JUDICIAL CAPACITY, CAUSATION, AND HISTORY: NEXT STEPS FOR THE JUDICIAL CAPACITY MODEL

DAVID S. SCHWARTZ*

INTRODUCTION

Andrew Coan's excellent book, *Rationing the Constitution*,[1] introduces and elaborates his "judicial capacity model" of judicial decisionmaking. Coan's elegant judicial capacity model (JCM) is remarkably predictive of the forms of judicial review in several important areas of American constitutional law. As Coan summarizes the model, "[i]n high-volume and high-stakes domains, the Court will be strongly constrained to employ some combination of deference and categorical rules."[2]

Coan convincingly shows that the Court does indeed rely on "clumsy categorical rules" that narrowly restrict constitutional challengers' chances of success (e.g., the "economic"/"non-economic" distinction under the Commerce Clause), or deferential standards (e.g., the "rational basis test"), or both in combination, to discourage constitutional litigation in six very important "high-volume" or "high-stakes" domains.[3] These include the commerce and spending powers, the non-delegation doctrine and presidential control over administration, and the Equal Protection and Takings Clauses.[4] Obviously, this list encompasses a sufficiently wide swath of constitutional law to demonstrate that the model is extremely useful even though it does not apply to what Coan calls "normal domains."[5] Those normal domains are areas where the Court's tolerance

* Foley & Lardner-Bascom Professor of Law, University of Wisconsin Law School.

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

2. *Id.* at 24.

3. *Id.* at 3, 7, 23.

4. *See generally id.* at 51–162 (citing to Part II of Coan's book).

5. *Id.* at 24–25.

of disuniformity in the lower courts and the relative absence of constitutional challenges to federal laws produce a relatively small impact on the Court's docket.[6] And Coan's six sample domains are illustrative: there are others, such as the taxing power, which appears to me to be a hybrid domain that further supports the JCM.

By showing a correlation between these forms of judicial review (pro-government categorical rules and deferential standards) and high-volume/high-stakes domains, Coan has made an important contribution to the literature of judicial decisionmaking and constitutional theory, in two ways. First, the JCM brings to light an element of judicial decisionmaking whose importance, and possible predominance, has been largely overlooked and insufficiently studied. Second, the JCM uncovers significant limitations in the prevailing models of judicial behavior—legalist, attitudinal, and strategic—which often fail to account for the Court's reliance on categorical rules/deferential standards in the domains Coan examines.

Proposing a new analytical construct is a tough business. It's a bit like a game of king-of-the-hill, where the conventional paradigm fights off the new alternatives trying to supplant it. If a new idea can be knocked down, the traditional king-of-the-hill idea can continue to occupy the hilltop without serious question. Here, the conventional paradigm is some combination of the legalist, attitudinal, and strategic models of judicial behavior: three ideas jostling at the hilltop, but perhaps united in an unwillingness to make room for one more. But in questioning and critiquing Coan's thesis, it is important not to force the JCM to play king-of-the-hill. A fair reading of *Rationing the Constitution* shows that Coan does not claim to have displaced other explanations of judicial behavior, but to supplement them. Rather than asking whether the JCM explains all facets of judicial decisionmaking, we should ask the question the other way around: Where the traditional models leave explanatory gaps, how might we fill them? By forcing the JCM play king-of-the-hill we may be doing ourselves the disservice of failing to see explanatory gaps in the existing legalist/attitudinalist/strategic models that the JCM may explain better.

Coan succeeds in showing that the JCM has sufficient explanatory power to put constitutional scholars on inquiry notice that further detailed explorations of the JCM are needed, not only to develop the JCM itself, but also for those who wish to continue making judicial behavior arguments relying on the legalist, attitudinalist, or strategic models. There is undoubtedly more to say, and more to prove, to establish the importance and role of the JCM, but to demand that there be no gaps or lingering questions in Coan's account is to set the bar for proposing a broad, multi-

6. *See id.* at 35.

domain model too high. I say this to make clear that in pointing to certain questions or gaps, I am not attacking the model, but suggesting directions that its advocates should pursue going forward.

In this Essay, I will explore Coan's commerce power example to raise some questions about the causal role played by the JCM in historical time. I argue that the next step in developing the JCM requires its proponent(s) to engage more closely with history. This requires confronting the fact that the constraint of judicial capacity is not a timeless abstraction, but a historically contingent fact that appears at various times and for historical reasons.

I. FEATURES AND LIMITATIONS OF THE JCM MODEL

The JCM posits that the Supreme Court will be constrained to resort to (unavoidably clumsy) categorical rules or highly deferential standards in capacity constrained domains. There are essentially two types of capacity constrained domains: "High-volume" domains are those in which the potential number of constitutional challenges is so great that a non-categorical, non-deferential standard—a "totality of the circumstances" test, for example, that offered a reasonable chance of success in holding a law unconstitutional—has "the potential to invite more litigation than the Court could handle."[7] "Hybrid domains" are those in which a combination of high volume and "high stakes" makes the Court "feel[] compelled to grant review" in "a large fraction of cases," such that even a small number of cert petitions would greatly expand the Court's docket.[8] Although Coan describes a category of "high stakes" domains, he admits that he cannot think of an example of a domain fitting that description, and he appears to include it merely for a tripartite symmetry that is not essential to the model.[9] The key point about "stakes" is that there will be some domains in which the Court "feels compelled to grant review in almost any case" such as when "the lower court invalidates a federal law."[10]

The domains are one side of the constraint equation. To use the terminology employed by Neil Komesar, from whose work Coan derives some of his inspiration, Coan's domains represent the "demand side" of the JCM.[11] The "supply side," the Court's docket capacity, is constrained less by the Court's size and budget (though these are part of the constraint) than by its own internal and norms of professionalism: deciding each case by the deliberation of the full court with detailed explanations of

7. *Id.* at 25–26.

8. *Id.* at 29–31.

9. *See id.* at 29.

10. *Id.* at 29.

11. *See* NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 3 (2001).

reasoning.[12] While these norms are not legally required, they are entrenched and unlikely to be changed in the foreseeable future. As a result, the Court can decide at the absolute most something in the range of 150–200 cases annually.[13] Compare this to the 280,000 civil cases and 80,000 criminal cases filed each year in federal court, not to mention state court cases raising federal law issues, and one can readily see the Supreme Court is indeed a "bottleneck" in the judicial system, as Coan puts it.[14] Coan's identification of these judicial norms as dominant contributors to the Court's constrained capacity is in itself a major insight.

Although the JCM is remarkably predictive and valuably illuminating, it remains preliminary on certain questions of causation. Coan is completely candid about this. In discussing the problem of "observational equivalence," Coan observes that his analysis cannot always disentangle the causal reason for the Court adopting categorical rules/deferential standards where an alternative explanation has some purchase.[15] There might be "joint causation" between the JCM and another explanatory model, or the JCM "might overlap" with another model.[16] It is not that these questions are unanswerable. Rather it is that Coan understandably unveils the JCM at a level of abstraction that cannot conclusively answer the causation question. To do that would involve a substantial additional scholarly undertaking for each of the six domains Coan addresses.

To advance the causation inquiry further, an advocate of the JCM will have to move beyond abstractions in two ways. One is to confront the reality of the Court as comprising just nine individuals rather than treating it as a faceless institution. The other is to subject case studies to more detailed historical analysis. Coan confronts this issue to a degree, when he recognizes that the chief contributors to the JCM's constraint—the Court's institutional norms for taking and deciding cases—are contingent and are not logically or legally required.[17] But the contingency of judicial capacity constraints goes beyond that. For starters, the norms are not only logically or legally contingent, they are historically contingent. It would be useful to know more, for example, about whether the Court in 1937 felt its present-day necessity to review most lower court decisions striking down

12. COAN, *supra* note 1, at 14, 17–18; KOMESAR, *supra* note 11.

13. COAN, *supra* note 1, at 14.

14. *See id.* at 13; *Federal Judicial Caseload Statistics 2018*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/VN5T-GFKJ]. Only a fraction of these cases will raise constitutional issues, of course. But it wouldn't take much encouragement through a non-deferential standard to generate a thousand extra cert petitions, which would mean fifty extra cases at the Court's current grant rate of five percent.

15. COAN, *supra* note 1, at 47.

16. *Id.* at 48–49.

17. *Id.* at 13–14.

federal laws. Furthermore, the other major element of the JCM—the existence of high-volume and hybrid/high-stakes domains—is also historically contingent, rather than a timeless abstraction. It would be useful, if not essential, to set out historical narratives of when and how particular capacity-constrained domains emerged.

This historical contingency has an additional layer: the JCM depends on *the Justices' perceptions* of high-volume and high-stakes domains. Even if a domain exists because of conditions on the ground, the JCM would not be expected to operate unless and until *the Justices perceive* those conditions. And judicial perceptions can work in both directions. Perhaps, for example, the Court has a particularly low tolerance for Commerce Clause challenges, and feels that three such cases per year is too many; it might craft a rule to send a strong signal discouraging such cases based on a subjective perception that the domain is high stakes or high volume, even if that perception is not shared outside the Court. Conversely (and again hypothetically), the Court might believe that it is not unduly burdened by taking fifteen dormant Commerce Clause challenges per year, and might thus ignore substantial evidence or belief outside the Court that this is a "high volume" domain.

Finally, an essential condition of the JCM is the human mechanism by which Justices' perceptions of capacity constraints are expressed as doctrine. Notwithstanding certain advantages noted by Coan that the JCM offers over the alternative explanatory models, those models hold one advantage over the JCM as presently formulated: They purport to explain the behavior of Justices as individuals.[18] The attitudinal and strategic models are both based on the plausible intuition that individuals are motivated by beliefs or strategic calculations of interest.[19] The legalist model plausibly assumes that Justices adhere to the training and methods of the legal profession.[20]

But how do Justices internalize and then act on awareness of the capacity-constrained domains that produce the JCM? Coan has not specified this in his model, but the question needs to be addressed. When assessing the behavior of large institutions, it makes sense to rely on general behavioral assumptions—such as that corporations tend to maximize profits—because individual variations and idiosyncrasies tend to cancel each other out or to be swamped by the generalizable behavior. That sort of approach doesn't get us far enough with the Supreme Court, which consists of nine identifiable people at any one time (and only 114 in the Court's 230-year history).[21] We can't simply assume that Justices

18. *Id.* at 48–49.

19. *Id.* at 42–46.

20. *See id.* at 41.

21. *FAQs – Supreme Court Justices*, SUP. CT. OF THE U.S. (2020), https://www.supremecourt.gov/about/faq_justices.aspx [https://perma.cc/KH5U-H2A8].

are aware of and act on capacity constraints as an abstract matter in lieu of looking at evidence about individual Justices and their motivations. Between their reasoned decisions, their papers and conference records about their behind-the-scenes deliberations, and their biographical data, we can inquire into their actual motivations, at least in some instances, rather than satisfying ourselves with the heuristic of plausible hypotheses about their motivations. As will be illustrated in the following historical discussion, a historical inquiry into the existence *vel non* of capacity-based motivations can shed considerable light on the knotty problem of causation.

II. JUDICIAL CAPACITY AND THE COMMERCE CLAUSE

The JCM offers a highly plausible explanation for the Court's post-1937 approach to Commerce Clause doctrine. Prior to 1937, the Court adhered to a narrow definition of interstate commerce: "as comprehending 'traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States.'"[22] Yet even this narrow definition might have supported a fairly lenient approach to commerce regulation had the Court followed its own reasoning in cases like *Champion v. Ames* (*The Lottery Case*)[23] and applied *McCulloch v. Maryland*'s doctrine of implied powers.[24] *Champion* recognized that goods for sale (lottery tickets, in that case) could be regulated when in interstate commerce, even to the point of banning them.[25] Applying *McCulloch*: in order to regulate even the interstate *exchange* of goods, it may be "convenient," "conducive," or "plainly adapted" (*McCulloch*)[26] to regulate the *production* of those goods.[27] This is not a complex or subtle point: Atlantans who buy only Georgia peaches do not buy California peaches; local production with no substantial interstate implications is more the exception than the rule, and has been so for many years. Justice Scalia used this reasoning process to conclude that Congress could prohibit simple possession of marijuana in support of its prohibition of an interstate marijuana market.[28] But before 1937, the Court instead applied a categorical rule that *supported* constitutional challenges, by holding

22. *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936) (quoting *Adair v. United States*, 208 U.S. 161, 177 (1908)).

23. 188 U.S. 321 (1903).

24. 17 U.S. (4 Wheat.) 316 (1819).

25. *Champion*, 188 U.S. at 355–57.

26. *McCulloch*, 17 U.S. at 413–15, 421.

27. *See* DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* 190–92 (2019).

28. *Gonzales v. Raich*, 545 U.S. 1, 36–40 (2005) (Scalia, J., concurring in the judgment).

regulation of employment and productive activities (mining, agriculture, manufacturing) categorically off limits to federal regulation.[29]

If Congress had not engaged in extensive regulation of the national economy, this non-deferential rule would not have created sufficient pressure under the JCM to produce a pro-government categorical rule or standard. The small number of federal statutes would have left the domain of commerce regulation as a sufficiently low-volume "normal" domain. That changed with the New Deal, which generated dozens of new federal laws and agencies, leading to an explosion of litigation. According to historian Jeff Shesol, there were some 1,000 cases pending in the lower courts challenging New Deal laws.[30] Coan cites these figures and plausibly concludes that "the number of cases threatened to overwhelm the judicial system, and the Supreme Court in particular."[31]

For Coan, the "doctrinal puzzle" insufficiently answered by other models is the question: "why have the Court's post-1937 decisions deferred so strongly to Congress"?[32] This deference takes the form predicted by the JCM: reliance on both categorical commerce limits that leave only a narrow opening for challengers (the economic/non-economic distinction) and deference (sustaining a broad "substantial effects" test based on rational basis review).[33] This doctrinal puzzle views the entire period of 1937 to the present as a unified whole, albeit with some minor doctrinal oscillation in the Rehnquist-Roberts era. But there are two other, related puzzles that arise in the New Deal era that bear on the JCM.

First, how does a domain evolve into a high-volume, high-stakes domain? As Coan points out, volume alone is not enough: it must be such that it will generate a potentially insupportable number of *Supreme Court* cases, which makes the Supreme Court's compulsion to grant cert a necessary condition.[34] The perception of high volume and high stakes must come from the Court, not from the opinion of an outside observer. Significantly, between March 1933, when Roosevelt was inaugurated, and February 1937, when President Roosevelt unveiled his "court-packing" plan, the Court decided only seven Commerce Clause challenges to federal laws.[35]

---

29. SCHWARTZ, *supra* note 27, at 191–92, 203–04.

30. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 168–69 (2010).

31. COAN, *supra* note 1, at 58 (quoting McNollgast, *Politics and the Courts*, 68 S. CAL. L. REV. 1631, 1672 (1994)). *See* SHESOL, *supra* note 30, at 168–69.

32. COAN, *supra* note 1, at 65.

33. *Id.*

34. *Id.* at 25–29.

35. *See United States v. Arizona*, 295 U.S. 174 (1935) (upholding the power of Congress to build a dam); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (striking down the Railroad Retirement Act of 1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act); *United*

Second, if judicial capacity was a significant causal element in the New Deal turnaround, either jointly with a legalist or strategic explanation, or as the determining factor, shouldn't we expect to see some more direct evidence of this in the historical record? Despite the JCM's power as a test of *correlation*—high volume/high stakes domains reliably produce combinations of pro-government categorical rules and deferential standards—the *causation* inquiry requires more and different observational data than the nature of domains and the nature of opinions in constitutional adjudication.

A. The JCM and the New Deal "Switch in Time"

The famous New Deal "Switch in Time that Saved the Nine" refers to the change in position by two swing Justices who voted to uphold economic legislation in two key cases in late March and April 1937.[36] The Switch, or the "New Deal turnaround," marked the end of the jurisprudence of *Lochner*-era economic due process and narrow construction of the Commerce Clause.

The Switch in Time is causally overdetermined, because there were powerful causal forces at work that are captured in the so-called "strategic" model of judicial behavior. To be fair, Coan does not argue that the JCM uniquely explains the 1937 Switch in Time. Rather, he argues very plausibly that the Commerce Clause is a hybrid domain, characterized by high volume and high stakes, when looked at as a whole starting in 1937.[37] To establish a causal role for the JCM in the New Deal constitutional crisis requires a deeper dive into historical processes. To begin with, it would be helpful to know whether the all-important constraining norm, that the

---

States v. Butler, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (upholding the federal construction of river dam); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act); *Ky. Whip & Collar Co. v. Ill. Central R.R. Co.*, 299 U.S. 334 (1937) (upholding the federal prohibition of interstate transportation of convict-made goods).

By way of comparison, the Court decided twenty-eight dormant Commerce Clause challenges to state laws during this period. These counts are based on analyzing Supreme Court case abstracts produced by a Lexis search for "commerce" in Supreme Court decisions during the relevant time period. For comparable data in the 1937–1942 period, see *infr*a note 67 and accompanying text.

36. The two Justices were Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts. The cases—both 5-4 decisions—were *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding state minimum wage law) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

The full phrase was a journalistic pun on the adage "a stitch in time saves nine," and referred to the view that the judicial switch took the wind out of the sails of FDR's Court-packing plan, which would have increased the number of Justices from nine to as many as fifteen. *See* SHESOL, *supra* note 30, at 434.

37. COAN, *supra* note 1, at 30.

Court will hear most cases striking down federal laws, was operative in 1937.

Judicial capacity figured explicitly in the 1937 crisis, but in a way that Coan would find ironic. Roosevelt claimed that his Court-packing plan was justified *in part* because the Court's workload was too heavy for older men: hence, a new appointment would be triggered whenever a justice refused to retire at age seventy.[38] Two aspects of this plan fail to jibe with the JCM. First, Roosevelt never attempted to link the Court's workload to the objectionable Lochner-era doctrines, even though the JCM rightly would link the two. Roosevelt simply pointed to workload.[39] Second, the general public and the Justices themselves perceived the workload issue to be a sham.[40]

The Switch in Time on the Commerce Clause occurred in *NLRB v. Jones & Laughlin Steel Corp.*,[41] and the Court's switch as a body resulted from the changing votes of two individuals, Chief Justice Hughes and Justice Owen Roberts.[42] Historians believe that Hughes had become convinced of the need to part ways with the conservative "Four Horsemen" and persuaded Roberts to join the liberals in upholding New Deal laws in the 1936–37 term.[43] Even that view involves some speculation. But the historical record permits some well-supported inferences, and these do not support the thesis that capacity-concerns motivated the Switch in Time.

---

38. President Franklin D. Roosevelt, *Fireside Chat* (Mar. 9, 1937), *in* THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/fireside-chat-17 [hereinafter Roosevelt, *Fireside Chat*].

39. *See id.*; *see also* SCHWARTZ, *supra* note 27, at 214.

40. *See generally* Roosevelt, *Fireside Chat*, *supra* note 38. Interestingly, many historians emphasize this fig-leaf of an explanation as though Roosevelt was unwilling to be candid about his real, jurisprudential/political reasons. *See* SHESOL, *supra* note 30, at 505. I've made this error myself. *See* SCHWARTZ, *supra* note 27, at 214. In fact, Roosevelt was more candid than not: in the Fireside Chat, after reviewing at length the Supreme Court's decisions striking down New Deal laws, Roosevelt said that the second of the plan's "two chief purposes" was "to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries." *See generally* Roosevelt, *Fireside Chat*, *supra* note 38.

41. 301 U.S. 1 (1937).

42. *See* SCHWARTZ, *supra* note 27, at 214.

43. *See, e.g.*, SHESOL, *supra* note 30, at 430–33. Historians disagree, however, over the impact of the Court-packing plan specifically on the Switch. On the one hand, it appears that Justice Roberts decided to reverse course and uphold the state minimum wage law in *West Coast Hotel*, in December 1936. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). But that was the minimum wage issue. *Id.* The switch on the Commerce Clause might still have been influenced by the Court-packing plan, which was announced on February 5, 1937, five days before oral argument in *Jones & Laughlin Steel*. *See* SHESOL, *supra* note 30, at 367; *Jones & Laughlin*, 301 U.S. at 1. And both switches occurred against the backdrop of Roosevelt's landslide re-election and the public affirmation of the New Deal. COAN, *supra* note 1, at 62.

We can start with the *Jones & Laughlin Steel* opinion itself, which upheld the application of the National Labor Relations Act (NLRA) to a massive and vertically integrated steel conglomerate. To be sure, we should not expect to find blunt statements of capacity concerns in cases deciding points of substantive doctrine. Generally speaking, the Supreme Court talks about "floodgates of litigation" only when deciding procedural and quasi-procedural doctrines, such as standing, remedies, enforcement of arbitration agreements, and the like. Judicial norms historically have not supported a practice of justifying the choice of substantive categorical rules or deference standards with direct reference to capacity constraints. (This norm in itself is worth exploring in future work on the JCM.) Accordingly, we have to read cases between the lines to find them.

In contrast to Coan, I find it difficult to read *Jones & Laughlin Steel* as prima facie support for the JCM. Is *Jones & Laughlin Steel* a clearly deferential ruling, containing either a pro-government categorical rule or a deferential standard, as the JCM would predict? Or does it instead embrace a case-by-case standard that would fail to signal to litigants that federal economic regulation will be virtually always upheld? Coan notes an ambiguous countercurrent, but ultimately reads the opinion in the manner favorable to the JCM.[44] But this is based on reading a single sentence out of context: "it is primarily for Congress to consider and decide the fact of the danger and meet it."[45] Significantly, that quotation is from the *Lochner*-era decision of *Stafford v. Wallace*,[46] a case that is hardly an example of deference to Congress.[47] The *Stafford* quotation made the point that once a matter was "within the regulatory power of Congress" under the Court's restrictive tests and formulas (there, the "stream of commerce" theory), then—and only then—was it "primarily for Congress" to decide whether and how to regulate.[48] *Jones & Laughlin Steel* provides the full quotation, and moreover, surrounds it with language making clear that the Court was still applying the *Lochner*-era "direct effects" test:

> Although activities may be intrastate in character when separately considered, if they have *such a close and substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp. v. United States*, *supra*.

44. COAN, *supra* note 1, at 66–75.
45. *Id.* at 62 (quoting *Jones & Laughlin*, 301 U.S. at 37).
46. 258 U.S. 495 (1922).
47. *Id.* at 521.
48. *Id.*

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree.[49]

Note the continued reliance on the archetypal anti-New Deal decision in *Schechter Poultry*, albeit subtly shifting to a paraphrase of the Cardozo concurrence in that case. Only at this point does the Court quote the *Stafford* language partially quoted by Coan. The *Jones & Laughlin Steel* Court goes on to say that "[t]he close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local."[50] Far from *abandoning* the non-deferential "direct effects" test, the *Jones & Laughlin Steel* Court *applied* it to the specific facts of the case—which it recited at length in its opening passage, emphasizing the huge interstate operations of the vertically-integrated steel empire. The Court concluded this section:

> It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra,* we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our federal system.[51]

Jones & Laughlin Steel was thus not a deference case. Rather it was a baby step in the direction of deference, in which the Court abandoned a categorical rule of unconstitutionality—that regulation of labor or production is categorically reserved to the states—by substituting a softer version of the "direct effects" standard that was a "question . . . of degree."[52] That is in essence Cardozo's case-by-case standard that Coan discusses as a non-deferential approach, but which he declines to discern in *Jones & Laughlin Steel*.[53]

---

49. *Jones & Laughlin*, 301 U.S. at 37 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).

50. *Id.* at 38.

51. *Id.* at 40–41 (quoting *Schecter*, 295 U.S. at 554).

52. *Id.* at 37.

53. COAN, *supra* note 1, at 62.

In the now-obscure companion case, *NLRB v. Friedman-Harry Marks Clothing Co.*,[54] the Court also upheld the application of the NLRA to a mid-sized business.[55] The clothing manufacturer did $1.75 million worth of business in 1935 (equivalent to around $32 million in 2018 dollars), around ninety percent of it to out-of-state buyers.[56] Hughes's opinion rested on "the reasons stated" in *Jones & Laughlin Steel*.[57] Together the two cases send an ambiguous signal. On the one hand, the Court showed that the NLRA would not be limited to the largest business enterprises only. On the other hand, *Friedman-Harry Marks* also signaled reliance on case-specific factors: it relied heavily on extensive factual findings by the NLRB and found it important that the clothing workers were represented by a major interstate union.[58]

It is worth noting that of the five Justices in the majority, only Harlan F. Stone had any track record of believing in a general principle of deference to Congress.[59] Cardozo was the author of the case-by-case approach, which he articulated in *Schechter Poultry* and *Carter Coal*.[60] Brandeis was no great friend to constitutional nationalism, and only reluctantly acknowledged the federal government's need to experiment with national economic regulation.[61] Hughes argued for a case-by-case approach to Commerce Clause challenges as late as the *Darby* case in 1941, his last term on the Court.[62] Roberts would eventually give in to a deferential approach to federal economic regulation, but in 1937 he had to be pulled along by Hughes. This was not a Court prepared to jettison decades of non-deferential judicial review at one blow, for capacity reasons or otherwise.

B. The JCM and the Real New Deal Revolution: Darby *and* Wickard

As I have argued elsewhere, the modern doctrine of Commerce Clause deference arose with *United States v. Darby Lumber Co.* in 1941.[63]

---

54. 301 U.S. 58 (1937). I am grateful to Sandy Levinson for pointing out this case.

55. *Id.* at 72.

56. *Id.* at 72–73; SCHWARTZ, *supra* note 27, at 292 n.12.

57. *Friedman-Harry Marks Clothing Co.*, 301 U.S. at 75.

58. *Id.* at 73–74.

59. See his dissent in *United States v. Butler*, 279 U.S. 1, 78–79 (1936) (Stone, J., dissenting) and his correspondence with professors Frankfurter and Beard discussed in SCHWARTZ, *supra* note 27, at 200–03.

60. *See* SCHWARTZ, *supra* note 27, at 201, 203–04.

61. *See id.* at 195.

62. *See id.* at 218–19; *see also infra* notes 69–76 and accompanying text.

63. *Id.* at 215–21. This conclusion is largely, though not entirely, consistent with that of Barry Cushman. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT, 209, 224 (1998).

As late as 1940, the Court was still employing the direct affects test, though it was giving that *Lochner*-era formula a more deferential spin.[64] Given the application of a soft standard so recently after the abandonment of a categorical rule of *unconstitutionality*, the JCM might predict numerous Commerce Clause challenges reaching the Court and straining its capacity. But in the five-and-one-half years between *Jones & Laughlin Steel* and *Wickard v. Filburn*,[65] the Court decided only fifteen cases (including *Darby*) reviewing Congress's commerce power to enact a federal law, just under three per year.[66] This is not a staggering number; by way of comparison, the Court decided forty-three *dormant* Commerce Clause challenges to *state* laws in this period (suggesting another potential JCM domain worth investigating).[67] It is certainly possible that the Court *perceived* three Commerce Clause challenges per year to be too many; in recent years, the Court seems to decide one such commerce challenge every five years. So the numbers alone don't disprove the hypothesis that the JCM at least partially explains the deferential standards in *Darby* and *Wickard*.

While it might be unrealistic to look for capacity concerns on the face of the New Deal Commerce Clause decisions for the reasons mentioned above, we might expect to find more candor in the Justices' behind-the-scenes deliberations. But my review of the documentary record underlying *Darby* and *Wickard* reveals no indication that judicial capacity was a concern of the Justices in reaching those decisions. Instead, the Justices struggled over what test to apply and whether the facts of the case met the "direct effects test"—the concerns typical of the legalist model of judicial decisionmaking.[68]

Darby involved a challenge to the federal Fair Labor Standards Act of 1938, which set minimum wages and maximum hours for all workers in or affecting interstate commerce.[69] In addition to direct regulation of wages and hours, Congress as a fall back included a "hot goods" provision which barred interstate shipment of goods made in violation of the wage and hours requirement.[70] This provision directly paralleled the child labor ban struck down in *Hammer v. Dagenhart*.[71] Given the administrative responsibilities over the federal judiciary falling to him as Chief Justice,

64. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393–94 (1940).

65. 317 U.S. 111 (1942).

66. These counts are based on analyzing Supreme Court cases abstracts produced by a Lexis search for "commerce" in Supreme Court decisions during the relevant time periods.

67. *See supra* note 66.

68. *See* SCHWARTZ, *supra* note 27, at 222–25.

69. *Id.* at 218.

70. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 12(a), 15(a)(1), 52 Stat. 1060, 1067–68 (current version at 29 U.S.C. §§ 212(a), 215(a)(1) (2018)).

71. 247 U.S. 251, 254 (1918).

Hughes might be expected to have been at least somewhat capacity-sensitive. But that wasn't so. In conference on the case, Chief Justice Hughes was willing to go as far as overruling *Hammer* and sustaining the hot goods provision, but he expressed serious doubts about the direct regulation of production and employment.[72] These were "not part of interstate commerce," he told his fellow Justices, and the provisions could come within the commerce power only if they had a "close and immediate" or "close and substantial relation to the interstate commerce."[73] Hughes argued that the statute was constitutionally flawed because it "provides no machinery" allowing employers to prove that their businesses lacked a close and substantial relation to commerce in a particular case.[74] As a result, the Act would impose minimum wage requirements on "some little man with a mill."[75] Hughes wasn't concerned that the Court would be overwhelmed with cases brought by "little men with mills." On the contrary, he wanted all of them to have more, not less, judicial process in a system of case-by-case determination. His concerns were doctrinal, not capacity-based: if the Court extended permissible commerce regulation to such "remote relationships," Hughes argued, "our dual system [of federalism] would be at an end."[76]

The other Justices' remarks likewise all focused on doctrinal issues.[77] Even Felix Frankfurter, who as a professor had authored a book on the work of the federal judiciary with much attention to caseload, apparently said nothing about caseload or capacity in the *Darby* deliberations. At conference, Frankfurter noted that the products in question "have to go into [the] stream of commerce."[78] In his memo to Stone, joining Stone's majority opinion, Frankfurter emphasized doctrine, not caseload concerns: "I especially rejoice over (1) the way you buried Hammer v. Dagenhart and (2) your definitive exposure of the empty hobgoblins of the 10th amend[men]t."[79]

---

72. Conference notes, "## 82 and 330, O[ct] T[erm] 1940," Frank Murphy Papers, Roll 123, Bentley Historical Library, University of Michigan [hereinafter Conference notes, Murphy Papers].

73. *Id.*; Conference notes, Dec. 12, 1940, "No. 82, U. S. v. F. W. Darby Lumber Co," William O. Douglas Papers, Library of Congress, Box 52, folder 1 [hereinafter Conference notes, Douglas Papers].

74. Conference notes, Douglas Papers, *supra* note 73.

75. SCHWARTZ, *supra* note 27, at 219 (citing Conference notes, "## 82 and 330, O[ct] T[erm] 1940," Frank Murphy Papers, Roll 123, Bentley Historical Library, University of Michigan).

76. Conference notes, Murphy Papers, *supra* note 72; Conference notes, Douglas Papers, *supra* note 73.

77. SCHWARTZ, *supra* note 27, at 219–20.

78. Conference notes, Murphy Papers, *supra* note 72; Conference notes, Douglas Papers, *supra* note 73.

79. Join memos, *United States v. Darby Lumber Co.*, Harlan Fiske Stone papers, Library of Congress, Box 66.

In November 1942, a year-and-a-half after deciding *Darby*, the Court decided *Wickard v. Filburn*, the case now generally regarded as fully establishing the controlling interpretation of the Commerce Clause to this day.[80] *Wickard* considered a Commerce Clause challenge to the Agricultural Adjustment Act of 1938, by an Ohio farmer who had exceeded his wheat quota in the course of growing a wheat crop that was intended to feed his livestock or be milled into flour for his home consumption.[81] *Wickard* famously held that the Commerce Clause governed small-scale local activities that are neither interstate nor commerce.[82] Surprisingly, in light of the Court's unanimity, the decision had caused Justice Jackson, the opinion's author, to agonize over the issue for months.[83] He left behind an unusually rich record of his internal thought process. Two-and-a-half weeks after *Wickard* was initially argued on May 4, 1942, Jackson circulated a draft opinion that expressed doubts about Congress's commerce power and proposed to order a remand for further factfinding. "To establish the power of Congress over intrastate activity it is of course not sufficient simply to spell out some plausible relationship between such activity and interstate commerce," Jackson wrote.[84] A statute "reaching into the reserved power of the states" could be "justified only by a state of facts showing that the intrastate activities sought to be reached are of such quality and substantiality that what would otherwise be an intrusion is proper for the protection and effective exercise of a granted federal power."[85] Far from yielding to capacity constraint, Jackson's first considered response was to pursue a fact-intensive, case-by-case approach to constitutionality.

Justices Frankfurter and James Byrnes immediately signed onto this opinion, but fortunately for modern commerce doctrine, Chief Justice Stone and Justices Hugo Black and William O. Douglas wanted to decide the merits of the case, presumably to uphold the statute.[86] At a conference the next day, the other six Justices, including Jackson, shifted to a middle ground favoring re-argument the next term.[87] The Court issued an order to rehear the case in October.[88]

---

80. SCHWARTZ, *supra* note 27, at 223.

81. *Id.*

82. *Id.*

83. SCHWARTZ, *supra* note 27, at 224–25; *see* CUSHMAN, *supra* note 63, at 212–22.

84. *Wickard v. Filburn*, No. 1080, May 22, 1942 (unpublished opinion), 9–10, 11, Robert H. Jackson Papers, Library of Congress, Box 125.

85. *Id.* at 11–12, 13.

86. SCHWARTZ, *supra* note 27, at 224.

87. *Id.*

88. Join memos to draft opinion (Byrnes, Frankfurter), Robert H. Jackson Papers, Library of Congress, Box 125; Stone, "Memorandum in re No. 1080 – Wickard v. Filburn," May 25, 1942, Robert H. Jackson Papers, Library of Congress, Box 125; Jackson to Stone,

As Jackson agonized over the opinion that summer, he set out his thoughts in June and July in two lengthy memos to his law clerk.[89] Jackson observed that the Court "felt that there must be some standards of economic effects," such as the direct-indirect effects test "made by Chief Justice Hughes in the *Schechter* case and referred to again by him in the *Jones & Laughlin* case."[90] But these formulations "have not been clear," and even the *Darby* test "has no real value, as this case amply demonstrates."[91] In the end, Jackson was inclined to throw his hands up in resignation. "Our years of experience have proved that legal phrases of limitation have almost no value in weighing economic effects. . . . In such a state of affairs the determination of the limit is not a matter . . . of constitutional law, but one of economic policy."[92] Deferring to Congress "for the intelligent and moderate use of [its] powers . . . is far better than to keep up a pretense of sharing responsibility for the scope of the commerce clause which [the Court has] no standard to discharge . . . ."[93] In the end, Jackson concluded, "[w]e cannot say that there is no economic relationship between the growth of wheat for home consumption and interstate commerce in wheat . . . .[W]e have no legal standards by which to set our own judgment against the policy judgment of Congress." [94]

In the end, of course, Jackson wrote the final version of the opinion holding that "even if appellee's activity be local and though it may not be regarded as commerce," it can be regulated under the Commerce Clause "if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[95] For Jackson and the *Wickard* Court, the scope of the Commerce Clause was based on "economic effects," a concept insufficiently susceptible to judicial management to permit non-deferential review of congressional judgments.[96] Jackson's hand-wringing reflected a concern, not for judicial capacity, but for what Coan distinguishes as "judicial *competence*," meaning "the capacity of the judiciary to produce reliably good decisions."[97]

May 25, 1942, Robert H. Jackson Papers, Library of Congress, Box 125; Douglas to Jackson, May 25, 1942, Robert H. Jackson Papers, Library of Congress, Box 125; Stone, "Memorandum in re No. 1080 – Wickard v. Filburn," May 27, 1942, Robert H. Jackson Papers, Library of Congress, Box 125.

89. SCHWARTZ, *supra* note 27, at 224.

90. "[First] Memorandum for Mr. Costelloe re Wickard case," Jun. 19, 1942, at 3, Robert H. Jackson Papers, Library of Congress, Box 125.

91. *Id.*

92. "[Second] Memorandum for Mr. Costelloe re Wickard case," Jul. 10, 1942, at 15, Robert H. Jackson Papers, Library of Congress, Box 125.

93. *Id.* at 18.

94. *Id.* at 20.

95. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

96. *Id.* at 123–25.

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

III. IMPLICATIONS

It is important to be clear about what the brief historical inquiry into the New Deal revolution in Commerce Clause doctrine does and doesn't tell us about the JCM. It is not, and is not intended to be, a refutation of the JCM. Simply put, the historical record tells us only that the Justices did not seem to be consciously motivated by capacity concerns as they transformed commerce power doctrine between 1937 and 1942. But the evidence leaves open at least two possibilities consistent with the JCM. First, and most obviously, the JCM could be fully sustained by the Court's adherence to JCM-consistent doctrines that are *maintained over time* for capacity-based reasons, even if the doctrines were initially adopted for other reasons. Indeed, Coan essentially makes this point, when he draws an inference in favor of the JCM from the fact that post-New Deal Courts have largely refrained from re-establishing categorical unconstitutionality rules or mushy standards in its commerce jurisprudence.[98]

Second, it is possible that Supreme Court Justices, even the New Deal Justices, consciously or unconsciously fold capacity concerns into more traditional legalist doctrines. The idea of deference to legislatures as a principle of constitutional adjudication, which goes back well into the nineteenth century, might always have encompassed (ideologically, if not logically) the premise that the price of judicially imposed limits on legislative enactments is constant vigilance. It is not far-fetched to suppose that Justices develop intuitions about capacity-constrained domains as they become socialized into the norms of Supreme Court adjudicative practice, even if they have not always or often articulated those intuitions.

Both these possibilities, it seems to me, require investigation if the JCM is to be further developed. It remains to provide a convincing account that the strategic and legalist models are insufficient to account for the Court's deferential approach to Commerce Clause cases. Coan concludes:

> The memory of [the 1937] political backlash and the institutional threat it posed to the Court might plausibly have deterred another all-out assault on the regulatory state. But it does not explain why the Court's liberals and conservatives have both refrained

98. *Id.* at 65–66. I disagree with the suggestion made by at least one fellow symposium author that adherence to a deferential Commerce Clause standard here might be entirely explained by conservative Justices' doctrinal agreement with it. *See* Gil Seinfeld, *Eighty Years of Federalism Forbearance: Rationing, Resignation, and the Rule of Law*, 2020 WIS. L. REV. (forthcoming). This legalist/attitudinalist explanation may be true up to a point—conservatives may not wish to roll back the clock to 1936—but it fails to explain why conservative Justices have not to date crafted a standard by which the Court could award itself the discretion to pick and choose among federal statutes and strike down only the ones that they find particularly distasteful—such as the Sarbanes-Oxley Act and as they nearly did with the Affordable Care Act. It is thus an incomplete explanation that is insufficient to knock down the JCM in the commerce power domain.

> from opportunistically invalidating commerce-power legislation that they oppose on ideological grounds. Nor does it explain why the Court's conservatives have never been seriously tempted to impose meaningful across-the-board limits that would curb, not overturn, the modern regulatory state.[99]

Here, I wonder whether Coan has given the conventional, non-JCM argument its due. The New Deal turnaround, this argument goes, was the result of Hughes's strategic reaction to political backlash, whether the backlash was the Court-packing plan itself or the broader trend, which included numerous proposed court-curbing constitutional amendments. But once Roosevelt had appointed a handful of new Justices, a new doctrinal paradigm took over based on substantive legalist views of deference to Congress that had their roots in the Progressive-era jurisprudence. This extremely familiar story gets us at least to the early 1970s. Here, I think Coan may underestimate the extent to which judicial conservatives were either consciously committed to, or had internalized, a legal process/neutral principles mode of thought, opposing judicial "*Lochner*izing" on economic matters as a basis for opposing Warren-era rights creation. Rehnquist was certainly in this tradition. For a JCM counter-narrative, I would look first for evidence of capacity concerns in legal process academic literature.

Nevertheless, I think Coan's assessment of the Commerce Clause is "good enough for the present purpose" of introducing the JCM. A truly rigorous effort to disentangle strategic, doctrinal, and capacity-based motivations for the Justices' acquiescence in Commerce Clause deference is a book in itself. Despite specifying a time range for its thesis from 1937 to the present, *Rationing the Constitution* is not a historical work, and doesn't need to be in order to make a strong and general prima facie case for the model.

What makes Coan's reading of the Commerce Clause most promising may be the existence of circumstantial evidence of a generalized concern with docket control that began to emerge in the Court in the mid-1980s. Because this era was the dawn of a more aggressive conservative jurisprudence of judicial review, it marks the beginning of when we would really expect to see an opportunistic conservative Court make a run at deferential judicial review of the commerce power. It was in the 1980s that the Court began talking in terms of a litigation explosion, trimming back civil discovery procedures, embracing mandatory arbitration, and tightening standing rules, among other things. It was also around this time that Rehnquist became Chief Justice, taking on administrative responsibilities and docket-control perspectives. At this point, interestingly, many if not most of the Court's "federalism" rulings

99. *Id.* at 67.

trimming back the commerce and other congressional powers seemed aimed at controlling the federal docket.[100] Note that hard-edged categorical rules work in two directions. On the one hand, they make clear the narrow range of permissible challenges to purported commerce regulation. On the other hand, they may be used to enforce capacity concerns by invalidating the creation of new rights. There is some evidence to suggest that Chief Justice Rehnquist created the economic/non-economic distinction in *Lopez* in direct anticipation of a constitutional challenge to VAWA, which he feared would inundate the federal courts with family-law cases.[101] While this aspect of *Lopez* and *Morrison* may fall within what Coan calls "normal domains" outside the JCM, it at least provides evidence of a capacity-consciousness on the Court that did not appear to be salient in the late New Deal.

At the end of the day, although we are now in year fifty of the long conservative Supreme Court, it is worth remembering that the generation of judicial conservatives Rehnquist and Robert Bork came of age during the Process School's dominance. It is only the newest generation of conservatives who have found it intellectually sustainable to lever apart a liberal deference to economic regulation from a conservative abhorrence of judicial activism, and thereby indulge in what conservatives like to call "judicial engagement." In that sense, the clearest evidence of the JCM at work is the *NFIB* case, where John Roberts, the new chief judicial administrator, took pains, as Coan points out, to make the Commerce Clause ruling appear to be sui generis rather than an open invitation to a new wave of Commerce Clause challenges.[102] Moreover, it is significant that Roberts upheld the Affordable Care Act under the taxing power, reaffirming the highly deferential doctrine that any tax that plausibly raises revenue will be upheld as a "tax" rather than struck down as a "penalty."[103] Nevertheless, dressed up with the emperor's new clothes of originalism, it remains to be seen whether the Court will, now, make more serious inroads into Commerce Clause deference. The true test of the JCM may be yet to come in Commerce Clause cases.

---

100. SCHWARTZ, *supra* note 27, at 240–42.

101. This astute observation was first made by Professor Nourse. Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women's Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 16 (1996); *see also* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 122 (2004).

102. COAN, *supra* note 1, at 64–65.

103. *Id.* at 64; *see Nat'l Fed'n Indep. Bus. v. Sebelius*, 517 U.S. 519, 569, 573–74 (2012).