DOCKET CONTROL, MANDATORY JURISDICTION, AND THE SUPREME COURT'S FAILURE IN *RUCHO V. COMMON CAUSE*

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INTRODUCTION

Andrew Coan's new book, *Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making*,[1] is a rare contribution to constitutional scholarship. It is primarily descriptive, not normative, and it offers a new analytical framework focusing on institutional constraints, not ideology or law. Coan argues that the Court's doctrinal and analytical approaches are driven in part by limitations on judicial capacity. Although he mentions the federal judicial system as a whole, Coan's primary focus is on the Supreme Court itself.[2]

Coan's empirical analysis is persuasive.[3] It seems undeniable that his Judicial Capacity Model (JCM) helps to explain the approaches that the Supreme Court takes in some areas of constitutional law, approaches that he describes as a form of "rationing."[4] He describes, for example, how the

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

2. *Id.* at 4, 13. Coan explains that because there is "just one court at the apex of the system, . . . [t]he capacity of the system as a whole is constrained by the capacity of the single court that sits at its top." *Id.* In part, Coan explains, this constraint arises from the Court's longstanding norms, including commitments both to uniformity in the application and interpretation of federal law and "to review[ing] nearly every invalidation of a federal statute." *Id.* at 15.

3. *See id.* at 51–162.

4. *Id.* at 4.

Court's deference to other government actors in some doctrinal areas discourages litigation and thereby reduces caseloads,[5] and how its preference for "clear categorical rules" in certain areas of law "reduces uncertainty and thereby encourages greater voluntary compliance and settlement outside of court."[6] And he persuasively identifies the types of subjects most susceptible to rationing—"high-stakes domains," in which the Court will not tolerate disuniformity, and "high-volume domains," which have the potential to generate more litigation than the Court can handle.[7]

In this Essay, I build on and complicate Coan's account. Coan begins his analysis with the New Deal (although he also acknowledges the significance of 1925, a key year for changes in the Court's jurisdiction, as I will discuss).[8] Here, I offer a deeper historical understanding of why and how the Court has attempted to manage its caseload, including when it has successfully appealed to Congress to address its concerns. This historical discussion, with its emphasis on the congressional role, suggests a normative critique of the Court's use of JCM, at least in those few areas of law, such as constitutional challenges to congressional and legislative districts, in which Congress has maintained the Court's mandatory appellate jurisdiction. More specifically, I argue that the Court's recent decision in *Rucho v. Common Cause, Inc.*,[9] holding partisan gerrymandering nonjusticiable, was wrongly decided in part because in that case, the Court flouted an explicit and carefully considered congressional determination about the Supreme Court's mandatory jurisdiction.

This Essay proceeds as follows. Part I outlines the history of Supreme Court caseloads and how the Court and Congress alike have responded when the Court's caseloads have become too burdensome. Part II turns first to the recent partisan gerrymandering cases, noting the caseload-related concerns articulated by some Justices during the oral argument. This Part then charts the history of Congress's decision to maintain the Court's mandatory jurisdiction in constitutional challenges to redistricting and argues that this history renders caseload considerations inappropriate in the partisan gerrymandering cases. Finally, Part III returns to Coan's book, discussing his understanding of judicial independence and arguing that it is both underinclusive and impossible to evaluate without a normative frame.

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5. *Id.* at 3.

6. *Id.* at 23 (emphasis omitted). *See also id.* at 165–66 (detailing both mechanisms).

7. *Id.* at 25–30.

8. *Id*. at 37.

9. 139 S. Ct. 2484 (2019).

I. THE SUPREME COURT'S LONG STRUGGLE TO CONTROL ITS DOCKET

The Judiciary Act of 1789 was the first bill introduced in the Senate in the first Congress.[10] The Act provided for a Supreme Court of six justices. It also established district courts and circuit courts, but those courts operated differently from the courts with those names today. Notably, both sets of courts had primarily original, not appellate, jurisdiction, with each responsible for different types of cases.[11] Most appeals went directly to the Supreme Court, which had no choice but to hear them.[12]

Such mandatory appellate jurisdiction was likely a default rather than a carefully evaluated decision. The form of appeal Congress adopted, a writ of error, "was deeply rooted in the English common law jurisprudence."[13] At the time, there was no particular reason to consider a different mechanism.[14]

At first, the system worked well. Between 1790 and 1795, the Court considered only about twenty-five cases.[15] But caseloads expanded with the country. By 1850, the Court had 253 cases pending, and by 1890, there were 1,816 pending cases.[16] Cases took three years to be heard.[17]

The Court's response to this flood of litigation is consistent with Coan's argument that caseload pressures influence how the Court decides

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10. Judiciary Act of 1789, ch. 20, 1 Stat. 73, (1789); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 49 (1923); Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 81 (1989).

11. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 11–13 (1927). Some district court cases were appealed to the circuit courts. *Id.* at 12 (citing Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–84 (1789)).

12. The Judiciary Act did not provide for appellate jurisdiction over every case, but in cases where it did, the Court had to decide the appeals absent a jurisdictional defect. Boskey & Gressman, *supra* note 10, at 82.

13. *Id.*

14. John M. Simpson, *Turning Over the Reins: The Abolition of the Mandatory Jurisdiction of the Supreme Court*, 6 HASTINGS CONST. L.Q. 297, 302–03 (1978) (describing this history).

15. Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH & LEE L. REV. 271, 275–76 (2006) [hereinafter Shapiro, *Olympian Court*] (citing ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 137 tbl.9 (1978) (listing the number of opinions per Court term)).

16. FRANKFURTER & LANDIS, *supra* note 11, at 60; *see also* Shapiro, *Olympian Court*, *supra* note 15, at 275–76 (describing this history); Carolyn Shapiro, *A "Progressive Contraction of Jurisdiction": The Making of the Modern Supreme Court*, *in* THEN & NOW: STORIES OF LAW AND PROGRESS 80 (Lori Andrews & Sarah Harding eds., 2013) [hereinafter Shapiro, *Progressive Contraction*] (same).

17. FRANKFURTER & LANDIS, *supra* note 11, at 257.

cases.[18] Similar to the deference that he describes the Court offering the executive branch as a way to stem a tide of cases it would otherwise feel obligated to hear,[19] the nineteenth century Court explicitly adopted deferential standards of review of lower court decisions. In 1865, for example, it affirmed a lower court judgment due to "ample testimony to support the decision"[20]—a standard that echoes today's "substantial evidence" or "clear error" standards for agency or lower-court factfinding.[21] And it explicitly warned that "in such cases, parties should not appeal to this court with any expectation that we will reverse the decision of the courts below."[22]

But the Justices did not rely solely on such jurisprudential techniques to manage their caseload. They also wanted Congress to act. By the late 1880s, the Justices were speaking out "to enlist public opinion to secure [c]ongressional action."[23] In 1891, Congress passed the Evarts Act,[24] which gave the Supreme Court discretion over whether to hear appeals in certain types of cases through the writ of certiorari.[25] There was an immediate, "decisive" reduction in the Court's caseload.[26]

The Evarts Act did not extend discretionary jurisdiction to most cases, however, and the Supreme Court's caseload swelled again. Between 1891 and 1920, Congress repeatedly eliminated the Court's mandatory jurisdiction over cases deemed unlikely to present issues of national significance.[27] And in 1925, Congress dramatically expanded the Court's

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18. *See generally* COAN, *supra* note 1.

19. *Id.* at 91–99. The parallels are apparent, but the situations are not identical. Coan describes a Court that today feels obligated to hear certain types of cases, such as cases that strike down a federal law, but that obligation arises primarily from judicial norms, not from statutory mandate. *Id.*

20. *Newell v. Norton*, 70 U.S. (1 Wall.) 257, 267 (1865).

21. *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (explaining substantial evidence standard); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (applying clearly erroneous standard); FED. R. CIV. P. 52(a)(6) (articulating clearly erroneous standard).

22. *Newell*, 70 U.S. at 267–68.

23. FRANKFURTER & LANDIS, *supra* note 11, at 97 (citations omitted).

24. Evarts Act (Circuit Court of Appeals Act), ch. 517, 26 Stat. 826 (1891). The statute was also known as the Circuit Court of Appeals Act. *Id.* Congress had been considering reforms to the judicial system, including to the Supreme Court, since after the Civil War. FRANKFURTER & LANDIS, *supra* note 11, at 60–97.

25. Evarts Act (Circuit Court of Appeals Act), ch. 517, §§ 6–7, 26 Stat. 826, 827–28 (1891). *See also* Shapiro, *Olympian Court, supra* note 15, at 276 n.11 (discussing Evarts Act). The Evarts Act also created intermediate federal appeals courts, hoping that a mandatory appeal at the intermediate level would make parties less likely to go to the Supreme Court. *See id.*; Shapiro, *Progressive Contraction*, *supra* note 16, at 83.

26. FRANKFURTER & LANDIS, *supra* note 11, at 102.

27. *See id.* at 103–45, 187–216. One of these measures, for example, a restriction on mandatory jurisdiction in cases arising under the Federal Employers' Liability Act, "is generally attributed to Mr. Justice McReynolds . . . ." *Id.* at 214.

discretionary certiorari jurisdiction in the Judges Act, so-called because it was strongly promoted by the Justices themselves.[28] In other words, when faced with jurisdictional requirements that led to an unmanageable caseload, the Court repeatedly asked Congress for help.

The same pattern recurred in the 1970s and 1980s. By the early 1970s, the Court was issuing about 150 plenary decisions a year.[29] That number held steady: between 1971 and 1988, not including summary affirmances, the Court heard and decided an average of 147 cases a year.[30] This caseload was seen as unmanageable by the Justices and courtwatchers alike, and it became a subject of public focus.[31] Again, the Court used the tools it had at its own disposal to manage its caseload. For example, the Court regularly summarily affirmed cases that came to it under its mandatory jurisdiction.[32] Summary affirmances required no oral argument and no briefing beyond the initial papers—and they also required no opinions by the Justices.[33]

And Congress also took action again, significantly reducing the Court's mandatory jurisdiction. One source of mandatory appeals had been created with the 1903 Expediting Act.[34] Under that law, certain types of cases were heard first by a three-judge district court and then were appealed directly to the Supreme Court as of right. Over time, Congress had subjected more types of cases to this procedure.[35] In the 1970s, Congress reversed course and eliminated the three-judge district court/mandatory appeal mechanism for a variety of different types of cases, including most cases seeking injunctive relief against the enforcement of state or federal statutes.[36] And in 1988, again at the Court's

28. Boskey & Gressman, *supra* note 10, at 85–86.

29. Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1728 (1978).

30. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403 & n.3. The Court was also receiving more than 4,000 petitions for certiorari annually, along with about 1,000 other case filings. *See* Boskey & Gressman, *supra* note 10, at 87.

31. *See* Shapiro, *Olympian Court*, *supra* note 15, at 276–77 (citations omitted); Simpson, *supra* note 14, at 298–99 n.7 (detailing public discussion of and attention to the problem of the Supreme Court's caseload).

32. Boskey & Gressman, *supra* note 10, at 92.

33. These summary affirmances created their own problems, notably by raising questions about their precedential authority in the absence of the Court's full deliberation. Boskey & Gressman, *supra* note 10, at 92–93.

34. Expediting Act (Trusts and Interstate Commerce), ch. 544, 32 Stat. 823 (1903).

35. *See* Expediting Act (Trusts and Interstate Commerce), ch. 544, § 1, 32 Stat. 823 (1903); Boskey & Gressman, *supra* note 10, at 89 (discussing such statutes).

36. Boskey & Gressman, *supra* note 10, at 89–90 (listing statutes).

urging, Congress eliminated the mechanism for almost (but not quite) all of the remaining cases to which it applied.[37]

Today, in contrast to the 1970s and 1980s, caseloads are at a historic low. The Court issued merits opinions in seventy-two argued cases last Term.[38] Indeed, some complain that the Court today does not decide *enough* cases, and argue that the Justices would write fewer separate opinions and there would be fewer fractured holdings if the Court decided more cases.[39] Coan himself would say that the Court's current caseload is nowhere near capacity, which he estimates at 150–200 cases a year.[40]

None of this discussion refutes Coan's argument, but it does complicate it and raise some questions. Are there differences, for example, in the Court's use of the caseload management techniques Coan has identified pre- and post-1988?[41] Of course, even if such differences do not exist, JCM could still carry explanatory power. If caseload concerns in the past drove doctrine, there could now be principles, precedents, norms, or habits of mind that still influence the Court.[42] Coan also suggests that even in the absence of immediate caseload pressures, the Court could be wary of opening the floodgates.[43] But the story is complicated by these historically low caseloads.

II. MANDATORY JURISDICTION AND PARTISAN GERRYMANDERING

This history of congressional attention to the Court's caseload concerns raises a normative point. That is, if the Court has concerns about its caseload, perhaps it should appeal to Congress, instead of manipulating doctrine.[44] But in those few arenas in where Congress has maintained

37. *Id.* at 91–93 (quoting Justices' letters to Congress in 1982 and 1987); Act of June 27, 1988, Pub. L. No. 100–352, 102 Stat. 662 (1988).

38. *Final Stat Pack for October Term 2018*, SCOTUSBLOG (Jun. 28, 2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf [https://perma.cc/F63H-VMAM]. This number counts consolidated cases as a single case. *Id.*

39. *See, e.g.*, Sanford Levinson, *Assessing the Supreme Court's Caseload: A Question of Law or Politics?*, 119 YALE L. J. ONLINE 99, 101 (2010); Shapiro, *Olympian Court*, *supra* note 15, at 294–95 & nn. 92–95.

40. COAN, *supra* note 1, at 15.

41. My unproven hypothesis is that there may be differences, most notably in the increase in what Sunstein calls minimalist judging. *See generally* Cass. R. Sustein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008). Minimalist judging can be costly in terms of capacity because litigants have to keep coming back if there is not clarity about what the law is. *See* David S. Schwartz, *Judicial Capacity, Causation, and History: Next Steps for the Judicial Capacity Model*, 2020 WIS. L. REV. 195.

42. *See* COAN, *supra* note 1, at 34–35.

43. *See id.* at 15–16. Coan also notes that he "does not assume that the influence of judicial capacity on Supreme Court decision-making is necessarily conscious." *Id.* at 34.

44. Neil Siegel made a similar point in his remarks at the symposium. Neil Seigel, Remark at the University of Wisconsin Law Review Symposium: Rationing the

mandatory jurisdiction, the Court should respect that legislative choice—something it failed to do in *Rucho*.

A. Caseload Concerns in the Gerrymandering Cases

In the recent partisan gerrymandering cases, Justices and advocates explicitly discussed caseload concerns. At oral argument in *Gill v. Whitford*,[45] the gerrymandering case argued the Term before the Court decided *Rucho*, the Chief Justice expressed his concern about how partisan gerrymandering claims would affect the Court's caseload:

> [I]f the claim is allowed to proceed, there will naturally be a lot of these claims raised around the country. Politics is a very important driving force and those claims will be raised. And every one of them will come here for a decision on the merits. These cases are not within our discretionary jurisdiction. They're the mandatory jurisdiction.[46]

The following Term, in *Rucho*, Paul Clement, arguing against justiciability, reiterated and emphasized this concern. "[I]f you get in the business of adjudicating these cases, these cases will come, they will come in large numbers, and they will come on your mandatory appellate jurisdiction."[47] Justice Gorsuch picked up on this theme when questioning the plaintiffs' lawyer. "[W]e're going to have to, as part of our mandatory jurisdiction, in every single redistricting case, look at the evidence to see why there was a deviation from the norm of proportional representation. That's -- that's -- that's the ask?"[48]

Roberts and Clement also expressly tied these concerns to the Court's judicial independence, more specifically the fear of the Court appearing unduly political. Roberts laid out this concern explicitly in *Gill*:

> We will have to decide in every case whether the Democrats win or the Republicans win. So it's going to be a problem here across the board. And if you're the intelligent man on the street and the Court issues a decision, and let's say the Democrats win, and that person will say: Well, why did the Democrats win? . . . It

Constitution: How Judicial Capacity Shapes Supreme Decision-Making (Oct. 24–25, 2019).

45. 138 S. Ct. 1916 (2018). The Court did not decide *Gill* on the merits, instead holding that the plaintiffs lacked standing. *Id.* at 1929-33.

46. Transcript of Oral Argument at 36–37, *Gill v. Whitford*, 138 S. Ct. 1916 (2017) (No. 16-1161).

47. Transcript of Oral Argument at 35, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422).

48. *Id.* at 46 (No. 18-422).

> must be because the Supreme Court preferred the Democrats over the Republicans. And that's going to come out one case after another as these cases are brought in every state. And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.[49]

Clement drove the point home in his oral argument in *Rucho*: "And once you get into the political thicket, you will not get out and you will tarnish the image of this Court for the other cases where it needs that reputation for independence so people can understand the fundamental difference between judging and all other politics."[50]

This candor at oral argument did not find its way into the *Rucho* and *Gill* decisions. And with good reason. While the political question doctrine requires an examination of whether the issue has a "judicially manageable standard," that manageability analysis goes to logic, evidence, and predictability, not to caseloads and not to fears of public reaction to hypothetical future decisions.[51]

Nonetheless, the partisan gerrymandering cases fit very neatly within Coan's analysis. They are certainly "high-stakes,"[52] and given both the existence of mandatory jurisdiction and the cyclical nature of redistricting, they could be seen as "high-volume" at least from the Court's perspective.[53] In this regard, *Rucho* could be seen as the judicial capacity model taken to an extreme. Rather than articulating legal standards that

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49. Transcript of Oral Argument at 37–38, *Gill v. Whitford*, 138 S. Ct. 1916 (2017) (No. 16-1161).

50. Transcript of Oral Argument at 35, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422). The "political thicket" was how Justice Frankfurter referred to litigation over reapportionment in his 1946 opinion announcing the Court's holding that Guarantee Clause claims are nonjusticiable. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

51. *Rucho*, 139 S. Ct. at 2499 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004)).

52. COAN, *supra* note 1, at 23. On the other hand, gerrymandering cases are not clearly as high-stakes as Coan defines it — likely to produce disuniformity or striking down federal laws. *Id.* at 29. Nonetheless, I think it is fair to say that even in the absence of mandatory jurisdiction, the Court would be likely to give plenary review to many, if not most, cases striking down legislative and congressional maps, out of federalism concerns if nothing else. Coan explains that the Court has to manage its caseload like a household manages its budget. *Id.* at 20–23. Thus, although it might be able to decide the gerrymandering cases, it might have to sacrifice its norms in other arenas. *Id.*; *see also id.* at 29 (explaining that in a high-stakes area of law, "even a decision that invites much less aggregate litigation is going to very quickly produce a significant demand on the Supreme Court"). In fact, partisan gerrymandering cases might be the unusual arena in which the aggregate amount of litigation has a remarkably disproportionate effect on the Supreme Court's own caseload. *See id.*

53. On the other hand, unlike many of the capacity-constrained arenas that Coan discusses, *see, e.g.*, *id.* at 172 (discussing the nondelegation doctrine); *id.* at 188 (discussing equal protection), the potential number of cases has a clear cap.

reduce or discourage litigation, the Court declared the federal judiciary simply unable to decide these cases.[54]

But if Coan is right that the Court sometimes manipulates doctrine to manage its docket, *Rucho* is a prime example of when doing so is particularly inappropriate. The erasure of the congressional role in both Coan's book and in the Court's partisan gerrymandering decisions masks an important normative critique of the Court's decision in *Rucho*. Not only is it doctrinally incoherent to import mandatory jurisdiction into the political question analysis, but it is exactly backwards. Congress chose to retain the three-judge panel and mandatory appeal procedure for constitutional challenges to congressional and legislative districts, even as it eliminated that mechanism in almost every other context. Examining that history demonstrates just how inappropriate the *Rucho* holding was.

B. Mandatory Jurisdiction to Ensure Constitutional Districting

As already explained, the three-judge district court, with direct mandatory appeal to the Supreme Court, was created in its basic form in 1903.[55] Initially, this mechanism was limited to civil antitrust cases brought by the attorney general.[56] Over time, however, even as Congress cut back on the Court's mandatory jurisdiction over some types of cases, it expanded the use of the three-judge court with direct appeal for others. In 1910, Congress provided that "federal interlocutory injunctions against unconstitutional state statutes" could be issued only by a three-judge district court,[57] and in 1925 and 1948, it extended that mechanism to

54. One could imagine, instead, that the Court announced a constitutional standard for evaluating partisan gerrymandering that is relatively deferential to state map-drawers perhaps by imposing a clear, categorical rule that most redistricting maps could meet. *See id.* at 168–71. Many opponents of partisan gerrymandering might have considered such a standard inadequate. *Cf. id.* at 178. But it might have been significantly preferable to *Rucho*'s outright abdication. In Coan's terms, finding partisan gerrymandering cases nonjusticiable might be, not a "second-best" outcome, but much lower on the list. *Cf. id.* at 168–71. *But see id.* at 187 (suggesting that under some circumstances, "crude categorical rules" are "worse than no judicial review at all").

55. Expediting Act (Trusts and Interstate Commerce), ch. 544, § 1, 32 Stat. 823 (1903).

56. *Id.*; Boskey & Gressman, *supra* note 10, at 84.

57. David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 7 & n.35 (1964) (citing Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557).

permanent injunctions against state statutes.[58] It did the same for cases seeking to enjoin federal statutes in 1937.[59]

The basic arguments in favor of this mechanism in cases seeking to enjoin statutes were both technical and political. As a technical matter, injunctions of duly enacted laws, whether federal or state, were disruptive, and a direct and mandatory appeal to the Supreme Court would ensure that they were dealt with expeditiously.[60] Dissatisfaction with such injunctions also arose from the political issues of the day, including concerns that federal judges were too eager to interfere with state laws and to stymie the badly-needed New Deal legislation at the federal level.[61] Three judges, it was thought, were more likely to be measured and would provide "more weight and greater deliberation."[62]

Although some members of the Court found the mechanism burdensome,[63] as David Currie observed, by the early 1960s, the numbers of such cases were modest:

> [O]f an average total of 10,000 cases annually tried in the district courts, a mere 60 are constitutional three-judge cases. And in a recent five-year period during which nearly 2,000 cases were filed in the Supreme Court each year, a total of 31 were direct appeals from constitutional three-judge courts.[64]

As already explained, however, by the 1970s, concern about the Court's caseload led Congress to expand discretionary jurisdiction and eliminate the three-judge district court for many, but not all cases.

Even as it cut back on the use of three-judge courts, Congress, deliberately and repeatedly preserved the mechanism for constitutional

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58. Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 936, 938; Act of June 25, 1948, ch. 155, §§ 2281–84, 62 Stat. 869, 969–69. The 1925 amendment was understood to apply only in cases where a preliminary injunction was sought first. Currie, *supra* note 57, at 8 & n.47 (citing *Smith v. Wilson*, 273 U.S. 388 (1927)). In 1948, Congress extended the mechanism to all cases seeking permanent injunctions of state statutes as unconstitutional. *Id.* at 8–9.

59. Act of August 24, 1937, ch. 754, § 3, 50 Stat. 751, 752.

60. Michael E. Solimine, *Congress, the Solicitor General, and the Path of Reapportionment Litigation*, 62 CASE W. RES. L. REV. 1109, 1137 (2012) [hereinafter Solmine, *Reapportionment*].

61. Currie, *supra* note 57, at 8, 10-11, 75.

62. *Phillips v. United States*, 312 U.S. 246, 250 (1941). *See also Ex parte Collins*, 277 U.S. 565, 567–69 (1928) (concluding that ordinances are not statutes requiring a three-judge district court when challenged); Currie, *supra* note 57, at 31–34 (detailing how the Court allowed single judges to hear cases involving statutes that were not of statewide significance).

63. Currie, *supra* note 57, at 11 (citing *Phillips*, 312 U.S. at 250).

64. *Id.* at 11–12 (footnotes omitted). Nonetheless, Currie argued in favor of eliminating the Supreme Court's mandatory jurisdiction over appeals in these cases. *Id.* at 74–76.

challenges to redistricting. Such challenges had only recently become legally cognizable. In 1962, the Supreme Court entered the "political thicket" and provided a judicial remedy for the severe malapportionment that tended to keep state legislatures disproportionately rural and white.[65] It first decided *Baker v. Carr*,[66] followed two years later by *Reynolds v. Sims*.[67] With these cases, the Court reversed its earlier conclusion in *Colegrove v. Green*[68] that such questions were nonjusticiable,[69] albeit by relying on a different clause of the Constitution than *Colegrove* had considered.[70] *Baker* and *Reynolds* were deeply controversial, at least initially, and even led some to propose stripping the federal courts of jurisdiction in such cases altogether.[71] But the opinions quickly gained widespread popular support, and within a remarkably short period of time, legislative and congressional districts around the country were redrawn.[72]

At first, *Baker*, *Reynolds*, and their progeny were brought in three-judge district courts because those courts were used for all cases seeking injunctive relief against state laws.[73] By the time Congress began paring back the types of cases heard by three-judge district courts, however, reapportionment cases were understood to have a special status. In fact, Congress went out of its way to protect these cases. In 1976, when it eliminated the three-judge district court/mandatory jurisdiction procedure for cases seeking to enjoin state laws, Congress retained the procedure for redistricting cases, adding specific language to the statute.[74] The relevant section reads: "A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."[75] And this provision has not been amended or repealed since it was added in 1976.

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65. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 267 (2009).

66. 369 U.S. 186 (1962).

67. 377 U.S. 533 (1964).

68. 328 U.S. 549 (1956).

69. *See Baker*, 369 U.S. at 208–09.

70. *Colegrove* held that Guarantee Clause challenges to redistricting were nonjusticiable. *See Colgrove*, 328 U.S. at 552. *Baker* and *Reynolds* allowed such challenges to proceed under the Equal Protection Clause. *See Baker*, 369 U.S. at 188; *Reynolds*, 377 U.S. at 568.

71. Currie, *supra* note 57, at 5 & n.27; Solimine, *Reapportionment, supra* note 60, at 1110 & n.5.

72. FRIEDMAN, *supra* note 65, at 269–70.

73. Currie, *supra* note 57, at 12 (quoting 28 U.S.C. § 2281 (1964)); Solimine, *Reapportionment*, *supra* note 60, at 1137–38.

74. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (codified in part as 28 U.S.C. § 2284(a)).

75. 28 U.S.C. § 2284(a) (2012).

Congress's decision to retain the three-judge district court for reapportionment cases was based on several years of consideration. As early as 1971, as Congress began considering cutting back on such courts, Senator Quentin Burdick proposed an amendment retaining them for redistricting challenges.[76] A 1973 Senate Judiciary Committee report on "Revision of the Jurisdiction of Three-Judge Courts" explained that such reapportionment cases "are of such importance that they ought to be heard by a three-judge court,"[77] a position echoed in a 1975 Senate report.[78] Judicial luminaries, such as Judges Skelly Wright and Henry Friendly, strongly supported retaining the three-judge district court for such cases.[79] Ultimately, Congress enacted the entirely new statutory language quoted above to maintain three-judge courts for reapportionment challenges.[80]

This decision was not only deliberate; it was also controversial. Some commentators and members of Congress expressly opposed keeping three-judge courts for redistricting cases.[81] And on the other side, the NAACP opposed eliminating such courts at all with respect to challenges to state laws, arguing that hostility to civil rights "tested the fortitude of a single district judge from that community, and that the broader perspective of three judges was necessary to give civil rights plaintiffs a fair hearing."[82] Leaving the procedure in place for reapportionment thus may have been a compromise. And some members of Congress may not only have considered reapportionment cases particularly important but also believed that a three-judge court would be seen as less partisan.[83] Congress again retained three-judge district courts for redistricting cases in the 1980s, when it eliminated them in almost every other remaining context,[84] although by then partisan gerrymandering cases were beginning to be

76. Sidney B. Jacoby, *Recent Proposals and Legislative Efforts to Limit Three-Judge Court Jurisdiction*, 26 CASE W. RES. L. REV. 277, 284 (1976).

77. S. REP. NO. 93-206, at 9 (1973).

78. S. REP. NO. 94-204, at 9 (1975).

79. Jacoby, *supra* note 76, at 284.

80. *Id.*

81. *See Three-Judge Court and Six-Person Jury: Hearing on S. 271 and H.R. 8285 Before the Subcomm. On Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 148–49 (1975) (statement of Clarence Mitchell, Director, Washington Bureau, National Association for the Advancement of Colored People) [hereinafter Testimony of Clarence Mitchell] (referencing also comments from Rep. Drinian); *Improvement of Judicial Machinery: Hearings on H.R. 6159 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 175–77 (1975) (Letter from Charles Alan Wright, McCormick Professor of Law, to Rev. Robert F. Drinian, House of Representatives (Oct. 9, 1974)).

82. Michael E. Solimine, *Congress,* Ex Parte Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 143 (2008) [hereinafter Solimine*,* Ex Parte Young]. *See also* Testimony of Clarence Mitchell, *supra* note 81.

83. *Id.* at 143–45 & nn. 212–29 (discussing legislative history).

84. *See* Act of June 27, 1988, Pub. L. No. 100–352, 102 Stat. 662.

litigated.[85] Constitutional challenges to reapportionment thus have a unique and congressionally recognized entitlement to special judicial consideration.

This history is one of a number of reasons the Supreme Court was wrong in *Rucho*, an opinion that has been justly and widely criticized.[86] But it is a reason that has not been well recognized. The history demonstrates, however, that to the extent that some Justices believed that the Court's mandatory jurisdiction was a reason not to find partisan gerrymandering claims justiciable, they had it exactly backwards. The mandatory jurisdiction is both a sign of the significance that Congress has placed on reapportionment litigation and a reminder that the Court does not alone control its jurisdiction.[87]

III. PROTECTING JUDICIAL INDEPENDENCE OR MASKING POLITICIZATION?

The concerns expressed during oral argument in *Rucho* and *Gill* were not limited to caseload size. As noted above, in *Gill*, Chief Justice Roberts raised concerns about how political the Court would appear, and Paul Clement echoed them during the *Rucho* argument.[88] This concern about politicization is akin to, but distinct from, Coan's discussions of judicial independence, which he links to JCM.

Coan's definition of judicial independence is "the capacity – or inclination – of the judiciary to produce social change against the tide of dominant political forces."[89] He explains that this independence is limited by judicial capacity because "[a]ny decision that constrains governmental power increases the expected benefit of constitutional litigation. And any decision that does so in the teeth of strongly held majority views is quite likely to involve a high-stakes, if not a high-volume, domain in which the Court feels compelled to grant review in a large fraction of cases."[90] Here, Coan offers JCM as reassurance, albeit not a panacea, to those concerned about the countermajoritarian difficulty. At least in high-stakes/high-volume domains, he argues, the Court's ability to thwart the will of the majority is limited simply because it cannot handle the litigation that

85. *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109 (1986).

86. *See, e.g.*, *Article III – Justiciability – Political Question Doctrine* – Rucho v. Common Cause, 133 HARV. L. REV. 252 (2019).

87. One need not embrace the three-judge district court/mandatory jurisdiction procedure as a normative matter to believe that mandatory jurisdiction undermines the Court's holding in *Rucho.*

88. *See* Transcript of Oral Argument at 3–4, 35–36, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422)

89. COAN, *supra* note 1, at 190.

90. *Id.* at 192.

would ensue if it were more aggressive.[91] Coan thus seems to hint at a normative view of JCM as helping to protect majoritarian government.

Put another way, Coan's model describes one mechanism by which the Court and the people interact. Where most of the population maintains a position at odds with the Court for any length of time, Coan suggests, the Court will not be easily able to impose its views.[92] But the majority in *Rucho* appeared afraid of public responses to hypothetical future rulings not because those decisions would necessarily be countermajoritarian but out of a desire to protect its claimed role as a neutral, non-political actor.

This desire was misplaced for numerous reasons, including that the *Rucho* decision itself undermined democratic processes much more than it protected them.[93] But Coan's model offers one more. The techniques of JCM demonstrate that the Court is not helpless in the face of political and social pressures that manifest in litigation. It can calibrate. The all-or-nothing political question ruling of *Rucho* simply ignored that reality and cut off the possibility of dialogue between the Court and the public.

Moreover, the Court's willingness to limit or preclude litigation in some of the most fraught areas of constitutional law itself may be politicized. It does not look like coincidence that the 5-4 *Rucho* decision split on party lines; partisan gerrymandering has, of late, strongly favored the Republican party. Partisan gerrymandering is also quite unpopular with the American people,[94] but it can entrench dominant political forces in power even if they do not command majority support.[95] And while blocking constitutional challenges to partisan gerrymandering is itself countermajoritarian, it shuts down any judicial dialogue with the people.

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91. *Id.* at 202–03.

92. *Cf.* Carolyn Shapiro, *Change Is the Only Constant: Unwritten Amendments and the Courts* (forthcoming 2020) (manuscript at 3) (on file with author) (discussing the "role of courts in developing and changing constitutional equilibria, as well as . . . evaluating the merits of the equilibria")

93. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *SCOTUS's Ruling on Gerrymandering Endangers U.S. Democracy Time*, TIME (July 11, 2019), https://time.com/5623638/scotuss-ruling-on-gerrymandering-endangers-us-democracy/ [https://perma.cc/6GJ4-GB2V].

94. *Americans Are United Against Partisan Gerrymandering*, BRENNAN CTR. FOR JUST. (Mar. 15, 2019), https://www.brennancenter.org/our-work/research-reports/americans-are-united-against-partisan-gerrymandering [https://perma.cc/8CGX-AE5S] (reporting on polls showing that a majority of Americans oppose partisan gerrymandering); Elaine S. Povich, *Gerrymandering Opponents Win Key Victories,* PEW STATELINE UPDATES (Nov. 7, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/07/gerrymandering-opponents-win-key-victories [https://perma.cc/368K-62CG] (reporting on recent popular initiatives to end partisan gerrymandering in three states).

95. Trip Gabriel, *Voting Issues and Gerrymandering Are Now Key Political Battlegrounds*, N.Y. TIMES (Jan. 2, 2019), https://www.nytimes.com/2019/01/02/us/politics/voting-gerrymander-elections.html [https://perma.cc/9NN5-TH5U].

Contrast *Rucho* with two cases in the current Supreme Court Term. In *New York State Rifle & Pistol Ass'n v. City of New York*,[96] the Court appeared poised to re-enter the pitched battles over gun regulation for the first time since *Heller*[97] and *McDonald*.[98] Consistent with JCM, the Court ultimately held, 6-3, that the issue before it was moot.[99]

The second case involves abortion, and as of this writing, it is still pending. The Court granted plenary review in *June Medical Services, LLC v. Gee*[100] despite the fact that the Fifth Circuit's decision upholding severe restrictions on abortion was so inconsistent with *Hellerstedt v. Whole Women's Health*[101] that summary reversal—which JCM would predict—would have been appropriate. Yet the Court granted certiorari on the substantive question about abortion restrictions. At the same time, however, it agreed to decide whether to dramatically limit, or even eliminate, abortion providers' long-recognized standing to vindicate the rights of their patients, making many, if not all, challenges to abortion restrictions impossible to litigate.

Closing the courthouse door to hotly contested constitutional questions may be consistent with JCM, but the tools of JCM can themselves be manipulated for political or ideological reasons, as these cases demonstrate. Overruling well-established third-party standing principles to close the courthouse door to most challenges to abortion restrictions only one Term after finding partisan gerrymandering entirely nonjusticiable by a 5-4 ideologically split vote would be seen as such manipulation by many. Similarly, Justice Alito dissented in *New York State Rifle*, hinting that the Court was manipulating mootness doctrine to avoid deciding a controversial issue that he believes is long overdue for the Court's attention.[102] In other words, JCM can undermine the very independence, or appearance thereof, that the Court is trying to maintain. A purely descriptive account of JCM fails to capture this complexity.

CONCLUSION

In *Rationing the Constitution*, Coan avoids normative judgments, and he describes a phenomenon that may be, at least in part, inevitable. But his

96. *New York State Rifle & Pistol Association Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (per curiam).

97. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

98. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

99. *New York State Rifle*, 140 S. Ct. at 1526-27.

100. 905 F.3d 787 (5th Cir. 2018).

101. 136 S. Ct. 2292 (2016).

102. 140 S. Ct. at 1527 (Alito, *J.*, dissenting). Unlike the nonjusticiability holding in *Rucho*, however, the mootness holding in *New York State Rifle*, applied only to a single issue, as presented to the Court in the particular case, and does not preclude the future development of Second Amendment law.

keen observations invite critical reflection by commentators and by the Court itself. Caseload management cannot justify ignoring congressional determinations that certain types of cases are entitled to special judicial consideration. Congress has made clear that constitutional challenges to reapportionment are entitled to such special judicial examination. The Court in *Rucho* abandoned that mandate. And as *Rucho* itself demonstrates, JCM is, or at least can be, just as politically or ideologically freighted as anything else the Court does. Coan opens a new avenue of inquiry, but as with so much high-quality scholarship, it raises at least as many questions as it answers.