

2019

Rationing the Constitution: Beyond and Below

Aaron-Andrew P. Bruhl

William & Mary Law School, apbruhl@wm.edu

Repository Citation

Bruhl, Aaron-Andrew P., "Rationing the Constitution: Beyond and Below" (2019). *Popular Media*. 460.
https://scholarship.law.wm.edu/popular_media/460

Tuesday, September 10, 2019

Rationing the Constitution: Beyond and Below

Guest Blogger

For the symposium on Andrew Coan, [Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making](#) (Harvard University Press 2019).

Aaron-Andrew P. Bruhl

In *Rationing the Constitution*, Andrew Coan presents a judicial-capacity model of the Supreme Court's behavior. The model starts from the unremarkable premise that the Supreme Court can decide only a limited number of cases. The Court's capacity constraints come from material limits (budget, staff, etc.) and, more importantly in Coan's telling, from norms of professionalism that deter the Justices from taking on cases at a rate that would compromise the quality and craft of the Court's opinions. The other important underpinning of the judicial-capacity model, besides the fact of constrained capacity, is the observation that the Court's limited capacity does not matter in every doctrinal space, but rather the constraints bite in what Coan calls "capacity-constrained domains." Those are domains that feature high volumes of litigation or high stakes or, especially, both. High-stakes cases, for these purposes, are those in which the Supreme Court would feel compelled to grant certiorari, most paradigmatically cases that strike down federal statutes as unconstitutional.

The above might not sound like much of a foundation upon which to build an interesting theory of judicial behavior, but Coan shows that judicial capacity is an important determinant of the content of constitutional doctrine. In particular, the judicial-capacity model predicts that in capacity-constrained domains the Court will have to either retreat from the scene by announcing doctrines of deference to the political branches or employ clumsy categorical rules that may have little first-best merit but at least prove easy for the lower courts to apply in a uniform way. The heart of the book is a series of case studies applying the model in fields ranging from the nondelegation doctrine to equal protection to federalism. The book is a very welcome contribution to the field of institutionalist approaches to courts, for it provides an account of how doctrine is shaped not only by the law's own internal logic but in which, *contra* the attitudinalists, doctrine is not merely the product of the Justices' political preferences either. Coan's valuable contribution is to show the influence of a neglected form of institutional constraint.

I am largely persuaded that Coan's judicial-capacity model describes and explains at least a meaningful amount of the Supreme Court's behavior. Just how far it succeeds is largely an empirical question. In the remainder of this review, I sketch out three new case studies drawn from the Court's October 2018 Term. The topics I have selected provide additional tests for the capacity model and, more importantly, suggest some elaborations on the basic model or highlight other interesting features of it.

The first case is *Rucho v. Common Cause*, which held partisan-gerrymandering claims nonjusticiable. Although *Rucho* is new and more definitive, the Court's hands-off approach to partisan gerrymandering is not new, and so I am surprised that partisan gerrymandering does not figure in the book. It would seem to be a supportive test case. Although one could explain the Court's behavior in non-capacity-related terms — in particular by invoking ideology or even low partisanship — the Court's retreat is at least consistent with the capacity model. Perhaps this area did not make the cut because Coan believes it is equally or better explained by those other factors. Or is this not a "high stakes" domain? Coan's central example of high stakes is a decision striking down a *federal* statute, but that does not exhaust the category of high stakes, and partisan gerrymandering would seem to have at least moderately high stakes in Coan's sense.

Another benefit of discussing partisan gerrymandering is that it would shed light on the interaction between the capacity model and congressional choices about the Court's appellate jurisdiction. A capacity-constrained domain is one that threatens a large number of cases that the Court would feel compelled by professional norms to review. But almost alone among claimants for the Court's attention, some election cases have privileged access to the Court in the form of mandatory appellate jurisdiction. (Indeed, the particular risk to the Court's docket from mandatory appellate jurisdiction came up during [oral argument](#) in *Rucho*.) The doctrine in a field with mandatory jurisdiction should therefore be especially susceptible to capacity influences. And since Congress controls the distribution of mandatory and discretionary jurisdiction, Congress can indirectly (and perhaps unwittingly) shape the substance of constitutional law through its jurisdictional regulations. To put the matter starkly, would partisan gerrymandering claims be justiciable if cases like *Rucho* came to the Court on certiorari rather than appeal?

The next data points — or maybe harbingers of future more diagnostically powerful data points — come from a pair of thematically related cases: *Gundy v. United States*, which concerned the nondelegation doctrine,

and *Kisor v. Wilkie*, which considered whether to overrule the *Auer* deference doctrine. The nondelegation doctrine is one of Coan's leading examples of the explanatory power of the capacity model. And doctrines of judicial deference to agencies, though often justified on grounds of accountability or institutional competence, also protect the Court's capacity by tending to reduce the number of circuit splits. *Gundy* was another failed attempt to establish a vigorous nondelegation doctrine, but one could easily see things turning out differently in a future case in which Justice Kavanaugh, who did not participate, joins with other skeptics of the administrative state to cut back on delegations.

Such a future decision would probably present Coan's account with a powerful counterexample. To be sure, one could imagine a strong nondelegation doctrine that is compatible with the capacity model — such as a nondelegation doctrine that uses blunt categorical rules that may cause havoc in the administrative state but would at least prove easy enough for the lower courts to apply. In any event, the current composition of the Court and the concurring and dissenting opinions in *Gundy* suggest that a probative test for the capacity model is in the offing. *Kisor*, which cut back on but did not overrule *Auer* deference, is not very significant for Coan's project in itself but it reminds us that the higher-stakes matter of *Chevron* deference's future looms on the horizon, with potentially substantial implications for the capacity model. Because Coan's model is descriptive and explanatory, its accuracy is tied to the Court's membership and appetites, and every October presents an opportunity for reevaluation or even the conclusion that the model has become false.

Last, I want to describe a case that presents a normative challenge to the Court's behavior and suggests an extension of the judicial-capacity model. The case is *United States v. Davis*, which held unconstitutionally vague a federal criminal statute that applied to the use of a firearm in connection with a "crime of violence." *Davis* followed on from *Sessions v. Dimaya* (2018) and *Johnson v. United States* (2015), which invalidated similar language in other criminal statutes. These decisions create a lot of work for lower courts as defendants sentenced under these frequently used statutes seek resentencing. Part of the reason is that unlike many pro-criminal-defendant rulings, these cases apply retroactively to final convictions. See *Welch v. United States* (2016) (holding *Johnson* retroactive); 2016 Judicial Business Report — [District Courts](#) (observing that "prisoner petitions jumped 197 percent (up 19,588 to 29,546 petitions) as motions to vacate sentences rose 350 percent (up 19,317 to 24,837 petitions)"); 2016 Judicial Business Report — [Courts of Appeals](#) (attributing 188-percent increase in original proceedings in courts of appeals to requests for leave to file successive habeas petitions in light of *Johnson* and *Welch*).

No matter how much these cases test the capacity of thinly stretched lower courts, the cases do not pose much of a challenge to the descriptive accuracy of Coan's judicial-capacity model. True, the professional norms that Coan attributes to the Justices include a desire to maintain adequate access to timely justice in the system as a whole. But the capacity that matters most to them, based on Coan's case studies, is the Court's own capacity, which requires doctrine that avoids generating too many cases the Court must take up. Some decisions can advance both of those capacity-related goals, such as creation of a rule of deference to the political branches, which tends to depress litigation in the system as a whole. But the goals can also come into conflict. In Justice Alito's view, the constitutional holding in *Johnson* reflected the Court's desire to "rid [its] docket" of a seemingly endless stream of "bothersome" cases addressing circuit splits over the "violent felony" and "crime of violence" definitions. *Johnson*, 135 S. Ct. 2573-74 (Alito, J., dissenting). To that extent, the *Johnson/Dimaya/Davis* line is consistent with the (Supreme Court-centered) capacity model, though not compelled by it (given that the circuit splits do not have high enough stakes to demand more than one or two cert grants a year). True, the decisions did predictably swell the dockets of the lower courts, leading to many thousands of requests for resentencing. Yet those resentencings, numerous as they are, will not generate too many high-stakes cases the Court will feel compelled to review.

As a matter of describing the Justices' own preferences, I think Coan is right to lay the emphasis on the Court's own capacity, but this raises normative questions about whether it is proper for the Court to care so much about its own capacity compared to that of other courts. Are the Justices just being selfish? Or are they right to view their own docket as a precious national resource? Is it socially valuable for them to write few but elaborate opinions? More valuable than faster and better justice in the lower courts?

Considering the lower courts' capacity also allows a generalization of the capacity model. Lower courts too have some lawmaking discretion, even in the district courts, and they are sensitive to burdens on themselves even if the Court isn't. When faced with sacrificing their own professional standards (or leisure or other goals), they can be expected to take steps to limit their own docket load, even if this means mangling or undoing the Court's rulings. Scholars have documented such behavior, which shows the broad applicability of judicial-capacity models (emphasis now on the plural), such as the one Andrew Coan has so ably and valuably presented.

Aaron-Andrew P. Bruhl is Associate Dean for Research and Faculty Development and Professor of Law at William & Mary Law School. His publications are available [here](#).