

2023

The New Judicial Power Grab

Josh Chafetz

Georgetown University Law Center, josh.chafetz@georgetown.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Josh Chafetz, *The New Judicial Power Grab*, 67 St. Louis U. L.J. (2023).

Available at: <https://scholarship.law.slu.edu/lj/vol67/iss4/7>

This Childress Lecture is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

THE NEW JUDICIAL POWER GRAB

JOSH CHAFETZ*

ABSTRACT

The judges are out of control. While judicial institution-building is nothing new in American history, the John Roberts-helmed judiciary has engaged in a remarkable power grab. This self-aggrandizement has not received the attention it deserves for at least two reasons: first, scholarly and public discourse about the courts, taking its cues from judges' own self-presentation, remains overly focused on doctrine and insufficiently focused on the courts as institutions. Second, and relatedly, the true scope of the phenomenon becomes apparent only when one looks across doctrines, rather than within them.

Accordingly, this essay, prepared for the St. Louis University School of Law's 2022 Childress Symposium, considers the new judicial power grab in three discrete areas: election law, congressional oversight, and administrative law. The essay focuses not only on the outcomes of cases, but also on the remarkably dismissive rhetoric that judges use toward other institutional actors, combined with rhetoric meant to obfuscate the judiciary's institutional character and present it as a disembodied, neutral voice for an apolitical law. The result is a judiciary that is currently in the process of amassing a striking amount of power at the expense of other governing institutions.

* Professor of Law, Georgetown University Law Center. This essay was prepared for the *St. Louis University Law Journal's* 2022 Childress Symposium, "The Business of the Supreme Court." I am grateful to the Symposium organizers and participants for their comments. Thanks also to Dave Pozen and Catherine Roach for helpful and thought-provoking comments and suggestions. Any remaining errors or infelicities are, of course, my own.

INTRODUCTION

The judiciary is an institution. This should strike everyone as obvious. And yet, in his Childress Lecture, Steve Vladeck has shown how scholarly discourse about the Supreme Court has moved away from its institutional aspects in favor of a disembodied focus on its doctrinal outputs. This deleterious turn in scholarly treatment of the courts has taken its lead from judges themselves, who routinely deploy a number of techniques to conceal their institutional situatedness. They present themselves as standing outside of space,¹ time,² and politics.³ They obscure the fact that courts are staffed by human beings—indeed, the official judicial costume literally obscures the distinctiveness of the human body underneath, rendering judges as heads floating above a sea of formless black cloth—so that we are invited to see them (and to refer to their highest ranks) as “Justice” incarnate or as “the Court.” And they hold themselves out as a pure, reason-based alternative to the messy business of the “political branches” in a manner that serves precisely to empower their own institution vis-à-vis the other branches in the game of constitutional politics.

Indeed, across a range of doctrinal areas, the John Roberts-helmed judiciary has deployed this concealment of its institutional situatedness in the service of systematically empowering its own institution at the expense of others. This phenomenon has gotten less attention than it deserves precisely because the courts are able to wrap their power grab in the disembodied language of “law.” In the judges’ presentation, it is not the courts taking power for themselves; the courts are simply neutral conduits for the law, which happens to limit the powers of the other institutions.

Of course, judicial self-empowerment is not a new phenomenon—judges have engaged in institution-building since the early Republic.⁴ But the judiciary

1. Consider the oddness of allowing a single judge sitting in Texas or Hawai‘i to issue an injunction prohibiting the federal government from enforcing a statute or regulation against *everyone in the country*, not just the plaintiffs seeking the injunction. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

2. Consider judges’ use of “we” to refer to decisions authored decades or even centuries earlier. See Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 76–90; see also Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329 (2010).

3. Is a citation even needed for this? If so, consider John Roberts’s insistence that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.” Adam Liptak, *Roberts Rebukes Trump for Swipe at ‘Obama Judge’*, N.Y. TIMES, Nov. 22, 2018, at A1.

4. See generally JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012). In the context of interbranch disputes, Niko Bowie and Daphna Renan have excavated the central role of white supremacy, showing how judicial intervention into disputes between Congress and the presidency arose out of the Lost Cause belief, channeled into judicial doctrine by William Howard Taft, that judicial assertiveness could have strangled Reconstruction even earlier and more thoroughly than in fact happened. Nikolas

has gone significantly further in recent years: with increasing frequency over roughly the last decade and a half, judges—primarily but by no means exclusively Republican judges—are inventing out of whole cloth new principles that disempower other governing institutions and empower themselves. These new principles are often announced in cases that use strikingly dismissive language about the governing capacity of other institutions and that hold up judicial procedure as a paragon of reason and rectitude.

Because this phenomenon involves the judiciary’s posture toward other institutions—which is to say, because it can only be seen by considering the judiciary *as* an institution—it requires looking across different doctrinal areas. Moreover, it requires attentiveness not only to the outcomes in the cases, but also to the rhetorical strategies employed by the judges. This essay will consider the new judicial power grab in three areas: election law, congressional oversight, and administrative law. But I have little doubt that bringing in other areas would only strengthen the conclusion.⁵

I. ELECTION LAW

The Roberts Court has been deeply hostile to campaign finance regulation—with the notable exception of judicial elections. This distinction between judicial and nonjudicial elections is almost explicitly premised on treating judges as abstract avatars of justice while treating other officeholders as situated in inherently degraded and borderline corrupt institutions. The current run of hostility to campaign finance law begins in earnest with *Citizens United* in 2010,⁶ but the clearest distillation of the justices’ view of their role as against the role of other officeholders comes in John Roberts’s 2014 plurality opinion in *McCutcheon v. Federal Election Commission*: “Campaign finance restrictions that pursue other objectives [than eradicating *quid pro quo* corruption or its appearance], we have explained, impermissibly inject the Government ‘into the debate over who should govern.’ And those who govern should be the *last*

Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2047–82 (2022).

5. In a recent essay, Mark Lemley has considered a partially overlapping set of fields and come to a similar conclusion. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022). Lemley, however, considers this a far more recent phenomenon. See *id.* at 97 (describing it as occurring over “the last two years”). In addition to disagreeing about the timeframe of this phenomenon, Lemley and I also consider somewhat different areas of law and come at the issue with somewhat different methodological tools. If anything, these differences should serve to reinforce the robustness of our largely shared conclusion.

6. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). In the last major campaign finance case before *Citizens United*, the Supreme Court upheld nearly all of the provisions before it. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003). The shift in the Court’s jurisprudence is attributable to Sandra Day O’Connor’s replacement by Samuel Alito in 2006.

people to help decide who *should* govern.”⁷ In this passage, Roberts simultaneously distances his own institution from both “the Government” and the processes of governance and suggests that there is something borderline corrupt (or at least self-dealing) about campaign finance regulations enacted by representative institutions.

Indeed, the justices in campaign finance cases have routinely described other officeholders as grasping and power-hungry. In Antonin Scalia’s words, “[t]he first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”⁸ For Anthony Kennedy, there is a risk that “Government official[s]” (clearly understood not to include judges) will use their “authority, influence, and power to threaten corporations to support the Government’s policies.”⁹ And for Roberts, campaign finance laws constitute “attempts to tamper with the ‘right of citizens to choose who shall govern them.’”¹⁰ In short, holders of other political offices are, in the justices’ presentation, likely to be structuring the rules so as to entrench themselves in power.¹¹

But these other officeholders aren’t just power-mad and self-dealing, according to the justices. One also gets the distinct sense that nonjudicial politics is just ... icky. It involves “sound bites, talking points, and scripted messages that dominate the 24-hour news cycle.”¹² Its practitioners run “television commercials touting a candidate’s accomplishments or disparaging an opponent’s character.”¹³ Such speech is worthy of protection in the same sense that “flag burning, funeral protests, and Nazi parades” are.¹⁴

Now consider how the justices have treated *judicial* elections. In *Caperton v. A.T. Massey Coal Co.*, the Court held that due process required a state supreme court justice to recuse himself from a case involving a company whose CEO had spent millions of dollars helping that justice get elected.¹⁵ Kennedy began his analysis for the Court by painting a rather flattering picture of the judicial role:

7. 572 U.S. 185, 192 (2014) (internal citations omitted). I have unpacked this passage at some length in Chafetz, *supra* note 2.

8. *McConnell*, 540 U.S. at 263 (opinion of Scalia, J.).

9. *Citizens United*, 558 U.S. at 355.

10. Fed. Election Comm’n v. Cruz, 142 S. Ct. 1638, 1652 (2022) (citation omitted).

11. *See id.* at 1655 (“That the limit may have been designed to protect incumbents should come as no surprise.”); *id.* at 1656 (“[D]eference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to ‘insulate[] legislators from effective electoral challenge.’” (citation omitted)); *McConnell*, 540 U.S. at 248 (opinion of Scalia, J.) (“We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice.”); *id.* at 306 (opinion of Kennedy, J.) (the provisions at issue “look very much like an incumbency protection plan”).

12. *Citizens United*, 558 U.S. at 364.

13. *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 191 (2014).

14. *Id.*

15. 556 U.S. 868 (2009).

The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings.¹⁶

Although there was no accusation of *quid pro quo* corruption in the case, Kennedy argued that the scope of the CEO's contributions threatened to undermine this august role by creating a "serious risk of actual bias—based on objective and reasonable perceptions."¹⁷

A few years later, in *Williams-Yulee v. Florida Bar*, the Court held that a state could forbid candidates for judicial office from personally soliciting campaign contributions—a restriction that it would clearly not tolerate in the context of nonjudicial elections.¹⁸ This time, Roberts wrote for the Court, and he, too, began with both a lofty conception of, and a lofty lineage for, the judicial role: "Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta."¹⁹ Quoting John Marshall, Roberts continued, "A judge instead must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or controul him but God and his conscience.'"²⁰ Judges, in other words, are pristine conduits for reasoned judgment; they are "not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money."²¹

Note how radically different the justices' descriptions of judicial and nonjudicial officeholders are.²² Nonjudicial officials "govern" and exercise "power," the "first instinct" of which is to maintain its hold on power. They speak in "television commercials," "sound bites, talking points, and scripted messages." Their speech is comparable to "Nazi parades." Judges, by contrast, focus on "reasons"; they make use of "logic and scholarship and experience and

16. *Id.* at 883.

17. *Id.* at 884.

18. 575 U.S. 433 (2015).

19. *Id.* at 445. The Magna Carta reference, it should go without saying, is ahistorical claptrap.

20. *Id.* at 447.

21. *Id.* at 437–38.

22. In fairness to the justices, they are hardly alone in their ambivalence toward judicial elections. See generally David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008). That said, nothing in this ambivalence requires the justices to adopt the respective *tones* they have taken toward judicial and nonjudicial institutions in these cases.

common sense”; they exercise “fairness and disinterest and neutrality.” Nothing influences a judge “but God and his conscience.” This judicial role morality finds its origins in Magna Carta and John Marshall.

These wildly different presentations of judicial and nonjudicial roles not only come in the *context* of aggressive acts of judicial governance—what else should we call dismantling significant chunks of the federal election-law regime?—they also serve to *reinforce* and *justify* that governance. As I have noted elsewhere, “the fact that the Court *required* judges to operate under a stricter conception of corruption than it *allowed* legislative and executive officials to impose upon themselves not only held the courts out as different, but also held them up as better, nobler, purer, more ermined.”²³ These rhetorical moves are distinctly in the service of the judiciary’s *institutional* interests: the justices are putting forward an argument for the courts as the most trustworthy policymakers, an argument that is backed by prohibitions on what they will allow competing policymaking centers to do. By distancing themselves from “those who govern,” the justices seek to justify their active intervention into the processes of governance.

II. CONGRESSIONAL OVERSIGHT

Next, consider congressional oversight. While the judiciary has on occasion taken a jaundiced view of Congress’s oversight powers in the past,²⁴ in recent years its contempt for this vital congressional function has reached new heights. Each of the last three presidential administrations—Bush, Obama, and Trump—has seen major conflicts over congressional access to information from the

23. Chafetz, *supra* note 2, at 89.

24. *See, e.g.,* *Kilbourn v. Thompson*, 103 U.S. 168, 191–92 (1881):

The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.

Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc):

While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.... We see no comparable need in the legislative process, at least not in the circumstances of this case.

See also JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 229–30 (2007) (critiquing *Kilbourn*); Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 *GEO. L.J.* 125, 129–39 (2021) [hereinafter Chafetz, *Nixon/Trump*] (critiquing *Senate Select Committee*).

executive branch. In each of these instances, the disputes have wound up in court. And every time, the courts have empowered themselves, primarily by denigrating Congress in the process of denying it timely access to the information it needs.

Consider the Bush cases.²⁵ In 2007, as part of its investigation into the politically motivated firing of a number of U.S. Attorneys, the House Judiciary Committee subpoenaed former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten. When Miers and Bolten refused to comply, asserting executive privilege, the House held them in contempt. After the Department of Justice (predictably) refused to prosecute under the contempt statute,²⁶ the House went to court, seeking a declaratory judgment that Miers and Bolten were in contempt of Congress and an injunction ordering them to comply with the subpoenas.

The case came before Republican district judge John Bates, who referred to his institution as the “ultimate arbiter” of executive privilege claims no fewer than five times over the course of the opinion (and, for a little variety, as the “final arbiter” of such claims once).²⁷ What of Congress’s inherent contempt powers?²⁸ Those are unsuitable, because

imprisoning current (and even former) senior presidential advisors and prosecuting them before the House would only exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis. Indeed, one can easily imagine a stand-off between the Sergeant-at-Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. *See* [citation to and quotation from an OLC opinion]. Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion.²⁹

Note a couple of things about this passage: first, Bates “can easily imagine” the executive branch defying a demand of the legislature and thereby causing a “stand-off” that might “precipitat[e] a constitutional crisis.” But Bates seems equally unable to imagine that either other branch might defy an order from a judge. The other branches coming into conflict would be so messy, so emotional—“acrimon[ious],” “unseemly,” “provocative,” “mischie[vous]”—but, because Bates cannot conceive of another branch disobeying a court order, judicial resolution is precisely the opposite: “civil” and “orderly.” Second, note

25. This discussion is drawn from JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 185–88* (2017) [hereinafter CHAFETZ, *CONGRESS’S CONSTITUTION*].

26. 2 U.S.C. §§ 192, 194.

27. *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 56, 76, 96, 103, 107 (D.D.C. 2008) (“ultimate arbiter”); *id.* at 71 (“final arbiter”).

28. *See generally* CHAFETZ, *CONGRESS’S CONSTITUTION*, *supra* note 25, ch. 5.

29. *Miers*, 558 F. Supp. 2d at 92.

that the only citation internal to that passage—the only attempt at providing evidence to support Bates’s speculations—is to a 1986 OLC opinion.³⁰ So Bates’s argument for why congressional enforcement of its own subpoenas against executive branch officials (or “former” executive branch officials, also known as private citizens) would be unseemly is that executive branch officials have said that it would.

Of course, this dismissive posture toward congressional power might be excused on the grounds that Bates gave Congress the win. After all, it was the House arguing for judicial intervention; the OLC memo was cited against Miers’s and Bolten’s claim that the case was nonjusticiable. And Bates went on to reject their claim of absolute executive privilege, while leaving open their ability to make specific claims of privilege against specific demands by the Judiciary Committee.³¹ But what happened next made clear that this was no win for the House: Miers and Bolten appealed, and the case was eventually settled in March 2009.³² Eagle-eyed readers will note that March 2009 was a couple of months into the 111th Congress and the Obama Administration. In other words, the Congress that had sought to conduct the oversight no longer existed, nor did the presidency that was meant to be overseen. The denigration of Congress’s inherent powers, then, was not in the service of the judiciary coming to Congress’s aid in any meaningful sense; it was simply an opportunity for a district judge to assert his institution’s superiority over the national legislature.

The issue recurred with the parties flipped during the Obama years.³³ After Attorney General Eric Holder refused to turn over documents subpoenaed by the House Oversight Committee in connection with its investigation into the Bureau of Alcohol, Tobacco, Firearms, and Explosives’ “Operation Fast and Furious” gunwalking operation, the House held him in contempt. Holder’s own department refused to prosecute him, and the House again filed suit. Pursuant to an order from a Democratic district judge, some of the material was turned over in April 2016—a year after Holder had stepped down as Attorney General. The dispute over the remaining material was finally dismissed in May 2019, over two years into the Trump Administration.³⁴

But the Bush and Obama Administrations’ disputes with Congress pale in comparison to the Trump Administration’s. Indeed, shortly after Democrats took control of the House of Representatives in 2019, Trump announced that, “We’re fighting all the subpoenas,” without bothering to articulate any grounds on which

30. Response to Cong. Requests for Info. Regarding Decisions Made under the Independent Couns. Act, 10 Op. O.L.C. 68, 86 (1986).

31. *Miers*, 558 F. Supp. 2d at 99–108.

32. CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 25, at 188.

33. This discussion is drawn from *id.* at 188–89.

34. *See* Docket, Comm. on Oversight v. Barr, No. 16-5078 (D.C. Cir. 2019) (entry for May 8, 2019).

the various subpoenas might be invalid.³⁵ In other words, Trump announced his intention to go to war with the very concept of congressional oversight.³⁶ Even in cases in which pellucid statutory text commanded that information be released, the administration refused to do so. The courts were willing allies to Trump in his fights against congressional subpoenas, while taking a significantly more adversarial stand in his fight against judicial subpoenas, with the overall effect that the judiciary positioned itself as the only entity competent to oversee the presidency.

Consider the fates in court of the following attempts by Congress to oversee the Trump presidency:

- In June 2017, eighteen Democratic members of the House Oversight Committee demanded information from the General Services Administration about the terms of the Trump Organization's lease on the Old Post Office Building in Washington, DC (then the Trump Hotel).³⁷ The demand was made pursuant to a provision of federal law providing that any executive agency "shall submit any information requested of it relating to any matter within the jurisdiction of the [Oversight] committee" when seven or more members of that committee have requested the information.³⁸ GSA refused, and the members sued. That demand remains tied up in litigation as of spring 2023.³⁹

- In April 2019, the House Ways and Means Committee demanded that the Treasury Department turn over Donald Trump's tax returns, pursuant to a provision of the Internal Revenue Code stating that Treasury "shall furnish" that committee with "any return or return information specified" in a written request from the committee chair.⁴⁰ The Treasury refused, and the committee sued. Republican district judge Trevor McFadden slow-walked the case until the end

35. Charlie Savage, *Trump is Setting Course to Battle House Oversight*, N.Y. TIMES, Apr. 25, 2019, at A1.

36. See Carl Hulse, *President Enters New Territory in a Turf War with the House*, N.Y. TIMES, Apr. 26, 2019, at A19.

37. For the full factual background, see *Cummings v. Murphy*, 321 F. Supp. 3d 92, 97–99 (D.D.C. 2018).

38. 5 U.S.C. § 2954. The statute refers to the "Committee on Government Operations," to which the current Committee on Oversight and Reform is the successor. See References in Laws to Committees and Officers of the House of Representatives, Pub. L. No. 104-14, § 1(a)(6), 109 Stat. 186, 186 (1995) (providing that references to the Committee on Government Operations shall be treated as referring to the Oversight Committee).

39. See *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020) (reversing a district court holding that the congressional plaintiffs lacked standing); *Maloney v. Carnahan*, 45 F.4th 215 (D.C. Cir. 2022) (denying rehearing en banc over *nineteen months* after the panel decision). The GSA has asked the Supreme Court to review the court of appeals's decision on standing. See Petition for Writ of Certiorari, *Carnahan v. Maloney*, No. 22-425, 2022 WL 16790993 (Nov. 4, 2022). Of course, even if cert. is denied or the Supreme Court affirms the court of appeals, that would only resolve the issue of *standing*. The underlying issue of the members' right to the information would presumably still remain to be litigated.

40. 26 U.S.C. § 6103(f)(1).

of the Trump Administration.⁴¹ When the Biden Administration's OLC determined that Treasury "must comply" with the committee's demand,⁴² Trump asked McFadden to order Treasury not to hand the returns over; McFadden ruled against Trump in December 2021 but stayed his judgment pending appeal.⁴³ The D.C. Circuit affirmed eight months later⁴⁴ and denied rehearing en banc two and a half months after that.⁴⁵ John Roberts stayed the court of appeals mandate pending disposition of a cert. petition;⁴⁶ three weeks later, the full Court vacated Roberts's order and lifted the stay.⁴⁷ The material was turned over to the Committee at the end of November 2022⁴⁸—nearly two years into the Biden Administration and roughly one month before Republicans retook control of the House.

• Also in April 2019, in connection with the (first) impeachment proceedings against Trump, the House Judiciary Committee subpoenaed former White House Counsel Don McGahn to testify. He asserted executive privilege and refused; the committee sued. A Democratic district judge ruled for the committee;⁴⁹ roughly three weeks after the Senate acquitted Trump in the impeachment trial,⁵⁰ a D.C. Circuit panel consisting of two Republicans and one Democrat (who dissented) vacated the district court's decision and ordered the case dismissed as nonjusticiable.⁵¹ In August 2020, the en banc D.C. Circuit (with a Democratic majority) held that the case was justiciable.⁵² The case was remanded to the same panel, which later that month ordered it dismissed for

41. See Comm. on Ways & Means v. U.S. Dep't of Treasury, No. 1:19-cv-01974 (TNM) (D.D.C. Mar. 20, 2020) (staying the proceedings pending the outcome of the interminable *McGahn* case, about which see more *infra*).

42. Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. ____ (July 30, 2021), available at <https://www.justice.gov/olc/file/1419111/download> [<https://perma.cc/3C2T-9H9U>].

43. Comm. on Ways & Means v. U.S. Dep't of Treasury, 575 F. Supp. 3d 53 (D.D.C. 2021).

44. Comm. on Ways & Means v. U.S. Dep't of Treasury, 45 F.4th 324 (D.C. Cir. 2022).

45. Comm. on Ways & Means v. U.S. Dep't of Treasury, No. 21-5289, 2022 WL 15524456 (D.C. Cir. Oct. 27, 2022).

46. Trump v. Comm. on Ways & Means, No. 22A362, 2022 WL 16556568 (U.S. Nov. 1, 2022).

47. Trump v. Comm. on Ways & Means, 143 S. Ct. 476 (2022).

48. See Charlie Savage, *House Committee is Granted Access to Trump's Tax Returns*, N.Y. TIMES, Dec. 1, 2022, at A15.

49. Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019).

50. See Nicholas Fandos, *Split Senate Clears Trump on Each Count in Finale of Bitter Impeachment Battle: 'Country's Victory,' President Says—Democrats Call Trial a Cover-Up*, N.Y. TIMES, Feb. 6, 2020, at A1.

51. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510 (D.C. Cir. 2020).

52. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) (en banc).

want of a cause of action.⁵³ The en banc court *again* vacated the panel decision and ordered rehearing en banc.⁵⁴ In May 2021, the Biden Administration reached a deal with the committee for McGahn's testimony, and he testified the following month, thereby mooting the case.⁵⁵

- In July 2019, also in connection with the (first) impeachment proceedings against Trump, the House Judiciary Committee sought access to certain grand jury materials related to Special Counsel Robert Mueller's investigation into Russian interference in the 2016 presidential election. In October of that year, a Democratic district judge granted the application;⁵⁶ in March 2020, a D.C. Circuit panel consisting of two Republicans and one Democrat affirmed.⁵⁷ (Meanwhile, the Senate acquitted Trump in the impeachment trial on February 5, 2020.⁵⁸) The Supreme Court stayed the D.C. Circuit's decision and granted cert.;⁵⁹ then, after the 116th Congress (which had issued the subpoena) had ended and Joe Biden had become president, the Court summarily vacated the decision below and ordered the case dismissed as moot.⁶⁰

Note that, in each of these cases, judicial action made congressional oversight of the Trump Administration impossible. Even in the cases that the legislature ultimately "won," the victory came well into the Biden Administration. And that, of course, meant that not only was congressional oversight of the Trump Administration stymied, so too was *public* oversight, as none of this material was made available in time for the voters to consider it in November 2020.⁶¹

But the most egregious example of this phenomenon was the one in which the Supreme Court finally weighed in, *Trump v. Mazars*.⁶² In April 2019 (a busy month for oversight), three House committees issued subpoenas to third parties seeking information that they held about Trump's personal finances and

53. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020).

54. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020).

55. Charlie Savage, *Trump Pushed to Remove Mueller, Ex-Counsel Testifies*, N.Y. TIMES, June 10, 2021, at A16 (noting his testimony); *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021) (en banc) (per curiam) (granting the parties' joint motion to dismiss the case as moot).

56. *In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d 129 (D.D.C. 2019).

57. *In re Application of the Comm. on the Judiciary*, 951 F.3d 589 (D.C. Cir. 2020).

58. *See Fandos, supra* note 50, at A1.

59. *DOJ v. House Comm. on the Judiciary*, 140 S. Ct. 2800 (2020) (mem.) (granting stay); *DOJ v. House Comm. on the Judiciary*, 141 S. Ct. 185 (2020) (mem.) (granting cert.).

60. *DOJ v. House Comm. on the Judiciary*, 142 S. Ct. 46 (2021) (mem.).

61. *See generally* Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020) (hereinafter Chafetz, *Congressional Overspeech*) (discussing the deep connection between congressional oversight and public communication).

62. 140 S. Ct. 2019 (2020).

business dealings. Trump sued seeking to prevent compliance with the subpoenas; he lost before a Democratic district judge in May 2019⁶³ and in the court of appeals (with a Democratic-majority panel) that October.⁶⁴ On July 9, 2020, John Roberts, writing for a seven-justice majority (with Clarence Thomas and Samuel Alito dissenting on the grounds that Roberts's opinion was insufficiently Trump-protective), invented from whole cloth a nonexclusive four-factor balancing test to determine the acceptability of congressional subpoenas for the personal papers of the president.⁶⁵ Note that these four factors were in addition to the "valid legislative purpose" requirement that the Court has applied to all congressional subpoenas,⁶⁶ and they apply when Congress seeks the *personal* papers of the president—that is, when there is no claim of executive privilege.

Why did Roberts treat the president as a super-citizen when faced with a subpoena from Congress? The answer is that "[w]e would have to be 'blind' not to see what '[a]ll others can see and understand': that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved."⁶⁷ Because congressional demands for the president's personal papers "may aim to harass the President or render him 'complaisan[t] to the humors of the Legislature,'"⁶⁸ they must be superintended by the courts, lest the legislature "exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared."⁶⁹

Roberts also went out of his way to contrast legislative proceedings to judicial ones—to the former's disadvantage, of course:

Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in quite the same way" when every scrap of potentially relevant evidence is not available. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not

63. *Trump v. Comm. on Oversight and Reform*, 380 F. Supp. 3d 76 (D.D.C. 2019).

64. *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019).

65. *Mazars*, 140 S. Ct. at 2035–36 (laying out the four considerations and noting that "[o]ther considerations may be pertinent as well").

66. *See id.* at 2031–32 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)). For a critique of the "valid legislative purpose" language, see Chafetz, *Nixon/Trump*, *supra* note 24, at 141 n.117. *See also* David Rapallo, *House Rules: Congress and the Attorney-Client Privilege*, 100 WASH. U. L. REV. 455, 460 (2022) ("[I]t is challenging to identify an investigation that is unrelated to a legitimate function of Congress.").

67. *Mazars*, 140 S. Ct. at 2034 (citation omitted).

68. *Id.* (quoting THE FEDERALIST NO. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

69. *Id.* (quoting THE FEDERALIST NO. 71, at 484 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.⁷⁰

This unflattering (to Congress) contrast between the legislature and the judiciary was heightened by another decision released on the same day, also authored by Roberts (with Thomas and Alito again dissenting and arguing for a more Trump-protective ruling): *Trump v. Vance*.⁷¹ This case involved a New York state grand jury's subpoenas for almost exactly the same documents that were at issue in *Mazars*. But in contrast to *Mazars*, which held that special rules apply when Congress seeks the personal papers of the president, *Vance* went out of its way to insist that the president was a citizen like any other when faced with a grand jury subpoena: "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury's ability to acquire 'all information that might possibly bear on its investigation.'" ⁷² Worries about state grand juries or state prosecutors engaging in a harassment campaign against a president of the other party are overblown because "[w]e generally 'assume[] that state courts and prosecutors will observe constitutional limitations.'" ⁷³ But if a state grand jury were to go off the rails, never fear: the federal judiciary could step in to provide a backstop.⁷⁴

Note how differently legislative and judicial institutions are treated in these two opinions: courts, including state courts, get the benefit of the doubt and are "assume[d]" to "observe constitutional limitations." They carefully consider "every scrap of potentially relevant evidence." Congress, by contrast, has at most a tangential use for facts and evidence. Moreover, its motives are inherently suspect (and, indeed, so obviously so that "all others can see and understand" that this is the case⁷⁵). As I have noted elsewhere, "[i]n *Mazars*, it is the obligation of the Court, figured as a neutral arbiter, to protect the president from a legislature that seeks 'control' and 'advantage' over other institutions. Congress, as Roberts presents it, is feral—driven by emotion ('humors') rather than reason and seeking dominance rather than accommodation."⁷⁶ And of course the practical effect of the *Mazars* opinion—just like all the other Trump-era oversight cases—was that no information was produced to Congress until well after the Trump Administration had ended.⁷⁷

70. *Id.* at 2036 (internal citations omitted).

71. 140 S. Ct. 2412 (2020).

72. *Id.* at 2430 (citation omitted).

73. *Id.* at 2428 (citation omitted).

74. *Id.* ("[F]ederal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here.").

75. See *supra* text accompanying note 67.

76. Chafetz, *Nixon/Trump*, *supra* note 24, at 142.

77. See *id.* at 145–46. See also *Trump v. Mazars USA, LLP*, 39 F.4th 774 (D.C. Cir. 2022) (narrowing the scope of the subpoenas in light of the Supreme Court's test, nearly eighteen months

Consistently across these cases from the Bush, Obama, and Trump administrations, the judiciary has not only acted so as to stymie effective congressional oversight of the executive, it has also done so using language that disparages Congress, elevates the judiciary, and suggests that the judiciary stands not only outside of the political sphere, but indeed above it. Congress and the presidency are “rival” institutions whose interests may “clash”;⁷⁸ they are subject to “humours” and seek “controll” and “aggrandize[ment]”;⁷⁹ they engage in “mischief” that presents “a grave risk of precipitating a constitutional crisis.”⁸⁰ The courts, by contrast, are “civil” and “orderly”;⁸¹ they scrutinize “every scrap of potentially relevant evidence”⁸² and are “assume[d]” to “observe constitutional limitations.”⁸³ They do not have “rival[ries].” No wonder, then, that the judges were not particularly concerned that their proceedings frustrated congressional oversight: why should such an august institution be bothered by inconveniences caused to such a degraded one?

III. ADMINISTRATIVE LAW

Focusing on the oversight cases might lead one to believe that the courts are simply anti-Congress—and, to be clear, I think they very much are.⁸⁴ But while the executive branch may have benefitted from their anti-Congress rhetoric in oversight cases, the justices have also used both anti-administrative⁸⁵ and anti-Congress rhetoric in administrative law cases to aggrandize themselves at both of the other branches’ expense.

into the Biden Administration); Luke Broadwater, *Trump’s Old Accounting Firm Begins Handing Over Records to Congress*, N.Y. TIMES, Sept. 18, 2022, at A29 (noting that the documents began being handed over to Congress nearly twenty months into the Biden Administration).

78. See *supra* text accompanying note 67.

79. See *supra* text accompanying notes 68–69.

80. See *supra* text accompanying note 29.

81. See *id.*

82. See *supra* text accompanying note 70.

83. See *supra* text accompanying note 73.

84. See Chafetz, *Nixon/Trump*, *supra* note 24, at 127–28 (describing the judiciary’s “disdain for Congress and its representative role and ... architectonic project of judicial empowerment at the legislature’s expense” (footnotes omitted)); see also Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 41–55 (2012); Jonathan S. Gould & Olatunde C. A. Johnson, *SCOTUS Doesn’t Trust Congress—And That’s a Problem for American Government*, ATLANTIC: IDEAS (July 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/scotus-congress-trust/614380/> [<https://perma.cc/PTW4-ULRR>].

85. On the contemporary conservative attack on the administrative state more generally, see Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–51 (2017).

Consider the rise and rise of the “major questions doctrine.” The doctrine’s lineage predates the Roberts Court,⁸⁶ but it was Roberts Court decisions in the middle of the last decade that took the doctrine from Step One of the *Chevron* analysis (i.e., a factor going to the consideration of whether the statute is, in fact, ambiguous) to Step Zero (i.e., a question of whether the *Chevron* framework would apply at all).⁸⁷ And a new set of cases from 2021–22 (authored and joined by all of the Republican justices, with all of the Democrats dissenting) dealing with federal government responses to climate change and the COVID-19 pandemic⁸⁸ has gone even further, transmogrifying the doctrine into a clear statement rule and thereby taking it ever closer to functioning as a revitalized nondelegation doctrine. At *Chevron* Step One, the doctrine could be understood as an empirical assumption about drafting: *surely if Congress had wanted to allow agencies to make such a big policy decision, it would have said so explicitly*.⁸⁹ In that regard, the old major questions doctrine might be understood as a subset of the “no elephants in mouseholes” canon.⁹⁰ But the revised major questions doctrine has both shifted to an earlier stage in the analysis and purports to specify the appropriate mode of statutory drafting: if Congress wants to allow agencies to reach certain results, it must say so explicitly.⁹¹ This is no longer about *figuring out* the most sensible reading of statutory language; it is instead about *dictating* how Congress does its work.⁹² Moreover, the justices have

86. See Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 52–54 (2016) (tracing a history beginning with *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994)); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at Sec. I(A)) (same), <https://ssrn.com/abstract=4165724> [<https://perma.cc/JEY9-KHNU>].

87. On *Chevron* Step Zero generally, see Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). There is some disagreement as to whether the move to Step Zero should be dated to *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), or *King v. Burwell*, 576 U.S. 473 (2015). Compare Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1948–54 (2017) (identifying *UARG* as the first of a trio of “power canon” cases in which the Court departed from the *Chevron* framework), with Deacon & Litman, *supra* note 86 (manuscript at 11) (treating *UARG* as within the *Chevron* framework and *King* as the departure).

88. These cases are: *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Nat’l Fed. Of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022); *Biden v. Missouri*, 142 S. Ct. 647 (2022); and *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485 (2021). For an insightful analysis of this suite of cases, see Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

89. See, e.g., *MCI*, 512 U.S. at 231 (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”).

90. See Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 969 (2021).

91. See Sohoni, *supra* note 88, at 265 (“[T]he Court ... told us that it is emphatically the province of the judicial branch to say what the law must say clearly.”).

92. See *id.* at 276 (“The old major questions exception was a check on executive power; in contrast, the new major questions doctrine directs how Congress must draft statutes and is therefore

evinced no desire to lay down detailed criteria of “majority”: they have adopted a “we know it when we see it” approach that, unsurprisingly, makes agency actions they dislike more likely to be seen as “major.”⁹³ As Lisa Heinzerling put it, these cases both “mask a judicial agenda hostile to a robust regulatory state”⁹⁴ and “aggrandize the courts at the expense of Congress and the executive.... [by changing] the ground rules of statutory interpretation after the other branches have acted, upsetting the reliance the other branches may have placed in the preexisting interpretive regime and yet not replacing that regime with stable and predictable rules that could foster reliance moving forward.”⁹⁵

Assuming five justices *do* deem a question “major,” just how clear a statement is necessary before they will allow Congress to allow an agency to speak to that question? As Deacon and Litman note, the justices have remained “somewhat cagey” about the answer, but they argue persuasively that the best reading of the cases is that “when it comes to major questions, even a broadly worded, *otherwise unambiguous* statute is not enough.”⁹⁶ In other words, if five justices determine that eating an ice cream cone is a major question, then it is not enough that Congress has empowered the agency to “eat any dessert it chooses.” It must legislate that the agency can “eat any dessert it chooses, including ice cream cones.”⁹⁷ But, of course, Congress has no way of knowing whether eating an ice cream cone is major or not until it sees what five justices have to say about it. (Indeed, the justices have deliberately built uncertainty into the doctrine by insisting that “matter[s] of great political significance” or of “earnest and profound debate across the country” can trigger the doctrine⁹⁸).

It is easy to see how this doctrinal turn empowers the justices “to pick and choose between the regulations they like and those they think run afoul of this arbitrary standard,”⁹⁹ and it is equally easy to see how this judicial self-

a check on congressional power as well.”); Chad Squitieri, *Who Determines Majority?*, 44 HARV. J.L. & PUB. POL’Y 463, 466 (2021) (“[A]lthough the major questions doctrine is said to speak to *whether Congress has* delegated authority, in practice, the major questions doctrine is invoked to *tell Congress how* it may delegate authority.”).

93. See Chafetz, *supra* note 86, at 57–58.

94. Heinzerling, *supra* note 87, at 1938.

95. *Id.* at 1999.

96. Deacon & Litman, *supra* note 86 (manuscript at 24).

97. Or, as Mila Sohoni puts it, the cases “demand[] not just that Congress speak, but that Congress yell.” Sohoni, *supra* note 88, at 283.

98. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (internal quotation marks and citations omitted).

99. Lisa Heinzerling, *The Supreme Court’s Unequal ‘Liberty’*, ATLANTIC (Nov. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/11/supreme-court-west-virginia-v-epa-liberty/672250/> [https://perma.cc/6YEW-L8A6]; see also Lemley, *supra* note 5, at 100 (noting that the new major questions doctrine “seems to be designed to allow the Court to reject significant agency actions that are within their grant of power but that the agency implements in ways the Court doesn’t like”); Sohoni, *supra* note 88, at 266 (noting that the suite of 2021–22 major questions cases

empowerment comes at the expense of both Congress and the executive.¹⁰⁰ But, as Beau Baumann has demonstrated in an important recent article, these decisions are revealed as even more self-aggrandizing when attention is paid to their rhetorical strategies. Whereas older cases skeptical of agency authority had been framed (perhaps disingenuously, perhaps not) in terms of protecting Congress from executive overreach, more recent cases are premised on a far more “cynical view of Congress.”¹⁰¹ On this view, lawmakers want to delegate in order to “reduc[e] the degree to which they will be held accountable for unpopular actions,”¹⁰² in Neil Gorsuch’s words. It is therefore the Court’s job to ensure that Congress cannot “divest its legislative power to the Executive Branch.”¹⁰³ The justices thus frame their increasing skepticism toward delegated power as protecting Congress from its own worst impulses. But, as Baumann notes, this “cynicism is all implication; [Gorsuch] never provided any evidence that Congress was avoiding accountability in passing the relevant” statutory provisions.¹⁰⁴ Moreover, the justices utterly fail to grapple with the myriad tools that Congress has at its disposal or the evidence that it does in fact use those tools to check administrative behavior.¹⁰⁵ Without evincing any knowledge of how Congress *has acted* or *does act*, the justices confidently invent and enforce a very particular conception of how it *should act*. In Baumann’s apt phrase, this constitutes “congressional gaslighting.”¹⁰⁶

“annexes enormous interpretive power to the federal judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean ‘just what [the Court] choose[s] it to mean—neither more nor less.’” (internal alterations in original; internal footnote omitted).

100. See Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 18–19 (2023) (“The result of this ongoing project is not a return to some eighteenth-century, original understanding of the separation-of-powers *system*. Instead, the result is, and will continue to be, a more powerful judiciary enforcing a separation-of-powers *doctrine* as courts understand it.” (internal footnote omitted)).

101. Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 469 (2023).

102. *Nat’l Fed. of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (internal quotation marks and citation omitted).

103. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

104. Baumann, *supra* note 101, at 470. As Baumann demonstrates at some length, the literature on Congress makes it clear that this declinist narrative is woefully inadequate as either an historical account or a description of the present-day Congress. See *id.* at 515–26.

105. For my own contributions to that literature, see generally CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 25; Chafetz, *Congressional Overspeech*, *supra* note 61; *Article One: Strengthening Congressional Oversight Capacity*, Hearing Before the H. Select Comm. on the Modernization of Congress, 117th Cong. 3–15 (Nov. 4, 2021) (statement of Prof. Josh Chafetz), available at <https://www.govinfo.gov/app/details/CHRG-117hrg48604/CHRG-117hrg48604/context>; *Protecting Congress’ Power of the Purse and the Rule of Law*, Hearing Before the H. Comm. on the Budget, 116th Cong. 11–74 (Mar. 11, 2020) (statement of Prof. Josh Chafetz), <https://www.govinfo.gov/app/details/CHRG-116hrg41966/context> [<https://perma.cc/5D7X-MZV7>]. For a survey, see Baumann, *supra* note 101, at 521–26.

106. Baumann, *supra* note 101, at 470.

Of course, Congress isn't the only bad actor whose impulses must be checked by the courts, as the justices see it. The agencies, too, are insidious. There is a risk of "government by bureaucracy supplanting government by the people."¹⁰⁷ In a world of (judicially) unchecked delegation,

agencies could churn out new laws more or less at whim. Intrusions on liberty would not be difficult and rare, but easy and profuse. Stability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power. Powerful special interests, which are sometimes "uniquely" able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds. Finally, little would remain to stop agencies from moving into areas where state authority has traditionally predominated.¹⁰⁸

This is quite a parade of horrors from which the justices are protecting us!

Note that these cases serve to "justify a transfer of power to the judiciary"¹⁰⁹ in two distinct ways. The first, and more obvious, way has to do with their outcomes. In essence, the Supreme Court majority has given itself carte blanche to toss agency actions that it doesn't like, based on a post hoc (and, importantly, ad hoc) determination that the question involved was "major" and therefore required Congress to legislate with a degree of specificity that it could not possibly have anticipated. More subtle, but no less insidious, is the way in which the justices portray the roles of various actors, including themselves. Administrative agencies are unaccountable behemoths that threaten to destroy republican self-government; they threaten values of liberty, stability, federalism, and more. Congress is simply trying to pass the buck so as to avoid responsibility for tough decisions. (All of these claims, it should go without saying, are made almost wholly free from the felt necessity of providing empirical support.) Of course, the justices never describe the motivations of their own institution: they simply describe the principles that they think should limit the other institutions, thereby implicitly holding themselves out as impartial, apolitical appliers of those principles. They are just the umpires, with no motivation other than to get the calls right.

CONCLUSION

In each of these three areas, the judiciary has simultaneously employed two distinct strategies to empower itself at the expense of other governing institutions. The first, and most readily apparent, is simply the role it has seized for itself in making important governance decisions. It has taken it upon itself to

107. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (internal quotation marks and citation omitted).

108. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (internal citations omitted).

109. Baumann, *supra* note 101, at 473.

disallow huge swaths of campaign finance law (and other election law, too¹¹⁰), to delay congressional oversight to the point of entirely incapacitating it, and to vacate regulations it doesn't like in crucial domains like pandemic and climate change policy.

The second strategy is somewhat less apparent, but may in the long run be more consequential. Across these different fields, judges at all levels of the federal judiciary have described other political institutions in overwhelmingly derogatory terms, while simultaneously either describing the judiciary in flattering terms or not describing it at all—denying its status as an institution and positioning it as simply a conduit of disembodied law. And while this move has largely been driven by Republican judges (after all, Republicans have controlled the federal judiciary for many decades), plenty of Democratic judges have participated as well. This is to a real degree a bipartisan project of judicial self-empowerment.¹¹¹

That's important, because ideas matter in constitutional politics.¹¹² Across a range of doctrinal areas, the judiciary has been vigorously promoting the idea that it alone can engage in principled, competent governance. It has promoted that idea with enough success that other governing institutions have largely bought in: Why else would Congress keep running to the courts asking them to “enforce” its subpoenas, even though it never gets anything out of it, when it could develop the tools to enforce them on its own? Why else would the executive give up enforcing vital national policy simply because the courts tell it to? To frame the answer to those questions in terms of “the rule of law” is to buy into the judiciary's self-interested self-presentation as nothing more than the avatar of law. But, as Vladeck has reminded us, the judiciary is an *institution*. Let's start talking about it as one.

110. See, most egregiously, *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013).

111. See Chafetz, *Nixon/Trump*, *supra* note 24, at 150 (“Something did indeed trump partisanship, but it was not so much the greater public good as it was the good of the Justices' own institution.”). On judicial institutional loyalty more generally, see David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 30–33 (2018).

112. See Sumrall, *supra* note 100, at 26–31 (summarizing the outpouring of recent American Political Development literature on how ideas shape political outcomes); see also Brian Christopher Jones, *Judicial Review and Embarrassment*, 2022 PUB. L. 179, 180 (“[H]ow the courts portray the elected branches is highly significant. After all, psychologists have found that intentional embarrassment can be used not just to negatively sanction someone's behaviour, but also to establish or maintain power.”).

