COMPARATIVE CAPACITY AND COMPETENCE

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INTRODUCTION

Andrew Coan's excellent book, *Rationing the Constitution*, sheds important new light on an important facet of Supreme Court decision-making: judicial capacity.[1] Professor Coan argues persuasively that courts' capacity—and, in particular, the U.S. Supreme Court's capacity—plays an important role in shaping various constitutional doctrines.[2] By "capacity," Coan means the number of cases that courts can realistically decide while preserving the judiciary's own professional commitments to careful deliberation and reasoned decision-making.[3] Because judges realize that their resources are limited, they shape various constitutional doctrines to deter potential litigants, lest a flood of constitutional plaintiffs inundate them with more cases than they can responsibly handle.[4] As Coan

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1. *See* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).
2. *Id.* at 13.
3. *Id.* at 15.
4. *Id.* at 25.

explains, "[t]he model's core prediction is that, above a certain threshold, and especially in combination, high stakes and high volume will strongly constrain the Court to employ some combination of strong deference and categorical rules."[5]

Coan's attention to judicial capacity is a shift away from the academy's historic attention to the related but distinct issue of judicial competence.[6] Whereas "competence" encompasses judges' expertise and skill, "capacity" is a matter of bandwidth. Coan explains that the two are closely linked. Judges might be capable of deciding a certain kind of case in theory, but if in practice they receive too many cases, their theoretical competence doesn't get them very far. Capacity helps determine competence.[7]

Coan is surely correct that capacity partially *does* shape competence. The same is true, however, of the political branches. The judiciary may have the much smaller budget,[8] but it is not the only part of our government that faces resource constraints. Nor is the judicial branch's competence uniquely suspect.

This symposium contribution considers whether and how comparative capacity and competence issues should inform judicial decision making. Building on some of my earlier work, it contends that courts should consider both their own and the relevant political branch's capacity and competence.[9] Judicial capacity constraints will necessarily play a role here, but this inquiry should be comparative. None of this is to attack Coan's perceptive account of judicial decision-making but, rather, to suggest that his insights raise related normative questions with which judges and scholars should grapple.

I. THE CASE FOR COMPARATIVE COMPETENCE INQUIRIES

Coan argues persuasively that capacity limits judicial competence.[10] Had judges infinite time and resources, they could carefully examine each

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5. *Id.* at 24.

6. The legal academy may have been surprisingly inattentive to these issues before Professor Coan's important book, but constitutional litigators have long recognized them. Indeed, constitutional plaintiffs' lawyers often try to persuade judges that vindicating their clients' claims in a particular case would not open the litigation floodgates. In other words, they try to allay judges' capacity concerns.

7. *See* COAN, *supra* note 1, at 180–81 (noting that courts are not "free to spend unlimited time and energy considering every constitutional issue on a case-by-case basis").

8. *See id.* at 17.

9. *See generally* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2068 (2011) [hereinafter Berger, *Administrative Law Norms*].

10. *See* COAN, *supra* note 1, at 179–89.

case's legal and factual complexities. Judicial time and resources, however, are limited and one reason to "doubt judicial competence."[11]

Though Coan's account is mostly descriptive, it also includes a normative corollary. Judicial capacity not only shapes constitutional doctrine but *should* shape it. In "capacity-constrained domains," Coan writes, courts "may simply lack the capacity to engage in significantly more robust review."[12] Thus, he continues, "[t]he judicial capacity model bolsters the case against the courts by identifying an additional and largely unappreciated reason to doubt judicial competence."[13] Judges and academics must account, then, for capacity's effects on judicial competence.

This all makes sense, but courts are not the only institution with sometimes compromised competence. It is certainly true that we should not assess judicial review without reference to problems of judicial capacity and competence, but we could make a similar point about other governmental institutions. The judiciary is not the only branch suffering from insufficient resources. To be sure, the federal judiciary's budget pales next to legislative and executive budgets,[14] and some parts of the federal government have an abundance of resources.[15] But some don't, and many state and local governments face severe budgetary constraints. Partially for this reason, public actors' competence varies from case to case.

Of course, as prominent judges and scholars have long recognized, the political branches' competence often *is* superior to courts'. Justice Holmes' famous dissent in *Lochner v. New York*[16] contended that legislatures, rather than courts, should make social and economic policy.[17] Building on this idea, legal process thinkers, most famously Henry Hart and Albert Sacks, asked which institution is best suited to making decisions in a particular sphere.[18] These and later thinkers frequently

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11. *Id.* at 181.

12. *Id.*

13. *Id.*; *see also id.* at 189 (arguing that courts "*should* leave most decisions to other institutional actors") (emphasis in original).

14. *See* ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2019 CONGRESSIONAL BUDGET SUMMARY i (Feb. 2018), https://www.uscourts.gov/sites/default/files/fy_2019_congressional_budget_summary_final_0.pdf [https://perma.cc/7G4M-NEHA] (noting the federal judiciary's 2018 assumed appropriation of $7 billion).

15. *See* Kimberly Amadeo, *US Federal Budget Breakdown*, THE BALANCE (June 25, 2019), https://www.thebalance.com/u-s-federal-budget-breakdown-3305789 [https://perma.cc/JU24-XQPU] (explaining that the Department of Defense has a base budget of $636 billion).

16. *Lochner v. New York*, 198 U.S. 45 (1905).

17. *See id.* at 75–76 (Holmes, J., dissenting).

18. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 3 (William N. Eskridge & Philip P. Frickey eds., 1994) ("[I]nstitutionalized procedures and the constitutive arrangements

sought to constrain courts on the theory that they lack the political and epistemic authority of the public actors they review.[19]

However, while judicial deference on these grounds is often warranted, it can also go too far, because the political branches themselves can be manifestly incompetent. Sometimes, the government's competence is compromised for capacity reasons. For instance, some administrative agencies lack the resources to fulfill their statutory mandates. A particular agency's competence, then, turns in some measure on resource allocations, which might fluctuate over time, depending on a variety of political, economic, and other factors.[20]

Other times, the political branches lack competence, because they resist making use of the resources they do have. For example, while Congress' fact finding capacity is greater than courts', it doesn't always utilize that superior capacity.[21] In such cases, Congressional competence may be diminished, because it lacks the political will to examine evidence carefully.

The political branches' capacity and competence, then, are not static. They can vary between and within departments and also over time. The question is what courts, which face their own capacity concerns, should make of this point. Courts' competence will sometimes be superior to the political branches'. The problem is that comparative capacity and competence inquiries are themselves time consuming. As Coan would remind us, they tax capacity. As a normative matter, then, how should courts' own capacity limitations shape their comparative institutional inquiries?

Constitutional scholars have long wrestled with variants of this question. Constitutional law often boils down to the question of "who decides who decides."[22] As scholars like Neil Komesar and Adrian Vermeule have emphasized, this question necessarily implicates institutional choice—that is, examination of the different branches' relative strengths and weaknesses.[23] This is not to say that courts

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establishing and governing them are obviously more fundamental than the substantive arrangements in the structure of a society . . . ."); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2033 (1994) (summarizing the legal process school).

19. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078–79 (2008).

20. *See, e.g.*, PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 77–80 (2002) (discussing appropriation process for agencies).

21. *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 21 (2009) (challenging the idea that legislatures are superior fact-finders because of repeated failure to adequately utilize fact-finding capabilities).

22. NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 162 (2001).

23. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) [hereinafter KOMESAR,

necessarily find institutional considerations decisive. Constitutional doctrine, indeed, encompasses a wide variety of inquiries and sometimes ignores institutional considerations, perhaps because, as Coan might suggest, courts lack the capacity to examine such issues thoroughly.[24] Still, given that constitutional law essentially allocates decision-making authority to one institution or another, courts ideally *should* examine both their own capacity and competence and the political branches'.[25] The inquiry should be comparative.[26]

II. COMPETENCE, CAPACITY, AND DEFERENCE

A. An Overview of Institutional Deference Determinations

If we accept that courts should compare their own competence and capacity to the other branches', the question is how to build such inquiries into judicial decision-making. One approach might be to build such deference into the doctrine itself. As Professor Coan explains, various constitutional doctrines in diverse areas such as commerce, spending, non-delegation, and equal protection are deferential in many or all contexts.[27] To be sure, there are important exceptions within some of these doctrines, and there are other areas, such as substantive due process, in which the Court seems non-deferential, at least at times. Nevertheless, Coan makes a compelling case that many constitutional doctrines reflect courts' own anxieties about their limited capacity.

A different approach would not bake deference into the doctrine but entertain an analytically distinct deference determination based on an institutional analysis of the political branch at issue. Such an analysis would focus on the relevant branch's political and epistemic authority in the given context and on the court's own comparative authority.[28] Of course, this analysis is complicated by the fact that it would often be layered atop the substantive constitutional analysis, such as the tiers of

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IMPERFECT ALTERNATIVES]; ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 1 (2006) (asking "What decision-procedures should particular institutions, with their particular capacities, use to interpret this text?").

24. *See* COAN, *supra* note 1, at 178–81; Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 661–63 (1988) (discussing the difficulties of courts examining an increasingly complex government).

25. *See* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 499 (2013).

26. *Cf.* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 23, at 3 (advocating for "comparative institutional analysis").

27. *See* COAN, *supra* note 1, at 57–136.

28. *See* Horwitz, *supra* note 19, at 1078–79.

scrutiny.[29] In other words, the institutional analysis would yield an approximate level of deference, which, in turn, would color (but not predetermine) the court's substantive doctrinal analysis.

Though this approach may sound novel, the Court already sometimes engages in a variation of it, applying constitutional doctrine with a more or less deferential gloss. Sometimes, for example, the Court concludes that an administrative agency accused of violating an individual's rights deserves less deference, because it has not made use of its ostensible expertise. In *Hampton v. Mow Sun Wong*,[30] for instance, the plaintiffs challenged on equal protection and due process grounds a Civil Service Commission rule that barred resident aliens from employment in the federal competitive civil service.[31] Though the case raised constitutional rather than administrative law claims, the Court nevertheless expressed concern that the agency did not fulfill its "obligation to perform its responsibilities with some degree of expertise, and to make known the reasons for its important decisions."[32]

The Court did not explain precisely how the institutional analysis affected the constitutional outcome, but the agency's institutional limitations militated in favor of undeferential review.[33] The Court, thus, struck down the rule. Significantly, the decision did not purport to alter equal protection or due process doctrine in other cases. The deference determination, then, was a separate step in the Court's analysis, distinct from the relevant doctrinal tests and unique to the agency action in that case.

To be sure, judges sometimes instead bake deference into a particular doctrinal test. The non-delegation doctrine, for example, is an especially deferential doctrine (at least for now).[34] An analytically distinct deference determination, then, is not the Court's only option in thinking about deference. However, a separate deference determination may be especially appropriate where the relevant institutional factors vary from case to case—that is, where the political branches' political and epistemic authority are likely to change depending on the circumstances, such as in cases involving administrative agencies.

Even outside the agency context, courts could calibrate the deference they extend based on how the political branch at issue has done its job. For example, courts defer inconsistently to congressional findings. The Court's approach to congressional fact-finding in these cases is

29. *See* Berger, *Administrative Law Norms*, *supra* note 9, at 2074.

30. 426 U.S. 88 (1976).

31. *Id.* at 90.

32. *See id.* 115.

33. *See id.* at 99–100, 115–17.

34. *But see Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (advocating for less deferential non-delegation doctrine).

haphazard,[35] but ideally it ought to depend on the care with which Congress has found the relevant facts.

Though some scholars contend that courts either should or should not defer to congressional findings as a matter of course, a more careful approach would calibrate such deference based on how Congress has acted in a particular instance.[36] Congress's factual findings, on this theory, deserve deference only where Congress has actually made use of its resources to examine evidence carefully.[37] Where Congress has simply asserted things it wishes to be true, there's a good argument that it doesn't deserve deference.[38]

B. Comparative Competence Inquiries and Administrative Agencies

This kind of comparative-competence inquiry may be especially useful in certain constitutional cases involving administrative agencies. Courts often ignore the possibility that they should review administrative policies differently than legislative ones, even though agencies differ from Congress in important ways.[39] Agencies' inherent advantage is their ostensible expertise, which usually surpasses legislatures'.[40] Their inherent disadvantage is their democratic accountability. Though executive agencies in theory answer to the President,[41] in practice, much agency action happens far outside the public eye and arguably lacks democratic legitimacy.[42]

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35. *Compare Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (rejecting Congressional findings underlying Americans with Disabilities Act), *with Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (deferring to congressional findings in Family Medical Leave Act).

36. *See, e.g.*, William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 919 (2013).

37. *See, e.g.*, *id.* at 906–26; Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170–71 (2001).

38. *See* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1175 (2007) ("[O]ften [Congress members] are locked into positions by ideology or political pressure before the hearing ever begins. Then the hearing is a charade."); John O. McGinnis & Charles W. Mulaney, *Judging Facts like Law*, 25 CONST. COMMENT. 69, 96 (2008) (noting that sometimes members of Congress try to create a legislative record that puts "legislation in the most favorable light").

39. *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 765–66 (1997).

40. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 19 (1985) (explaining that agency expertise is one of the primary justifications for the administrative state).

41. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

42. *See, e.g.*, Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 59 (2008); Richard B. Stewart, *The Reformation of*

Importantly, though, an agency's epistemic and political authority can vary tremendously depending on the circumstances. If institutional characteristics matter, judicial deference should depend on the agency's authority in a particular context. An agency's political authority in a particular case might depend on a host of factors, including, *inter alia*, the specificity of legislative guidance, the amount of political oversight, and the transparency of agency action.[43] Its epistemic authority could turn on its level of expertise, its time and resources to study a problem, and the thoroughness of its consideration.[44] These inquiries, of course, are already very familiar to courts from administrative law cases.[45] My proposal here is that these same factors help guide deference determinations in certain constitutional cases.

Such a case-by-case approach recognizes that a one-size-fits-all doctrine fails to account for the great diversity of agencies and agency actions.[46] A deferential or undeferential general doctrine based on agencies' institutional features, then, risks applying generalizations about agency action to specific instances where they don't make sense. A more nuanced approach would calibrate the deference due to the agency based on the relative competence of the agency in a given case.

This kind of institutional analysis would be particularly useful in fleshing out the deference owed to agencies in individual rights cases, like *Mow Sun Wong*.[47] The Supreme Court has been very inconsistent in how it approaches these questions of deference. Courts sometimes reflexively grant institutionally-based deference—but not always. In some cases, for example, the Court expresses concern that an *agency*—rather than a more politically accountable unit of government—is acting.[48] Oftentimes, however, the Court seems oblivious to these factors.[49]

American Administrative Law, 88 HARV. L. REV. 1667, 1675–84 (1975) (rejecting theory of administrative law that conceives of agency as "transmission belt" for implementing legislative preferences).

43. *See* Berger, *Administrative Law Norms*, *supra* note 9, at 2059–67.

44. *See id.* at 2067–70.

45. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 527–33 (2003); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 483 (2010).

46. *See United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

47. My focus is cases in which administrative action allegedly violates the Constitution, not cases involving "ordinary" administrative law, such as claims that particular agency action is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(a) (2016). Relatedly, my theory would not apply in areas like the non-delegation doctrine, where the questions involve larger separation-of-powers issues and do not turn on the particulars of agency behavior (though they do turn on the details of Congress's delegation).

48. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Freedman v. Maryland*, 380 U.S. 51 (1965).

49. *See, e.g.*, *Baze v. Rees*, 553 U.S. 35 (2008); *Korematsu v. United States*, 323 U.S. 214 (1944).

Even in cases that present similar questions, the Court is inconsistent. For example, two canonical affirmative action cases, *Regents of the University of California v. Bakke*[50] and *Grutter v. Bollinger*,[51] approach these issues differently. In *Bakke*, Justice Powell's famous opinion emphasized that the university (that is, an administrative agency), rather than the state legislature, had crafted a policy that arguably infringed on equal protection principles. "[I]solated segments of our vast governmental structures," wrote Powell, "are not competent to make those decisions [about important policy questions], at least in the absence of legislative mandates and legislatively determined criteria."[52] A quarter-century later in *Grutter*, the Court seemed untroubled by the fact that an agency, the University of Michigan Law School, had designed the policy in question. Indeed, the Court in *Grutter* explicitly deferred to the university, even though California and Michigan had delegated similar authority to their universities.[53]

The proposal here would help bring some order to this chaos. Specifically, it would ask courts to supplement a traditional doctrinal analysis (*e.g.,* free speech, equal protection) with an institutional deference determination. To be sure, courts can apply such doctrine without any reference to the institutions at issue, but if institutional competence matters, such a narrowly doctrinal approach oversimplifies the problem of institutional choice. Individual rights doctrine, after all, usually does not account for *who* is acting within the government and therefore tends to treat elected legislatures, administrative agencies, and other public actors as, more or less, the same. But they are not the same. Administrative agencies differ from legislatures in important respects. Even within the administrative sphere, some agencies are more competent than others, and some agency designs better facilitate accountability and performance.[54] Thus, where the agency has acted with political authority, expertise, and procedural regularity, more deference is appropriate than where it has not. Phrased somewhat differently, concerns about judicial capacity and

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50. 438 U.S. 264, 306 (1978).

51. 539 U.S. 306 (2003).

52. *Bakke*, 438 U.S. at 306.

53. *See* CAL. CONST. art. IX, § 9(a); MICH. CONST. art. VIII, § 5; Berger, *Administrative Law Norms*, *supra* note 9, at 2031.

54. *See, e.g.*, Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L. J. 1002, 1009 (2017) (examining features of institutional design that help shape agency's political responsiveness); Paul Sabatier, *The Acquisition and Utilization of Technical Information by Administrative Agencies*, 23 ADMIN SCI. Q. 396, 411–13 (1978) (examining variables affecting administrative agencies' acquisition and utilization of technical information); Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1117–29 (2015) (using typology of expertise to highlight complex and multifaceted nature of agency expertise).

competence would militate more strongly for deference where the relevant political branch itself demonstrates genuine competence.

Of course, under a comparative competence inquiry, courts often will compare unfavorably to the political branches, especially in their understanding of "the realities of administration, and the manner in which power, including and most especially political power, operates in context."[55] But while the judiciary may be at a disadvantage in many cases, the political branches do not always make use of their comparative advantages. As Professor Coan points out, political branch officials, bowing to political pressures, may ignore their expertise.[56] While judges' fact-finding capacities are limited, they do also have access to legislative and administrative records, as well as other forms of fact-finding, such as trial transcripts and amicus briefs.[57] Moreover, in some cases, it may turn out that an administrative agency is acting in secrecy with minimal expertise or procedural regularity. Where agencies act unprofessionally, there's a good argument that judicial deference is undeserved.

III. COUNTER-ARGUMENTS AND COMPLICATIONS

My basic contention so far is that courts should weigh their own capacity and competence against the relevant political branch's, especially in individual rights challenges to administrative action. There are, of course, important counter-arguments and complications to consider. It is impossible to do justice to them all in a short symposium contribution. Nevertheless, a few are worth identifying briefly to flesh out my own theory and to highlight interesting questions that Professor Coan's exciting project raises.

A. Comparative Institutional Analysis and the Problem of Fallible Judges

Coan's argument raises serious questions about my proposal. As he puts it, because of judicial capacity limitations, courts "*should* leave most decisions to other institutional actors."[58] Coan's argument draws some inspiration from Komesar's and Vermeule's concerns about the judiciary's limitations.[59] As Professor Vermeule contends, judges often lack the

55. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010) (Breyer, J., dissenting); *see also* COAN, *supra* note 1, at 179–80 (discussing arguments for and against judicial deference).

56. *See* COAN, *supra* note 1, at 180.

57. *See id.*

58. *Id.* at 189 (emphasis in original).

59. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 23, at 134–49 (weighing shortcomings in adjudicative system and judicial competence against merits of judicial independence and characteristics of other institutions); VERMEULE, *supra* note 23,

information and resources to make sound institutional choices.[60] In other words, many scholars' and judges' infatuation with vigorous judicial review fails to account for limited judicial capacities.[61] This "single institutionalism," as Professor Komesar puts it, asks courts to police the other branches without considering when courts are well suited for that role.[62]

My proposal is sympathetic to these concerns, but ultimately I place the power to review agency performance in judges' hands, because agencies' own competence and capacity vary too much to merit a uniform level of deference. Quite simply, encouraging courts to assess the relative epistemic and political authority of an agency in each case can help courts make more informed deference determinations. My theory recognizes that the institutional considerations can vary widely from case to case, and it encourages judges to calibrate their deference accordingly.

Admittedly, my theory offers little institutional analysis of courts themselves. The best judges will consider such factors and weigh the judiciary's institutional strengths and weaknesses against those of the agency under review. Ideally, scholars would assist this endeavor by providing their own independent analyses, which could help judges recognize more accurately when courts' institutional deficits militate for deference. But I must concede that judges will never perform these analyses perfectly, and some might not even perform them well.

One way out of this difficulty would be to eschew case-by-case institutional analysis and adopt a super-deferential presumption that would only invalidate political branch actions that clearly violate the Constitution.[63] There are serious arguments in favor of this super-deference,[64] but, even if one accepts them, it is not clear that they should apply to constitutional challenges to *administrative* action. After all, administrative agencies suffer not only from a systematic democratic deficit but also sometimes even from an epistemic deficit that calls into question their *raison d'etre*.

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at 153–82 (arguing that uncertainty and "bounded rationality" sharply limit judicial competence).

60. *See* VERMEULE, *supra* note 23, at 158, 254–55 (noting that judges make "interpretive choices in the face of impoverished information" with "only limited capacity to generate the needed information").

61. *See id.* at 237–53 (critiquing numerous constitutional theories which fail to account properly for judges' limitations).

62. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 23, at 5–6.

63. *See, e.g.*, VERMEULE, *supra* note 23, at 254–55.

64. *See, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 167–84 (2012); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–32 (1999); VERMEULE, *supra* note 23, at 254–55; James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151 (1893).

Indeed, there are instances where even a capacity-diminished court will bring more care to a matter than a delinquent agency. In such instances, categorical deference to the government could ignore blatant incompetence. If we take comparative institutional analysis seriously, judicial capacity should militate for judicial deference only if those limitations render the judiciary less competent than the political actor in question. Admittedly, comparative competence is not easily quantifiable, and there may be cases where we quibble about which institution is, in fact, more competent. But in a given case, judicial deference is only an appropriate reaction to capacity concerns if the judiciary's competence is inferior to the government's.

To be sure, judges won't always accurately judge their own competence. Some judges might be inclined to overestimate their competence. Others, preferring to defer to the political branches, might consistently underestimate it. Given that the comparative analysis requires courts to measure their relative competence with some accuracy, the difficulty of that inquiry poses a potentially serious problem to my proposal.

It is worth pointing out, though, that courts might misjudge their own competence in many cases anyway. To this extent, my proposal offers the benefit of focusing judges' attention squarely on these institutional questions. As we have already seen, courts sometimes engage in a version of these inquiries already, albeit in an inconsistent and inchoate manner.[65] The proposal here would encourage courts to be more deliberate and systematic. Courts, in other words, already inject deference determinations into their decisions, so we should encourage them to calibrate that deference more accurately and articulate it more honestly. To that extent, though admittedly imperfect, my proposal would likely be a substantial improvement over the status quo.

Furthermore, this comparative institutional analysis can help avert constitutional injustices resulting from governmental incompetence. Lethal injection is a helpful example here. In part because of limited resources, many departments of corrections have proven incapable of designing and implementing viable lethal injection protocols that do not create significant risks of excruciating pain. The parade of errors is long. These agencies have entrusted protocols to dyslexic doctors, who admitted to mixing the wrong amounts of the drugs;[66] specified certain drugs in their written protocols, only to end up injecting different drugs in actual

65. *See supra* notes 47–53 and accompanying text.

66. *See* Elizabeth Weil, *The Needle and the Damage Done*, N.Y. TIMES MAG. (Feb. 11, 2007), https://www.nytimes.com/2007/02/11/magazine/11injection.t.html [https://perma.cc/N6GK-TZVW] (describing the execution protocol single-handedly controlled by a dyslexic doctor who admitted to using inconsistent dosages for lethal injection).

execution procedures;[67] and failed to employ trained personnel to set the IV catheter in the inmate's veins (resulting in the drugs being delivered not to the veins, but to the surrounding tissues).[68] These and other glaring mistakes have contributed to several visibly botched executions.[69] Quite simply, some agencies are not competent to perform the tasks the states have assigned them, and their incompetence creates a significant risk of an excruciating execution in violation of the Eighth Amendment. Moreover, many states shroud their execution protocols in secrecy,[70] a lack of transparency that partially undermines the agencies' political accountability.

The Supreme Court has typically extended great deference to states in cases challenging these procedures on Eighth Amendment grounds.[71] Under my theory, such reflexive deference is unwarranted, given many states' manifest incompetence.[72] Limited judicial capacity and competence do not alter this conclusion. Judges, of course, should be aware of their own limitations, but judges are perfectly capable of determining whether prison officials are designing and implementing lethal injection protocols competently. An inexpert judge can still recognize the problem when a prison guard injects Drug A instead of Drug B.[73]

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67. *See* Associated Press, *Oklahoma Death Penalty: State Plans to Execute Inmates with Nitrogen Gas*, THE GUARDIAN (Mar. 14, 2018), https://www.theguardian.com/us-news/2018/mar/14/oklahoma-death-penalty-nitrogen-gas-lethal-injection [https://perma.cc/4ED8-EVTU] (noting that during a 2015 execution, Oklahoma injected the wrong lethal drugs).

68. *See* Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida [https://perma.cc/BB8W-9P7Z].

69. Matt Ford, *One Hour and 57 Minutes in Arizona*, THE ATLANTIC (Jul. 24, 2014), https://www.theatlantic.com/politics/archive/2014/07/one-hour-and-fifty-seven-minutes-in-arizona/374951/ [https://perma.cc/Y2XP-G8UU] (describing four visibly botched executions in 2014 including nearly two hour execution of Joseph Wood); Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ [https://perma.cc/TZ5L-FRFR].

70. *See* ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES (2018), https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf [https://perma.cc/V2L5-CU58]; Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1388–92 (2014).

71. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019); *Glossip v. Gross*, 135 S. Ct. 2726, 2739–40 (2015); *Baze v. Rees*, 553 U.S. 35, 52 (2008).

72. *See* Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 944–94 (2016).

73. *See* Matt Ford, *An Oklahoma Execution Done Wrong*, THE ATLANTIC (Oct. 8, 2015), https://www.theatlantic.com/politics/archive/2015/10/an-oklahoma-execution-done-wrong/409762/ [https://perma.cc/B69E-FMGK] (noting that Oklahoma used the wrong drug to execute Charles Warner in January 2015).

More generally, most judges can recognize when an inexpert agency acts in secret without standard procedures, meaningful oversight, or political accountability. In such circumstances, the case for deference is weak. The occasional judge may get it wrong in the occasional case, but, if encouraged to study these factors, most will not. Courts' own limitations, then, ought not dissuade them from carefully reviewing governmental actors for plain incompetence, especially when that incompetence has constitutional implications.

Even considered solely as a matter of judicial capacity, the Court's deference in the lethal-injection area is perplexing, because the potential for future cases is limited. Only twenty-nine states still have the death penalty, and, depending on how you count, only roughly half of those actually attempt to carry out executions.[74] Whereas a less deferential Commerce Clause test could plausibly call into question the constitutionality of huge sections of the federal code,[75] even were the Supreme Court to renounce its deference in lethal injection cases, we wouldn't see a huge uptick in cases. It's true that lethal injection cases are resource intensive (especially in the trial courts), because they require careful factual analyses. In the aggregate, though, these cases are but a drop in the judicial bucket; there just aren't that many lethal injection protocols to challenge.

Nevertheless, my proposed institutional analysis is necessarily imperfect. A scholar like Professor Vermeule would point out that some judges aren't going to be very good at assessing agencies' competence or, for that matter, their own.[76] Judges, for a variety of reasons, are fallible.[77]

These are serious concerns, but given the nature of our judicial system and the terrific variety of administrative action, there is no other way to gauge agency competence in a given case. Legislatures and academics can measure agency performance in various ways over the long haul and identify those found lacking.[78] This information can be useful to a court in

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74. *See States with and without the Death Penalty – 2020*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

75. *See* COAN, *supra* note 1, at 74–75.

76. Vermeule, for his part, limits his discussion of judicial review to review of federal statutes, *see* VERMEULE, *supra* note 23, at 282–83, so it is possible he would entertain a less deferential review over the class of cases I focus on (individual rights challenges to state or federal administrative agency actions). Presumably, however, his concerns about judicial limitations would still deeply inform his approach.

77. *See id.* at 257.

78. *See, e.g.*, Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63 (1995); Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 886 (2007); Xinsheng Liu et al., *Bureaucratic Expertise, Overconfidence, and Policy Choice*, 30 GOVERNANCE 705, 715–18 (2017); U.S. GEN. ACCOUNTING OFFICE, INAPPROPRIATE USE OF EXPERTS AND CONSULTANTS AT SELECTED CIVILIAN AGENCIES (July 17, 1991).

determining whether an agency deserves presumptive trust in particular litigation. But many administrative agencies are very large with many employees performing a wide variety of tasks in a vast bureaucracy, so a particular agency's "trustworthiness grade," while moderately helpful, cannot definitively resolve whether an agency's behavior merits deference in a particular case. Moreover, it's highly unlikely that outside actors (legislatures or academics) could provide meaningful insight to such granular questions within the relatively short timeframe of litigation.[79] Nor are agencies themselves likely to provide a fair and impartial measure of their own competence, especially in the context of litigation to which they would be a party.

This really just leaves the courts. Judges are imperfect, some more so than others. There are hundreds of federal judges possessing a relatively wide range of abilities, work ethics, ideologies, temperaments, and so on. But the variation in federal judges' abilities is still likely substantially smaller than the variation of federal and state agency action. Most federal judges (and many state judges, too) have impressive academic and professional accomplishments and earnestly believe themselves to be committed to fairness, impartiality, and rigor. All Article III judges enjoy life tenure and salary protection, which presumably affords a certain degree of independence. The ideal federal judge is exceptionally smart, impartial, exacting, and rigorous. While most judges fall short of these ideals, a large number are still very smart and aspire to them.

Significantly, judges also all share some expertise over procedural issues. They may know nothing about a particular agency's subject matter, but they should be able to tell whether the agency has followed the right administrative procedures and acted with care. For these reasons, we can be reasonably confident that most judges under my proposal would ask the right questions about administrative competence and that many would use that information wisely to discern a rough level of deference.

By contrast, the qualifications, motivations, professional norms, backgrounds, ambitions, institutional commitments, and goals of administrative officials vary tremendously across and within agencies. So do the types of administrative agencies (federal, state, and local) and the kinds of things each agency does. This variation helps explain why one-size-fits-all judicial scrutiny—whether lax or strict—is inappropriate. The appropriateness of deference in each case will necessarily depend on the particulars, and only the judge handling a particular case is in the position to weigh those particulars.

79. To be clear, academics likely can provide more helpful comparative institutional analysis when measuring the courts against legislatures, but that analysis would not provide much guidance in cases involving administrative agencies on which I focus.

To be sure, judges' rough (albeit informed) sense of an agency's competence in a specific case might offend the pure institutionalist's desire for more finely tuned assessment or, alternatively, for extreme deference that would obviate the need for judicial assessment at all.[80] If the judge asks the right questions, however, she will be improving the quality of judicial review and making more informed decisions about when deference is appropriate.[81] A conscious, comparative institutional analysis performed by a judge, however imperfectly, should help improve the judiciary's competence. It is, in short, better for courts to ask these questions than not.

Admittedly, these improvements will only be marginal. A scholar like Vermeule (and possibly Coan himself) would cry foul, for my proposal asks judges to perform a crucial task without providing a mechanism for measuring judges' own fallibility. In one sense, this critique is fair, insofar as I ask judges to perform an inquiry that some will perform inadequately. In another sense, however, I think this critique misses the mark, because it ignores the need to work within the institutional and procedural systems we already have. Even if a blanket deference were theoretically appropriate in cases where an administrative agency has allegedly infringed on individual rights—and I have already argued it is not—it is emphatically not the system we have. Nor do courts defer consistently elsewhere. To the contrary, American judicial review modulates its level of deference based on a host of contextual but inconsistent (and sometimes unstated) factors.[82]

Were we starting from scratch, perhaps a different approach would be preferable. For better or worse, though, we are not starting from scratch, and judges are working within frameworks that have existed, more or less, for generations. My institutional analysis asks a lot—probably too much—of judges, but it is also realistic, because judges can incorporate my proposal into pre-existing practices of judicial review. It is an incremental change, but, for that reason, it is actually feasible. It will not solve all our problems, and it may even create some new ones, but, on balance, it improves our system of judicial review.

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80. *See* VERMEULE, *supra* note 23, at 2–6 ("Interpreters situated in particular institutions make mistakes when implementing any first-best account.").

81. *Cf.* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 23, at 150 (arguing that judicial independence "should tell judges that they should employ the limited resources of the adjudicative process by substituting adjudicative decision-making for political decision-making . . . only when the balance of bias, competence, and scale favors that substitution").

82. *See* Berger, *supra* note 25, at 472–91. To be clear, my argument does not directly address the rich scholarship exploring the relative merits of judicial review writ large, though my focus on institutionally based deference does accept judicial review's legitimacy.

On this view, institutional analysis should encompass not only comparative analysis but also the unpleasant concession that we often won't do it that well. It is still better to do it imperfectly than not to do it at all. Blanket deference may be appealing, because it accounts for judicial fallibility, but it fails to recognize that judges, more often than not, will have sufficient information and competence to evaluate agency competence fairly. Blanket deference also fails to protect against genuine administrative abuses. Of course, ideally we would conduct a more thorough, accurate comparative institutional analysis, but our system lacks the capacity to do that every time an agency is hauled into court for an alleged individual rights violation.[83] By my lights, an imperfect institutional analysis is preferable to no institutional analysis and infinitely more realistic than a perfect one.[84]

Finally, it bears emphasis that the institutional analysis proposed here would often *not* result in deferential review. It therefore should not necessarily further tax judicial capacity, at least in the aggregate. In some instances, like the lethal injection example, the inquiry will likely uncover governmental incompetence and yield a less deferential result. But those results will not always incent more plaintiffs, because the class of plaintiffs (death row inmates) will file cases anyway. And, significantly, in many other contexts, the court should conclude that the agency at issue has institutional competence superior to the judiciary's and that deference is therefore appropriate. The approach here, then, will not produce consistently deferential results and therefore ought not invite substantially more litigation.

B. Other Complications

1. INTRA-JUDICIAL CAPACITY AND COMPETENCE

While my focus has been inter-branch competence and capacity, intra-branch capacity can matter, too. Within the federal judiciary, for instance, different courts may have different capacities.[85] Coan focuses primarily on the Supreme Court, which has the most visible docket.[86] The

83. Scholars like Vermeule and Komesar are entirely correct that many important constitutional questions never reach the courts and that the judiciary's role in shaping our constitutional order is therefore often overstated. *See, e.g.*, VERMEULE, *supra* note 23, at 269. But judicial review nevertheless matters—quite obviously in the constitutional cases the Court *does* decide, but also in creating a constitutional baseline of which the political branches take frequent notice.

84. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 23, at 5 ("Institutional choice is difficult as well as essential. The choice is always among highly imperfect alternatives.").

85. *See supra* notes 79–80 and accompanying text.

86. *See* COAN, *supra* note 1, at 19.

Court's docket obviously matters tremendously, probably especially in the field of constitutional law. But the Supreme Court's capacity differs from the lower federal courts' in important ways. Most notably, the certiorari process allows the Court to control its own caseload.[87] Even were the Court to issue decisions unleashing a torrent of litigation, it could insulate itself from future cases simply by denying review. This isn't hard to do; over the past few decades, the Court has reduced its annual merits cases by about half.[88]

Of course, as Coan points out, the Court feels some pressure to maintain uniformity of federal law.[89] Uniformity, however, is only one of several values to which the Court must attend,[90] so that pressure does not necessarily translate into a much larger caseload. The Court, in fact, often lets circuit splits percolate and reviews only 0.11% of circuit court decisions.[91] Admittedly, the Court likely hears a somewhat higher percentage of *constitutional* decisions, but, even so, the Court takes very few cases a year.

Moreover, even when the Court wishes to resolve a matter, it often can do so by deciding a case or two, and then letting the lower courts apply those precedents. Sometimes, discrepancies arise, but the Court does not always feel obligated to resolve them.[92] By contrast, it is the lower federal courts that for years have suffered from "a crisis of volume."[93]

To this extent, lower courts usually bear the brunt of the Court's rulings. Of course, Supreme Court justices still may internalize capacity concerns and consider the capacity of the judiciary writ large. However, at the end of the day, the Justices do not shoulder the burdens of the caseload they help create.

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87. *See, e.g.*, 28 U.S.C. § 1254 (2020); 28 U.S.C. § 1257 (2020).

88. *See Supreme Court of the United States Petitions Granted, 1970-2015*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015 [https://perma.cc/3DQM-V4HS] (documenting sharp decrease in number of certiorari petitions granted annually from approximately 170 a year in the 1970s and 1980s to roughly eighty per year in the 2010s).

89. *See* COAN, *supra* note 1, at 19.

90. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 502 (7th ed. 2015).

91. *See* Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention* 4 VAND. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3459840; Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481–96 (2012) (discussing the Supreme Courts practice of allowing issues to percolate in the lower courts and the benefits and risks accompanying that approach).

92. *See* Gewirtzman, *supra* note 91, at 474–77 (discussing the growing "discretionary space" in constitutional law).

93. *See, e.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990), available at https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf [https://perma.cc/9T57-5VET]; WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 3–4 (2013).

The relative capacity of different courts complicates my proposed comparative-competence inquiry. The capacities (and the competence) of courts vary. One application of my theory might ask each court to consider its own particular capacity limitations in weighing the judiciary's competence against the political branch's. Such an approach would be untenable. Neither the law of deference (to the extent there is such a thing) nor the law generally should vary based on the congestion of a particular court's docket or each individual judge's familiarity with a particular area of law. In practice, perhaps these factors silently do shape judicial decisions, but the uniformity of federal law would be seriously compromised should judges formally incorporate such considerations into the law. In other words, while variations between agencies should affect judicial deference, the variations between different judges should not. Still, Coan's insights might inspire future work examining whether lower court deference, as an empirical matter, turns partially on issues like docket size, particular judges' substantive expertise, and other capacity and competence issues.

2. CONGRESSIONAL REGULATION OF JUDICIAL CAPACITY AND THE RATIONING OF JUSTICE

Courts are not the only public institutions with something to say about judicial capacity. Specifically, Congress sometimes stipulates deferential review, in part to preserve judicial resources. These interventions shed normative light on the dangers of letting capacity concerns play too dominant a role in the law and access to justice.

The best example involves prison litigation. About 2.2 million people are in state and federal prisons annually.[94] These inmates file many civil rights and habeas claims,[95] some meritorious and some bogus. On the civil rights side, some prisoners live in appalling conditions, which raise genuine Eighth Amendment issues. Others may have minor grievances and have nothing to lose by suing. On the habeas side, some inmates can point to serious constitutional violations underlying their convictions and even evidence of actual innocence.[96] Others have legally and factually weak habeas claims but bring them anyway. Once again, they have little to lose.

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94. *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM 2 (2017).

95. Civil rights prisoner actions challenge the way in which the inmate's sentence is carried out, such as the prison conditions. Habeas petitions challenge the legitimacy of the inmate's sentence or the fact of conviction. *See Heck v. Humphrey*, 521 U.S. 477, 481 (1994).

96. *See* BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 179 (2012).

Responding to the high volume of prison cases, Congress in 1996 passed both the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Prison Litigation Reform Act (PLRA).[97] Both statutes made it substantially harder for prisoners to bring successful court actions, whether through habeas petitions (AEDPA) or civil rights suits (PLRA).[98] AEDPA made several changes that collectively required greater federal court deference to state court criminal proceedings.[99] It also imposed a new "gatekeeping" provision, preventing inmates from filing "second or successive" habeas petitions except in narrow circumstances, even if a particular claim was not ripe at the time the inmate filed his initial habeas petition.[100] For its part, the PLRA also restricted inmates' access to federal courts by imposing on inmates new exhaustion requirements, filing fees, and other procedural hurdles.[101]

Judicial capacity was a motivating factor behind both statutes. In 1995, inmates filed 40,000 new federal civil lawsuits, amounting to 19% of the federal civil docket.[102] About 15% of federal civil trials that year were for inmate civil rights cases.[103] There were not as many federal habeas petitions, but in the half decade prior to AEDPA, inmates still filed a sizable number—about 12,800 per year.[104] In light of these statistics, Congress wanted to make it harder for prison inmates to bring cases, in part because it perceived that such litigation was consuming substantial judicial resources.[105]

It is no accident that Congress chose to protect judicial capacity in the area of prisoner litigation. Prisoners are an especially unpopular class, so it was politically safe to restrict their access to courts. Congress also may

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97. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996); 42 U.S.C. § 1997e (1996).

98. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003) (arguing that the PLRA "drastically altered the corrections litigation environment" by making it much harder in various ways for inmates to bring meritorious civil rights claims).

99. *See, e.g.*, RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4[d][xi], at 81 (2018).

100. *See* 28 U.S.C. § 2244(b) (2020).

101. *See* Schlanger, *supra* note 98, at 1559, 1627–33.

102. *See id.* at 1558.

103. *See id.*

104. This number includes both capital and non-capital habeas petitions. *See* FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES (2007), https://www.everycrsreport.com/reports/RL33259.html#ifn25 [https://perma.cc/G2QE-PV35].

105. *See, e.g.*, H.R. Rep. No. 104-518, 94th Cong., 2d Sess. 111 (1996) (noting that AEDPA attempts to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital systems"); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771, 1772 (2003) (explaining that Congress passed PLRA in part to deal with high volume of prison civil rights suits, including some notoriously frivolous cases).

have wanted to signal that it was tough on crime, a response to the period's high crime rates.[106] And Congress, no doubt, believed that much prisoner litigation was frivolous. But part of Congress's motivation was that, frivolous or meritorious, there was simply too much prisoner litigation.[107] It was a capacity issue.

The scholarly consensus is that these statutes go too far.[108] In seeking to reduce habeas and civil rights actions, AEDPA and the PLRA cut off access to justice for many inmates with legitimate grievances.[109] Congress may have been correct that prison litigation (some of it frivolous) overwhelmed the federal courts, but it over-corrected.[110]

This example has implications for both Professor Coan's argument and my own. For Coan, it suggests that Congress, notwithstanding the Court's deferential doctrines, thinks the judiciary sometimes needs assistance managing its own limited capacity. Even frivolous cases take time to resolve, so deferential doctrines and bright-line rules only relieve docket congestion so much, especially when the incentive to file cases is high, regardless of the legal rule.

Interestingly, the Court also may recognize that it can encourage Congress to lighten the judiciary's load. Chief Justice Rehnquist, after all, formed the Powell Committee in 1988 to study "the necessity and desirability of legislation directed towards avoiding delay and the lack of finality in capital cases."[111] Congress ultimately adopted some of the

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106. Crime rates actually peaked in 1991 and by 1996 had already begun what would become a dramatic decline. *See* PFAFF, *supra* note 94, at 3. Nevertheless, crime rates in 1996 were still near all-time highs.

107. *See Porter v. Nussle*, 534 U.S. 516, 524–25 (2002) ("Beyond doubt, Congress enacted [the PLRA] to reduce the quantity and improve the quality of prisoner suits.").

108. *See, e.g.*, James S. Liebman, *An "Effective Death Penalty"?: AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 427 (2001) ("AEDPA's reforms have made the system substantially less safe and reliable."); Roosevelt, *supra* note 105, at 1772 (summarizing academic commentary about PLRA).

109. *See, e.g.*, Liebman, *supra* note 108, at 427; Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PENN. J. CONST. L. 139, 140 (2008) ("The PLRA's obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences.").

110. *See generally* Schlanger, *supra* note 98, at 1575–78 (examining trends in inmate litigation before and after the PRLA and the impact the PRLA has had on inmate litigation in comparison to non-inmate litigation); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas*, 77 N.Y.U. L. REV. 699, 794 (2002) ("The story of the restrictions on successive habeas corpus petitions in habeas corpus is a microcosm of a larger dynamic that often creates poorly constructed procedural devices to remedy ill-defined structural problems in an atmosphere of anger, fear, and uninformed rulemaking.").

111. *See* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report, *as reprinted in* 135 Cong. Rec. 24694 (1989).

Powell Committee's recommendations in AEDPA,[112] thus demonstrating that the judiciary and Congress can collaborate when they believe that judicial capacity problems are interfering with other societal goals.

Of course, capacity concerns were not Congress's sole motivation. Congressional actions were limited to the area of prison litigation, so perhaps lessons from these statutes are not generalizable. Indeed, given Coan's study, the conclusion might be that the Court appropriately manages its own limited capacity most of the time, and that Congress only intervenes in unusual circumstances when an especially unpopular group of plaintiffs files an especially high number of cases, many of them frivolous. Still, one lesson from these statutes is that Congress has the authority to reshape judicial dockets substantially.

These statutes also complicate my proposal that courts consider not only their own competence limitations but also the political branches'. When Congress heightens the bar for, say, prison-conditions cases, courts have fewer opportunities to examine whether a particular prison's expertise and behavior merit deference. To this extent, the PLRA makes it substantially harder for litigants to uncover unprofessional and unconstitutional governmental behavior. In other words, it makes it more difficult to put my theory into practice.

To the extent many commentators agree that AEDPA and the PLRA go too far in limiting access to justice for prison inmates,[113] this story raises the normative question of whether judicial capacity should be such a dominant value. Some prison conditions in this country are horrific, threatening the health and even the lives of tens of thousands of people.[114]

112. *See, e.g.*, Celestine Richards McConville, *The Right to Effective Assistance of Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 49.

113. *See, e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 359–60 (2018); Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus are Wrong*, 37 SEATTLE U.L. REV. 55 (2013) (criticizing the application of AEDPA by courts in restricting access to habeas review); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 (2015).

114. *See, e.g.*, Jennifer Lackey, *The Measure of a Country is how it Treats its Prisoners. The U.S. is failing*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/opinions/the-measure-of-a-country-is-how-it-treats-its-prisoners-the-us-is-failing/2019/02/06/8df29acc-2a1c-11e9-984d-9b8fba003e81_story.html (describing dangerous prison conditions including exposure to extreme cold, punishment of mentally ill inmates, and prolonged stays in solitary confinement); Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html [https://perma.cc/NEQ5-PG6L] (describing prison conditions in the Alabama prison system which has among the highest rates of homicide and rape in the United States).

The PLRA makes it harder for these people to protect their rights and lives in court. Similarly, many innocent people are in prison,[115] and AEDPA makes it harder for them to establish their innocence.

Professor Coan's book makes a compelling case that courts can and should factor judicial capacity into their decisions. I agree but also caution that there are other important values in play. We must recognize the importance of judicial capacity in shaping doctrine and limiting judicial competence, but, as a normative matter, such concerns ought not justify abdication of judicial responsibility.[116] The public is starting to pay attention to our criminal justice system's deep flaws, so perhaps serious legislative reforms may soon be feasible. For decades, however, litigation provided prison inmates the primary protection against horrific conditions and grave injustice. It was courts or nothing.

Access to justice is an especially acute concern in the prison context, given that inmates are politically powerless. But access to justice issues arise in other contexts as well, and individuals, particularly members of various minority groups, sometimes must turn to courts to protect themselves from grave injustices. A core judicial function is to protect unpopular minorities from tyrannical majorities.[117] We should pay attention to judicial capacity, but we should not forget these other norms. As Learned Hand put it, "thou shalt not ration justice."[118]

CONCLUSION

Professor Coan's superb book persuasively argues that judicial capacity plays a significant role in shaping constitutional doctrine. He further suggests that because judicial capacity limits judicial competence, judges should tailor their review accordingly. My modest and (I believe)

115. *See* GARRETT, *supra* note 96, at 5–6.

116. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

117. *See* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L. REV. 1, 2 (2010). This is not to argue that courts always do perform this role, or that strong judicial review is necessary or sufficient for the protection of core human rights. Nor is it to deny that courts often follow, rather than lead, societal changes. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). Nevertheless, courts, for all their limitations, sometimes play an important role in protecting unpopular minority groups. *See generally* LESLIE F. GOLDSTEIN, THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL 371, 399 (2017) (arguing that the Supreme Court, with some important exceptions, often outperformed the political branches in the protection of racial minorities).

118. Judge Learned Hand, Keynote Address at the Legal Aid Society's 75th Anniversary (Feb. 16, 1951), *in* IRVING DILLARD, THE SPIRIT OF LIBERTY xix (1952).

friendly amendment is to suggest that before limiting the scope of judicial review in particular contexts, we also consider the relative capacities and competencies of the political branches, particularly in cases involving administrative agencies. Capacity, as Coan contends, does partially determine judicial competence, so it clearly matters, both descriptively and normatively. However, the political branches' capacity and competence are also limited. When they are more limited than courts', judicial deference is inappropriate. Competence, in short, should be a comparative inquiry. Judicial capacity is an important part of that inquiry, but it is only a part of it.