# JUDICIAL CAPACITIES

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## INTRODUCTION

Andrew Coan's *Rationing the Constitution* offers a powerful and elegant argument for the proposition that institutional limits impose a significant ceiling on the Supreme Court's power. The Court simply lacks capacity, he tells us, to decide more than a small fraction of disputes.[1] He lucidly shows that Justice Antonin Scalia was off—by many orders of magnitude—when he posited "a Supreme Court standing . . . at the apex of government, empowered to decide all constitutional questions, always and everywhere primary in its role."[2] Now, to be fair: One might simply dismiss this claim as vintage Scalian hyperbole. But there is more to the idea of a runaway court than Scalia's perception alone. The historical line of political concerns about judicial activism—or what in earlier periods was branded "judicial oligarchy"[3]—is long and enduring. By detailing the limits on the Court's capacity to act, the book offers a strong corrective to any view of unlimited judicial power, and this corrective has obvious implications for the ability of the Court to autonomously advance social change.

Coan's emphasis on the *quantitative*, however, leaves much to be said about the *qualitative* aspect of the Court's ability to make powerful change, and to insert itself into many of the most contested and volatile debates of the day. In this sense, I think we must attend not only to capacity in the singular sense that Coan means it—the limited volume the Court can handle—but also to the plural *capacities* of the Court, understood as

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1. ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISIONMAKING 2 (2019).

2. *Id.*

3. Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209, 215.

its many different capabilities to act. That is, Coan has elaborated a meaningful set of limitations on the Court, but those limitations themselves are insufficient to allay fears that the Court has the ability to act selectively and, when it chooses, to exercise formidable policymaking power in highly controversial realms. Indeed, some of what I am getting at here is implicit in the book's title. Consider by analogy the fears of government "rationing health care" that animated those opposed to the Affordable Care Act during the noisy health care debates of 2010.[4] A core fear encapsulated in that soundbite was that government would get to choose who received care and who did not.[5] So, we might say, the very fact that the Court must and does "ration" the Constitution is, in fact, a key part of what stirs counter-majoritarian anxieties. It is a feature, not a bug, of this critique that the Court *selectively* engages, and creates and deploys frameworks that give it the disquieting discretion to choose when to act.

In this Essay, I undertake to show that the fears of excessive judicial power that are a key launching point for Coan's model are unlikely to be alleviated by his demonstration of volume-based limits. I will use Fourteenth Amendment doctrine as my grounding. My focus will be on equal protection, but I will consider some substantive due process doctrine, as well.[6] I will argue first that Coan's rendering of equal protection doctrine is too oriented to black letter doctrine and insufficiently attentive to how putatively clear, categorical rules have been deployed in a more standard-like, strategic way. The Court's capacity, if you will, to shape-shift constitutional rules is very much on display in this area, and the ways it has deployed doctrine in some of the most controversial issues is not less objectionable to critics because the Court is not *also* acting in many other domains.

Second, I will argue that the justices also have a range of other capacities to act, often in dynamic interaction with the political process. In this Essay, I touch on only a few examples, and will focus on how the contemporary media environment can amplify these capacities. The point I hope to emphasize is this: the decision of cases on the merits is at the heart of the Court's power, but it does not exhaust the ability of the justices to shape policy and social movements. Considering a more comprehensive set of capacities gives us a fuller picture of judicial influence and independence than can Coan's caseload-based analysis alone.

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4. Elizabeth Weeks Leonard, *Death Panels and the Rhetoric of Rationing*, 13 NEV. L.J. 872, 875 (2013).

5. *Id.* at 873 (describing Sarah Palin's claim that the proposed Affordable Care Act would allow government to choose who is "worthy of health care").

6. Although Coan notes that space limitations prevented him from including substantive due process in his book, he views that doctrine as subject to the same dynamics he identifies in the realm of equal protection. COAN, *supra* note 1, at 114.

## I. CAPACITY AND CONSTRAINT: THE WEAK STRICTURES OF FOURTEENTH AMENDMENT DOCTRINE

Coan's picture of equal protection doctrine boils down to a few key points: The Court would be swamped if it ever engaged in meaningful equal protection review of a broad swath of governmental activity. In recognition of that, its equal protection doctrine has eschewed broad, functional standards of the kind favored by Justices Stevens[7] and Marshall[8] and has, instead, utilized "categorical rules over standards,"[9] in order to "cleanly insulate the vast majority of government discrimination from serious constitutional review."[10] Thus, Coan notes, "meaningful Equal Protection review in the modern era has never extended beyond a short list of narrow, discrete rights and suspect classes."[11]

Coan is surely correct that the Court has not—and likely will not—put a broad range of governmental action under the equal protection microscope. He notes, for example, that neither the more liberal, nor the more conservative justices have shown any inclination to use equal protection to systematically address economic issues, notwithstanding the ideological principles that might incentivize each group to do so.[12] And indeed, there are indications in the equal protection case law that the Court is wary of opening the proverbial floodgates.[13] But I think Coan's rendering of equal protection doctrine misses the mark in terms of how the doctrine actually operates and how it facilitates the Court's ability to powerfully advance social change when it is so disposed. That ability to act *selectively* is itself an important form of power, and one that animates many critiques of the Court. This is especially clear in relation to LGBT rights, but I will address some other areas, as well.

At the outset, Coan's portrait of equal protection doctrine and the role of the "tiered scrutiny"[14] strikes me as anachronistic, at the very least. Black letter doctrine aside, the last few decades of equal protection

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7. *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451–54 (1985) (Stevens, J., concurring).

8. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–117 (1972) (Marshall, J., dissenting); *Cleburne*, 473 U.S. at 460–65 (Marshall, J., concurring in the judgment and dissenting in part).

9. COAN, *supra* note 1, at 127.

10. *Id.* at 136.

11. *Id.* at 121.

12. *Id.* at 5.

13. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 248 (1976) (arguing that applying strict scrutiny to policies with a discriminatory impact without requiring proof of discriminatory intent would be "far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white").

14. COAN, *supra* note 1, at 134.

doctrine have shown us that the tiers of scrutiny are anything but crisp and categorical. Instead, they are both malleable as deployed, and dispensable when convenient. These characteristics, in turn, allow the Court to act independently to pursue change when five or more justices wish to do so.

For one thing, the notion that we have three and only three tiers of scrutiny is belied by recent case law. It is perhaps more accurate to say we have eight or nine tiers, with stronger and weaker versions of each. So, for example, consider conventional strict scrutiny,[15] strict scrutiny minus,[16] strict scrutiny-sometimes,[17] intermediate plus,[18] conventional intermediate,[19] intermediate minus,[20] rational basis plus,[21] conventional rational basis,[22] and something like defies-easy-categorization.[23] What this tells us, among other things, is that the tiers are highly variable as applied, and sometimes seem to operate more like a standard than a rule. And, this inconsistency in the tiers can fuel political critiques of the Court in ways that are orthogonal to Coan's notion of limited capacity, and not answered by the fact of that limited capacity.

Take race discrimination, the prototypical case for strict scrutiny. During the late 1980s and then the 1990s, the Court mulled in several cases

15. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).

16. For examples of a more deferential version of review in the context of strict scrutiny, see *Grutter v. Bollinger*, 539 U.S. 306, 326–29 (2003) and *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207–08 (2016).

17. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) applied strict scrutiny to a denial of benefits to noncitizens lawfully in the country, but cases like *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) and *Ambach v. Norwick*, 441 U.S. 68, 74 (1979) carved an exception for policies that exclude aliens but are deemed part of a state's self-government. Policies that fall into this latter category are reviewed only for rationality.

18. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982) and *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (requiring an "exceedingly persuasive" level of justification).

19. *See Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (requiring that the challenged policy serve "important governmental objectives" and be "substantially related to the achievement of those objectives").

20. *See Nguyen v. INS*, 533 U.S. 53, 74 (O'Connor, J., dissenting) (criticizing Court's weak application of intermediate scrutiny in the case as "a stranger to our precedents").

21. The Court applied some form of heightened rational basis scrutiny in *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–38 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–41 (1985); *Romer v. Evans*, 517 U.S. 620, 631–36 (1996); and *United States v. Windsor*, 570 U.S. 744, 770–75 (2013). The emergence and character of this scrutiny is insightfully explored in Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016).

22. The canonical case is *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

23. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 216–24 (1982). For a perspective on the idiosyncratic rationale in *Plyler*, see Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1213 (arguing that, in striking down a state law barring the children of undocumented persons from access to public school, *Plyer* heightened scrutiny based on "the interaction between the right and the class").

the question whether to apply strict scrutiny to cases that involve claimed discrimination against whites. This was itself a highly contested proposition, as those justices opposing it argued in the major affirmative action cases that finally settled the question by ruling that strict scrutiny would, in fact, be applied.[24] If equal protection jurisprudence is concerned with "suspect classes" that derive from footnote four,[25] then it simply makes no sense to extend such scrutiny to claims by whites. By reorienting—some would say changing—the rules to focus on suspect *classifications* instead of *classes*, the Court brought strict scrutiny into play, with plainly adverse consequences for affirmative action and other race-conscious policies designed to dislodge long term structures of discrimination.

This doctrinal move placed the idea of colorblindness at the center of race and equal protection.[26] Yet, when some justices later flinched at the implications of categorical colorblindness and strict scrutiny for affirmative action in higher education, the Court pulled back by weakening the force of strict scrutiny in high profile, showdown cases testing the permissibility of race-conscious admissions policies. The Court's decisions upholding such policies in *Grutter v. Bollinger*[27] and *Fisher v. United of Texas* (*Fisher II*)[28] did so by granting some measure of judicial deference to universities in this realm, prompting opposing justices to argue that strict scrutiny had been illegitimately diluted.[29]

On occasion, moreover, some justices are unclear about the crucial question of whether or how strict scrutiny applies to race-conscious governmental decision-making at all. Consider Justice Kennedy's influential concurrence in *Parents Involved in Community Schools v. Seattle School District*,[30] another showdown case, this one testing the constitutionality of public school admissions criteria that included race, among other factors.[31] The Court, led by the Chief Justice, struck down as

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24. The question was settled in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–98 (1989) and *Adarand Constructors v. Pena,* 515 U.S. 200, 218–31 (1995). The Court's decision to apply strict scrutiny in these cases was met with impassioned dissents arguing that the Court profoundly misunderstood the dynamics of racial inequality. In *Croson*, see 488 U.S. at 528–61 (Marshall, J., dissenting); *id.* at 561–62 (Blackmun, J., dissenting). In *Adarand*, see 515 U.S. at 242–71 (Stevens, J., dissenting); *id.* at 264–71 (Souter, J., dissenting); *id.* at 271–76 (Ginsburg, J., dissenting).

25. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

26. For thoughtful reflections on the doctrinal emergence of colorblindness, see Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

27. 539 U.S. 306 (2003).

28. 136 S. Ct. (2016).

29. *See, e.g.*, *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting); *Fisher*, 136 S. Ct. at 2223 (Alito, J., dissenting).

30. 551 U.S. 701 (2007).

31. *Id.* at 782–98 (Kennedy, J., concurring in part and concurring in the judgment).

unconstitutional the plans used to reduce racial segregation in schools in Seattle and in Jefferson County, Kentucky.[32] But perhaps more important was the Kennedy concurrence's exegesis about what school districts could and could not do in the future to combat racial segregation. Although an early section of the concurrence included a doctrinally standard recitation of strict scrutiny,[33] crucial language later in the opinion was elusive about the core question of how and when racially-conscious decision-making by school officials triggers strict scrutiny, as well as when such measures can survive it. At one point, Kennedy included a list of permissible strategies (such as, for example, strategic site selection and certain targeted recruitment efforts) that he characterized as "race conscious" but "unlikely . . . [to] demand strict scrutiny" because they "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race . . . ."[34] Elsewhere, though, he underscored that "[a] compelling interest exists in avoiding racial isolation," as it does to "achieve a diverse student population," of which "[r]ace may be one component."[35] What is left unexplained, however, is a central question: do the actions Kennedy suggests fail to trigger strict scrutiny (as initially suggested) or do they survive it? That is a question of central import to the policymakers and school district lawyers around the country to whom he was speaking, but the opinion was ambiguous.

The zigging, zagging, and occasional opaqueness in these cases is the point I wish to underscore. The assertedly-categorical rules, a point of great emphasis by Coan, can be quite elastic, and their boundaries uncertain. And these rules apply to some of the hottest-button issues of all. For Coan, the significant fact is that these disputes are cabined to race and therefore do not implicate a volume of cases the Court cannot handle. A different perspective is to say the charges of "judicial supremacy" with which the book begins[36] are in fact inspired and fueled *precisely by* the discretion the Court has to intervene unevenly and to shape policy

32. The case is perhaps best known for its pitched rhetorical battle over the legacy of *Brown*, along with the pugnacious Roberts postulate that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 746–48.

33. Under strict scrutiny, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling state interests.'" *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Johnson v. California*, 543 U.S. 499, 505 (2005)).

34. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment).

35. *Id.* at 797–98 (Kennedy, J., concurring in part and concurring in the judgment). This language forms part of a rousing conclusion urging school districts to use creativity to "achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications." *Id.* at 798 (Kennedy, J., concurring in part and concurring in the judgment).

36. COAN, *supra* note 1, at 1.

unpredictably. Think *Bush v. Gore*.[37] The case is not objectionable to critics who see it as illegitimate activism because its logic and approach opens too many doors to widespread equal protection review of voting practices; it is objectionable because it was *only* used to resolve a single election dispute of enormous consequence.[38] The selectivity *is* the problem.

Coan, I think, also misses the mark in discounting what the Court's gay rights cases reflect about doctrine.[39] After canvassing the relatively short lists of suspect and quasi-suspect classifications, Coan notes that the Court has engaged in "studied ambiguity" as to the standard of review it was applying in its gay rights cases.[40] But, he argues, "[no one] thinks that the de facto heightened scrutiny" in those cases is "likely to expand beyond discrimination based on sexual orientation and, perhaps, gender identity."[41] Let me offer a different perspective.

Consider what the Court, led by Justice Kennedy, did on an issue of great public salience and deep controversy over the course of nearly twenty years. Starting with *Romer v. Evans*'[42] equal protection-based invalidation of an anti-gay rights ballot measure in 1996,[43] continuing through the striking down of bans on sodomy in *Lawrence v. Texas*,[44] and culminating in the marriage-equality rulings in *United States v. Windsor*[45] and *Obergefell v. Hodges*,[46] the Supreme Court fundamentally changed the social and legal landscape *without ever assigning a tier of scrutiny*. Indeed, notwithstanding mountains of briefs charting every conceivable route to heightened scrutiny under equal protection,[47] the Court never so much as framed the question in its opinions. The "clear and categorical" rules said to reflect the key constraints on the Justices simply had no role.

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37. 531 U.S. 98 (2000).

38. *See, e.g.*, Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (criticizing Court's language that its ruling was limited to the particular circumstances of the case as a "disingenuous limiting instruction" reflecting "the classic 'good for this train, and this train only' offer").

39. COAN, *supra* note 1, at 122–23.

40. *Id.* at 122.

41. *Id.* at 122–23.

42. 517 U.S. 620 (1996).

43. *Id.*

44. 539 U.S. 558 (2003).

45. 570 U.S. 744 (2013).

46. 135 S. Ct. 2584 (2015).

47. *See, e.g.*, *Obergefell v. Hodges*, SCOTUSBLOG (2020), https://www.scotusblog.com/case-files/cases/obergefell-v-hodges/ [https://perma.cc/3PV8-4SYP] (collecting the large number of amicus briefs filed in *Obergefell*); *Windsor v. United States*, SCOTUSBLOG (2020), https://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/ [https://perma.cc/7PN4-9UAG] (collecting the large number of amicus briefs filed in *Windsor*).

As such, it is hard to make the case that these rules ought to soothe anxieties about the Court's power.

Circa 1996, *Romer* looked like it might be a one-off case that dealt with an unusually broad anti-gay rights ballot measure that was saturated with hostility towards sexual minorities.[48] There was no guarantee it would be followed up with anything more, especially when the Court denied certiorari a few years later in a post-*Romer* case in which the Sixth Circuit upheld a similar, though more narrowly-drawn, local measure.[49] We now know, however, that it was the beginning of a broad constitutional refashioning of sexual orientation law, and it proceeded independently of the categorical rules that Coan places at the center of the analysis. If the Court can pursue change in a starkly non-doctrinal fashion on this issue, it is unclear why it cannot or will not do so in some future set of controversial disputes.

The style of Justice Kennedy's decisions in these cases also bears mention. Indeed, as much as anyone, Kennedy illustrates how apparent rules can function as anything but "clean" and "categorical." Consider some of his most influential Fourteenth Amendment opinions. In both *Romer* and *Windsor*, the equal protection tier of scrutiny was confusing and obscure, and broad concepts—like animus, dignity, and the synergy between equality and liberty—took the place of anything clearly rule-like.[50] Animus looms especially large here because it had surfaced as an important principle in pre-Kennedy cases not only about gay rights but about poverty (*Department of Agriculture v. Moreno*)[51] and intellectual disability (*City of Cleburne v. Cleburne Living Center*).[52] It supplies a standard that threatens the rule of toothless rationality review because the presence of animus can function to negate any governmental claim to having a rational basis. To be sure, the Court has not widely deployed animus, and the Roberts Court as recently reconstituted seems especially unlikely to do so. But there it sits, as a lever ready to be pulled by a future Court interested in imposing more demanding review—say, on select matters relating to religious liberty, should the Court want to expand

48. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257–58 (1996) (reading *Romer* to be grounded in a rarely-invoked principle that the government may not broadly bar a group from meaningful participation in society).

49. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied* 119 S. Ct. 365 (1998).

50. For a detailed examination of the role of these ideas in Kennedy's opinions in these cases, see, for example, Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 447–48 (2017) (arguing that these ideas are central to the "gay rights canon").

51. 413 U.S. 528 (1973).

52. 473 U.S. 432 (1985). On the constitutional jurisprudence of animus, see Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183; Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

protections in that realm and add an equal protection dimension to what has conventionally been framed as a matter of freedom of religion. There will be a ready new route to take, should that prove expedient.

Just as Justice Kennedy wrote opaque equal protection opinions in *Romer* and *Windsor*, so his *Lawrence* opinion invoking due process confounded many, including the lower courts, which split on what standard of review they thought the Court had applied.[53] The opinion was, in Kennedyesque fashion, long on sonorous language and abstract principles but short on doctrinal clarity. *Obergefell* was in some ways the most doctrinally conventional of his gay rights quartet. Kennedy called the right to marry fundamental, which formally triggered strict scrutiny.[54] But one searches the opinion in vain for any doctrinal discussion of compelling state interests or narrow tailoring. Instead, *Obergefell* continued Kennedy's familiar emphasis on abstract ideas, like dignity and synergy, and his signature rhetoric—seen by some as inspired and others as purple prose.[55] Whatever it and the other gay rights decisions reflect, it is not doctrinal clarity or adherence to crisp rules. Standards of "animus" and "dignity" were the decidedly non-rule-like stars of the show.

As we focus on areas of intense public controversy, let us add abortion into the mix. It has not, of course, been framed by the Court as an equal protection issue, notwithstanding scholarly arguments to reconceive reproductive rights in those terms.[56] But the doctrinal path taken in this area pertains directly to the rules versus standards analysis that is part of the Coan model. In *Casey v. Planned Parenthood*,[57] the Court moved from the rule-like approach of *Roe v. Wade*,[58] featuring a fundamental right triggering strict scrutiny and a bright line trimester approach, to the notoriously indeterminate standard known as "undue burden."[59] Before fetal viability, said the joint opinion in *Casey* by Justices Kennedy, O'Connor, and Souter, it is impermissible for the government to adopt a

53. *Compare Lofton v. Sec'y of the Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 816 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) (declining to read *Lawrence* as having recognized a fundamental right that triggered heightened scrutiny), *with Witt v. Dep't of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) (reading *Lawrence* as having applied heightened scrutiny).

54. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

55. For an overview of the debates about Justice Kennedy's opinions and jurisprudential style, see Mitchell Berman & David Peters, *Kennedy's Legacy: A Principled Justice,* 46 HASTINGS CON. L.Q. 312 (2019).

56. *See generally* Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 U.C.L.A. L. REV. DISCOURSE 160–70 (2013).

57. 505 U.S. 833 (1992).

58. 410 U.S. 113 (1979).

59. *Casey*, 505 U.S. at 874–75 (finding that *Roe*'s trimester approach was flawed and that the undue burden standard protected valid state interests more effectively).

policy "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[60] Laws that have only "the incidental effect of making it more difficult or more expensive to procure an abortion" do not constitute an undue burden, nor, typically, will "state measure[s] designed to persuade [a woman] to choose childbirth over abortion." [61] One struggles to find much real content in this standard, and there has been a high volume of litigation around the country sparring over its application to particular restrictions on access to abortion. Recent litigation in the Court has revealed sharp differences among the justices about whether the undue burden test supplants or is supposed to work in tandem with the rational basis inquiry. The Court's most recent word on the subject indicated the former,[62] but with new justices on the Court, and a pending case in which to address the question,[63] the Court may well shift closer to the latter (if not impose more draconian changes to abortion law). There is no mistaking the flexibility the Court has to do so under the strikingly uncertain standard it has adopted.

In sum, the Fourteenth Amendment doctrine reviewed here is quite malleable and leaky, and is undefined in ways that complicate Coan's picture of hard and fast limits on judicial power.

## II. OTHER JUDICIAL CAPACITIES

In this section, I briefly consider some other judicial capacities that are relevant to the Court's ability to promote change. Rather than attempting any comprehensive overview, I focus on two such capacities that are both noteworthy in their own right and can also interact with one another in interesting ways.

### *A. Agenda-Setting*

One obvious way the justices can act to autonomously effectuate change is by setting their own agenda. Sometimes the Court is depicted as a passive institution, different from the proactive political branches because it must wait for cases to arrive at its door. But that is an overly simplistic characterization. Coan shows us that there is a sharp limit on the volume of litigation the Court can adjudicate, but it is significant—and he freely accepts—that the justices have wide freedom to decide what issues to take up. Not only does the Court have almost-unlimited power to decide

60. *Id.* at 878.

61. *Id.* at 874, 878.

62. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

63. *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted* 88 U.S.L.W. 3087, 3087 (Oct. 4, 2019).

which cases it wants to hear through its certiorari docket,[64] but there is also strategic agenda-setting by the justices.[65] The dynamics of this agenda-setting include "aggressive grants" and "defensive denials"[66] designed to pursue or thwart particular policy objectives. Especially noteworthy is the extent to which the justices salt their opinions with language that signals litigants to pursue a particular case or issue for future adjudication by the Court.[67] These signals are decipherable to sophisticated advocates and policy reformers who closely follow the Court. Although this dialogue is of a decidedly insider variety and is not meaningfully visible to most of the public, it does reflect another way that the Court exercises its power selectively and strategically.

### *B. Communicating with the Public and Social Movements*

There is a classic, if old, school of thought in political science that sees the Court as able to influence how the public views issues through its opinions. The so-called "republican schoolmaster" view, associated with Ralph Lerner and Eugene Rostow, contemplates that the justices can lead public opinion in significant ways.[68] Over the years, critics of this didactic view of the Court have raised significant questions about its persuasive force.[69] Among other questions, it is surely fair to ask: who is the audience for Supreme Court opinions? And what is the evidence that the justices' opinions "teach" or necessarily have the effect of legitimating the Court's views with the public?

I will not be pressing the republican schoolmaster view. At the same time, the breezy dismissal of that view based on the idea that very few people read or care about Supreme Court opinions is less warranted than it once was. The informational dynamics surrounding the Court have changed radically since Rostow and Lerner wrote in the 1950's and 60's, respectively. Taking account of these changes opens the way to identify a

64. *See* Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 706 (2018) (noting Court's "nearly boundless power to decide which cases it will hear").

65. The literature on agenda-setting is reviewed, and its dynamics explored, in VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT (2007).

66. *Id.* at 23.

67. *See id.* at 42–67.

68. *See, e.g.*, Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127 (exploring capacity of the Court to foster civic responsibility and shape public opinion); Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (asserting that justices are "teachers in a vital national seminar").

69. Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564, 566 (2009). For a succinct review of the literature on the relationship between the Court's decisions and public opinion, see PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 10–12 (Nathaniel Persily et al. eds., 2008).

different judicial capacity. In the contemporary context, what the justices write and say is quickly launched into the political ecosystem in ways that inject the Court into a kind of dialogue with social and political movements—whether the justices wish to be in that dialogue or not. The advent of instant digital access to the Court's opinions and oral arguments, and the availability of social media to quickly and widely disseminate, interpret and comment on the justices' language, greatly expands the reach of their words.[70] And the fact that the Court is as polarizing a force as other contemporary political institutions suggests that people may well engage with what the justices say and do in similar ways as they engage with other political institutions.[71]

I have looked closely at this issue in the context of the landmark *Obergefell* decision, after which there was a massive digital response, including many tweets and postings that quoted and sometimes commented on the opinions.[72] Blockbuster decisions like that one may be most likely to garner widespread attention online, but contemporary social media provides a platform to draw more eyes to a wider array of Supreme Court decisions if thought-leaders or those with a large online following make an effort to do so. In this sense, the gatekeeping dynamics surrounding public attention and the Court have changed and now allow the justices' views to become part of public policy debates in new ways, although it is an open question how much public appetite there will be to engage with the Court.[73] This phenomenon is not, of course, limited to what the justices say in their opinions. Speeches, books, interviews, testimony at confirmation hearings and other extrajudicial statements also circulate widely,[74] especially given the rise of so-called "celebrity justices."[75] All of this reflects another route to judicial influence of a sort.

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70. It is worth noting that the public's easier access to judicial opinions does not necessarily mean that that the justices' words "teach" in the vein of a republican schoolmaster, though some justices may aspire to that role. For an example of such an aspiration, see Kimberly J. Mueller, *Justice Kennedy, Teacher*, 52 U.C. DAVIS L. REV. ONLINE 329, 336–39 (2019).

71. For an example in the realm of same-sex marriage, see Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1036 (2016). On polarization and the Court more generally, see Richard Hasen, *Polarization and the Judiciary,* 22 AM. REV. POL. SCI. 261 (2019); Neal Devins & Lawrence Baum, S*plit Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301.

72. Schacter, *supra* note 71, at 1029–31.

73. *Id.* at 1028.

74. For good overviews, see Olga Frishman, *Court-Audience Relationships in the 21st Century*, 86 MISS. L.J. 213 (2017); Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI-KENT L. REV. 487 (2013).

75. *See* Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157 (2016).

Let me point to three examples of opinions in the areas I have focused on here that illustrate the ways in which the justices can influence and interact with social movements.

The abortion context offers a particularly sharp example of this phenomenon. For many years, the battles lines over abortion had been drawn in familiar terms: the pregnant woman's right to choose clashes with the state's prerogative to protect the life of the unborn. Starting in the early 2000s, however, the organized pro-life movement began to offer assertedly "woman-protective" justifications for restricting access to abortion.[76] Whether couched in terms of protecting women's health or shielding women from "regret" about abortion they might later feel, this was a style of argument that diverged sharply from the traditional defense of restrictive policies grounded in moral claims about the fetus. This reframing by the pro-life movement was years in the making. In *Gonzales v. Carhart*,[77] it was explicitly accepted and validated by Justice Kennedy's opinion upholding the so-called partial health abortion law on the grounds that it would prevent a woman from later regretting her decision.[78] This acceptance was welcomed by pro-life activists, and it solidified this form of argument in the political and legislative battles for restrictive abortion policies.[79] The embrace by the Court of such rationales has helped to bolster and support the national movement toward targeted regulation of abortion providers (so-called "TRAP" laws).[80] These laws have generated abundant litigation about whether regulation asserted to protect women's health is simply a pretext for burdening abortion providers and shutting down as many clinics as possible.[81]

This turn in the abortion debate shows a Supreme Court justice in a form of dialogue with a social movement: The pro-life movement's

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76. On "woman-protective" justifications, see Reva B. Siegel, *Dignity and the Politics of Protection*, 117 YALE L.J. 1694 (2008) [hereinafter Siegel, *Dignity*]; Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Arguments*, 57 DUKE L.J. 1641 (2008) [hereinafter Siegel, *The Right's Reasons*]. On the emergence of antiabortion advocacy framed as a form of feminism, see Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 268 (2013).

77. 550 U.S. 124 (2007).

78. The key language was: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow." *Id.* at 159 (internal citation omitted).

79. Siegel, *Dignity*, *supra* note 76, at 1733–35 (noting "elation" of pro-life community and subsequent organizing efforts designed to build on the Kennedy opinion's rationale).

80. Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. L.J. 735, 761–62 (2018).

81. *See Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *cert. granted sub nom. June Med. Servs. v. Rosso*, 140 S. Ct. 35 (Oct. 4, 2019).

development of justifications linked to the woman made that a plausible basis for Justice Kennedy to accept. His acceptance of it, in turn, solidified its legitimacy in constitutional discourse. All of this, then, reflects the Court acting to shape a major public debate in a way that goes beyond upholding or striking down a law on the merits.

*Lawrence v. Texas*[82] provides another example of this phenomenon. Language used by both Justice Kennedy and Justice Scalia was picked up by social movements active in the gay rights arena. The majority opinion placed a heavy focus on same-sex relationships, repeatedly citing the state's obligation to "respect" same-sex relationships,[83] and to recognize the "[enduring] bond"[84] between partners that go beyond sex. The state, Kennedy concluded, "cannot demean [the partners'] existence or control their destiny by making their private sexual conduct a crime."[85] While Kennedy twice signaled in the opinion that he was *not* addressing any right to same-sex marriage,[86] his language about the state's obligation of respect was picked up only months later in the Massachusetts Supreme Judicial Court's groundbreaking decision recognizing marriage equality under its state constitution.[87] And the *Lawrence* language, notwithstanding the caveats Kennedy attached about marriage, was used to support the gay rights movement's argument for equal gay citizenship and, over time, became a staple of the social and associated legal movement for marriage equality.[88]

Justice Scalia's dissent in *Lawrence* provided fuel to the opposing social movement. As he had in his *Romer* dissent,[89] and would later in his *Windsor* and *Obergefell* dissents,[90] Scalia used sharp language strongly redolent of culture war-style opposition to gay rights. He echoed political rhetoric by engaging in slippery slope arguments placing homosexuality on a list with many provocative traits and behaviors.[91] He asserted that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their

82. 539 U.S. 559 (2003).

83. *Id.* at 574–75, 578.

84. *Id.* at 567.

85. *Id.* at 578.

86. *Id.* at 567 (arguing that the state should not define the meaning of a relationship "absent injury to a person or abuse of an institution the law protects"); *id.* at 578 (noting that the case did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

87. *Goodridge v. Dep't of Public Health*, 789 N.E.2d 941, 953 (Mass. 2003).

88. This dynamic is explored in Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 727–31 (2012).

89. *See Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

90. *See United States v. Windsor*, 570 U.S. 744, 778–802 (2013) (Scalia, J., dissenting); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting).

91. *See Lawrence*, 539 U.S. at 589–90, 602–03 (Scalia, J., dissenting).

children, as teachers in their children's schools, or as boarders in their home" because "[t]hey view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive."[92] He appealed to anti-elitism by saying that "[t]oday's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[93] And he warned that, the majority's bracketing of marriage notwithstanding, the opinion would lead to the legalization of same-sex marriage: "[t]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[94] Scalia's views about the effects and errors of *Lawrence* were soon picked up by political opponents of same-sex marriage.[95]

Ironically, some of Scalia's language also provided fuel—undoubtedly unintended—for the movement *supporting* marriage equality. Kennedy's attempt to distinguish between protecting same-sex relationships in *Lawrence* and offering constitutional support for same-sex marriage was branded by Scalia a "bald, unreasoned disclaimer," and readers were told: "Do not believe it."[96] His prediction, though, later provided fuel for activists and legal advocates supporting marriage equality. This might have been an *unintended* communication between the justice and the political process, but it became an influential one connecting the dots between decriminalizing sodomy and legalizing same-sex marriage.

A third example of a justice interacting with the public in potentially important ways flows from a number of Justice Sonia Sotomayor's opinions. More than once, Sotomayor has penned opinions offering extended reflections on the role of race in America. In something of a progressive counterpart to Scalia's rhetorical outreach to like-minded activists, Sotomayor has done so using non-legalistic, non-doctrinal language that seems intended to speak not only to her colleagues but also to citizens and those advocating for racial justice. One principal example

92. *Id.* at 602 (Scalia, J., dissenting).

93. *Id.* (Scalia, J., dissenting).

94. *Id.* at 604 (Scalia, J., dissenting).

95. For an example, see Jonathan Rauch, *The Supreme Court Ruled for Privacy, Not Gay Marriage,* THE ATLANTIC (July 1, 2003), https://www.theatlantic.com/politics/archive/2003/07/the-supreme-court-ruled-for-privacynot-for-gay-marriage/377633/ [https://perma.cc/LRR8-HBJR] (noting how conservative activists adopted Scalia's views). Leading work connecting the efforts of the justices to social movements is collected in NeJaime, *supra* note 88, at 670 n.36, 732 n.446.

96. *Lawrence*, 539 U.S. at 604.

is her dissent in *Schuette v. Coalition to Defend Affirmative Action*,[97] a case testing the constitutionality of Michigan's post-*Grutter* ban on race-conscious admissions policies by the public universities in that state. Her fifty-eight-page dissent included several pages devoted to showing how and why "race matters," including a line that pungently responded to the Chief Justice's well-known language about colorblindness from *Parents Involved*:[98]

> Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. . . .
>
> And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."
>
> . . . The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.[99]

More recently, Justice Sotomayor addressed with similar candor the issue of race and policing in her dissenting opinion in *Utah v. Strieff*,[100] a case about the exclusionary rule in the context of a police stop. Some of her dissent was joined by Justice Ginsburg (who had also joined the full *Schuette* dissent), but not the latter portions:

> Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe

97. 572 U.S. 291, 337–92 (2014) (Sotomayor, J., dissenting).

98. *See supra* note 32 (quoting the language from the Chief Justice's opinion that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007)).

99. *Schuette*, 572 U.S. at 380–81 (Sotomayor, J., dissenting).

100. 136 U.S. 2056 (2016).

> consequences much greater than the inconvenience suggested by the name. . . . We also risk treating members of our communities as second-class citizens.
>
> . . . The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. . . . For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.
>
> . . . By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.
>
> We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.[101]

Sotomayor's language in both cases commanded substantial media attention from both supporters and opponents of her views.[102] When she has been asked about what she is trying to accomplish when she writes opinions, Sotomayor has said that, in addition to talking to the other branches of government, she is sometimes "talking to the public in the sense of engaging them around an issue that might get missed."[103] It is unclear whether judicial rhetoric of this sort can produce the effects that

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101. *Id*. at 2069–71 (2016) (Sotomayor, J., dissenting) (internal citations omitted).

102. The unusually high profile of these opinions, and the conflicting reactions they produced, are addressed in Robert Barnes, *Sotomayor's Fierce Dissent Slams High Court's Ruling on Evidence From Illegal Stops*, WASH. POST (June 20, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-dont-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html?itid=lk_inline_manual_5; Adam Liptak, *Sotomayor Finds Her Voice Among the Justices*, N.Y. TIMES (May 6, 2014), https://www.nytimes.com/2014/05/07/us/politics/sotomayor-finds-her-voice-among-the-justices.html [https://perma.cc/JMJ3-MLJD].

103. Liptak, *supra* note 102.

some admirers of Justice Sotomayor's dissent claim.[104] But the attention she draws crystallizes another aspect of the justices' capacity to act to become part of salient public debates.

The examples reviewed in this section have shown various justices, through their written opinions, interacting with the public and social movements. Whether these interactions are a net institutional positive or negative for the Court, they reflect a different, more nuanced judicial capacity to pursue and influence social change. The phenomenon is not accounted for by the capacity limits Coan emphasizes.

## CONCLUSION

*Rationing the Constitution* lucidly demonstrates limits on the Supreme Court's capacity to pursue social change. Coan's model makes a significant contribution to understanding the dynamics of constitutional law and the Supreme Court. At the same time, it is important to see that volume-based limits on the Court do not resolve hard normative questions about the Court's ability to act selectively, nor do they account for the full range of capacities the justices have to influence public law and policy.

104. *See, e.g.*, Allegra McLeod, *Police Violence, Constitutional Complicity and Another Vantage*, 2016 SUP. CT. L. REV. 157 (praising the Sotomayor dissents for revealing the Supreme Court's "complicity" in police abuse and arguing that her vision can reframe the relationship between constitutional doctrine and race-based police violence); Dorothy Roberts, Foreword, *Abolition Constitutionalism,* 133 HARV. L. REV. 1, 90 (2019) (lauding the Sotomayor dissents for "powerfully spotlight[ing]" the problems in the "Court's colorblind and discriminatory intent doctrines," and "offering insights on what an alternative jurisprudence guided by abolition constitutionalism might look like").