Separation of Powers and the Judiciary Act of 1925

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Abstract

Contemporary separation of powers doctrine endorses a vision of the Constitution that sees power neatly distributed across the three branches of government. That vision sees Congress exercising legislative power, the judiciary exercising judicial power, and the presidency and the executive branch exercising executive power. Modern separation of powers doctrine understands the Constitution as neatly distributing different powers across branches that operate interdependently but distinctly from one another. But separation of powers doctrine would have us believe that the constitutional system works differently than it does in reality.

Using the Judiciary Act of 1925 as a case study, this essay explores the separation of powers as a process, not a doctrine. The origin process of the Judiciary Act of 1925 saw a much more complex and nuanced picture of the separation of powers than modern doctrine reflects. The Act was drafted by the Justices, not by a member of Congress. Congress devoted little time to debate, as the Justices' testimony to Congress helped to convince legislators that the Act's reforms were necessary and too complex for the legislators to understand. At the same time, the Justices acknowledged Congress's authority to regulate its docket, and Congress did not abdicate its authority to regulate the Supreme Court. If the Judiciary Act of 1925's approval process was permissible instance of interbranch dynamics and the separation of powers in action, then modern doctrine endorses a different idea than reality reveals. It also demonstrates a deep irony in American constitutional politics: the Supreme Court that today tells a story about the separation of powers doctrine is a product of a separation of powers process that looks very different than the story it tells.

Introduction

Perhaps no principle is more foundational to American constitutional law than the separation of powers. As a matter of constitutional theory, the separation of powers is a principle

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to justify particular constitutional design choices—the legislature being separate from the executive function, for example. But as a matter of extant constitutional law, the separation of powers is a doctrine that judges enforce. When judges invoke the separation of powers, they use it to justify their holding. When judges invoke the separation of powers, they tell a story about what it is or what it is for. That story might be true. Or it might be fiction.

This essay examines the story that the Supreme Court tells about the separation of powers. In their opinions, letters, and public statements, Justices of the Supreme Court tell stories and endorse ideas about law, the constitutional system, and themselves.[1] The contemporary Supreme Court's ideas about the separation of powers reflect a somewhat wooden understanding of the constitutional system. Congress exercises legislative power when it legislates. The president exercises executive power when it executes and enforces laws. The judiciary exercises judicial power by deciding cases and controversies while wielding neither sword nor purse. The story the Justices have been telling recently is neat and clean. It assumes that constitutional boundaries are clear and rigid—simple yet brilliant. Interdependent but stable. And the Court is its enforcer.

But the ideas the Supreme Court endorses about the separation of powers do not reflect reality. In reality, the separation of powers system is much more complex, nuanced, and messy. Using the case of the Judiciary Act of 1925,[2] this essay explores the separation of power system in action. When the Supreme Court Justices were overrun with work and too many cases they believed were not worth their time, they dreamed up a solution. They got together and came up with a draft bill they presented to Congress. The Justices knew they needed Congress to solve their workload crisis. They lobbied Congress, working to convince legislators that the bill was necessary

[1] Karen M Tani, *The Supreme Court 2023 Term -- Forward: Curation, Narrative, Erasure: Power and Possibility at the U.S. Supreme Court*, HARV. L. REV. 1, 8 (2024); Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 29–30 (2023).

[2] Pub. L. 68-415, 43 Stat. 936 (February 13, 1925).

but too complex for them to understand. Legislators recognized their own power to regulate the Supreme Court but knew that they needed to listen to the Justices' own ideas about how their institution ought to be structured. Although there was no question that Congress had the authority to regulate the Supreme Court and change its docket, legislators did not fully grapple with the gravity of the bill. Partially because of the Justices' careful lobbying, Congress seemed not to realize that the bill would fundamentally reshape the role of the Supreme Court in the constitutional system. This moment of interbranch deliberation and collaboration also helped to solidify and popularize the idea that the Supreme Court's proper role is to supervise the federal judicial system and express its expert opinion to resolve circuit splits.[3]

The story of the Judiciary Act of 1925 reveals a separation of powers system that is collaborative but messy; dynamic but productive. It demands collaboration and interbranch expertise, but also institutional accountability. It needs public engagement for its enforcement, not just judicial line-drawing. But the narrative told by the Supreme Court today is different. If we were to learn about the separation of powers from recent Supreme Court opinions and the Justices' public statements, we would learn that the complex system that the Constitution sets up is clean, simple, and demands judicial enforcement. The deep irony is that the Supreme Court that tells this story is a product of separation of powers process that looks very different from the story it tells.

The mismatch between the ideas the Supreme Court espouses and the reality of the separation of powers systems matters because ideas are important forces in constitutional politics.[4]

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[3] *See* Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925* (Draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5075524; *Cf.* Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73 (2007).

[4] Sumrall, *supra* note 1; Allen C. Sumrall, *The Law Incongruous Ideas of Impeachment: "Impeachable Offenses" and the Constitutional Order*, 50 PRESIDENTIAL STUD. Q. 948 (2020); Suzanne Mettler & Richard M. Valelly, *Introduction*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 1 (Richard M. Valelly, Suzanne Mettler, & Robert C. Lieberman eds., 2016); Vivien A. Schmidt, *Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth 'New Institutionalism,'* 2 EURO. POL. SCI. REV. 1 (2010);

Ideas can catalyze institutional change and stability,[5] but also structure how people understand their own political partisanship,[6] the world around them, and political institutions' purpose.[7] They also give life to interbranch power relations.[8] By endorsing certain ideas about the separation of powers system and their own place in it, the Justices necessarily exclude other ideas. They tell a story about the constitutional system, and those Court-made narratives "can then *become law*, giving them more formal power" than the ideas and stories told by nonjudicial actors.[9] Those ideas can even empower the judiciary over and above its more formal sources of power.[10] The mismatch, therefore, reveals a risk of perpetuating a particular idea about how the constitutional system works when reality reveals something different. It ought to have consequences for how we consider doctrinal change but also for understanding the federal judiciary's place in the constitutional system. To be sure, it ought to make us reconsider the wisdom of current separation of powers doctrine if the story it tells is contradicted by the Judiciary Act of 1925's enactment. The mismatch also offers more evidence about the importance of historically contingent ideas in American constitutional development.

Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697 (2002).

[5] JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION (2021).

[6] STEPHANIE TERNULLO, HOW THE HEARTLAND WENT RED: WHY LOCAL FORCES MATTER IN AN AGE OF NATIONALIZED POLITICS (2024). Ternullo's work discusses the importance of diagnostic frames to changing the impact of national political forces across place. There of course is a conceptual difference between diagnostic frames, narratives, and ideas, but that difference does not affect this essay's analysis. This essay treats those concepts interchangeably.

[7] Andrea Louise Campbell, *Policy Makes Mass Politics*, 15 ANN. REV. OF POL. SCI. 333 (2012); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595 (1993).

[8] JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

[9] Tani, *supra* note 1 at 43. For more on the importance of narrative in law, see Robert M Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

[10] Allen Sumrall & Beau Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE (2024); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635 (2023); Josh Chafetz, *Corruption and the Supreme Court*, YALE J.L. & HUMAN. (2025), https://papers.ssrn.com/abstract=4971946 (last visited Oct 3, 2024). *See also* Allen C. Sumrall, *The Ideational Dimension of Judicial Power* (Draft) (2024) (manuscript on file with author).

At the outset, it is important to note what this argument is not. This is not an argument that the Judiciary Act of 1925 violates the separation of powers doctrine. Rather, this essay draws a distinction between the doctrine and the ideas or story that the cases embrace or tell, and observes tension between the Judiciary Act of 1925 and the ideas about the separation of powers put forward in relevant separation of powers judicial opinions. The argument is not a prediction about what doctrinal conclusion the Supreme Court might reach when confronted with various processes that happened during the Judiciary Act's passage. The argument is instead about the picture or vision of the separation of powers that the Court tells does not map onto how the separation of powers system has worked. Because ideas matter in constitutional politics, the focus is on what the Court tells us about the separation of powers' purpose and function, not the doctrinal conclusions that the Court derives from those ideas. To be sure, that contemporary separation of powers doctrine bears little resemblance to the system's reality is not solely a criticism of judicial decision-making. Likely any judicially managed separation of powers rules would not easily capture how the system in fact works. While there is room for doctrinal improvement, the research presented in this essay suggests that the disconnect between doctrine and the system's reality may be difficult if not impossible to avoid. Nevertheless, even if there is an unavoidable disconnect between the system's reality and judicial rulemaking, the ideas that courts embrace and articulate need not be so divergent from those that animate the system itself.

This essay proceeds in two parts. First, it tells the story of the Judiciary Act of 1925. The Judiciary Act's origin story involved deep interbranch collaboration. It arose out of the Supreme Court Justices' perceived need to reduce their workload. The Justices believed they dealt with too many cases, but especially too many frivolous ones. But the Act's approval process involved a dense network of communication between the Justices, Congress, the Executive Branch (including the President), and private interest groups like the American Bar Association. The process was messy but ultimately productive. Today, the Justices enforce the Act. The story of the Judiciary Act's birth sounds much different than the story the Justices tell us today about how the separation of powers works. Second, the essay discusses the story that the Supreme Court and its Justices tell us today about the separation of powers. It draws from recent caselaw as well as public statements from the Justices. The Supreme Court's separation of powers story is clean, tidy, simple, and relies on a handful of platitudes about the separation of powers' purpose as a constitutional principle. It is entirely foreign to the productive and complex interbranch process that produced the Act that continues to shape the Supreme Court to this day. The essay concludes by considering why the narrative mismatch is important and what the ideational divergence tells us about constitutional development and the separation of powers system.

I. The Judiciary Act of 1925

Without the Judiciary Act of 1925, the Supreme Court would look very different today. Every year, the Court carefully curates a list of cases it will decide in its upcoming term.[11] But before the Judiciary Act, the Court was inundated with mandatory appeals and cases some saw as frivolous. The Judiciary Act of 1925 changed that. The Act made changed the bulk of the Supreme Court's docket from mandatory to discretionary jurisdiction and "remains the basis of the Court's modern day jurisdiction."[12] But the Judiciary Act's passage also offers an opportunity to examine the separation of powers system's operation.

[11] Or, perhaps more accurately, it assembles a list of questions it will decide. The Supreme Court does not decide cases. It decides questions—a practice that began soon after the Judiciary Act's passage. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).
[12] H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 301 (1991).

This part discusses the enactment of the Judiciary Act of 1925 as an example of the separation of power system in action. It offers a window into the messy but often productive process that happens when different institutions collaborate to address a perceived policy problem. Functions are mixed, and actors take on various roles. Public engagement is key. The enactment of the Judiciary Act of 1925 tells a story of interbranch collaboration by offering differing (institutional) perspectives on policy change. The Judiciary's Act enactment largely reflects what Richard Neustadt famously described as "a government of separated institutions *sharing* powers."[13] Justices were deeply involved in the legislative process. Congress gave far less thought to the legislation than the Justices did. And now, the Executive Branch does not enforce the Judiciary Act. That duty belongs to the Justices and, presumably, to Congress to try to exercise oversight (including impeachment) if the Justices ignore the Act. The Act that continues to greatly shape the Supreme Court's current function was forged out of a messy, dynamic, but ultimately productive interbranch lawmaking process.

By the 1920s, the judiciary was overworked, its docket was overrun, and litigants faced significant delays.[14] The Supreme Court could not handle the size of its docket. In 1922, Chief Justice Taft explained to the American Bar Association that the federal judiciary was "likely to be swamped, and delay is a denial of justice."[15] The federal judiciary lacked "structure and accountability."[16] Over the prior decade, the federal judiciary's criminal docket had grown by almost 800 percent, and the number of petitions for certiorari to the Supreme Court had increased in 270 to 539.[17] The crippling workload resulted from numerous factors, including increased

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[13] RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1st Free Press paperback ed ed. 1991) (emphasis in original).
[14] JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 199 (2012).
[15] William Howard Taft, *Three Needed Steps of Progress*, 8 AMERICAN BAR ASSOCIATION JOURNAL 34, 34 (1922).
[16] Kevin J. Burns, *Chief Justice as Chief Executive: Taft's Judicial Statesmanship*, 43 J. SUP. CT. HIST. 47, 51 (2018).
[17] CROWE, *supra* note 14 at 199.

national economy regulation, new income tax violations, lingering World War I espionage cases, civil litigation over canceled wartime contracts, the "growing federalization of crime," notably trafficking and drug smuggling, and prosecutions against organized crime and alcohol distributors after the Eighteenth Amendment's ratification and the Volstead Act.[18] The still "highly decentralized" court system was left "laboring under cumbersome procedures like automatic appeals to the Supreme Court, with a bloated and substantially backlogged docket."[19] Taft saw a culprit, too: "[t]he administration of justice has been under attack and subjected to proper criticism" and the "legislatures have been largely to blame and not the judges in carrying out what the legislatures have put into the statutes."[20] Taft believed that piecemeal fixes were insufficient, and the "post-World War I judiciary requires less tinkering and more transformation."[21] Taft knew that the Court could not fix its workload crisis on its own. He needed Congress's help.[22]

At the same time, Taft had in mind a broader reform agenda. The pragmatic reforms dovetailed nicely with Taft's vision for the federal judiciary's role in constitutional governance.[23] Although Taft already had served as President, he had "long been a student of the Supreme Court" and, importantly, "held definite views on its place in American politics."[24] Taft sought to elevate the status of the federal judiciary—but especially the Supreme Court—within the constitutional system but also in the public consciousness. Taft's vision must be observed as a historical project of institutional reform, but it is no coincidence that his views largely reflect the Supreme Court

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[18] 41 Stat. 205 (October 28, 1919). *See* ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930 480 (2023); CROWE, *supra* note 14 at 199.
[19] CROWE, *supra* note 14 at 199.
[20] Taft, *supra* note 15 at 35.
[21] CROWE, *supra* note 14 at 200.
[22] POST, *supra* note 18 at 477. (noting that "Taft realized that the Supreme Court needed legislative reform of its jurisdiction to keep pace with its torrential docket").
[23] *Id.* at 479. ("By 1910 . . . the crisis in the Supreme Court's docket had become so pronounced that Taft began to connect his account of the Court to the necessity of reducing its impossible large workload.").
[24] ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 47 (1968).

today. In effect, he envisioned the Supreme Court as a super-legislature, where judicial review was the highest function to preserving the integrity of American governance. As Taft wrote in 1914, "[t]he greatest advantage of our plan of government over every other is the character of the judicial power vested in the Supreme Court," because it is the "chief instrument in the maintenance of that self-restraint which the people of the United States have placed upon themselves and which has made this Government the admiration of intelligent critics the world over."[25] Taft saw judges as "high priest[s] in the temple of justice" where symbolism and the mythology of judicial expertise and wisdom justified a broad supervisor judicial role.[26] He sought to mold the judiciary and the entire constitutional system to his vision. While Taft envisioned an aggrandized judiciary that would act not "as a final appellate tribunal" but "as the supervisor of the system of federal law," the piecemeal pieces of legislation that he had in mind both helped bring that vision to life and solve the practical problems that plagued the judiciary.[27]

Among the reforms that Taft had in mind was a dramatic reduction in the Supreme Court's mandatory jurisdiction.[28] When Taft became Chief Justice, he created a committee of Justices Day, Van Devanter, and McReynolds to draft a bill that eventually became the Judiciary Act of 1925.[29] The reason the Act often is called the "Judges' Bill" is because the Justices themselves drafted the legislation. While Taft's broader purpose for the legislation that became the Judiciary Act was to help transform the judiciary into something more resembling a super-legislature, the stated point of the legislation was to streamline the Supreme Court's docket. Before the Act, the Justices were often asked to "wrestle[] with a host of minor disputes" while "matters of grave constitutional

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[25] William H. Taft, Popular Government; Its Essence, Its Permanence and Its Perils 184–85 (1913).
[26] William H. Taft, Present Day Problems; A Collection of Addresses Delivered on Various Occasions 63–64 (1908); *See* Mason, *supra* note 24 at 47.
[27] Post, *supra* note 18 at 479.
[28] The 1922 Judicial Conference Act was another. 42 Stat. 837 (Pub. L. No. 67-298).
[29] Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 Colum. L. Rev. 1643, 1662 (2000).

import bided their time."[30] Clever lawyers could take advantage of the appeals system and get their client's case in front of the Justices "no matter how picayune or devoid of public interest."[31] And so, the legislation was designed to remove from the Supreme Court's consideration many mandatory appeals from the lower federal appeals courts. The legislation greatly expanded the Supreme Court's discretionary certiorari jurisdiction, effectively ensuring that the Justices could keep a small docket and only consider the questions that they wanted to answer.[32]

To urge the Bill through Congress, Taft relied on his unique reputation as a former president and his extensive networks, "both of which furnished him with much-needed political capital."[33] The Justices themselves saw a need for policy change, wrote the bill, and then Taft lobbied Congress, the public, and the American Bar Association to convince Congress to pass the bill. The Justices were deeply involved in this legislative reform. Congress was receptive to the Justices' arguments in favor of shrinking the Court's docket and giving the Justices more policy control.

There is some dispute whether the Justices began drafting the bill at Congress's request or whether the Justices began drafting it on their own.[34] On the whole, the record suggests that the Supreme Court Justices began drafting a bill to propose to Congress on their own in November, 1921, and the interest of a few legislators in the same issue was a coincidence.[35] In November, 1921, Senator Albert B. Cummins sent a proposal to Taft that affected change the Court's jurisdiction over state court judgments.[36] Taft wrote back, noting that "We are preparing a bill

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[30] ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 108 (1965).
[31] *Id.*
[32] POST, *supra* note 18 at 484. The Act left in place some mandatory jurisdiction, however, including state court decisions invalidating federal statutes or upholding state statutes against federal constitutional challenges. *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 48 n.252 (2009).
[33] Crowe, *supra* note 3 at 204.
[34] POST, *supra* note 18 at 480–83.
[35] *See Id.* at 483.
[36] Hartnett, *supra* note 29 at 1662.

which we hope to bring before your committee."[37] "I would to discuss the matter with you," Taft, the Chief Justice of the United States, wrote to Senator Cummins.[38] Taft explained that the bill "has been under consideration by the Supreme Court for some time," and that the other Justices "wish me to go before the committee and present" the bill "at the request of the Supreme Court."[39] Several days later, Taft wrote to Cummins again expressing his view that Cummins' proposal was "unnecessary" because there already are "authorities which cover the current case."[40] Because Taft wanted his bill to pass and wanted to avoid having Progressives on the Senate Judiciary Committee who were skeptical of federal judicial power, Taft in January, 1922, "went so far as to suggest particular individuals to be placed on that committee."[41]

Taft himself lobbied Congress—both the House and Senate—to pass the Justices' bill. He appeared before the House Judiciary Committee in March of 1922 to persuade the Committee to pass the Court's bill.[42] When the Chief Justice's first attempt at in-person lobbying did not produce immediate results, Taft wrote letters to both the Speaker of the House and the chairman of the Rules Committee and enclosed copies of the bill and of his remarks to the House Judiciary Committee.[43] "This is the bill of which I spoke to you this morning," he said, "and in the passage

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[37] Letter from William H. Waft to Albert B. Cummins (Nov. 25, 1921). Taft papers. https://www.loc.gov/resource/mss42234.mss42234-236_0020_1184/?sp=366&st=image.
[38] *Id.*
[39] *Id.*
[40] Letter from William H. Waft to Albert B. Cummins (Dec. 1, 1921). Taft papers. https://www.loc.gov/resource/mss42234.mss42234-236_0020_1184/?sp=757&st=image.
[41] Hartnett, *supra* note 29 at 1663.
[42] *Id.*
[43] WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 131 (1964); Letter from William H. Taft to Frederick H. Gillett (April 8, 1922), Taft Papers; https://www.loc.gov/resource/mss42234.mss42234-240_0020_1207/?sp=1102&st=image; Letter from William H. Taft to Frederick H. Gillett (April 8, 1922), Taft Papers. Taft sent these letters the same day he declined a dinner invitation, noting that Senator George Norris warned him that he is "likely to be corrupted by dinners, and, of course, [he] must preserve the ermine of the judiciary." Letter from William H. Taft to C. Stuart Patterson (April 8, 1922), https://www.loc.gov/resource/mss42234.mss42234-240_0020_1207/?sp=1110&st=image. The threat of judicial independence came evidently from socializing with members of the public, not from taking advice from Senators.

of which I solicit your assistance."[44] When those efforts proved unsuccessful, Taft tried again several months later, urging the Speaker of the House to take up the bill. Taft promised to "make an effort to get it up in the Senate" if he passed the House.[45]

When his initial lobbying attempts did not cause immediate results, Taft got creative. He also "carried his fight to the public," specifically to the American Bar Association, which Taft enlisted in his fight to get Congress to change the Supreme Court's jurisdiction.[46] Taft spoke to the ABA in August, 1922, and implored the ABA the support the Justices' plan for judicial reform.[47] The ABA got on board and framed their campaign as an informational one.[48] The ABA worked to convince Congress that the jurisdictional questions the Justices sought to amend were too complex for the legislators to understand.[49] In the words of Thomas Shelton, the ABA tried to convince members of the House that "this bill was of such a highly technical order that the Bar Association did not feel itself prepared or qualified to act" and so Congress should "adopt the bill promptly and watch its operation" and be prepared to act if "any hardships should happen."[50] The assumption being, of course, that Congress needed to act, inquire, watch, and, if necessary, react.

Taft also enlisted the help of the Executive Branch. He coordinated with the Solicitor General in lobbying Congress, who eventually testified in the House in favor of the bill.[51] In a remarkable event by today's standards, Taft—who, it bears repeating, was the Chief Justice—convinced President Calvin Coolidge to let him draft a portion of Coolidge's first State of the

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[44] *Id.*
[45] *Id.*
[46] MURPHY, *supra* note 40 at 131.
[47] William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601 (1922).
[48] Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 15 (2003).
[49] Hartnett, *supra* note 29 at 1661; *Id.* at 1674.
[50] Letter from Thomas Shelton to William H. Taft (Dec. 19, 1924), Taft Papers.
[51] *See* at 1669.; Letter from William H. Taft to Joseph Walsh (April 8, 1922), Taft Papers, https://www.loc.gov/resource/mss42234.mss42234-240_0020_1207/?sp=1124&st=image.

Union speech.[52] With Coolidge's support (via Taft), Congress finally began hearings on the bill in earnest.

A Senate Judiciary Committee subcommittee held hearings in February 1924, with Taft providing input into who would testify.[53] Senator Thomas Walsh acknowledged Congress's role in regulating the courts, explaining that "if the work of the Supreme Court is accumulating beyond its power to dispatch . . . it is incumbent on Congress . . . to grant relief."[54] Justices Van Devanter, McReynolds, and Sutherland testified to the Senate in support of their bill.[55] Along with the bill, Senator Cummins introduced into the record not his own analysis of the bill, or the analysis of any other member of Congress, but the Supreme Court's pre-prepared analysis.[56] After Justice Sutherland testified in support of the bill, the Senate Judiciary Committee reported the bill favorably and adopted as its own Cummins' subcommittee's report, which noted that it "'could not improve upon'" the commentary from Justices Van Devanter and McReynolds.[57]

During the 1924 election, Taft and Coolidge communicated about the campaign and about Coolidge's defense of the Court.[58] After Coolidge won reelection, Taft once again convinced Coolidge to spend some time in his State of the Union speech expressing support for the Judges' Bill.[59] The continued support from Taft and Coolidge helped spur the House Judiciary Committee to hold its own hearings on the Judges' Bill in December 1924.[60] During those hearings, Van

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[52] Hartnett, *supra* note 29 at 1674; MURPHY, *supra* note 40 at 132; Hartnett, *supra* note 29 at 1684.
[53] Hartnett, *supra* note 29 at 1675. Letter from William H. Taft to Thomas W. Shelton (Jan. 31, 1924), Taft Papers. [missing link since LOC resource not working for that section of Taft papers].
[54] 62 Cong. Rec. 8548 (1922) (Statement of Sen. Walsh), https://www.congress.gov/67/crecb/1922/06/12/GPO-CRECB-1922-pt8-v62-17-1.pdf.
[55] Hartnett, *supra* note 29 at 1676.
[56] *Id.* And yet, despite the Justices' obvious deep involvement in the legislative process, Van Devanter denied that the Justices wanted to involve themselves in the legislative process. *Id.* POST, *supra* note 18 at 482.
[57] Hartnett, *supra* note 29 at 1680 (quoting Appellate Jurisdiction of the Federal Courts, S. Rep. No. 68-362, at 2 (1924)).
[58] *Id.* at 1682.
[59] *Id.* at 1684.
[60] *Id.*

Devanter explained that the Justices were hesitant to express an opinion on any item of legislation, despite appearing before the Committee to do just that for a bill the Justices themselves authored.[61] When the committee chair explained his view that the proposed bill makes no changes to the Court's obligatory jurisdiction over state court judgments, Van Devanter corrected him, explaining that the bill would shift most of those cases from obligatory to discretionary jurisdiction.[62] The discussion demonstrates not only that the legislators were deferring to the Justices on the bill's particulars and its necessity, but also that the Justices acknowledged that they needed Congress to pass this bill in order for the change to its docket to take effect. In a way, each branch acknowledged that they needed the other for this project. Before the House Judiciary Committee hearings concluded, Congressman Montague asked the Justices present whether they wanted to appear in the record as the bill's authors.[63] Van Devanter equivocated and reiterated the contested (and dubious) assertion that the Justices drafted the bill in response to a request from Congress and not strictly on their own volition.[64] After Taft spoke at the hearing, Congressman Michener asked the Justices directly whether it was "'the judgment of each individual member of the Supreme Court that this legislation should be enacted?'"[65] Taft responded: "'Well, I am told by all the members that I can say that the court is for the bill.'"[66] The House Judiciary Committee issued a report several weeks after the hearing recommending the bill and stating that the Justices prepared the bill in response to a request from Congress.[67]

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[61] *Id.* at 1685.
[62] *Id.*
[63] *Id.* at 1687.
[64] *Id.* at 1687–88.
[65] *Id.* at 1691 (quoting Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States, Hearings on H.R. 8206 Before the House Comm. on the Judiciary, 68th Cong. 29 (1924)).
[66] *Id.*
[67] *Id.*

When the bill reached the floor of the House and the Senate, the same interbranch dynamics were on display. The Justices were publicly acknowledged to have drafted the bill and to strongly support it. Although strong opposition had prevented the Senate from considering the bill earlier, the vocal support from the Justices and the Executive Branch (at least most of which was Taft's handiwork), the Senate began debate on January 31, 1925.[68] Senator Cummins "made clear that the 'bill was prepared by the justices of the Supreme Court' and that he 'introduced the bill at the suggestion of the members of the Supreme Court.'"[69] Members of Congress were reluctant to offer any strong opinions on the bill or even any amendments. In the House, when Congressman McKeown tried to offer an amendment, he was rebuffed and told that he should defer to the Justices. McKeown was informed that he "should not be offering a floor amendment to a bill prepared by Justices of the Supreme Court."[70] The House passed the bill with barely any discussion and without a roll call vote, prompting one congressman to remark that "there are not five men here who have heard the bill read or have heard any discussion of the amendment offered," even though it is a "most important bill."[71] In the Senate, one member inserted into the record his correspondence with Chief Justice Taft, in which Taft explains that he anxiously has been awaiting the bill's passage for years.[72] The Senate eventually passed the Judges' Bill and Coolidge signed it on February 13, 1925.[73] Coolidge's signature brought to an end a long period of interbranch collaboration and discussion, highlighted of course by Taft's aggressive lobbying of individual

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[68] *Id.* at 1692.
[69] *Id.* at 1694 (quoting 66 Cong. Reg. 2754 (1925)).
[70] *Id.* at 1695.
[71] 66 Cong. Rec. 2879 (1925).
[72] 66 Cong. Rec. 2920 (1925) https://www.congress.gov/bound-congressional-record/1925/02/03/senate-section.
[73] Pub. L. 68-415, 43 Stat. 936 (February 13, 1925).

congressmen, the Executive Branch, including the Solicitor General and the President, and the ABA.[74]

The Judges' Bill has had lasting effects on the Supreme Court's role in the constitutional system. A bill born out of a complex interbranch dynamic has enabled the Court to embrace its current role as a declarer of federal law and supervisor of the federal lawmaking process.[75] This consequence should not be surprising, considering it was part and parcel of Taft's broader project to reshape the judiciary as a high temple of constitutional guardianship and a quasi-super legislature, rather than a mere resolver of disputes. Taft wrote in 1908 (before he held the presidency) that the Supreme Court's core function was not merely to resolve disputes between parties but to "lay down general principles of law in the interpretation of State or Federal constitutions or statutes, or in the application of the common law, for the benefit and guidance, not of the particular litigant affected, but of the communities at large."[76] Taft believed that the Supreme Court's "highest function" is "the interpretation of the Constitution of the United States" not to determine a rule applied to a particular case in a dispute between parties, but for the much larger purpose of "guid[ing] the other branches of the Government and the people of the United States in their construction of the fundamental compact of the Union."[77] For this reason, Taft believed that the judiciary is the "most important . . . branch of government."[78] Taft saw the judiciary's role as

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[74] Of course, we cannot credit entirely Taft's lobbying efforts for the bill's passage. The legislators' preferences also aligned with the Justices' preferences. *See* Buchman, *supra* note 45.
[75] *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 522 (2002) ("The increasingly conspicuous role of the Supreme Court in the political system would be further advanced by the Judges' Bill of 1925 . . . and the subsequent construction of the Court's own building, the so-called 'Marble Temple' in the 1930s.").
[76] William H. Taft, *Delays and Defects in the Enforcement of Law in This Country*, 187 N. AM. REV. 851, 852 (1908).
[77] *Id.*
[78] *Id.*

"soften[ing] the impact of popular passions" and "restraining the impulsive desires of the majority."[79]

Taft's image of the Supreme Court as the supervisor and guide to the rest of government animated his entire reform agenda, of which the Judiciary Act was only part.[80] Just several years after the Judiciary Act, the Court seized for itself the authority to decide questions, and only those question it chose to consider, rather than resolving cases.[81] The Court's role had been fundamentally transformed into something more closely resembling Taft's vision, a supreme declarer of big questions of federal law, such that it could guide other branches and effectively veto actions taken by other branches.[82]

The Judiciary Act of 1925's approval process reveals a separation of powers system that involved Justices spotting an administrative problem with the judiciary whose solution could help Taft mold the judiciary and the constitutional system in his vision.[83] Yet, the Justices knew that they could not solve the problem on their own because they needed Congress to exercise its and extraordinary power to control how the courts function. So, they concocted a solution. They drafted a bill and proposed it to Congress while also publicly demurring the extent of their own role in concocting it. The Chief Justice communicated directly and frequently with members of Congress to convince them to pass his bill, which involved some careful politicking about how the committee hearings would run and which witnesses would testify.[84] The Chief Justice persuaded the President to dedicate time offering vocal support of the Supreme Court and its desired changes in two state of the union speeches. The Chief Justice knew that public engagement on the issue would put

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[79] MASON, *supra* note 24 at 49.
[80] *See* CROWE, *supra* note 14; Crowe, *supra* note 3.
[81] Johnson, *supra* note 11.
[82] *See* Post, *supra* note 3.
[83] Sumrall, *supra* note 1; Crowe, *supra* note 3.
[84] *See* Hartnett, *supra* note 29 at 1675 ("They agreed that it would be best if Taft did not testify himself, lest it provoke some of his old enemies. In his stead appeared Van Devanter, McReynolds, and Sutherland.").

pressure on an apprehensive Congress. Yet Congress itself did not spend significant time or energy on the Judges' Bill. It deferred to the Justices expertise on the bill's meaning and necessity. Finally, the enforcement question is especially tricky. Who enforces the Judiciary Act? Not the President exercising executive power. The Justices execute the Judiciarsy Act when they choose which petitions of certiorari to grant.[85] The Act's origin reveals a dynamic, collaborative, and communicative separation of powers system that requires cooperation but benefits from deliberative disagreement and sometimes relies on public engagement. And the process shows that, by embedding ideas into its structure, its operation can affect how the constitutional system works in the future. In general, the process demonstrates that the separation of powers system is just that—a system, not a rule.

II. Today's Supreme Court's Ideas of the Separation of Powers

Over the last several decades, but particularly over the last several years, the Supreme Court has reshaped the separation of powers system in its image. It has turned its attention most explicitly to the executive branch. The Supreme Court has deployed ideas about top-down presidential control of the administration to reshape the administrative state and executive power. And the story that it tells about the purpose of the separation of powers and its functionality greases those wheels. Yet, the Judiciary Act of 1925's passage sounds little like the story the Supreme Court has been telling in its recent separation of powers cases. The Supreme Court's recent ideas about the separation of powers are unfamiliar to the Judiciary Act's passage. The Judges' Bill was created

[85] What the Supreme Court does when it follows the Judiciary Act looks a lot like "[i]nterpreting a law enacted by Congress to implement the legislative mandate," which, the Supreme Court tells us, "is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 732 (1986). But *that* is what the Executive does, the Court tells us in *Bowsher v. Synar*. Although, the Justices have not always upheld their duty to enforce the Act. The Justices continued to decline to exercise mandatory appellate jurisdiction even though the Act continues to require it. Hartnett, *supra* note 29 at 1706–13.

in a dynamic and dialogic back-and-forth between collaborative branches with interests that sometimes diverged. But the ideas the Supreme Court espouses today about the separation of powers are different.

The Supreme Court's contemporary narrative about the separation of powers is a simple one: each branch has its own sphere of legal authority that can be known ex ante by examining the Constitution's text.[86] The separation of power's purpose is to protect individual liberty. Another branch cannot exercise the same legal power as another branch. All methods of interbranch contestation or conflict must take the form of the exercise of particular legal powers, all of which are already laid out in the Constitution itself.[87] Those methods of conflict, too, can be known ex ante. And, of course, the Supreme Court's role in the separation of powers is to police it and say what the allegedly "political" branches (Congress and the President) are allowed to do and how they are allowed to interact. Interbranch contestation is disfavored. If the branches are to be in conflict at all, it is likely to be by exercising a particular branch's legal authority in a way inconsistent with the other ("political") branch's preferences, and the federal judiciary can decide whether that exercise is permissible. At the same time, the President is designed to be energetic, which typically means unchallenged. Congress is weak and defunct but can be jumpstarted with doctrinal intervention. And the Court is the separation of powers' enforcer.[88]

Pieces of this story (or at maybe all of it) might seem uncontroversial or even normal. Perhaps there is only one correct narrative about the separation of powers, and Supreme Court's

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[86] For example, there is a robust area of research about the meaning of the Constitutions' Article II Vesting Clause and the meaning of "executive power." *See*, *e.g.*, Julian Davis Mortenson, *The Executive Power Clause*, 167 PENN. L. REV. 1269 (2020); Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019).

[87] The Supreme Court's ideas of the separation of powers echo what Mariah Zeisberg calls the "settlement thesis," the claim that "the very point of constitutions is to resolve conflict over basis political questions like the allocation of power between institutions." MARIAH ZEISBERG, WAR POWERS THE POLITICS OF CONSTITUTIONAL AUTHORITY 8 (2013).

[88] Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L. J. 2020, 2024 (2021).

is the correct one. We must resist the inclination to see the Supreme Court's story as the only one. The Supreme Court's story might be correct. But seeing it as the embrace of particular, historically constructed and contingent, ideas is critical. To be sure, not all methods of interbranch contestation take the form of the exercise of a formal legal power that is contrary to another branch's wishes.[89] Some take the form of public debate and engagement—or even their own brand of narrative creation. Not all those forms of engagement attach to a particular legal hook in the Constitution. Some interbranch disputes are best settled by winning over the public, not by winning over the Supreme Court Justices. The separation of powers is not just designed to protect individual liberty. It also is designed to produce better policy.[90] The judiciary is a participant in the separation of powers system, a creature of friction between all three branches.[91] The judiciary's role in the separation of powers system is not reduced to being its umpire or its police force. Asking whether Congress is broken is an extraordinarily complex question that cannot be answered simply by turning to judicial solutions. And Alexander Hamilton's famous prescription for energy in the executive might mean an institutional predisposition to rapid solutions, not unbounded and unchallengeable discretion.[92]

The purpose of this section is not to rebut the ideas Supreme Court tells us about the separation of powers. It is to outline them with an eye towards seeing them as a set of ideas or a narrative rather than merely an exposition of constitutional principles. There are many ideas about

[89] *Cf.* Christopher L. Eisgruber, *Judicial Supremacy and Constitutional Distortion*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 70, 80 (Sotirios A. Barber & Robert P. George eds., 2001) ("The judiciary's obsession with textual specificity has produced a series of interpretive gyrations that serve only to obscure constitutional meaning.").

[90] Tara Ginnane, *Separation of Powers: Legitimacy, Not Liberty*, 53 POLITY 132 (2021).

[91] *See* Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 YALE L. J. 2360, 2366 (2023) ("When federal judges opine on the separation of powers, they are not neutral arbiters of the separation of powers [because, when] . . . judges resolve cases and controversies that purport to draw the boundaries of our tripartite structure of governance, judges are active participants in the separation of powers.").

[92] *See* Federalist #70, ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS (2003).

the separation of powers. The story might take many forms. The Supreme Court today tells only one.

A. *The Executive*

The Roberts Court did not begin the story that the Supreme Court tells today about the separation of powers. But it has added new chapters that crystallize the narrative and sharpen the ideas. The Roberts Court has been especially fond of endorsing ideas about the executive that demand a siloed and unchallengeable presidency. The Roberts Court's recent presidential immunity decision shows this point plainly. In *Trump v. United States*, Chief Justice John Roberts's largely conclusory opinion relies heavily on the phrase "separation of powers" as some sort of trump card that he thinks settles the debate.[93] In *Trump v. United States*, the Court holds that the "nature of presidential power" under the Constitution requires that "a former President have some immunity from criminal prosecution for official acts committed during his tenure in office."[94] But the opinion is light on reasoning. Roberts leans heavily on Alexander Hamilton's claim in Federalist #70 that the Executive must have "energy."[95] According to Roberts, the "Framers' design of the Presidency did not envision" that "counterproductive burdens" like criminal prosecution would threaten the ''vigor[]'' and ''energy'' of the Executive."[96] In Roberts' telling, a President would be less energetic under threat of possible criminal prosecution, so criminal prosecution must not be allowed. But notice the claim that Roberts makes: a threat of criminal prosecution threatens *energy*. The threat of criminal sanctions would make a President more tired, calm, or maybe less enthusiastic. In Federalist 70, Hamilton uses the words "energy"

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[93] 603 U.S. 593 (2024).
[94] *Id*. at 606.
[95] Hamilton *supra* note 9.
[96] Trump v. United States, 603 U.S. at 614.

and "vigor[]" almost interchangeably, suggesting that the personality he sees in the Constitution's Executive features strength, rapid movement, quick responses, and urgency—the characteristics that Congress lacks by design.[97] When Roberts refers to an energetic Executive, however, he means an executive who can thoroughly and wholeheartedly exercise her legal powers granted by Article II. It is about the extent to which a President uses powers—to the hilt or to the absolute outer bound that the Constitution's power grant might permit, or not. Roberts' invocation of "energy" does not refer to the timing or conditions under which the President might use her power, even if she does not exercise it to the hilt. The threat of prosecution that Roberts worries about is a threat not to the rapidity, style, or conditions under which a President uses power, but what the President does with her power.

At the same time, Roberts claims that a "President's authority to act necessarily 'stem[s] either from an act of Congress or from the Constitution itself.'"[98] Roberts' internal quotation comes from *Youngstown Sheet & Tube Co. v. Sawyer*,[99] perhaps the most foundational precedent on the scope of presidential power. The full quote reads: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[100] Justice Black's opinion in *Youngstown* analyzed the legality of Truman's order to seize steel mills and reasoned that, if Truman had the authority to act, it must come from statute or directly from the Constitution. By citing to *Youngstown* in *Trump*, Roberts seeks to draw a parallel between Truman's action and Trump's action. But the question in *Trump* is not whether Trump had the authority to act, but

[97] It is worth noting here that Hamilton is far from the authority on the Constitution's Executive. The Constitution's Executive reflect James Wilson's ideas much more closely than Hamilton's. *See* CHARLES C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY (1969). But this nuance is lost in the Court's opinion and replaced with casual citations to *The Federalist*.
[98] Trump v. United States, 603 U.S. at 607 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). The Court endorsed this same principle in *Medellín v. Texas*. *See* 552 U.S. 491, 524 (2008).
[99] 343 U.S. 579 (1952).
[100] *Id*. at 585.

whether he (or any president) can be held criminally liable for using his executive power improperly or unlawfully. But neither the Constitution nor any statute gives the President the power to commit crimes. Note, too, the word that Roberts adds: "necessarily." That word is not in the *Youngstown* quote, but Roberts's addition in *Trump* betrays a subtle sleight of hand. In *Youngstown*, the question is whether Truman had the authority to act. In *Trump*, Roberts's addition of the word "necessarily" suggests (but does not say definitively) that *when* a President acts, the President has statutory or Constitutional authority to do so. It glosses over the threshold question: whether the President has such authority in the first place.

Curiously, Roberts includes the president's rhetorical powers within the sphere of the President's official constitutional responsibilities. No textual provision in the Constitution conveys on the President the power to speak to, or on behalf of, the entire nation. And yet, Roberts writes that the President is "the sole person charged by the Constitution with executing the laws of the United States" and therefore "will frequently speak publicly about . . . a vast array of activities that touch on nearly every aspect of American life."[101] According to Roberts, a "long-recognized aspect of Presidential power is using the office's 'bully pulpit' to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest."[102] "For these reasons," Roberts concludes, "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities."[103] Of course, this reasoning is relevant because if rhetorical powers are within a president's official responsibilities, they fall within the scope of conduct covered by absolute immunity.

[101] Trump v. United States, 603 U.S. at 629.
[102] *Id.*
[103] *Id.*

Roberts's embrace of presidential rhetoric as a an official presidential responsibility matters for the vision of the presidency that he, and the Court by extension, embrace. The presidency that Roberts describes—one "even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government"[104]—echoes many characteristics of the rhetorical presidency. But the rhetorical presidency describes a historically contingent development to how the office of the presidency has changed over time.[105] The rhetorical presidency is not an inherent feature of American constitutionalism, as indicated partly by the fact that nineteenth-century presidents and some early-twentieth-century presidents did not behave as Roberts describes.[106] Roberts instead treats presidential practice and the public's corresponding expectations that practice will continue as among the president's official constitutional responsibilities. The rhetorical presidency is a real constitutional development but Roberts would have us believe that public engagement and speaking over Congress's heads and directly to the people is as inherent a feature of presidential power as any other.

The picture of the Executive Branch and the presidency that the *Trump* Court depicts is a strong and unitary actor with a dedicated sphere of legal authority. Presidential powers are fixed and "necessarily" rely on statutory or constitutional authority.[107] But the Court's presidency also is a public-facing institution whose unique rhetorical position evidences presidential importance, not the other way around. In other words, the story that Roberts tells on behalf of the Court about the separation of powers is that the President is a siloed institution, immune from influence by outside actors except insofar as the Constitution strictly permits other actors to do so. But, of course, if the Constitution permits another institution to check Executive power, then that is no

[104] Trump v. United States, 603 U.S. at 629.
[105] TULIS, *supra* note 8.
[106] *Id.*
[107] Trump v. United States, 603 U.S. at 607.

outside influence at all. It is inherent to the nature of the Constitution's Executive. Reading about the separation of powers from *Trump v. United States* would teach us that the President is a solitary actor whose unrestrained exercise of her constitutional and statutory powers is more important than the danger that she will do so irresponsibly or even criminally, all in the name of energy to some undefined and unknown purpose. And the Court's job is to draw the lines between permissible and impermissible interbranch disputes.

Another recent case echoes many of the same ideas about the separation of powers. In *Seila Law v. CFPB*,[108] the Court held that the Dodd-Frank Act's for-cause removal restrictions on the President's ability to remove the director of the Consumer Financial Protection Bureau violates the separation of powers.[109] But while the *Trump v. United States* immunity decision shields presidents from criminal liability for official conduct, even if used criminally against members of the public, *Seila Law* leans heavily on the President's accountability to the public. The separation of powers that *Seila Law* depicts has an elementary simplicity. It is clean, neat, and without contradiction or difficulty. Roberts, again writing for the Court, writes that, "[u]nder our Constitution, the 'executive power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[110] Without defining what "power" is or which particular "powers" are included, Roberts articulated his theory of the separation of powers: "divide power everywhere except for the Presidency, and render the President directly accountably to the people through regular elections."[111] For Roberts, the "power" that is being divided are particular authorities to take given actions, where their legitimacy comes from the legal authority to take such action. And the purpose of dividing power is to "'preserv[e] liberty,'" which presumably

[108] 591 U.S. 197 (2020).
[109] *Id.* at 204.
[110] *Id.* at 203 (quoting U.S. Const. Art. II § 1, cl. 1).
[111] *Id.* at 224.

refers to individual liberty, let alone that the separation of powers also is designed to produce better policy outcomes.[112] The Court then explains that there are "'three defined categories'" of "'powers,'" namely "'Legislative, Executive, and Judicial.'"[113] If we are to take the Court at its word, these categories can be known ex ante, because certain legal authorities are inherently legislative, executive, or judicial, rather than just functions that have been assigned to institutions with those names. The Court never considers or offers an answer to the question: what makes a power "executive"? Nevertheless, the Court leaves the reader with the impression that these categories are neat and cleanly distributed across branches. After all, violations of that clean distribution are what give rise to separation of powers violations in the first place. It is this characterization that leads Elena Kagan in dissent to accuse the majority of "offer[ing] the civics class version of the separation of powers—call it the Schoolhouse Rock definition of the phrase."[114]

Critically, according to Roberts' opinion, the reason the presidency's power is undivided and concentrated wholly in one individual is because the President is "the most democratic and politically accountable official in Government," because the President is "elected by the entire Nation," which is "enhanced by the solitary nature of the Executive Branch."[115] At the very least, Roberts' claims are strange, considering (1) the fact that the President is not elected by the entire Nation, but by the electoral college, (2) that tens of millions of eligible American voters do not vote; and (3) the Court's later holding in the immunity case, which took off the table one important mechanism for holding the President accountable for her actions. If we are to believe the Court's

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[112] *Id.* at 223 (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986)).
[113] Id. at 223 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).
[114] Id. at 264. To be sure, though, Kagan accepts many of the majority's assumptions about the separation of powers' purpose and design.
[115] *Id.* at 224.

narrative, presidential elections really are referenda on the president's constitutional fidelity and performance as a prospective policy leader. In this vision, the Court's job is to exercise its "power" to police the boundaries of the separation of powers. In the Court's words, although Congress can create an expansive federal bureaucracy, the Court's "duty" is to "ensure that the Executive Branch is overseen by a President accountable to the people."[116]

B. The Judiciary

The recent decision to end the regime of *Chevron* deference tells a similar story about the Court's role and how the so-called "political" institutions must be kept appropriately siloed to their respective exercises of legal powers. It is no mistake that this essay discusses the judiciary before it discusses Congress—the Court adopts the same hierarchy. *Loper Bright v. Raimando*[117] tells a story about a court-policed separation of powers system, where courts exist to tell other branches when and how they can govern. The Court's *Loper Bright* opinion would have readers believe that administrative agencies—creatures of Congress's creation—deserve careful scrutiny from judges. The opinion leaves the reader with the impression that Congress surely could not have meant for the administrative state to work as it does, and the courts have an unflagging obligation to supervise what agencies do. The opinion portrays that vision of the separation of powers system as normal and as the system that has always existed while using that same judicial function to upend decades of practice and precedent that left less room for judicial supervision. As Karen Tani aptly observes, the *Loper Bright* opinion works hard to depict its decision as "utterly 'ordinary'" and as "unleashing no concerning consequences, especially vis-à-vis judicial power."[118]

[116] *Id.* at 232. Of course, that claim does not address the question of the Court's duty when the President is not accountable to the people.
[117] 144 S. Ct. 2244 (2024).
[118] Tani, *supra* note 1 at 69.

Roberts' majority opinion couches an aggrandized vision of the judicial role in deceptively simple principles.[119] Roberts, with citations to Federalist 78, writes, "[t]he Framers . . . envisioned that the final 'interpretation of the laws' would be the 'proper and peculiar province of the courts.'"[120] From this premise, it is easy to see where the Court eventually ends up—overturning the doctrinal regime that afforded agencies deference in statutory interpretation. If the courts' proper role (and unique strength) is to have the final say over legal provisions like statutes, then no wonder Roberts worries when agencies do something the Constitution prohibits. Notice, though, that Roberts adds the word "final"—that word does not appear in Federalist 78. Roberts's addition of the word "final" suggests that judicial supremacy is the natural order of things, rather than a historically constructed practice.[121] Notice, too, that ideas of the courts' role in the separation of powers that the court embraces here put independent *judicial* opinions above other interpretations. Even if constitutional and statutory interpretation is the "proper and peculiar province of the courts," it does not follow that the courts cannot create a standard like they did in *Chevron* that gives weight to another interpretation. But the *Loper Bright* opinion instead embraces a peculiar idea that the real and proper judicial role is to interpret statutes (and the Constitution) free from any outside influence or persuasion, never mind that this vision demands an impossible view of judicial independence.[122] Roberts claims that the "traditional understanding" is that "questions of law were for courts to decide, exercising independent judgment"[123]

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[119] *See* Sumrall and Baumann, *supra* note 10 (defining judicial aggrandizement).
[120] Loper Bright, 144 S. Ct. at 2257 (quoting Federalist #78).
[121] KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007); Sumrall and Baumann, *supra* note 10.
[122] It is not clear what, exactly, proper judicial interpretation would look like it is truly free from any outside influence. *Cf* Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 45 (2002) ("[J]udicial independence has no clear meaning distinct from the theory of adjudication in which it is embedded.").
[123] 144 S. Ct. at 2258. At the same time, Roberts acknowledges that, in exercising independent judgment, courts properly "seek aid from the interpretations of those responsible for implementing particular statutes."[123] Because that

The upshot is that *Loper Bright*'s real innovation is to endorse a particular idea of the judicial role: to supervise the other branches by giving final meaning to the law that Congress drafted and the President enforces. To help tell this story, the Court's opinion invokes the oft-quoted language from *Marbury v. Madison*[124] that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[125] But, as Josh Chafetz has observed, the common story that language is invoked to tell omits the next two sentences from *Marbury*, which suggest that *Marbury* Court only was "making a straightforward claim about conflict-of-laws principles to be applied to cases already before a court."[126] While the *Loper Bright* court invokes that *Marbury* language to support its embrace of an aggrandized vision of the judiciary, the Supreme Court did not cite that *Marbury* language until 1901, when it was quoted at length to support only the proposition of judicial review,[127] and then not again until *Cooper v. Aaron*[128] in 1958.[129] But no matter to the Court, which describes its role of the judiciary as an "elemental proposition reflected in judicial practice dating back to *Marbury*."[130]

C. Congress

Readers of recent Supreme Court opinions would learn that Congress is a broken institution whose only purpose is to draft and pass laws. The Congress that the Supreme Court depicts is not

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analysis might still somewhat resemble what courts did with *Chevron*, the actual doctrinal implications of *Loper Bright*, remain to be seen.

[124] 5 U.S. (1 Cranch) 137 (1803).

[125] *Id.* at 137; *See* Loper Bright, 144 S. Ct. at 2257.

[126] Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 131 (2021).

[127] *See* Fairbank v. United States, 181 U.S. at 285-87 (1901).

[128] 358 U.S. 1, 18 (1958).

[129] *See also* Akhil Reed Amar, *The Supreme Court, 1999 Term--Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 83 (2000) (noting that "the Rehnquist Court has also been fond of sweeping assertions of judicial supremacy, regularly proclaiming itself the Constitution's 'ultimate' interpreter, a self-description that nowhere appears in *Marbury* and never appeared in the *United States Reports* until the second half of the twentieth century").

[130] 144 S. Ct. at 2261.

trustworthy,[131] and is limited to acting only if the given action can be grounded in its so-called "legislative power." Actions that Congress takes that are not drafting and passing laws—serving subpoenas or holding public hearings to communicate with the public[132]—are questionably legitimate and the Court must closely scrutinize them.

In *Trump v. Mazars*,[133] the Court was asked to decide whether the House of Representatives acted unconstitutionally when it issued subpoenas to various financial institutions seeking information about the finances of President Donald Trump and his family. In its opinion, the Court goes out of its way to emphasize that it does not want to decide the case. It explains that, historically, judicial intervention in "disputes over congressional demands for presidential documents have not ended up in court."[134] But because of the apparently "significant departure from historical practice,"[135] the Court weighs in. Yet, the opinion reveals a Court reluctant to permit Congress to have its way. Because the Court's timing virtually ensured that the information Congress sought could not be made public before the 2020 presidential election, it appears to be humoring Congress while preventing Congress from having its way. Silly Congress. Had it not requested this information, the Court would not have to sort out the mess.

The *Mazars* analysis—again from Roberts—begins by acknowledging that Congress can issue subpoenas. But the opinion quickly explains all the ways in which that power is limited. Together with the Court's assertions in *Haaland v. Brackeen*,[136] students learning about the separation of powers from the Court's opinions would learn that Congress's subpoena power is a

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[131] *See* Chafetz, *supra* note 122; Pamela S. Karlan, *Democracy and Disdain The Supreme Court 2011 Term: Foreword*, 126 HARV. L. REV. 1 (2012); Josh Chafetz, *Governing and Deciding Who Governs Does Election Law Serve the Electorate*, 2015 U. CHI. LEGAL F. 73 (2015).
[132] *See* Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020).
[133] 591 U.S. 848 (2019).
[134] *Id*. at 859.
[135] *Id*. at 861.
[136] 599 U.S. 255 (2023).

barely permissible incidental power. "Article I gives Congress a series of enumerated powers, not a series of blank checks," the Court writes in *Haaland*.[137] Congress's power is narrowly limited by what is specifically enumerated in the text: "like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere."[138] Too atmospheric or no clear textual hook? Congress cannot act because it cannot be trusted. And yet, the Court in *Mazars* reluctantly acknowledges the (arguable) exception: while "Congress has no enumerated power to conduct investigations or issue subpoenas," it does have "power 'to secure needed information' in order to legislate.'"[139] The Court emphasizes, however, that the congressional investigatory power is "'justified solely as an adjunct to the legislatives process'"[140] and therefore "is subject to several [court-enforced] limitations."[141] As Josh Chafetz explains, the Court's worry is that a "feral" Congress that is "driven by emotion ('humors') rather than reason" and seeks "dominance rather than accommodation" would harass a defenseless president.[142] The Court's job, then, is to ensure the bullying Congress stays in its lane.[143] In this telling, the Court is "deliberative" and a "neutral arbiter" but not a "*player* in the separation of powers."[144] Ultimately, because the congressional subpoenas sought *presidential* information, as opposed to information about anyone else, the Court saw fit to apply a more exacting standard to assess the subpoenas' validity. At the same time, in a world in which congressional requests for information are incidental only to Congress's need to legislate, Congress's basic oversight powers, which have no

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[137] 599 U.S. at 276.
[138] *Id*. at 273.
[139] Mazars, 591 U.S. at 862 (quoting McGrain v. Daugherty, 273 U.S. 135, 161 (1927)).
[140] *Id.* at 862 (quoting Watkins v. United States, 354, U.S. 178, 197 (1957)).
[141] *Id.* at 862.
[142] Chafetz, *supra* note 122 at 142. (quoting Mazars, 591 U.S. at 868).
[143] *Id.* at 143.
[144] *Id.*

explicit constitutional authorization,[145] have no clear place. The Court would have us believe that Congress's only purpose is to draft legislation.

The separation of powers vision that arises from the subpoena case is one of separately siloed institutions who work properly when they control separate spheres. The Court explains that a "balanced approach" is best to assess the validity of congressional subpoenas for presidential information.[146] The standard must resist the "'pressure inherent within each of the separate Branches to exceed the outer limits of its power.'"[147] In this telling, it is the Court's role to police interbranch disputes between Congress and the President and ensure neither oversteps the delimiting line between their spheres of authority. Rather than leaving some responsibility to Congress and to the Executive to help resist the others' tendency to supplant the other, the Court understands that it has that duty, and that the solution is doctrinal. Without limits on its subpoena power, the Court claims, Congress could 'exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense, just as the Framer's feared."[148] Yet, the Court makes this claim despite acknowledging that doctrinal limits on Congress's subpoena power to the president are new. If disputes like this between Congress and the President historically were sorted out without judicial intervention, then why should we worry that an absence of judicial intervention risks the breakdown of the separation of power system? The Court would have us believe that its doctrinal interventions are the remedy to the separation of powers malady it diagnoses. But in doing so, the Court endorses particular ideas about the separation of powers' purpose and proper functioning.

[145] Chafetz, *supra* note 128 at 541.
[146] Mazars, 591 U.S. at 869.
[147] *Id* (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).
[148] *Id* at 867.

Further, and curiously, the Court asserts that, despite the structural incentives for an agonistic separation of powers system, "[o]ccasions for constitutional confrontation between the two branches should be avoided whenever possible."[149] The Court itself is not in this picture, despite the reality that in that very case it is disagreeing with Congress about the scope of congressional authority. More fundamentally, however, the Court tells us that confrontation between the branches is something to be avoided, not a basic (and inevitable) feature of the system itself. If it is best avoided, then presumably proper functioning means siloed institutions acting on their own sphere without treading on another branch's sphere of authority. The Court endorses this same idea again in *SEC v. Jarkesy*[150] when it writes that the separation of powers is maintained in part by prohibiting "'the judicial power'" from being "shared with the other branches."[151] Of course, this idea of the separation of powers assumes that each type of "power" can be known and defined, and are not just different styles of approaching policy issues.

The idea that Congress makes laws and the President executes them lives large in recent separation of powers cases. Building on the idea of properly siloed institutions, the story that the Supreme Court tells is that the constitutional system functions properly when Congress drafts, debates, and enacts laws, and the President makes enforcement decisions by ensuring the public follows the laws that Congress passes. Of course, this is not an untrue statement of the American constitutional system. But the Supreme Court elevates these functions into ends in themselves—that is, that the separation of powers system functions properly only when these processes are

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[149] *Id* at 869. Roberts makes a similar point in his 2024 year-end report. He states that "some tension between the branches of the government is inevitable" but that judicial review "makes tensions between the branches unavoidable." John G. Roberts, Jr., *Year End Report on the Federal Judiciary* (2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf. The implication is that interbranch contestation must be avoided whenever possible but that the exercise of judicial review makes total avoidance impossible.

[150] SEC v. Jarkesy, 603 U.S. 109 (2024).

[151] *Id*. at 127 (quoting Stern v. Marshall, 564 U.S. 462, 483 (2011)).

happening, and malfunctions when a branch does not do these tasks or when another branch risks doing the task. The idea of the separation of powers system that the Court recently has endorsed apparently excludes other styles of governance or any possible style of institutional operation, even if it is temporary. In a sense, Chief Justice Chase's assertion in *Ex parte Milligan* that "[T]he power to make the necessary laws is in Congress; the power to execute in the President" has taken on a life of its own.[152] The Court suggests that this assertion also includes the propositions that neither the President nor the Courts can "make the necessary laws" and neither Congress nor the Courts can "execute" the laws.

For example, writing for the Court in *Hamdan v. Rumsfeld*,[153] Justice John Paul Stevens quoted at length Chase's *Milligan* opinion when considering the propriety of trial by military commission.[154] But the *Hamdan* opinion equivocates on the language's purpose. It offers it only to note the joint role that Congress and the President play in warmaking. Yet in *Medellín v. Texas*,[155] John Roberts's majority opinion quotes *Hamdan* (quoting *Milligan*) to support his conclusion that presidents cannot unilaterally enforce a non-self-executing treaty.[156] Roberts writes: "Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'"[157] The idea of the separation of powers here is of separate spheres for separate functions: Congress makes laws; the President executes them. The unstated implication is that

[152] Ex parte Milligan, 71 U.S. 2, 139 (1866).
[153] 548 U.S. 557 (2006).
[154] *See id*. at 592.
[155] 552 U.S. 491 (2008).
[156] *Id*. at 526.
[157] *Id*.

Congress cannot enforce laws and the president cannot make them—and, presumably, courts can do neither. That vision of the separation of powers is so whimsically simple.

The Court endorses this same idea in *Biden v. Nebraska*[158] and in *West Virginia v. EPA*.[159] In *Biden v. Nebraska*, the Court worried that the Secretary of Education had "never previously claimed powers of this magnitude"[160] and effectively would be making a law when forgiving student debt pursuant to the so-called HEROES Act. According to the Court, were it to accept the Secretary's reading of the statute, it would be enacting a government program "that Congress has chosen not to enact itself."[161] If another branch in effect tries to enact a program it wants, that interferes with Congress's proper role, according to the Court. The Court tells us that Congress knows about the problems with student loans—it is "not unaware of the challenges facing student loan borrowers"—and yet it chose not to enact this program, so another branch cannot do it instead.[162] In *West Virginia v. EPA*, the Court gave life to the major questions doctrine, which the Court justifies as a mechanism to protect the integrity of the separation of powers.[163] The major questions doctrine holds that if Congress wants to delegate authority to an agency to address a major question of political or economic significant, then it must speak in especially clear statutory terms.[164]

But notice the vision of Congress that this (court-enforced) doctrine would require. A Congress that needs the major questions doctrine is one that cannot assert itself and barely knows how to draft statutes. In *West Virginia v. EPA*, the Court once again worries that an executive

[158] 600 U.S. __, 143 S. Ct. 2355 (2023).
[159] 597 U.S. at 736 (2022).
[160] 143 S. Ct. at 2372.
[161] *Id*. at 2373.
[162] *Id*.
[163] 597 U.S. at 722–24; *See also id.* at 737 (Gorsuch, J., concurring) ("The major questions doctrine works in much the same way to protect the Constitutions' separation of powers.").
[164] *See id*. at 716.

agency might be doing something that the Court thinks is "too legislaturey"—based on its vision of the legislature's proper role—so it sees a reason to step in to ensure the separation of powers is protected. Note, too, what the idea of the separation of powers is doing here. To the Court, it is doctrine that helps protect individual liberty.[165] It is not a principle justifying particular constitutional design choices that *also* can be justified as a way to ensure better policy outcomes.[166] But for the Court, separately siloed institutions have clear, definable functions, and protecting those boundaries' integrity is the Court's job.

Finally, the Court's recent standing cases endorse similar ideas about the separation of powers. Justice Brett Kavanaugh's majority opinion in *TransUnion LLC v. Ramirez* begins by explaining how the "[s]eparation of powers 'was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.'"[167] Of course, this assertion is true. But Kavanaugh's next sentence is: "*Therefore*, we start with the text of the Constitution."[168] For Kavanaugh, the Constitution's text apparently exhausts all separation of powers considerations—the separation of powers exists prior to the text and, for the Framers, justified particular phrasing choices, rather than institutional design choices that may or may not be reducible to the meaning of particular textual phrases. Kavanaugh's separation of powers considerations begin and end with a list of clauses.

After equating the separation of powers' relevance to a matter of textual interpretation, the Court proceeds to endorse a particular view of the relationship between Congress and courts. The question in *TransUnion* was whether the cause of action that Congress had created for violations

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[165] *See*, *e.g.*, *id*. at 738 (Gorsuch, J., concurring) ("The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty.").
[166] Ginnane, *supra* note 86.
[167] TransUnion v. Ramirez, 594 U.S. 413, 423 (2021) (quoting INS v. Chadha, 462 U.S. 919, 946 (1983)).
[168] *Id*. (emphasis added).

of the Fair Credit Reporting Act[169] was sufficient to confer standing on people who had false credit reports generated because they shared names with people on the U.S. Treasury's Department Office of Foreign Assets Control list of people who threaten America's national security. The Court concluded that, despite Congress creating a cause of action for Act violations, only the people who had their flawed credit reports shared with potential creditors had standing to sue. People who never had their credit reports shared outside TransUnion had no standing. The Court had to choose between an expansive and domineering view of its own standing jurisprudence, and the idea that Congress can decide to create rights and confer remedies. The Court chose the former.

The story the Court tells in *TransUnion* about Congress, the Court, and the Executive Branch is the same—separately siloed institutions with discrete legal powers, where any institution exercising the legal power of another violates the separation of powers. Whether the separation of powers functions correctly or properly when those boundary crossings occur does not enter the picture. The Congress that the Court depicts cannot simply create statutory rights that courts could enforce through civil suit. While courts "must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant,"[170] Congress cannot "'enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'"[171] Congress's legal powers do not extend to defining what constitutes a harm that courts can remedy.[172] In the Court's telling, only Courts decide what constitutes harm sufficient for a judicial remedy. If Congress could do that, the Court says, it also would "infringe on the Executive Branch's Article II authority," because "the choice of how to prioritize and how

[169] 84 Stat. 1127. As amended, see 15 U.S.C. § 1681 *et seq*.
[170] 594 U.S. at 425.
[171] *Id*. at 426 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).
[172] *See id*. at 426 ("Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment.").

aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch."[173] In other words, as the Court explains, the requirement that plaintiffs demonstrate concrete harm to establish standing "is essential to the Constitution's separation of powers."[174] The Court's story about the separation of powers leaves little room for Congress to tell the Court what to do because it relies on ideas about separately siloed institutions whose powers stem directly from textual provisions, which themselves exhaust separation of powers considerations.

Some individual Justices have expressed these same ideas in other public statements. Amidst an ongoing controversy over whether the Supreme Court ought to have an ethics code, Justice Samuel Alito told a reporter, "No provision in the Constitution gives them the authority to regulate the Supreme Court — period."[175] Alito relies on the absence of an explicit grant of authority in the text that would confer on Congress the explicit legal authority to establish an ethics code, never mind that other constitutional provisions almost demand Congress regulate the Supreme Court.[176] John Roberts, too, in his interactions with Congress invokes ideas about siloed institutions operating independently in separate spheres. In April 2023, Senator Dick Durbin invited Roberts to testify before the Senate Judiciary Committee about the ethics code.[177] Roberts declined the invitation, citing (vague) "separation of powers concerns and the importance of

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[173] *Id*. at 429.
[174] *Id*.
[175] David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7.
[176] *E.g.*, U.S. CONST. art. I, § 8 ("The Congress shall Power to . . . constitute Tribunals inferior to the supreme Court[.]"); *id*. ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").
[177] Letter from Sen. Dick Durbin to Chief Justice John Roberts (April 20, 2023), https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf.

preserving judicial independence."[178] Because Roberts never explains what those concerns are or whether they might be valid, his logic is hard to follow. But the tenor suggests that Roberts believes that the Chief Justice's mere appearance before Congress risks the integrity of judicial independence and somehow would how the Constitution separates powers and functions. For Roberts, then, the separation of powers requires the branches to act almost entirely independently—the overlap exists only in those specific instances where the Constitution delineates specific legal influence over another. Anything else, including oversight or persuasion, is out of bounds.[179]

The separation of powers means many things. It does not have one fixed meaning or understanding. It is a principle that undergirds constitutional design choices, but the Supreme Court today invokes it as a trump card that permits it to dictate how Congress and the Executive Branch can operate.[180] The idea of the separation of powers that contemporary doctrine endorses is of siloed institutions: Congress drafts and enacts legislation; the President enforces it; the Court protects the rule of law to ensure other branches do not act illegally or unconstitutionally. Separate and independent. No cross-pollination.

Conclusion

The story the Supreme Court tells us about how the separation of powers works does not map onto reality. The Supreme Court would have us believe have the separation of powers is a

[178] Letter from Chief Justice John Roberts to Sen. Dick Durbin (April 25, 2023), https://s3.documentcloud.org/documents/24705409/2024-05-30-cjr-letter-to-chairman-durbin-and-senator-whitehouse-1.pdf.

[179] It is worth noting that Roberts' views, which today arguably are mainstream views about the judicial role, reflect the idea of the judiciary that Taft worked so hard to build. Taft wanted "the court beyond popular control and above criticism." MASON, *supra* note 24.

[180] *C.f.* Sumrall, *supra* note 1 at 45 (noting the difference between "the separation-of-powers *system*" and "the separation-of-powers *doctrine* for the courts, but especially the Supreme Court, to enforce").

doctrine it applies to a set of facts. In reality, the separation of powers is more than a doctrine. The Supreme Court's ideas about the separation of powers see the separation of powers doctrine as indistinguishable from the separation of powers system itself—if courts enforce the (judge-made) doctrine, the system is working as it should. If we were to believe the story the Court recently has been telling about the separation of powers, we would think that Congress legislates, the President enforces and executes, and courts (or maybe the Court) decide whether the other branches have overstepped their power.

But the separation of powers system works differently than the Supreme Court would have us believe. As the story of the Judiciary Act of 1925's approval and enforcement demonstrates, separation of powers describes a messy but dynamic system of government. It demands collaboration but encourages disagreement. Sometimes it produces policy through chaotic interbranch politics. Sometimes separate institutions share functions. Sometimes those functions overlap.

Why does the disconnect between the Supreme Court's current vision of the separation of powers and the system's reality matter? In a world where the Supreme Court is asked to opine on myriad issues of law, its interpretations of the Constitution often are treated as the Constitution. Most law school constitutional law courses teach what the Supreme Court has said about the Constitution. It is, therefore, easy to forget that the Constitution is more than the body of law that the Supreme Court has given us over the years. The Constitution also sets up a system of government. The separation of powers describes a style of institutional design, not merely a legal doctrine. The Constitution creates a framework for politics to happen. It creates politics. The Supreme Court's ideas about what the Constitution is or how it works ought to be observed and analyzed, and not just for the legal doctrine they bolster.

This essay also reveals a deep irony in the ideas that today's Supreme Court espouses about the separation of powers. The Court that today describes the separation of powers as separately siloed institutions with separate legal powers whose basic design is to protect individual liberty is a product of a much more complicated system. Yet that complex system helped to produce the judiciary and Supreme Court that we have today, whose ideas about and descriptions of the separation of powers clash with the very system that created it. Surely, if pressed, today's Supreme Court would not conclude that its broad certiorari jurisdiction is unconstitutional because the Judiciary Act's approval process violated the separation of powers doctrine. But that is not the point. The point is not to get lost in the doctrinal weeds but to study the ideas the Court espouses about the Constitution that creates it—the narrative it weaves about its place in the separation of powers system. The Court that discusses the separation of powers as a clean and simple system with separately siloed institutions is the one whose authority to do precisely that came, in part, out of a system that worked very differently. The next, and here unanswered, question is where those ideas came from.

Because political elites and the public typically treat the Supreme Court's opinions as indistinguishable from the Constitution, the ideas the opinions adopt, embrace, and espouse are important. It matters what the Supreme Court tells us about what the separation of powers *is*. The Court's ideas and the narrative they weave together can alter the public's consciousness and our collective understanding of our constitutional history and the Constitutions' purpose and proper function. And when those ideas favor certain institutions over others, our practice of constitutional politics can shift. For example, embracing an aggrandized vision of the judiciary can empower the judiciary over and above its formal legal powers.[181] That process *is* judicial aggrandizement.[182] While some ideas might aggrandize the judiciary, others work as a piece to construct the modern presidency.[183] Because ideas and the stories they create can change how institutional actors like judges understand their own role and its purpose, those ideas can change how the constitutional system functions. They can change the Constitution—not the meaning of its text but how its institutions interact. And the institutions' standard interaction practices can affect textual meaning in turn.

Finally, the mismatch between the Judiciary Act's history and the Supreme Court's ideas about the separation of powers offers an additional lens through which to analyze a growing problem for the federal judiciary: its crisis of legitimacy and authority. Whether the crisis is authentic or manufactured is not the question. Rather, the contingency of the Supreme Court's ideas of the separation of powers matters when those ideas are the assumptions bolstering both attacks and defenses of the judiciary. The separation of powers system that produced the Judiciary Act of 1925 is complex and messy. That reality demonstrates an irony to the ideas about the separation of powers that today's Supreme Court embraces. The same Court that embraces an understanding of the separation of powers that makes any congressional (or executive) interference with Congress look problematic; criticism or the threat of oversight is a threat to judicial independence.[184] But the same Court that expresses those ideas is a direct creation of interbranch dynamics that are at odds with its ideas. So, if the Court's version of the separation of powers is but one vision, maybe its critics levy meaningless charges. But it is equally (if not more) likely

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[181] Sumrall and Baumann, *supra* note 10; *See also* Sumrall, note 9 *supra*.
[182] *Id.* ("Judicial aggrandizement is the successful deployment of ideas and norms that reinforce the judiciary's role as the final arbiter of political disputes at the expense of other governing institutions.").
[183] TULIS, *supra* note 8; DEARBORN, *supra* note 5.
[184] *See* Rivkin & Taranto, *supra* note 98; Roberts, *supra* note 72.

that its defenders protect a mirage. Real debate about the judiciary's future and place in our constitutional system must do better than devolving into contingent platitudes about constitutional law. It must grapple with constitutional politics and purpose.