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Judicial Capacity and the Substance of Constitutional Law

ABSTRACT. Courts can decide only a small fraction of constitutional issues generated by the American government. This is widely acknowledged. But why do courts have such limited capacity? And how does this limitation affect the substance of constitutional law? This Essay advances a twofold thesis. First, constraints on judicial capacity derive from a combination of the hierarchical structure of the judiciary and broadly held judicial norms. Second, in certain important constitutional domains, these constraints create strong pressure on courts to adopt hard-edged categorical rules, defer to the political process, or both. The argument is mostly positive but has significant normative implications. In particular, the constraints of judicial capacity suggest a new and previously unexplored justification for courts to defer many constitutional questions to the political process. Capacity constraints also help to explain the reluctance of courts to challenge political majorities, diminishing though not eliminating the countermajoritarian difficulty. For these reasons and others, judicial capacity deserves a central place on the agenda of constitutional theory.

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ESSAY CONTENTS

INTRODUCTION

Start with a very basic premise: courts can decide only a small fraction of the constitutional issues generated by the American government. By now, this is something of a commonplace among constitutional theorists. But it is a commonplace of a peculiar sort. It receives frequent lip service but is almost never taken really seriously. Advocates for more expansive constitutional protections routinely brush aside, or outright ignore, the judiciary's limited capacity. Opponents of such protections routinely write as if "government by judiciary" were a real and worrisome possibility. Meanwhile, there has been very little work exploring why the judiciary has such limited capacity or how we should expect this limitation to affect the substance of its constitutional decisions.

This Essay is the beginning of an attempt to take judicial capacity seriously. My thesis is twofold. First, the constraints on judicial capacity are a product of both the structural organization of the judiciary and certain widely shared but little-discussed normative commitments of American judges. Second, in certain important constitutional domains, these constraints create an almost irresistible pressure on courts to adopt hard-edged categorical rules rather than vague standards and a very strong pressure to defer to other government actors. After explaining each of these points in more detail, I apply them to the Supreme Court's recent Commerce Clause decisions as an illustrative example. My argument is mostly positive, but I conclude with a few thoughts on its normative implications, which I believe to be quite significant.

Before I begin, it is necessary to distinguish what I will be calling judicial capacity from two other attributes of the judiciary that sometimes go by that name. By judicial capacity, I mean the total volume of cases the court system is capable of handling. I do not mean the capacity of the judiciary to produce reliably good decisions, which I shall call *judicial competence*. Nor do I mean the capacity (or inclination) of the judiciary to produce social change against the tide of dominant political forces, which I shall call *judicial independence*.

Both judicial competence and judicial independence are the subjects of substantial literatures. Indeed, in one form or another, they have dominated the agenda of constitutional theory for more than half a century. For decades, theorists have debated whether courts represent a reliable "forum of principle" or an imperious aristocracy;[1] whether courts possess the factfinding tools and

1. *Compare* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (criticizing judicial supremacy in constitutional interpretation), *with* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981) (defending the

expertise to make reliable decisions on empirically difficult constitutional questions;[2] whether courts are meaningfully independent of the political process;[3] and if so, whether they are capable of producing meaningful social change in the teeth of political opposition.[4] That these questions have garnered substantial attention is hardly surprising. They are obviously important.

The principal aim of this Essay is to show that judicial capacity is comparably important. This claim rests on three premises. First, the constraints on judicial capacity help to explain the shape and evolution of many important constitutional doctrines. The Commerce and Equal Protection Clauses are two examples. In both contexts, the Supreme Court has adopted a broadly deferential posture toward the political process. And on the relatively rare occasions when it engages in serious review, it does so in the form of relatively hard-edged categorical rules that clearly insulate the vast majority of political action from serious scrutiny. Many of these rules are difficult to explain except as responses to the constraints of judicial capacity.

Second, capacity's influence on doctrine is a crucial determinant of judicial competence, one that constitutional theorists have almost completely overlooked. In particular, when the Court attempts to second-guess the political process, capacity constraints generally force it to do so in the form of crude categorical rules. This dynamic, in turn, produces constitutional doctrines that are at best crude proxies for the underlying purposes they are meant to serve. The pressure that capacity constraints place on the Court to employ such functionally unsound rules provides an important, though not necessarily dispositive, reason to distrust the Court, quite apart from the standard arguments about judicial expertise, information, and democratic unaccountability.

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judiciary as an institution to vindicate important rights claims and elaborate constitutional meaning).

2. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 123-50 (1994); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

3. *Compare* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (suggesting that the Supreme Court generally responds to majoritarian forces), *with* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (offering a qualified argument to the contrary).

4. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); David Schultz, *Introduction* to LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998).

Third, the constraints on judicial capacity impose important limits on the judiciary's ability to challenge dominant political forces. These limits too have been largely overlooked.[5] Simply put, capacity constraints generally force the Court to adopt a posture of deference toward the political process. To do otherwise would invite more litigation than the judiciary could handle. But of course, it is difficult to challenge dominant political forces while adhering to a broad policy of deference. This is not to say that the Court will never swim against the tide of public opinion, but the limits of judicial capacity sharply constrain its ability to do so. Better understanding those limits therefore promises to enrich our understanding not only of the substance of constitutional law but also of judicial competence and judicial independence, two of the central preoccupations of American constitutional theory.

The Essay unfolds as follows. Part I explains the source and character of the constraints on judicial capacity. Part II lays out a positive theory of the influence of judicial capacity on the substance of constitutional law. Part III discusses the Supreme Court's recent Commerce Clause decisions as an illustrative example of the theory. Part IV draws out normative implications. Together, these Parts provide a brisk, broadly drawn overview of judicial capacity and its importance for constitutional law. Part V adds nuance and shading, in the form of several important caveats.

I. THE LIMITS OF JUDICIAL CAPACITY

The most important work on judicial capacity traces the limited capacity of the courts to the pyramid-like structure of the federal judicial system, with the ninety-four district courts as its broad base, the thirteen courts of appeals as its somewhat narrower middle section, and the "one supreme Court" mandated by Article III as its apex.[6] The theory is that having just one court at the apex of

5. The most important exception is Neil Komesar, whose pioneering work I build on throughout. *See* KOMESAR, *supra* note 2, at 252 ("The physical capacity for the courts to review governmental action is simply dwarfed by the capacity of governments to produce such action.").

6. U.S. CONST. art III, § 1. Functionally speaking, the base of the judicial pyramid also comprises dozens of federal administrative agencies (employing more than one thousand administrative law judges) whose decisions are reviewable in the courts of appeals or, occasionally, in the federal district courts. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1099 (1987); *see also Frequently Asked Questions*, U.S. CTS., http://www.uscourts.gov/Common/FAQS.aspx (last visited Sept. 3, 2012) (discussing the number of federal courts).

the system, just one court that possesses authority to make nationally binding decisions of federal law, creates a kind of bottleneck. The capacity of the system as a whole is constrained by the capacity of the single court that sits at its top.[7]

This structural explanation is an important part of the story, but it is not the whole story. We can see that rather easily once we recognize that nothing in the hierarchical structure of the judiciary requires the Supreme Court to approach its work in any particular way. Specifically, nothing in the hierarchical structure of the judiciary requires the Court to spend as much time on—or to approach with the degree of seriousness that it does—the cases that it decides. If the Justices were so inclined, they could decide cases by coin flip instead of by briefing and oral argument. Coin flips are fast. The Court could do an effectively unlimited number of them per year. If the Justices approached their decisions in this way, they would totally eliminate the bottleneck at the top of the American judiciary. Alternatively, the Court might delegate final decisional authority to individual Justices or even their law clerks. Neither would eliminate the Supreme Court bottleneck as would decision by coin flip, but either would expand the Court's decisional capacity fairly dramatically.

Of course, none of these is a remotely plausible scenario. But the mere fact that they are possible without abandoning the hierarchical structure of the judicial system shows that this structure alone cannot explain the limited capacity of the judiciary. Any full explanation of the limits on judicial capacity needs to account for the widely shared judicial norms that make it unthinkable for the Court to decide cases by coin flip or in other ways that might radically expand its capacity relative to what the structural theorists have assumed that capacity to be.[8]

What are those norms? The first and most basic is a commitment to maintaining minimum professional standards of judging.[9] At the Supreme Court level, this involves an elaborate briefing process, oral argument, internal deliberation, and public justification of the Court's decisions—all of which are expensive and time-consuming. Adherence to this norm alone probably caps

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7. *See, e.g.*, KOMESAR, *supra* note 2, at 144-45; NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 40-41 (2001); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 133-34 (1996).

8. That norms play a role in constraining judicial capacity may seem fairly obvious. But they have received little attention in the literature, and, as we shall see in the next Part, their precise content is crucial to understanding just how the limits of judicial capacity affect the substance of constitutional law.

9. *See, e.g.*, Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 852 (1984) ("As the example of the coin-flipping judge illustrates, we insist upon deliberate, rational dispute resolution.").

the capacity of the Supreme Court at somewhere between one hundred fifty and two hundred full-dress decisions per Term, roughly what the Court decided at its peak in the early twentieth century.[10] This may not seem that constraining, given that the modern Supreme Court routinely decides fewer than one hundred cases per Term.[11] The appearance, however, is deceiving. Had the Court interpreted the Commerce, Equal Protection, or Takings Clauses differently—to pick just a few examples—the demands on its capacity would be vastly higher. That the Court has shaped constitutional law to avoid overwhelming its modest capacity should not be taken as evidence that this capacity is unlimited or overabundant.[12]

Of course, the Court's jurisdiction is almost entirely discretionary. It might therefore respond to any increase in demand simply by refusing to hear more cases.[13] But other widely shared judicial norms make this approach unlikely. The most important of these is a commitment to maintaining a reasonable degree of uniformity in the interpretation and application of federal law—or stated in reverse, a commitment to eliminating significant disuniformity in this domain. In any hierarchical judicial system, the decisions of the lower courts will produce discordant and divergent legal interpretations.[14] Generally, the Supreme Court strives to mitigate this problem by granting certiorari and issuing nationally binding decisions in areas of significant disuniformity among the lower courts.[15] To perform this function, however, it needs first to

10. *See* VERMEULE, *supra* note 2, at 268 (suggesting this ceiling on the Supreme Court's capacity); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 745-46 (2001) (surveying the history of the Court's plenary docket).

11. David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 153 fig.1 (2010).

12. To be clear, the Court certainly could decide more cases than it does now. And perhaps it should. The important point is that it could not decide much more than one hundred fifty cases per year without sacrificing its commitment to minimum professional standards. As we will see in Part II, this significantly constrains the Court's constitutional options.

13. *See* Cordray & Cordray, *supra* note 10, at 740 (noting "a steady drop in the *percentage* of petitions for certiorari granted by the Court" in the face of a "steady increase in the number of cases filed").

14. *See, e.g.*, POSNER, *supra* note 7, at 4 ("[T]he more intermediate appellate courts there are, the greater the burden on the supreme court of maintaining uniformity among the intermediate courts.").

15. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631-35 (2008) ("[E]nsuring uniformity for its own sake is the Supreme Court's central preoccupation; it is the Court's first order of business and the task to which it devotes the great majority of its time."); *see also* H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES

cull such cases from the great mass of petitions for certiorari it receives and second to decide them. If the total volume of litigation overwhelms the Court's capacity to do either, its ability to preserve the uniformity of federal law will be seriously undermined. Thus, for the Court to maintain its commitment to uniformity, while also maintaining a commitment to minimum professional standards, the volume of federal litigation must remain limited. More precisely, the number of cases the Court must decide to eliminate significant disuniformity must not exceed its capacity of one hundred fifty to two hundred full-dress decisions per Term.

A final norm bears mentioning. That is the widely shared judicial commitment to timely and efficient access to the legal system.[16] Unlike minimum professional standards and the uniformity of federal law, this norm has little to do with the Supreme Court bottleneck effect. In fact, it applies with the greatest force to the work of lower courts, especially the federal district courts. As the volume of litigation increases, the ability of the lower courts to process cases in a timely and efficient fashion, while maintaining a commitment to minimum professional standards, diminishes. Assuming that, at some point, the Supreme Court will find the impact on efficiency intolerable, this norm will operate as a constraint on judicial capacity.

We are now in a position to reassess not only where the limits of judicial capacity come from, but also, in a deeper sense, what those limits actually are. To the extent that theorists have considered this question at all, they have

SUPREME COURT 251 (1991) ("A circuit split is not simply a formal criterion for cert.; it is probably the single most important criterion . . . ."). Significance here encompasses both the extent of the disuniformity (how many lower courts disagree about how much) and its practical impact. In some legal domains, the Court is unwilling to countenance even the possibility of disuniformity raised by a single unreviewed lower court decision. Here I am thinking principally of lower court invalidations of federal statutes, which the Court reviews almost without exception. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 244 (8th ed. 2002) (noting that in such cases "certiorari is usually granted because of the obvious importance of the case"). By contrast, the Court is much more willing to tolerate disuniformity in lower court invalidations of state and local laws, the interpretation (as opposed to invalidation) of federal statutes, the exclusion of unconstitutionally obtained evidence, etc. *See, e.g.*, *id.* at 246-47, 271-72; *see also* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1254 (1989) (noting that the likelihood of Supreme Court review turns on both the existence of a conflict among lower courts and the importance of the constitutional question).

16. *See* POSNER, *supra* note 7, at 128 ("[T]he people who control the federal court system . . . have acted consistently as if they had an unshakable commitment to accommodating any increase in the demand for federal judicial services without raising the price of those services, directly (as by filing fees) or indirectly (as by imposing delay), in the short run or the long run . . . .").

generally assumed these limits to be basically analogous to limits on the physical capacity of a vessel or a bottle—hard structural constraints.[17] But this analogy to physical capacity is misleading. What we are really talking about when we talk about the limits of judicial capacity is the unwillingness of judges to sacrifice certain normative commitments, whose sacrifice would expand the capacity of courts. In other words, the limits of judicial capacity are not a fact of nature, in the sense of limited time and material resources. At least they are not only a fact of nature. Nor are they simply or irrevocably hard-wired into the structure of the judiciary. They are also the product of a collective, and contingent, choice on the part of American judges, but a choice that is unlikely to change significantly any time soon because the norms it is based upon are so widely shared and deeply embedded in American legal culture.[18]

Of course, these norms are not monolithic. Different judges will be committed to them with different degrees of firmness. They will also have different ideas about what constitutes minimum professional standards or intolerable disuniformity or intolerable delays in the timeliness or efficiency of access to the court system. But as an empirical matter, I believe these disagreements exist within a fairly narrow band. Put differently, I believe there would be very substantial resistance among American judges to wholesale abandonment of these norms—or even to significant relaxation of them. To offer just two examples, it is essentially unthinkable that any Supreme Court Justice—today or at any other point in American history—would decide cases by coin flip or regularly vote against review of lower court decisions invalidating federal statutes, given the risk of disuniformity that such decisions create in the enforceability of laws with nationwide scope. So long as this remains the case, so long as there is a strong baseline level of commitment to these norms of judicial decisionmaking, the courts will be constrained to avoid deciding cases in any way that sharply increases the volume of litigation flowing into the federal courts.

Before moving on, I should say a word about judicial budgets, which are minuscule in comparison to those of many institutions whose work courts are

17. *See, e.g.*, VERMEULE, *supra* note 2, at 268 (tracing the judiciary's limited capacity to its starkly limited material resources); Cordray & Cordray, *supra* note 10, at 740 ("[T]he boundaries of the Court's calendar merely reflect the natural limitations upon the amount of time and work that the Justices themselves can put in over the course of a given Term.").

18. I bracket the possibility that some or all of these norms have structural determinants—e.g., public and political pressure that might result if judges abandoned them. That is probably part of the story, but for the purposes of my argument here, it is the existence of the norms that is crucial, rather than their origins.

charged with reviewing.[19] Is this an important constraint on judicial capacity? Yes and no. It is certainly difficult to imagine an institution as small as the federal judiciary comprehensively policing an institution as large as the political process. A larger budget could pay the salaries of more judges and support staff, which would enable the lower courts to decide more cases involving a broader range of government action. But budgetary constraints are neither sufficient nor necessary to explain the limits of judicial capacity. They are insufficient because, even at present budgetary levels, the courts could decide vastly more cases if judges were willing to sacrifice the broadly held norms discussed above. They are unnecessary because even a much larger budget would do little to eliminate the bottleneck at the top of the judicial pyramid. Indeed, expanding the number of Supreme Court Justices might actually reduce the Court's capacity by making deliberations more cumbersome.[20] And expanding the number of lower court judges would increase disuniformity in their interpretations of federal law, increasing pressure on the Court's docket.[21] For all of these reasons, I bracket budgetary issues in my subsequent analysis.

19. *See* VERMEULE, *supra* note 2, at 268 ("[I]n 1999 the total federal judicial budget was $3.9 billion, while the administrative budget of the national political branches alone ran to some $80 billion . . . .").

20. *See* POSNER, *supra* note 7, at 4 ("The more judges there are in an appellate court, the more cumbersome and protracted their deliberations will be unless they sit in panels—and then there must be a mechanism for coordinating the panels."); *see also* KOMESAR, *supra* note 2, at 145 (noting that an increase in judges "would probably make . . . collective decisions more difficult and time consuming"); *cf.* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 268 n.213 (1985) (noting the constitutional permissibility of a substantially expanded Supreme Court without addressing the complications noted by Posner and Komesar).

21. *See* KOMESAR, *supra* note 2, at 145 ("[E]xpansion of these intermediate courts is limited. At some stage, conflicts among the views taken by these separate courts begin to create greater uncertainty and greater demands for resolution by the higher supreme court."); POSNER, *supra* note 7, at 133 (same). These tradeoffs are the staples of a large literature on judicial reform and the perceived federal caseload crisis of the 1970s and 1980s. *See, e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 693-94 (1984) (discussing such tradeoffs in connection with proposals for the creation of a national court of appeals); Arthur D. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28, 39-40 (1983) (same).

II. A JUDICIAL CAPACITY MODEL OF SUPREME COURT DECISIONMAKING

The next question is how we should expect the limits of judicial capacity to affect the decisionmaking of courts in general and of the Supreme Court in constitutional cases in particular. The decisions of the Supreme Court are of special interest because it is the limited capacity of that Court, in conjunction with widely shared judicial norms, that sharply constrains the capacity of the federal judiciary as a whole. The Court's constitutional decisions are of special interest because, as we shall see, they are the decisions most directly and predictably affected by the constraints of judicial capacity.

The first and most obvious thing we can say on this subject is that the Court will be constrained to decide cases in a way that keeps the total volume of litigation below some threshold level, beyond which the basic normative commitments discussed in Part I would be threatened.[22] In this formulation, "total volume of litigation" is a shorthand. The real issue of interest is demand on the capacity of the judiciary, which is determined not just by the number of the cases but also by their complexity and their tendency to produce disuniformity. The bottom line is that the Court cannot spend more capacity than it has. It cannot invite more litigation than the court system as a whole can handle consistent with the bedrock normative commitments of most judges. But there are a wide variety of tools or approaches that the Court might employ to keep its expenditures of capacity below the ceiling imposed by these normative commitments.

An analogy may be helpful. Imagine a family of four with an annual budget of $100,000. There are some things that such a family flat-out cannot afford. It cannot buy a $300,000 Ferrari, even on credit. It cannot buy a $5 million house—it could not get a mortgage or make the payments if it did. Still, there are an almost infinite number of ways that such a family can draw up its budget. The family could buy a new Lexus SUV. It would have to cut back in a lot of other areas, and this is probably not the choice most families would make, but it could be done. The family could take three extravagant Caribbean vacations a year. It might need to live in a one-bedroom apartment to do so,

22. Here and throughout, I frequently speak of "the Court" as a unitary institution. This is obviously a shorthand, but one that poses relatively few dangers for my purposes because the norms that limit judicial capacity are so broadly held. I do not mean that these norms will necessarily—or even often—push the members of the Court toward consensus, only that whatever group constitutes a majority in a given case is likely to feel constrained by them.

but it could be done. Certainly, the limits of the family budget will be relevant to these decisions, in the sense that those limits dictate the nature of the tradeoffs each decision requires. But the budget would not constrain the family's decisions in the hard sense of placing any of them firmly off-limits. Whether the family buys the Lexus or takes the vacations will depend not only or even principally on its budgetary constraints but rather on the value it places on these things relative to other potential uses of its limited funds.

In the same way, there are a wide variety of approaches the Supreme Court might take to budgeting the judiciary's limited capacity. Just as a family might splurge on a new car or an expensive vacation, the Court might choose to invite more litigation in some areas, by making substantive law more friendly to plaintiffs[23] or employing vague standards that produce greater uncertainty and thus make settlement more difficult.[24] Alternatively, it might choose to loosen pleading standards or to liberalize Article III standing requirements.[25] These options are all on the table, so long as the Court is willing to make compensating tradeoffs that keep the total volume of litigation below the threshold imposed by judicial capacity. These tradeoffs, too, could take any number of forms. The Court might make substantive law in some other area less friendly to plaintiffs, thus reducing the expected value of litigation.[26] Or it might employ more categorical rules in the hope of reducing disuniformity in the lower courts and encouraging settlement by potential litigants.[27] Or it

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23. *See* POSNER, *supra* note 7, at 98-99 (noting that expanding the scope of legal rights increases demands on the judicial system).

24. *See id.* at 369 ("The choice between rule and standard has profound institutional implications. . . . [G]enerally rules reduce and standards increase the amount as well as the length of litigation."); *see also* KOMESAR, *supra* note 2, at 147-48 (same). Of course, the Court is unlikely to pursue an increase in uncertainty or a reduction in settlement as an end in itself. Rather, these are the factors that make vague standards expensive (in terms of judicial capacity). What makes them attractive—the judicial equivalents of a Caribbean vacation—is the power they afford to tailor the application of legal norms more closely to their underlying purposes.

25. *See* POSNER, *supra* note 7, at 95-96 (describing Article III standing as "another form of indirect pricing of federal judicial services," whose relaxation greatly increased the volume of litigation in the 1960s and 1970s).

26. *See* KOMESAR, *supra* note 2, at 147 ("[T]he courts can reduce the number of requests that they review governmental activity by setting out standards that increase the deference given to the reviewed entity.").

27. Categorical rules reduce disuniformity among lower courts by reducing mistakes and making deviation easier to police. *See, e.g.*, POSNER, *supra* note 7, at 178 (discussing *New York Times v. Sullivan*, 376 U.S. 254 (1964), as an illustration of this dynamic); Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 819-20 (1967)

might make various procedural rules more stringent to reduce the volume and complexity of litigation across the board.[28] The range of permutations is practically infinite.[29]

Of course, many of the factors affecting the total volume of litigation are outside the direct control of the judiciary. Within broad constitutional limits, Congress controls the jurisdiction of the federal courts and thereby the kinds of disputes those courts are permitted or required to hear.[30] Congress also has the power to make the procedural rules governing federal litigation more or less stringent.[31] Perhaps most important, it has the power to create new substantive rights (and to eliminate old ones), thereby creating or eliminating whole classes of litigation.[32] Other factors that the judiciary has little control over but that have the potential to substantially affect its workload include the cost of

(using the one-man-one-vote rule of *Reynolds v. Sims*, 377 U.S. 533, 559 (1964), as an illustration). They encourage settlement by reducing uncertainty and more closely aligning adverse parties' assessments of the risk-adjusted value of litigation. *See, e.g.*, Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 32 (2000) ("The *ex ante* certainty that rules provide should encourage more disputes to settle out of court and not require adjudication at all."); *see also* POSNER, *supra* note 7, at 369 (same).

28. *See* KOMESAR, *supra* note 2, at 147 ("[T]he courts can decrease litigation by requiring more forms and procedures, by narrowing the types of cases acceptable for adjudication, by narrowing standing or by increasing the requirements for class action."). The Supreme Court's recent decisions tightening pleading standards under Rule 8 of the Federal Rules of Civil Procedure arguably fit this bill. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (dismissing an antitrust class action for failure to state a "plausible" claim); *see also* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (applying *Twombly*'s plausibility standard to dismiss a *Bivens* action against former Attorney General John Ashcroft); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 54 n.206 (2010) (noting that *Twombly* and *Iqbal* were decided against a backdrop "in which federal court caseloads have dramatically increased, the number of federal judges has remained relatively constant, [and] a significant number of judgeships have been vacant for significant periods of time").

29. *Cf.* Andrew B. Coan, *Is There a Constitutional Right To Select the Genes of One's Offspring?*, 63 HASTINGS L.J. 233, 263 (2011) (noting many possible tradeoffs in the allocation of scarce judicial resources); Strauss, *supra* note 6, at 1102 (making a similar point).

30. *See* U.S. CONST. art. III, § 2; Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.); *Ex parte* McCardle, 74 U.S. 506 (1869); Sheldon v. Sill, 49 U.S. 441 (1850).

31. *See* U.S. CONST. art. I, § 8, cl. 18; Rules Enabling Act, 28 U.S.C. § 2072 (2006).

32. *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1649 (1995) ("[I]f the elected branches seek to weaken the authority of the Supreme Court, one way to do so is to pass laws that increase the caseload of the lower courts.").

legal services and the availability of free legal services to those who cannot afford to pay.[33] Social and economic changes too can have a large impact.[34] None of this, however, changes the basic reality: whatever the balance of external factors, the Supreme Court must so manipulate the levers in its control as to keep the volume of litigation below the ceiling imposed by its bedrock normative commitments. In doing so, it enjoys a wide range of choice.

At first blush, this freedom of choice appears to undercut substantially the predictive power—and the actual significance—of judicial capacity. Given the wide range of options available to the Court, all that the limits of judicial capacity can tell us is that we can reliably expect it to choose among the set of options that fall below its capacity threshold. But the really interesting question is which option from this large set the Court is likely to choose. In most contexts, that question is not going to be answered or answerable by the limits of judicial capacity. If the Court wants to recognize an implied right of action under Title IX, it can do so.[35] If it wants to employ a vague balancing test to define the free speech rights of public employees, it can do so.[36] If the Court makes enough choices of this sort, compensating tradeoffs will be required. But in this too, the Court will have many options. The Court's choice, like our hypothetical family's, will be driven by considerations other than capacity, which will function at most as a background constraint. I will call contexts in which this is true "normal legal domains."

Fortunately, for my purposes, not all legal domains are normal in this sense. Indeed, the most important constitutional domains are not. Again, the family budget analogy helps to illustrate the point. In managing the limited capacity of the judiciary, the Supreme Court may have many options, but many is not the same as all. There are judicial analogues to a $300,000 Ferrari or a $5 million house—certain classes of decisions that would not only require compensating tradeoffs but which, by themselves, would invite litigation beyond the overall capacity of the judiciary (or at least come so close as to be practical nonstarters). There are two classes of legal domain where this is the

33. *See* POSNER, *supra* note 7, at 96 ("A major change in the price of access to the federal courts has been the greatly expanded availability of lawyers for indigent claimants, especially but not only indigent criminal defendants.").

34. *See* KOMESAR, *supra* note 2, at 143 ("For all of these qualifications . . . a significant increase in demand for adjudication is inherent in the sizable growth in the market and politics.").

35. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979) (recognizing such a right of action).

36. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (balancing the interest of a teacher in commenting on matters of public concern with the interest of the school district in efficient public service).

case, which I shall refer to as "high volume" and "high stakes." In these domains, the limits of judicial capacity have real predictive power about how we should expect the Court to behave. And where the two domains overlap, the predictive power of judicial capacity is even greater.

A. High-Volume Legal Domains

In high-volume domains, the potential volume of litigation that the Court would invite by ignoring constraints of judicial capacity is so great that no procedural recalibration or shifting of resources from other areas could possibly stem the tide. As a consequence, to maintain its commitment to minimum professional standards and the uniformity of federal law (in these domains and across the board), the Court has essentially two choices. It can decide these issues using clear-cut categorical rules, as opposed to vague standards, in the hope of reducing disuniformity among lower courts and encouraging settlement out of court. Or it can adopt more stringent standards of liability, reducing the expected value—and thereby the likely volume—of litigation.[37]

Some examples will be helpful. Regulatory takings and equal protection are two good ones. These are not domains in which the Court feels compelled to grant review of just any decision striking down government action. They often do not involve federal law. In fact, they often involve challenges to executive action, rather than legislation, and especially to executive action at the state and local levels, which is often quite limited in scope. All of these factors generally raise the Supreme Court's tolerance of disuniformity.[38] Yet despite this fact, both regulatory takings and equal protection have the potential to invite more litigation than the Court could handle while maintaining even a basic commitment to uniformity. They also have the potential to invite more litigation than the lower courts could handle consistent with a basic commitment to timely and efficient access to the legal system. A robust reading of either the Equal Protection Clause or Takings Clause, articulated in the form of a vague standard, would imperil half of the U.S. Code. It would also imperil half of state and local laws and a great number of administrative agency and

37. Unless specifically noted, I use the phrases "more stringent standard of liability" or "more stringent substantive standard" to denote increased hurdles to the successful prosecution of constitutional claims. This has the opposite effect of strict or stringent review of government action.

38. *See supra* note 15.

other executive actions at all levels.[39] The resulting volume of litigation would be far more than the federal court system, and in particular the Supreme Court, could handle, consistent with widely shared commitments to minimum professional standards, the uniformity of federal laws, and timely and efficient access to the legal system.

For this reason, we can predict with a reasonable degree of confidence that judicial capacity will impose a major constraint on the way in which the Court decides equal protection and regulatory takings cases. In particular, we can predict that the Court will feel constrained either to employ clear-cut categorical rules, which reduce uncertainty for potential litigants and thus reduce the volume of litigation, or to abandon anything resembling the full potential enforcement of either of these provisions. Quite possibly it will feel compelled to do both. It may not have to back off completely from any serious review, but it will have to back off a lot and in a way that draws a fairly categorical line, clearly insulating most government action from judicial scrutiny.

As a general matter, that is what we see in these areas.[40] Under the Equal Protection Clause, virtually all government classifications are subject to minimal rational basis review. The few exceptions are narrow, clear-cut, and subject to heightened scrutiny, which amounts to a rule of per se invalidity.[41] Similarly, under the Takings Clause, the vast majority of regulations are subject to the highly deferential test of *Penn Central Transportation Co. v. City of*

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39. *See* KOMESAR, *supra* note 2, at 251 ("[J]udicial review in connection with equal protection can in theory bring any government action to the courts for review."); *cf.* Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another 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."). For purposes of judicial capacity, what matters is not how many government actions are actually invalidated but how many are called into question to the point of generating serious litigation. This is a crucial distinction.

40. *See* KOMESAR, *supra* note 2, at 251 ("[I]f clauses like the Equal Protection Clause or the Takings Clause can be all encompassing in theory, they must be and are significantly less than that in practice.").

41. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004) ("Almost immediately, the 'set' [of classifications subject to heightened scrutiny] closed when a majority of the Court accorded sex-based classifications quasi-suspect status. It has not expanded since." (footnote omitted)).

New York.[42] The two narrow exceptions—"permanent physical invasion" and "complete elimination of a property's value"—are subject to clear-cut rules of per se invalidity.[43] There are occasional deviations from this pattern, typically short-lived, but the general tendency in both domains is consistent with the judicial capacity model.[44]

One apparent counterexample deserves mention. That is the constitutional rights revolution of the 1950s and 1960s, which generated an enormous volume of new litigation.[45] This important historical episode might seem to contradict my prediction that the Court will generally be compelled to defer to other government actors in high-volume domains. Conspicuously, however, none of the new constitutional rights established during this period threatened anywhere near as large a swath of government activity as would a broad interpretation of equal protection or regulatory takings. In fact, most affected the single, circumscribed sphere of criminal prosecutions.[46] That is not to say

42. 438 U.S. 104 (1978); *see* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006) ("The Court uses a deferential, rational basis-like scrutiny to review the constitutionality of so-called 'regulatory takings' under *Penn Central Transportation v. New York*."); *see also* Basil H. Mattingly, *Forum over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 699 (2000) ("A review of the cases . . . suggests that balancing is nothing more than an empty ritual in which the claimants rarely prevail unless they qualify for compensation pursuant to a 'per se' rule.").

43. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-39 (2005) (explaining that these "two categories of regulatory action generally will be deemed *per se* takings for Fifth Amendment purposes").

44. Other plausible examples of capacity-constrained decisions in high-volume domains include (1) the Court's post-New Deal substantive due process doctrine, carefully limited to a few discrete "fundamental liberties"; and (2) the Court's longstanding adherence—with only minor exceptions—to a rigid, conceptually unsatisfying state-action doctrine. A more expansive or less categorical version of either doctrine would greatly expand the range of government action (and inaction) subject to constitutional challenge. *See* POSNER, *supra* note 7, at 317 ("Should the movement [for revitalizing old constitutional doctrines limiting government regulation of business] ever succeed, the federal courts will be overwhelmed by cases challenging on constitutional grounds local zoning and rent control ordinances, state and local licensure laws, and a vast array of federal, state, and local regulatory measures . . . ."); Christian Turner, *State Action Problems*, 65 FLA. L. REV. (forthcoming 2013), http://ssrn.com/abstract=2026631 (offering an institutional explanation and rehabilitation of the Court's much-maligned state-action doctrine).

45. *See* POSNER, *supra* note 7, at 98 (describing "the expansion of constitutional rights and remedies" as one of the most important explanations for the explosion of federal caseloads between 1960 and 1983).

46. *See* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 273-77, 329-40 (1988) (recounting the expansion of habeas corpus as a mechanism for enlisting lower federal

that these rights were incapable of generating substantial litigation. They clearly did. But they are probably best understood as falling within normal domains—the judicial equivalents of Caribbean vacations or Lexus SUVs, rather than Ferraris or $5 million houses.[47]

B. High-Stakes Legal Domains

The second class of cases in which we can expect capacity to have real predictive force I call "high-stakes" domains. As with high-volume domains, the reason we can expect capacity to have real predictive force in high-stakes domains is that they are analogous to a Ferrari or $5 million house. They represent situations where no amount of procedural recalibration or shifting of resources from other areas could compensate for the volume of litigation the Court risks inviting. The defining feature of high-stakes domains is that the Supreme Court is much less willing to tolerate disuniformity among the decisions of lower courts. In many of the domains that fit this description, the Court is willing to tolerate virtually no disuniformity. In particular, it feels compelled to grant review in almost any case in which the lower court invalidates a federal law.[48]

From this, it follows fairly straightforwardly that, even at much lower total volumes of litigation, the pressure on the Court is going to build very quickly. Some rough figures may be helpful for purposes of illustration. Suppose that, in a normal legal domain, the Court feels compelled to grant review of one in seventy-five serious petitions. In a high-stakes domain, it might feel compelled

courts in the enforcement of the Warren Court's revolution in the rights of criminal defendants); *see also* BRIAN R. MEANS, POSTCONVICTION REMEDIES § 4:6 (2011) (offering a similar account).

47. For the same reasons, the Court's retreat from many of these rights in subsequent decades should probably not be understood as compelled by the limits of judicial capacity. Capacity may have been one factor, but it was hardly the only one, as evidenced by the willingness of most liberal justices to stay the course. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218, 273 (1973) (Powell, J., concurring) (describing "the sentiment, shared alike by judges and legislators, that the writ has overrun its historical banks to inundate the dockets of federal courts"), *with* Schriro v. Landrigan, 550 U.S. 465, 499 (2007) (Stevens, J., dissenting) (blaming the Court's denial of habeas relief on "its increasingly familiar [and unjustified] effort to guard the floodgates of litigation").

48. *See* STERN ET AL., *supra* note 15, at 244; Cordray & Cordray, *supra* note 10, at 763 (noting that "the key 'importance' criterion for granting review on the merits is met, almost ipse dixit, when the federal government asserts that it is directly and substantially affected by the outcome or reasoning of a lower court decision").

to grant one in ten.[49] In the latter case, even a decision that invites much less aggregate litigation is going to very quickly produce a high demand on the Supreme Court, triggering the bottleneck effect discussed in the Introduction. Again, the bottleneck effect is not only a function of the hierarchical structure of the judiciary. It is a combination of that structure and the widely shared bedrock norms that the Court is unwilling to sacrifice. But for this reason, in high-stakes domains, we can predict that the Court will be constrained much as it is in high-volume domains. It will be forced to rely on hard-edged categorical rules, which reduce disuniformity among lower courts and encourage settlement, and more stringent tests of liability, which discourage litigation by lowering its expected payoff.

Of course, many domains that can be described as high-stakes in this sense are also high-volume domains. Where that is the case, I will use the term "hybrid" domain. Hybrid domains are actually the most important for my purposes, because they are the domains in which the limits of judicial capacity constrain the Court most strongly. Moreover, as an empirical matter, it is actually difficult to come up with high-stakes domains that are not also high-volume domains. But one plausible example is Section 5 of the Fourteenth Amendment, which grants Congress the power to enforce the rights-granting provisions of the Amendment through "appropriate legislation."[50]

Section 5 is a pure high-stakes domain, rather than a hybrid domain, for two basic reasons. First, the legislative authority created by Section 5 is relatively narrow, at least under the interpretation of the *Civil Rights Cases* of 1883.[51] Second, the practical need to invoke that authority has been narrowed even further by the broad modern understanding of the commerce power, which makes it unnecessary for Congress to rely on Section 5 except where it wishes to override state sovereign immunity.[52] Even so, any time a court invalidates a law under Section 5, it always invalidates a *federal* law, meaning that the Supreme Court feels strongly compelled to grant review. And so the

49. The difference becomes even more significant when we consider that, in normal domains, the number of petitions filed is presumably already reduced by the low odds of success.

50. U.S. CONST. amend. XIV, § 5.

51. 109 U.S. 3 (1883) (limiting this authority to legislation correcting the effects of *state* actions prohibited by the Fourteenth Amendment).

52. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 148 (2004) ("The Section 5 power is an enumerated power, but many of its applications will overlap with the commerce power. . . . We must worry about the scope of the Section 5 power, then, only when Congress wishes to do something it could not do under the Commerce Clause.").

pattern of decisions we see in this area is very consistent with what we would expect to see in high-stakes domains under the judicial capacity model.

Without apparently thinking through the implications for capacity, the Court began in *City of Boerne v. Flores* by adopting the stringent and standard-like "congruence and proportionality" test.[53] But that test very quickly called into question a high proportion of Section 5 legislation. The Court stuck to its guns for a while; indeed, it still has not formally abandoned the congruence and proportionality test. But it has converted that test, which was originally a vague standard, into something much closer to a hard-edged categorical rule. If the right protected by Section 5 legislation is subject to heightened scrutiny, then the law is categorically permissible. If the right is not subject to heightened scrutiny, the law is categorically impermissible. That is the essential message of *Nevada Department of Human Resources v. Hibbs*,[54] which upheld sections of the family care provision of the Family and Medical Leave Act, and *Tennessee v. Lane*,[55] which did the same for the public services provision of the Americans with Disabilities Act.[56] This move to rule-based decisionmaking in the face of mounting litigation pressure is exactly what a judicial capacity model would predict.

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53. 521 U.S. 507, 530 (1997) ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."). Here I use "stringent" to describe the Court's posture toward government action, rather than constitutional plaintiffs.

54. 538 U.S. 721 (2003).

55. 541 U.S. 509 (2004).

56. *Cf.* Justin Schwartz, *Less than Meets the Eye: Antidiscrimination and the Development of Section 5 Enforcement and Eleventh Amendment Abrogation Law Since* City of Boerne v. Flores, 38 HASTINGS CONST. L.Q. 259, 312-20 (2011) (offering a similar reading of *Hibbs* and *Lane*). The Court's most recent Section 5 decision, invalidating the self-care provision of the Family and Medical Leave Act, adheres to this approach. *See* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012). However, the vigorous disagreement between the plurality and dissent as to whether the self-care provision targets gender discrimination suggests that the approach may prove less rule-like, and thus less sustainable, in practice than in theory. *Compare id.* at 1335 (plurality opinion) ("Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs."), *with id.* at 1340 (Ginsburg, J., dissenting) ("[T]he FMLA, in its entirety, is directed at sex discrimination."), *and id.* at 1338 (Scalia, J., concurring in the judgment) ("The plurality's opinion seems to me a faithful application of our 'congruence and proportionality' jurisprudence. So does the opinion of the dissent.").

C. Hybrid Legal Domains

Much more important than pure high-stakes domains are hybrid domains. These domains involve both high volume and high stakes. For that reason, judicial capacity is likely to constrain the Court's decisionmaking in these domains more sharply than in any other context. The quintessential example of a hybrid domain is the Commerce Clause. The Commerce Clause qualifies as high volume because the potential volume of litigation that a plaintiff-friendly test of liability or a vague standard would invite is enormous. The reason for this is simple: the fraction of federal legislation grounded in the commerce power is enormous.[57] The Commerce Clause qualifies as a high-stakes domain because any statute invalidated under it will be a federal statute, meaning the Court will feel strong pressure to grant review. So here too, we should expect the Court to feel strongly constrained by judicial capacity. And here too, we have a $300,000 Ferrari or a $5 million house that the Court simply cannot afford to buy—does not have enough capacity to buy—no matter how much it is willing to raise pleading standards or reallocate resources from other legal domains. As in the contexts we have already discussed, the pattern of the Court's decisions interpreting the Commerce Clause is very consistent with what we would expect to see under the judicial capacity model. Several of these decisions will be discussed in more detail in the next Part.

D. Summary

To review, in normal domains, the most we can say about judicial capacity is that it will operate as a kind of background constraint. The Court will need to be generally conscious of capacity to keep the total volume of litigation below the threshold necessary to preserve the bedrock norms of American judges. But it will have a wide range of choice in meeting this objective. The exception to this general rule occurs in high-volume domains and high-stakes domains, where we can fairly confidently predict that judicial capacity will create strong pressure on the Court to embrace hard-edged categorical rules, defer to the political process, or both. The predictive power of capacity is even stronger in hybrid domains, which involve both a high potential volume of litigation and also high stakes of the sort that would compel the Court to grant

57. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 238 (2d ed. 2002) (noting that the Commerce Clause "has been the authority for a broad array of federal legislation, ranging from criminal statutes to securities laws to civil rights laws to environmental laws").

review in an unusually high percentage of cases coming up from the lower courts.

III. CAPACITY AND COMMERCE

In this Part, I briefly discuss the Supreme Court's decisions in *United States v. Lopez*,[58] *United States v. Morrison*,[59] and *Gonzales v. Raich*[60] as an illustration of the judicial capacity model.[61] Each of these decisions interpreted the scope of national legislative authority under the Commerce Clause, the principal constitutional foundation of the modern regulatory state. In each case, the judicial capacity model illuminates aspects of the Court's decision and the dissenting minority's objections that are otherwise difficult to explain. As such, they provide a suggestive example of how we would expect the model to look in action.

The nub of my argument is that the Commerce Clause is a hybrid domain, in which we should expect capacity constraints to play a large role in shaping the Supreme Court's decisions. Obviously capacity is not the only factor that plays a role. The level of concern that individual Justices harbor about federal overreach also matters greatly. But the ways in which this concern is translated into the Court's constitutional decisions are strongly constrained by judicial capacity.

Take *United States v. Lopez* as an example. Judicial capacity does not explain the Court's decision to strike down the Gun-Free School Zones Act or the Court's renewed interest in limiting federal power under the Commerce Clause. But the Court's choice to pursue these objectives through a categorical distinction between economic and noneconomic activity is strongly suggestive of a concern with judicial capacity. While this distinction has justly been

58. 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844, as beyond Congress's commerce power).

59. 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, as beyond Congress's commerce power).

60. 545 U.S. 1 (2005) (upholding the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970), as a valid exercise of the commerce power as applied to homegrown medical marijuana).

61. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012), came down just as this Essay was going to press. I therefore do not discuss it at length. From the standpoint of judicial capacity, however, *NFIB* is broadly similar to the Court's other recent Commerce Clause decisions, as explained *infra* note 63.

subject to a great deal of functional criticism,[62] it has two notable virtues from the standpoint of judicial capacity. It threatens (or appears to threaten) a relatively small fraction of federal legislation—since all regulation of economic activity is still subject to the highly deferential rational basis test—and it does so (or appears to do so) in relatively clear categorical terms.[63] The first of these virtues keeps the incentives to challenge government regulation relatively low, while the second reduces uncertainty among potential litigants and thus the likelihood that they will bring suit (especially to challenge economic regulations, where their challenges would be futile). *United States v. Morrison* reaffirmed *Lopez* but went one step further, clarifying that the rule for noneconomic regulation is one of virtually per se invalidity. This probably moderately increased the incentives to litigate, but it did so in a narrow domain—regulations of noneconomic activity—and through a relatively categorical rule, probably offsetting whatever modest capacity risks it created.

At the time of these decisions, the dissenting Justices objected not just to the substance but also to the administrability of the majority's new rule. While these objections were not self-consciously articulated in terms of judicial capacity, they amount to an argument that the capacity-based virtues of the economic/noneconomic distinction are chimerical. The distinction between economic and noneconomic activity, Justice Breyer argued, was hopelessly

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62. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 43 (2010) ("[I]t should not matter that air pollution comes from a backyard incinerator or a factory, or that a migratory bird is shot by a lone hunter or a corporate operative. If noneconomic activity creates a federal problem that states cannot individually handle, it should fall within the commerce power." (footnote omitted)); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 164 (2010) ("The economic/noneconomic distinction . . . does not systematically relate to the advantages of the federal and state governments. The federal government is not especially able in economic matters and the state governments are not especially able in noneconomic matters.").

63. Whatever its ultimate merit, the commerce power analysis in *NFIB* has similar virtues. Chief Justice Roberts was explicit that his reading of the Commerce Clause (broadly shared by the four joint dissenters) threatens only a single federal statute, and it does so on the basis of a categorical distinction between activity and inactivity. *See NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) ("Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."). All nine Justices, moreover, appear to have agreed that Congress could pass the perfect economic equivalent of the Affordable Care Act's individual mandate under the taxation power, so long as it invokes that power explicitly. *Id.* at 2651 (joint dissent) ("The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so."). A rule this narrow and easily evaded seems unlikely to threaten much legislation going forward. Or, at any rate, it is easy to imagine five Justices believing this to be the case. The Court's spending-power holding is a different matter. *See infra* note 88.

porous.[64] As a result, Justice Souter predicted, the majority's decisions would come to threaten an unacceptably large swath of federal legislation.[65]

In *Gonzales v. Raich*, a differently composed majority concluded that these concerns had come home to roost. Although *Raich* nominally reaffirmed the categorical constitutional line between economic and noneconomic activity, it defined economic activity with a breadth that seems clearly designed to staunch the substantial flow of litigation the Court anticipated if it tried to apply a narrower definition that would invalidate more federal legislation.[66] As Justice O'Connor put it in dissent, "The Court uses a dictionary definition of economics to skirt the real problem"—and the herculean judicial task—"of drawing a meaningful line between 'what is national and what is local.'"[67] As a double security, the majority also revitalized the categorically deferential rational basis test for regulations of noneconomic activity as part of a larger regulatory scheme.[68]

The contrast between this approach and Justice O'Connor's *Raich* dissent vividly illustrates the centrality of capacity. To preserve the force of the economic/noneconomic distinction, Justice O'Connor would have required the Court to make case-specific determinations about whether Congress had a persuasive justification for including a particular class of activity in a broadly drawn economic regulation.[69] This is a mushy standard if ever there was one, and one that could be applied to seek a group- or conduct-specific carve-out from virtually any federal legislation. The potential volume of litigation under such a standard would be staggering, and the majority would have none of Justice O'Connor's test, I believe at least in part for that reason.[70] Of course, it is not impossible to imagine a Court with five Justice O'Connors. And it is not

64. *Morrison*, 529 U.S. at 656-59 (Breyer, J., dissenting); *Lopez*, 514 U.S. at 628-29 (Breyer, J., dissenting).

65. *Morrison*, 529 U.S. at 637, 642-43 (Souter, J., dissenting).

66. *Cf.* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 528 (2011) ("The strongest indicator that the Court was throwing in the towel on policing Congress's Commerce Clause authority came in 2005, when the Court decided *Gonzales v. Raich*.").

67. Gonzales v. Raich, 545 U.S. 1, 49 (2005) (O'Connor, J., dissenting) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

68. *Id.* at 19, 22 (majority opinion).

69. *See id.* at 47-48 (O'Connor, J., dissenting).

70. *Cf. id.* at 28 (majority opinion) ("[T]he dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the 'outer limits' of Congress' Commerce Clause authority." (internal quotation marks omitted)).

only the issue of judicial capacity that drove her disagreement with the majority. But for the reasons the majority identifies, it is very difficult to imagine her test surviving very long under the pressure of litigation.

IV. NORMATIVE IMPLICATIONS

The judicial capacity model developed and applied in the previous three Parts is purely descriptive. It aims only to predict when and how the limits of judicial capacity will affect the substance of judicial decisions. Nevertheless, like many descriptive models, the judicial capacity model has implications for normative analysis. In this Part, I discuss four of them, which I believe to be especially significant. Throughout, I draw heavily on the Commerce Clause cases discussed in Part III.

A. Judicial Capacity and the Constitutional Choice Set

As we think about the normative choices facing the Court in high-volume, high-stakes, and hybrid legal domains, the judicial capacity model reminds us that it is a mistake to confine our focus to the first-best question of how a case would ideally be decided. Rather, the limits of judicial capacity generally prevent the Court from resting its decisions directly on the functional defensibility or indefensibility of the government actions it reviews. Functionalist standards for decisionmaking, especially ones that appear to have real teeth and are used to invalidate federal statutes, would in most cases invite more litigation than the judiciary can handle. Therefore, the Court needs first to consider the tools that are available to it given its capacity constraints. In high-stakes, high-volume, and hybrid domains, these are likely to boil down to (1) a categorical rule of deference, which will inevitably require the Court to uphold some functionally indefensible government action, and (2) some alternative categorical rule or rules, which will inevitably require the Court to invalidate some functionally defensible government actions. The question is not whether either of these options is ideal but which is least bad.

In making this point, I do not mean to endorse the normative commitments to minimum professional standards, uniformity of federal law, and timely and efficient access to the legal system that underlie the limits of judicial capacity. These are all quite defensible norms, but my argument here is not that the Court should take account of judicial capacity. Rather, my argument takes these norms as given. It therefore assumes that, in approaching high-volume, high-stakes, and hybrid legal domains, judges are constrained to choose among options that respect the limits of judicial capacity. Taking these constraints as given, it is a mistake to assess or criticize the approach that the

Court adopts to these cases based on a purely functional analysis, because a standard that directly incorporates such an analysis is unavailable to capacity-constrained courts.

As an example, consider the functionalist criticism of *Lopez* and *Morrison*, which is legion. Although many critics are willing to concede that the Gun-Free School Zones Act and even the Violence Against Women Act might exceed the federal commerce power, they routinely savage the categorical distinction the Court used to strike them down on functional grounds.[71] There is simply no functional basis, the argument goes, for restricting federal power under the Commerce Clause to economic regulations. Not all economic regulations address the kind of collective action problems Congress was empowered to address, and plenty of noneconomic regulations do. As lawyers are wont to put it, the distinction is both over and underinclusive with respect to the function federal power is best understood to serve.[72]

Once we consider capacity constraints, however, the Court's approach looks much more defensible. A functional collective action standard for applying the Commerce Clause, one requiring that federal statutes respond to a sufficiently serious collective action problem among the states, would invite an avalanche of litigation if applied with any stringency. (What federal statute would not be open to challenge under this formulation?) And if not applied with any stringency, it could not produce the result the majority reached in *Lopez* and *Morrison*. It would amount effectively to the rational basis test endorsed by the dissenters in those cases, which in practice is a rule of categorical deference.[73]

Thus, the Court's categorical distinction between economic and noneconomic activity had a fair amount going for it. It achieved a result that many critics concede to be right or at least reasonable—the invalidation of a federal statute that did not respond to any obvious collective action problem among the states. And because the distinction was both categorical and quite deferential to Congress, it achieved this result without calling into question a

71. Balkin, *supra* note 62, at 41-44; Cooter & Siegel, *supra* note 62, at 162-64.

72. Cooter & Siegel, *supra* note 62, at 164 ("[E]conomic activities do not generally cause collective action problems, and noneconomic activities are not generally free from collective action problems."). This is a familiar drawback to the kind of categorical rules the Court is forced to adopt in high-volume, high-stakes, and hybrid domains. *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 992 (1995) ("Rules are both overinclusive and underinclusive if assessed by reference to the reasons that justify them.").

73. *See, e.g.*, KOMESAR, *supra* note 7, at 161 (describing rational basis review as a "rule[] of abdication"); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 913 (2005).

giant swath of federal legislation. Or so the majority might reasonably have believed.

At the same time, the judicial capacity model also sheds helpful and favorable light on the position of the *Lopez* and *Morrison* dissenters. It may be true that the Gun-Free School Zones and Violence Against Women Acts were merely congressional grandstanding that solved no serious collective action problems.[74] But if a functionally indefensible categorical distinction was the only way to invalidate them consistent with the limits of judicial capacity, the position of the dissenters has a strong appeal. Invalidating a broad array of functionally defensible noneconomic regulations—of pandemic disease, interstate environmental problems, etc.—just to invalidate two indefensible statutes seems to do more harm than good to the ideals of federalism *Lopez* and *Morrison* were ostensibly meant to protect.

B. Judicial Capacity as Independent Normative Metric

In addition to taking first-best functional ideals off the table, the limits of judicial capacity provide an important additional metric against which to assess the decisions of the Court in high-volume, high-stakes, and hybrid legal domains. All else equal, constitutional decisions that create capacity problems are inferior to those that avoid them.[75] Here again, the *Lopez* and *Morrison* decisions are a helpful example. We can distinguish between three different objections to the majority's decisions in those cases. One is a first-best functional argument that the statutes they invalidated should have been upheld. Another is the second-best argument discussed above—that rational basis review is functionally superior to the majority's categorical distinction between economic and noneconomic activity, even if it requires the Court to uphold some functionally indefensible statutes like the ones invalidated in *Lopez* and *Morrison*. A third objection is that the majority's apparently categorical rule—even if functionally superior to rational basis review—is insufficiently hard-edged and will in fact break down under the pressure of

74. To be clear, I do not endorse this position. I state it here merely for the sake of argument.

75. Again, I do not mean to endorse the normative commitments that underlie the limits of judicial capacity. But to the extent that judges are already committed to such norms, they will need to assess which of the options available to them are consistent with that commitment. Mostly they will be interested in this question for the obvious reason that they care about the norms at issue. But they will also care about it—and should—because a decision that exceeds the limits of judicial capacity is likely to be costly and short-lived and therefore, in the larger scheme of things, futile.

litigation. When it does, the result will be to invite an avalanche of litigation that the judiciary is unprepared to handle, at which point the Court will have to retreat anyway. If that is the case, why bother trying?

The same sort of argument played a prominent role in the recently concluded challenges to the Affordable Care Act, though it was not widely recognized as a claim about judicial capacity. This was the argument that the activity/inactivity distinction pressed by the Act's challengers is too difficult for courts to apply consistently in practice.[76] For purposes of argument, one could accept the challengers' position that the Act is functionally undesirable; and even if one does not accept that position, one could accept that the activity/inactivity distinction is preferable to the toothless rational basis test of *Raich*. Even so, if the activity/inactivity distinction is insufficiently sturdy to provide guidance to lower courts and potential litigants under the pressure of litigation, that is a powerful reason to reject it. This is not just because courts might make mistakes in applying the test. It is also because, by employing such an unsteady test, they risk inviting an avalanche of litigation that would force them to retreat in short order, in which case the game will not have been worth the candle. In the Affordable Care Act litigation, there was an additional wrinkle, which may also apply in some other high profile cases. Had the Court invoked the activity/inactivity distinction to strike down the Act only to retreat from that distinction shortly thereafter, this may have given its decision the kind of nakedly political appearance that judges are generally keen to avoid.[77]

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76. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2622 (2012) ("It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate 'activity' from those that regulate 'inactivity.'"); Seven-Sky v. Holder, 661 F.3d 1, 17 (D.C. Cir. 2011) ("[W]ere 'activities' of some sort to be required before the Commerce Clause could be invoked, it would be rather difficult to define such 'activity.'"); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 561 (6th Cir. 2011) ("An enforceable line is even more difficult to discern when it comes to health insurance and the point of buying it: financial risk. . . . [T]he notion that self-insuring amounts to inaction and buying insurance amounts to action is not self-evident."); *see also* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1836 (2011) (noting the similarity of the activity/inactivity distinction to other categorical distinctions that have broken down under the pressure of litigation); Corey Rayburn Yung, *The Incredible Ordinariness of Federal Penalties for Inactivity*, 2012 WIS. L. REV. 841, 870 (arguing that "scores of" federal regulations might plausibly be described as regulating inactivity). I take no position on the merits of this argument here. I merely flag its connection to judicial capacity.

77. *Cf.* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 174 (dubbing this aversion to the appearance of political decisionmaking "the Frankfurter constraint"). Of course, this consideration only comes into play if the Justices otherwise inclined to embrace a rule are convinced it will prove unsustainable in the long run. That was clearly not true of the five Justices who embraced the activity/inactivity distinction in

C. Judicial Capacity and Judicial Competence

The next normative implication I wish to discuss is a broader one, applicable not so much to particular cases but to our evaluation of the competence of the judiciary across the board. In a nutshell, my argument is that judicial capacity puts judicial competence in a new and more helpful light. It is commonly assumed that the Court feels compelled to defer to the political branches in the great bulk of constitutional cases because judges are comparatively incompetent to make the kinds of decisions required. Although I cannot fully make the case here, I believe this argument to be grossly overstated, at least if we confine ourselves—as most versions of the argument do—to the competence of the individual officials who staff the relevant institutions, the factfinding tools at their disposal, and the political incentives shaping their decisions. Considering only these factors, it is possible to make a strong case for the superiority of judges over other plausible alternative decisionmakers in many constitutional domains.[78] Certainly, the argument is nowhere near as lopsided as is frequently and casually assumed.

My point is not that the conventional wisdom is wrong. It is that it has the causality at least partially backward. It is not (or not only) the judiciary's incompetence that drives the Court to defer most constitutional decisions to other institutional actors. Rather, the judiciary's capacity-based need to defer most decisions to other actors is a crucial source of its incompetence, forcing the Supreme Court to rely on functionally crude categorical rules chosen to deter litigation rather than for their substantive merits. At the very least, this is an important parallel factor to consider in evaluating the comparative competence of the judiciary and other institutions. If we know that the courts, at least in high-volume and high-stakes domains, will predictably be impelled to employ relatively crude categorical rules, this is at least as important to the

NFIB. *See NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.) ("[T]he distinction between doing something and doing nothing would not have been lost on the Framers . . . ."); *id*. at 2649 (joint dissent) ("Ultimately, [Justice Ginsberg's] dissent is driven to saying that there is really no difference between action and inaction, a proposition that has never recommended itself to law or common sense."). Again, I take no position on the plausibility of this view. The important point is that no Justice who sincerely held it would have worried about the costs of an inevitable, capacity-driven retreat.

78. *See, e.g.*, Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 83-87 (1989) (canvassing strengths of the judiciary and weaknesses of the political process); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1172-77 (2007) (reviewing MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005)) (same).

proper role of the judiciary as the competence of individual judges, or even the quantity and quality of information available to them.

This is not to say that capacity will always provide a satisfying reason for courts to defer to other actors. Sometimes the options consistent with the limits of judicial capacity will be reasonably good. Even when they are not, the pathologies of the alternative decisionmaking institutions may be even more severe. Either way, capacity is a crucial and largely overlooked determinant of judicial competence.

D. Judicial Capacity and Judicial Independence

The final normative implication I wish to discuss is the relationship between judicial capacity and judicial independence. Like the relationship between capacity and competence, this relationship offers an important alternative justification for a conventional view that might otherwise be in serious trouble. In the past two decades, a substantial literature has grown up downplaying the extent of judicial independence—both in terms of the judiciary's inclination to act contrary to political consensus and in terms of its ability to overcome political resistance.[79] The work in this vein is rich and varied, but its central thrust is that "the Court [is] so tightly cabined in by 'majoritarian forces' as to be little more than a reflection of preexisting majoritarian preferences."[80] Not surprisingly, proponents of this positive claim have been broadly dismissive of traditional normative concerns about judicial countermajoritarianism.[81] On both the positive and normative fronts, they have largely carried the day. Their view has become the new orthodoxy.[82]

Like the conventional view of judicial competence, I believe this orthodoxy to be substantially overstated. For reasons persuasively developed by Richard Pildes, the political constraints that are supposed to keep the Supreme Court reliably in line with majoritarian preferences—chiefly, the power of Congress to discipline the courts, the political nature of judicial appointments, and the

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79. *See, e.g.*, FRIEDMAN, *supra* note 3; ROSENBERG, *supra* note 4; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

80. Pildes, *supra* note 3, at 116.

81. *See* FRIEDMAN, *supra* note 3, at 9-16 (downplaying the countermajoritarian difficulty in light of the Supreme Court's general responsiveness to public opinion).

82. *See* MARK TUSHNET, WHY THE CONSTITUTION MATTERS 16-17 (2010) (describing his views, which are roughly consonant with those of the Supreme Court majoritarians, as "the conventional wisdom among scholars . . . who study the Constitution").

dependence of courts on political actors to enforce their decisions—are significantly weaker than they have been made out to be.[83] Nor is there any certainty that these constraints will operate as effectually in the future as they have in the past. Indeed, Pildes offers good reasons to believe the opposite is the case. If he is right, the countermajoritarian difficulty may still have real bite.[84]

I obviously cannot do full justice to this contest here. But again, my point is not that the conventional view is wrong—at least not as wrong as Pildes's important account suggests. Rather, that view has ignored what may be the most important limit on the Supreme Court's power to challenge dominant political forces: judicial capacity. Even in the absence of *any* effective political constraints, the limits of judicial capacity would severely constrain the Court's ability to challenge majoritarian views. The reason is straightforward. Any decision that constrains governmental power increases the expected benefits of constitutional litigation. And any decision that does so in the teeth of strongly held majority views is overwhelmingly likely to involve a high-stakes, if not a high-volume, domain.

In some contexts, the Court may be able to manage this capacity problem by employing hard-edged categorical rules to reduce disuniformity in the lower courts and encourage settlement. But as the recent Commerce Clause cases suggest, the clarity and determinacy of such rules often breaks down under the pressure of litigation, which is likely to remain strong in any context where the Court's decisions challenge the views of political majorities. We should therefore generally expect the Court to refrain (or quickly retreat) from serious intervention in areas that the public really cares about—not because it fears political backlash or because the Justices' views systematically track the public's, but because the Court lacks the capacity to take such issues on in large numbers.

Of course, this is not to say that a capacity-constrained Court will never make countermajoritarian decisions. It obviously will. Nor do I mean to join Friedman in dismissing the countermajoritarian difficulty as passé. That large question is beyond the scope of this Essay. My point is simply that the limits of judicial capacity are essential to understanding the actual extent of judicial independence and whatever normative conclusions may follow from it. Any account that focuses exclusively on political constraints, ignoring capacity limits, is likely to overstate the power of courts to challenge political majorities, perhaps dramatically so.

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83. Pildes, *supra* note 3, at 126-42.

84. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (providing the classic statement).

V. CAVEATS

The argument above is offered in the hope of catalyzing a much-needed conversation on judicial capacity and the substance of constitutional law. As such, I have deliberately articulated it in broad strokes. Undoubtedly, many of my claims require further elaboration and refinement. For now, I would like to emphasize a few especially important qualifications that extend to the argument as a whole.

First, I do not by any stretch mean to suggest that capacity is the only factor that drives Supreme Court decisionmaking, even in high-volume and high-stakes legal domains. My argument is merely that that the limits of judicial capacity substantially constrain the options available to the Court to pursue its capacity-independent agenda. In *Lopez*, for example, it was clearly the majority's ideological commitment to limited federal power that led it to invalidate the Gun-Free School Zones Act. But it was the limits of judicial capacity that constrained the Court to embrace a categorical distinction between economic and noneconomic activity, rather than a more functionally defensible standard. This picture of judicial decisionmaking as a mixture of ideological and jurisprudential considerations is a staple of the new institutionalist literature in political science.[85] It is also consistent with recent empirical work blending new institutionalism with attitudinalist and strategic-actor traditions.[86]

Second, I do not mean to claim that the Court will always recognize perfectly what kind of decisions would invite an overwhelming volume of litigation. I believe that judges generally have a strong intuitive understanding of what kinds of decisions invite large volumes of litigation. But judges obviously can and do make mistakes. When they do, however, the system responds. And across the run of cases, this response places a hydraulic pressure on the Court toward more stringent standards of liability and hard-edged rules. More specifically, the volume of litigation increases, which pushes the Court, when it veers off course or begins to veer off course, to back off its original mistaken predictions.

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85. *See, e.g.*, SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999) (collecting new institutionalist perspectives on Supreme Court decisionmaking).

86. *See, e.g.*, Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062 (2009) (attempting to identify and disentangle the legal and political influences on Supreme Court agenda setting).

A slightly different but related question is how well and how clearly we can expect judges to understand the limits of judicial capacity (as opposed to the volume of litigation their decisions are likely to generate). Here too I do not mean to claim anything like judicial omniscience. At any given point in time, judges may have only a vague sense of what the limits of judicial capacity are. But to return to the family budget analogy, they know they cannot buy a Ferrari or a $5 million house. And in the relatively rare event that they seriously overestimate judicial capacity or underestimate the capacity effects of their decisions, the iterative nature of the litigation process gives them an opportunity to return any purchases that look profligate in retrospect.[87] The Commerce Clause and Section 5 cases discussed above are good examples.[88]

Third, although I have focused exclusively on the Supreme Court's constitutional decisions, the limits of judicial capacity operate generally. In particular, the two types of domains I have identified in which capacity is likely to exert an especially strong influence—high-stakes and high-volume—are not in principle confined to constitutional cases. As an empirical matter, however, I believe they almost always will be. This is not to say that only constitutional decisions can place significant strain on judicial capacity. There are all kinds of nonconstitutional demands that severely tax the judiciary. The federal drug laws are an obvious example.[89] The civil cause of action created by the Violence

87. The feedback effects of decisions that underestimate judicial capacity or overestimate the capacity effects of particular rules are likely to generate less pressure for correction. The principal consequence of such decisions will be greater judicial leisure, which studies of judicial behavior conventionally assume at least some judges are inclined to maximize. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). But if this is the case, judicial capacity should have even greater predictive value.

88. *See supra* Section II.B and Part III. A similar retreat and retrenchment seems likely following the remarkably muddy spending-power holding of *NFIB*. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2603-06 (2012) (holding the Affordable Care Act's Medicaid expansion unconstitutionally coercive based on some combination of (1) the size of the federal grants at issue, (2) the independence of the Medicaid expansion from the preexisting Medicaid program, and (3) the unforeseeability—from the states' perspective—of such a dramatic change to the Medicaid program). Without some retrenchment, that holding threatens to unleash a tidal wave of challenges to federal spending legislation. *See* Andrew Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2012 WIS. L. REV. (forthcoming Dec. 2012) (predicting on this basis that *NFIB*'s spending-power holding will be short-lived).

89. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1154 (1995) ("In addition to consuming a tremendous outlay of resources, the drug war has had an insidious effect on the federal justice system. The influx

Against Women Act and invalidated in *Morrison* may have been another one, had it survived.[90]

Nevertheless, my considered intuition is that nonconstitutional demands on judicial capacity will usually fall into the first category discussed in Part II—what I have called "normal domains." They are trips to the Caribbean, not Ferraris or $5 million houses. Capacity may be one thing we can expect the Court to consider in these domains. But the limits of judicial capacity are not going to constrain the Court to anything like the degree they do in high-volume, high-stakes constitutional domains. The major reason for this is that the Court is much more willing to tolerate disuniformity in statutory domains than it is in constitutional domains.[91] Of course, this observation is a general one. There may well be exceptions. And if there are, nearly everything I have said about the way judicial capacity affects the Court's decisions in high-volume and high-stakes constitutional domains would apply to statutory domains that meet these descriptions.

Fourth, I do not mean to suggest that the judicial norms that underlie judicial capacity are in any sense monolithic or perfectly static over time. Both the content of these norms and the degree of intensity with which they are held obviously fall along a spectrum. These norms have also obviously evolved in important respects over time, sometimes in response to changing demands on judicial capacity.[92] If the Court wants to take on more litigation in one area (or is compelled to by circumstance or legislation), it has to make some change to compensate. It can accomplish this through substantive decisions that make litigation in other areas more difficult. Or it can do so through procedural and case-management decisions that reflect a change in the assessment of what basic professional norms require. Such changes have been quite pronounced at the court of appeals level, where the rate of summary disposition increased and

of thousands of new drug prosecutions attributable to this remarkable enforcement effort threatens to overwhelm the federal courts.").

90. For a discussion of Chief Justice Rehnquist's dire (but probably exaggerated) predictions to this effect, see FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 362-63 (2009).

91. *See* STERN ET AL., *supra* note 15, at 247-48 (noting the hurdles to obtaining Supreme Court review in statutory cases); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 809-10 (1990) (noting the rarity of Supreme Court review in statutory cases as compared to the number of such cases resolved in the courts of appeals).

92. *See* Friedman, *supra* note 27, at 808 ("Abandonment of the judicial system, or at least of traditional judicial procedures, has indeed been historically one major social response to the pressures of increasing business."); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011) (empirically demonstrating an example of this process in action).

the time allowed for oral argument decreased dramatically during the appellate caseload explosion of the 1960s and 1970s.[93]

Despite this, I believe that the judicial capacity model has a great deal of explanatory power in the domains I focus on. The reason is that they all involve Ferraris and $5 million houses. Norms might change to raise the family budget from $100,000 to $150,000 or even $200,000. (We might think of relaxing professional norms as the judicial equivalent of currying favor with a wealthy but unsavory relative.) But at least in the near future, norms seem unlikely to change enough for the Court to afford a Ferrari or a $5 million house—that is, to engage in searching review, in the form of vague standards, in high-volume or high-stakes domains—even if it is willing to scrimp in other areas.

The extent to which the judicial capacity model applies looking backward is a more difficult question. The role of the Supreme Court and the nature of the federal judiciary have changed dramatically over the course of American history, as have the role and scope of the federal government as a whole. In light of these changes, it is certainly possible that the limits of judicial capacity operated differently in earlier periods of American history than they do today. But the existence of high-volume and high-stakes legal domains is hardly a new development. Nor are the Court's commitments to minimum professional standards and preserving the uniformity of federal law. The judicial capacity model should have real explanatory power for any period in which these conditions obtain, as they have at least since the New Deal and probably since the rise of the federal administrative state at the turn of the twentieth century.[94]

Finally, the goal of this Essay has been to initiate a much-needed discussion of judicial capacity, not to exhaust the subject. To that end, I have offered a theoretical account of the relationship between judicial capacity and the substance of constitutional law, along with a pattern of decisions consistent with that account. It is important to emphasize that this pattern of decisions is merely suggestive. Certainly, there are other forces besides capacity constraints

93. *See* POSNER, *supra* note 7, at 160-62; Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 688 (2000).

94. Of course, even in this period, judicial capacity has hardly remained static. The number of federal trial and appellate judges grew sevenfold from 1901 to 2001. *See* Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1104 (2006). Federal magistrate judgeships were created in 1968, expanding the capacity of federal trial courts. *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, 1108-14 (1968) (codified as amended at 28 U.S.C. §§ 631-39). And the last significant vestiges of the Supreme Court's mandatory appellate jurisdiction were eliminated in 1988. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.). None of these changes, however, fundamentally altered the bottleneck effect that drives the judicial capacity model.

that might produce a similar pattern, alone or in combination. Strong ideological views on the rule of law, democratic legitimacy, and comparative institutional competence are three possibilities. Fear of political reprisal or recalcitrance is another. A full attempt at disentangling these factors from the influence of judicial capacity must await future work.

For now, I limit myself to three reasons to think such work worth undertaking. First, while judicial capacity may not be necessary to explain the Court's embrace of categorical rules and deference to the political process, it is fully sufficient to do so. As such, this pattern of decisions seems likely to persist—at least in high-stakes and high-volume domains—even as judicial views on the rule of law, democratic legitimacy, and the comparative competence of courts ebb and flow. Second, while the Court's broad deference to the political process might be explained by judicial humility, such an explanation is closely bound up with judicial capacity. That is because, as explained above, capacity constraints are a principal factor preventing courts from dealing competently with many important constitutional questions. Put differently, an ideological preference for deferential outcomes seems likely to be, at least in part, endogenous to the limits of judicial capacity. The same goes for fears of political recalcitrance, which are often invoked to explain judicial deference. One reason such fears have bite is that sustained recalcitrance would bury the courts under an avalanche of litigation.

Finally, although I cannot fully develop the argument here, the Court seems noticeably more willing to subject government action to serious review, in the form of vague standards, in low-volume, low-stakes domains. The balancing tests employed in many First Amendment contexts are an example.[95] The reasonableness test applied to brief investigative detentions—so-called "*Terry* stops"—under the Fourth Amendment is another.[96] Neither the rule of law, nor democratic legitimacy, nor comparative institutional competence can readily explain this difference. Judicial capacity can. Because these doctrines affect only the relatively narrow subsets of government action directed at speech and investigative detention, and because most such action is state and local, the Court has more flexibility to employ standards, occasionally with real bite, in these domains. This explanation applies with special force to investigative detention doctrine, where most rulings rest on highly particular

95. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

96. Terry v. Ohio, 392 U.S. 1 (1968) (upholding such stops when based on reasonable suspicion).

circumstances of individual cases and therefore create little pressure for Supreme Court review.

CONCLUSION

Judicial capacity has been too long misunderstood and too long neglected. It is a central institutional characteristic of the judiciary, which has significant predictive power in important constitutional domains and also significant normative implications. It deserves consideration from constitutional theorists on par with that accorded to judicial competence and judicial independence. Indeed, it is crucial to a full understanding of both of these much-discussed institutional features of the judiciary.

This Essay has developed a theory of judicial capacity and its relationship to the substance of constitutional law. But much remains to be done. High-stakes, high-volume, and hybrid domains can and should be defined with greater precision, as can the judicial norms that give these domains their significance. More examples of such domains can be identified and the theory's predictions more rigorously tested with respect to those examples. In the process, more work will be necessary to disentangle judicial capacity from plausible alternative explanations with the potential to produce observationally equivalent results. Such disentangling has both a theoretical and an empirical dimension. Finally, while this Essay has focused on the capacity constraints of the Supreme Court, the capacity constraints of lower courts are also of great interest, both for their potential effects on Supreme Court decisionmaking and for their effects on the decisions of lower courts themselves. The magnitude and difficulty of these questions is daunting but also exciting. It has been a long time since constitutional theory confronted such an expanse of fresh, fertile, and largely unexplored terrain.