nation’s welfare (especially by encouraging international commerce).⁶⁷ In particular, the original conception of “general Welfare” was the provision of public goods such as interstate infrastructure that must be

62. U.S. CONST. art. I, § 8, cl. 1.

63. *Id.*

64. *See id.* art. I, § 9, cl. 4. Under the original Constitution, it was unclear if “Taxes” included those on income. A 1913 Amendment made that power explicit and also eliminated any requirement that federal income taxes be uniform or apportioned by state population. *See id.* amend. XVI; *see also* Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97, 110 (2012) (highlighting the distinction between “direct” and “indirect” taxes).

65. *See* *United States v. Butler*, 297 U.S. 1, 61 (1936); *see also* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 34-44 (1922) (invalidating Congress’s purported “tax” on employers who had used child labor because it was in reality a “penalty” for violating a regulatory provision banning such labor); *id.* at 40-43 (citing several other cases limiting Congress to levying “taxes”).

66. *See Butler*, 297 U.S. at 64-68.

67. *See, e.g.*, THE FEDERALIST No. 45, at 312-14 (James Madison) (Jacob E. Cooke ed., 1961).

made available to everyone, not direct transfer payments from one group of citizens to another.⁶⁸

More controversially, in the 1790s Madison claimed that the “general Welfare” encompassed only the other seventeen subjects enumerated in Section 8 of Article I (for example, regulating interstate commerce and building post offices).⁶⁹ Hamilton, on the other hand, maintained that the “general Welfare” provision was an independent grant that could extend to anything that genuinely promoted the national interest.⁷⁰ Hamilton’s interpretation seems more consistent with the Clause’s broad language, which could accommodate congressional spending for needs that the Founders themselves may not have anticipated but that later emerged and were truly national in scope.⁷¹

In any event, the Madison-Hamilton debate remained largely academic for well over a century because Congress exercised its Taxing and Spending Power so sparingly.⁷² The New Deal ended such legislative self-restraint.

Once again, the Court initially thwarted Congress. For instance, the 1936 case of *United States v. Butler* involved a federal tax on processors of agricultural commodities, the proceeds of which went not to the Treasury but to farmers who reduced their crop acreage (and thereby helped stabilize prices).⁷³ The Court purported to adopt the broad Hamiltonian position, but invalidated the tax on three related grounds.⁷⁴ First, the statute did not technically impose a “tax” at all, because Congress had expropriated money from one

68. See Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 28, 30-32 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013). Nonetheless, the Taxing and Spending Clauses are worded so broadly as to authorize Congress to raise sufficient revenue to meet all national and military needs, even if they mushroom far beyond what the Founders could have imagined. The Hamiltonian vision could accommodate such growth. See *infra* notes 70-71, 74, 81-91, 94-97.

69. See David E. Engdahl, *The Spending Power*, 44 *DUKE L.J.* 1, 19-20 (1994).

70. See *id.* at 5-24.

71. See *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); Engdahl, *supra* note 69, at 44-48.

72. See Engdahl, *supra* note 69, at 22-40.

73. 297 U.S. 1, 53-57 (1936).

74. *Id.* at 65-67, 77. Professor Engdahl argues that the Court did not actually understand Hamilton’s position, which would have counseled upholding the tax. See Engdahl, *supra* note 69, at 35-43.

private group for the benefit of another, rather than for Americans as a whole through payment to the federal government.⁷⁵ Second, Congress could use its Taxing and Spending Power only to further the “general” (that is, national) welfare, not to invade an area of purely “local” concern such as agricultural production that the Tenth Amendment reserved to the states.⁷⁶ Third, Congress could not allocate federal funds to purchase compliance by either states or farmers on a subject within the states’ exclusive domain, even if their acquiescence was voluntary.⁷⁷ The Court concluded that any “asserted power of choice is illusory”: Congress had engaged in “coercion by economic pressure” because farmers who refused to cooperate would forfeit benefits that could well lead to financial ruin.⁷⁸

Justice Cardozo joined the dissent of Justice Stone, who argued that Congress’s power in this field was plenary and thus not limited by the Tenth Amendment.⁷⁹ Furthermore, Justice Stone contended that Congress could address a national economic problem through noncoercive “conditional gifts of money,” such as its offer here to pay farmers if they voluntarily decreased their crop production.⁸⁰

The dissenters’ view prevailed the very next year in *Steward Machine Co. v. Davis*.⁸¹ *Steward Machine* dealt with a Social Security Act (SSA) provision that imposed a federal unemployment tax on employers, but gave them a credit for taxes they had paid into a state unemployment fund that satisfied specific and detailed federal criteria.⁸² The SSA also granted participating states money to help them administer their unemployment funds.⁸³ The Court sustained this statute and rejected the company’s claim that the SSA had unduly undermined federalism by coercing states and invading their reserved powers.⁸⁴

75. *Butler*, 297 U.S. at 58-61, 70, 75-76.

76. *Id.* at 62-70.

77. *Id.* at 70-78.

78. *Id.* at 71.

79. *Id.* at 78-88 (Stone, J., dissenting).

80. *Id.* at 85-88.

81. 301 U.S. 548 (1937).

82. *See id.* at 574-76.

83. *Id.* at 577-78.

84. *See id.* at 587-98.

Writing for a razor-thin majority, Justice Cardozo initially held that the SSA served the “general Welfare” because mass unemployment was a problem “national in area and dimensions,” which states acting independently could not resolve.⁸⁵ Experience had shown that states which had adopted unemployment compensation tax laws were at a competitive economic disadvantage compared to states that had not, and unemployed citizens of the latter laggard states had demanded massive financial assistance from the federal government.⁸⁶ The Court ruled that, given this factual context, Congress had reasonably set up a program in which the federal and state governments would cooperate for the common good.⁸⁷ Furthermore, Justice Cardozo maintained that each state could freely choose (1) whether it wished to take advantage of the federal credit and other assistance being offered, and (2) if so, to create and implement any unemployment compensation scheme that the state deemed appropriate, as long as its law met the minimum federal standards.⁸⁸

Accordingly, the Court concluded that Congress had merely “induc[ed]” or “persua[ded]”—rather than “coerced” or “comp[elled]”—states to create unemployment compensation funds.⁸⁹ Justice Cardozo then carefully explained, and circumscribed, this holding:

We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose of its intervention ... is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is

85. *Id.* at 586-89.

86. *Id.* at 587-89.

87. *See id.*

88. *See id.* at 589-98.

89. *See id.* at 589-91.

unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national.... It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.⁹⁰

In this crucial (and long overlooked) passage, Justice Cardozo left the task of distinguishing “inducement” from “coercion” to later common law development, yet suggested that this line would be crossed if Congress tried to compel states to legislate on a subject that was not of truly national concern but rather fell within the states’ exclusive constitutional orbit.⁹¹

Four Justices dissented. Two maintained that the federal unemployment compensation provisions, even if they did not technically “coerce[]” the states, nonetheless violated the Tenth Amendment by forcing states to surrender their exclusive reserved power to administer their own tax laws.⁹² The other two Justices found such coercion: Even if states theoretically were free to decide whether or not to participate in the SSA’s unemployment “tax and credit” program, realistically states had to do so because otherwise they would needlessly expose their citizens to the burden of both federal and state taxes for the same basic benefit.⁹³

In the companion case of *Helvering v. Davis*, the Court upheld the SSA provisions taxing employers and employees to ensure retirement benefits.⁹⁴ In his majority opinion, Justice Cardozo stressed that Congress had great discretion in deciding that a matter fell

90. *Id.* at 590-91.

91. *See id.*; *see also id.* at 593-98 (concluding that the SSA did not require states to unconstitutionally relinquish their essential reserved powers, as states retained a wide range of discretion in complying with the federal statute—as long as they met the baseline standards that Congress deemed essential—and could opt out anytime and give up the federal credit).

92. *See id.* at 609-16 (Sutherland, J., dissenting, joined by Van Devanter, J.).

93. *See id.* at 598-609 (McReynolds, J., dissenting); *id.* at 616-18 (Butler, J., dissenting).

94. 301 U.S. 619, 639-46 (1937).

within the “general Welfare,”⁹⁵ particularly because that concept was dynamic rather than static: “Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation.”⁹⁶ He concluded that Congress had reasonably found, based on abundant evidence, that the problem of income insecurity in old age was “plainly national” and that “laws of the separate states cannot deal with it effectively” because any state that did so unilaterally would be competitively handicapped.⁹⁷

Once again, Cardozo endorsed generous, but not absolute, federal power. Unfortunately, his key proposed limit—that Congress could “encourage[.]” but not “coerce[.]” states⁹⁸—proved to be toothless. The Court never seriously engaged in Cardozo’s recommended common law elaboration of this distinction, which depended chiefly on whether or not the regulated subject was “national” (in the sense that states acting individually could not competently address it).⁹⁹ Instead, for nearly eight decades the Court approved all taxing and spending laws, even those that seemed to compel states to accept federal regulation of matters that had always been left to the states and could still be capably managed by them.¹⁰⁰

C. *The Nondelegation Doctrine*

Article I of the Constitution vests in Congress “[a]ll legislative Powers”¹⁰¹ to make, amend, or repeal laws that reflect majoritarian preferences.¹⁰² Conversely, Article II grants the President alone all

95. *See id.* at 640 (“The discretion [to determine the ‘general Welfare’] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”); *id.* at 644-45. This astoundingly weak standard of judicial review is in tension with Cardozo’s other insight that courts should not permit Congress to interfere with subjects that the Constitution reserves to the states and which they can competently address independently. *See supra* notes 85-87, 90-91 and accompanying text, *infra* notes 99, 193, 258-65 and accompanying text.

96. *Davis*, 301 U.S. at 641.

97. *Id.* at 644. *But see id.* at 646 (McReynolds & Butler, JJ., dissenting) (asserting that the SSA retirement benefits provisions contravened the Tenth Amendment).

98. *Steward Mach.*, 301 U.S. at 585-91.

99. *See infra* Part III.B.

100. *See infra* Part III.B.

101. U.S. CONST. art. I, § 1, cl. 1.

102. *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) (tracing the historical development of the concept of “legislative power”).

“executive Power”¹⁰³ to administer and enforce federal law.¹⁰⁴ Articles I and II delineate a basic separation-of-powers structure that led the Court to proclaim: “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”¹⁰⁵

Of course, Congress’s ability to pass all laws “necessary and proper” to carry into effect the federal government’s powers¹⁰⁶ means that Congress can organize the executive branch—with the number, structure, and jurisdiction of executive departments and agencies left to Congress’s judgment. Yet it would not be “proper” for Congress to delegate its distinctively “legislative” power to (1) make normative policy choices that are important enough to its statutory scheme that only Congress should make them, and (2) write laws with sufficient specificity such that the executive branch can understand what is being prescribed and voters can evaluate their representatives.¹⁰⁷ Accordingly, the Court insisted that the Constitution required Congress to articulate its particular policy and to “lay down ... an intelligible principle to which the person or body authorized to [act] is directed to conform.”¹⁰⁸

This nondelegation doctrine came under severe pressure during the 1930s, when Congress enacted many statutes that announced general policy goals and gave executive agencies vast discretion to promulgate and administer detailed implementing regulations.¹⁰⁹ Constitutional attacks on such delegations succeeded in a pair of 1935 cases, but Justice Cardozo rendered separate opinions approving the use of this tool within reasonable limits.¹¹⁰

First, in *Panama Refining Co. v. Ryan*, the Court struck down Section 9(c) of the NIRA, which authorized the President to criminally prohibit interstate transportation of petroleum and its

103. U.S. CONST. art. II, § 1, cl. 1.

104. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 416-17, 430-31 (1996).

105. *Field v. Clark*, 143 U.S. 649, 692 (1892).

106. U.S. CONST. art. I, § 8, cl. 18.

107. See *supra* notes 10, 101-02 and accompanying text; see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239-40 (1994).

108. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

109. See BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 105-08 (1991).

110. See *infra* notes 111-27 and accompanying text.

byproducts that had been produced in excess of a state's production quota (deemed "hot oil").¹¹¹ Writing for the majority, Chief Justice Hughes held that Congress had run afoul of the Constitution's system of government by delegating its legislative power, yet failing to expressly declare its policies and define a rule or standard to cabin the President's exercise of discretion.¹¹²

In a solo dissent, Justice Cardozo agreed that a valid delegation required a "reasonably clear" limiting standard, but he inferred one from the statute "considered as a whole."¹¹³ Initially, he noted that Section 9(c) restricted the President to a specific act—prohibiting the interstate shipment of petroleum that exceeded state production restrictions—rather than either (1) granting him a "roving commission to inquire into evils [in the oil business] and then, upon discovering them, [to] do anything he pleases," or (2) allowing him "to roam at will among all the possible subjects of interstate transportation."¹¹⁴ Cardozo further argued that other sections of the statute supplied the necessary standard: The President could ban the transportation of "hot oil" only when he determined, based on industry conditions, that doing so would effectuate Congress's declared general purposes (removing obstacles to interstate commerce, eliminating unfair business practices, promoting optimal use of natural resources, stabilizing prices, reviving industry, and reducing unemployment).¹¹⁵ Consequently, Cardozo maintained that "[d]iscretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing."¹¹⁶

More generally, he rejected formalism by declaring that

the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation ... [and] elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety.¹¹⁷

111. *See* 293 U.S. 388, 406, 418 (1935).

112. *Id.* at 414-30.

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

114. *Id.* at 434-35.

115. *Id.* at 435-39.

116. *Id.* at 440.

117. *Id.*

After reviewing many legislative and judicial precedents dating back to 1794 that authorized delegations, Justice Cardozo concluded:

There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section. What can be done under ... that permission is closely and clearly circumscribed both as to subject matter and occasion. The statute was framed in the shadow of a national disaster. A host of unforeseen contingencies would have to be faced from day to day, and faced with a ful[li]ness of understanding unattainable by any one except the man upon the scene. The President was chosen to meet the instant need.¹¹⁸

Finally, Cardozo proposed that courts should presume the lawfulness of a President's action taken pursuant to a legitimate congressional delegation, except in the extremely rare situation (not present here) where his conduct is shown to be irrational and arbitrary.¹¹⁹

Second, in *Schechter* the Court struck down the NIRA provision authorizing the President to promulgate "fair competition" codes for all industries.¹²⁰ This provision not only overleapt the bounds of the Commerce Clause,¹²¹ but also unconstitutionally delegated Congress's essential "legislative Power[]" by failing to establish any rules or standards concerning "fair competition" that would limit the President's discretion.¹²² Justice Cardozo concurred separately to explain that, unlike the statutory provision in *Panama Refining*, here "an attempted delegation [was] not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect [was] a roving commission to inquire into evils and upon discovery correct them."¹²³ He stressed that Congress could not give the President a blank check to regulate all industry based on his notions of fairness¹²⁴: "This is delegation

118. *Id.* at 443-44.

119. *See id.* at 444-48.

120. *See* A. L. A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-51 (1935).

121. *See id.* at 542-50; *supra* notes 47-50 and accompanying text.

122. *Schechter*, 295 U.S. at 529-42.

123. *Id.* at 551 (Cardozo, J., concurring).

124. *See id.* at 552-53.

running riot. No such plenitude of power is susceptible of transfer.”¹²⁵

In sum, the Court in the mid-1930s manifested hostility to Congress’s delegation of its legislative power.¹²⁶ By contrast, Justice Cardozo realized that such delegations were necessary to the functioning of the fledgling administrative state, but sought to ensure that Congress enacted laws that covered a particular subject area and that articulated true legal standards which directed and hemmed in the executive branch’s range of action.¹²⁷

Even Cardozo’s modest efforts at containing legislative delegations, however, did not long endure. The FDR appointees quickly eviscerated the nondelegation doctrine, which has never again been invoked to strike down a federal statute.¹²⁸

III. REVIVING CARDOZO’S “BROAD BUT LIMITED” APPROACH TO FEDERAL POWER, WITH A NEO-FEDERALIST TWIST

Justice Cardozo became incapacitated in late 1937 and passed away the following July.¹²⁹ Most of his colleagues either died or retired between 1937 and 1943.¹³⁰ President Roosevelt seized this unique opportunity to reshape the Court.¹³¹ His nine appointees were not seasoned judges like Cardozo who sought to apply legal standards on a case-by-case basis to ensure muscular, but still bounded, federal power.¹³² Rather, FDR chose politicians and law professors who enthusiastically supported the New Deal, and they quickly embraced total judicial deference to liberal economic and social welfare legislation.¹³³

These Democratic Justices rationalized their results by concocting doctrines that had little-to-no discernible basis in the Constitution’s text, structure, drafting and ratification history, or understandings shared by all three federal branches during America’s

125. *Id.* at 553.

126. *See supra* notes 110-12, 120-22 and accompanying text.

127. *See supra* notes 113-19, 123-25 and accompanying text.

128. *See infra* Part III.C.

129. *See KAUFMAN, supra* note 4, at 566-67.

130. *See LEUCHTENBURG, supra* note 13, at 154-56, 210-12, 220.

131. *Id.* at 154-55, 162, 210-12, 220.

132. *See supra* notes 13-14 and accompanying text.

133. *See supra* notes 13-15, 61, 99-100, 128 and accompanying text.

first century-and-a-half.¹³⁴ Nonetheless, this novel precedent eventually took root, and the Warren and Burger Courts repeatedly rubber-stamped groundbreaking and expansive federal statutes in areas such as civil rights, Medicare, and environmental law.¹³⁵

This bedrock case law has created a quandary for conservative Republican Justices, who attained a majority in the late 1980s.¹³⁶ On the one hand, they are ideologically inclined to “conserve” history and tradition—and thus to adhere to *stare decisis*, especially on issues of government powers that have generated settled expectations.¹³⁷ On the other hand, the conservatives treat the Constitution itself as law, and therefore attempt to interpret and apply its language and structure as historically understood.¹³⁸

The conservative Justices have been unable to reconcile post-1936 precedent with the original Constitution, so they have adopted an awkward compromise.¹³⁹ They invariably parrot the Federalist tenet that the federal government is limited to its enumerated powers, with all others reserved to the states.¹⁴⁰ But this abstract principle rarely yields practical results, as the Court has imposed only a few weak limits—and even those are not derived from

134. See LEUCHTENBURG, *supra* note 13, at 154; Nelson & Pushaw, *supra* note 44, at 79-85 (analyzing the main cases).

135. See Nelson & Pushaw, *supra* note 44, at 86-88 (discussing illustrative decisions).

136. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 600-01 (5th ed. 2009) (noting that this new conservative majority faced the challenge of translating its commitment to traditional federalism into workable judicial doctrine).

137.

[S]tare decisis exerts real force in certain areas, especially if the seminal decision has been widely accepted and reaffirmed over a time period lengthy enough that reversing course would exact serious costs in terms of legal stability, continuity, and governmental legitimacy. Obvious examples include the Court's New Deal-era judgments endorsing the modern administrative-social welfare state and Warren Court cases like *Brown [v. Board of Education]* and *Baker [v. Carr]*.

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). Although the Justices display varying degrees of commitment to *stare decisis*, and although some of them would happily overturn cases such as *Roe v. Wade*, a few moderate Republican Justices have kept liberal precedents largely intact. See *id.* at 521-27, 577-78.

138. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 9-13, 37-47 (1997).

139. See examples of such opinions *infra* notes 153-76, 192-220, 271-74 and accompanying text.

140. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533-38 (2012).

historical constitutional materials, but rather from a distorted reading of cases between 1937 and 1994.

Unfortunately, the conservative Justices have failed to pursue in-depth historical analyses that could have justified the results in many (although not all) of these cases.¹⁴¹ Accordingly, these Justices need not continue to twist precedent to glean previously unnoticed “limits” and then further tweak them from case to case. In this regard, it is worth remembering that such a common law method, which Cardozo employed to permanently reshape the law of contracts and torts,¹⁴² did not yield similar success for him in establishing enduring constitutional restraints on federal power.¹⁴³

Instead, the conservative Justices should set forth and consistently apply legal rules, rooted in the Constitution’s text as historically understood, that would permit the sort of generous yet bounded power that Cardozo endorsed. My proposed “Neo-Federalist” approach would clarify the Court’s jurisprudence on the Commerce Clause, the Taxing and Spending Power, and the nondelegation doctrine.¹⁴⁴

A. *The Commerce Clause*

1. *Modern Case Law*

Shortly after Justice Cardozo died, the Court jettisoned the limits it had announced in *Jones & Laughlin Steel* and permitted application of the NLRA to any employer, however small and local, if its workers’ labor disputes might disrupt interstate commerce.¹⁴⁵ Subsequent decisions suggested that the Court would acquiesce to all Commerce Clause legislation. For example, in 1941, the Court sustained enforcement of the Fair Labor Standards Act against a little Georgia lumber company¹⁴⁶ and labeled the Tenth Amendment

141. See *infra* Parts III.A.2, III.B.2, and III.C.

142. See, e.g., KAUFMAN, *supra* note 4, at 243-360.

143. See *supra* Part II.

144. See *supra* notes 21-22 and accompanying text (describing the Neo-Federalist methodology).

145. See *NLRB v. Fainblatt*, 306 U.S. 601, 604-09 (1939); see also *supra* notes 56-60 and accompanying text (discussing *Jones & Laughlin Steel*).

146. See *United States v. Darby*, 312 U.S. 100, 108-09, 113-25 (1941).

a mere “truism” that did not independently constrain Congress’s power.¹⁴⁷

The next year, *Wickard v. Filburn* upheld the extension of the Agricultural Adjustment Act (AAA) to a humble farmer for growing an admittedly “trivial” amount of wheat (slightly in excess of his federally imposed quota) for home rather than commercial use.¹⁴⁸ The Court invented the theory that Congress could “aggregate” the activities of all such farmers across the country to justify its finding of a “substantial effect” on interstate commerce.¹⁴⁹ As the Justices well understood, virtually any activity, when added up nationally, has such an impact.¹⁵⁰

Wickard thereby unleashed nearly absolute federal power. For the next half century, the Court rejected every challenge to Acts of Congress passed under the Commerce Clause, even those that reached seemingly noncommercial and local activities.¹⁵¹ Indeed, the Court asserted that it would suffice if Congress might have had some “rational basis” for concluding that an activity, considered in the aggregate, “substantially affected’ interstate commerce,” regardless of whether Congress had made findings to demonstrate this effect.¹⁵²

The Rehnquist and Roberts Courts have been unwilling to overrule this precedent, which has stymied their efforts to impose meaningful originalist restrictions on the Commerce Clause. For instance, in *United States v. Lopez*, Chief Justice Rehnquist and four conservative colleagues struck down a 1990 federal criminal law banning possession of a firearm near a school.¹⁵³ This bare majority held that when Congress legislated in an area of “traditional state concern” (such as crime or education), the “substantial effects” test would be applied rigorously if Congress sought to reach activities that were not “commercial,” either of themselves or as “an essential part of a larger regulation of economic activity.”¹⁵⁴ The Court declined to define “commerce,” declared that its meaning

147. *See id.* at 123-24.

148. 317 U.S. 111, 114-15, 118-28 (1942).

149. *Id.* at 127-30, 133.

150. *See* Nelson & Pushaw, *supra* note 44, at 82.

151. *See id.* at 83-86 (analyzing the relevant cases).

152. *Id.* at 86-88.

153. 514 U.S. 549, 551, 556-68 (1995).

154. *Id.* at 561.

would instead be determined on a “case-by-case” basis, and made the conclusory assertion that mere possession of a gun did not constitute “commerce.”¹⁵⁵ The Chief Justice recognized that this common law approach would produce some “uncertainty,”¹⁵⁶ but insisted that such line drawing was necessary to maintain the historical “distinction between what is truly national and what is truly local” and thereby preserve the Constitution’s structure founded upon a limited federal government.¹⁵⁷

Chief Justice Rehnquist manipulated post-1936 precedent. Most importantly, the Court had always deferred to Congress’s judgment that a particular activity (specifically including gun possession) “substantially affected” interstate commerce, regardless of whether the activity itself was “commercial.”¹⁵⁸ In fact, after 1937, the Court abandoned its previous attempts to confine Congress to regulating only (1) “commerce,” defined as the sale of goods and transportation services, and (2) subjects deemed “interstate” or “national,” as opposed to inherently “local” matters that states had traditionally regulated (such as labor and agriculture).¹⁵⁹

More generally, the *Lopez* majority made two fundamental, and related, mistakes. First, trying to work out the meaning of “commerce” on an ad hoc basis, rather than through a fixed definition, invites arbitrary judgments.¹⁶⁰ Second, *Lopez* harkens back to Justice Cardozo’s common law assessments as to whether a particular statute reached activity (even noncommercial) that was “local” or “national,” which depended largely on whether the activity had a “close,” “direct,” and “substantial” impact on interstate commerce.¹⁶¹ Such fine distinctions have become increasingly difficult to draw because changes in technology, transportation, and communications have created an interdependent society in which it is

155. *Id.* at 561-62.

156. *Id.* at 566.

157. *Id.* at 567-68.

158. See Nelson & Pushaw, *supra* note 44, at 79-88. Most pertinently, the Court had held that the Commerce Clause authorized Congress to ban possession of guns (by ex-felons). See *Scarborough v. United States*, 431 U.S. 563, 563-64, 568-77 (1977).

159. See Nelson & Pushaw, *supra* note 44, at 68-71 (summarizing pre-1937 cases adopting this crabbed definition of “commerce”); *id.* at 79-83 (describing later precedent rejecting this approach).

160. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 331-32 (2005).

161. See *supra* notes 50, 54-60 and accompanying text.

nearly impossible to gauge the effects of any isolated activity on the interstate economy.¹⁶² The upshot is that judicially enforceable restrictions must be based on a workable definition of “commerce,” not on whether an activity exerts a “substantial” and “direct” effect on interstate commerce.¹⁶³

Despite the shortcomings of *Lopez*, it was applied by the same five conservative Justices in *United States v. Morrison* to invalidate Congress’s creation of a federal tort action for victims of gender-motivated violence.¹⁶⁴ The Court ruled that Congress had interfered with “traditional state concerns” (tort and criminal law) and that sexual assault could not rationally be characterized as “commercial” activity or as “substantially affecting” interstate commerce.¹⁶⁵

In *Gonzales v. Raich*, however, Justices Scalia and Kennedy deserted their three conservative comrades and joined the liberals in holding that Congress could criminalize the noncommercial and intrastate growth, possession, and use of marijuana for medical purposes, even though California had authorized these activities pursuant to its traditional police powers over criminal law and health care.¹⁶⁶ While the Court did not overrule *Lopez* or *Morrison*,¹⁶⁷ it was unwilling to apply the constitutional limits announced in those cases to strike down a long-established and important federal law.¹⁶⁸ Thus, *Raich* appears to have cabined *Lopez* and *Morrison* to new, and largely symbolic, statutes that effectively duplicate existing state laws.¹⁶⁹

Of similarly marginal likely impact is *National Federation of Independent Business v. Sebelius*.¹⁷⁰ In that case, Chief Justice Roberts authored a solo opinion, which Justices Scalia, Kennedy, Thomas, and Alito joined in the part that rejected Congress’s assertion of power under the Commerce Clause to impose an “individual mandate” (IM) on uninsured Americans to purchase

162. See Nelson & Pushaw, *supra* note 44, at 11-12, 49, 110-12.

163. See *id.* at 9.

164. 529 U.S. 598, 601-19 (2000).

165. See *id.* at 615-18.

166. 545 U.S. 1, 25-33 (2005).

167. See *id.* at 23-26 (differentiating *Raich* from *Lopez* and *Morrison*).

168. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 880-85, 900-13 (2005).

169. See *id.* at 882.

170. 567 U.S. 519 (2012).

health insurance, as required by the Affordable Care Act (ACA).¹⁷¹ This slender majority held that Congress could regulate only pre-existing commercial “activity”—as contrasted with forcing people to engage in commerce by buying something they did not want.¹⁷² The Court crafted this “activity versus inactivity” distinction by cleverly repackaging a few words used in previous cases.¹⁷³ In any event, prohibiting Congress from regulating “inactivity” will have almost no real-world legal teeth because the IM represents the only time Congress has ever invoked the Commerce Clause to compel inactive Americans to purchase something, and no similar statutes have been enacted or proposed.¹⁷⁴

Overall, the Court improvised the “substantial effects” and “aggregation” standards for the sole purpose of sustaining the New Deal, and they proved to be worthless in checking federal power for nearly six decades.¹⁷⁵ Unsurprisingly, the Rehnquist and Roberts Courts have failed in their efforts to mine this precedent to unearth principled limits on Congress.¹⁷⁶ The *Lopez/Morrison* “commerce” requirement lost steam within a decade, and the *National Federation* prohibition on regulating “inactivity” will have negligible practical force. Therefore, the conservative Justices should consider a fresh approach.

171. See *id.* at 547-61 (Roberts, C.J.); *id.* at 649-69 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (agreeing with this Commerce Clause holding, but not with Roberts’s further conclusion that the IM could be sustained under the Taxing Power).

172. See *id.* at 549-58 (Roberts, C.J.); *id.* at 647-60 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

173. The Court cited cases reciting that Congress could regulate “commercial activity.” See *id.* at 549-54, 556-58 (Roberts, C.J.); see also *id.* at 647-48, 652-57 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Those opinions, however, contrasted “commercial” with “noncommercial” activity—not “activity” with “inactivity” (for the obvious reason that none of the challenged statutes purported to reach inactivity). 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, 1747-48.

174. 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, 985-87, 990-91, 995-96, 1000 (2013).

175. See *supra* Part III.A.1.

176. See *supra* text accompanying notes 153-74.

2. *The Neo-Federalist Alternative*

The Commerce Clause's text and history support a two-part legal inquiry.¹⁷⁷ First, Congress can only regulate "commerce," defined as "the voluntary sale or exchange of property ... and all accompanying market-based activities, enterprises, relationships, and interests."¹⁷⁸ Second, such commerce must be "among the several States" (that is, either cross state lines or occur in one state but have some discernible impact in at least one other state).¹⁷⁹ Such interstate effects are pervasive in our integrated national economy, so the domain of completely internal commerce that each state can competently regulate has shrunk dramatically.¹⁸⁰ Hence, the threshold "commerce" requirement is usually dispositive.

Application of this two-step test would result in sustaining most Commerce Clause legislation, but through a straightforward application of precise legal rules grounded in that Clause—as contrasted with the Court's convoluted use of flexible standards cobbled together over the years. To illustrate, Congress can regulate as "commerce" (1) the sale of goods and their production through manufacturing, farming, mining, and general labor—as well as the environmental and safety incidents of those activities; (2) business services such as commercial transportation, banking, insurance, and public accommodations (including antitrust and antidiscrimination laws designed to ensure a free market in those services); and (3) crimes that entail the voluntary sale of goods (such as illegal drugs) or services (such as gambling, loan sharking, and prostitution).¹⁸¹

The foregoing approach, while broad, demarcates certain clear boundaries. For example, although "commerce" includes production intended for the marketplace, it cannot be stretched to encompass production to fulfill personal or household needs, such as the growth

177. Grant Nelson and I applied this Neo-Federalist approach to the Commerce Clause in a book-length article. See Nelson & Pushaw, *supra* note 44, at 8-9; see also Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002) (defending our thesis against the claim that this Clause limited Congress to regulating only the sale and transportation of goods).

178. Nelson & Pushaw, *supra* note 44, at 9; see also *id.* at 107-10 (elaborating upon this definition).

179. *Id.* at 10-11, 110-11.

180. *Id.* at 10-11, 110.

181. *Id.* at 9-12, 107-13, 119-27, 136-52, 158-63 (discussing illustrative cases).

of wheat in *Wickard* or marijuana in *Raich*.¹⁸² Likewise, although the sale of guns or drugs constitutes “commerce,” mere possession of such items without the intent to sell does not.¹⁸³ Consequently, the Court reached the correct result in *Lopez*, but not *Raich*.¹⁸⁴ Similarly, “commerce” includes only “voluntary” market transactions¹⁸⁵—not the compelled purchase of health insurance involved in *National Federation*.¹⁸⁶ Finally, the Commerce Clause and the Constitution’s basic federalist structure bar Congress from interfering with noncommercial matters of exclusively moral, social, or cultural concern (such as the crime and tort of gender-based assault considered in *Morrison*).¹⁸⁷

In short, application of the Neo-Federalist methodology would yield the same result as in most of the Court’s major post-1936 cases, but through consistent application of defined legal principles. Those rules would, however, establish certain fixed limits on Congress’s power—most notably, by prohibiting statutes that purport to cover activities that are not “commerce,” such as violent crimes or the mere possession of items.

B. The Taxing and Spending Power

1. The Court’s Blind Deference to Congress

After 1937, and especially since the Great Society of the 1960s, Congress has exercised its power to tax and spend for the “general Welfare” to exponentially proliferate grants-in-aid to state and local governments, conditioned on their compliance with federal standards.¹⁸⁸ Although in theory states can choose to forego federal funding and not cooperate with any federal program, in practice political and economic considerations invariably lead states to accept these schemes because otherwise they will not receive their

182. See Pushaw, *supra* note 168, at 885, 909-10, 913-14.

183. See *id.* at 909-13.

184. See *id.* at 896, 913-14.

185. See Nelson & Pushaw, *supra* note 44, at 9, 107.

186. See Pushaw, *supra* note 173, at 1751-52.

187. See Nelson & Pushaw, *supra* note 44, at 10-12, 21, 27, 41, 78, 109-10.

188. See JAMES L. BUCKLEY, *SAVING CONGRESS FROM ITSELF: EMANCIPATING THE STATES & EMPOWERING THEIR PEOPLE* 48-49, 55-56 (2014); see also *id.* at xi (noting that funding for such federal programs had exploded from \$24 billion in 1970 to an estimated \$641 billion in 2015).

proportional share of federal money derived from federal taxes that their citizens have already paid.¹⁸⁹

This extensive congressional legislation has facilitated a federal takeover of subjects that states and their subdivisions are fully capable of handling, such as operating city and county schools, roads, and public safety departments.¹⁹⁰ Obeying detailed, rigid federal rules and mandates has imposed a huge burden on state and local governments because those governments (1) incur massive administrative costs, (2) cannot address local problems in more suitable, innovative, and efficient ways, and (3) cannot truly represent their constituents, who often cannot figure out whether state or federal officials are responsible for the wastefulness and other flaws of such programs.¹⁹¹

The Supreme Court has acknowledged that such taxing and spending statutes might at some point violate “federalism,” but has rejected every constitutional attack on them (with one recent and extraordinarily narrow exception).¹⁹² Most pertinently, the Court

189. *See id.* at xii, 6-7, 16-17. The only major exception to such state submission has been the Affordable Care Act, as twenty-one states declined offers of full federal funding for medical insurance expenditures during the first three years because they calculated that any benefits would eventually be outweighed by the costs—years of onerous federal regulation, gradually decreasing payments, and the inability to respond effectively to their citizens’ health care needs. *Id.* at 17-18.

190. *See id.* at xi, 6-7, 9-11. Although there are countless inappropriate federal projects, my favorites are fixing a one-lane bridge in rural Connecticut and beautifying a tiny Kansas town. *Id.* at 9-11.

191. *See id.* at xi-xii, 9-16, 19-47, 53-56, 58-59, 62-63. Conversely, Congress’s focus on such local concerns has diverted its attention from tasks that it alone can address, such as foreign affairs and ballooning federal deficits. *Id.* at xi, xiv, 47-53, 59, 63. The concrete positive results of such runaway federal spending on local matters such as education have been either nonexistent or negligible, with the largest percentage of money being wasted on compliance costs. *Id.* at 13-16, 19-26.

Buckley, a former United States Senator and D.C. Circuit judge, proposes abolishing all federal grant-in-aid programs, with block grants to states phased out over five years to enable their governments to adjust. *Id.* at xvi, 57-64. However, members of Congress have little political incentive to take this radical step, as the current system enables them to take credit for attending to their constituents’ most immediate concerns (such as crime, education, and local roads), while shifting accountability for any problems with such laws to state and local governments. *Id.* at 30. Accordingly, I believe that only the Supreme Court, which is independent of direct political pressure and sworn to uphold the Constitution, can reverse this situation.

192. *See* Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 2019-33 (2013) (analyzing this precedent). A landmark case suggesting that such “federalism” restrictions

has rendered Justice Cardozo’s “inducement versus coercion” distinction meaningless by ignoring his observation that “coercion” exists where Congress pressures states to accept federal funding on matters that have always been entrusted to—and can still be competently addressed by—the states acting individually and that Congress has no constitutional power to regulate directly.¹⁹³

The Court’s total abdication became transparent in *South Dakota v. Dole*, which sustained a federal law that withheld 5 percent of states’ highway funding if they did not raise their minimum alcohol-drinking age to twenty-one.¹⁹⁴ In his majority opinion, Chief Justice Rehnquist breezily dismissed the dissenters’ argument that the Twenty-First Amendment authorizes states alone to control “intoxicating liquors,”¹⁹⁵ and that therefore Congress cannot condition a grant in a way that abridges this exclusive state power.¹⁹⁶ The Court then identified three other Spending Clause “limitations,”¹⁹⁷ but they proved to be merely theoretical.

First, Chief Justice Rehnquist acknowledged that expenditures could only be for “the general Welfare,” yet stressed the Court’s previous extreme deference to Congress¹⁹⁸ and cited with approval a 1976 case questioning whether “general Welfare” was “a judicially

were more rhetorical than real was *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127, 143-44 (1947) (holding that the Tenth Amendment did not prohibit Congress from withholding federal money unless states complied with the condition that their officials refrain from engaging in certain political activities, and thus sustaining a federal order to remove a state official).

193. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 624-33 (2012) (Ginsburg, J., concurring in part and dissenting in part) (emphasizing that since 1937, the Court had never deemed a federal statute to unconstitutionally “coerce” the states). Justice Cardozo indicated that “coercion” could be found when Congress relied on the Spending Power as a pretext to take over areas that the states could regulate on their own. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590-98 (1937); *Helvering v. Davis*, 301 U.S. 619, 644 (1937); see also *supra* notes 81-98 and accompanying text.

194. 483 U.S. 203, 206-12 (1987).

195. *Id.* at 205 n.1 (“Section 2 of the Twenty-first Amendment provides: ‘The transportation of or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.’”).

196. See *id.* at 212 (Brennan, J., dissenting); *id.* at 218 (O’Connor, J., dissenting). With no supporting authority, Chief Justice Rehnquist asserted that the Court’s previous statement that there could be an “independent constitutional bar” on the Spending Power simply meant that Congress could not attempt to induce states to take actions that “would themselves be unconstitutional,” such as “invidious[] discrimina[tion].” *Id.* at 210-11 (majority opinion).

197. *Id.* at 207-08.

198. *Id.* at 207 (quoting *Helvering*, 301 U.S. at 640-41).

enforceable restriction at all.”¹⁹⁹ Not surprisingly, the Court yielded to Congress’s judgment that the “general Welfare” would be furthered by a national solution to the interstate highway problems caused by different state drinking ages.²⁰⁰ As Justice O’Connor emphasized in her dissent, though, judicial surrender to Congress’s “notion of the general welfare” allows it to assume general parliamentary power and destroy the states’ reserved jurisdiction.²⁰¹ In this instance, Congress’s purported concern for reducing interstate highway accidents barely disguised its true goal: regulating underage alcohol use throughout the country.

Second, the Chief Justice recognized that conditions on a federal grant might be illegitimate if they were not reasonably related to the United States government’s interest in a national project or program.²⁰² However, the Court found that the condition here (raising the legal drinking age) logically related to the federal interest in safe interstate travel.²⁰³ Justice O’Connor disputed this conclusion because eighteen-to-twenty-year-olds (1) would be barred from drinking even if they were not about to drive across a state border, and (2) were only a small part of America’s drunk driving problem.²⁰⁴ She chided the majority for permitting Congress to “regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.”²⁰⁵

Third, the Court reiterated that Congress could not “coerc[e]” states, but held that this statute had merely “encourage[d]” them because 5 percent was relatively small²⁰⁶ (albeit without indicating what percentage or amount of lost funds would tip the scales).²⁰⁷ Relatedly, Chief Justice Rehnquist declared that Congress’s clear notice to the states that full federal highway funding depended upon

199. *Id.* at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

200. *See id.* at 208.

201. *Id.* at 217 (O’Connor, J., dissenting).

202. *See id.* at 207-08 (majority opinion).

203. *See id.* at 208-09.

204. *Id.* at 213-15 (O’Connor, J., dissenting).

205. *Id.* at 215. Justice O’Connor added that the Spending Clause authorized Congress to only specify how federal money should be spent, not to impose a regulation. *Id.* at 216-17.

206. *Id.* at 211-12 (majority opinion).

207. *See* Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464, 466-69, 532-33 (2003).

increasing the drinking age underscored the voluntary nature of their consent.²⁰⁸ The Court did not, however, explain why state legislators would ever freely refuse to accept any federal funding generated by federal taxes that their citizens had already paid, and then slap these constituents with an additional state tax to make up for that loss to obtain the same benefit (such as highway maintenance and repair).

In short, the *Dole* “limitations” have no legal or practical bite.²⁰⁹ Remarkably, the Court caved in even though Congress had invoked the Spending Clause to regulate a subject that the Constitution expressly removes from the federal government’s domain.²¹⁰ *Dole* naturally led Congress to believe that this power was absolute, and the Court reinforced that conclusion over the next quarter of a century.²¹¹

In 2012, however, *National Federation* produced a small crack in this brick wall of post-1936 precedent. The Court reaffirmed that Congress’s authority to tax is virtually absolute,²¹² but finally found an exercise of its power to spend to be “coercive.”²¹³ As previously mentioned, Chief Justice Roberts agreed with the four other Republican appointees that Congress could not enact the IM under the Commerce or Necessary and Proper Clauses.²¹⁴ Surprisingly, however, he joined the four liberal Justices in holding that, despite Congress’s explicit declaration that it was enacting the IM exaction as a “penalty” to punish violations of its interstate commercial regulation of health insurance, this charge could also be construed

208. *Dole*, 483 U.S. at 207-08.

209. See Baker & Berman, *supra* note 207, at 461-85. Perhaps most notably, the Court failed to clarify whether “coercion” meant that a Spending Clause condition had to be accepted because the state (1) otherwise would not survive as a government entity, (2) had “no fair choice” because “the range of alternatives ... was unacceptably narrow as a normative matter,” or (3) had only one objectively rational choice. *Id.* at 520-21.

210. See *Dole*, 483 U.S. at 212 (Brennan, J., dissenting); *id.* at 218 (O’Connor, J., dissenting).

211. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 631-44 (2012) (Ginsburg, J., concurring in part and dissenting in part) (summarizing the Court’s unbroken line of modern precedent deferring to Congress’s exercise of the Spending Power).

212. See *id.* at 563-74 (Roberts, C.J.); *id.* at 589, 623 (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor & Kagan, JJ.).

213. See *id.* at 575-85 (Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 674-89 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

214. See *id.* at 547-61 (Roberts, C.J.); *id.* at 649-60 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); see also *supra* notes 170-74 and accompanying text (discussing this holding).

as a “tax” on those who did not buy insurance.²¹⁵ This creative statutory interpretation enabled the Court to sustain the IM under Congress’s Taxing Power, which is essentially plenary.²¹⁶ The Chief Justice suggested that Congress could not constitutionally levy a “tax” that was so high as to be in reality a “penalty,” but he did not identify any specific tipping point.²¹⁷

Of more relevance here, all of the Justices except Ginsburg and Sotomayor unexpectedly struck down as “coercive” a different ACA provision, which required states to either expand their Medicaid programs to include millions of new low-income recipients or lose all of their current Medicaid funding (not merely the new portion earmarked for the ACA).²¹⁸ This total deprivation left states with no realistic choice but to accept Congress’s terms, as Medicaid spending consumed 20 percent of the average state’s budget and about \$100 billion was at stake.²¹⁹ Chief Justice Roberts contrasted such numbers with the 5 percent deprivation in *Dole* (amounting to a few million dollars), but pointedly declined to identify the percentage of federal funds (or dollar figure) that Congress would have to withhold for “coercion” to be found.²²⁰

The ACA’s Medicaid expansion provision was unique in that it threatened states with a complete forfeiture of their Medicaid funding—a draconian measure never before attempted by Congress and unlikely ever to be tried again.²²¹ Thus, *National Federation* will have almost no effect on the many other conditional spending

215. See *Nat’l Fed’n*, 567 U.S. at 561-75 (Roberts, C.J.); *id.* at 589, 623 (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor & Kagan, JJ.).

216. See Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court’s Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 125-27, 195-205 (2016) (arguing that the Court’s reading of the IM could not be justified under established principles of statutory interpretation and hence must have reflected raw political pragmatism).

217. See *Nat’l Fed’n*, 567 U.S. at 572-73 (Roberts, C.J.).

218. See *id.* at 575-86 (Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 648, 671-89 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Chief Justice Roberts and his four liberal colleagues softened the blow of this holding by permitting Congress to offer the states a fresh supply of Medicaid funds to induce them to voluntarily comply with the new ACA conditions. See *id.* at 585-88 (Roberts, C.J., joined by Breyer & Kagan, JJ.); *accord id.* at 626, 645-46 (Ginsburg, J., concurring in part and dissenting in part, joined by Sotomayor, J.).

219. See *id.* at 576-85 (Roberts, C.J.); *id.* at 671-89 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

220. See *id.* at 580-85 (Roberts, C.J.).

221. See Pushaw, *supra* note 192, at 2038, 2042.

programs that have so badly eroded state independence.²²² Most significantly, the Court has refused to define “coercion” and instead has vaguely indicated that it falls somewhere between the 5 percent threatened withholding in *Dole* (which amounted to less than 0.5 percent of the state’s total budget—a few million dollars) and the 100 percent involved in *National Federation* (which was 20 percent of the typical state budget and could cost billions).²²³ The Court has thereby left Congress and lower federal judges adrift in evaluating the constitutionality of the many statutes that fall between these extremes.²²⁴ When litigation over such laws reaches the Supreme Court, it has complete discretion to determine whether Congress has crossed the imaginary line separating “encouragement” from “coercion.”

The Court, then, has abandoned serious judicial review of Congress’s exercise of its power to tax and spend for the general welfare. By contrast, a Neo-Federalist methodology can supply legal principles that would restore restraints on Congress. As we shall see, this approach provides historical support for Justice Cardozo’s crucial insight that Congress cannot constitutionally interfere with subjects that states, acting separately, are competent to regulate.²²⁵

2. Some Neo-Federalist Limitations

Political constraints on Congress’s power under the Taxing and Spending Clauses²²⁶ do not imply the absence of legal ones. Rather, my earlier examination of the original meaning of each Clause reveals certain legal boundaries that can still be judicially enforced today.²²⁷

222. See *supra* notes 188-93 and accompanying text.

223. See *Nat’l Fed’n*, 567 U.S. at 580-85.

224. See *id.* at 642-44 (Ginsburg, J., concurring in part and dissenting in part) (decrying this arbitrariness); Gregory P. Magarian, *Chief Justice Roberts’s Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 NW. U. L. REV. ONLINE 15, 29-30 (2013).

225. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590-91, 593-98 (1937).

226. Obviously, voters will not support taxes above a certain level. See *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (noting that the statute at issue explicitly laid a “tax” and concluding that “[t]he remedy for excessive taxation is in the hands of Congress, not the courts”).

227. See *supra* notes 62-71 and accompanying text.

To its credit, Congress has almost always respected the textual limits in the Taxing Clause itself by (1) levying “taxes,” as contrasted with “penalties,” (2) imposing indirect taxes (duties, imposts, and excises) uniformly, and (3) apportioning direct taxes among the states based on their population.²²⁸ Thus, in the rare instances when Congress oversteps these bright lines, the Court can candidly say so with very little disruption of federal fiscal policy.

That is why the Court’s failure to check Congress in *National Federation* was so misguided. The ACA refers to the IM exaction eighteen times as a regulatory “penalty” (and never as a “tax”), and Congress and the President repeatedly assured Americans that it was not a tax.²²⁹ Chief Justice Roberts’s rewriting of the IM charge as a “tax” (with the approval of four colleagues) destroyed the critical restraint on the Taxing Power: the political fact that voters will hold Congress accountable for unwanted tax increases, which is the main justification for judicial deference in this area.²³⁰ Moreover, even assuming that this indefensible statutory interpretation were correct, the IM “tax” was “direct” and hence had to be allocated based on population, and this bedrock requirement was not met.²³¹

In short, *National Federation* countenances absolute congressional power under the Taxing Clause. Instead, the Court should have adopted the Neo-Federalist view that this authority is broad but subject to a few minimal limits—namely, those contained expressly in the Clause itself.

Similarly, the Court should interpret the Spending Clause as imposing certain restrictions. Two items in this Clause have always been clear: paying America’s debts and providing for the national defense.²³² Rather, debate has centered on the phrase “the general

228. See *supra* notes 63-65 and accompanying text.

229. See Pushaw, *supra* note 192, at 2026-28 (making this point and marshaling massive evidence showing that the IM charge could plausibly be interpreted only as a regulatory “penalty,” not a “tax”).

230. See *id.* at 1996, 2028-30, 2042-43 (maintaining that political accountability can be ensured only if the Court reasonably construes statutory “penalties” as such, instead of relabeling them as “taxes” years after a statute is enacted and thereby enabling Congress to evade responsibility).

231. See *id.* at 2029-30 (setting forth this “direct tax” argument and adding that the Constitution allows Congress to tax only the purchase of products (such as cigarettes), not the failure to buy things).

232. See *supra* note 67 and accompanying text.

Welfare.”²³³ The Court settled the main historical dispute in 1936: Congress can spend to promote anything that serves the national interest (Hamilton’s position), and therefore is not limited to achieving the aims contained in Article I’s seventeen other enumerated powers (Madison’s conception).²³⁴ Alas, the Court has explicitly declined to set forth any legal rules to determine whether a subject falls within the “general” welfare (that is, the national interest), as contrasted with matters of “local” welfare committed to the states.²³⁵

This abdication of judicial review has resulted in the unchecked explosion of federal spending legislation that began with the New Deal, especially grants-in-aid to states with strings attached.²³⁶ From a purely historical standpoint, the gigantic modern administrative and social welfare state is unconstitutional,²³⁷ as the Framers and Ratifiers contemplated a small federal government maintained by low spending, with autonomous states retaining the vast bulk of regulatory power.²³⁸

Yet Neo-Federalism acknowledges that the Founders’ subjective expectations are not controlling, for two reasons. First, the Constitution enshrines a phrase—“general Welfare”—which can encompass matters that in 1787 concerned only state governments, but that have gradually become interstate problems of federal interest because of economic and social changes (particularly advances in technology and transportation).²³⁹ Second, from a pragmatic standpoint, our current governmental system cannot be dismantled because legal, political, economic, and social chaos would result.²⁴⁰ These two considerations, however, do not dictate the conclusion that the “general Welfare” provision grants Congress absolute (as opposed to broad) power and that it is thus futile to try to fashion reasonable limits based on timeless constitutional principles.

233. *See supra* notes 66-72 and accompanying text.

234. *See supra* notes 73-74 and accompanying text.

235. Indeed, the Court has questioned whether any such judicially enforceable legal standards are possible. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207 & n.2 (1987).

236. *See supra* notes 100, 188-93 and accompanying text.

237. *See, e.g.*, Lawson, *supra* note 107, at 1231-54 (arguing that the post-New Deal federal government cannot be reconciled with the Constitution’s original public meaning).

238. *See supra* notes 67-68 and accompanying text.

239. *See supra* note 71 and accompanying text.

240. *See* Nelson & Pushaw, *supra* note 44, at 6, 8, 101-02, 173.

No constitutional precept is more fundamental than federalism: The states and “We the People”²⁴¹ retain all government power, except for a few enumerated powers entrusted to the federal government.²⁴² In analyzing the Spending Clause, the conservative Justices invariably have highlighted this federalism principle.²⁴³ Unfortunately, they have then applied a flexible “coercion” analysis that cannot possibly safeguard the states’ reserved powers—indeed, that has allowed Congress since the New Deal to browbeat states into subservience.²⁴⁴

The brute reality is that Congress’s conditional grants to states are inevitably coercive. State officials cannot reasonably be expected to refuse their share of federal funds, then make up the difference by increasing state taxes to get the same benefit.²⁴⁵ Because such double taxation is political and economic poison, states will invariably yield to Congress’s demands. Ultimately, the only real question is the degree of coercion, not the red herring of trying to distinguish “encouragement” from “coercion.”²⁴⁶

The Court has permitted Congress to force states to carry out federal regulatory and social welfare programs. This system has eviscerated state autonomy²⁴⁷ and has undercut political accountability because it is so difficult to ascertain whether the federal or state government is responsible for any particular action.²⁴⁸ In theory, then, the cleanest solution would be for the Court to abandon its “coercion” touchstone and instead insist that Congress implement its Spending Power laws exclusively through federal

241. U.S. CONST. pmbl.

242. See, e.g., THE FEDERALIST NO. 32, *supra* note 67, at 199-200 (Alexander Hamilton); THE FEDERALIST NO. 45, *supra* note 67, at 313 (James Madison).

243. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533-38, 552-55, 557, 559-61, 577, 588 (2012) (Roberts, C.J.); *accord id.* at 647-48, 653-60, 675-78, 691, 706-07 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

244. See *supra* notes 98-100, 188-211, 222-24 and accompanying text.

245. See Epstein, *supra* note 68, at 45.

246. See Pushaw, *supra* note 192, at 2040.

247. See Baker & Berman, *supra* note 207, at 469-85 (arguing that the Court should enforce meaningful limits on the Spending Power to promote diverse approaches among the states to problems within their constitutional competence, because such a legal regime will satisfy more people—and hence increase aggregate social welfare—than will Congress’s imposition of a uniform national policy).

248. See *supra* notes 190-91 and accompanying text.

agencies. In practice, however, such a radical change seems exceedingly unlikely.

Stare decisis makes it similarly improbable that the Court will discard an analysis (“encouragement” versus “coercion”) that it has followed since 1937.²⁴⁹ Consequently, a more feasible recommendation would be for the Court to set forth specific legal guidelines that can be applied to make this distinction. One possibility would be to identify numerical amounts, in terms of both percentage and dollars of funds withheld, that Congress cannot exceed without being found to have “coerced” the states.²⁵⁰ Although such mathematical precision would have the salutary effect of sharply curtailing the discretion of judges (and Congress), it is a purely pragmatic proposal that has no historical foundation.

By contrast, a Neo-Federalist approach yields a practical solution that is rooted in the Constitution’s original meaning. Madison’s Virginia Plan, the Constitutional Convention’s initial blueprint, provided in Resolution VI that Congress can “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual [state] Legislation.”²⁵¹ The Framers eventually moved away from this grant of Parliament-style general legislative authority and instead limited Congress to eighteen enumerated powers, which left all powers not listed to the states or the People.²⁵² For example, rather than authorizing Congress to govern anything that occurred interstate, Article I restricted Congress to regulating only “Commerce” (market-oriented activity) “among the several States.”²⁵³ Likewise, the Framers did not empower Congress to

249. See *supra* notes 84-91, 98-100, 193, 206-09, 218-24 and accompanying text.

250. See Pushaw, *supra* note 192, at 2040. The Court could also pinpoint the maximum percentage of the state’s budget that a federal program, which is threatened with a funding cutoff, can consume. The Court has unhelpfully indicated that 0.5 percent is acceptable (*Dole*), but 20 percent is not (*National Federation*). See *supra* notes 206-07, 218-24 and accompanying text.

251. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131-32 (Max Farrand ed., Yale Univ. Press 1966) (1787).

252. For an illuminating analysis of the Convention’s movement from general to enumerated powers, see Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123 (2012).

253. U.S. CONST. art. I, § 8, cl. 3.

legislate for the “general Welfare,” but imposed the qualifications that (1) Congress first had to levy a “tax” (and not, say, a “penalty”), (2) “direct” taxes had to be apportioned by population, and (3) “indirect” taxes had to be uniform throughout America.²⁵⁴ Similarly, Congress could not enact any bankruptcy or naturalization laws it pleased, but instead had to ensure that they were “uniform ... throughout the United States.”²⁵⁵

Although Resolution VI did not survive in the final Constitution and therefore has no binding legal force, it remains useful in developing a workable definition for phrases such as “among the States,” “general Welfare,” and “throughout the United States.”²⁵⁶ Most pertinently, “general Welfare” can most plausibly be interpreted to mean matters that are of truly “national” interest (that is, affecting Americans collectively) or that states acting individually are incompetent to address.²⁵⁷

Remarkably, Justice Cardozo discerned this basic federalism principle even though he cited no historical authority for it (and apparently had never read the Convention records). His insight is illustrated in his two opinions sustaining the Social Security Act’s unemployment compensation and retirement benefits provisions.²⁵⁸ Justice Cardozo held that Congress had established through abundant evidence that these employment problems were “national in area and dimensions”²⁵⁹ and that “laws of the separate states cannot deal with [the problems] effectively,”²⁶⁰ because any state acting on its own could not provide such employee benefits without

254. See *supra* notes 62-65 and accompanying text.

255. U.S. CONST. art. I, § 8, cl. 4.

256. To be clear, Resolution VI can help flesh out the meaning of constitutional phrases such as “general Welfare” that refer to national and interstate issues. By contrast, that Resolution should not be invoked to justify an expansive gloss on words such as “commerce” and “taxes.” See Pushaw, *supra* note 173, at 1705-06, 1721-25.

257. Other scholars have made a similar argument. See, e.g., Baker & Berman, *supra* note 207, at 525-26; Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555-56, 613 (1995).

My suggested interpretation finds further support in the very language of Article I, Section 8, Clause 1, which authorizes taxes for “the common Defence and general Welfare.” U.S. CONST. art. I, § 8, cl. 1. Obviously, military defense concerns the entire body politic and cannot be handled by states.

258. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (unemployment); *Helvering v. Davis*, 301 U.S. 619 (1937) (retirement); *supra* notes 81-97 and accompanying text.

259. *Steward Mach.*, 301 U.S. at 586; see also *Helvering*, 301 U.S. at 644.

260. *Helvering*, 301 U.S. at 644.

placing itself at a severe competitive disadvantage.²⁶¹ Accordingly, Justice Cardozo concluded that Congress had merely “encouraged” or “induce[d]” states to cooperate with the federal government in resolving these common problems.²⁶² Nonetheless, he cautioned that Congress would cross the line into “coercion” if it laid a tax “upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power.”²⁶³

In short, Justice Cardozo did not contemplate that judges would have untethered discretion to label a federal statute as either “encouraging” or “coercing” state assent—much less that this distinction would be a sham that would disguise absolute congressional power. Rather, he thought that this determination would hinge on the question of whether Congress sought to govern a subject of truly national concern that states, operating independently, were incapable of addressing.²⁶⁴ If the answer was no, the statute would be struck down as a coercive invasion of an area reserved by the Constitution to the states.²⁶⁵ Justice Cardozo’s nuanced analysis almost perfectly captures the original meaning of the phrase “general Welfare,” and thus provides an excellent Neo-Federalist baseline.

The Court should revive the Cardozo test, which supplies a relatively simple and sensible benchmark for assessing the constitutionality of Spending Clause laws. Usually, such federal statutes clearly fall on one side of the line or the other. For instance, Acts of Congress designed to remedy environmental problems are plainly “national” because pollution crosses state boundaries and cannot be effectively addressed by the states acting on their own, owing to the “race to the bottom” phenomenon that Cardozo identified in the Social Security cases.²⁶⁶ Conversely, the Court should invalidate federal spending statutes that interfere with subjects that the Constitution commits to the states and that those governments and their subdivisions can still competently handle separately. Examples

261. See *Steward Mach.*, 301 U.S. at 586-89, 591; *Helvering*, 301 U.S. at 641-44.

262. *Steward Mach.*, 301 U.S. at 586, 589-91, 594-98; see also *Helvering*, 301 U.S. at 641-44.

263. *Steward Mach.*, 301 U.S. at 590; *id.* at 591 (same).

264. See *supra* notes 84-91, 96-99, 193, 225, 251, 256-63 and accompanying text.

265. See *supra* notes 90-91, 98-99, 193, 225, 263 and accompanying text.

266. See *supra* notes 85-91, 97-99, 258-63 and accompanying text.

include city and county schools and police forces, almost all crimes, and maintenance of local roads. Moreover, contrary to *Dole*, the Court should never permit Congress to rely on the Spending Clause to regulate a subject that the Constitution specifically entrusts to the states alone, such as liquor control.²⁶⁷

In sum, the proposed Neo-Federalist/Cardozo test can typically be applied in a straightforward manner. To be sure, hard cases will arise, but that is always true. Such inevitable difficulty is not a reason for the Court to abandon principled legal analysis altogether.

C. *The Nondelegation Doctrine*

Although FDR's appointees did not formally overrule the *Panama Refining/Schechter* principle that Congress generally cannot delegate its "legislative Power[],"²⁶⁸ they swiftly drained this doctrine of all practical force. Most notably, in 1943 the Court summarily rejected the claim that Congress, by authorizing the Federal Communications Commission to grant broadcast licenses in "the 'public interest,'" had set forth a standard so indefinite as to be unconstitutional.²⁶⁹

By allowing such a bottomless grant of discretion, the Court signaled that it would permit any delegation.²⁷⁰ Indeed, this total deference has continued unabated,²⁷¹ despite then-Justice Rehnquist's

267. See *supra* notes 194-96 and accompanying text.

268. See *supra* notes 111-28 and accompanying text (describing these two cases).

269. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943).

270. See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("What legislated standard ... can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

271. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-74 (2001) (making this point, and holding that the Clean Air Act did not unlawfully delegate power in instructing the EPA to set air quality standards "requisite to protect public health" based on certain criteria). The Court has acknowledged that Article II confines agencies to the "executive power" (carrying into effect laws passed by Congress), rather than legislating by independently formulating policy goals. See *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324-28 (2014).

Nevertheless, the Court has asserted that Congress can invoke the Necessary and Proper Clause to "delineate[] the general policy," enact "broad ... directives," and seek assistance from expert agencies to promulgate detailed regulations and take other actions to effectuate the statute's objectives. See *Mistretta*, 488 U.S. at 371-74; see also LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 982 (3d ed. 2000) (contending that Congress cannot transfer its core "legislative Power[]" to choose policy goals, but can delegate discretion to agencies to select the best means to achieve those ends).

attempt to resurrect the nondelegation doctrine in 1980.²⁷² The Court has even suggested that its basic test—that Congress must articulate an “intelligible principle” to guide and limit executive discretion—can never result in invalidation because statutes are invariably written in such general terms, with so much room for executive discretion in interpreting and implementing the legislative scheme, that legally principled judicial review is impossible.²⁷³ The Court apparently believes that serious application of the nondelegation doctrine would fatally disrupt the functioning of the modern administrative state.²⁷⁴

Yet this conclusion is not necessarily true. The Court need not make a stark choice between its pre-1937 antipathy to all delegations and its subsequent blessing of any delegation. Rather, Justice Cardozo showed that a middle path could be charted. He quickly grasped that the new federal regulatory regime required delegations, but insisted that Congress (1) make specific policy decisions that targeted a particular subject area, and (2) set forth reasonably clear legal standards that defined and confined the executive branch’s range of action.²⁷⁵ To illustrate, he agreed with the Court that Congress could not simply grant the President *carte blanche* to promulgate “fair competition” codes for all industries and trades,²⁷⁶

272. In *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980), the Court allowed Congress’s delegation to the Occupational Safety and Health Administration to “set the standard which most adequately and feasibly assures, on the basis of the best available evidence, that no employee will suffer *any* impairment of health.” *Id.* at 647. By contrast, Justice Rehnquist argued that this delegation was invalid because the statutory provision gave the agency no indication as to where on the vast continuum of relative safety it should fix the standard. *Id.* at 672-88 (Rehnquist, J., concurring in the judgment). More recently, Justice Thomas said that he would be “willing to address ... whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.” *Whitman*, 531 U.S. at 487 (Thomas, J., concurring). No other Justice, however, has expressed an interest in such a reconsideration.

273. See *Whitman*, 531 U.S. at 472-75 (majority opinion). The Court’s unbroken eighty-two year record of sustaining every federal statute challenged under the nondelegation doctrine has reduced to mere rhetoric its frequent assertion that it has “long ... insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.” See *Mistretta*, 488 U.S. at 371-72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

274. See Lawson, *supra* note 107, at 1241.

275. See *supra* notes 113-19, 123-25, 127 and accompanying text.

276. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551-53 (1935) (Cardozo, J., concurring); see also *supra* notes 120-25 and accompanying text (discussing *Schechter*).

but would have permitted delegating to the executive branch the power to take a particular action (forbidding the shipment of “hot oil”) based on the discretionary application of many factors.²⁷⁷

The Neo-Federalist approach builds on Cardozo’s basic insight, but supplies a firmer foundation in the Constitution’s text, structure, and history. The applicable constitutional principles are so fundamental that it is surprising the Court has so casually disregarded them.²⁷⁸ The Constitution creates a democracy in which Congress and the President are accountable to the electorate, which is possible only if “legislative” and “executive” powers remain distinct.²⁷⁹ Article I vests Congress alone with “[a]ll legislative Powers”—to enact prospective laws of general applicability that embody the majority’s policy wishes.²⁸⁰ Therefore, statutes must be specific and detailed enough to achieve two key purposes. First, citizens must be able to know what the law prescribes (or proscribes) and to determine if their policy preferences are being fulfilled. Second, the President and his subordinates must understand how they are to exercise their Article II “executive Power” to administer and enforce federal law. Although Congress obviously can entrust the President and other executive officials with some discretion (since they cannot execute each provision of every statute with total vigor), their leeway cannot be infinite.

The Court’s “intelligible principle” standard has proved useless in effectuating the foregoing basic constitutional tenets.²⁸¹ It has enabled Congress to routinely declare vague but popular goals (with attendant political gain), then delegate difficult policy choices to executive bureaucrats—who can be blamed, but not face electoral

277. See *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 434-44 (1935) (Cardozo, J., dissenting); see also *supra* notes 111-19 and accompanying text (analyzing *Panama Refining*).

278. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 498-500 (2014); William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 *NOTRE DAME L. REV.* 2107, 2115-22, 2127 (2017) (contending that Justice Scalia staunchly defended the Court’s extraordinarily deferential nondelegation doctrine because he believed that judges could legitimately apply only fixed legal rules rather than discretionary standards (such as an “intelligible principle”), but emphasizing that Scalia never considered the doctrine’s historical meaning).

279. See *supra* notes 9, 101-08, 112, 122 and accompanying text.

280. See *supra* notes 101-02, 107-08 and accompanying text.

281. See *supra* notes 108, 112, 122-28, 268-74 and accompanying text (emphasizing that the Court has found that every challenged congressional delegation contained a sufficiently “intelligible principle” to guide the executive branch).

responsibility, for onerous and costly regulations.²⁸² For instance, members of Congress can take credit for passing a law to “prevent and control” air pollution (a surefire political winner),²⁸³ but shift the hard details (including economically damaging regulations) and political responsibility to the Environmental Protection Agency. The Court has found that all federal regulatory statutes contain an “intelligible principle,”²⁸⁴ which indicates that this standard has no real legal content.

The conservative Justices cannot plausibly continue this pretend judicial review while insisting that they are committed to enforcing the Constitution as law. Instead, they should adopt a new test that has some teeth: Congress cannot delegate its exclusive “legislative Power[]” to make substantive policy choices that are crucial to its statutory scheme, and Congress must enact statutory provisions that are specific enough that an average citizen can evaluate their advantages and disadvantages.²⁸⁵

Although application of this standard would require the Court to exercise judgment in drawing certain lines, this task is not hopelessly arbitrary. For example, a federal statute that simply authorizes the executive branch to promulgate “fair competition codes” or to regulate “in the public interest” would flunk that test.²⁸⁶ Conversely, the lengthy Affordable Care Act,²⁸⁷ despite its many constitutional and practical infirmities, lays out Congress’s major policy judgments in detail: for instance, “guaranteed issue” of health insurance to all applicants,²⁸⁸ community rating to prevent insurers from varying their premiums to account for preexisting conditions,²⁸⁹ an individual mandate to purchase an insurance policy,²⁹⁰ and a huge expansion of Medicaid to include poor citizens.²⁹¹

282. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 14 (1993).

283. See Clean Air Act of 1970 § 2(a)(4), 42 U.S.C. § 7401(a)(4) (2012).

284. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472-75 (2001).

285. See *supra* notes 102, 107 and accompanying text.

286. See *supra* notes 120-25, 269-71 and accompanying text (citing statutes that featured such language).

287. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 29, and 42 U.S.C.).

288. 42 U.S.C. § 300gg-1(a) (2012).

289. *Id.* § 300gg(a)(1).

290. 26 U.S.C. § 5000A(a) (2012).

291. See 42 U.S.C. § 1396a(a)(10)(A)(i)(I) (2012).

Overall, a Neo-Federalist approach would require the Court to revive the nondelegation doctrine by setting forth concrete legal standards that impose some genuine limits on Congress. Otherwise, the conservative Justices' professed commitment of faithfulness to the Constitution's text, structure, and history is empty rhetoric.

CONCLUSION

Justice Cardozo played a crucial role in persuading the Court to retreat from its fierce resistance to New Deal legislation enacted under the Commerce, Necessary and Proper, and General Welfare Clauses—and to the broad delegations of rulemaking power contained in those statutes. Shortly after his death, however, the FDR-appointed Justices abandoned all restraints on federal power—even the modest and reasonable ones suggested by Justice Cardozo. That judicial default has sacrificed the many valuable benefits of federalism and separation of powers. The Court should try to repair the damage to the Constitution's structure by developing and enforcing principled Neo-Federalist limits on the federal government.