ARTICLES

NONDELEGATION AND JUDICIAL AGGRANDIZEMENT

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Opponents of the administrative state have chosen doctrine, not legislation, as their preferred tool to restructure administrative governance in the United States. As a result, courts may soon decide that the nondelegation doctrine is insufficiently robust. While the justification for giving teeth to the nondelegation doctrine typically rests on trying to democratize the administrative state or to encourage Congress to speak more precisely, creating a robust nondelegation doctrine would, however, only empower the courts at Congress's expense. This Article argues that making a robust nondelegation doctrine would be an example of judicial self-aggrandizement. To explain why the Supreme Court would only be empowering itself, this Article describes judicial aggrandizement and argues that it is best understood as a type of institutional change motivated by ideas. Drawing on original research on William Howard Taft and his decision in J.W. Hampton, Jr., & Co. v. United States*, this Article demonstrates that ideas about judicial empowerment structured the initial shifts from a separation-of-powers system into a separation-of-powers doctrine that courts must enforce. Taft successfully used Supreme Court decisions to aggrandize the Supreme Court and the judiciary as a whole. The same ideas continue to structure the courts' role in the constitutional system. Creating a robust nondelegation doctrine requires endorsing*

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the same ideas and further entrenching the Supreme Court as the final arbiter over core questions of constitutional self-governance. A robust nondelegation doctrine would be yet another example of judicial self-aggrandizement.

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I. INTRODUCTION

Opponents of the administrative state hope that a more robust nondelegation doctrine will rein in a runaway bureaucracy.[1]

What does that mean for the courts? Rather than prioritizing electing legislators who would pass legislation repealing administrative organic statutes or trimming the executive agencies' statutory authority, opponents of the administrative state have asked the courts to do the heavy lifting. They have chosen doctrine over legislation. Rather than directing their energy at Congress, opponents of the modern administrative state condemn the extant nondelegation doctrine and *Chevron*[2]

[1] *See* Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994) (mourning the "death" of the nondelegation doctrine).

[2] This term comes from *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court held that agencies should be given wide discretion in their

and *Auer*[3] deference and posit a greater role for the courts to defend individual rights against a regulatory state.[4] These attacks "regularly condemn contemporary national government as being at odds with the constitutional structure the Framers created."[5]

Administrative agencies were created to tackle the governing exigencies of the day,[6] but they have come into conflict with those who see the Constitution and the law as unchanging and unwavering institutions of stability. The heart of the debate centers on what executive agencies constitutionally may do. While this debate may be—and likely is—a proxy for policy disagreements,[7] it is expressed in terms of constitutional politics and legal doctrine. The debate is not over policy *per se*. Opponents of the modern administrative state purport not to take issue with the policies that the agencies create.[8] For example, they may agree that strict environmental regulations are a good thing but that Congress, not the EPA, should be writing those laws. As expressed, the disagreement purportedly is over the role of agencies in the constitutional order. It is the source of the policy, not the policies themselves, that supposedly animates the debate. Principled disagreements over the constitutional limits of executive lawmaking raise big questions about the development of American constitutional

interpretation of statutes. *Id.* at 844–45. Where the intent of Congress is ambiguous with respect to the issue in question, a court must defer to the agency's interpretation of the statute if it is "based on a permissible construction of the statute." *Id.* at 843.

[3] This term comes from *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). While *Chevron* deference covers agency interpretation of statutes, this doctrine covers agency interpretations of their own regulations. It gives an agency's interpretation "controlling [weight] unless [it is] 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

[4] Gillian E. Metzger, *The Supreme Court 2016 Term Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–5 (2017).

[5] *Id.* at 3.

[6] *See generally* JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (discussing the administrative state in the early years of the Republic); RICHARD F. BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877 (1991) (examining the role of the Civil War on the development of the administrative state); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982) (analyzing the development of the administrative state in its early years after the Civil War).

[7] *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1968 (2017).

[8] *See* Lawson, *supra* note 1, at 1237–41.

politics, especially because opponents of the administrative state have chosen courts as their preferred venue to try to gut agencies' governing authority. What does this say about which institutions are doing the most governing in the United States?

Opponents of the contemporary administrative state have found champions in the Supreme Court. A majority of the Supreme Court has now signaled its willingness to use doctrine to dismantle the administrative state.[9] In the summer of 2019, Justice Neil Gorsuch wrote a clattering dissent in *Gundy v. United States*[10] that echoed many of the classic arguments of the Conservative Legal Movement's assault on the administrative state. Chief Justice John Roberts and Justice Clarence Thomas joined Gorsuch's dissent.[11] Justice Samuel Alito filed a concurrence that signaled a similar willingness to reconsider the existing approach to the nondelegation doctrine.[12] Although Justice Brett Kavanaugh did not participate, he has since signaled his agreement with his conservative colleagues.[13] In January 2022, the Supreme Court stayed an emergency COVID-19 vaccination rule promulgated by Occupational Health and Safety Administration (OSHA).[14] Concurring, Justice Gorsuch once again invoked the nondelegation doctrine, asserting that it protects "government by the people" by preventing agencies from displacing Congress's authority to govern.[15] There is, therefore, good reason to think that the Justices may decide to alter the nondelegation doctrine because opponents of the administrative state have decided that doctrine can effectively rein it in.[16]

[9] *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (holding that 34 U.S.C. á 20913(d) does not violate the nondelegation doctrine, which is a doctrine that "bars Congress from transferring its legislative power to another branch of Government"); Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (suggesting that Justice Gorsuch's analysis of the nondelegation doctrine in his dissenting opinion in *Gundy v. United States* "raised important points that may warrant further consideration in future cases").

[10] 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting).

[11] *Id.* at 2131.

[12] *Id.* at 2130–31 (Alito, J., concurring).

[13] *Gundy*, 139 S. Ct. at 2130; *see also Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari).

[14] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Health & Safety Admin., 142 S. Ct. 661, 666–67 (2022) (per curiam).

[15] *Id.* at 669 (Gorsuch, J., concurring) (quoting Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST., J. ON GOV'T & SOC., July-Aug. 1980, at 25, 27).

[16] Alternatively, the Supreme Court may invoke the "major questions doctrine." In *West Virginia v. EPA*, the Supreme Court decided that there was a "reason to hesitate" before

This Article argues that giving teeth to the nondelegation doctrine would have an important consequence. The nondelegation doctrine's proponents portend to focus on democratizing policymaking by divesting experts and bureaucrats of rulemaking authority,[17] but a robust nondelegation doctrine would only empower courts at Congress's expense. Concluding that Congress cannot constitutionally delegate as much or any lawmaking authority would be a remarkable example of judicial aggrandizement, particularly because these judgments typically involve political judgment and policy discretion. A strong nondelegation doctrine both relies on and reifies the idea that courts are not just bulwarks against rapid political change, but also the proper instruments to push for political change and even structural constitutional change. It would be nothing short of "judicial disdain for Congress and its representative role and an architectonic project of judicial empowerment at the legislature's expense."[18] Although the Court would justify it as respect for Congress's proper role, the Court

concluding that the Clean Air Act permits the Environmental Protection Agency to regulate so-called generation shifting in power plants to reduce greenhouse gas emissions. 142 S. Ct. 2587, 2608 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)). The Supreme Court decided that the newly minted "major questions doctrine" precludes the EPA from regulating in this manner under Section 111(d) of the Clean Air Act. *See id.* at 2616. In major questions doctrine cases, the question is not whether Congress constitutionally may delegate the power at issue, but whether Congress in fact delegated the power that the agency claims. *Id.* at 2614. If the power is major or if there is a reason to hesitate before concluding that the agency may do what it wants under the statute at issue, then Congress evidently must speak particularly clearly when choosing to delegate. *Id.* at 2607–08. The major questions doctrine "directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but instead to require explicit and specific congressional authorization for certain agency policies." Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming) (manuscript at 3–4), https://ssrn.com/abstract=4165724. What makes a delegation sufficiently "major," though, ultimately is up to the Court and is largely standardless. *See id.* The major questions doctrine thus provides a way around the nondelegation doctrine question. *See* Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 994 (2021) ("The legal fictions underlying the major questions doctrine (specifically, the 'major questions doctrine as *Chevron* step zero test') and Chief Justice Roberts' jurisdictional exception are poised to become the Court's new nondelegation tests.").

[17] *E.g.*, David Casazza, Note, *Liberty Requires Accountability: Checking Delegations to Independent Agencies*, 38 HARV. J.L. & PUB. POL'Y 729, 729–30 (2015) (asserting that "delegated rulemaking authority and for-cause removal protections unconstitutionally undermine political accountability and violate the separation of powers").

[18] Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 127–28 (2021).

would yet again be working to position itself as "standing outside of—indeed, above—separation-of-powers conflicts."[19]

As an institution, American courts have been profoundly altered by ideas about the courts. Judge Jeffrey Sutton writes that, "[i]n the zero-sum world of changes to American domestic power, the courts have been the net winners."[20] Congress has altered the courts' jurisdiction many times since it first created lower federal courts,[21] but judges play an important role in shaping courts as an institution. While judges lack the power to rewrite their own jurisdictional statutes, they exercise enormous power by choosing which ideas and assumptions about the courts and American politics are valid. Most importantly, over time, judges have constructed their own supremacy by endorsing the idea that they are the primary arbiter over foundational questions of constitutional politics.

This development did not happen by accident. The conditions that make today's nondelegation debate possible are the result of calculated moments of judicial institution building.[22] As this Article shows, Chief Justice William Howard Taft was instrumental not just in lobbying for the Court's power over its own docket and making the judiciary more hierarchical, but also in bolstering judicial power by endorsing ideas that justify the judiciary's centrality to American politics.[23]

This Article's focus on the nondelegation doctrine further illuminates the role of ideas in political change and bolsters our understanding of the courts' increasingly domineering role in American politics. The nondelegation doctrine is one of two primary targets of the Conservative Legal Movement's project to rein in an administrative state they see as unwieldy and unconstitutional.[24] The other targets are the various forms of interpretive deference courts give to

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[19] *Id.* at 128; s*ee also* GEORGE THOMAS, THE MADISONIAN CONSTITUTION 15–16 (2008).

[20] JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 13 (2021).

[21] *See, e.g.*, Judiciary (Evarts) Act of 1891, ch. 517, 26 Stat. 826; Judiciary Act of 1925 § 11, Pub. L. No. 68-415, 43 Stat. 936.

[22] *See* discussion *infra* Section IV.

[23] *Id.*

[24] *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 477 (2022).

agencies—principally *Chevron* deference[25] and *Auer/Seminole Rock* deference.[26]

This Article argues that, were courts to decide that the nondelegation doctrine should be more robust than it has ever been before, the courts would empower themselves by continuing to endorse the idea that courts, not legislatures or even voters, are the primary arbiters of constitutional change.[27] The irony, however, is that, in the event that courts decide not to change the nondelegation doctrine, they will still have empowered themselves.[28] This Article proceeds in three parts. First, it discusses the nondelegation doctrine in more detail by explaining its doctrinal operation as well as the current debates about its future, including how it became a target of the Conservative Legal Movement and other opponents of administrative governance. Second, it describes the phenomenon of judicial aggrandizement. While both Josh Chafetz and I have written about judicial aggrandizement,[29] legal scholars and political scientists have not yet theorized about how to understand it as a type of institutional change. This section suggests that judicial aggrandizement is best understood as a product of the influence of ideas on institutional change. Third, drawing on original research, this Article describes a formative moment in the development of the American separation-of-powers system—namely, when Chief Justice William Howard Taft, operating from a set of ideas about the courts' proper role in American constitutional politics, set about aggrandizing the courts, especially the Supreme Court, through a series of decisions that profoundly reshaped not just American law, but constitutional politics more generally. By revealing how Taft's ideas about judicial supremacy influence the current nondelegation doctrine, this Article shows how, were today's Supreme Court to decide they should wield the nondelegation doctrine to scrutinize congressional enactments more closely, it would only empower itself. While the

[25] Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[26] Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[27] *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 288 (2021).

[28] This is, and would be, true irrespective of the Court's decision to invoke the major questions doctrine. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[29] *See* Chafetz, *supra* note 18, at 129; Allen Sumrall, *The Supreme Court is Aggrandizing Itself and the Presidency, in That Order*, HOUSE DIVIDED 129 (July 17, 2020), https://ahousedividedapd.com/2020/07/17/the-supreme-court-is-aggrandizing-itself-and-the-presidency-in-that-order/.

nondelegation example may look like a single-outcome study,[30] its aim is to offer a window into broader patterns of political development. The Article concludes by offering some thoughts on the future of the administrative state and the increasingly dominating role that courts play in American politics.

II. THE NONDELEGATION DOCTRINE AND THE ADMINISTRATIVE STATE

The nondelegation doctrine bars a branch of government—typically Congress—from giving away its lawmaking authority.[31] Proponents of the nondelegation doctrine believe, therefore, that it is an appropriate legal mechanism to protect the sanctity of the separation of powers.[32] In theory, the nondelegation doctrine prevents Congress from abdicating its duty to govern by giving away all its constitutional authority to someone or something else.[33] Without some version of the nondelegation doctrine, Congress could "permanently cut itself out of the constitutional design."[34] As a result, many who believe that administrative agencies in their current form are unwise or unconstitutional think that the nondelegation doctrine can rein in runaway administrative governance.

Opponents of the modern bureaucracy, particularly those who are part of the Conservative Legal Movement, tend to endorse a particular vision of the separation of powers. They see the separation of powers not as a principle that produces better government but as an end in itself.[35] These opponents see the branches of government as largely distinct, separate entities (mostly) hermetically sealed off

[30] *See* John Gerring, *Single-Outcome Studies: A Methodological Primer*, 21 INT'L SOCIO. 707, 710 (2006).

[31] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

[32] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131–36 (2019) (Gorsuch, J., dissenting).

[33] *See* Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363, 373–74 (2019).

[34] Mortenson & Bagley, *supra* note 27, at 282–83.

[35] *See, e.g.*, Redish, *supra* note 33, at 383–87, 391–93 (explaining "[w]hen Congress delegates its legislative power to the executive branch, the Constitution's separation of powers collapses, as the same body can both proscribe and enforce the law"); Casazza, *supra* note 17, at 745 (worrying that the Supreme Court permitting the other branches to aggrandize themselves "underestimates the threat to . . . the separation of powers").

from one another.[36] Moreover, these opponents see separation of powers as a doctrine that courts can enforce, rather than a principle of the constitutional system.[37] Interbranch contestation is a basic feature of a separation-of-powers system, but proponents of today's nondelegation doctrine assume instead that courts are exercising their proper judicial function when they prevent interbranch contestation, unless it is done within the bounds of the courts' rules.[38] Those who think that courts should prevent Congress from delegating authority employ an assumption that stifles interbranch contestation in favor of legal settlement, rather than adopting a theoretically robust vision that grounds interbranch contestation in producing better policy outcomes.[39]

As the criticism goes, insofar as the administrative state exercises some combination of the "executive," "legislative," and "judicial" powers of the United States, its existence violates the Vesting Clauses[40] and the separation-of-powers system as a whole.[41] Importantly, however, the

[36] *See, e.g.*, Redish, *supra* note 33, at 384 (contending that James Madison recognized that a branch cannot exercise another's "whole" power). These opponents tend to assume that "power" means a legal power in the sense that some positive law authorizes someone to do something, not "power" in the sense of persuasion, coercion, or agenda-setting. *E.g.*, Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254–55 (2010). For these opponents, this assumption does enormous work but is unexplained. *Id.*; *see also* John F. Manning, *The Supreme Court 2013 Term Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 32, 43–48 (2014) (observing that the Rehnquist Court and the Roberts Court have "invalidated acts of Congress based on the Court's high-level functional assessment of what separation of powers requires . . . rather than deferring to Congress's contrary judgment").

[37] There is an important conceptual distinction between the separation-of-powers principles that undergird the Constitution and the separation-of-powers doctrine that courts enforce. *See* JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 42 (1987) (explaining that the term "separation of powers" has "obstructed the understanding of the extent to which different structures were designed to give each branch the special quality needed to secure its governmental objectives"); Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, *in* THE CONSTITUTIONAL PRESIDENCY 229–46 (Jeffrey K. Tulis & Joseph M. Bessette, eds., 2009); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

[38] Daphna Renan, *"Institutional Settlement" in a Provisional Constitutional Order*, 108 CALIF. L. REV. 1995, 1999 (2020).

[39] *See* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY (2013); Tara Ginnane, *Separation of Powers: Legitimacy, Not Liberty*, 53 POLITY 132, 132–59 (2020); GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 5 (2009).

[40] U.S. CONST. art. I, § 1; U.S. CONST. art II, § 1, cl. 1; U.S. CONST. art. III, § 1, cl. 1.

[41] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 541–665 (1994).

Conservative Legal Movement and other opponents of administrative governance have chosen the courts, rather than Congress, as their champion.[42] Although they could try to convince Congress to rewrite agency organic statutes—the very statutes that unconstitutionally delegate "legislative [p]ower[]"[43]—they have chosen legal doctrine to be their weapon. This choice has important consequences.

A. The Nondelegation Doctrine

Justice Elena Kagan explained in *Gundy* that "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[44] Given the demands of flexibility and practicality that lawmaking requires, articulating a coherent nondelegation standard proves elusive. Today, the standard comes from the Supreme Court's 1928 decision in *J.W. Hampton, Jr., & Co. v. United States*.[45] In *J.W. Hampton*, in an opinion by Chief Justice William Howard Taft, the Court wrote that an act of delegation is permissible as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[46] In other words, if there is some "intelligible principle" that guides the agency's discretion when enforcing a statutory delegation, there is no nondelegation doctrine violation.[47] As the Supreme Court wrote in 2019, "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation."[48] Therefore, the constitutional question in a nondelegation inquiry is "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."[49] So, a court must first determine the statute's meaning. Once it does that, it can decide "whether the law sufficiently guides executive discretion to accord with Article I."[50]

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[42] *E.g.*, PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018) (arguing that the courts should deconstruct the administrative state by reviving the nondelegation doctrine and abrogating *Chevron* deference).

[43] U.S. CONST. art. I, § 1.

[44] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

[45] 276 U.S. 394 (1928).

[46] *Id.* at 400, 409.

[47] *Id.* at 409.

[48] *Gundy*, 139 S. Ct. at 2123.

[49] *Id.*

[50] *Id.* at 2119.

Further, as Justice Kagan wrote, "once a court interprets the statute, it may find that the constitutional question all but answers itself."[51]

Not everyone likes the existing nondelegation doctrine, however. Most of the confusion and contention over what the nondelegation doctrine is or should be stems from the phrase "legislative power" in Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."[52] Concurring in *Gundy*, Justice Alito asserted that the "Constitution confers on Congress certain 'legislative [p]owers,' and does not permit Congress to delegate them to another branch of Government."[53] Supporters of the nondelegation doctrine often see Article I's Vesting Clause as a constitutionalization of John Locke's idea that a legislature must not have the "power to transfer their Authority of making laws, and place it in other hands."[54]

But just what is "legislative power"? If "legislative power" means something substantive, like the power of lawmaking or creating generalized rules, and relies on an enumerated list of legal "powers" that are inherently, and qualitatively, legislative, then maybe there are grounds for a robust nondelegation doctrine. But if "legislative power" means nothing more than that which the legislature does, then the nondelegation doctrine seems baseless.

Determining just what "legislative power" means has proven troubling for legal scholars[55] and constitutional theorists[56] who focus

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[51] *Id.* at 2123.

[52] U.S. CONST. art. I, § 1.

[53] *Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring) (alteration in original) (internal citations omitted). Alito wrote, though, that, "since 1935, the [Supreme] Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Id.* at 2130–31. Justice Alito explains that he supports an effort to reconsider the current approach to the nondelegation doctrine, but thinks "it would be freakish to single out the provision at issue" in *Gundy* for "special treatment." *Id.* at 2131.

[54] JOHN LOCKE, THE SECOND TREATISE: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT (1690), reprinted in Two Treatises of Government and a Letter Concerning Toleration ch. XII, § 141, at 163 (Ian Shapiro, Ed., Yale Univ. Press 2003); *see, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297–99 (2003).

[55] *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Alexander & Prakash, *supra* note 54; Mortenson & Bagley, *supra* note 27.

[56] *See* JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986).

on the word "legislative" and not on the word "power." Legal scholars who believe that the historical record can reveal a clear definition of "legislative power" have had particular difficulty. Legal scholars Eric Posner and Adrian Vermeule, for example, believe the Constitution bars delegation of legislative power, but that a "statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power."[57] Rather, a statutory grant of authority to the executive "is not a *transfer* of legislative power, but an *exercise* of legislative power."[58] Others, notably Larry Alexander and Saikrishna Prakash, believe that both Locke and Article I's Vesting Clause mean the same thing when they refer to "legislative power": "the power to make rules for society."[59]

The nondelegation doctrine has proven especially controversial in the last few decades as "originalist" approaches to constitutional interpretation have become more popular.[60] Many originalists, as well as other proponents of a strong nondelegation doctrine, point to two related problems in contemporary constitutional practice. The first is the administrative state, which, they argue, cannot be found through a strict, legal reading of the Constitution of 1787.[61] Second, they see nonoriginalist approaches to constitutional interpretation as unprincipled, unpredictable, and motivated by personal policy preferences.[62] The nondelegation doctrine greases both sets of wheels. Supporters believe that a strong nondelegation doctrine is properly grounded in the Constitution—it does nothing more than restate what is plainly written in Article I.[63] As legal scholar Gary Lawson has written, "[i]f one is concerned about the original meaning of the Constitution, the widespread modern obsession with the nondelegation doctrine may

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[57] Posner & Vermeule, *supra* note 55, at 1723.

[58] *Id.*

[59] Alexander & Prakash, *supra* note 54, at 1320.

[60] *See* Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 3, 821–22 (2021).

[61] *See* Lawson, *supra* note 1, at 1231; *see also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

[62] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1997) (asserting that only originalism "meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy").

[63] *E.g.*, Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332–33 (2002).

have some justification."[64] Second, it would help rein in the administrative state, which, originalists assert, was created because Congress wrote laws giving away its legislative power to executive agencies run by unelected, unaccountable bureaucrats.[65] According to constitutional conservatives, a robust, court-enforced nondelegation doctrine would not only protect the sanctity of the separation of powers as they see it but would return to an original and "correct" understanding of the Constitution.[66] To again quote Gary Lawson, many originalists believe "[t]he nondelegation principle is grounded in the more basic principle of enumerated powers."[67]

One complication, though, is that nobody—including most originalists—seriously contends that Congress cannot give anything away. From a doctrinal perspective, rather than being a complete and total bar, the nondelegation doctrine only prevents Congress from giving away *too much* "legislative power," whatever that may mean. The Supreme Court has never held that the nondelegation doctrine prevents Congress from delegating anything at all,[68] nor would it—both practically and as a matter of constitutional theory—make sense for the Court to do that. The Supreme Court has held acts of congressional delegation unlawful only a handful of times. Cass Sunstein notes that the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)."[69] The Court, as well as most commentators, point to *Schechter Poultry Corp. v. United States*[70] and *Panama Refining Co. v. Ryan*,[71] both in 1935, as the only times the Court has found an act of delegation unlawful.[72] Although it may

[64] *Id.* at 334.

[65] *See id.* at 344–52.

[66] *See* Redish, *supra* note 33, at 383–87.

[67] Lawson, *supra* note 63, at 334.

[68] Mortenson & Bagley, *supra* note 27, at 278.

[69] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

[70] 295 U.S. 495, 551 (1935).

[71] 293 U.S. 388, 433 (1935).

[72] *See* Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) ("Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." (quoting Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989)). The Supreme Court is not correct, however. The Supreme Court has also concluded that Congress cannot delegate certain power over maritime law to the states. *See* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164–66 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924).

not be a surprise, the Court found a reason to strike down these laws when they were so poorly drafted.[73]

But the overall point holds. Although the Court has often declared that Congress cannot transfer to another branch "powers which are strictly and exclusively legislative,"[74] the Court has been quick to acknowledge that the Constitution does not deny "Congress the necessary resources of flexibility and practicality" it needs "to perform its function[s]."[75] Indeed, the Court acknowledged in 1989 that Congress may need the "assistance of its coordinate Branches," which may involve exercising its "ability to delegate power under broad general directives."[76] As a result, the nondelegation doctrine has never been a serious hurdle for Congress to contend with when it writes laws that give discretion to other governing bodies. Keith Whittington and Jason Iuliano have gone so far as to call the doctrine a "myth."[77] However, Whittingon and Iuiliano's assertion is misleading. It is not correct to say the doctrine does not exist. It clearly does—the Court today discusses it and cites relevant cases.[78] Rather, it is more accurate to say the doctrine does nothing to limit congressional delegation, although its principles can be found in other arenas of administrative law.[79] The doctrine itself may be utterly toothless, but it is a doctrine—one with an articulable standard—nonetheless.

As some scholars have noticed, the nondelegation doctrine is toothless because there is no reason for it to have teeth—the nondelegation doctrine never has been robust because it has no constitutional reason to be robust.[80] Historical inquiries into the nondelegation doctrine find that the doctrine is a low bar for Congress to clear because it has always been a low bar for Congress to clear. Legal

[73] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 36–37 (1998).

[74] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[75] Yakus v. United States, 321 U.S. 414, 425 (1944) (quoting Currin v. Wallace, 306 U.S. 1, 15 (1939)).

[76] Mistretta v. United States, 488 U.S. 361, 372 (1989).

[77] Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017).

[78] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019).

[79] *See* Sunstein, *supra* note 69, at 315–16 (arguing that the nondelegation doctrine has "been relocated" into a series of "'canons' of construction" that "forbid administrative agencies from making decisions on their own").

[80] *See* Mortenson & Bagley, *supra* note 27, at 285.

scholars Nicholas Bagley and Julian Mortenson's deep dive into the historical treatment of delegation and "legislative power" reveals that the nondelegation doctrine never had real teeth at least in part because the Framers were perfectly comfortable with Congress delegating some of its powers.[81]

B. The Constitutional Conservatives and the Administrative State

Not everyone agrees that the nondelegation doctrine should be such a low bar. Moreover, not everyone agrees that the "intelligible principle" test *is* a low bar. Many originalist arguments have found champions on the Supreme Court. Dissenting in *Gundy v. United States* in 2019, Justice Gorsuch suggests that the nondelegation doctrine needs reviving.[82] Chief Justice Roberts and Justice Thomas joined Gorsuch in accusing the plurality of "endors[ing] an extraconstitutional arrangement."[83] Gorsuch believes that the statute at issue "scrambles" the separation of powers as originally construed because it gives the executive branch the power to "write laws restricting . . . liberty."[84] Holding fast to an understanding of separation of powers that treats each branch as a hermetically sealed unit with discrete, definable "power," Gorsuch wrote that the "framers warned us against permitting" a blending of the powers as he defined them.[85] Crucially, according to Gorsuch, it is the judiciary's job to enforce the separation of powers, or, more accurately, to enforce his understanding of separation of powers: "enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone," as well as protecting individual liberties.[86]

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[81] *See id.* at 278–81; s*ee also* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021) (arguing "that the originalist skeptics of rulemaking are mistaken to say that no early congressional grant of rulemaking power was coercive and domestic . . . . [They overlook] the rulemaking power under the 'direct tax' of 1798."). *But see* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (asserting that there is evidence that "those first operating under the new Federal Constitution" endorsed at least some version of a nondelegation doctrine).

[82] *See Gundy*, 139 S. Ct. at 2134, 2148 (Gorsuch, J., dissenting).

[83] *Id.* at 2131.

[84] *Id.*

[85] *Id.* at 2135.

[86] *Id.*

Gorsuch made the same argument in January 2022.[87] In *National Federation of Independent Business v. Occupational Health and Safety Administration*, the Supreme Court stayed a rule promulgated by the Occupational Health and Safety Administration (OSHA) that required employers with at least 100 employees to ensure their workers either are fully vaccinated against COVID-19 or tested weekly.[88] The Supreme Court applied the major questions doctrine and concluded that the Occupational Health and Safety Act[89] does not authorize such a "significant encroachment into the lives—and health—of a vast number of employees."[90] According to the majority, COVID-19 "is not an *occupational* hazard," OSHA "has never before adopted a broad public health regulation of this kind," and, therefore, Congress "has not given [OSHA] the power to regulate [employees'] public health . . . simply because they work for employers with more than 100 employees."[91] Concurring, Justice Gorsuch wrote that the nondelegation doctrine is a "reason to apply the major questions doctrine."[92] According to Gorsuch, both the major questions doctrine and the nondelegation doctrine "are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic process the Constitution demands."[93]

Gorsuch was not the first to articulate this separation-of-powers criticism of the administrative state. He was not even the first member of the Court to do so. Justice Antonin Scalia dissented in *Mistretta v. United States*[94] in 1988, explaining that he "can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."[95] Scalia chastised the United States Sentencing Commission for issuing guidelines imbued with "value judgments and policy assessments."[96] Scalia asserted that, "[e]xcept in a few areas constitutionally committed

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87 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Health & Safety Admin., 142 S. Ct. 661, 668–70 (2022) (Gorsuch, J., concurring).

88 *Id.* at 662–63 (per curiam).

89 29 U.S.C. § 651.

90 *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (per curiam).

91 *Id.* at 665–66.

92 *Id.* at 668 (Gorsuch, J., concurring).

93 *Id.*

94 488 U.S. 361 (1989).

95 *Id.* at 413 (Scalia, J., dissenting).

96 *Id.* at 414.

to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."[97] In a striking break from contemporary proponents of the nondelegation doctrine, Scalia wrote that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[98]

In 2001, Justice Thomas offered a somewhat different criticism in his concurring opinion in *Whitman v. American Trucking Associations*,[99] indicating that he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[100] Thomas's opinion in *American Trucking*,[101] Gorsuch's *Gundy* opinion,[102] and Kavanaugh's short opinion in *Paul v. United States*[103] are harbingers of the influence of the growing movement among constitutional conservatives to use doctrine to reshape American constitutional politics.[104] Part of burgeoning American movement conservatism, the Conservative Legal Movement took shape in the 1960s, but did not gain momentum until the mid-1980s.[105] If it is to be taken at its word, it is animated less by a series of explicit policy goals than by constitutional principles.[106] The Federalist Society, the nexus of the Conservative Legal Movement, declares itself not to be an ideological or partisan organization, but an academic organization dedicated to rediscovering forgotten constitutional principles.[107] One of the Federalist Society's darlings is a vision

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[97] *Id.* at 415.

[98] *Id.*

[99] 531 U.S. 457 (2001).

[100] *Id.* at 487 (Thomas, J., concurring).

[101] *Id.* at 486–87.

[102] Gundy v. United States, 139 S. Ct. 2116, 2131–42 (Gorsuch, J., dissenting).

[103] 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

[104] *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 220–21 (2008) (describing the shift in conservative efforts to influence American politics through the courts beginning in the late 1980's); *see also* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 1–2, 4 (Oxford Univ. Press, Inc. ed., 2015) (detailing the influence of the Federalist Society in the Supreme Court's Constitutional Decisions); TerBeek, *supra* note 60, at 821–22.

[105] *See* KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION 28 (2019); *see also* TELES, *supra* note 104, at 1–2, 4.

[106] TerBeek, *supra* note 60, at 822, 828.

[107] HOLLIS-BRUSKY, *supra* note 104, at 1–4.

of the separation of powers that sees the branches as largely distinct, separate entities (mostly) hermetically sealed off from one another.[108]

American movement conservatism has long been suspicious of the administrative state and has yearned for an empirically inaccurate and historically flawed view of Congress and legislative politics.[109] Conservatives see the administrative state as a regulatory burden that treads on individual autonomy.[110] They see bureaucracy as a form of arbitrary power, one "rife with inefficiencies and redistribution."[111] So, movement conservatism targeted the administrative state. Rather than setting its sight on rewriting the statutes that create agencies, the Conservative Legal Movement has declared its nemeses to be the doctrinal mechanisms that allow the administrative state to function: nondelegation and *Chevron* deference.[112] The stated reasoning is that delegation causes "[c]ongressional decline or fecklessness," and "the only tonic is judicial interventions to reorder congressional incentives."[113] Contemporary conservative judges, many of whom are products of the Federalist Society and its expansive network,[114] have become vehicles for the translation of these conservative ideas into doctrine. The result of this ongoing project is not a return to some eighteenth-

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[108] *See, e.g.*, Ryan J. Watson & James M. Burnham, *Separation of Powers: A Primer*, FEDERALIST SOC'Y (Sept. 9, 2015), https://fedsoc.org/commentary/fedsoc-blog/separation-of-powers-a-primer ("The Founders created this system by dividing the government's powers among, and even within, three separate and competing branches."); *see also Separation of Powers*, FEDERALIST SOC'Y, https://fedsoc.org/no86/module/separation-of-powers (last visited Dec. 27, 2022) ("The Founding Fathers feared the concentration of power in one body, and they were deliberate about the powers they gave to each of the branches."). This version of the separation of powers is not faithful to the Constitution's political architecture and is the result of a deliberately misconstrued version of *The Federalist*. *See* Jeffrey K. Tulis & Nicole Mellow, *The Anti-Federal Appropriation*, 3 AM. POL. THOUGHT 157, 160–61 (2014).

[109] Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. (forthcoming 2023) (manuscript at 9–10), https://ssrn.com/abstract=4033753.

[110] *See id.*

[111] KERSCH, *supra* note 105, at 153.

[112] Metzger, *supra* note 4, at 15, 17.

[113] Baumann, *supra* note 109, (manuscript at 9). Notably, however, the rationale does not stand up to empirical scrutiny. *See id.* (manuscript at 55); *see also* Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication"*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 7–11), https://ssrn.com/abstract=4045079.

[114] HOLLIS-BRUSKY, *supra* note 104, at 9–10.

century, original understanding of the separation-of-powers *system*.[115] Instead, the result is, and will continue to be, a more powerful judiciary enforcing a separation-of-powers *doctrine* as courts understand it.

III. JUDICIAL AGGRANDIZEMENT AND INSTITUTIONAL CHANGE

A curious feature of courts in the United States is that they can empower themselves through their decision-making. Generations of Americans have been taught John Hart Ely's argument that courts are necessary to protect against majority tyranny.[116] The fascination with courts that pervades American political discourse and limits its political imagination has, however, largely overlooked the extent to which it allows judges enormous discretion to empower themselves. As Yvonne Tew points out, "[a]s legal actors, courts expand power through adopting self-empowering doctrinal mechanisms that enlarge their scope of authority."[117] Judicial self-aggrandizement is best understood as a mechanism of institutional or constitutional change. Importantly, judicial decisions can reify courts as political actors even though their decisions do not result in any formal institutional change, like a new jurisdictional statute or increase in resources.[118] Some judicial decisions are both motivated by, and help to reaffirm, the idea that courts are the proper venues to settle certain disputes. In an especially litigious and court-centric political culture like the one in the United States,[119] judicial self-aggrandizement is welcomed and often goes unnoticed.

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[115] For an elaboration of the difference between the separation-of-powers system and the separation-of-powers doctrine, see TULIS, *supra* note 37, at 26, 41–42.

[116] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).

[117] Yvonne Tew, *Strategic Judicial Empowerment*, AM. J. COMPAR. L. (forthcoming) (manuscript at 22), https://ssrn.com/abstract=3323022.

[118] *See generally* DANIEL M. BRINKS ET AL., UNDERSTANDING INSTITUTIONAL WEAKNESS: POWER AND DESIGN IN LATIN AMERICAN INSTITUTIONS 27 (2019) (explaining that "[a]uthoritative interpretation in response to unexpected contingencies and arising exigencies can add needed flexibility to an institutional framework" and that "judicial interpretation may merely provide 'legal' cover and legitimacy for what is clearly a rule violation, or may be manipulated to produce frequent changes in response to changing preferences").

[119] *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 90 (Henry Reeve trans., D. Appleton & Co., 1899). To be sure, the claim is not that Americans sue too much or that their damages awards are too extravagant. *See* DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE 1 (2016); *see also* WILLIAM HALTOM & MICHAEL

A. Aggrandizement and the Separation of Powers

In the American context, judicial aggrandizement is especially visible in the American separation-of-powers domain. Consider two separation-of-powers cases decided in 2020. As both a candidate and as president, Donald Trump refused to adhere to the custom among presidential candidates of releasing his tax returns.[120] Seeking to answer questions regarding possible criminal activity, Congress and a state grand jury in New York subpoenaed his financial records.[121] Rather than complying with the valid subpoenas or taking it up with those who issued them, Trump ran to court. In two remarkable cases, *Trump v. Vance*[122] and *Trump v. Mazars USA, LLP*,[123] the Supreme Court found the subpoenas could go forward subject to a series of conditions and considerations. Notably, Chief Justice Roberts acknowledged that this was a novel scenario, and one in which the Supreme Court need not be involved.[124] Roberts pointed out that, "[h]istorically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'"[125] Despite this, the Court still found a way for courts to police the process of congressional subpoenas (*Mazars*[126]) and state subpoenas (*Vance*[127]) to sitting presidents.[128]

Josh Chafetz and I have both described *Vance* and *Mazars* as examples of "judicial self-aggrandizement."[129] This interpretation is largely missed by contemporary Supreme Court observers. Most commentators focused on the doctrinal outcome in *Vance* and *Mazars*.

MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 6 (2004). Rather, the claim is that law, rights, and legal remedies permeate the American political psyche.

[120] *See* Julie Hirshfeld Davis, *Trump Won't Release His Tax Returns*, N.Y. TIMES (Jan. 22, 2017), https://www.nytimes.com/2017/01/22/us/politics/donald-trump-tax-returns.html.

[121] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026 (2020); Trump v. Vance, 140 S. Ct. 2412, 2420 (2020).

[122] 140 S. Ct. at 2429.

[123] 140 S. Ct. at 2035–36.

[124] *See id.* at 2035.

[125] *Id.* at 2029 (quoting *Hearings on S. 2170 Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov't Operations*, 94th Cong., 1st Sess., 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns.)).

[126] 140 S. Ct. 2019.

[127] 140 S. Ct. 2412.

[128] *See* Sumrall, *supra* note 29.

[129] Chafetz, *supra* note 18; Sumrall, *supra* note 29.

The *New York Times* plastered "President Is Not 'Above the Law,' Justices Decide" across its front page.[130] The most obvious interpretation of these cases is that the President is not above the law because the subpoenas were not categorically invalid as a result of some presidential immunity. There is truth in this characterization, but it is incomplete. This interpretation misses an important feature regarding the Court's institutional self-promotion. These cases also say something about judicial power. The Court did not outright reject the theory of the presidency that Trump's lawyers put forward. Chief Justice Roberts's opinion "was careful to leave some room for Trump's theory, but only when the courts say so."[131] These cases offered the Court a "unique opportunity to increase its own power by adopting part of Trump's theory."[132] Similarly, Chafetz argues that these cases show a "judicial disdain for Congress and its representative role" and, perhaps more dramatically, "an architectonic project of judicial empowerment."[133] In both of these cases, the courts "worked assiduously to position themselves as standing outside of—indeed above—separation-of-powers conflicts. The judiciary, in its own self-presentation, is simply a neutral arbiter between the contending sides."[134] By treating separation of powers not as a principle that explains aspects of our constitutional design but as a rule for the judiciary to enforce, courts gain institutional power.[135]

Judicial aggrandizement is actively ongoing. Justice Gorsuch began his concurrence in *National Federation of Independent Business v. Occupational Health and Safety Administration* by asserting that

[130] Adam Liptak, *President Is Not 'Above the Law,' Justices Decide: Court Backs a Subpoena on Trump's Tax Records, With Some Limits*, N.Y. TIMES, A1 (July 10, 2020), https://static01.nyt.com/images/2020/07/10/nytfrontpage/scan.pdf.

[131] Sumrall, *supra* note 29.

[132] *Id.*

[133] Chafetz, *supra* note 18, at 127.

[134] *Id.* at 128.

[135] *Id.* Subpoenas are not the only separation-of-powers issue the Court seeks to police. There are of course numerous other issues that implicate separation-of-powers concerns that the judiciary has sought to police—the legislative veto, the powers and duties of courts, executive agreements and treaties, appointments power, and the structure and power of executive agencies. Even within separation-of-powers litigation, however, there has been a subtle but quite hazy development from declaring certain rules or practices to be unconstitutional—the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), for example—to creating standards that require future court intervention. Doctrinally, in these cases there is ample room for future court involvement. This is exactly what the Court did in *Vance* and *Mazars*. Chafetz, *supra* note 18, at 127.

the core question before the Court is: "[w]ho decides?"[136] Justice Gorsuch asked whether "an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people," or whether "that work belongs to the state and local governments across the country and the people's elected representatives in Congress."[137] Gorsuch asserted that, although "[t]his Court is not a public health authority," it is "charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land."[138] Although Gorsuch suggests that the two possible answers to his "[w]ho decides"[139] question are an agency or legislatures, the Court's opinions make the answer obvious: the Court. The bottom line of *National Federation of Independent Business v. Occupational Health and Safety Administration*,[140] as Justice Gorsuch's concurrence highlights, is that the rest of the United States government cannot govern unless the Court permits it. By asserting that the Court gets to decide who decides, the Court glosses over its self-aggrandizing tendency to assert that it decides. The underlying premise is that the

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[136] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Health & Safety Admin., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

[137] *Id.* In dissent, Justice Sotomayor, Justice Kagan, and Justice Breyer pointed out that Justice Gorsuch's question has a third answer that he does not acknowledge: "Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?" *Id.* at 676. (Breyer, Sotomayor, and Kagan, JJ., dissenting). The joint dissent concluded by arguing that the Court "usurps a decision that rightfully belongs to others." *Id.* at 677.

Nathan Richardson argues that, in the COVID cases, the Court "arrogated to itself broad discretionary power to reject delegations of authority to administrative agencies without openly altering any doctrinal principle." Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 U. VA. L. REV. ONLINE 174, 175–76 (2022). Richardson correctly observes that the Court arrogated broad discretionary power to itself, but it is not clear that, in Richardson's telling, the Court's apparent elevation of the major questions doctrine into a substantive canon of construction did not openly alter any doctrinal principle. Richardson's assertion risks downplaying the Courts' role as an institution, focusing instead on the doctrinal developments (or lack thereof). Whether the major questions doctrine is a discrete doctrine or a canon of construction for when to apply the nondelegation doctrine is arguably beside the point, when the Court has openly created a "new veto point." *Id.* at 201.

[138] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring).

[139] *Id.*

[140] *Id.*

Court—and the judiciary as a whole—is somehow not part of the governing structure because it "stands outside of, and indeed above, the structures and processes of governance."[141]

Judicial aggrandizement appears most strikingly in the separation-of-powers domain. In the United States today, courts are no longer a coequal part of the separation-of-powers system. Instead, courts are supreme and decide when other political institutions act unconstitutionally by violating the courts' rules, deciding which institution is allowed to govern and how. As the Supreme Court wrote in 2020, when "a provision violates the separation of powers, it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."[142] We seem to have forgotten that the Constitution contemplates a separation-of-powers *system*, not a rigid set of procedures with the Supreme Court policing the boundary between branches hermetically sealed off from one another. For many lawyers, legal academics, and political scientists, this development is difficult to see. It is easy to conflate the courts' role as the separation-of-powers police with judicial review or judicial supremacy. For example, this development is not an example of policy drift, where legislative inaction leads other actors to find new ways to use an existing policy that remains formally static.[143] Examining the Supreme Court's role in policy drift, political scientist Warren Snead observes that political actors sometimes turn to the courts to subvert the pattern of legislative inaction, which creates opportunities for the Court to "interpret statutory language," thus encouraging or discouraging policy drift.[144] The development at issue here is different. Exposing opportunities for statutory interpretation is not the issue here, as the nondelegation doctrine is not based in any statute.[145] Rather, the broader development is marked by an increase in political actors using the courts to push for political and policy change. Whether courts have the final say over constitutional

141 Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 75 (2015).

142 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2196 (2020) (quoting Bowsher v. Synar, 478 U.S. 714, 727 n. 5 (1986)).

143 Warren Snead, *The Supreme Court as an Agent of Policy Drift: The Case of the NLRA*, AM. POL. SCI. REV. 1 (2022) (explaining how policy drift "illuminates the transformative effect of legislative *inaction* and the importance of postenactment politics by describing how policies may remain formally static but produce new outcomes due to a dynamic external environment").

144 *Id.*

145 *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409–11 (1928).

meaning means little if the courts are not asked to exercise this authority or choose not to exercise it. Constitutional supremacy is beside the point if someone else holds political power.

Whether or not legislative inaction is partially to blame for actors turning to the courts, there is no constitutional reason for the courts to have aggrandized themselves so thoroughly and consistently. It is one thing for courts to have the power of judicial review. It is quite another for them also to be the institutional target of social movements seeking dramatic constitutional change. It is one thing for courts to say a law violates the Constitution. It is quite another for the courts to pretend they are not a part of the separation of powers, and to instead assert that they are its final arbiters. It is one thing for non-judicial political actors to defer to courts in the realm of constitutional or statutory interpretation because it offers a degree of insulation from political accountability.[146] It is quite another for courts to police the boundaries between branches, especially in ways that aggrandize themselves.

B. Conceptualizing Judicial Aggrandizement

Conceptualizing judicial aggrandizement proves difficult, however. For example, Yvonne Tew examines four strategies of judicial self-empowerment, which are mechanisms that judges use to enhance "the judiciary's own institutional empowerment vis-a-vis other branches of government."[147] Moreover, Tew explicitly cabins her analysis to examples of "particular instances of judicial self-empowerment at a punctuated equilibrium in time, rather than with the evolutionary accretion of judicial power over an extended period."[148] Tew therefore leaves little room to ask how courts can subtly empower themselves by reinforcing the ideas and assumptions they rely on to issue certain decisions. In effect, Tew almost closes off our capacity to assess *Vance* and *Mazars* as examples of judicial self-aggrandizement. More directly, Tew's definition of judicial power is overbroad. Tew defines "judicial power" as "the strength of a court's ability to assert itself against the

[146] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005).

[147] Tew, *supra* note 117, at 21.

[148] *Id.* at 21.

governing political branches and to affect the outcomes of constitutionally and politically significant issues."[149] Tew's definition does not allow us to distinguish between an example of courts signaling to Congress that it should give the judiciary more jurisdiction and a court issuing a decision that few realize empowers itself.

By contrast, Josh Chafetz explains that courts can aggrandize themselves by presenting courts to be "simply a neutral arbiter between the contending sides."[150] "The judiciary's self-presentation as standing outside of the interbranch contest for power is meant to make it appear more trustworthy, and the courts therefore accrue more power precisely to the extent that the public buys into this self-presentation."[151] For Chafetz, judicial power stems from public support, and is not directly a function of the courts' legal authority.[152] A judge's motivations for judicial aggrandizement are not clearly in the picture, nor are the assumptions the courts adopt to attract public support.

Compare Chafetz's and Tew's descriptions of judicial aggrandizement with the way that existing studies describe the judiciary's institutional change. Justin Crowe, for example, finds that the judiciary "was not born independent, autonomous, and powerful," but developed through a "process that was both politically determined and politically consequential."[153] In a nod to political scientist Stephen Skowronek's definition of state building,[154] Crowe defines "judicial institution building" as "*the creation, consolidation, expansion, or reduction of the structural and institutional capacities needed to respond to and intervene in the political environment*."[155] Crowe focuses on "three building blocks"—"functions," "individuals," and "resources"—that he says are "both common and essential to all political institutions."[156] "Functions" denotes the "number and types of cases" that courts hear, "as well as the manner in which those courts are empowered, encouraged, and permitted to dispose of them."[157] "Individuals" denotes the number and

[149] *Id.*

[150] Chafetz, *supra* note 18, at 128.

[151] *Id.*

[152] *Id.*

[153] JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 8 (2012).

[154] *See* SKOWRONEK, *supra* note 6, at 10.

[155] CROWE, *supra* note 153, at 8.

[156] *Id.* at 8–9.

[157] *Id.* at 9 n.33.

location of judges and other judicial personnel . . . as well as the way in which said personnel are hired, fired, organized, and supervised."[158] "Resources" denotes the "amount, source, and type of appropriations granted to the judiciary . . . as well as the legal materials and the availability of office space, courtrooms, and courthouses."[159] Although Crowe's work helps to uncover how the American judiciary was constructed and molded through time, it cannot account for the ways in which the judiciary aggrandizes itself through its decisions. While Crowe is concerned with institutions as sets of rules and material capacities,[160] judges can shape—and have shaped—the judiciary's role in American politics through their decisions. As political scientists Daniel Brinks and Abby Blass point out correctly, however, "actual judicial power is not simply a function of institutional design, just as exercised executive or legislative power is not purely a function of institutional design."[161]

C. Ideas, Power, and Judicial Aggrandizement

Ideas and assumptions can shape political institutions.[162] Ideas structure actor preferences or can be institutionalized in the form of rule or policy change.[163] However, they can also explain why one policy or institution was chosen over another, or why certain political developments did not happen.[164] Even if an idea is not causal or if an actor does not act solely on an idea, ideas can structure debates

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[158] *Id.* at 9 n.34.

[159] *Id.* at 9 n.35.

[160] *See id.* at 8–9.

[161] Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT'L J. CONST. L. 296, 304 (2017).

[162] *See* JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 1 (2021); JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS 2–3 (2018); Allen C. Sumrall, *The Law Incongruous Ideas of Impeachment: "Impeachable Offenses" and the Constitutional Order*, 50 PRESIDENTIAL STUD. Q. 948, 960 (2020); Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697, 697–98 (2002); Rogers M. Smith, *Ideas and the Spiral of Politics: The Place of American Political Thought in American Political Development*, 3 AM. POL. THOUGHT 126, 126–36 (2014); John A. Dearborn, *The "Proper Organs" for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921*, 31 J. POL'Y HIST. 1, 1–41 (2019); J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM, at xxvii (1994).

[163] *See* DEARBORN, *supra* note 162, at 24–25; *see also* Smith, *supra* note 162, at 129–31.

[164] *See* DEARBORN, *supra* note 162, at 32–33.

or make certain assumptions more tenable to political conversation.[165] As Suzanne Mettler and Richard Valelly note, "political ideas matter—that is, . . . they are independent forces in politics and in the life of the American regime."[166]

Ideas have long been marginalized in the study of politics in favor of interests, preferences, or rules.[167] Their influence has often been presumed, but, because they are difficult to conceptualize and measure, they have often been tossed aside in favor of the study of interests or institutions.[168] Recent scholarship, especially in the field of political development, has begun to explore how ideas shape political outcomes. An idea is a "premise about how something in the world works, an assumption that an actor brings to bear on political affairs."[169] Ideas are not policy preferences or interests.

Political development scholars have begun to develop theoretical frameworks for deriving hypotheses about the impact of ideas on politics and political change.[170] Preliminary evidence demonstrates that ideas do shape political outcomes.[171] Political scientists Robert Henry Cox and Daniel Béland argue that influential political actors' ideas "can form their interests and also inspire their efforts to build new or transform existing institutions."[172] Debates over the meaning and applicability of ideas "are at the heart of politics."[173] They go on to explain that taking the ideational perspective means that "politics is more than the contest over who gets what, when and how, as Harold Lasswell famously put it. Politics is also about what is just, fair, and legitimate."[174]

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[165] Sumrall, *supra* note 162, at 960–63.

[166] RICHARD M. VALELLY & SUZANNE METTLER, *Ideas Matter*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 6 (Richard M. Valelly et al. eds., 2016).

[167] *See* Smith, *supra* note 162, at 126–27; DEARBORN, *supra* note 162, at 23–26.

[168] *See* RICHARDSON DILWORTH & TIMOTHY P. R. WEAVER, HOW IDEAS SHAPE URBAN POLITICAL DEVELOPMENT 1–4 (Richardson Dilworth & Timothy P. R. Weaver eds., 2020).

[169] DEARBORN, *supra* note 162, at 24.

[170] *E.g.*, see materials cited *supra* note 162; DEARBORN, *supra* note 162, at 32–33.

[171] *See, e.g.*, DEARBORN, *supra* note 162, at 25.

[172] Robert Henry Cox & Daniel Béland, *Preface: Urban Political Development and the Politics of Ideas* of HOW IDEAS SHAPE URBAN POLITICAL DEVELOPMENT, at xi (Richardson Dilworth & Timothy P. R. Weaver eds., 2020).

[173] *Id.* at xii.

[174] *Id.*

More tangibly, political scientist John Dearborn demonstrates that the development of key aspects of the institutional presidency rested on the changing salience of the idea that the president represents the people as a whole.[175] Dearborn develops a framework to think about how ideas can impact institutional development and durability.[176] He argues that there are two categories of ideas that are important for institutional development: those that impact institutional *choice*—whether an idea is "responsible for the choice of a set of institutional arrangements"[177]—and those that influence institutional *durability*—the extent to which the "durability of an institution or policy depend[s] on the continued belief that the ideas underlying it are legitimate."[178] In his study of the institutional presidency, Dearborn finds that the legitimacy of the idea of presidential representation was critical.[179] Although American political institutions are historically stable, their operation and durability may rest on "implicit and explicit causal beliefs held by key actors about how particular institutional arrangements will function."[180] Dearborn asks: "how do ideas impact political change?"[181] He posits that ideas can act as background variables that support and structure political developments.[182] Whether and how they do is an empirical question.[183]

Most studies of institutional change and characterizations of institutional aggrandizement focus on formal institutional change like rule changes.[184] They suggest that an institution becomes more powerful when it gains new legal authority.[185] For example, Crowe shows how Taft helped to make the Court more powerful by pushing through formal rules changes that gave the Justices broader certiorari jurisdiction.[186] Similarly, Dearborn shows how the Executive Branch was empowered over time by Congress authorizing presidential

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[175] DEARBORN, *supra* note 162, at 32–37.

[176] *See id.* at 24–25.

[177] *Id.* at 25–26.

[178] *Id.* at 30.

[179] *Id.* at 38–39.

[180] *Id.* at 24.

[181] *Id.* at 23.

[182] *See id.* at 23–24.

[183] *Id.* at 32.

[184] *See, e.g.*, CROWE, *supra* note 153, at 8–9.

[185] *See, e.g.*, Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POLS. 73, 73–75 (2007).

[186] *Id.* at 73–74.

discretion in the Budget and Accounting Act of 1921,[187] the Reciprocal Trade Agreements Act of 1934,[188] the Reorganization Act of 1939,[189] and the Employment Act of 1946.[190] Judicial aggrandizement is different. While formal rule change can empower the judiciary,[191] judicial self-aggrandizement through doctrine is qualitatively distinct. Judicial aggrandizement is similar to patterns of institutional drift—when "rules remain formally the same but their impact changes as a result of shifts in external conditions"—or institutional conversion—when "rules remain formally the same but are interpreted and enacted in new ways."[192] Judges alter doctrine in ways that empower themselves by building on existing assumptions—that is, widely held ideas—that they can decide the dispute before them, and then deploy similar ideas in a way that reaffirms and reifies those ideas. The result is a more powerful judiciary that has the same governing rules, people, and resources.

Judicial self-aggrandizement involves courts deploying ideational resources to enhance their own power. "Power" is a slippery concept, however. Political scientists typically talk about power as having three dimensions, or "faces."[193] The first face is about who prevails in open political conflict; the second is about the control of the issue or policy agenda; the third, the most slippery, "relates to the ability to shape

[187] Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20; DEARBORN, *supra* note 162, at 37.

[188] Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943; DEARBORN, *supra* note 162, at 37.

[189] Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 56; DEARBORN, *supra* note 162, at 37; *see* John A. Dearborn, The Historical Presidency*: The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939*, 49 PRESIDENTIAL STUD. Q. 185 (2018).

[190] Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23; DEARBORN, *supra* note 162, at 37.

[191] *See* Kevin J. Burns, *Chief Justice as Chief Executive: Taft's Judicial Statesmanship*, 43 J. SUP. CT. HIST. 47, 47–49 (2018) (observing that Taft's judicial reforms "greatly increased the power of the Supreme Court").

[192] JAMES MAHONEY & KATHLEEN THELEN, EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 17 (2009); *see also* BRINKS ET AL., *supra* note 118, at 5.

[193] *See* ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 102–62 (David Horne ed., 1961); Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 950 (1962); JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY 12 (1982); STEVEN LUKES, POWER: A RADICAL VIEW 25 (1st ed. 1974).

the political opinions, identities, and preferences of others."[194] Judicial self-aggrandizement involves exercising all three faces of power, but the most important for the aggrandizement dynamic is the third. By deploying ideational resources, courts reaffirm their own centrality and importance. In their opinions, judges can adopt certain assumptions, emphasize certain ideas over others, and endorse patterns of reasoning that shape others' ideas about how courts can and should operate.[195]

What, then, is judicial aggrandizement? Chafetz likens it to a form of popular support.[196] Chafetz contends that courts aggrandize themselves by convincing the public to see courts as above separation-of-powers disputes.[197] Although Chafetz's definition risks defining judicial aggrandizement as the process by which it occurs, his definition is accurate. Chafetz's definition does not easily square with existing understandings of institutional change, however, and assumes a link between court decisions and the broader public learning about and accepting those decisions, a link that warrants empirical scrutiny. Capturing judicial aggrandizement more completely means understanding it as a form of institutional change animated and structured by ideas. Importantly, for Chafetz's observations about *Vance* and *Mazars* to be correct,[198] he does not need to argue that members of the Court believed they were participating in a self-aggrandizing project. Rather, even if the Justices themselves are not doing it deliberately or are not even consciously aware of it, certain assumptions structured the Court's decisions—assumptions about the Court's (and the lower courts') proper role in the constitutional system. Tew correctly points out that courts can "expand power through adopting self-empowering doctrinal mechanisms that enlarge their scope of authority," but does not account for the ways in which those mechanisms also reinforce the idea that the courts are the proper arbiters of the disputes for which the doctrine is created.[199] In fact, both historical and ideational

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[194] MATTHEW J. LACOMBE, FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE 42 (2021).

[195] *Cf.* GARY JEFFERY JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION 184 (2020) (arguing that "a judicial decision can completely transform the core values of the constitutional order").

[196] Chafetz, *supra* note 18, at 128.

[197] *Id.*

[198] *Id.* at 126–28.

[199] Tew, *supra* note 117, at 22.

factors—"shared experiences, beliefs, identities, ideologies, and interpretations of events and sequences of events at home or abroad"—affect how actors reshape and empower institutions, especially courts.[200] Judicial aggrandizement, therefore, is the practice of courts' continued embrace of ideas and assumptions that support their role as the final arbiter of political disputes. In other words, courts can aggrandize themselves by embracing and deploying—explicitly or implicitly—ideas that suggest courts, rather than other political institutions, are the proper venue for certain questions or disputes. Courts can also continue to aggrandize themselves by reaffirming certain ideas that make those earlier developments durable.

What does this look like in practice? Before we can fully understand the ramifications of the court inventing a robust nondelegation doctrine, we need to see what ideas structured the choice to make the courts the arbiters of separation-of-powers disputes in the first place. In addition, this dynamic illustrates how today's nondelegation debate makes earlier developments durable.

IV. CHIEF JUSTICE TAFT'S JUDICIAL STATESMANSHIP AND THE NONDELEGATION DOCTRINE

The decision to use doctrine rather than legislation to try to deconstruct the administrative state would not be possible if not for earlier endorsements of similar ideas of judicial power. The origins of the judiciary declaring itself to be over and above, rather than an equal player in, the separation-of-powers system, can be found in William Howard Taft's tenure as Chief Justice. Taft's tenure was one of the most formative moments of judicial self-aggrandizement. Although the Court first used the phrase "separation of powers" in an opinion in 1937, [201] the seeds were planted about a decade earlier.[202] As Chief Justice, Taft sought to build the institution of the judiciary on two fronts, both animated by the same concerns. On the one hand, he lobbied for formal rule change.[203] On the other hand, Taft's judicial philosophy was acutely concerned with bolstering the idea of

[200] Lisa Hilbink, *The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment*, 62 POL. RSCH. Q. 781, 782 (2009).

[201] Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 142 (1937).

[202] *See* Myers v. United States, 272 U.S. 52, 116 (1926); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

[203] *See* CROWE, *supra* note 153, at 203–04.

the judiciary as a stable, reliable, and expert institution, sometimes at the expense of his own personal policy preferences.[204] The case of Chief Justice Taft's judicial statesmanship demonstrates that the idea that courts and their counter-majoritarian tendencies allow them to be better venues of governing authority is responsible for some of the first steps on the path to the courts' current role as the separation-of-powers police and the practice of using legal doctrine and statutes to impose limits on constitutional politics. It also highlights the ideas and assumptions that make the Court's current situation possible and, for the nondelegation doctrine's proponents, palatable.

As Chief Justice, William Howard Taft was no ideologue or partisan. He was, though, a fierce advocate for his institution. Although he had served as President of the United States from 1909–1913,[205] Taft had his heart set on serving as Chief Justice.[206] As Chief Justice, Taft pushed a project of institution building.[207] He wanted a more expert, efficient, supreme, and hierarchical judiciary.[208] Taft's project of institutional development occurred on two fronts. On the one hand, Taft was explicitly trying to change the rules. He lobbied for formal rule change to make the judiciary more streamlined and hierarchical.[209] On the other, though, Taft pursued a project of reputation building.[210] He explicitly tried to reify and bolster the idea of the judiciary as a robust and reliable policymaker through his jurisprudence. The nondelegation doctrine is one key example.

A. Taft's Two-Pronged Project of Institution Building

Taft's project to change the rules so that the judiciary exercised more discretion over its docket is well known. Crowe refers to Taft's tenure as Chief Justice as a period of "bureaucratization" during which judicial autonomy increased.[211] Taft drew on his existing reputation and political networks to pursue institutional changes that

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[204] *See* Burns, *supra* note 191, at 57–58.

[205] *William Howard Taft*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/william-howard-taft/ (last visited Dec. 27, 2022).

[206] Burns, *supra* note 191, at 47.

[207] *Id.* at 47–49.

[208] *Id.* at 48–51; Crowe, *supra* note 185, at 73–74.

[209] *See* Burns, *supra* note 191, at 49–51; Crowe, *supra* note 185, at 73–74.

[210] Crowe, *supra* note 185, at 78–79.

[211] *Id.* at 80–82.

resulted in an altered judicial structure.[212] Taft noticed the spike in litigation and the court system struggling to keep up, so he "proposed to entrench in the judiciary the very aims of professional expertise, scientific administration, and managerial efficiency valued by the late-Progressive Era state-building climate."[213] Taft was a "judicial statesman."[214] Many historians argue that the Taft Court was reactionary and was concerned with restructuring the judiciary to protect private property, but he was also concerned with reducing the cost of litigation to make access to the courts more available to the poor.[215] Generally, Taft made efficiency and hierarchy the goals of his plan for judicial reforms.

Taft drew on his political acumen, networks, and expertise to put his plan into action.[216] Crucially, though he was generally an opponent of Progressives, he used many progressive ideas to animate his institutional reforms. In fact, as Crowe points out, Taft's entire platform for reform turned on the idea of "infusing 'executive principle'—practices or procedures explicitly designed to increase administrative precision and efficiency—into the tasks and governance of the judicial branch."[217] He wanted to expand the judicial capacity. In pursuing his reforms, Taft acted as a model political entrepreneur.[218] He succeeded in "framing the terms of political debate and guiding innovation [and acting as] an entrepreneur consolidating his innovations into comprehensive and enduring institutional change."[219]

Taft's entrepreneurship resulted in three significant, lasting changes in the federal judiciary's structure: "the reorganization of the federal court system under the Chief Justice, the establishment of the Judicial Conference, [and] the radical expansion of certiorari jurisdiction."[220] These were the partial result of the passage of the Judicial

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[212] *Id.* at 79–80.

[213] CROWE, *supra* note 153, at 202.

[214] *See* Burns, *supra* note 191, at 47.

[215] *Id.* at 47–48.

[216] Crowe, *supra* note 185, at 74.

[217] CROWE, *supra* note 153, at 207 (internal citation omitted).

[218] *See generally* Adam D. Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 STUD. AM. POL. DEV. 185, 187–89 (2003) (defining political entrepreneurship).

[219] Crowe, *supra* note 185, at 75.

[220] *Id.* at 80.

Conference Act[221] and the Judiciary Act of 1925,[222] neither of which would have passed without Taft's entrepreneurship.[223]

Taft was acutely concerned with institution building, but he did not just seek to alter the judiciary's formal rules and resources.[224] His ideas about judicial power are woven into his judicial philosophy and decision-making. Above all else, Taft was concerned with political stability. Taft was worried about wealth distribution and was wary of a self-aggrandizing political elite, but he believed a strong and independent judiciary would be better to stave off those problems than Congress.[225] According to Alpheus Mason, Taft's judicial philosophy "smack[ed] of Plato."[226] Taft believed the judiciary, but especially the Supreme Court, should revise outdated laws in light of new circumstances.[227] However, Taft thought that "the presumption lay with the greater wisdom of old prescriptions. Adjustment to the new must be undertaken cautiously, with due regard for existing rights, not in automatic response to whatever popular whim may be currently in numerical favor."[228] Law should not be strictly Holmesian, as public opinion was not to be trusted.[229] Taft believed that "only a Court whose members held views in strict accord with his own could save the country from disaster."[230]

Taft saw the increasing power of organized labor as a potential problem.[231] It implied a possible leveling of economic hierarchy.[232] Insofar as organized labor targeted the judiciary as a potential barrier to its success, Taft saw it as a mortal threat to the fabric of society.[233] The Court's function was adaptive and positive, but still deliberative

[221] Judicial Conference Act, Pub. L. No. 67-298, § 2, 42 Stat. 837, 838 (1922) (codified as amended at 28 U.S.C. § 331).

[222] Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

[223] CROWE, *supra* note 153, at 200.

[224] *See* Burns, *supra* note 191, at 60 (arguing that Taft worked "tirelessly" to protect the judiciary's reputation).

[225] *See* ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 47–49 (1964).

[226] *Id.* at 174.

[227] *Id.*

[228] *Id.*

[229] *See id.* at 175.

[230] *Id.*

[231] *See id.*

[232] *Id.*

[233] *Id.*

and careful. If the judiciary were functioning properly, it could "weigh and adjust class interests for the good of the whole."[234] Perhaps more than for other Justices and Chief Justices, Taft saw judicial decision-making as critical to the Court's appearance and function. Unity and care were vital. He actively discouraged dissents, writing to Justice John Hessin Clarke that in cases where he disagrees with the majority, he believes "it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way."[235] Taft worked tirelessly to ensure the Supreme Court functioned smoothly and cohesively, often going out of his way to send notes to Justices when they were sick and easing the opinion-writing load of overworked Justices to ensure they stayed content and afloat.[236] Political scientist Donald Anderson argues that these characteristics helped construct the popular understanding of the Court as "above the fray of partisan politics" and as an "impartial interpreter of the Constitution."[237]

Legal scholars Nikolas Bowie and Daphna Renan make a similar observation by showing the persistent influence of Dunning School historiography on Taft's separation-of-powers jurisprudence.[238] Bowie and Renan correctly observe that, although the "juristocratic separation of powers is often taken as a natural or inherent feature of American constitutionalism," a legalistic separation-of-powers principle stormed the American constitutional imagination only after 1926, when the Supreme Court decided *United States v. Myers*.[239] Bowie and Renan attribute the "separation-of-powers counterrevolution" to Taft's beliefs that the

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[234] *Id.*

[235] *Id.* at 223–24.

[236] *See id.* at 205–06.

[237] Donald F. Anderson, *Building National Consensus: The Career of William Howard Taft*, 68 U. CIN. L. REV. 323, 324 (2000).

[238] *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2068–69 (2022).

[239] *Id.* at 2025; Myers v. United States, 272 U.S. 52, 52 (1926). Curiously, while Bowie and Renan correctly remind us that the juristocratic separation of powers is a historical invention, not a necessary aspect of constitutional operation, they still implicitly adopt a version of the settlement thesis that suggests disputes can be settled and resolved with a firm, stable rule. Bowie & Renan, *supra* note 238, at 2046–47. Moreover, although their article would be the perfect place to do it, they fail to theorize about the courts' role in Mariah Zeisberg's characterization of the separation of powers. *See* ZEISBERG, *supra* note 39.

Reconstruction-era Congress overreached, so the judiciary had to intervene to prevent Congress from "reimposing Reconstruction on the presidency."[240] According to Bowie and Renan, Taft was a "lifelong Republican who nevertheless sympathized with the Democratic Party's criticism of Reconstruction."[241] Bowie and Renan attribute Taft's separation-of-powers jurisprudence to his sympathy with the Dunning School—that is, that a lingering opposition to Reconstruction plagued Taft's jurisprudence[242]—which continues to guide our constitutional system. While Bowie and Renan's findings are important, they underemphasize Taft's views about courts specifically. For Taft, courts were not just the institutional vessel for his ideas about Reconstruction.[243] Taft also had strong views about the courts and, specifically, the Supreme Court as an institution.[244] As Bowie and Renan acknowledge, Taft believed that "the Supreme Court was the only body capable of determining 'whether Congress is acting within its constitutional limitations.'"[245]

More than anything else, Taft's ideas about the law and judicial power animated his judicial decision-making. This is not to say that ideology—including his dislike of Reconstruction[246]—never played a role in his decision-making. Rather, whether Taft did it consciously or not, ideas about judicial power and the proper role of the judiciary often took precedence. A fawning letter sent to Taft in early 1928 noted that Taft's "greatest ambition was to sit on the Bench of the United States Supreme Court."[247] Anthony Deddens, the letter's author, wrote that, as Governor of the Philippines, Taft would "[i]gnor[e] precedent when precedent hampered the spirit of the law."[248] Deddens wrote that, as Chief Justice, Taft "does not merely sit like a single judge, pondering principles, matching and contrasting cases in point,

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[240] Bowie & Renan, *supra* note 238, at 2049.

[241] *Id.* at 2065.

[242] *See id.* at 2027–28.

[243] *See* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1273 (2001).

[244] *See* Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 126 (1975).

[245] Bowie & Renan, *supra* note 238, at 2066 (quoting WILLIAM HOWARD TAFT, FOUR ASPECTS OF CIVIC DUTY 59 (1906)).

[246] *See id.* at 2048–49.

[247] Letter from Anthony T. Deddens to William Howard Taft (1929) (on file with the Library of Congress, William Howard Taft Papers, ser. 3, reel 300).

[248] *Id.*

and writing fair and learned decisions, for in a way he heads the public knowledge of the law and the constitution."[249] Rather, Taft, "[a]s head of our final court of appeal, [] organizes his thought, directs its energies, and inspires it with human fights and needs as well as collect [sic] its individual opinion in regard to legal constructions."[250] Taft believed that judges should have more discretion when presiding over trials, even at the expense of juries and the parties' lawyers. Speaking to the National Crime Commission Conference in 1928, Taft said:

> We need legislation to enlarge the power of the judges to guide the trial and to help the jury in understanding the evidence and in reaching its conclusions upon the evidence. This means that the law should not prevent the charge of the court from being enlightening and clarifying. It should obviate the camouflage that is so often created in a court room by the skill and histrionic ability of the counsel. We must trust somebody in the supervision of the trial and that somebody must be and should be the judge. The procedure and rules of evidence should not be such that the lawyers can weave a web to trip the trial judge, which an upper court by reason of technical rules would have to set aside. Neither the English judges nor the judges of a Federal court are restricted in the aid which they can give the jury to enable it to understand the real issues and to weigh evidence intelligently. But judges are more restricted in other courts. The truth is that the American people in many States have distrusted the judges and preferred to let the jurors wander about through a wilderness of evidence without judicial suggestion or guide and often to become subject to an unfair and perverted presentation by counsel of the evidence, leading to a defeat of justice.[251]

Taft put enormous faith in judges as judges. For example, Taft disapproved of Congress's decision not to let judges comment on evidence before it is submitted to a jury for consideration.[252]

Above all, Taft loved the law and its power to act as a bulwark against rapid and unconsidered social change and believed that the Court should be the vehicle for that type of law.[253] For Taft, "judicial selection" was "one of the most important governmental acts" because judges needed to "read policy into as well as out of constitutional

[249] *Id.*

[250] *Id.*

[251] Eighty-third Annual Report of the Prison Association of New York, *reprinted in* E.R. CASS, REVIEW OF NATIONAL CRIME COMMISSION CONFERENCE 9 (1928) (quoting William Howard Taft), https://www.loc.gov/resource/mss42234.mss42234-300_0020_1152/?sp=213.

[252] Letter from William Howard Taft to Horace Taft (Mar. 20, 1928) (on file with the Library of Congress, William Howard Taft Papers, ser. 3, reel 300).

[253] Burns, *supra* note 191, at 60–62.

clauses" to preserve the status quo.[254] Taft wanted Congress to trust in the federal courts the entirety of Article III jurisdiction.[255] Taft thought that publicity would help Congress increase the federal courts' jurisdiction, asserting that Black Americans are strongly in favor of being able to use federal courts to assert their Thirteenth, Fourteenth, and Fifteenth Amendment rights, and that divesting lower federal courts of jurisdiction over collection and foreclosure actions could hurt farmers.[256] Taft thought that "stir[ring] up the Germans and the Irish and the negroes to an appreciation of the importance to them of maintaining the jurisdiction of the trial courts, we can make the Democrats a bit chary of burning their fingers with such a revolutionary proposal."[257] Keeping trial courts open as an avenue of redress was itself not the goal for Taft—it was instrumental to maintaining judicial power.

Taft's project of institution building occurred not just through his attempts to restructure the formal rules of the judiciary so it would be more streamlined, hierarchical, discretionary, and decisive.[258] It also played out though his judicial philosophy and decision-making. The point is not that Taft was always or only concerned with the idea of the Court as bureaucratic, or that this was the only idea that animated all his decisions. Rather, the idea of an expert, bureaucratic, and supreme judiciary can be found in Taft's judicial decision-making. The ideas that permeate Taft's decisions and decision-making managed to help establish the judiciary as *the* decider and *the* protectorate of constitutional fidelity and political stability. Insofar as the Court regularly makes crucial constitutional pronouncements on Congress's legislation, it helps construct its own institutional authority, as well as the authority over the doctrinal frameworks they formulate.

B. The "Intelligible Principle" Test and Judicial Power

What about the administrative state? Little is known about the Court's decision in *J.W. Hampton*. It does not appear in most accounts

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[254] Walter F. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159, 162 (1961).

[255] *See* Letter from Unknown to Francis L. Kohlman (Apr. 7, 1928) (on file with the Library of Congress, William Howard Taft Papers, ser. 3, reel 300).

[256] *Id.*

[257] Letter from William Howard Taft to Horace Taft (Apr. 7, 1926) (on file with the Library of Congress, William Howard Taft Papers, ser. 3, reel 301).

[258] *See* Burns, *supra* note 191, at 48–49; Crowe, *supra* note 185, at 81.

of the development of the administrative state, despite it being one of the most important administrative law decisions in American history. What is going on here? Perhaps one reason scholars have paid little attention to the case is because they believe Taft, in writing the opinion, was doing exactly what Justice Gorsuch believes: seeking "only to explain the operation of the[] traditional tests . . . [and giving] no hint of a wish to overrule or revise them."[259] Yet that understanding requires an assumption of *J.W. Hampton* the evidence does not support. Taft did a great deal more than simply restate the existing tests. Ideas about institution building—specifically about constructing the power of the judiciary, not the bureaucracy—permeate Taft's *J.W. Hampton* opinion.[260] Taft articulated the "intelligible principle" test,[261] a clearly delineated but deliberately vague standard that would ensure the judiciary would play a more important role in constitutional change and policing the separation of powers. Taft's standard ensured the answer to the "who decides?" question would be the courts.

Attempting to assemble a Taftian defense of the administrative state by examining his writings on executive power risks reading a theory of delegation to administrative agencies into a set of ideas that Taft did not consider in depth. Taft had developed thoughts on delegation itself, however—that is, delegation as a principle.[262] In particular, Taft's thoughts on delegation to the judiciary map well onto his broader project to bolster judicial power. The idea that animated Taft's opinion in *J.W. Hampton* was not, as many of the administrative state's contemporary critics might assume, about exigencies of governing, executive power, or even a necessarily functionalist approach to separation of powers *per se*. It was judicial power. The point is not that one idea only animated *J.W. Hampton*—nine justices voted for it, after all, each of which no doubt had varying reasons for doing so. Instead, the point is that, whether or not Taft or the other Justices intended it to, the idea that courts are the proper venue to sort out interbranch disputes permeates *J.W. Hampton*.

Consider Taft's views on the legitimacy of government and separation of powers. Taft believed government "is a human

[259] Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

[260] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

[261] *Id.* at 409.

[262] *See* discussion *infra* Section IV.B.

instrumentality to secure the greatest good to the greatest number, and the greatest happiness to the individual."[263] Further, he thought the government best suited to reach those ends was one "in which every class has a voice."[264] Importantly, he appears to hold a largely Madisonian understanding of separation of powers,[265] but with an important highlight. Namely, Taft appears to leave some room for some delegation. Taft acknowledges that

> [i]f we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave it all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government,

but it risks becoming the "simplest of all possible forms—a pure despotism."[266] However, Taft notes that the Executive is "properly influenced by that discretionary policy which he was elected by his constituents to carry out."[267] The president, Taft reminds us, has a constituency: "he represents the majority of the electorate."[268] Importantly, Taft believed that a tight relationship between Congress and the executive would improve the functioning of government.[269] The strict separation between the two causes inefficiencies. It would have been wiser, Taft thought, to increase the length of the president's term to six or seven years but make the president only eligible for a single term.[270] This change would "give to the Executive greater courage and independence in the discharge of his duties."[271]

Taft's ideas leave some room for delegation and executive discretion, but Taft was extremely wary of a big, intrusive government. In 1929, a resolute Taft was resisting pressure to resign despite his

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[263] William H. Taft, *The Judiciary and Progress: Address of Hon. William H. Taft at Toledo, Ohio, Friday Evening, March 8, 1912*, 3 (U.S. Gov't Printing Off., 1912).

[264] *Id.*

[265] *See* THE FEDERALIST NO. 47, at 323 (James Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands, . . . may justly be pronounced the very definition of tyranny."). Notably, however, Taft's understanding of the separation of powers diverges from Madison's in Taft's regard for the judiciary in constitutional politics. *See* GEORGE THOMAS, THE MADISONIAN CONSTITUTION 14–38 (2008).

[266] Taft, *supra* note 263, at 4.

[267] *Id.*

[268] *Id.*

[269] *See* WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 4–5 (1916).

[270] *Id.* at 4.

[271] *Id.*

age and health.[272] Despite his failing health, he was worried what the Court would become in his absence.[273] He wrote, "I must stay on the Court in order to prevent the Bolsheveki from getting control."[274]

Taft's strongest views about institutional power related to the judiciary. Taft believed that the judiciary's job is to "construe the limitations on the Executive and Legislative powers contained in the Constitution and thereby through the moral influence and force of its judgments to affect the future action of the Executive and the Congress, and restrain them within the limits of the fundamental law as declared by it."[275] Taft is very clear that constitutional or statutory interpretation and writing legislation are very different.[276] Taft valued consistency in judicial opinions above almost all else and believed that the judiciary's countermajoritarian power is one of its best features.[277] He railed against the idea of popular recall of judicial decisions because it would mean "there will be a suspension of the Constitution to enable a temporary majority of the electorate to enforce a popular but invalid act."[278] The most serious objection to such a procedure is, for Taft, that "it destroys all probability of consistency in constitutional interpretation."[279]

Because it was important for Taft that the judiciary function this way, the next logical step was for the courts to have more power and discretion to protect its control of the Constitution and the law. When Taft took over the judiciary with his appointment to the chief justiceship in 1921,[280] his challenges, according to Crowe, "were to develop (or, at the very least, refine) unique organizational capacity and to establish political legitimacy for an institution that possessed little of either."[281] Delegation, especially to the judiciary, was part of Taft's project.

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[272] *See* Letter from William Howard Taft to Horace Taft (Nov. 14, 1929) (on file with the Library of Congress, William Howard Taft Papers, ser. 3, reel 315).

[273] *See id.*

[274] *Id.*

[275] TAFT, *supra* note 269, at 1.

[276] Taft, *supra* note 263, at 5–7.

[277] *See id.*; TAFT, *supra* note 269, at 138.

[278] Taft, *supra* note 263, at 6.

[279] *Id.*

[280] Crowe, *supra* note 185, at 73.

[281] *Id.* at 77.

One of Taft's biggest victories for institution building came when Congress passed bills in 1922 that created twenty-four new district judgeships, gave the Chief Justice authority to move judges around to overworked districts, and established the "Conference of Senior Judges" that could survey the judiciary and make policy recommendations to Congress.[282] When the bill was being debated in the Senate prior to ratification, the discussion centered around varying ideas of the separation of powers. Senator John Shields (D-TN) opposed the bill on the grounds that it blurred the lines between the branches.[283] Shields endorsed a rigid, legalistic understanding of the separation of powers[284]—one that bears resemblance to the contemporary Conservative Legal Movement's formalistic readings. Shields argued that the "great corner stone of our form of government" is the "principle requiring the separation of the powers of Government—the executive, the legislative, and the judicial—into three great coordinate and independent departments to be exercised by the particular department in which the powers are vested, without interference from the other departments and through different persons and officers."[285] Shields worried that giving the Chief Justice the power to relocate district judges would mean giving both legislative and executive powers to the judiciary.[286] In a statement Taft no doubt would have agreed with, Shields explained that it is "generally conceded that the judiciary is the balance wheel of our system and the great bulwark of the liberties of the American people."[287] Shields therefore thought it necessary to the preservation of the American constitutional system that the judiciary be "upheld and kept separate and independent of the executive and legislative departments."[288] This bill would mean conferring the power to establish lower courts, an inherently legislative function, to the judiciary.[289] Taft perhaps agreed with this proposition but supported the bill nonetheless. As Alpheus Mason points out, what

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[282] Act of Sept. 14, 1922, ch. 306, 42 Stat. 837, 837–39 (1922); Crowe, *supra* note 185, at 73.

[283] *See* 62 CONG. REC. 4855 (1922) (statement of Sen. John K. Shields).

[284] *See id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *See* MASON, *supra* note 225, at 104.

Chief Justice Taft wanted from Congress was "a delegation of this power."[290] He ultimately got it.

Taft endorsed a similar idea in a speech before the Chicago Bar Association in December 1921. Using language that both echoed existing nondelegation precedent (specifically *Wayman v. Southard*[291]) and foreshadowed the test he put forward in *J.W. Hampton*,[292] Taft argued for a shift in how court procedural rules were written.[293] Although Taft's vision would not take shape until Congress passed the Rules Enabling Act in 1934[294] —after Taft's death—the idea was floated early in his career as Chief Justice. The separation of law and equity suits made things particularly complex and made the administration of justice particularly slow and cumbersome.[295] Taft pointed to the English courts as a potential model and then explained that Congress could delegate rulemaking power to the courts.[296] Taft was careful to point out, though, that doing so would not be "a delegation of great power to the Supreme Court."[297] The Court would, Taft explained, "consult a committee of the Bar and a committee of the trial judges."[298] In a clear foreshadowing of his later approach to the nondelegation doctrine, Taft posited that "Congress can lay down the fundamental principles that should govern, and then the court can fill out the details."[299] Parts of this speech were later entered into the record as supplemental materials to a House Judiciary Committee hearing on possible changes to federal court procedure.[300]

Taft did not hold a functionalist understanding of the separation of powers, yet he still found room for a theory of delegation. Specifically, however, his theory of delegation related to the judiciary.

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[290] *Id.*

[291] 23 U.S. (10 Wheat) 1, 14–15, 42, 48 (1825).

[292] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[293] William Howard Taft, Three Needed Steps of Progress, Speech Before the Bar Association of Chicago (Oct. 1920), *in* 8 A.B.A J. 34, 35 (1922).

[294] Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072).

[295] *See* Taft, *supra* note 293.

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Procedure in the Federal Courts*, 67 H.R. 2377, Committee on the Judiciary, 67th Cong., 2nd sess., 49–50 (1922).

This accords with Taft's broader project of institution building. He saw delegation to the judiciary as one way the judiciary could wield its powers more effectively. For Taft, then, giving the judiciary more discretion over its docket, structure, and rules would allow it to more effectively fulfill its role in the constitutional order. When *J.W Hampton* came to the Court in 1927, then, Taft had a theory of delegation ready-made—but, importantly, it was a theory of delegation to the judiciary. The test Taft articulated in *J.W. Hampton* for courts to determine if Congress had violated the nondelegation doctrine, the "intelligible principle" test,[301] thus imported an idea about the power of the judicial branch into legal doctrine. Formalizing this standard in doctrine bolstered judicial power. By articulating a single, desperately vague standard of nondelegation, Taft ensured the Court would maintain an important role in determining when other governing institutions violated its rules.

The "intelligible principle" test was not immediately objectionable for either Congress or the president as it did not declare any clear winner between them. Although one *Harvard Law Review* article describes the lower-court decision—which the Supreme Court upheld—as "probably . . . [the] farthest step yet taken in upholding such concentration of power in administrative agencies,"[302] it was clear who the real winner was: the Court. By importing these ideas into legal doctrine and articulating a single nondelegation standard, Taft bolstered the Court's role as the final arbiter of separation-of -powers disputes. In a moment of institutional choice, Taft chose the courts. Taft successfully aggrandized the judiciary.

C. Deconstructing the Administrative State Through Doctrine: Empowering Congress or the Court?

The Taft example reveals two insights about the urge to give teeth to the nondelegation doctrine with hopes that it will help to dismantle the administrative state. First, it would only be possible in a post-*J.W. Hampton* (and post-*Myers*) world in which courts rely heavily on the idea that they are not a part of the separation of powers but stand above it, ready to police its boundaries. Second, it suggests that, were the Court to try to deconstruct the administrative

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301 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

302 *Constitutional Law—Legislative Powers: Delegation of Powers—Validity of Flexible Tariff*, 41 HARV. L. REV. 95, 95 (1927).

state through a more robust nondelegation doctrine—or were it even to decide not to but imply that it could—the Court would only empower itself.

Research on the American administrative state typically examines the changing conditions that made the need for agencies more pressing, how those agencies were shaped or changed over time, how and why they became more autonomous, and the relationship among agencies, Congress, and the presidency.[303] Little is known about the judiciary's role in developing and shaping the administrative state, despite its enormous role in shaping the law that dictates how the administrative state operates. One response may be the obvious one, that the law that governs it does no real work—the nondelegation doctrine is simply a "myth."[304] There is surely some truth to that response. Yet it bears asking if something more is going on. If the Court has had no effect on the development of the bureaucracy, then should we expect the Conservative Legal Movement's project to use doctrine to try to deconstruct the administrative state to fail? What other consequences might it have?

Ideas about judicial power and that courts are the expert and learned bulwark against popular discontent structured the initial transformation of the American separation-of-powers system. Taft was successful in beginning to turn the separation-of-powers *system* into the separation-of-powers *doctrine* for the courts, but especially the Supreme Court, to enforce. As a result, the courts began to morph

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[303] SKOWRONEK, *supra* note 6; DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 (2001); *see* ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE (2016); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1995); Elisabeth S. Clemens, *Organizational Repertoires and Institutional Change: Women's Groups and the Transformation of U.S. Politics, 1890-1920*, 98 AM. J. SOC. 755 (1993); KAREN ORREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT 105–23 (2017); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985); Joshua D. Clinton et al., *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387 (2014); Melinda N. Ritchie, *Back-Channel Representation: A Study of the Strategic Communication of Senators with the US Department of Labor*, 80 J. POL. 240 (2018); Kenneth Lowande, *Who Polices the Administrative State?*, 112 AM. POL. SCI. REV. 874 (2018).

[304] Whittington & Iuliano, *supra* note 77 (arguing that the nondelegation doctrine is a myth).

into the final arbiter of questions of constitutional politics. Courts found a way to insert themselves into interbranch disputes in a way that ensured they would have the (likely) final say.[305] This development was not complete with Taft, however. It continues today. The idea that courts are still the proper venue to sort out basic questions of constitutional politics—including, as the 2020 presidential election demonstrates,[306] who wins elections—is widely accepted.[307] The attempt to deconstruct the administrative state through doctrine rather than legislation confirms this point.

The development is not complete, however. Courts need not be the ones to decide whether the United States can have a robust administration. Yet, the risk is that Taft's work was so successful that the assumption that courts should decide these questions will become even more self-affirming. Once courts begin to decide these questions, Taft's ideas become more deeply embedded, and the courts' role as the separation-of-powers police becomes more durable. Parties then come back to the court to ask them to decide other, related questions. The nondelegation doctrine is one example. Were the Supreme Court to decide that the nondelegation doctrine must be robust, and that courts, not legislators, the president, or even voters, must be the deciders that Congress has given agencies too much discretion, courts would only empower themselves. The justification that it would encourage Congress to speak with more precision and would democratize the administrative state is misplaced.[308] By endorsing the idea that the courts are the ultimate authority over the terms of constitutional politics, the Supreme Court would further entrench their own position, thus making it more difficult to dislodge.

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[305] *See* Allen Sumrall & Josh Chafetz, *Trump's Subpoena Stalling Highlights the Growing Hubris of America's Judges*, NBC NEWS (Oct. 29, 2022), https://www.nbcnews.com/think/opinion/trump-hopes-judge-will-january-6-subpoenas-rcna54620.

[306] *See* Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L. J. 150, 151 (2022) (discussing the increase in election litigation rates in 2020 and noting how Trump and his colleagues went to the courts to overturn the 2020 election results).

[307] *Cf.* Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. (forthcoming 2022) (manuscript at 1–5) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3970932 (arguing that mainstream liberal scholars should stop submitting to the idea that the courts are the proper venue for the protection of democracy).

[308] *See* Baumann *supra* note 109, at 7, 67 ("If Americana administrative law is to be replaced, the administrative law field must give up the pretense that it can somehow diagnose and treat whatever may be ailing a body as complex as Congress.").

V. CONCLUSION

Courts may soon decide to breathe life into the nondelegation doctrine. Many members of the Supreme Court have signaled their willingness to try to use doctrine to dismantle the administrative state.[309] In other words, those who believe that American bureaucracy as currently composed is unconstitutional or otherwise normatively distasteful are asking courts, not Congress, to reduce the executive branch agencies' policymaking authority. Although the courts justify, and no doubt will continue to justify, this move as an attempt to democratize the administrative state,[310] this move will have other consequences for American constitutional politics. Whether they intend it to or not, courts giving teeth to the nondelegation doctrine will be another example of judicial self-aggrandizement at Congress's expense. Moreover, it will mean the courts are taking away the government that Americans have chosen through their political institutions while claiming to do the opposite.

Political scientists Nicholas Jacobs, Desmond King, and Sidney Milkis argue that contemporary American partisan politics is "no longer a struggle over the size of the State," but "a struggle for the services of national administrative power."[311] Notably, however, the administrative state's opponents have chosen doctrine over legislation as their weapon. This choice has important consequences.[312] When Justice Scalia dissented in *Mistretta v. United States* in 1988, he asserted that an "unconstitutional delegation" is "not an element readily enforceable by the courts."[313] In 2021, in a per curiam opinion, the Justices wrote: "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"[314] In

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[309] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

[310] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Health & Safety Admin., 142 S. Ct. 661, 666 (2022) (per curiam).

[311] Nicholas F. Jacobs et al., *Building a Conservative State: Partisan Polarization and the Redeployment of Administrative Power*, 17 PERSP. ON POL. 453, 453 (2019).

[312] The nondelegation doctrine is not the only example of this phenomenon. Stephen Skowronek demonstrates that unitary executive theory is the result of a project to establish a stable doctrinal foundation for empowering the presidency. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2092–96 (2009).

[313] 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

[314] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (quoting Util. Air Regul. Group v. EPA, 573 U.S. 302, 324 (2014)).

January 2022, the Court struck down OSHA's vaccine-or-test COVID-19 rule for large employers because, it concluded, there is "little doubt" that the rule is a "significant encroachment into the lives—and health—of a vast number of employees."[315] The shift from a system of democratic choice and accountability to one where the courts, but especially the Supreme Court, is the preeminent decider over who can govern and under what circumstances marks a profound development in American politics. The choice to use doctrine rather than legislation to push for constitutional or political change reifies the courts' centrality in modern American politics.

This development has been long in the making. Chief Justice Taft's entrepreneurship was critical to the development of today's judicial system—both its formal institutional powers and the ideas and assumptions about how it operates and should operate, which allow it to decide enormous policy questions while purporting merely to be deciding "legal" questions. In addition, this development corresponds with the rise of the modern or rhetorical presidency,[316] an obstinate Congress,[317] increased party insecurity in Congress,[318] economic inequality,[319] decline in loyal opposition, a resurgence of malignant partisanship,[320] and global trends towards juristocracy.[321] The whole picture suggests that judicial aggrandizement is not occurring in a vacuum and that the choice to use doctrine rather than legislation to push for political change is part of larger changes to the American political system. While the evidence presented in this article is not sufficient to answer these questions, it suggests that we should be

[315] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (per curiam)

[316] *See* RICHARD NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS (1990); TULIS, *supra* note 37; DEARBORN, *supra* note 162.

[317] *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS (2016).

[318] *See* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016).

[319] Juliana Menasce Horowtiz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/.

[320] Russell Muirhead & Jeffrey K. Tulis, *Will the Election of 2020 Prove to Be the End or a New Beginning?*, 52 POLITY 339, 345–47, 351–52 (2020); RUSSELL MUIRHEAD, THE PROMISE OF PARTY IN A POLARIZED AGE, 1–5 (2014); SEAN M. THERIAULT, THE GINGRICH SENATORS: THE ROOTS OF PARTISAN WARFARE IN CONGRESS 172–73 (2013).

[321] HIRSCHL, *supra* note 146, at 1; *see also* Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics,* 118 HARV. L. REV. 28, 29–34 (2004).

wary of the courts' rising dedication to self-aggrandizement and of the social movements and the elite lawyers that they hire to reinforce it.