JUSTIFYING JUDICIAL MODESTY

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INTRODUCTION

In *Rationing the Constitution*, Andrew Coan offers a largely convincing theory of judicial behavior centered on the idea of judicial capacity. In this paper, I first briefly discuss some of the main elements of Coan's argument in Part I, and then grapple with the status of judicial capacity concerns as a type or modality of judicial argument in Part II. In line with some of Coan's comments throughout his book, my starting assumption is that judicial capacity concerns have not figured prominently in judicial defenses of judicial modesty. My first substantive task, however, is to provide some tentative support for this by cataloging some of the arguments that Supreme Court justices have offered in this regard in several of the Court's key voting rights opinions. This is the focus of Part III.

However, if it is the case that judicial capacity concerns figure less prominently in judicial defenses of judicial modesty relative to some other themes, this leads to a related question: why are judicial capacity concerns not more commonly invoked in this context? In Part IV, I set forth some tentative answers. In short, I believe that the more conventional judicial defenses of judicial modesty tend to be more appealing to judges because they either invoke common underlying assumptions—among judges and within the broader polity—about the nature of the judicial role, or because they reference significant threats to judicial institutional prestige as informed by prevailing historical narratives. Given this, judicial capacity

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concerns are unlikely to figure prominently in judicial defenses of judicial modesty.

I. THE JUDICIAL CAPACITY MODEL

Stated simply, Coan contends that significant elements of judicial behavior since the New Deal era[1] have been driven by an overarching concern with judicial capacity.[2] That is, Supreme Court justices have chosen to engage certain legal issues, in certain ways, because of the Court's inescapably limited capacity to adjudicate cases.[3]

Coan identifies a set of basic norms among American judges that dictate this limited capacity for the Supreme Court including, in turn, "a commitment to maintaining minimum professional standards of judging,"[4] a "commitment to maintaining a reasonable degree of uniformity in the interpretation and application of federal law,"[5] and a "commitment to timely and efficient access to the legal system."[6] Given the Supreme Court's limited capacity to hear and resolve cases, Coan maintains that in certain areas of doctrine characterized by "high-stakes," or the potential for a "high-volume" of litigation, or both (which he labels "hybrid" domains),[7] the Supreme Court will be driven to outcomes that will minimize the risk of future litigation overwhelming the Court's capacity.[8] In these high-stakes, high-volume, and hybrid domains, Coan maintains that capacity concerns will be crucial, and the Court will thus consistently utilize categorical rules and/or deference to other governmental entities in response to those concerns.[9] The judicial capacity model sets forth a view of an often-deferential Supreme Court,[10] lacking the ability to consistently engage in more expansive judicial intrusions into the nation's social and political life.[11]

Three of the many virtues of Coan's argument are: its clarity; its welcome and sophisticated treatment of constitutional cases encompassing an examination of doctrinal *forms of argument*; and its thoughtful engagement with alternative theories of judicial behavior. On the last point in particular, Coan is careful and judicious in leaving room for the

1. ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 37 (2019).
2. *Id.* at 2–3.
3. *Id.* at 2, 4–6.
4. *Id.* at 14.
5. *Id.*
6. *Id.* at 16.
7. *Id.* at 25–30.
8. *Id.* at 19, 25, 28–30.
9. *Id.* at 3–4, 7, 24–25, 31.
10. *Id.* at 5, 7, 31, 39.
11. *Id.* at 5, 6, 8–9, 203, 205–06.

explanatory power of these alternative theories, while also clearly demarcating those points where his capacity model may outperform its competitors.[12] I found Coan's repeated comparisons between his judicial capacity model and these alternative theories, along with his repeated discussion of observational equivalence problems, to be some of the most engaging and well-argued portions of the book.[13]

Coan has convinced me that judicial capacity considerations have been a persistent and important influence on judicial behavior over time. In assessing the various factors that shape constitutional law and development, the considerations emphasized by Coan have undoubtedly been significant. Indeed, stated in a basic sense, the claim that judicial capacity would matter to judges seems rather hard to dispute; if one reasonably presumed that stable institutions like the Supreme Court would consistently be motivated by, at least in part, a basic instinct for institutional self-preservation, something like the judicial capacity model would seemingly follow. Of course, the judicial capacity model as put forward by Coan also goes beyond this simple insight to provide more novel and specific claims about how precisely judicial capacity concerns give rise to strong patterns in judicial behavior and judicial outcomes.

II. JUDICIAL CAPACITY AND JUDICIAL ARGUMENT

In this paper, however, I would like to further probe the concept of judicial capacity beyond its use as a descriptive theory of judicial behavior. Accepting that capacity concerns likely play a role in affecting constitutional development, I would like to pose some questions and offer some tentative thoughts about the status of judicial capacity as an element of judicial argument.

As an initial point, consider what Coan does say about the judicial capacity model within public and legal discourse. As he states:

> Advocates for more expansive constitutional protections routinely brush aside, or outright ignore, the judiciary's limited capacity. Opponents of such protections routinely write as if "government by judiciary" were a real and worrisome possibility. . . . Certainly, popular discourse on the Supreme Court and constitutional law reflects virtually no appreciation for [capacity] issues.[14]

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12. *See, e.g.*, *id.* at 40–45.

13. *Id.* at 32–33, 41–50, 182–86, 194–201.

14. *Id.* at 2. Coan elsewhere references the unfortunate lack of attention to judicial capacity concerns among legal scholars throughout the book. *Id.* at 5–6, 172, 181, 187, 208.

With respect to how judicial capacity concerns are understood and referenced by judicial actors, Coan appears to argue that they are often underlying constraints rather than explicit considerations. He argues that judicial actors are not omniscient about the limits of judicial capacity or the threat to judicial capacity in certain cases, and thus may only have a vague sense of where those limits may be.[15] Furthermore, Coan tells us that his judicial capacity model "does not assume that the influence of judicial capacity on Supreme Court decision-making is necessarily conscious. Rather, that influence affects the boundaries of the thinkable."[16]

The ready implication of these comments is that judicial capacity concerns may not be receiving the kind of explicit recognition by judicial and non-judicial actors that they are due, given their significance. Indeed, explicit judicial references to judicial capacity concerns are sparse in Coan's extensive discussion of cases. Though there may be other references I missed, I count only one mention in the book where Coan reports that that judicial capacity concerns were explicitly referenced in a set of judicial decisions.[17] Further, one presumes that the novelty of Coan's study would stem, at least in part, from a disjunction between the significance of judicial capacity concerns and their lack of sufficient recognition within the judicial and legal academic communities.

Although I am unable to offer a more systematic assessment on how often judicial capacity arguments are used within Supreme Court opinions, I proceed here on the assumption that they indeed appear relatively infrequently in judicial arguments. Coan's general assessment that judicial capacity concerns are under-emphasized seems correct to me. Beyond that, however, even in those situations where a true threat to judicial capacity was not really present, a judicial *claim* about threats to judicial capacity would seem quite plausible in a wide variety of circumstances outside of the hybrid domains that are the focus of Coan's argument. Indeed, such arguments—with their appeal to political and institutional realities—could

15. *Id.* at 33–34.

16. *Id.*; *see also id.* at 34–35.

17. This was in the context of the Court's three major decisions on exactions in the chapter on "Takings." *Id.* at 158–59. With respect to scholarly references to judicial capacity concerns, I found two mentions in the book: in the same chapter, he also mentions scholarly references to judicial capacity concerns in the context of regulatory takings. *Id.* at 157–58. Finally, Coan mentions an argument within the legal community during the first wave of challenges to the Affordable Care Act—regarding the activity/inactivity distinction—that could be understood as an argument about judicial capacity. *Id.* at 176. In fairness, Coan is upfront that the evidence he is seeking to confirm the judicial capacity model is the consistent appearance of "some combination of deference and categorical rules such that *the government will almost always win, or the application of the Court's test will almost always be readily predictable by judges or litigants,* or both." *Id.* at 39–40. As such, cataloging explicit references to judicial capacity concerns was not the task he set for himself. At the same time, one also suspects such concerns were not widely referenced in the various opinions he discusses either.

be seen as a close relative of familiar "prudential" modes of constitutional argument.[18] Given their status as a plausible form of judicial argument, a relative under-emphasis of capacity concerns in judicial opinions would be, perhaps, even more striking.

If that is the case, however, it raises a question: why are judicial capacity concerns relatively neglected in legal and judicial discourse? Let me briefly state two very tentative claims on these points that will occupy the remainder of this paper. First, I would indeed expect that a number of other argumentative themes in judicial opinions seem to play a more prominent role than judicial capacity arguments when the Court declines to engage in more aggressive interventions. The next Part of this article will be focused on a set of cases aiming to identify a number of familiar argumentative themes we tend to see in cases where the Supreme Court is reluctant to substantively engage on legal controversies. As I will discuss below, some of those arguments might plausibly intersect with judicial capacity concerns. However, even when such connections may be possible to draw, it is also apparent that judicial capacity concerns are not the focal point of these argumentative themes.

If the discussion below offers a plausible assessment of judicial discourse, it then raises a question as to *why* other themes seem to enjoy a more prominent place in judicial defenses of modesty relative to judicial capacity concerns. This leads to my second tentative claim: the reason for this prioritization of arguments is likely related to dominant perceptions of the Court, within and outside it. As I will elaborate in Part III, expectations of the Supreme Court, within and outside the legal community in contemporary American life—some of which Coan holds out for criticism in the above quotation—render some justifications more acceptable than others when the judiciary declines to intervene in certain controversies. Given these expectations, I would suggest that judicial capacity arguments will not be terribly attractive options for judges who might otherwise deploy them, or compelling considerations for observers of the Court.

III. JUDICIAL DEFENSES OF JUDICIAL MODESTY

As an initial point, consider that the concept of judicial capacity could plausibly encompass considerations beyond Coan's focus on the finite time and energy judges possess to hear and decide cases. For example, we might deploy Coan's metaphor of a family on a limited budget[19] beyond the context of judicial capacity to encompasses the Supreme Court's finite institutional capital to decide controversial questions. Judicial capacity

18. "Prudential argument is constitutional argument which is actuated by the political and economic circumstances surrounding the decision." PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 61 (1982).

19. COAN, *supra* note 1, at 20–22.

understood in this broader sense subsequently leads us to a set of familiar argumentative themes justifying judicial modesty that reappear in judicial opinions and in scholarly arguments.

The task of this Part is to identify and catalog some of these themes. The focus of the discussion below will primarily be on a handful of high-profile Supreme Court opinions dealing with malapportionment and partisan gerrymandering, and the various judicial arguments deployed to justify judicial non-intervention. In fairness, this set of cases may not clearly qualify as a "hybrid" domain of litigation as defined by Coan.[20] As such, they may be potentially less useful as a focus of discussion: presumably, any under-emphasis of judicial capacity arguments in this context may be expected because, perhaps, judicial capacity was not such a pressing concern here.

To be clear, I make no claim that the cases I discuss below systematically demonstrate the broader prevalence (or non-prevalence) of particular modes of arguments justifying judicial non-intervention. My focus on these cases is purely illustrative in aiming to provide some examples of argumentative types that I presume do appear with greater regularity than judicial capacity concerns. My hope is that the themes discussed below will provide at least a serviceable discussion of the more prominent explicit justifications offered by judges as to why certain areas of litigation may not be suitable for more aggressive judicial interventions.[21]

Beyond that, the value of a closer look at these particular cases stems from several additional considerations. First, whether they truly encompass a hybrid domain of litigation or not, clearly some elements of the judicial capacity model were/are relevant for litigation on malapportionment and partisan gerrymandering. As discussed below, some of the justices in these cases extensively discussed the virtues and vices of potential legal standards to apply (and the subsequent

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20. Coan notes, for example, that extensive judicial intervention during the rights revolution of the 1950s and 1960s does not challenge his thesis about the importance of judicial capacity concerns because judicial action in these cases focused on areas that were not truly hybrid domains of litigation. His evidence for this claim is that judicial intervention did not subsequently overwhelm the judicial system. *Id.* at 28. One might plausibly see Coan making a similar argument with respect to the Court's interventions on malapportionment and partisan gerrymandering as well. For what it is worth, I found the distinction that Coan draws between "normal" versus "high-stakes," "high-volume," and "hybrid" domains of litigation to be not totally convincing, though Coan is aware of, and addresses potential skepticism on this point. *Id.* at 161.

21. In focusing on arguments concerning judicial reluctance to enter *areas* of potential litigation, as opposed to arguments focused on judicial reluctance to hear and decide individual cases, my discussion in the paragraphs below will intersect more closely with the political question doctrine than other justiciability doctrines. Ultimately, I frame my discussion of judicial modesty arguments in this manner to better align it with the claims and implications of the judicial capacity model.

consequences for future litigation flowing from the choice of legal standard); high stakes were implicated in these cases in terms of control of the electoral process; and there is a persistent theme in these cases of judicial reluctance to get involved. Second, part of my motivation in looking at these cases is driven by contemporary events given the Court's recent ruling in *Rucho v. Common Cause*.[22] In seeking to understand the dynamics justifying judicial reluctance to intervene on controversial legal issues at the present time, *Rucho* and the topic of partisan gerrymandering seems an especially appropriate place to focus one's attention at present.

Drawing from these cases, we might group judicial arguments that justify judicial modesty into at least three categories: (1) judicial anxiety about judicial competence; (2) judicial anxiety about intruding into and disrupting other institutional authorities; and (3) judicial anxiety about entangling the court in deeply divisive political controversies.[23]

As will be clear in the discussion below, these three categories or types of judicial anxiety track much of Justice Brennan's six-part definition of a political question. However, the overlap is not total, and I will clarify where some of these concerns extend beyond Brennan's formulation. Again, some of the judicial capacity concerns identified by Coan can plausibly be linked to some of these judicial anxieties as well. At the same time, it should also be clear that many of the familiar arguments we hear from justices defending non-intervention seemingly have little to do with anxieties about limited judicial capacity, at least as Coan defines the term.

A. Anxieties about Judicial Competence

Unsurprisingly, reluctance to intervene in legal controversies is commonly justified by judicial actors with reference to their anxieties about having sufficient competence to do so. At least two of Justice Brennan's six formulations of a political question in *Baker v. Carr*[24] directly implicate judicial competence concerns: "a lack of judicially discoverable and manageable standards for resolving" a question and "the impossibility of [judges] deciding [a question] without an initial policy determination of a kind clearly for nonjudicial discretion."[25]

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22. 139 S. Ct. 2484 (2019).

23. This array of concerns thus speaks to concerns by various justices about the standing of the Court in the eyes of the broader public, and/or in the eyes of the legal community presumably composed of other judges, scholars, lawyers, and government officials. As such, these concerns implicate both "sociological" and "legal" legitimacy, as Richard Fallon uses those terms. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21, 96 (2018).

24. 369 U.S. 186 (1962).

25. *Id.* at 217. Coan discusses judicial competence concerns at length as an alternative theory of judicial behavior, and as it relates to judicial capacity concerns more

And in the redistricting context in particular, this theme that judges should limit their interventions to areas where they can deploy "judicially discoverable and manageable standards" has long been a prominent one.[26] Although somewhat artificial, we might further disaggregate this judicial emphasis on the need for discoverable and manageable standards into a handful of sub-themes that recur in these cases, and that speak to different elements of the judicial anxiety about institutional competence.

Most prominently, many of the justices writing opinions in these cases identify the very craft or practice of judging with a form of principled decision-making that requires identifiable standards. Here is a representative statement from Chief Justice Roberts in *Rucho* in discussing the absence of a sufficiently clear standard for "fairness" in partisan gerrymandering claims:

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.[27]

Second, there is a very close corollary idea implied here as well: the ability of judges to deploy discoverable and manageable standards in a ruling serves as a ready way to distinguish such judicial interventions from political decision-making. At the same time, to the extent such standards *cannot* be formulated, judicial actors should be wary that intervention in such circumstances could cross the line into political decision-making, something that unelected judges would have no authority to do.[28]

Third and finally, the anxiety of judicial intervention without the benefit of clear standards is seemingly often linked to a distinct judicial fear about venturing into the unknown. Note in this regard Justice Harlan's comment towards the end of his dissent in *Baker v. Carr*, after raising a

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generally. COAN, *supra* note 1, at 179–89. Again, I discuss judicial competence here in a related but somewhat different context: as a type of argument deployed as an explicit justification for judicial actions.

26. *Rucho*, 139 S. Ct. at 2496–98.

27. *Id.* at 2500 (citation omitted). For other examples, see *id.* at 2499–502; *Vieth v. Jubelirer*, 541 U.S. 267, 281, 291, 305–06 (2004) (plurality opinion); *id.* at 307–09 (Kennedy, J., concurring in judgement); *Reynolds v. Sims*, 377 U.S. 533, 621–24 (1964) (Harlan, J., dissenting); *Baker*, 369 U.S. at 267–68, 330 (Frankfurter, J., dissenting); *id.* at 337 (Harlan, J., dissenting).

28. *Rucho*, 139 S. Ct. at 2498–99; *Vieth*, 541 U.S. at 291; *Reynolds*, 377 U.S at 620 (Harlan, J., dissenting); *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946).

concern about the absence of standards to adjudicate malapportionment cases:

> The majority seems to have accepted the argument, pressed at the bar, that if this Court merely asserts authority in this field, Tennessee and other "malapportioning" States will quickly respond with appropriate political action, so that this Court need not be greatly concerned about the federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not fulfilled. Thus, what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication.[29]

One could read elements of the judicial capacity model into these comments—that making ill-advised judicial interventions not sufficiently anchored to the judicial role could overwhelm the federal judiciary in more litigation than it might want. As I will discuss further below, while judicial capacity concerns may very well figure in some of these arguments, other considerations seem to be more prominent.

B. Anxiety About Judicial Disruption of Other Institutional Authorities

Stated simply, judicial reluctance to intervene on certain issues is often articulated in terms of an aversion to intruding upon, or undermining, other institutional authorities. This theme is the most prominent one in Justice Brennan's six-part formulation of a political question, encompassing at least four of the six formulations he set forth.[30]

But although the bulk of Brennan's concern lay with the separation of powers within the federal government,[31] the concern about federal judicial intrusion goes beyond a worry about intruding upon the authority of Congress or the President. Evident throughout the malapportionment

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29. *Baker*, 369 U.S. at 339 (Harlan, J., dissenting).

30. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . or the impossibility of a court's undertaking Independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. Other references to the separation of powers in these cases include: *Colegrove*, 328 U.S. at 554 (1946); *id.* at 566 (Rutledge, J., concurring).

31. Robert G. McCloskey, *Foreword: The Reapportionment Cases*, 76 HARV. L. REV. 54, 60–62 (1962).

cases, for example, there is a concern by some about federal judicial intrusion upon state authority and federalism. As Justice Harlan put it:

> [N]o thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.[32]

Further, judicial worries about federal judicial intrusion were sometimes articulated in an even broader and more amorphous sense to encompass a worry about disrupting established expectations set by history, precedent, and/or past practice.[33]

Finally, at other moments, the worry about judicial intrusion seemingly amounted to a generalized concern about disrupting the policy-making process—the latter of which may encompass not a single institutional entity or two, but rather a grouping of multiple non-judicial institutions. When articulated as a justification for judicial non-intervention, a common line of argument in these cases was that these other institutions should be the focal point for the redress of pressing public problems. In contrast, it would be a mistake for individuals to begin to view federal (and potentially state) judges as the default solver of public problems. Thus, Justice Frankfurter called for "frank acknowledgment":

> [T]hat there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an

32. *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting); *Baker*, 369 U.S. at 327–28 (1962) (Frankfurter, J., dissenting); *id.* at 333–37 (Harlan, J., dissenting).

33. *Rucho*, 139 S. Ct. at 2494–96; *Reynolds*, 377 U.S. at 590–611 (Harlan, J., dissenting) (on the history of the Fourteenth Amendment's ratification and subsequent practice as related to malapportionment); *Baker*, 369 U.S. at 277–97 (Frankfurter, J., dissenting) (on precedent); *id.* at 268–69, 300–24 (on history and past practice); *Colegrove*, 328 U.S. at 555–56 (on past practice).

> aroused popular conscience that sears the conscience of the people's representatives.[34]

For the most part, this anxiety about the Court's improper intrusion into the policy-making process is rooted in considerations about judicial legitimacy and expectations about the judicial role.[35] Still, within these arguments, there was also a coexisting pragmatic element as well: that is, federal (and potentially state) judicial intrusion in certain matters was sometimes articulated as problematic because the likely consequences and outcomes were negative ones. For example, Justice Harlan articulated a fear about a subsequent weakening to democratic initiative subsequent to the Court's intrusion into apportionment disputes:

> What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. As I have said before, I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.[36]

Justice Frankfurter sounded a similar note, though with an emphasis on federalism concerns:

> In all of the apportionment cases which have come before the Court, a consideration which has been weighty in determining their non-justiciability has been the difficulty or impossibility of devising effective judicial remedies in this class of case. An injunction restraining a general election unless the legislature reapportions would paralyze the critical centers of a State's political system and threaten political dislocation whose consequences are not foreseeable.[37]

C. Judicial Anxiety about Entanglement in Divisive Politics

In his dissent in *Baker v. Carr*, Justice Frankfurter stated the following in discussing a potential negative consequence of the judiciary departing from a more modest orientation:

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34. *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting). *See also Reynolds*, 377 U.S. at 624–25 (Harlan, J., dissenting); *Rucho*, 139 S. Ct. at 2496, 2507–08 (emphasizing state governmental and congressional routes for tackling the problems of partisan gerrymandering).

35. *Baker*, 359 U.S. at 270.

36. *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting) (citation omitted).

37. *Baker*, 369 U.S. at 327 (Frankfurter, J., dissenting). *See also Colegrove*, 328 U.S. at 552–53.

> [Judicial interventions] may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[38]

Thus, while a concern with preserving judicial legitimacy was clearly present in the arguments in the preceding two sections, a pragmatic concern about judicial legitimacy is even closer to the surface in the preceding Frankfurter comment. Stated as a kind of fact of life, Frankfurter's worry about the judiciary being tainted with the divisiveness of deep political conflicts is articulated in clear prudential terms.

The anxiety about judicial entanglement in political conflict is often identified with the arguments articulated by Justice Frankfurter on apportionment.[39] Of course, Frankfurter was a dissenter in *Baker v. Carr*, and the assertiveness of the Warren Court subsequently set the Supreme Court on a path, in future decades, quite distinct from the course of action he urged.[40] Still, this anxiety about judicial entanglement in political conflict continues to resonate, perhaps especially so in the context of redistricting in the present era of heightened partisan division. This is how Justice Kennedy put it in his concurrence in *Vieth*: "With uncertain limits [on judicial intervention on partisan gerrymandering], intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust."[41] Very much in this vein, Chief Justice Roberts is often identified by commentators as one especially concerned with the maintenance of the Court's popular esteem and institutional legitimacy.[42]

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38. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

39. *See, e.g.*, LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 201 (2000).

40. As Powe succinctly puts it, "Yet even more than the New Deal Court, the Warren Court was engaged in a fundamental discarding of older law." *Id.* at 485; *see also id.* at 485–86.

41. *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment).

42. *See, e.g.*, Adam Liptak, *After 14 Years, Chief Justice Roberts Takes Charge*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/chief-justice-roberts.html (noting that while "his views are in the mainstream of conservative legal thinking . . . the chief justice also considers himself the custodian of the Supreme Court's prestige, authority and legitimacy").

This is what he stated in *Rucho* on the possibility of the Court striking down a partisan gerrymander as unconstitutional:

> [This] expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.[43]

Thus, the threat to judicial legitimacy suggested with these comments is a particular kind of fear: namely, that judicial willingness to step into political controversy may prompt not settlement, but continuing conflict where partisan anger or dissatisfaction toward the Court is lasting. While lasting antipathy to an opposing political party is natural and expected in a democratic system, federal judges should worry about comparable feelings being directed toward the federal courts as a supposedly neutral institution, composed of unelected, life-tenured judges.

IV. EVALUATING CLAIMS OF JUDICIAL MODESTY

Assuming one finds the preceding array of arguments a fair representation of some common themes in judicial defenses of modesty, one might then ask why these themes may be more prominent than discussion of judicial capacity concerns. In this concluding Part, I would propose at least three possible answers.

First, perhaps most obviously, judicial capacity concerns may be less significant in judicial discourse simply because they might be seen as less central to how judges and members of the public perceive the judicial role. To the extent we are inclined to think of the Supreme Court as a "forum of principle,"[44] whose job is to uphold constitutional principle regardless

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43. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). On the similarities between Frankfurter and Roberts with respect to their fears of judicial intervention, see Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 257–58 (2018).

44. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981). Relatedly, this view aligns with Wechsler's notable insistence that given their lack of electoral legitimacy, judicial actors should align their actions with "neutral principles" to ensure the maintenance of judicial legitimacy. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12–16, 19 (1959); *see also* McCloskey, *supra* note 31, at 67.

of institutional and political constraints, justices appealing to their limited capacity to hear cases are unlikely to make a terribly compelling case for their failure to take a course of action. Of course, it is a long running theme in the literature that as a descriptive and historical matter, Supreme Court actions tend to align with and are sensitive to political and institutional forces.[45] Yet even if it may be true, this view of the Court, at best, continues to coexist and share space with often more weighty expectations—among lawyers and non-lawyers—that legal principle should be paramount in driving judicial actions.

Consider in this regard two familiar examples that underscore the continuing weight of the expectation that judges be oriented by legal principles. In the voting rights context, Justice Holmes's opinion for the Court in *Giles v. Harris*[46] is often referred to as one of the more remarkably candid statements of judicial institutional weakness in the Court's history. In addressing a Fourteenth and Fifteenth Amendment challenge by an African-American man to the disfranchisement scheme of Alabama embodied in its state constitution,[47] Holmes stated that:

> Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the Government of the United States.[48]

Of course, Justice Holmes's opinion is not usually celebrated today as a clear-headed and laudable statement of judicial pragmatism. To the contrary, and especially given the nature of the question that was then in front of the Court, most would likely find Holmes's opinion problematic

45. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (focusing on the constraints imposed by the appointments mechanism); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36–37 (1993) (noting that the Supreme Court has occupied a recurrent role in constitutional history in engaging, at the invitation of elected officials, on issues that cross-cut the dominant governing coalition); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005) (noting that the demands of the dominant governing coalition often prompt and support judicial activism).

46. 189 U.S. 475 (1903).

47. *Id.* at 482.

48. *Id.* at 488.

for its neglect of the judiciary's responsibilities and for contributing to the entrenchment of Jim Crow in the South.[49]

A second, familiar example is a little more recent. In *The Least Dangerous Branch*, Alexander Bickel's celebration of "the passive virtues" sought to explicitly incorporate the institutional constraints upon the judiciary—along with the need for "expediency" in our democratic politics—into his constitutional theory.[50] But the pragmatic concerns that, at least in part, informed his theory went too far for some. Hence the notable quip by Gerald Gunther, who critiqued Bickel's argument: "There indeed lies the novelty and vulnerability of the Bickel thesis: the emphasis on principle as the highest Court duty, but only in a limited sphere of Court actions; the 100% insistence on principle, 20% of the time."[51]

Again, my claim here is not that legal or more popular discourse about the Court is incapable of incorporating political and institutional realities. Rather, my suggestion is that those political and institutional realities are usually incorporated, if at all, in only a half-hearted way. The image of the Court driven by legal principal is still a powerful one, and as such, claims of limited judicial capacity inescapably fit oddly against this expectation.

To be sure, there is a way in which the discourse of limited judicial capacity could be joined with a view of standard-bound judicial actors. Recall the rhetorical theme in the preceding Part about the need for discoverable and manageable standards in instances of judicial intervention.[52] As I noted before, there is a hint of the judicial capacity idea in these arguments, and it is possible that judicial capacity concerns may have been on their minds of some of the justices participating in these cases. Still, it is also possible to conceptually separate this concern from judicial capacity concerns. Another way to understand this preoccupation with legal standards—perhaps the more obvious way to understand it—is that the Supreme Court should not be standard-less, all-purpose problem solvers because this is simply not what the Court should do (whether it possesses the capacity or not). The role of at least some judges—if not all

49. *See, e.g.*, OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, 378–79 (1993); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 306, 316–17 (2000).

50. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 68–71, 112–13 (1962).

51. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964). *See also id.* at 5, 22–25. More recently, Tara Leigh Grove has noted the related point that judicial actions driven by concerns about sociological legitimacy or sociological considerations—like public backlash—sit in considerable tension with "legal legitimacy." Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2259–60, 2267, 2271 (2019) (reviewing RICHARD H. FALLON, JR., THE SUPREME COURT'S LEGITIMACY DILEMMA (2018)).

52. *See supra* notes 26–29 and accompanying text.

of them—is to adjudicate cases according to clear legal principles; judicial solutions for some social and political ills may simply not fit that template. Understood in this sense, the points raised by Justices Frankfurter, Harlan, and Roberts are at root a justification for judicial modesty based upon a view of the judicial role and judicial duty.

A second and related reason why judicial capacity concerns may be less prominent in judicial discourse may have more to do with prevailing historical narratives about the Court. It is telling that much of the focus in the preceding Part is devoted to judicial concerns about intruding onto the domain of other institutional authorities. As discussed before, the root of this worry may indeed lie in a persistent insecurity the federal judiciary has felt about being an unelected branch of government. But worries about ill consequences for the Court following from overly aggressive moves—in the form of a loss of institutional prestige, public standing, or more aggressive threats from the elected branches—have historical reference points. There are examples like *Dred Scott*[53] or *Lochner v. New York*[54] that have seemingly outsized influence within prevailing historical narratives as cautionary tales of how the Court may be damaged when it loses a sense of caution and restraint. To offer a familiar take on these cases, William Wiecek has stated that "*Lochner* has become in modern times a sort of negative touchstone. Along with *Dred Scott*, it is our foremost reference case for describing the Court's malfunctioning."[55]

In contrast, one is hard-pressed to think of analogous, well-known episodes in the Court's history that would provide a cautionary tale for judicial actors that ignored capacity constraints—and that figure as prominently as the preceding examples within American legal culture. As such, judicial actors seeking to justify more modest courses of action would not surprisingly reach for historical examples and historical fears that would resonate more deeply with them, and with other members of the legal community.

Third and finally, I suspect there are elements within the present context of American politics that would likely make judicial capacity arguments especially less compelling. Starting from a common baseline

53. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

54. 198 U.S. 45 (1905).

55. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123 (1988). Later, Wiecek is more specific on the nature of this "malfunctioning": "We speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature." *Id.* at 124–25. Notably, Don Fehrenbacher thought the danger posed to the Supreme Court's institutional prestige by the *Dred Scott* ruling may have been overstated by some. But he nevertheless conceded that in the post-Civil War era, "*Dred Scott* continued to have great rhetorical value to Republicans as a point of departure, a basis of comparison, and a horrible example." DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 579 (1978).

expectation, noted above, that judicial actors should primarily be driven by legal principle, I believe we live in a time where many actually do expect the Court to be the default solver of some social problems. This is due, I suspect in part, to the recurrence of divided government that has existed at the federal level since Nixon's election to the presidency in 1968.[56] Given that, and given the increasingly gridlocked governance that has followed, we have entered a time—especially in the last decade—where citizens and elected officials look to the federal judiciary as their best option for achieving major policy reforms at the national level.[57]

Against this backdrop, reformers who look to the federal courts as their only viable avenue for national change may very well find none of the above-noted rhetorical themes on judicial modesty to be very persuasive. But even in a relative sense, appeals to limited judicial capacity suffer from the liability of being less familiar; they are less connected to an ideal of judges as driven by legal principle, and less tied to cautionary tales from the past. In the contemporary context, it is especially hard to see judicial capacity arguments gaining traction and becoming a favored modality of judicial argument to justify more modest courses of action.

Within the Court itself, it also seems unlikely that judicial capacity arguments would gain much traction in the present time either—though for a different reason. At present, it seems we are in a period where challenges to the Court's institutional legitimacy seem greater. Within the present context of heightened partisan polarization,[58] the public has witnessed two bruising confirmation battles with the appointments of Justices Gorsuch and Kavanaugh—along with the memory of Judge Garland's failed nomination hanging over both of these appointments.[59] Perceptions of a principled separation between law and politics may no

56. On the present condition of persistent, divided federal governance, and its influence upon the federal judiciary, see, e.g., Richard H. Pildes, *Is the Supreme Court a "Majoritarian Institution?"* 2011 SUP. CT. REV. 103, 136–37; Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 IND. L. REV. 141, 171–74 (2016). For my own discussion on how divided government has contributed to a present state of "uncertainty" for the Supreme Court in certain areas of constitutional law, see Stuart Chinn, *The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality*, 2019 UTAH L. REV. 915, 945–58.

57. This point dovetails with the related observations of others on the gradual growth of judicial interpretive authority over constitutional meaning over the course of American history—a trend aided in more recent times by, among other factors, the persistence of divided government. *See, e.g.*, KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 232, 274, 283–84 (2007).

58. NOLAN MCCARTY, KEITH T. POOLE, AND HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL ROLES 18, 25–35 (2d ed. 2016).

59. *See, e.g.*, Carl Hulse, *The Court Mitch McConnell Built*, N.Y. TIMES (June 29, 2019), https://nyti.ms/2Nm2kmM.

longer seem as much of a given within the legal community and within the broader polity.[60]

To the extent that justices might reasonably internalize some of these dynamics in broader society, it might incentivize them to lean on those argumentative themes that are more grounded in legal principle rather than instrumentalism or prudential concerns. Of course, a judge appealing to the constraints of judicial capacity would not necessarily sound like a mindless partisan. But again, judicial capacity arguments do not sound especially legal either. To the extent justices may feel incentivized to cultivate a perception of the judiciary's separation from politics, some of the argumentative themes noted in the preceding Part would contribute more toward that goal than judicial appeals to its limited institutional capacity.

60. Thus in noting trends in Gallup polls over the past several decades, and in noting that only thirty-seven percent of respondents had "a great deal" or "quite a lot of confidence" in the Supreme Court in 2018, Thomson-DeVeaux and Roder stated that "[t]he reality is that today, Americans' confidence in the Supreme Court is weaker than it was 20 years ago. Americans may no longer be willing to give the court the benefit of the doubt." Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/ [https://perma.cc/NPZ9-V4Q8]. The Gallup response with respect to this question in 2019 was thirty-eight percent. *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx?version=print [https://perma.cc/V54G-DMLK].