EXTRA-JUDICIAL CAPACITY

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INTRODUCTION

I'm delighted to be part of an event honoring and exploring the insights of Professor Andy Coan's book, *Rationing the Constitution*.[1] I occupy Andy's old office here at the University of Wisconsin Law School, and given his incredible scholarly productivity, I continue to suspect I will find manuscripts or new constitutional models tucked under the floorboards.

Rationing the Constitution instructs us to think of the workings of our constitutional system, and courts in particular, through the lens of capacity.[2] The book focuses mostly on the supply side of constitutional adjudication: how limited judicial resources shape the judicial decisions that courts supply. Coan does not altogether ignore the litigants who make up the demand side of judicial decision-making, though. He acknowledges the demand side when he posits that his model will work where cases are "high-volume and high-stakes"[3]—terms I will return to shortly. But *Rationing the Constitution*'s principal aim, and accomplishment, is revealing how capacity constrains doctrine. The book sharpens our understanding of why courts supply the types of decisions they do.

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

2. *Id.* at 4 ("American constitutional law is shot through with strong doctrines of deference and clumsy categorical rules that are difficult to explain except as responses to the constraints of judicial capacity.").

3. *Id.* at 24.

In this brief symposium essay, I will focus instead on the demand side of judicial decision-making. My account is not at odds with Coan's, but instead asks complementary questions outside of courts. This essay is thus about *extra-judicial capacity*. In the context of constitutional law, that capacity means the existence of some "constitutional community"—people who pay attention to, interpret, discuss, and invoke the constitution.[4] Extra-judicial capacity, like judicial capacity, shapes constitutional law in ways that are worth exploring.

As a preliminary matter, judicial capacity and extra-judicial capacity are interrelated. Coan's model, as just noted, applies only to high-volume, high-stakes cases.[5] High volume domains are those where the constitutional question might invalidate many government actions and many people would plausibly sue to reap the benefits of those invalidations.[6] High stakes domains are those involving questions so important that the Supreme Court of the United States is unwilling to tolerate non-uniformity in the lower courts.[7] It is in these contexts, Coan argues, that the Supreme Court is more likely to adopt categorical rules (which reduce litigation by increasing clarity) or postures of judicial deference (which reduce litigation by lowering the expected benefit of suing). This entire set of assumptions, in which courts devise doctrines to affect the volume of litigation, works only if people pay attention to those doctrines. In short, without some threshold extra-judicial capacity, we should not expect the judicial capacity model to work, and we also would not really need it.

The significance of extra-judicial capacity to constitutional law also extends far beyond its connection to Coan's project. In the remainder of the essay, I will make two points to highlight extra-judicial capacity's import.

First, extra-judicial capacity is a vital element of the project of constitutionalism. No constitutional provision or constitutional ruling does much work without a constitutional community to digest it, discuss it,

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4. I use this term in the same way in another ongoing project. *See* Miriam Seifter, *Unwritten State Constitutions? In Search of a Constitutional Audience*, presented at Boston College Law School as part of the conference *Amending America's Unwritten Constitution* (manuscript on file with author) [hereinafter *In Search*].

5. Where these conditions do not apply, Coan does not make strong predictions, suggesting that judicial capacity will just be among background constraints.

6. *Id.* at 25 (defining high-volume cases as dependent on: "(1) the quantity of existing and future government action that the constitutional provision in question could plausibly be read to invalidate; (2) the magnitude of the benefits that such invalidation would generate for prospective plaintiffs; and (3) the number of prospective plaintiffs either collectively or individually capable of mustering the resources to litigate"). Note that the high-volume concept itself requires there to be litigants or lawyers who are aware of the benefits that might come from constitutional litigation and have enough expertise to bring such claims.

7. *Id.* at 29.

apply it, and invoke it. This may sound like a trivial or hypothetical point. After all, we live at a time when the U.S. Constitution is our "civil religion," as Sandy Levinson tells us.[8] On most constitutional law questions, it is fair to assume not just some participation, but often maximalist participation from all corners. Still, extrajudicial capacity is a contingent feature of constitutionalism, not an inherent one. State constitutions and state courts illustrate this point.

Second, the composition of a given constitutional community appears to be an important variable, especially but not only where communities are small. Without reaching any firm conclusions, I will raise some questions about how who it is that interacts with constitutions might sway how courts or other actors understand the law. Nothing about constitutionalism guarantees participation from a range of actors. What happens when the cast of characters changes?[9]

I. THE HUMANS OF CONSTITUTIONAL LAW

Extra-judicial capacity via constitutional communities is a prerequisite to any sort of constitutional effectiveness. One of constitutions' core and most-touted functions, in addition to conferring capacity for collective action, is constraining government officials.[10] At a minimum, it is safe to say that a widely held goal is for the constitution to play some role in the decisions of government actors.

Constitutions can't do this without people who attend to them. One way to understand why this is true has to do with jurisprudential insights

8. SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–12 (1988).

9. The remarks on which this essay is based were part of a panel on Judicial Capacity and the Separation of Powers. Perhaps it is worth a word on why extrajudicial capacity pertains to the separation of powers. First, as the essay describes more below, capacity outside the courts seems especially important in separation of powers cases. Whereas Coan deems presidential administration a high-volume/high-stakes area at the federal level, there is often little extra-judicial capacity for separation of powers cases in the states. In addition, the largely non-governmental actors that create extra-judicial capacity—the messy world of civil society that sues, organizes, protests, studies, explains, agitates, and so on—are part of the separation of powers in their own right. See, for example, the work of my co-panelist Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals:*
An Account of the Old and New Separation of Powers, 91 N.Y.U. L. REV. 227, 229, 239–40 (2016). It is non-governmental actors who are often the driving force behind constraining the government, often by pulling fire alarms or activating the energies of the other branches. *See* Miriam Seifter, Response, *Complementary Separations of Power*, 91 N.Y.U. L. REV. Online 186, 196–99 (2016). When we think about the separation of powers, we should think about civil society, too.

10. *E.g.*, Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 659 (2011). Mark Graber would put the emphasis on "empowering the faithful." MARK GRABER, CONSTITUTIONS AS CONSTRAINTS 6 (2009) (unpublished manuscript) (on file with author).

regarding what motivates people to follow the law in the first place. Even on the "internal" accounts of law as a duty, the law-abider must know what the law means, which is often a shared social project.[11] But especially in the more compelling "external" account of law as motivated by threat of consequences,[12] it is people who generate those consequences. It is people who link law-breaking to outcomes like reputational harm, the burden of a lawsuit, or professional disadvantages. For law-breaking to yield consequences, it is thus necessary to have a constitutional community that includes the would-be shamers, the motivated litigants, and the reactive employers.

Indeed, the legal system's clear dependence on actual human involvement animates a variety of law-related scholarship. My colleague Neil Komesar, for example, has long used a participation-centered model that uses "bottom up" thinking about litigation.[13] Scholars for decades, from Robert Dahl to the present day, have viewed courts as responsive to public demands.[14] Closer to my point here, the political scientist Charles Epp has argued that securing new constitutional rights requires a "support structure" of litigators and money.[15]

Still, because we are so awash in federal constitutional participation, the importance of its simple existence—the requirement of extra-judicial capacity—rarely surfaces. We therefore may lose sight of the point that it is a prerequisite to constitutional functioning, and that extra-judicial capacity is crucial to the question of whether law constrains. (A caveat here is that constitutions never constrain perfectly, even at the federal level, as Fred Schauer and others have noted.[16] My argument is thus incremental one: the presence or absence of a community affects the degree of (imperfect) constraint.)

States provide useful terrain for examining this insight. Although it is difficult to show empirically at present,[17] it seems safe to say that the ranks of state constitutional communities are generally thinner than those of the

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11. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

12. *See* FREDERICK SCHAUER, THE FORCE OF LAW 124 (2015).

13. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 7–8 (1997).

14. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291, 293 (1957); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 9, 13–14 (2009).

15. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 44–49 (1998).

16. *See* Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 83–88, 98 (2012).

17. I am at work on an empirical project to describe state constitutional litigation and litigants. *See* Miriam Seifter and Robert Yablon, *The State Supreme Courts Project* (preliminary data on file with authors).

federal constitutional community.[18] Fewer people are aware of state constitutional law than its federal counterpart; fewer law schools teach it; and so on.[19] To be sure, there are exceptions and variety; some state constitutional domains, like education, do have active constitutional communities. But many more fly under the radar, scarcely areas of litigation, study, or debate.

The separation of powers in the states seems to fall into this latter category—especially when compared to the domain of the federal separation of powers—and thus illustrates the import of extra-judicial capacity. It's not that there are no state-level conflicts implicating the separations of powers, but that they seem to generate scant constitutional dialogue. In the past couple of years, a number of what I call "power plays" have occurred across the country in which state constitutions seemed to play very little role.[20] The state legislatures in North Carolina, Wisconsin, and Michigan used or tried to use lame-duck sessions to dramatically curtail the power of incoming executive officials.[21] Governors in a number of states have refused to hold special elections, claimed appointment powers they did not appear to have, or refused to implement popularly enacted initiatives.[22] The Minnesota Governor zeroed out the operating budget of the state legislature, and the West Virginia legislature impeached all members of its supreme court.[23] As I wrote in a recent essay, "if the national branches are playing constitutional hardball, the states are playing hand grenades."[24]

Yet in virtually none of these controversies was there any discussion of the state-level constitutionality of these actions at the time they occurred, even as they implicated such significant state constitutional questions. Opponents criticized these actions as undemocratic; incumbents defended them as "saving taxpayer dollars" (in the context of elections),[25] or, in the context of legislatures stripping executives of power, simply "majority rule."[26] But these plausibly unconstitutional acts did not seem to encounter much of a constitutional community. They didn't register in constitutional tones. It seems very unlikely that the state constitution

18. *See* Seifter, *In Search*, *supra* note 4.

19. *See id.*

20. Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1218–20 (2019).

21. *Id.* at 1224–27 (discussing the state legislatures' post-election special sessions limiting gubernational appointments and imposing legislative vetoes on executive branch decisions).

22. *Id.* at 1228–29 (describing such gubernatorial "power plays" in Florida, Wisconsin, and Maine, respectively).

23. *Id.* at 1229–30.

24. *Id.* at 1219.

25. *See id.* at 1238.

26. *See id.* at 1226.

played a serious role ex ante (or contemporaneously) in affecting the officials' decisions.[27]

Interestingly, there is a postscript here. Weeks and months after these events, opponents sued, and they did raise state constitutional claims, perhaps because they were against the ropes and no other claims were available. But that just raised more questions: How would they brief and argue these cases? To whom could they turn for expertise? And what of the resulting decisions, now being handed down? Will *they* have an audience? It is not yet clear whether and how much. The academy serves as one important intermediary between judges and lay audiences,[28] and there has been virtually no scholarly attention to these decisions to date. That brings me to my next point.

II. COMPOSITION MATTERS

Once we attend to the importance of extra-judicial capacity, another question deserves attention: What of the *composition* of constitutional communities? Just as Coan asks about how judicial capacity shapes outcomes, is there something about who constitutes the extra-judicial capacity (when it exists) that affects the content of the law? Here is a sketch of reasons to believe the answer is yes.

To begin, imagine the cast of characters that plausibly constitutes the federal constitutional community around "Presidential Administration," one of the separation of powers topics Coan studies. The list would presumably include many lawyers, in Congress and the executive branch and agencies therein; scholars of various stripes; commentators, both professional and popular; think tanks and interest groups, left, right, and center; organizations like the Federalist Society and the American Constitution Society, and on and on. In addition to bringing different perspectives or ideologies, the various components of the community bring different resources or services, like expertise, publicity, personnel, and financing.

What happens when we take away some components of the community? What if there are no journalists? No public interest lawyers? No philanthropists interested in backing a particular movement? What if

27. As others have noted, constraint and its absence may sometimes be observationally equivalent; the constitution may have affected an official's decision-making without being dispositive. *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1122 (2013). Still, the absence of virtually any contemporaneous *public* constitutional discourse by either officials or their opponents suggests the weakness of state constitutional law as a frame or incentive.

28. For discussions of the role (and limitations) of academics as intermediaries, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 706 (2009); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 385, 469, 473–74 (2011).

the community is skewed heavily in favor of one ideology or one side of an issue—might we get a sort of "constitutional capture?" Presumably major changes like these in a constitutional community could have downstream effects on things like public dialogue, official behavior, and the content and results of litigation.

The types of effects of community composition might vary depending on which members are present or absent. I'll focus the inquiry on one subset of a constitutional community: What if there are no experts on a topic? What is constitutional law without experts?

The state experience, again, provides food for thought. State legal communities have few experts on constitutional law.[29] There are few scholars of state constitutional law; few courses on it; and not much in the way of modern treatises (though there used to be).[30] My research assistants and I took a look at the number of amicus briefs that legal scholars file in state supreme courts, and in many states the number is vanishingly small. Amicus briefs by academics are a regular feature in United States Supreme Court cases each term,[31] yet there are often very few or even zero in in a number of state supreme courts.[32] There are also very few think tanks or interest groups focused on state constitutions, nothing like the Federalist Society or ACS for state constitutions, and only a handful of state bars have a section on state constitutional law.

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29. *Cf.* Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166 (2009) (identifying the small number of law schools that offer courses in state constitutional law).

30. For example, treatises on constitutional law tended to include material on state constitutional law until the early to mid-20th century. *See* HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW v–viii (4th ed. 1927); FRANCIS NEWTON THORPE, THE ESSENTIALS OF AMERICAN CONSTITUTIONAL LAW 191–93 (1917); JAMES PARKER HALL, CONSTITUTIONAL LAW 5–6 (1915); THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 381–92 (3d ed. 1898).

31. Data via e-mail from Robert Reeves Anderson, Partner of Arnold & Porter, to author (Nov. 13, 2019, 15:12 CST) (on file with author).

32. For example, since 2008, not a single academic amicus brief appears to have been filed in cases that led to published decisions in the supreme courts of Hawaii, Idaho, Louisiana, Mississippi, Nevada, South Dakota, Wyoming; just one in West Virginia, and two in Vermont. (To be sure, there is variety: over the same period, there were seventeen such cases in the supreme courts of Texas and California.) To determine the number of cases in which a state supreme court had received an academic amicus brief, we first determined that all but a handful of state supreme court opinions usually denote the presence of an amicus filing along with the notation of party filings. We then searched for "amici" or "amicus" within the same paragraph as "professor," "academic," or "scholar," limiting results to decisions published after December 31, 2007. While I expect that our rough tally undercounts to some extent—primarily due to the possibility of opinions that did not list an amicus filing or called it by another name—the general conclusion of infrequent academic amicus filings seems reasonable. The underlying data is on file with the author.

How might the absence of an expert community change constitutional law? A preliminary response to that question might begin with work from political scientists like Amanda Hollis-Brusky[33] and Steven Teles,[34] and from legal historians like Karen Tani[35] and sociologists like Pamela Brandwein.[36] This work highlights, in varied contexts, the role that experts play in interpreting and transmitting legal ideas—from the people to courts and back again.

By shaping legal meanings and suggesting legal boundaries, experts might serve as a sort of stabilizing force in the law. It is experts who decide on a canon and anti-canon.[37] It is experts who define which ideas are "on the wall" or "off the wall."[38] And I think it is experts that explain why we think of certain legal domains, as Coan's book terms them, as "domains" at all. Consider again Coan's attention to the domain of Presidential Administration, in which he analyzes the case law on independent agencies. In a paper published recently in the *Michigan Law Review*, I found that most state courts don't have a theory of gubernatorial control over agencies or a category called "independent agency," even though they're asking the same sorts of questions federal courts are.[39] These state cases tend not to register as part of a domain with special rules. Why would similar ruling be understood very differently at the federal and state levels? Perhaps the answer lies in part on who is (or isn't) studying them.

Related, experts may foster the development of legal norms and salience around constitutional questions which otherwise have no obvious constituency, either because their connection to outcomes is attenuated, or because their occurrence is rare.

In the attenuated category, it's not clear why individual litigants would bother to develop theories about originalism or other constitutional methodologies, which might cash out for or against them. The pervasiveness of those arguments at the federal but not state level may be the result of having professional commentators.

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33. AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 12 (2015).

34. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 18 (2008).

35. *See, e.g.*, Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 326–27 (2012).

36. PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 188 (analyzing the relation of constitution, political, and social histories as a "sociology of constitutional law").

37. Greene, *supra* note 24, at 473–74.

38. Jack M. Balkin, *"Wrong the Day it was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 718–19 (2005).

39. Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1562–63 (2019).

In the rare category, there are seldom occasions to test ideas about impeachment in the courts. And yet at the federal level, the discourse of scholars devoted to the study of the topic gives us boundaries for, if not consensus on, questions like whether impeachment decisions are reviewable and what conduct is impeachable. Those resources might have been useful in West Virginia during its recent contest regarding judicial impeachment.[40]

If these preliminary observations about the role of experts are on track, then communities lacking experts may have a narrower range of constitutional topics that get attention (mostly those with immediate effects on plausible litigants). Communities with few experts may also have a more ad hoc, less steady approach when constitutional questions do arise.

Moving forward, we could try to develop a similar account for other types of constitutional participants. Again, the presence or absence of certain types of lawyers, certain types of funders, and certain types of journalists might each demonstrate ways that extra-judicial capacity affects constitutional outcomes. We could also zoom out and ask: Are there federal constitutional domains that can be fruitfully understood through the lens of extra-judicial capacity? In other words, are there federal constitutional questions featuring small or otherwise distinctive communities that might shape the content of the law?

CONCLUSION

Though answers to some of the more fine-grained questions about extra-judicial capacity must await future study, I hope I have shown a few things. Some degree of extra-judicial capacity is required for any constitutional project, but it is contingent, not guaranteed. The composition of constitutional communities is also worth interrogating, because it might shape the content of the law. And extra-judicial capacity both affects separation of powers litigation and is itself constitutive of the separation of powers, in the sense that it affects whether government actors are constrained. In short, the existence of extra-judicial capacity is yet another way that we "ration the constitution."[41]

40. *See* Seifter, *supra* note 20, at 1229–30.

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