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Rationing the Constitution vs. Negotiating it: Coan, Mud, and Crystals in the Context of Dual Sovereignty

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**RATIONING THE CONSTITUTION VS. NEGOTIATING
IT: COAN, MUD, AND CRYSTALS IN THE CONTEXT OF
DUAL SOVEREIGNTY***

ERIN RYAN**

Introduction.....	165
I. Coan’s Model of Capacity-Constrained Interpretation	168
A. Overview.....	168
B. Strengths	173
II. Judicial Competence and Balanced Federalism.....	176
A. Skepticism over Bright-Line Federalism Rules.....	176
B. Limited Judicial Competence and Negotiated Federalism .	182
III. When In the Glass House.....	185
A. Avoid Stone-Throwing.....	185
B. Covert Cooperation Among Competing Models	189
Conclusion: An Invitation to Normative Analysis.....	191

INTRODUCTION

In *Rationing the Constitution: How Judicial Capacity Shapes Supreme Decision-Making*,¹ Professor Andrew Coan makes the provocative argument that judicial capacity is the most determinative factor in the Supreme Court’s constitutional interpretation, especially regarding such critical realms as equal protection, takings, and the horizontal and vertical separation of powers. He contends that the Supreme Court’s legitimate anxiety over managing workflow to the federal bench operates more powerfully to shape its responses to the questions raised in these areas of law than any alternative theories of constitutional interpretation, including the doctrinal models popular most among legal academics and the strategic models more popular among political scientists.² This essay assesses the major strengths and weaknesses of Coan’s argument, contrasting its convincing explanatory power with some

* This essay is based on a presentation at the WISCONSIN LAW REVIEW’s 2019 symposium on Andy Coan’s provocative new book, *RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME DECISION-MAKING* (2019).

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

2. *Id.* at 40–47.

of the limits of its own breadth of field. It also explores the intersection of his theory with a different capacity-driven theory of constitutional interpretation that I first offered in *Negotiating Federalism*³ and later in *FEDERALISM AND THE TUG OF WAR WITHIN*.⁴

Andy's essential argument is that structural limitations on how much attention federal judges can give to any individual case assert powerful but underappreciated constraints on the kinds of decision rules those judges render in interpreting constitutional dilemmas.⁵ Too often, he argues, the Supreme Court reacts to this pressure by creating decision rules more responsive to the limits of judicial capacity than to the substantive legal values at stake in a given constitutional dispute.⁶ For Coan, judicial capacity is thus the most reliably dispositive factor in much of the Supreme Court's subject matter jurisprudence—explaining why the Court so often turns to bright-line categorical rules that limit judicial discretion in complex constitutional arenas where litigation might otherwise overwhelm the federal bench.⁷ More troubling, he contends that the Court gravitates toward categorical rules to cope with capacity pressures even when the complex nature of constitutional disputes makes categorical rules sub-optimal on the merits, especially in the realms of constitutional federalism and separation of powers, equal protection, and takings.⁸

Some readers will be more persuaded than others on different parts of the argument, but we all owe a debt of gratitude to Andy for challenging us with this provocative invitation to reconsider some of the canonical theories of constitutional interpretation that it threatens to disrupt. I was especially interested in the way that his theory of judicial capacity intersects with my own theory of negotiated governance within Balanced Federalism, which recognizes the interpretive value of certain bilaterally negotiated outcomes by political branches in federalism contexts where judicial capacity is low.⁹ Although we do not cover the exact same theoretical territory, Andy and I share the deep concern that the Court's federalism jurisprudence sometimes misuses categorical rules in contexts where they are necessarily under- or over-inclusive, failing to account for critical nuances in complex cases, controversies, and policy dilemmas.¹⁰

3. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) [hereinafter Ryan, *Negotiating Federalism*].

4. ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011) [hereinafter RYAN, F&TWW].

5. See COAN, *supra* note 1, at 2–9.

6. *Id.*

7. *Id.*

8. *Id.*

9. See generally RYAN, F&TWW, *supra* note 4.

10. For that reason, the subtitle of my presentation, *Coan, Mud, and Crystals in the Context of Dual Sovereignty*, is a direct homage to Carol Rose, who famously helped us think so effectively about the implications of deploying crystalline rules and muddier

Andy may not have anticipated that his argument would support mine, but his critique of how capacity constraints cause the Court to reach sub-optimal solutions in the federalism context provides critical theoretical support for my claim that federalism interpretation should be shared among all three branches according to the distinctive capacity that each brings to the interpretive enterprise.¹¹

The remarks that follow will assess some of the strengths and weaknesses of Coan's provocative argument and explore the support that the capacity theory provides for the role of interpretive intergovernmental bargaining in contexts of jurisdictional overlap. I'll begin with an overview of Coan's book, paying homage to some of his most important contributions. There are many, of course, but in Part I, I'll review three in particular. First, there is the undeniable explanatory power of his model in accounting for the plethora of bright-line rules and categorical deference that we find among the Court's jurisprudence in the areas he highlights. In light of this model, Coan provides valuable advice to litigants about how to advocate around the capacity constraints of judicial decision-making. Perhaps even more important are the admonitions he offers the rest of us about how the limits of judicial capacity should temper our expectations about the role of the courts in a legal system within which courts are only one component.

In Part II, I'll consider the intersection between RATIONING THE CONSTITUTION, especially its analysis of the Court's federalism jurisprudence, and my own theory of negotiated governance within Balanced Federalism. As noted, we share a strong skepticism about the Court's use of "bright-line" categorical rules in its federalism jurisprudence, and the implications for judicial competence in these arenas. I'll make the case that Coan's analysis of the limits of judicial capacity buttresses my own claims in favor of intergovernmental bargaining in the interjurisdictional gray area as an alternative means of interpreting federalism where judicial capacity is low.

standards to resolve problems like these. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

11. RYAN, F&TWW, *supra* note 4, at 181–214, 265–70, 339–70 (discussing what the Balanced Federalism model involves). As I describe in subsequent work, "Balanced Federalism emphasizes dynamic interaction among the various levels of government and shared interpretive responsibility among the three branches of government, with the overall goal of achieving a balance among the competing federalism values that is both dynamic and adaptive over time. The full elaboration in [F&TWW] helps provide the missing theoretical justification for the tools of cooperative federalism that predominate in modern American governance, as well as support for future moves by environmental governance toward even greater dynamic engagement. It emphasizes the skillful deployment of legislative, executive, and judicial capacity at each level of federalism-sensitive governance, allocating authority based on the specific forms of decision-making in which they excel." Erin Ryan, *Secession and Federalism in the United States*, 96 OR. L. REV. 123, 161 (2017) [hereinafter *Secession and Federalism*].

Finally, in Part III, and notwithstanding the admiration that I have for the work overall, I'll nod to some of the limits that I see in Coan's theory. I'll suggest that in his robust critique of categorical rules, Coan nevertheless applies one himself, in a way that conflates important differences between the bright-line categorical deference that the Court applies in some contexts and the deferential but discretionary review that it applies in others. Coan also presents the capacity model as distinct from the predominant models of judicial interpretation that preceded it—the attitudinal, legalist, and strategic models—but I'll suggest that the capacity model is really symbiotic with them, and in some regards, already accounted for within them.

I'll close by pressing Andy to think more seriously about a systemic remedy for the problems he so aptly identifies here—in which limited judicial capacity leads to suboptimal judicial decision-making. After all, one potential solution to the problem Coan identifies is to vastly expand the courts by seating more judges, which would alleviate capacity constraints by directly increasing capacity. Yet another potential conclusion one might draw from his work is that we should reduce the size and importance of the judiciary, yielding greater power to the political branches, because courts are inherently unable to manage the responsibilities, we heap upon them in the framework of adversarial process. It's unclear which of these alternatives would be preferable to Andy, but given the strength of the rest of his presentation, I think we'd all like to hear his normative recommendations.

I. COAN'S MODEL OF CAPACITY-CONSTRAINED INTERPRETATION

This part briefly outlines the thrust and then the strengths of Coan's argument. The book warrants praise, especially for its powerful explanation of the Court's penchant for categorical rules in legal realms that would strain judicial capacity, for the guidance it offers litigants operating within the capacity-constrained system, and for the clear-eyed assessment it provides of how judicial capacity also limits judicial competence—even in circumstances where we traditionally have high expectations for the courts.

A. Overview

In a very small nutshell, Coan's argument is that the federal judiciary lacks the capacity—in terms of the sum total of hearts, minds, and human hours available each day—that would be necessary to resolve all the cases that come before it in the most optimal way.¹² As he explains, there are

12. COAN, *supra* note 1, at 13–18.

comparatively few federal judges available to hear cases in a large nation, and far fewer Supreme Court justices.¹³ Accordingly, there is only so much these individuals can do, even with all the institutional support provided by the federal court system. This inherent capacity limitation puts strong pressure on the Supreme Court to craft rules of adjudication that will limit the flow of cases to the federal bench beyond what it can effectively handle within minimal professional standards.¹⁴

As a result, Coan argues that in legal domains where the Court is worried about being overwhelmed, it has no choice but to either “defer to the political process, employ hard-edged categorical rules, or both.”¹⁵ The Court will prefer decision rules that limit how closely judges must engage with the facts of each case, and how often they are asked to assess them, because otherwise, the system of justice would simply grind to a halt.¹⁶ Alternative approaches that invite broader judicial discretion and closer scrutiny of individual circumstances would simply invite more time-consuming litigation than the judiciary could realistically handle—at least without sacrificing certain bedrock principles of judicial administration that we are collectively unwilling to sacrifice, such as minimum professional standards, due process, and legal-quality workmanship.¹⁷ Equally important, the Court will create categorical rules to limit disuniformity across the federal circuits to a tolerable level, reflecting concerns that too much disuniformity among the lower courts could call into question both the rule of law and the effectiveness of the judiciary within it.¹⁸

Coan summarizes his fundamental claim by analogizing to a family budget: the Supreme Court can’t spend more capacity than it has, so it must effectively “ration” constitutional adjudication by creating rules that limit the time and effort federal judges will have to spend engaging with the kinds of cases that most dangerously threaten these harms.¹⁹ He concedes exceptions in some areas of law, where the Court has created vague standards or bucked majoritarian impulses that invite more litigation than the capacity model would predict.²⁰ But even if it is not

13. *Id.*

14. *Id.* at 19–31.

15. *Id.* at 32.

16. *Id.* at 32–37.

17. *Id.*

18. *Id.*

19. *Id.* at 20–21.

20. *See, e.g., id.* at 202–03 (noting the Court’s willingness to invalidate major federal statutes in contrast to the predictions of the judicial capacity model, such as the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012), the Gun-Free Schools Act in *United States v. Lopez*, 514 U.S. 549 (1995), and the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000)); *id.* at 77 (describing how such Spending Clause cases as *United States v. Butler*, 297 U.S.

perfect, Coan argues that it still outperforms any of its chief competitors at explaining judicial behavior. And on this point, it must be conceded that the capacity model has real explanatory power.

He then distinguishes these primary alternative models, which he identifies as the Attitudinal, Legalist, and Strategic Models.²¹ Coan finds the capacity model superior to the pragmatic Attitudinal Model, a favorite of political scientists, which assumes that judges will decide cases based on personal political ideologies just as legislators do in enacting policy.²² He also considers the more heroic Legalist Model, which explains judicial decisions in terms of constitutional text, history, precedent, and judges' principled commitments to, for example, the rule of law, judicial restraint, or other legal process ideals.²³ Coan points out that law professors and judges are almost romantically attached to this model and therefore proceed from its assumptions most often—but he concludes that it, too, falls short of the predictive power of the capacity model.²⁴ Finally, he considers the Strategic Model, which merges elements of Game Theory and Positive Political Theory into the Attitudinal model for the long game.²⁵ This model acknowledges that justices' strategic anticipation of how other institutional actors are likely to react to their moves can constrain individual political bias in the short term to preserve credibility for accomplishing preferred outcomes further down the line.²⁶ While Coan concedes different values in each approach, he maintains that none comes close to the accuracy with which the capacity model can predict outcomes.²⁷

Moreover, Coan predicts that based on the constraints of judicial capacity, the Court will be especially predisposed toward categorical rules or broad judicial deference in three specific varieties of legal disputes. The first, which he coins “high volume legal domains,” are subject matter areas in which there is likely to be lots of litigation, such that the sheer number of potential legal claims could exceed capacity for meaningful judicial oversight.²⁸ If the Court were to craft a fact-responsive, discretionary

1 (1936), and *NFIB* run counter to the judicial capacity model); *id.* at 115 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as an example from the Court's Equal Protection jurisprudence and *Horne v. Dept. of Agriculture*, 569 U.S. 513 (2013), as an example from the Court's Takings jurisprudence that depart from the predictions of the capacity model). See also *id.* at 37 (noting that the Court's decisions during the New Deal era did not conform to the capacity model).

21. *Id.* at 40–47.

22. *Id.* at 42–44.

23. *Id.* at 41–42.

24. *Id.*

25. *Id.* at 44–46.

26. *Id.*

27. *Id.* at 40–47.

28. *Id.* at 25–28.

standard, the time and energy it would take to handle the resulting litigation would overwhelm the courts beyond their ability to manage.²⁹ For an example of this kind of legal issue, Coan cites takings claims by plaintiffs alleging the government has burdened their property rights.³⁰

The second variety that will be especially constrained by judicial capacity are “high stakes legal domains,” which are legal matters on which the Supreme Court cannot tolerate disuniformity among the circuits for prudential reasons and must therefore resolve the issue.³¹ For example, the Supreme Court feels pressure to resolve circuit splits created whenever a court in one region of the country invalidates a congressional statute while others reach a different result.³² As a result, the Court is unlikely to open the flood-gates for discretionary decision-making in these arenas, providing categorical guidance to avoid more disuniform decision-making in high-stakes legal arenas than it can effectively resolve.³³ And of course, the third and most capacity-constrained legal arenas are the “hybrid” domains that involve both high-volume and high-stakes legal issues, maximizing pressure on the Court to create categorical rules.³⁴

Coan then spends time exploring how the Supreme Court has managed several of these hybrid domains—areas of law that, if not managed wisely, could portend dangerously high volumes of high stakes litigation—by creating categorical rules.³⁵ He begins with federalism, a classic example of a hybrid “high-volume/high-stakes” domain, in which capacity constraints have operated to produce, he argues, suboptimal categorical rules in the Court’s consideration of Commerce and Spending Clause claims.³⁶

If the Commerce Clause became the subject of judicial discretion through a more contextually contingent judicial standard, that could make an enormous number of claims more available for judicial review, and these decisions would also be of the high-stakes variety, as the court would not tolerate different responses from different parts of the country on the same federal statutes.³⁷ Lots of federal legislation is grounded in the Commerce Clause, and virtually every statute invalidated by a lower court will require Supreme Court review.³⁸ Coan explains that the Court’s solution to this potential problem has been to categorically defer to

29. *Id.*

30. *Id.*

31. *Id.* at 28–29.

32. *Id.*

33. *Id.*

34. *Id.* at 30.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

Congress—requiring the lower courts to sustain congressional statutes against challenges with just a few narrow limits at the margins, thereby avoiding the onslaught of high-stakes adjudication otherwise required.³⁹ Coan makes the same claim about the Spending Clause, for the same reasons.⁴⁰ Lots of federal legislation is rooted in the Spending Power, so there would be many claims, and all would involve the potential for invalidating federal statutes, requiring Supreme Court review. If the Court were to reject categorical deference for more judicial discretion in interpreting Spending Clause cases, the federal bench would strain to guarantee uniformity across the polity.⁴¹

Coan argues that in opting for categorical deference, the Court has eschewed the use of looser standards that would enable the kind of judicial analysis that could yield more nuanced interpretive results that better adjudicate among the competing values at stake. To demonstrate a competing model that would better grapple with the complexity of these cases, he points to the dissenting position taken by Justice Cardozo in *Carter v. Carter Coal*⁴² near the beginning of the Court’s modern Commerce Clause jurisprudence.⁴³ In *Carter Coal*, Justice Cardozo cogently argued for a more fact and context specific analysis for assessing Commerce Clause violations.⁴⁴ Yet the Court has never taken that path, notwithstanding the potentially superior results it could yield from a substantive perspective, because, Coan says, doing so would throw open the floodgates to litigation that could easily overwhelm available judicial capacity.⁴⁵

In addition to the Commerce and Spending Clause, Coan analyzes categorical rules that the Court has adopted in its Separation of Powers, Equal Protection, and Takings jurisprudence as hybrid-driven results of which the capacity model is predictive.⁴⁶ He does concede that there are exceptions, such as his recognition that the model is actually less predictive in the Spending Power context than he might expect,⁴⁷ given the Court’s introduction in *National Federation of Independent Businesses*⁴⁸ (*NFIB*) of the new “anti-leveraging” constraint on Congress’s spending power, a standard amply critiqued as vague.⁴⁹ Indeed, the fact

39. *Id.*

40. *Id.* at 76–87.

41. *Id.*

42. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

43. *Id.* at 324–41 (Cardozo, J., dissenting).

44. COAN, *supra* note 1, at 61–62.

45. *Id.*

46. *Id.*

47. COAN, *supra* note 1, at 66.

48. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

49. Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1036 (2014) [hereinafter *Spending Power*].

that the *NFIB* rule threatens to do exactly what capacity theory says the Courts should avoid—opening an avalanche of high-stakes, high-volume litigation—somewhat undercuts the force of Coan’s argument, indicating that, at the very least, there is more operating behind the Court’s decision-making than simple capacity planning (but more about that in Part III). And that, very much in brief, is the case that Coan makes for the capacity model of Supreme Court interpretation.

B. Strengths

While reading Coan’s book, a famous scientific aphorism came to mind: “[A]ll models are wrong, but some are useful.”⁵⁰ And indeed, whether or not one accepts his entire theory as correct, Coan deserves a good deal of credit for some of the very useful insights that he derives from his observations and analysis. To begin with, there is undeniable explanatory power in Coan’s assessment of many of the realms of law he analyzes, where bright-line rules and categorical deference really do permeate the Supreme Court’s jurisprudence. There is plain, inexorable logic in the notion that the Court has chosen these, in part, to avoid the crisis of judicial capacity that might ensue under a more complex set of interpretive decision rules. In this regard, Coan’s argument just makes sense. It’s hard to argue that capacity constraints are not part of the picture. It’s what the legalists have previously referred to as “prudential” concerns, addressing, for example, the importance of administrability.⁵¹

Moreover, Coan’s analysis suggests cogent advice to litigants on how to craft their legal arguments in terms of judicial capacity.⁵² Advocates should look for ways to frame their preferred outcome in terms favorable to judicial economy, and to characterize their opponents’ requested outcome as a threat to judicial capacity.⁵³ By the same token, advocates should consider how courts may be constrained by capacity on the issues they are seeking redress, and then think carefully about what they are asking for.⁵⁴ They should carefully assess whether the rule they are likely to get from a capacity-constrained judiciary will really advance their goals in litigation.⁵⁵ If a categorical limit will be more hurtful than helpful to the concerns that motivated their suit, they should reconsider their line of argument, their litigation strategy, and perhaps even their choice to

50. Quote attributed to the British statistician George E. P. Box. The Royal Statistical Society, *George Box, a Model Statistician*, SIGNIFICANCE (Sept. 2010) <https://rss.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1740-9713.2010.00442.x> (“Essentially all models are wrong, but some are useful.”).

51. See COAN, *supra* note 1, at 41–42, 180–81.

52. *Id.* at 204–05.

53. *Id.*

54. *Id.*

55. *Id.*

litigate.⁵⁶ If a categorical approach will indeed, advance their goals, then they should use the capacity theory wisely in argumentation.⁵⁷

Coan's analysis also offers important advice for jurists, scholars, and policy makers to be equally mindful of the limits of judicial capacity when creating, expanding, or allocating judicial authority.⁵⁸ For example, legislators might think carefully before including purposeful judicial remedies in statutes if categorical rules are unlikely to produce optimal results in adjudication.⁵⁹ Scholars should not blindly assume that courts are best positioned to consider the particulars of cases and controversies if categorical rules prevent this.⁶⁰ And courts themselves, especially the justices of the Supreme Court, should consider more forthrightly how the rules they create are vulnerable to categorical bias in light of capacity constraints.⁶¹

Yet most important of all, perhaps, is Coan's warning about just how seriously the limits of judicial capacity can undermine judicial competence in realms where we ordinarily take it as a matter of faith that judicial competence exceeds that of the political branches.

Coan makes the important point that judicial capacity is an overlooked factor when we assess judicial competence to decide specific issues relative to other institutional actors, because capacity limits their ability to do the kind of focused analysis that would best suit the needs of the situation.⁶² Good governance theory is preoccupied with the question of which branch of government is best suited to deal with which kinds of questions (certainly mine has been).⁶³ In these debates, the proponents of judicial review often assume all sorts of judicial institutional advantages that make them a better forum for decision-making in cases and controversies compared to other institutional actors in the legislative or executive branches.⁶⁴ They may argue that the judiciary is best suited to resolve important legal dilemmas through adversarial litigation, because, for example, judges are highly educated, principled actors who are less likely than legislators or executive branch actors to have a personal stake in the issues they are deciding. We assume that they will stand up for counter majoritarian principles and take the time to resolve each individual

56. *Id.*

57. *Id.*

58. *Id.* at 198–207.

59. *Id.* at 204–07 (advising advocates to temper expectations about what the judiciary can realistically accomplish in light of capacity constraints).

60. *Id.*

61. *Id.*

62. *Id.*

63. RYAN, F&TWW, *supra* note 4, at xii–xvi, 1–6; Ryan, *Secession and Federalism*, *supra* note 11, at 153–62.

64. COAN, *supra* note 1, at 203.

case on the merits, in contrast to the majoritarian impulses of the legislature and the broad-brush approaches of regulations and statutes.

Yet these intuitions, says Coan, fail to account for the reality of the circumstances within which judges do their work.⁶⁵ It may well be true that their sources of competence look excellent on paper; their resumes may make each individual look like an agent of competence whose discretion we would rightly value in problem-solving. But their delivery on that potential is fatally compromised by their inability to allow those sources of competence to fully operate to inform their good judgement, because capacity limitations remove their meaningful discretion.⁶⁶

Coan goes on to describe how the limits of judicial capacity can complicate the constitutional “choice set” of alternatives for crafting legal rules, because when the first-best choice is unworkable due to capacity limitations, the second best choice is often a very distant second, potentially doing more harm than good.⁶⁷ In other words, when we compare judicial capacity with legislative capacity to resolve a particular kind of controversy, we may prefer judicial capacity because of the way it can theoretically consider all the individual inputs from a politically neutral way to craft a fitting resolution to an individual case in context. However, if judicial capacity constraints take that kind of adjudication off the table, and the second best choice is a non-discretionary bright-line rule or categorical deference that cannot consider any of the factual nuances, then we might have chosen legislative or executive capacity instead, to make a more nuanced policy accounting for different facts in different circumstances.⁶⁸

Finally, Coan shatters the most hallowed halo with which we crown the judiciary, which is its designated role as the protector of unpopular principles and other disfavored minorities. Coan argues that capacity problems even limit the Court’s ability to make good on its promise of providing a counter-majoritarian bulwark against popular misdirection and even tyranny, because standing up to truly majoritarian impulses may strain capacity beyond tolerance.⁶⁹ Defying a prevailing social norm will necessarily prompt pushback in the form of ample litigation, to which courts might not be able to devote appropriate attention. If the Supreme Court fears that the federal bench will be overwhelmed by litigation that it cannot effectively manage within the constraints of professional norms, it may pass on that conflict altogether.⁷⁰

65. *Id.*

66. *Id.*

67. *Id.* at 165–68.

68. *Id.*

69. *Id.* at 191.

70. *Id.* at 191–92.

The bottom line, and it's a very important one, is that Coan urges us to not have unrealistic expectations of what the judiciary can do.⁷¹ The limits of judicial capacity are necessarily also limits on judicial competence, even in those realms where we have most romanticized the judicial role. That alone is an exceedingly valuable contribution of the book.

It also leads me to the intersection with my own work, so let me now turn to that subject.

II. JUDICIAL COMPETENCE AND BALANCED FEDERALISM

Coan's critique of judicial competence in *RATIONING THE CONSTITUTION* was especially interesting to me because of the way it dovetails with my own work on negotiated governance, especially within the model of Balanced Federalism that I proposed in *FEDERALISM AND THE TUG OF WAR WITHIN* and the work that preceded it.⁷² His insights about how capacity constraints limit judicial competence help explain why state and federal actors so often negotiate solutions to federalism dilemmas,⁷³ and they support the need for bilaterally negotiated solutions as a constitutional alternative to judicial federalism interpretation where judicial competence/capacity⁷⁴ is low (and where minimum standards of fair bargaining are met).⁷⁵ This Part reviews our shared critique of "bright-line" categorical rules in federalism jurisprudence, and how the limits on judicial competence that Coan identifies promote the phenomenon of federalism bargaining.

A. Skepticism over Bright-Line Federalism Rules

While Coan and I pursue different theoretical objectives in our books, we begin with a shared critique of the misuse of categorical rules in the federalism context, finding that they are often too blunt an instrument to accomplish the task with the delicacy required.⁷⁶ Federalism

71. *Id.*

72. See generally RYAN, F&TWW, *supra* note 4; Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1 (2010) [hereinafter *Federalism at the Cathedral*].

73. See RYAN, F&TWW, *supra* note 4, at 20–21. See generally *id.* at 265–70.

74. A quick note on shared and contrasting vocabulary between these books: *Federalism and the Tug of War Within* uses the word "capacity" to refer to a variety of competencies, including expertise, legal authority, jurisdiction, operationalism, etc. See generally, RYAN, F&TWW, *supra* note 4. *RATIONING THE CONSTITUTION* uses the word more specifically, to refer to the availability of resources to perform a specific task. See generally, Coan *supra* note 1.

75. RYAN, F&TWW, *supra* note 4, at 104–10, 339–40.

76. *Id.* at 141–44 ("Haunted by the ghost of classical dualism, the cases effectively ask us to identify zones of properly local and national authority and protect each

disputes generally require a determination about which competing level of government should have the final say in regulatory conflicts where each has a legitimate claim to authority.⁷⁷ But in the most vexing federalism conflicts, both the state and federal actors have strong claims for authority under different aspects of constitutional text and precedent.⁷⁸ Lacking clearer constitutional guidance about who should get to decide, interpreters wrestle with the task of allocating contested authority in ways that will best protect the underlying values of constitutional federalism.⁷⁹ As I've argued elsewhere, American federalism is essentially a project of managing the tension between incommensurable constitutional values, including:

[T]he maintenance of (1) checks and balances between opposing centers of power that protect individuals; (2) governmental accountability and transparency that enhance democratic participation; (3) local autonomy that enables interjurisdictional innovation and competition; (4) centralized authority to manage collective action problems and vindicate core constitutional promises; and finally (5) the regulatory problem-solving synergy that federalism enables between the unique governance capacities of local and national actors for coping with problems that neither can resolve alone.⁸⁰

from incursion by the other, narrowing the expanse of permissible jurisdictional overlap. Reinforced by those decisions' preference for formal doctrinal rules that eschew consideration of functional consequences, the enterprise is akin to 'bright-line rule' jurisprudence—in which the judiciary articulates 'clearly defined, highly administrable' lines separating permissible from impermissible activity.") (internal citations omitted). See also Ryan, *Federalism at the Cathedral*, *supra* note 72, at 67–68 (discussing the implications of bright-line rule jurisdictional separation for federalism bargaining); RYAN, F&TTW, *supra* note 4, at 256–57.

77. RYAN, F&TTW, *supra* note 4, at 2.

78. Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 WIS. L. REV. FORWARD 17, 25 [hereinafter Ryan, *Negotiating Environmental Federalism*]; Erin Ryan, *Environmental Federalism's Tug of War Within*, in THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS 355 (Kalyani Robbins ed., 2015) [hereinafter Ryan, EFTWW].

79. RYAN, F&TTW, *supra* note 4, at 141. See generally Ryan, *Negotiating Federalism*, *supra* note 3.

80. Ryan, *Secession and Federalism*, *supra* note 11, at 154–55. See also RYAN, F&TTW, *supra* note 4, at xiv, 34–67 (specifically detailing the values of checks, transparency, localism, and synergy and dealing more holistically with the nationalism values necessarily implied by a federal system). In the original book, I discussed the four federalism values most directly voiced in American federalism jurisprudence: checks and balances, transparency and accountability, localism values, and the problem-solving value implied by subsidiarity. Later, I added overt discussion of the values of centralized power that counterbalance the localism values within federalism. See Ryan, EFTWW, *supra* note 78, at 362–64, n.41.

And when adjudicating between multiple incommensurate values, there is often no clear “right answer” to the problem, as there could be countless possible outcomes that appropriately balance competing values in different ways.

Without belaboring points that I’ve made elsewhere, environmental and land use law offer some of the most compelling examples of these dilemmas, because they “allocate power in regulatory contexts where both the state and federal claims to authority are simultaneously at their strongest.”⁸¹ These problems usually match “the need to regulate the harmful use of a specific parcel of land—something we normally think of as a local matter—with the need to regulate the boundary-crossing harms associated with that use,” one of the “original predicates” of national authority.⁸² Land and environmental law are especially prone to federalism dilemmas because locally distinctive geography proves so salient, but similar dilemmas arise in other legal realms that pit states’ traditional police powers to protect the public health and safety against newer federal powers to resolve collective action and prevent spillover harms, such as health, education, criminal, and family law.⁸³

When jurisdictional conflicts arise in circumstances like these, discretion matters. The ability to respond to the unique facts and circumstances in each individual controversy are critical. The judiciary might be up to the task if judges are unfettered to consider the specifics, drawing on all the features of judicial competence that we idealize, such as neutrality, expertise, intelligence, compassion, and faithfulness to the public interest writ large. However, these features will be unavailable if judicial competence has been undercut by the Court’s mandatory application of the categorical rules that Coan decries. In that case, the judiciary may not command any real advantage over the competence of other branches of government in resolving federalism dilemmas—and in important ways suggested by Coan’s analysis, they may have even less competence.⁸⁴ In some of these circumstances, a bilaterally negotiated resolution between genuinely consenting political actors may have more interpretive merit than one produced by a judicial umpire hopelessly trying to call balls and strikes during the equivalent of a four-dimensional quidditch match.⁸⁵

81. Ryan, *Negotiating Environmental Federalism*, *supra* note 78, at 21 (emphasis removed); *see also* Ryan, EFTWW, *supra* note 78, at 372.

82. Ryan, *Negotiating Environmental Federalism*, *supra* note 78, at 22; *see also* Ryan, EFTWW, *supra* note 78, at 372.

83. Ryan, *Negotiating Environmental Federalism*, *supra* note 78, at 22; *see also* Ryan, EFTWW, *supra* note 78, at 355–56, nn.1–10.

84. COAN, *supra* note 1, at 165–78.

85. *See* Ryan, *Negotiating Federalism*, *supra* note 3, at 135–36; RYAN, F&TWW, *supra* note 4, at 368–72.

Bright line rules serve well enough in the outer rings of federalism adjudication, where the Constitution provides clearer instructions about who is responsible for what (and accordingly, how to balance the competing federalism values at stake)—such who should be responsible for military engagement overseas (the nation), and who is responsible for managing elections (the states).⁸⁶ But the difficult federalism dilemmas that Coan and I worry about take place in “the interjurisdictional gray area”—the awkward inner rings where both the state and federal governments have legitimate regulatory interests and obligations⁸⁷—and where bright-line, categorical rules of adjudication can result in frustratingly arbitrary results.⁸⁸ The Constitution provides some guidance for adjudicating this jurisdictional overlap, enumerating certain powers to the federal government and reserving others to the states, with the Supremacy Clause supposedly policing the boundary in between.⁸⁹ Even so, we sometimes characterize the Supremacy Clause as policing the boundary between state and federal power in terms of a categorical rule, strictly separating realms of exclusive state and federal jurisdiction,⁹⁰ while other times we construe it to allow hierarchical but concurrent and dynamic jurisdiction.⁹¹

These, as Coan points out, are the circumstances that Justice Cardozo had in mind when he argued in *Carter Coal* for a more contextually responsive analysis of Commerce Clause violations.⁹² Yet the Supreme Court took a different approach in *Carter Coal*, articulating what Coan

86. RYAN, F&TWW, *supra* note 4, at xii, 8–11; U.S. CONST. amend. X (explaining that the powers not delegated in the Constitution are reserved to states and the people); U.S. CONST. art. I, §§ 1–2, 8 (stating that legislative powers are vested in Congress); U.S. CONST. amend XII (describing the state role in presidential elections).

87. RYAN, F&TWW, *supra* note 4, at 145–80; *see also* Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 567–84 (2007).

88. RYAN, F&TWW, *supra* note 4, at 145–80; *see also* Ryan, *Federalism at the Cathedral*, *supra* note 72, at 57–88.

89. RYAN, F&TWW, *supra* note 4, at 10.

90. As we do, for example, in dividing state and federal jurisdiction over water resources under the Clean Water Act, or in matters of immigration law. *See* RYAN, F&TWW, *supra* note 4, at 311–19.

91. As we do, for example, in vast areas of environmental, health, and safety law, where federal statutes set a national floor of regulation that states may not undercut, but which allow states to set a higher level of concurrent regulatory policy. *See* Ryan, F&TWW, *supra* note 78; William W. Buzbee, *Federal Floors, Ceiling, and the Benefits of Federalism’s Institutional Diversity*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 98 (William W. Buzbee ed. 2009); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006).

92. COAN, *supra* note 1, at 62 (discussing Cardozo’s dissent in *Carter Coal*).

regards as a rule of categorical deference to Congress.⁹³ And during the Rehnquist Court era, the Supreme Court began applying bright-line rules in the opposite direction, in exactly those federalism contexts where Coan, I, and presumably Justice Cardozo believe it should have been applying standards.⁹⁴

For example, in 1992, the Court created the categorical Tenth Amendment “anti-commandeering” rule in *New York v. United States*,⁹⁵ which prevents the federal government from forcing state actors to participate in a federal regulatory regime.⁹⁶ There is much to recommend a bright-line default rule to prevent federal commandeering of state actors, but as I have pointed out in previous work, this decision did not only create a default rule against commandeering, it protected that bright-line rule with an inalienability remedy rule that doubly categorically prevents the state and federal governments from bargaining around the default.⁹⁷ Borrowing from Guido Calabresi and Douglas Melamed’s famous model of property, liability, and inalienability remedy rule alternatives for vindicating legal entitlements in *One View of the Cathedral*,⁹⁸ I have shown that the Court’s award to the states of the anti-commandeering entitlement was partnered with an inalienability rule that prevents them from initiating federalism bargaining—even when the states see it as necessary and preferable to alternatives.⁹⁹ The rule is also confusing because it stands in such contrast to the property-rule protected jurisdictional entitlements that the Court administers under the Spending Clause, which allow the state and federal governments more freedom to negotiate around the jurisdictional defaults established by the Constitution through bargaining over access to federal funds.¹⁰⁰

The facts underlying the *New York* case demonstrate exactly the gray area circumstances in which Coan and I suggest bright-line rules will lack the flexibility and nuance needed for good legal decision-making. In the last ditch effort to resolve a collective action dilemma among the states that had led to a near shut-down of all available disposal facilities for

93. *Id.* at 61–62. *See also Carter v. Carter Coal Co.*, 298 U.S. 238, 314–16 (1936) (“What authority has this court, by construction, to convert the manifest purpose of Congress to regulate . . . ?”).

94. *See* RYAN, F&TWW, *supra* note 4, at 109–44.

95. 505 U.S. 144 (1992).

96. *Id.*

97. RYAN, F&TWW, *supra* note 4, at 215–64. *See also* Ryan, *Federalism at the Cathedral*, *supra* note 72, at 57–58.

98. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

99. Ryan, *Federalism at the Cathedral*, *supra* note 72; RYAN, F&TWW, *supra* note 4, at 243.

100. RYAN, F&TWW, *supra* note 4, at 215–53; Ryan, *Federalism at the Cathedral*, *supra* note 72, at 78–79; *See also* Ryan, *Spending Power*, *supra* note 49.

radioactive waste, the states partnered with Congress to pass a federal law, the Low Level Radioactive Waste Policy Act, which enacted a state-generated plan.¹⁰¹ Led by New York, the states effectively bargained with Congress to harness an aspect of federal regulatory capacity that the states needed to actualize their exhaustively negotiated plan: the force of the Supremacy Clause, needed to bind all states to the promises they made to share responsibility for fairly siting radioactive waste.¹⁰² However, when the Court invalidated the resulting “Take Title” provision of the law as commandeering New York State—a provision that New York State had itself championed behind the veil of ignorance¹⁰³—the narrow majority in *New York* effectively held that the states and Congress could not bargain this way, even if the states had been the initiators of bargaining.¹⁰⁴ Thirty years later, the problem of radioactive waste disposal remains largely unresolved (especially compromising public safety in the few states that continue to site it for the rest), suggesting how valuable that federalism bargaining would have been in resolving a serious interjurisdictional problem.¹⁰⁵

While the anti-commandeering rule makes sense in many contexts, the controversial facts of the *New York* case show that it might not make sense in all contexts, including some very high-stakes contexts with substantial public impacts. Indeed, this is exactly the problem with categorical, bright-line rules that remove judicial discretion to consider the complex facts in gray area contexts. In this case, applying the bright-line, anti-commandeering rule—buttressed by an immobilizing inalienability remedy rule—removed the needed tool of state-federal bargaining to reach a bilaterally negotiated, finely-tuned allocation of authority, in the absence of fixed constitutional entitlements in a realm of deep jurisdictional overlap, where both the states and federal government had clear claims to regulatory authority and obligation. I have long argued that this is not conducive toward good governance,¹⁰⁶ and Coan argues that it is the inevitable result of judicial capacity constraints, because allowing courts to consider that level of nuance would force more high-volume, high-stakes litigation on the judiciary than it can handle.¹⁰⁷

101. *New York v. United States*, 505 U.S. 144, 149–50 (1992).

102. *Id.* at 181 (“[T]he Act embodies a bargain among the sited and unsited States . . .”).

103. RYAN, F&TWW, *supra* note 4, at 166.

104. *Id.* at 224–26; Ryan, *Federalism at the Cathedral*, *supra* note 72, at 7–8.

105. RYAN, F&TWW, *supra* note 4, at 227; Ryan, *Federalism at the Cathedral*, *supra* note 72, at 8.

106. RYAN, F&TWW, *supra* note 4, at 264; Ryan, *Federalism at the Cathedral*, *supra* note 72, at 3–4, 77–78.

107. COAN, *supra* note 1, at 19.

B. Limited Judicial Competence and Negotiated Federalism

It is from this perspective that Coan's theory was especially interesting to me, because his recognition that capacity constraints limit judicial competence to adjudicate complex federalism dilemmas lends support to the idea I have proposed that other institutional actors may sometimes have superior competence to interpret the constitutionally appropriate result.¹⁰⁸ Even though we normally think of constitutional interpretation as something courts are best situated to perform, Andy's insights support the idea that in contexts where judicial capacity limits competence, we may rightly look to the political branches for superior competence—at least when they are allocating contested jurisdictional entitlements bilaterally, across state-federal lines, and through legitimately conducted bargaining that honors the principles of mutual consent.¹⁰⁹ Coan and I share the view that underappreciated limitations on judicial competence may mean that the Court is not always the branch best equipped to interpret the allocation of jurisdictional entitlements in complex federalism dilemmas. My work on negotiated federalism goes a step further in arguing that bilateral interpretation by negotiating state and federal actors may more faithfully vindicate the underlying constitutional principles that federalism is designed to protect.¹¹⁰

It was the aforementioned critique of the anti-bargaining rule in *New York* that inspired my fuller research agenda into federalism bargaining, which explored how frequently state and federal actors use various forms of bargaining to bilaterally allocate contested authority in gray-area contexts of jurisdictional overlap.¹¹¹ I discovered a vast enterprise of negotiated federalism, including instances of direct cooperation, statutorily staged coordination, dynamic competition, and channels for dissent.¹¹² In previous work, I provided a typology of ten different ways that state and federal actors negotiate with one another, including: (1) conventional forms of federalism bargaining (such as enforcement

108. RYAN, F&TWW, *supra* note 4, at 155–56, 314–15, 362–67; Ryan, *Negotiating Federalism*, *supra* note 3, at 4–5.

109. RYAN, F&TWW, *supra* note 4, at 354 (“The principle of mutual consent underlies our faith in the bargaining process, conferring legitimacy on negotiated results so long as these three underlying assumptions are met: (1) bargaining autonomy, (2) interest literacy, and (3) faithful representation.”). *See also id.* at 342–47; Ryan, *Negotiating Federalism*, *supra* note 3, at 105–10.

110. RYAN, F&TWW, *supra* note 4, at 339; Ryan, *Negotiating Federalism*, *supra* note 3, at 21–23.

111. RYAN, F&TWW, *supra* note 4, at 280–319, 340–41; Ryan, *Negotiating Federalism*, *supra* note 3, at 24–73.

112. RYAN, F&TWW, *supra* note 4, at 308, 316–29, 340–41; Ryan, *Negotiating Federalism*, *supra* note 3, at 4–5.

negotiations or interest-group bargaining over lawmaking);¹¹³ (2) state-federal negotiations to reallocate authority (such as spending power bargaining, by which the federal government negotiates for access to authority otherwise constitutionally delegated to the states, or the congressional authorization of interstate compacts that allow states to encroach on areas of federal Commerce Clause authority);¹¹⁴ and (3) the statutorily-driven joint policymaking forums (which are advanced programs of cooperative federalism with elaborate systems of rules to encourage, facilitate, and organize bargaining between state and federal actors concurrently operating in selected corners of the gray area).¹¹⁵ Examples range from single-issue deal making to programmatic platforms to subtler forms of intersystemic signaling (for example, over marijuana policy¹¹⁶), but in each instance, the end result is some jointly constructed plan of action that takes account of both local and national interests and expertise.¹¹⁷

In this previous work, I have offered a fuller theory of federalism interpretation that allocates roles among all three branches of government in different circumstances.¹¹⁸ However, the most controversial claim is that, at least when certain constraints of fair bargaining are met, bilateral intergovernmental bargaining around elusive jurisdictional lines can produce more constitutionally principled and pragmatically robust results than judicial administration.¹¹⁹ Given that the underlying federalism values—checks and balances, transparency and accountability, localism and nationalism, and interjurisdictional synergy—are largely procedural values for balancing different levels of public interest and expertise, I argue that the process of bilaterally negotiating results within gray-area federalism dilemmas can prove the most faithful means of vindicating the values that underlie federalism itself.

113. RYAN, F&TWW, *supra* note 4, at 283–87; Ryan, *Negotiating Federalism*, *supra* note 3, at 28–37.

114. RYAN, F&TWW, *supra* note 4, at 288–96 (discussing legal interest implicating the Commerce Clause, such as the interstate waterways and No Child Left Behind); Ryan, *Negotiating Federalism*, *supra* note 3, at 28–50.

115. RYAN, F&TWW, *supra* note 4, at 296–314, 359; Ryan, *Negotiating Federalism*, *supra* note 3, at 50–73 (discussing statutory programs that explicitly lay out how the different players are going to coordinate in the project of joint governance, such as the Coastal Zone Management Act and the Clear Air Act’s treatment of mobile sources).

116. RYAN, F&TWW, *supra* note 4, at 311–13; Ryan, *Negotiating Federalism*, *supra* note 3, at 70–72.

117. See, e.g., RYAN, F&TWW, *supra* note 4, at 268–72, 315–16, 339–41; Ryan, *Negotiating Federalism*, *supra* note 3, 50–73. This research relies on the negotiation theorist’s definition of bargaining: a jointly constructed decision taken through an iterative process of communication. RYAN, F&TWW, *supra* note 4, at 268 n.12.

118. RYAN, F&TWW, *supra* note 4, at 370–71.

119. RYAN, F&TWW, *supra* note 4, at 367; Ryan, *Negotiating Federalism*, *supra* note 3, at 136.

We have already acknowledged that federalism interpretation involves an adjudication among competing incommensurate values that could be resolved in multiple possible ways, so it is illusory to think that a court alone can come to the “right answer.”¹²⁰ In federalism dilemmas, we are seeking the best possible answer among many, further reducing the edge that judicial adjudication holds over competing means of resolution. By producing a result that honors both local and national interests and expertise through a fair process of genuinely consensual negotiation, federalism bargaining may well advance those values better than a single judge or panel of judges on a court.¹²¹ Coan’s capacity theory in *Rationing the Constitution* adds the potential corollary that federalism bargaining will almost certainly advance those values more effectively than a judicial panel administering a categorical, bright-line, necessarily over- and under-inclusive rule—one whose primary claim to value is simply that it is easy for an overwhelmed judiciary to administer.¹²²

In adopting categorical rules of federalism interpretation, the Supreme Court has often framed its role in adjudicating federalism dilemmas as though it is policing a zero-sum game,¹²³ in which a bright line separates state and federal prerogative, and wherever the Court draws that line determines what one side wins and what the other side loses.¹²⁴ By excluding the possibility of nuance and overlap, categorical rules reify this simplistic, zero-sum view of federalism. But as I’ve argued previously, the line between state and federal power is itself a project of ongoing negotiation, and the best federalism-sensitive governance often incorporates multiscalar contributions that can reward both sides of the continuum in the ways that matter to them.¹²⁵ The intergovernmental federalism bargaining I’ve described belies this outdated zero-sum view, increasing the prize available to both sides by ensuring that policy is formed with attention to both local and national concerns and competence, empowering interests on both sides of the line.¹²⁶

Coan’s work is important to this line of reasoning, because it suggests how the limits of judicial capacity can operate to dumb-down the Court’s

120. See *supra* Part II.A.

121. RYAN, F&TWW, *supra* note 4, at 367; Ryan, *Negotiating Federalism*, *supra* note 3, at 134–35.

122. COAN, *supra* note 1, at 19–31; RYAN, F&TWW, *supra* note 4, at 356–61; Ryan, *Negotiating Federalism*, *supra* note 3, at 121–28.

123. Erin Ryan, *Negotiating Federalism Past the Zero-Sum Game*, 38 ADMIN. & REG. L. NEWS 4, 4 (2012).

124. RYAN, F&TWW, *supra* note 4, at 267–70; Ryan, *Negotiating Federalism*, *supra* note 3, at 84–86.

125. RYAN, F&TWW, *supra* note 4, at 268–72, 315–16, 339–41; Ryan, *Negotiating Federalism*, *supra* note 3, at 110–27.

126. RYAN, F&TWW, *supra* note 4, at 267–71; Ryan, *Negotiating Federalism*, *supra* note 3, at 4–8.

federalism jurisprudence, reducing it to rules of categorical prerogative¹²⁷ that run counter to the more sophisticated mechanics of joint decision-making that has allowed our multijurisdictional system of governance to thrive.¹²⁸ If he's right, it's all the more worth considering the ways in which negotiated federalism can be a legitimate form of constitutional interpretation, especially in those realms in which courts lack capacity to do more than offer categorical rules.

I could obviously say much more about all this, but instead, I'll turn now to some of the limits of Coan's insightful work that we should nevertheless also consider.

III. WHEN IN THE GLASS HOUSE...

This Part explores some potential limits of the Capacity theory as Coan has presented it. In turning to them here, I begin with the implied corollary to the scientific aphorism I quoted earlier: "some models are useful, but all are wrong."¹²⁹ In this case, as with all others, while there are clearly some very useful aspects to the Capacity model, there are also some that bear further scrutiny. In particular, and notwithstanding Coan's robust critique of categorical rules, it seems that Coan inadvertently applies one himself—conflating some of the critical distinctions we should recognize between the categorical deference that the Court applies in some contexts and the deferential but discretionary review that it applies in others. In addition, Coan distinguishes the Capacity model from the Attitudinal, Legalist, and Strategic models of judicial interpretation that preceded it, and argues that Capacity is superior to all—but I'll argue that the Capacity model has a more symbiotic than antagonistic relationship with them, and indeed, is already accounted for within them.

A. Avoid Stone-Throwing

I begin with Andy's ironic use of overly categorical thinking to characterize Supreme Court decision-making in high-stakes and high-volume domains. In critiquing what he sees as the Court's tendency to oversimplify complexity with crude categorical decision rules, Coan nevertheless sets forth a model that is at least partially built on a simplifying categorical analysis. This little irony preoccupied me throughout the book (prompting reflection of the conventional advice to people in glass houses). Coan ably critiques the Court's tendency to apply

127. COAN, *supra* note 1, at 19–31.

128. RYAN, F&TWW, *supra* note 4, at 368–72, 315–16, 339–41; Ryan, *Negotiating Federalism*, *supra* note 3 at 91–92.

129. See The Royal Statistical Society, *supra* note 51 (citing the original aphorism: "[a]ll models are wrong, but some are useful.").

ill-fitting categorical rules where flexible standards are needed for the purpose of judicial economy,¹³⁰ but Coan's own analysis also threatens to oversimplify the Court's performance by overgeneralizing important distinctions in the rules it deploys. I generally agree with the broad outlines of Coan's argument, so I don't want to overstate this point, but in some of the areas of law he critiques, the Court's jurisprudence is more complex than the book gives credit for.

For example, Coan is right that the Court applies overly rigid bright-line rules in some areas of its federalism jurisprudence, including the categorical 10th Amendment anti-commandeering rule¹³¹ (where, in past work, I have also argued that a standard allowing at least some forms of consensual bargaining would make more sense).¹³² However, I'm not sure his analysis applies in all areas of the Court's federalism jurisprudence—even some of the specific realms he considers in the book, like the judicial treatment of the Commerce and Spending powers. As Coan suggests, the Court does apply a bright-line rule to bar intentional discrimination under the Commerce Clause,¹³³ but at the same time, it assesses nondiscriminatory measures under the dormant aspect of the Commerce Clause using the *Pike* balancing test, a flexible standard.¹³⁴ The force of the *Pike* balancing test may be waning at the moment,¹³⁵ but for decades, it has balanced the burden on Commerce against the relative putative local benefits.¹³⁶ There's no finessing this—the Court deployed a vague, flexible, context-responsive standard in interpreting Congress's reach under the Commerce Clause, which the Capacity theory pointedly asserts the Court should not do.

Similarly, Coan characterizes the Court's Spending Clause jurisprudence as a blanket grant of deference to Congress, enabling

130. COAN, *supra* note 1, at 49, 62, 70.

131. *New York v. United States*, 505 U.S. 144, 161 (1992).

132. Ryan, *Federalism at the Cathedral*, *supra* note 72, at 66.

133. COAN, *supra* note 1, at 63 (“The Court formalized this categorical rule of deference in the rational basis test announced in *Katzenbach v. McClung*, which upheld Title II of the Civil Rights Act of 1964 as a valid exercise of the commerce power. Simply put, where legislators ‘have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce,’ the Court held, ‘our investigation is at an end.’ Suffice it to say, this test is very easily satisfied.” (quoting *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964))).

134. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

135. The Roberts Court has cast doubt on the future of the *Pike* balancing test in *United Haulers*, where Justice Roberts wrote: “There is a common thread to [the plaintiff’s] arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause [referencing *Lochner v. New York*, 198 U.S. 45 (1905)]. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007).

136. Ryan, *Federalism at the Cathedral*, *supra* note 72, at 22.

virtually any jurisdictional bargain that Congress trades for with federal funds to pass muster,¹³⁷ but in its most recent spending power decision, *National Federation of Independent Businesses*, the Court articulated a notoriously vague rule confounding that blanket deference with a vague standard.¹³⁸ Under the new rule, Congress may not condition a state's receipt of certain federal funds within an entrenched spending power partnership on that state's assent to an independent program if the funds at stake are so substantial that the threat of losing them operates to coerce the state's consent.¹³⁹ It effectively proscribes Congress from bullying a state into accepting a program it doesn't want by leveraging the state's reliance on a large and long-standing but unrelated federally supported program,¹⁴⁰ but as even Coan concedes, the new rule is riddled with uncertainty about how to distinguish related and unrelated programs, and how big a reliance interest must be before the rule is triggered.¹⁴¹ Scholars siding with the dissenting voice in this case have complained that nobody really knows what this test means.¹⁴²

Even *South Dakota v. Dole*,¹⁴³ the gold standard for adjudicating Spending Clause disputes—and the case that Coan relies on for his assertion of blanket deference—arguably includes a standard, albeit a deferential standard.¹⁴⁴ In *Dole*, the Court held that Congress may place conditions on states' receipt of federal funds so long as they (1) promote the general welfare, (2) are unambiguous, (3) are reasonably related (or “germane”) to the federal interest, (4) do not induce independent constitutional violations, and (5) are not coercive.¹⁴⁵ The third factor, the “germaneness” inquiry, requires a discretionary assessment of whether the conditions are reasonably related to the putative federal interest.¹⁴⁶ Indeed, but the debate among the justices hearing the challenge to the National Minimum Drinking Act in *Dole* bitterly debated the application of the

137. COAN, *supra* note 1, at 77–80 (discussing that since the Supreme Court's spending power decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), “the consensus view of commentators, supported by twenty-five years of decisions following *Dole*, was that the decision represented a blank check to Congress.”).

138. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574–85 (2012).

139. *Id.*

140. *See id.* at 581–82; *Spending Power*, *supra* note 49, at 1030.

141. COAN, *supra* note 1, at 66.

142. *See e.g.*, Ryan, *Spending Power*, *supra* note 49, at 1022; Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 866–73 (2013).

143. 483 U.S. 203 (1987).

144. *Id.* at 207–08.

145. *Id.*

146. Ryan, *Spending Power*, *supra* note 49, at 1015; Bagenstos, *supra* note 142, at 918.

germaneness criteria to the facts¹⁴⁷—demonstrating that while the standard may be applied deferentially, it cannot be considered a bright-line rule of categorical deference.

Coan also considers the Court's rules for assessing alleged regulatory takings as an example of categorical deference,¹⁴⁸ even though the seminal *Penn Central* regulatory balancing test is expressly framed as a discretionary balancing test among three orthogonal factors.¹⁴⁹ Under that test, the adjudicator does not categorically defer to the government: it must weigh the economic impact of the regulation on the owner, the extent it interferes with the owner's reasonable, investment-backed expectations, and the character of the government action.¹⁵⁰

Coan's answer to this critique is doubtlessly that while these legal rules are *framed* as standards, they are actually *applied* as categorical deference, and thus consistent with his argument.¹⁵¹ No conditional spending deals have ever failed the *Dole* standard, and regulatory takings challenges rarely succeed (at least in federal court).¹⁵² But here's where Coan's categorical analysis conflates two significantly different legal phenomena: deferential standards are not interchangeable with categorical deference. He's certainly right that many of these standards are applied very deferentially, but that's not the same thing as deference without discretion, and conflating the two masks some important regulatory nuance operating in the background, on the supply side as well as the demand side.

Even seldom violated standards do regulatory work that is distinctive from the automated line-drawing of nondiscretionary deference. When there is categorical deference, we already know the answer before the question in each case has even been framed. But deferential standards allow courts to appropriately defer to legislative judgement while still preserving the option to police for abuses. The factors in a deferential standard have meaning. Institutional actors think about them while crafting laws and later deciding whether to fight or to fold if they are challenged. By outlining the factors that a reviewing court will consider,

147. *Dole*, 483 U.S. at 208–09. Writing for the majority, Justice Rehnquist found the germaneness test satisfied, while Justice O'Connor, writing for the dissent, did not. *Id.* at 208–16.

148. COAN, *supra* note 1, at 149–51.

149. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

150. *Id.* at 124.

151. COAN, *supra* note 1, at 83–87.

152. However, the same cannot be said of regulatory takings claims made in state courts, on the basis of the same test. *See, e.g., De Cook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011) (holding that the government engaged in a regulatory taking under the *Penn Central* test); *see also Phillips v. Montgomery County* 442 S.W.3d 233 (Tenn. 2014) (using the *Penn Central* test to hold that the landowners' claim of a regulatory taking was sufficient to survive a motion to dismiss).

such standards can provide incentives for regulatory actors to plan on the basis of set criteria, to avoid the force of the rule in litigation. They can influence stakeholder decisions about litigation, and establish the parameters for bargaining.¹⁵³

They can also provide important guidance around which parties can structure their behavior, as in the context of regulatory takings. Even though the *Penn Central* balancing test is seldom failed, the three factors introduce substantive considerations that can operate to constrain regulatory activity to stay within the boundaries of the deference courts are likely to afford them.

Moreover, deferential standards can be used to set a federal regulatory floor that state courts and legislatures can meet or exceed, providing another important intersection between judicially crafted rules and standards in the federalism context. For example, the Supreme Court did exactly this in its treatment of economic development takings in *Kelo v. New London*,¹⁵⁴ in which it set forth a rule of categorical deference, but invited states to take a more stringent position.¹⁵⁵ And indeed, at least half the state have done since then, either by judicial or legislative rule-making.¹⁵⁶ So conflating deferential standards with categorical deference shortchanges the distinction, and failing to acknowledge the nuance here limits the utility of the theory.

B. Covert Cooperation Among Competing Models

Finally, I want to discuss the relationship between the capacity model and the other models that Coan argues it outperforms. There is certainly much value to be gleaned from Coan's capacity theory for understanding constitutional rulemaking, especially when it is used in combination with other models—but I'm not sure that it stands on its own as reliably as it sets out to do.

The model is very convincing in some important ways, but of course, it would be even more convincing if all the justices always acted in ways the model anticipates. Yet that rarely happens. As even Coan acknowledges, for example, both Justice Cardozo and Justice Thomas have rejected categorical deference in the context of the Commerce Clause

153. Ryan, *Negotiating Federalism*, *supra* note 3, at 133–34; Ryan, EFTWW, *supra* note 78, at 366–67.

154. *Kelo v. City of New London*, 545 U.S. 469 (2005).

155. *Id.* at 489–90.

156. See Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGY L.Q.* 703 (2011); Harvey M. Jacobs & Ellen M. Bassett, *After "Kelo" Political Rhetoric and Policy Responses*, *LAND LINES*, Apr. 2012, at 14–15 (“Following the invitation of the court, [forty-three] states adopted laws that appear to challenge *Kelo* . . .”).

in different contexts.¹⁵⁷ Coan celebrates Justice Cardozo's proposed standard in *Carter Coal* as an alternative to categorical deference.¹⁵⁸ Even though they are both minority views, the capacity model predicts that justices shouldn't take these positions—which means that there must be something else also operating in the background—some other model or models to explain what else is driving these justices to go in these different directions. So capacity can't be the only theoretical model that is doing work, or operating in the background of interpretive decision-making by the Court.

In the end, I had to question the severity of the isolation that Coan creates around the constraints of capacity, in opposition to the other models he identifies, such as the legalist, attitudinal, and strategic models. Because in the end, I see the Capacity Model not just as something in opposition to these other models, but as something already baked into these other models in fundamental ways. There is clear symbiosis between capacity and each of the others, and perhaps all of them together. After all, concern for judicial capacity is both a legalist and attitudinal concern, and with strategic implications as well. Doctrinal concerns for administrability are a capacity-driven concern. "Legalist" adherence to principles of judicial restraint reflect embedded administrability concerns about preserving national uniformity and predictability within minimum professional standards. Strategic agendas break down if judges create decision rules that cannot be effectively administered within the present system.

Even Coan recognizes the synergy that must exist among these models, even as he argues that the capacity model is superior,¹⁵⁹ but I'm not as sure as he is that it's truly possible to isolate them from one another. Capacity is just as important an element in these other models, just as these other models are implicitly bound up with the capacity model's concern for legitimacy and results—because otherwise, the justices would not care about achieving minimal professional standards or disuniformity across the federal circuits. Indeed, the very underpinnings of the capacity model necessarily implies legalist and strategic considerations. The Court could decide as many cases as it wants to by flipping a coin, but it doesn't take that route, because it is too committed up those (pesky) legalistic principles of due process and the rule of law. So I agree with Coan that it's useful to be able to distinguish these as separate inputs to an overall model of Supreme Court decision-making, but in the end, I see them as much more intertwined than his book suggests.

157. COAN, *supra* note 1, at 60–62.

158. *Id.* at 70 (explaining that Justice Cardozo's approach seems "more consistent with both constitutional text and constitutional structure than any of the Court's categorical limits . . .").

159. *See* COAN, *supra* note 1, at 47–50.

CONCLUSION: AN INVITATION TO NORMATIVE ANALYSIS

I conclude with an open invitation for Coan, now that he has opened this Pandora's Box, to give us the normative analysis that his positive account so sorely begs. Andy, now that we fully understand all the problems limited judicial capacity can create for good judicial administration and good governance in general—what does the path forward look like?

Having provided this powerful account of how capacity constraints predetermine Supreme Court decision-making, I'd encourage Coan to think more seriously about the appropriate remedy for the problems he has identified. He makes a strong case that limited judicial capacity can lead to suboptimal judicial decision-making, especially in legal realms threatened by high volumes of high-stakes litigation. Still, I'm not clear on what he thinks we should do about this, and one could draw markedly different conclusions from his analysis.

If we are convinced by his account of all the problems that can flow from limited judicial capacity, is the right answer is to simply increase capacity? Should we expand the federal judiciary by hiring more personnel who can spend more time and energy dealing with the intricacies and nuances of constitutional dilemmas in each case and controversy in which they arise? Will seating more federal judges enable the Supreme Court to articulate more of the context-responsive standards that he, Justice Cardozo, and I might prefer?

Or, alternatively, is the proper conclusion from Coan's work that we should have *fewer* judges? Should we reduce the size and importance of the judiciary, shifting some of that interpretive authority to the political branches instead, because courts are inevitably incapable of managing the responsibilities we heap upon them with the requisite care? Is the promise of individualized judicial review more a pipe-dream than an actualizable reality? Should we accordingly concede defeat and reduce the judicial role, because courts are inherently ill-equipped to deal with high-volume, high-stakes issues in the first place? Will capacity issues, like a chicken and egg problem, always strain judicial competence, because the more finely grained review they can provide, the more litigation will chase after those resources until they are limited once again?

Coan's palpable frustration with what he sees as the failures and limitations of judicial review almost seems to call for this kind of solution, though it would produce formal structural deference to the political branches that may be similar to what he critiques now. This would enable legislative and regulatory dispute resolution at a more fine-grained level, and with more limited judicial oversight, perhaps not unlike the categorical judicial deference Coan critiques here—but at least we would be up front about what we were doing. Another potential result could be more negotiations among the relevant stakeholders—something my own work

might seem to champion—but even I don’t believe that negotiation is the appropriate tool for resolving conflict in all contexts.¹⁶⁰ It can work in the federalism context, where incommensurate values within legal realms of heightened jurisdictional uncertainty creates a forum amenable to bilaterally negotiated consensus, but I’m not sure that negotiation is the right answer when it comes to adjudicating equal protection in contexts of extreme power imbalances, often involving the civil rights of the vulnerable. We don’t generally think that people should bargain over human rights.

And while upstarts like me and Coan will still argue at the margins, maybe—just maybe—the judiciary is roughly right about the restraint with which it administers its own role, at least in general. Imagine what the legal world would look like if the Court did *not* treat legislative and executive rulemaking with so much deference in high stakes, high volume arenas? Right now, the Court saves the power to reject duly enacted laws and regulation as a big stick that it holds in the background, while it speaks more softly in the foreground through deferential standards. So long as the stick is there, it has meaning. But if we reversed those postures, imagine the potential for judicial tyranny, and the political turmoil it would unleash. The complaints we regularly hear today about judicial lawmaking under the Court’s current practices would seem quaint.

So at least in general, perhaps this is the better balance, and we can affirm the prevalence of deferential judicial rules for principled reasons that go beyond the principle-neutral acknowledgement of the limits of judicial capacity. Even so, the same might *not* be true for bright line rules created by the Court that are *not* deferential. When the Court strikes down duly-enacted lawmaking, perhaps that is when it owes the more nuanced consideration that Coan and I advocate for. My own personal take is that when the core constitutional promises associated with human rights are implicated, the Court is on its most solid ground in rejecting federal lawmaking under a bright line rule (for example, against race discrimination). But when it engages structural constitutional promises that are almost never as substantively clear, bright-line rules are perhaps more perilous.¹⁶¹

160. RYAN, F&TTW, *supra* note 4, at 354–55 (“To reiterate the critical caveats, the interpretive potential within federalism bargaining does not mean that every bargain between state and federal actors will always be faithful to federalism, nor does it mean that all federalism-sensitive governance should be negotiated.”).

161. *Id.* at 348–49 (“In contrast to adjudicating rights, a substantive realm in which the Constitution’s directions are relatively clear, the adjudication of federalism draws on penumbral implications in the text that leave much more to interpretation. The boundary between state and federal authority is implied by structural directives such as the enumeration of federal powers in Article I and the retention of state power in the Tenth Amendment, but neither commands the clarify of commitment that the Constitution makes to identifiable individual rights . . .”).

Which is all to say, dear Andy, that you've set a splendid table, but there's more work to be done on the meal! Having discussed this matter with you already, I know that you had intended the book as a purely descriptive project, without normative recommendations—but having delivered the analysis you did, I think it's incumbent on you now to go further. We will all look forward to the next chapter, and in the meanwhile, we thank you for inviting us to share your fascinating intellectual journey to this point.