

SYMPOSIUM INTRODUCTION

FDR AND OBAMA: ARE THERE CONSTITUTIONAL LAW LESSONS FROM THE NEW DEAL FOR THE OBAMA ADMINISTRATION?

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It was the popular media that first made the comparison between an Obama presidency and that of Franklin Roosevelt. The media did not wait until President Obama took office, but began the comparisons in earnest after the presidential election of 2008, perhaps most famously on Time Magazine's November 24, 2008 cover depicting a photoshopped Barack Obama in a characteristic pose of the New Deal President along with an article titled "the New New Deal." Most of the comparisons had to do with the fallout from the economic near collapse of September 2008 amid reports of the second Great Depression and the expectation at that time of a legislative agenda suited for the present times, as the New Deal has been historically portrayed was for its times.¹ And though FDR presided over a period of upheaval in national economics, his presidency also set the stage for a period of profound change in constitutional interpretation leading to a revolution in regulatory development which redefined the role of the state in American life. This period was made all the more dramatic by the related conflicts between the Presidency, the Supreme Court, and the Congress. The media may have had less of the latter on their minds when these comparisons were made, but as the Obama Administration progressed, it became apparent to constitutional scholars that the regulatory developments in the areas of health care reform and financial regulation were creating some in-

¹ See Paul Krugman, *Franklin Delano Obama*, N.Y. TIMES, Nov. 10, 2008, at A29 (arguing that to achieve a success similar to the one enjoyed by the New Deal, President Obama needed to adopt a bold economic policy); Mark Green, *7 Days: FDR = Obama? Alter*, *Huffington, vanden Heuvel & Green Discuss and Compare Their Transitions*, HUFFINGTON POST (Nov. 15, 2008, 11:28 AM), http://www.huffingtonpost.com/mark-green/7-days-fdr-obama-alter-hu_b_144058.html (discussing the respective transition strategies of Obama and Roosevelt); George Packer, *The New Liberalism: How the economic crisis can help Obama redefine the Democrats*, NEW YORKER, Nov. 17, 2008, available at http://www.newyorker.com/reporting/2008/11/17/081117fa_fact_packer (arguing that times of economic crisis can allow Presidents to makeover their political parties and agendas).

teresting substantive interactions between the two periods, which in turn resulted in new interest in examining the constitutional developments of the New Deal era.

The regulatory state as we know it began during the New Deal and the Patient Protection and Affordable Care Act is one of the most significant regulatory programs passed by Congress since the New Deal. As a result of these obvious connections, and the constitutional theory underlying them, several scholars were invited to consider the two periods and comment on what they considered to be noteworthy constitutional developments connecting the administrations. This symposium edition is the product of a conference of the same name, which was held at the University of Pennsylvania Law School in January of 2012. That event was preceded by a single panel presentation addressing the same issues at the Annual Meeting of the Southeastern Association of Law Schools (“SEALS”) in the summer of 2011. This core panel, which was the basis for the larger symposium at the University of Pennsylvania, produced the scholarship presented in this edition.²

A tacit recognition of the doctrinal legacy of the New Deal on present day constitutional doctrine is evident in this scholarship, as each article engages the New Deal period in some way as part of the backdrop for larger points of discussion. The New Deal, Franklin Roosevelt and the Democratic Congress’s legislative response to the Great Depression convened a period whose richness as a source of discussion, argument, and analysis for constitutional law scholars has to do with the fact that several doctrinal strands came together during the period and underwent profound changes. Most notable of these were the jurisprudence of the Commerce and the Due Process Clauses, and the federalism and separation of powers doctrines intertwined with these areas. Frustrated with a court holding to principles of interpretation thought to undermine New Deal legislation, President Roosevelt sought to add up to six new Justices to the Supreme Court for every justice over seventy in hopes of getting a Court more ideologically attuned to his agenda. Failing that, Roosevelt went on to appoint eight Justices to the Court in his second and third terms, ef-

² This is true with two exceptions. This writer’s paper, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, was not delivered at the SEALS meeting or the University of Pennsylvania Law School symposium and is being presented for the first time in this edition. An article titled *1937 Redux? Reflections On Constitutional Development And Political Structures* by Professor Mark Tushnet, a member of the core panel at SEALS and the University of Pennsylvania Law School was published in Volume 14 of this Journal. See Mark Tushnet, *1937 Redux? Reflections On Constitutional Development And Political Structures*, 14 U. PA. J. CONST. L. 1103 (2012).

fectively achieving the result that he sought through the ill-fated Court Packing Plan. That result was a court willing to entertain broader understandings of key constitutional provisions, as well as the doctrines of federalism and separation of powers (key to the New Deal), and with that, set in motion the development the beginnings of the modern regulatory state.

This writer's article, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, focuses on how the Court has defined Congressional power through the Commerce Clause. The Supreme Court, beginning in 1937, has interpreted the Clause as a powerful and plenary power of Congress when rationally used and has deferred to Congress on matters of federalism. However since *United States v. Lopez*,³ the Court has sought to limit this power, and its Commerce Clause decisions have been weakest when the Court subjectively develops limiting principles on Congressional authority without solid constitutional bases. Broad and vague constitutional provisions such as the Tenth Amendment describe a policy but do not provide adequate specifics to justify the non-political branch imposing its conceptions of federalism on the legislature. The economic activities principle in *Lopez* and *United States v. Morrison*⁴ is such an example. The activities/non-activities dichotomy in *National Federation* ruling that the Commerce Clause did not authorize Congressional passage of the Individual Mandate is another such example of a subjective limiting principle.

The present Court's dilemma is that in seeking to arrest the expansive nature of the New Deal Commerce Clause, it is limited in the means to pursue limiting principles. The old conservative Court had the specific language of the Commerce Clause—"among the several states"—to limit Congress's power, and when it went beyond that to allow implementation beyond the specifics of the clause via the Necessary and Proper Clause, it limited Congress to channels and instrumentalities of commerce. Decisions in 1937 and after expanded Congress's authority much further by use of the Substantial Effects Doctrine and aggregation theory making Congress's commercial authority a general economic regulatory authority. In doing so, the decisions opened the door to the creation of the modern regulatory state with influence in economic and social policy to the extent the national economy was affected. To return to the old conservative ways would mean rewriting the six decades of Court precedent prior

³ 514 U.S. 549 (1995).

⁴ 529 U.S. 598 (2000).

to *Lopez*. Instead of such a drastic move, the present day court majority chooses to impose its own view of the proper role of Congress vis-à-vis the states over the judgment of Congress, and it has done so with subjective approaches to the federalism principles. *National Federation's* Commerce Clause ruling is the latest example.

Professor Laura Cisneros is an associate professor of law at the Golden Gate University School of Law in San Francisco. In her article *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, Professor Cisneros takes the single most dramatic political and legal moment in the New Deal era, Roosevelt's Court Packing Plan, and examines how it has been used rhetorically in federal court decisions since then. She notes that Dean Erwin Chermersky has argued that fuller understanding of Supreme Court decisions can be achieved by examining how the justices of the Supreme Court and judges on lower courts use rhetoric.⁵ With this in mind, Professor Cisneros identifies two kinds of messages in the use of the Court Packing Plan in decisions.

Some references in federal cases have invoked the Court Packing Plan to warn of incursions into judicial independence. Others have used the Plan to caution against judicial policy-making. Both references, worded differently to reflect the writer's intent, demonstrate the "transformative power" of the event.

Professor Cisneros continues in her essay to review the uses of the language "switch in time"—the reference to the legend of Justice Robert's "change" of judicial philosophy following the announcement of the Court Packing Plan. She also reviews decisions where both references were used together. Professor Cisneros says that the language of the Court Packing Plan as a rhetorical tool "has entered our culture of argument" over the role of the Courts in our governmental system.⁶

Professor Charlton Copeland is an associate professor of law at the University of Miami School of Law. His article *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, is an examination of an alternative way of looking at federalism issues through the lens of the Court's decision in *National Federation*⁷ on the Medicaid expansion provision of the Affordable Care Act. Professor Copeland argues that the dominant paradigm for ex-

⁵ Laura A. Cisneros, *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 63 n.12 (2012) (referencing Erwin Chermersky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2008 (2002)).

⁶ *Id.* at 90.

⁷ *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

aming federalism enforcement focuses primarily on the separation of authority between states and the federal government at the time of legislative enactment. This approach ignores how implementation of legislative policy at both national and state levels involves cooperative federalism in cases involving federal Spending Clause legislation.

Professor Copeland maintains that the decision of a majority of the Court invalidating part of the Medicaid expansion provision, on the basis that the provision amounted to coercion, was an opportunity missed. He argues that the better way to evaluate federalism issues is to focus on how administrative law principles protect state interests and their role in implementation of legislative policy. The coercion theory, rooted in Tenth Amendment jurisprudence, is an example of a truncated approach to federalism. Professor Copeland gives other examples of Tenth Amendment jurisprudence, demonstrating that case law's reliance on separation as the exclusive mode of analysis. Professor Copeland's discussion of the Medicaid program shows how actual administrative implementation of the program conflicts with the separation approach to federalism enforcement, and how that long established practice in Medicaid implementation could have influenced the Court in its analysis of the expansion. Professor Copeland gives examples of other state-federal programs from the implementation point of view, suggesting that administrative law doctrine offers a more realistic means of evaluating the state-federal relationship.

Professor Barry Cushman is the John P. Murphy Foundation Professor of Law at the University of Notre Dame. Professor Cushman's article is an extensive review of the book *Supreme Power: Franklin Roosevelt vs. the Supreme Court*⁸ by Jeff Shesol. Shesol's book has been regarded as not only a description of the politics and law of the three branches of government surrounding Roosevelt's Court Packing Plan, but also as a subtle suggestion of similarities between Roosevelt's times and the present with hotly contested regulatory developments and a divided Supreme Court at both ends of the timeline.⁹ Professor Cushman's article examines Shesol's book from three perspectives: (1) Shesol's treatment of the political story of the Court Packing Plan, (2) that episode's legal story, and (3) how the two stories relate to each other. Professor Cushman concludes that the book

⁸ JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

⁹ Casey Greenfield, *FDR's Court Shenanigans*, THE DAILY BEAST (Apr. 13, 2010, 7:42 PM) available at <http://www.thedailybeast.com/articles/2010/04/13/fdrs-court-shenanigans.html> (noting parallels between Roosevelt's difficulty in enacting New Deal programs and Obama's attempts to pass healthcare reform).

is far more successful in addressing the political story than it is in addressing the remaining two perspectives.

Professor Cushman describes the political story as “how to understand the political trajectory of the Plan from its initial conceptualization to its ultimate failure”¹⁰ and he credits Shesol’s “skillful rendering of the political story”¹¹ as supporting the view the Plan was mishandled from the beginning at the announcement of the plan—so much so that “[i]t was not unreasonable for the justices to doubt that their immediate, total, and unconditional surrender was necessary in order to avert the threat of Court-packing.”¹²

However, the article does not regard the book as being nearly as successful in its rendering of the legal story in large part because of inconsistent reflection on what Professor Cushman calls the internal story—how factors having to do with quality of constitutional argument, legislation, doctrinal developments over time, and the appointments process affected the posture of the Court both before and after the announcement of the Court Packing plan.¹³ Though he acknowledges that the book lays some groundwork validating an internal perspective—Professor Cushman faults Shesol’s willingness to resort to the factors external to legal craftsmanship—personalities of the Justices, the threat of the Court Packing Plan, and the magnitude of Roosevelt’s 1936 landslide victory—to describe the legal story. Professor Cushman argues that in the book’s perspective, “being a liberal or a conservative justice boiled down to selecting between two competing theories of political economy in the service of two competing sets of interests”—laissez-faire economics and the welfare state.¹⁴ Professor Cushman believes that resort to this paradigm in Shesol’s telling of the legal story, as well as the relationship between the legal and political stories, dilutes and negates much of Shesol’s recognition of the internal dimension to the developing interpretive process going on at the Court.¹⁵

Professor Jamal Greene of Columbia Law School analyzes the litigation strategy in *National Federation of Independent Business v. Sebelius*, the Patient Protection and Affordable Care Act case.¹⁶ Justifications for the Act’s Individual Mandate were based primarily on the authori-

10 Barry Cushman, *The Man on the Flying Trapeze*, 15 U. PA. J. CONST. L. 183, 184 (2012).

11 *Id.* at 209.

12 *Id.* at 210.

13 *Id.* at 205–07, 214–15.

14 *Id.* at 217.

15 *Id.* at 208.

16 132 S. Ct. 2566 (2012).

ty of Congress to regulate interstate commerce under Article I of the Constitution,¹⁷ an argument based in large part on New Deal era precedents that expanded the reach of Congress's power under that clause. Professor Greene establishes in his article, *What the New Deal Settled*, that the strategy to attack Congressional authority under the Commerce Clause to pass the individual mandate is not demonstrably stronger than a strategy based on substantive due process—a strategy that was not pursued by the Act's opponents. Though the basis for legislative authority under both the Commerce and Due Process Clauses were expanded by New Deal era precedents, the opponents to the law, and to the individual mandate in particular, were willing to challenge the constitutionality of the law under the former but not the latter. Professor Greene offers several critical assessments on this litigation strategy.

Acknowledging the political component of the debate and litigation over the health care law, Professor Greene suggests three reasons for this strategy. First, arguments based on due process would have drawn into question the constitutionality of the similar Massachusetts state level health care legislation signed into law by the Republican presidential candidate Mitt Romney when he was governor of that state. In addition, that strategy, with its foundation in the liberty interest component of due process theory, would have weakened the fragile coalition between libertarians and social conservatives in the Republican Party. Finally, Professor Greene suggests a reluctance on the part of the mandate to “affiliate their arguments with the Court's reproductive freedom precedents” which would be practically unavoidable.¹⁸

Professor Greene also argues that the absence of due process arguments shows just how pervasive the aversion to the economic due process legacy of the *Lochner* decision is on constitutional thinking. Substantive due process arguments in economic cases can be distinguished from *Lochner*-style economic due process by articulating constitutional principles based upon accepted rationales. Yet *Lochner*'s disproportionate impact on constitutional theory stymies these arguments.

Within the scenarios played out during this period of constitutional interpretive change was the principle of separation of powers. This produced an understanding between the Court and Congress on

17 See Brief for Petitioners (Minimum Coverage Provision) at 17–20, *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398).

18 Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 267 (2012).

the role of deference by the Court to Congress based upon a presumption of constitutionality that the Court would accord legislation before it if the legislation were shown to be a rational exercise of Congressional authority. Professor Louise Weinberg, the holder of the Bates Chair at the University of Texas School of Law, reminds us in her article, *Unlikely Beginnings of Modern Constitutional Thought*, that part of this settlement, outlined in *United States v. Carolene Products Co.*¹⁹ between the two branches, did not include legislation affecting constitutional rights. Footnote four in that decision separated constitutional rights from the new deferential settlement by establishing a rights-based tiered scrutiny approach based on interest analysis, instead. And though *Carolene Products* is celebrated as being the source of rights-based jurisprudence, Professor Weinberg demonstrates a heretofore unrecognized jurisprudential heritage of the concept occurring in Court decisions earlier in the decade, most notably in the conflicts of laws area. Professor Weinberg describes *Carolene Products'* Footnote Four not only as “the beginning of the end of pre-modern constitutional thought” in the area of rights-based constitutional analysis, but in light of the earlier case precedent, “also the end of the beginnings.”²⁰

The principle that government must have at least a legitimate purpose to enforce its legislation is first observed in a 1930 conflict of laws case establishing that state legislation applies only to those transactions with which the state had significant contacts creating state interests.²¹ Similarly, that government must have a rational reason for its actions is first observed in an opinion written by Justice Stone,²² the author of *Carolene Products*. In that case the Court agreed that California’s interest in protecting its public assistance funds was a rational reason for its law requiring application of its workman’s compensation law for injured workers likely to domicile there.²³ And though *Erie v. Tompkins*²⁴ is not thought of as a due process decision, Professor Weinberg demonstrates that it reflects thinking that was developing prior to *Carolene Products*, recognizing state interests as being important in establishing state legislative, or in the case of *Erie*, state

19 304 U.S. 144 (1938).

20 Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291, 293 (2012).

21 *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930).

22 *Alaska Packers v. Indust. Acc. Comm’n of Calif.*, 294 U.S. 532, 543 (1935) (“As the state had the power to impose the liability in pursuance of state policy, it was a rational, and therefore a permissible, exercise of state power to prohibit any contract in evasion of it.”).

23 *Id.* at 549–50.

24 304 U.S. 64 (1938).

judicial authority, and is part of a clarifying movement focusing issues of federalism, due process, and commerce on the governmental interests involved.

CONCLUSION

This symposium's approach to the subject matter, and the topics of the articles, faces the obvious "elephant in the room," the health care litigation, not by depicting it as a non-issue, but by treating it as one of many issues in what can be described as an ideological impasse on governance. That impasse developed from doctrinal trends during the New Deal, and has developed into an impasse perhaps over the last generation. The topical treatments here emphasize a holistic view of how the modern regulatory state came into being, how it has been characterized, and how ideology has affected the articulation of constitutional standards, both now and at the beginning of the debate in the late 1930s. Though it turned out not to be the bellwether opinion many had hoped for, *National Federation's* importance lies in laying bare the tensions between two quite different views of the Constitution and national governance. This symposium hopefully will provide a bit of context to the impasse displayed in the Supreme Court's opinion.

