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CLARIFYING JUDICIAL AGGRANDIZEMENT

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ALLEN C. SUMRALL<sup>†</sup>

BEAU J. BAUMANN<sup>††</sup>

*Scholars argue that the Roberts Court has been engaged in a judicial “power grab.” Some scholars describe the Court as “juristocratic,” others “aggrandizing.” The Court’s supporters argue that these critics’ charges only thinly veil the critics’ policy differences with the Court. Is the Roberts Court’s power materially different from other Courts? If the charge is about “judicial activism,” do the critics hold the Warren Court to the same standard?*

*Scholarship about the Roberts Court has encountered a long-running difficulty; “judicial power” is an amorphous braid of norms, ideas, and institutional arrangements. We advance a taxonomy for understanding different aspects of contemporary judicial power by untangling several concepts: judicial supremacy, juristocracy, judicial activism, and judicial self-aggrandizement. Of these criteria, the Roberts Court’s exceptional feature is judicial self-aggrandizement, its demeaning rhetoric about other constitutional actors and vague judicial standards that together reify judicial importance and justify centralized power in the judiciary.*

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## INTRODUCTION

The federal judiciary today is an immensely powerful institution that sits at the center of many contentious political disputes.<sup>1</sup> In recent years, scholars, practitioners, and other commentators have suggested that the judiciary has reached the zenith of its power.<sup>2</sup> At the same time, the Roberts Court has become unpopular as its critics have subjected the Court to withering criticism.<sup>3</sup> These two trends exist side by side. As the Roberts Court expands the judiciary’s reach over American life—with respect to guns,<sup>4</sup> abortions,<sup>5</sup> responses to the COVID-19 pandemic,<sup>6</sup> and more—criticisms of the Court have only intensified.<sup>7</sup> The challenge, though, is to describe and diagnose both

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<sup>1</sup> See, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. FORUM 97, 97 (2022) (describing the emergence of an “imperial Supreme Court”); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 2 (2023) (describing the Roberts Court’s version of the major questions doctrine as aggregating power in the Court at the expense of democratic institutions).

<sup>2</sup> See, e.g., Josh Chafetz, *The First Name of a Supreme Court Justice Is Not Justice*, N.Y. TIMES (June 2, 2023), <https://www.nytimes.com/2023/06/02/opinion/supreme-court-john-roberts-contempt.html> [<https://perma.cc/22MA-E874>] [hereinafter Chafetz, *The First Name*] (“Over roughly the past 15 years, the justices have seized for themselves more and more of the national governing agenda, overriding other decision makers with startling frequency.”).

<sup>3</sup> For the latest on the Court’s approval ratings, see Greg Stohr, *Supreme Court Approval Slides Amid Thomas Ethics Controversies*, BLOOMBERG L. (May 24, 2023, 1:00 A.M.), <https://news.bloomberglaw.com/us-law-week/supreme-court-approval-slides-amid-thomas-ethics-controversies> [<https://perma.cc/GSP2-PA9W>] (“The court’s approval rating fell to 41%, down six percentage points from January, the poll found. Only 25% of people expressed a great deal or a lot of confidence in the court, the lowest figure since [the Marquette Law School Poll] began in 2019.”).

<sup>4</sup> See generally *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (holding that a New York law limiting gun ownership violated the Constitution).

<sup>5</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (“It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

<sup>6</sup> See, e.g., Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 524–46 (2023) (reviewing the Roberts Court’s active role relating to COVID-era regulations on religious worship, eviction moratoriums, and vaccine mandates).

<sup>7</sup> See, e.g., Jamelle Bouie, *Neil Gorsuch Has Given Himself Away*, N.Y. TIMES (May 23, 2023), <https://www.nytimes.com/2023/05/23/opinion/neil-gorsuch-covid-civil-liberties.html> [<https://perma.cc/KFJ7-W6ET>] (dissecting a Gorsuch statement that the author argues reveals the Justice’s blinkered view of history and of the oppression of civil liberties).

judicial power and judicial politics with analytical precision, so we can compare the Roberts Court to other Courts.

Consider a popular critique of the Roberts Court: Stephen Vladeck's *The Shadow Docket*.<sup>8</sup> Vladeck describes the "shadow docket" as all of the Supreme Court's business other than the merits docket.<sup>9</sup> For Vladeck, the shadow docket warrants intense concern in part because it facilitates a judicial "power grab."<sup>10</sup> In Vladeck's telling, the shadow docket increases the odds that the public will see the Justices as advancing their own ideological preferences.<sup>11</sup> But, as he acknowledges, the shadow docket is not a new development.<sup>12</sup> Vladeck's own account of the rise of the shadow docket reveals that it is a bipartisan and long-running project of judicial capacity building.<sup>13</sup> So what insight—precisely—does Vladeck's account offer into the judicial power during the Roberts Court era?

A problem exemplified by *The Shadow Docket*—but by no means limited to it—is that scholars lack a clear vocabulary for analyzing changes in judicial power. Vladeck leverages several concepts having to do with judicial power without distinguishing between them. His primary concern is the risk that unexplained orders erode judicial legitimacy.<sup>14</sup> Some of his concerns echo the literature on *juristocracy*.<sup>15</sup> Elsewhere, Vladeck's concerns—although he does not frame them this way—are with the appearance of *judicial activism*,<sup>16</sup> *judicial legitimacy*,<sup>17</sup> and what we call *judicial self-aggrandizement*.<sup>18</sup> Because

<sup>8</sup> STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023).

<sup>9</sup> *Id.* at xii (“[T]he term ‘shadow docket’ [is] . . . [a] shorthand” which “describe[s] everything other than the [Supreme] Court’s ‘merits docket.’”).

<sup>10</sup> *Id.* at 22.

<sup>11</sup> *Id.* at xiii (“In deciding so much while saying so little, the justices are not only failing to provide adequate guidance to lower courts and government actors but also exacerbating charges of political partisanship.”).

<sup>12</sup> *See id.* at 12 (“The shadow docket itself isn’t new. For as long as there has been a Supreme Court, the Court has issued unsigned procedural orders shaping and structuring how the justices process and ultimately resolve each of the cases before them.”).

<sup>13</sup> *See id.* (observing that the ‘shadow docket’ has existed for a longtime and that it is fairly uncontroversial).

<sup>14</sup> *Id.* at 277 (“If [the Supreme Court’s] legitimacy turns upon the Court’s ability to explain itself, then the rise of the shadow docket is anathema to that understanding.”).

<sup>15</sup> *See, e.g., id.* at 12–13 (arguing that the shadow docket allows the Justices to intervene in political disputes in fly-by-night fashion).

<sup>16</sup> *See, e.g., id.* at 12–21 (arguing that the secrecy of the shadow docket allows the Justices to overturn precedent without reasoned deliberation and the consistency of right-left voting on the shadow docket bolsters the appearance that the Justices are advancing their own partisan interests).

<sup>17</sup> Vladeck’s idea of judicial legitimacy is processual; the Court as an unelected branch of government maintains legitimacy by consistently observing certain norms and engaging in visible deliberation. *Id.* at 21.

<sup>18</sup> *See, e.g., id.* at 42 (describing the foundational ideas of William Howard Taft, who advocated for an expansive role for the Supreme Court during his time as Chief Justice).

these ideas are expressed without clear distinctions between them, the shadow docket's implications are difficult to grasp. But if it is difficult to completely grasp the nuances of Vladeck's account of the shadow docket, it is because the author's insights implicate different frameworks for discussing judicial power.

The literature on judicial power uses a *mélange* of concepts to capture the judiciary's rising influence. Judicial supremacy, juristocracy, and judicial activism are all labels we attach to the arrangements that result from contingent political developments.<sup>19</sup> These terms describe concepts that capture the result of judicial politics over time, but they do not help us understand *how* courts have accumulated governing authority or power—broadly understood—in a way that other constitutional actors will accede to.

This Essay is preoccupied with the Januslike complexion of judicial power. It introduces an analytical taxonomy to distinguish judicial power's different aspects, which are often conflated and misunderstood. Judicial supremacy, juristocracy, judicial activism, and judicial self-aggrandizement are concepts that reflect different dimensions of the judiciary's presence in American political life. While there is no “correct” way to use any of these terms, and our purpose is not to chide usages that deviate from our own, it is important to distinguish between the designations when they capture related but conceptually distinct political, institutional, or even constitutional developments. By using this taxonomy, scholars can add depth to their discussion of the Roberts Court, judicial power, and the rhetoric of judicial politics. First, this Essay discusses judicial supremacy, juristocracy, and judicial activism. For reasons that we describe, these terms are not especially helpful when diagnosing the Roberts Court's pathologies—or at least what is unique about the Roberts Court era. Second, we contrast these concepts with judicial aggrandizement, the “practice of courts' continued embrace of ideas and assumptions that support their role as the final arbiter of political disputes.”<sup>20</sup> Judicial self-aggrandizement provides a critical insight into the Roberts Court era. The term focuses on the means and rhetoric of judicial power in a way that helps us study how the judiciary accrues *power* over time.

Besides disentangling different conceptions of judicial power, this Essay is motivated by a desire to explain the newest of these terms: judicial self-aggrandizement. Both of us have discussed judicial self-aggrandizement in our scholarship.<sup>21</sup> We have operated in a larger literature that has attempted

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<sup>19</sup> See discussion *infra* Part I.A–C (defining and expanding on the ideas of judicial supremacy, juristocracy, and judicial activism).

<sup>20</sup> Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 31 (2023).

<sup>21</sup> See generally *id.* (exploring the legacy of Chief Justice William Howard Taft as an example of judicial self-aggrandizement); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023) (describing a strain of political morality among conservative jurists that justifies the accretion of power from Congress to the judiciary as an example of judicial self-aggrandizement).

to introduce judicial self-aggrandizement to scholars, practitioners, and the public.<sup>22</sup> As a concept, judicial self-aggrandizement describes a judicial style where judges expand their authority at the expense of other constitutional actors—Congress, the executive branch, lower federal courts, and state authorities—by deploying norms and ideas about the proper allocation of authority.<sup>23</sup> Although the literature on judicial self-aggrandizement has proceeded apace, one of the first mentions of the concept in the *New York Times*<sup>24</sup> prompted responses showing that the concept is poorly understood and often conflated with other dimensions of judicial power.<sup>25</sup> This Essay is meant to clarify the concept of judicial self-aggrandizement for scholars and others who might be interested in understanding how we got here, and what is exceptional about the Roberts Court era.

## I. CONCEPTS FOR JUDICIAL POWER

In a widely covered law review article, Mark Lemley asserts that the “past few years have marked the emergence of the imperial Supreme Court.”<sup>26</sup> Lemley observes that a “nearly bulletproof majority [of] conservative Justices” in recent years have dramatically reshaped the state of American law.<sup>27</sup> For Lemley, these decisions have no common denominator like an interpretive method. Rather, these decisions all fall into one basket: “they concentrate power in one place: the Supreme Court.”<sup>28</sup> Lemley lambasts recent decisions for “centraliz[ing] power in the Supreme Court, which today is not only the most activist of any Court in the past century, but increasingly

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<sup>22</sup> See, e.g., Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U.L.J. 635, 636 (2023) (describing how the judiciary conceals its institutional situatedness); Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO L.J. 125, 128 (2021) [hereinafter Chafetz, *Nixon/Trump*] (outlining the impacts of judicial self-aggrandizement as it concerns access to Trump’s financial records and access to Nixon’s White House tapes); Chafetz, *The First Name*, *supra* note 2 (highlighting the self-aggrandizing nature of the Supreme Court in the Roberts Court era); Yvonne Tew, *Strategic Judicial Empowerment*, AM. J. COMPAR. L. (forthcoming 2024) (manuscript at 21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3323022](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323022) [<https://perma.cc/EUM5-WD55>] (defining judicial power as “the strength of a court’s ability to assert itself against the governing political branches and to affect the outcomes of constitutionally and politically significant issues”).

<sup>23</sup> See Sumrall, *supra* note 20, at 31 (discussing the courts’ embrace of notions supporting its role as a political arbiter).

<sup>24</sup> See Chafetz, *The First Name*, *supra* note 2 (discussing the history of the Court’s self-aggrandizement).

<sup>25</sup> See, e.g., Dan McLaughlin, *A Flimsy Case that the Supreme Court Has Grown More ‘Imperial’*, NAT’L REV. (June 5, 2023, 2:00 PM), <https://www.nationalreview.com/corner/a-flimsy-case-that-the-supreme-court-has-grown-more-imperial/> [<https://perma.cc/DB3K-B6HA>] (meeting a charge of judicial self-aggrandizement by focusing on judicial outcomes).

<sup>26</sup> Lemley, *supra* note 1, at 97.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

the locus of all legal power.”<sup>29</sup> Lemley’s key move is to focus not on the merits of individual decisions, but on what those decisions reveal about the state of the modern American judiciary, especially the Supreme Court.

To many, Lemley’s account is intuitively appealing.<sup>30</sup> To others, it evidences nothing more than his disappointment with particular Supreme Court decisions.<sup>31</sup> Our basic insight is that Lemley’s account—and the accounts of many others—would benefit from separating analytically different ways of discussing judicial power and politics. Judicial power in the United States is deeply undertheorized.<sup>32</sup> Charges that the Roberts Court is centralizing power in itself often are dismissed by the Court’s supporters, who charge left-leaning commentators with ignoring other Courts’ judicial supremacy or tendency towards judicial activism.<sup>33</sup> Both students of judicial power and critics of any particular court can preempt these accusations by being more specific about their diagnosis.

In short, we suspect that Lemley hits on a real phenomenon. To help scholars, practitioners, and commentators, this Part provides analytically distinct articulations of judicial supremacy, juristocracy, and judicial activism. Because these terms capture only a part of any critique of judicial power in the United States, Part II will introduce a newer concept: judicial self-aggrandizement.

### A. Judicial Supremacy

Judicial supremacy describes an arrangement where the judiciary has the final say on the meaning of constitutional text.<sup>34</sup> In practice, judicial supremacy in the United States means that the Supreme Court determines

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<sup>29</sup> *Id.* at 113.

<sup>30</sup> See, e.g., Adam Liptak, *An ‘Imperial Supreme Court’ Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html> [<https://perma.cc/2XYN-HM7B>] (summarizing positively Lemley’s article and other studies that demonstrate a broader trend in the Roberts Court’s behavior).

<sup>31</sup> See, e.g., Noah Rothman, Commentary, *The Anti-Imperial Supreme Court* (Dec. 19, 2022), <https://www.commentary.org/noah-rothman/the-anti-imperial-supreme-court/> [<https://perma.cc/E2SB-DC6T>] (contending that Lemley’s account “convey[s] nothing more than the left’s frustration with institutions that resist their will”).

<sup>32</sup> See FRANCOIS VENTER, *THE LANGUAGE OF CONSTITUTIONAL COMPARISON: ELGAR MONOGRAPHS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW* 201 (2022) (arguing that constitutionalism and judicial review have led to vague modes of pushback, including “juristocracy”).

<sup>33</sup> See, e.g., Jonathan Adler, *The Restrained Roberts Court*, NAT’L REV. (July 13, 2023), <https://www.nationalreview.com/magazine/2023/07/31/the-restrained-roberts-court/> [<https://perma.cc/VXZ2-VZH2>] (critiquing Lemley and others while arguing that charges of judicial activism lack an evidentiary basis).

<sup>34</sup> See generally KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

what the Constitution means.<sup>35</sup> As a form of constitutionalism characterized by interpretive supremacy, judicial supremacy differs from legislative supremacy—a system in which Congress would have the final word on constitutional meaning—and from departmentalism.<sup>36</sup> As a concept, judicial supremacy encompasses various approaches to interpreting and constructing constitutional meaning. In practice, and because the federal constitution binds both the federal government and the state governments, judicial supremacy gives the judiciary a veto on all other constitutional actors.<sup>37</sup>

The joint opinion of all nine Justices in *Cooper v. Aaron* is a noteworthy example of judicial supremacy.<sup>38</sup> In *Cooper*, the Court refused to postpone a desegregation order against the Little Rock schools despite state officials' intransigence.<sup>39</sup> As an answer to this intransigence, all nine Justices of the Supreme Court signed an opinion that made the case for judicial supremacy: "[*Marbury v. Madison*] declared the basic principle that the federal judiciary is *supreme in the exposition of the law of the Constitution*, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."<sup>40</sup> Contrary to judicial pretensions on the subject, judicial supremacy is not an innate feature of American constitutionalism, but a developmental phenomenon. Whittington shows that the judiciary in the United States "has been able to win the authority to independently interpret the Constitution because recognizing such an authority has been politically beneficial to others."<sup>41</sup> Although presidents have at times used departmentalist rhetoric to challenge judicial supremacy,<sup>42</sup> judicial supremacy has been with us for several generations, as jurists and other political actors from across various ideological spectrums have reinforced the Court's ability to speak with finality on constitutional questions.<sup>43</sup>

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<sup>35</sup> See, e.g., *id.* ("A model of judicial supremacy posits that the Court . . . authoritatively interprets constitutional meaning.")

<sup>36</sup> See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) ("The power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers.")

<sup>37</sup> See Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1461 (2017) (noting that "judicial supremacy" gives the Supreme Court an authoritative say over both the political branches and the states).

<sup>38</sup> 358 U.S. 1 (1958).

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.* at 18 (emphasis added).

<sup>41</sup> WHITTINGTON, *supra* note 34, at 27.

<sup>42</sup> *Id.* at 31–40.

<sup>43</sup> For a perhaps overstated analysis of the triumph of judicial supremacy in the late twentieth century, see, e.g., Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959,



Judicial supremacy has limited explanatory power in modern American politics because judicial primacy in constitutional interpretation has been a feature of the federal judiciary for at least half a century. It has become common for contemporary jurists to cite *Marbury* or *Cooper*, often removing those cases from their contexts.<sup>44</sup> For example, in the *Nixon Tapes* litigation, Warren Burger ordered the White House to comply with a grand jury subpoena.<sup>45</sup> In Josh Chafetz's words, the Court took this opportunity to "vacuously" cite to "*Marbury*'s statement that, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"<sup>46</sup> As Chafetz suggests, this use of *Marbury* "shore" that case "of context" because John Marshall "was making a straightforward claim about conflict-of-laws principles . . . ." <sup>47</sup> Regardless, the Burger Court's enthusiasm for judicial supremacy has been a mainstay for modern courts.<sup>48</sup>

This is not to say that judicial supremacy now is inevitably entrenched in America's legal system. Many important issues never reach the courts.<sup>49</sup> Because of limits on judicial review, other constitutional actors often are permitted a near-final say on legal meaning.<sup>50</sup>

The point, for our purposes, is that judicial supremacy is limited in its ability to compare recent courts and explain changes in American constitutional politics. Is the Roberts Court endorsing judicial supremacy more than the Rehnquist Court or the Warren Court? There is little evidence that judicial supremacy is an exceptional feature of the Roberts Court era.

### B. *Juristocracy*

Juristocracy describes a particular governing regime in which other political actors defer to courts to decide policy questions that otherwise would

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964 (2004) (arguing that although popular constitutionalism has predominated throughout most of American history, judicial supremacy emerged as "the norm" in the late twentieth century).

<sup>44</sup> Chafetz, *Nixon/Trump*, *supra* note 22, at 130–31 (exploring this trend).

<sup>45</sup> *Id.* at 130 (citing *United States v. Nixon*, 418 U.S. 683, 716 (1974)).

<sup>46</sup> *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>47</sup> *Id.* at 131.

<sup>48</sup> See, e.g., Kramer, *supra* note 43, at 963–64 (arguing that judicial supremacy emerged as a bipartisan "norm" in the late twentieth century); Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 *YALE L.J.* 2020, 2022–23, 2027 (2022) (providing a post-bellum starting point for the "separation-of-powers counterrevolution" that started in the early 20th century).

<sup>49</sup> Cf. Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 *U. PA. L. REV.* 1699, 1738 (2019) ("Continuing limits on judicial review also left ample space for administrative constitutionalism to thrive" [even as] [t]he Warren and Burger Courts expanded avenues for courts to impose their constitutional interpretations on agencies [on other constitutional actors]).

<sup>50</sup> See, e.g., *id.* at 1738–39 (arguing that agencies often have the final say on legal issues because of limits on judicial review).

have belonged to a legislature or an executive.<sup>51</sup> Although the term was used as early as 1923,<sup>52</sup> Ran Hirschl elevated juristocracy to describe a global trend in the late-20th and early-21st century where “constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.”<sup>53</sup> Juristocracy describes the dramatic rise in constitutionalization and judicial review and the concomitant transformation of political questions into legal questions through judicialization.<sup>54</sup> Hirschl uncovers the importance of hegemonic elites and established interests to this process, postulating his “hegemonic preservation” thesis where “political, economic, and legal power-holders who either initiate or refrain from blocking” constitutionalizing reforms “estimate that it serves their interests to abide by the limits imposed by increased judicial intervention in the political sphere.”<sup>55</sup> Juristocracy is one of several ways in which politics has become more judicialized. In that vein, Hirschl underscores why juristocracy is not best understood as reflecting a more progressive social and political regime.<sup>56</sup> To the contrary, juristocracy is about elite political interests insulating policy preferences from popular pressure.<sup>57</sup>

Elsewhere, juristocracy has become a popular word to describe a muscular form of judicial review. Sam Moyn uses the term as an antonym to democracy in his hard-charging critiques of constitutionalism writ large.<sup>58</sup> Moyn wraps together judicial supremacy and an arguably Tocquevillian American legal culture under the label juristocracy.<sup>59</sup> Writing in 2018, Moyn warns about the

<sup>51</sup> See, e.g., James Grant, *The Scourge of Juristocracy*, WILSON QUARTERLY (Spring 2010), <http://archive.wilsonquarterly.com/essays/scourge-juristocracy> [http://perma.cc/B643-CXG2] (describing “juristocracy” as moves that “take[] political power away from elected politicians and shift[] it to unelected judges”).

<sup>52</sup> VENTER, *supra* note 32, at 207 (“Somewhat unexpectedly, the term ‘juristocracy’ appears to have been coined in England as long ago as 1923 in connection with the functions of a Bar Associations . . .”).

<sup>53</sup> RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004).

<sup>54</sup> See, e.g., *id.* (“Over the past few years the world has witnessed an astonishingly rapid transition to what may be called *juristocracy*. Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.”).

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 212.

<sup>57</sup> *Id.* at 213.

<sup>58</sup> See Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/>,

[<https://perma.cc/8NYB-U763>] (“But the Constitution is what got us here, along with longstanding interpretations of it such as *Marbury v. Madison* that transform popular rule into elite rule and democracy into juristocracy.”).

<sup>59</sup> *Id.* Moyn’s Tocqueville assertion is no doubt a reference to the often-quoted assertion in *Democracy in America* that, “[s]carcely any political question arises in the United States which is not

end of affirmative action in higher education and abortion rights, and of the weaponization of the First Amendment to protect business interests.<sup>60</sup> For this predicament, Moyn blames both the Constitution itself and its interpretation in *Marbury v. Madison*<sup>61</sup> for “transform[ing] popular rule into elite rule and democracy into juristocracy.”<sup>62</sup>

While Moyn’s use of the term “juristocracy” deviates marginally from the taxonomy we have adopted here, his usage captures the thrust of the term. Across the world, juristocracy is real: the domain of courts has become larger, leaving to the side more directly democratic mechanisms.<sup>63</sup> But Moyn also hits another point—this development is not new. The United States’s slide towards juristocracy has been decades long (at a minimum).<sup>64</sup>

In the Roberts Court era, the Court’s decisions on the Second Amendment have subjected more state decisions on gun regulation to stringent judicial review in federal courts.<sup>65</sup> As Lemley suggests, the defining feature of the Roberts Court era is not the Court’s respect for constitutional actors or its willingness to preserve important questions for state and congressional resolution.<sup>66</sup> Juristocracy is one dimension of expanding judicial power, but more is required to capture the whole picture.

Juristocracy must be distinguished from judicial supremacy and from politics’ judicialization. If juristocracy captures both concepts, then the importance of the rise of constitutionalization and judicial review is unclear, unless judicial supremacy accompanies those practices. If juristocracy sweeps in judicial supremacy, then blaming *Marbury* for juristocracy is difficult to square with evidence about judicial supremacy’s historical construction. A strong judiciary that appears to have the final say over large swaths of American policy does not result from *Marbury*, nor from the Constitution

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resolved, sooner or later, into a judicial question.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357 (Francis Bowen ed., Henry Reeves trans., 1862).

<sup>60</sup> *Id.*

<sup>61</sup> 5 U.S. (1 Cranch) 137, 176 (1803) (concluding that courts have a duty to “say what the law is” and that this duty implies the power of judicial review).

<sup>62</sup> Moyn, *supra* note 58.

<sup>63</sup> HIRSCHL, *supra* note 53.

<sup>64</sup> See Moyn, *supra* note 58 (emphasis added) (“This syndrome is reflected in the left as well as the right, and their choice *over the decades* ‘to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver.’”).

<sup>65</sup> See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122 (2022) (“Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.”); *McDonald v. Chicago*, 561 U.S. 742, 750 (2010) (holding that the Second Amendment applies fully and completely to the States); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the District of Columbia could not ban handguns “used for self-defense in the home”).

<sup>66</sup> See Lemley, *supra* note 1, at 104, 110 (explaining that the Roberts Court often “reject[s] congressional power even absent a claim that it violated some constitutional right” and has “siphoned power away from the states”).

itself. At the very least, it took almost two centuries before courts began to shoulder the burden of policing democracy and deciding elections.<sup>67</sup> In short, juristocracy has certain limits as a concept for critiquing contemporary judicial politics.

### C. Judicial Activism

Judicial activism is a fraught label placed on judges that get out over their skis.<sup>68</sup> In a colloquial sense, activism relates to judicial policymaking and is cast as the antithesis of “judicial restraint.”<sup>69</sup> It has a negative connotation.<sup>70</sup> It charges a judge with pursuing their own ideological preferences at the expense of what the law requires.<sup>71</sup> A judicial-activism charge typically bridges the gap between the critics’ policy preferences and their idea about a judge’s proper role. At the height of the conservative reaction against the Warren Court, for example, critics called for Earl Warren’s impeachment and decried judicial activism.<sup>72</sup>

The colloquial connection between judicial activism and verboten judicial policymaking is problematic for legal scholars who acknowledge that jurists engage in various forms of judicial policymaking.<sup>73</sup> The reality that

<sup>67</sup> See Richard H. Pildes, *The Supreme Court 2003 Term—Forward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31 (2004) (tracing the trend towards constitutionalizing democratic politics).

<sup>68</sup> The term “judicial activism” first appeared in print in a 1947 article by Arthur Schlesinger. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, XXXV FORTUNE, no. 1, Jan. 1947, at 208. Because Schlesinger did not provide a conceptually clear version of either “activism” or “restraint,” both concepts have been underdetermined from the beginning. See Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1203 (2009) (arguing that Schlesinger never adequately explained what made some of the Justices of his era “exemplars of activism”).

<sup>69</sup> See Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1753 (2007) (“Activism was often juxtaposed against a policy of ‘judicial restraint’ . . .”).

<sup>70</sup> Compare Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1444 (2004) (outlining different meanings behind “judicial activism,” all of which are negative), with Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 404 (2014) (listing calibrating the “proper” amount of judicial activism as one of the “persistent controversies” surrounding originalism).

<sup>71</sup> See Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 262 (2008) (quoting Black’s Law Dictionary 862 (8th ed. 2004)) (calling judicial activism “[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions”).

<sup>72</sup> See generally Brett Bethune, *Influence Without Impeachment: How the Impeach Earl Warren Movement Began, Faltered, But Avoided Irrelevance*, 47 J. SUP. CT. HIST. 142 (2022) (providing an overview of the John Birch Society’s role in the “Impeach Earl Warren” movement).

<sup>73</sup> See, e.g., Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons and Textualism*, HARV. L. REV. (forthcoming 2024) (manuscript at 72), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4330403](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330403) [<https://perma.cc/5GE8-WH7Q>]

policymaking is a basic judicial function creates a problem for those charging activism. On the realist's account, the underdeterminacy of many constitutional provisions invites some level of judicial policymaking in what originalists call "the construction zone."<sup>74</sup> Because even many Warren Court critics acknowledge the necessity and pedigree of judicial policymaking in constitutional construction, the charge that a judge is engaging in judicial activism requires a deeper meaning loaded with some vision of the proper role of courts.

A more academically rigorous idea of judicial activism associates the concept with epistemic recklessness.<sup>75</sup> It starts from the premise that legal holdings invoke claims about what the law requires.<sup>76</sup> Lawyers, judges, and legal scholars need to make claims about what we *know* about what the law requires to parse legal claims. On this version of judicial activism focused on epistemics, a judge engages in judicial activism by ignoring relevant evidence of constitutional meaning.<sup>77</sup> For example, on this telling, judicial activism would be implicated if the Supreme Court disregarded the history of Reconstruction in pursuit of a colorblind approach to the Fourteenth Amendment.<sup>78</sup> One way to ignore relevant evidence—depending on your priors—could be giving too little weight to other constitutional actors' claims of knowledge. A court also engages in judicial activism when it applies the wrong standard to the available evidence.<sup>79</sup> This idea is ever-present in the dispute over the nondelegation doctrine—who has the greater burden? Nondelegationists, who argue for a rejuvenated standard, or revisionists, who point to evidence that the doctrine conflicts with reams of Founding-era evidence?<sup>80</sup>

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(demonstrating that many substantive canons partake in judicial policymaking in a way that is inconsistent with textualism).

<sup>74</sup> See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 458 (2013) (discussing a zone of constitutional indeterminacy the author calls "the construction zone").

<sup>75</sup> See Green, *supra* note 68, at 421–22 (posing one of the intellectual benefits of defining judicial activism in epistemic terms as crafting nuanced views of the concept).

<sup>76</sup> *Id.* at 405–06.

<sup>77</sup> *Id.*

<sup>78</sup> See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *VA. L. REV.* 753, 754–55 (1985) (arguing that the legislative history surrounding the 14th Amendment and other contemporaneous evidence belie a colorblind reading of the Constitution).

<sup>79</sup> Green, *supra* note 68, at 406–07.

<sup>80</sup> See Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 *GA. L. REV.* 81, 88 (2021) ("Early Congresses routinely delegated important policy decisions that required executive officers to go far beyond finding facts and filling up details."). See generally Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 *COLUM. L. REV.* 2323 (2022) (discussing epistemic issues surrounding the nondelegation doctrine that have been prompted by new originalist critiques of the doctrine).

What did the Warren Court's critics mean by judicial activism? The Warren Court has long been accused of seizing on underdetermined text to achieve results that the relevant evidence could not justify.<sup>81</sup> Some of its most controversial opinions, including *Gideon v. Wainwright*<sup>82</sup> and *Miranda v. Arizona*,<sup>83</sup> have been criticized as unbounded judicial policymaking that advanced the rights of criminal defendants.<sup>84</sup> Later critics of the *Roe v. Wade* decision and the Burger Court argued that the Court drew on the open-endedness of the Due Process Clause of the Fourteenth Amendment to invent a right to abortion.<sup>85</sup> The idea is not just that the Justices engaged in judicial policymaking, but that the Justices ignored the relevant evidence that would have established that the Constitution does not protect abortion access.

Of all the terms discussed in this Essay, judicial activism might have the most remarked-upon limitations. Because a judicial activism charge depends on one's own commitments, methodologies, and evaluations of constitutional knowledge, judicial activism is in the eye of the beholder. As the Burger Court was criticized for enshrining a right to abortion in *Roe*, critics of the Roberts Court have likewise charged the conservative Justices with judicial overreach for overruling *Roe* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*.<sup>86</sup> Of course, other observers pointed out that *Roe* and *Dobbs* might both embody judicial activism, albeit with distinct ideological or partisan valences.<sup>87</sup> Consequently, judicial activism is not an especially helpful concept to evaluate the judiciary.

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<sup>81</sup> See, e.g., A. E. Dick Howard, *From Warren to Burger: Activism and Restraint*, 1 WILSON QUARTERLY, Spring 1977, at 109–10 (exploring criticism that the Warren Court achieved “the formulation of results . . . by little or no effort to support them in reason”).

<sup>82</sup> 372 U.S. 335 (1963) (holding that defendants in criminal trials have a constitutional right to legal representation).

<sup>83</sup> 384 U.S. 436 (1966) (holding that a defendant is required to be warned that he has the right to remain silent when he is taken into custody and questioned).

<sup>84</sup> See Howard, *supra* note 81, at 113 (“A Court as activist as the Warren Court could not help but play to mixed reviews . . . Nixon declared that judicial decisions had ‘gone too far in weakening the peace forces as against the criminal forces in this country.’”).

<sup>85</sup> See generally Spencer Shia, *The Folly of Roe v. Wade and the Perils of Judicial Activism*, OXFORD UNIV. CONSERVATIVE ASS'N (June 8, 2022), <https://www.ouconservatives.com/blog/2022/6/8/the-folly-of-roe-v-wade-and-the-perils-of-judicial-activism> [<https://perma.cc/PS7R-3EEF>] (providing a contemporary version of the judicial activism charge against the *Roe* decision).

<sup>86</sup> See Jay Michaelson, *Alito's 'Dobbs' Opinion Overturning 'Roe' Is Judicial Activism at Its Most Self-Deceptive*, THE DAILY BEAST (June 24, 2022, 3:31 PM), <https://www.thedailybeast.com/alitos-dobbs-opinion-overturning-roe-is-judicial-activism-at-its-most-self-deceptive> [<https://perma.cc/SE8Y-D9Z6>] (“Are we really supposed to believe that it’s just a coincidence that a court loaded with religious conservatives has just obtained the most sought after goal of religious conservatives [an end to abortion rights]?”).

<sup>87</sup> See, e.g., Tom Nichols, *Roe Was Flawed. Dobbs Is Worse.*, THE ATL. (June 17, 2022), <https://www.theatlantic.com/newsletters/archive/2022/06/dobbs-conservative-justices-activist-court-roe-overturned/661410/> [<https://perma.cc/6H3K-89JW>] (“They were right: *Roe* was the product of an activist Court. But then, so was *Dobbs v. Jackson Women's Health Organization*.”)

## II. JUDICIAL SELF-AGGRANDIZEMENT

While many observers sense a judicial “power grab,” that feeling is not enough to support an empirical finding, much less diagnose or understand it. Our existing vocabulary sharply limits our ability to describe the Roberts Court, to compare it to the Courts that preceded it, or to offer any normative critiques of its power. Judicial supremacy is useless for comparing recent Courts. Juristocracy fares no better because it describes a governing regime and has limited ability to describe developments that happen within an existing juristocratic regime. In other words, juristocracy offers no clear guidance on how a court can become more powerful absent other actors giving it formal policymaking authority. Finally, judicial activism is too subjective to offer guidance.

In this Part, we offer a more fruitful alternative. Judicial self-aggrandizement as we describe it better captures what is distinctive about, but not new to, the Roberts Court’s behavior. Judicial aggrandizement is more concerned with how power is redistributed across governing institutions, how that power is exercised, and what that power *is*, rather than with analogous but distinct question of what legal powers a court or any governing institution holds. Judicial aggrandizement helps us interrogate the foundational question: who governs?<sup>88</sup> Judicial self-aggrandizement helps us understand how judges accrue power—and justify its accrual—within the judiciary at the expense of other constitutional actors.

While there is not necessarily one correct way to use these terms, analytical clarity is important. For example, if judicial self-aggrandizement is coterminous with boundless judicial discretion, then it loses its explanatory power. Criticizing the major questions doctrine’s open-textured standard and anti-democratic implications, Jody Freeman and Matthew Stephenson write that the doctrine “gives judges an extraordinary degree of flexibility” and leaves room for a judge’s personal policy preferences.<sup>89</sup> The trouble, though, is that it is unclear how broad judicial discretion by itself aggrandizes the court or its judges. If unbounded judicial discretion amounts to judicial aggrandizement, then there is little difference between judicial aggrandizement and juristocracy, or between a court constrained by public

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<sup>88</sup> See generally ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY? (1961) (questioning some classic assumptions about who likely holds political power and instead investigating “who actually governs?”); E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA (1960) (analyzing how American democracy works in practice rather than in principle).

<sup>89</sup> Freeman & Stephenson, *supra* note 1, at 23.

opinion and a court with broad diffuse support.<sup>90</sup> More fundamentally, if a judge acting on their policy preferences alone aggrandizes the court, then there is little difference between aggrandizement and many exercises of judicial review.<sup>91</sup> Instead, Freeman and Stephenson's analysis is better characterized as a study in judicial activism through poorly crafted doctrine. Yet open-ended standards are common in the public law canon. Spotting standards that create opportunities for judicial activism is important, but it is hard to leverage them to critique the Roberts Court.

The account of judicial self-aggrandizement proffered in this Part provides more depth to Roberts Court scholarship and to some judicial politics research. Rather than focusing on the differences between legal and political power, judicial aggrandizement instead provides a more complete picture of how judges' public rhetoric, judicial reasoning, and judicial choices about which cases to decide affects the judiciary's share of power in the constitutional system.

#### A. *In a Nutshell . . .*

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.<sup>92</sup> Judicial *self*-aggrandizement refers to when jurists, rather than other actors, deploy the same rhetoric.<sup>93</sup> The deployment must be successful—that is, adopted by other political actors—because otherwise the rhetoric would not contribute to aggrandizement. The relevant rhetoric and ideas create, support, and reaffirm a consensus about the courts' proper role in American politics, especially that the courts ought to be a venue through which political actors can push for change. For that reason, judicial aggrandizement is uniquely focused on the

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<sup>90</sup> See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992) (observing two dimensions to public opinion about the Court: "specific support" and "diffuse support").

<sup>91</sup> See generally JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (finding that Supreme Court decisionmaking follows judicial policy preferences and setting out the attitudinal model of judicial decisionmaking); Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (asserting that the Supreme Court is a policymaker).

<sup>92</sup> The judiciary's perceived role as the final arbiter of political disputes is not necessarily a question of judicial supremacy. Rather than ask who has final interpretative authority, judicial aggrandizement asks: who is exercising power?

<sup>93</sup> See Sumrall, *supra* note 20, at 31 (explaining that judicial self-aggrandizement "is the practice of courts' continued embrace of ideas and assumptions that support their role as the final arbiter of political disputes"); *id.* at 31 ("[C]ourts can aggrandize themselves by embracing and deploying—explicitly or implicitly—ideas that suggest courts, rather than other political institutions, are the proper venue for certain questions or disputes.").



rhetoric and reasoning supporting judicial outcomes. There are two common forms of judicial self-aggrandizement: creating vague judicialized standards that ensure courts are future arbiters and using particular—sometimes demeaning—rhetoric to describe other political institutions.

Even putting aside the Roberts Court, judicial aggrandizement is a useful concept. By focusing on how courts deploy ideas and norms that reify the judiciary's power over American life, judicial aggrandizement takes courts seriously both as political actors and as contestants in an evolving separation-of-powers system.<sup>94</sup> For example, it is hard to understand certain early-20th century developments without looking to William Howard Taft's efforts to accrue power in the judiciary.<sup>95</sup> Judicial aggrandizement also allows us to focus on norms and ideas, which helps reveal why other constitutional actors and the public accede to expanding notions of judicial power absent a constitutional or statutory change.

Unlike juristocracy and judicial supremacy, which are political developments caused at least in part by other actors giving special credence to judicial policymaking, judicial aggrandizement also risks affecting who holds political power (or who governs) in the separation-of-powers system, rather than merely who holds legal policymaking authority. While the Constitution arguably leaves room for juristocracy or judicial supremacy because other actors may choose to defer to judicial policymaking if they wish, the Constitution does not contemplate a system where the Supreme Court would dictate when, how, and whether other institutions govern.<sup>96</sup>

Judicial activism, too, is distinct. Judicial aggrandizement asks about both a decision's legal result and about the rhetoric used to reach it. Judicial activism looks only at the legal result and compares it against what the observer believes the judge ought to have done—consider relevant evidence, apply the right standard, or reach the right result. A decision could be self-aggrandizing even if an observer does not charge it as activist. Taft's work on the nondelegation doctrine likely fit this description.<sup>97</sup>

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<sup>94</sup> See JOSH CHAFETZ, CONGRESS' CONSTITUTION 18 (2017) (“[W]ritten constitutional tools define the parameters of the field upon which the branches can fight . . . Political institutions are involved in constant contestation, not simply for the substantive outcomes they desire, but also for the authority to determine those outcomes.”).

<sup>95</sup> See Sumrall, *supra* note 20, at 31–46 (discussing Taft's role in working to elevate the judiciary above the other branches in the “separation-of-powers system”).

<sup>96</sup> See Bowie & Renan, *supra* note 48, at 2024 (“Today, judges and lawyers from across the political spectrum take for granted that the U.S. Constitution imposes unwritten but judicially enforceable limits on the power of one branch of government to interfere with the others.”); Cf. Jeffrey K. Tulis, *Reflections on Congressional Abdication and Constitutional Erosion*, 70 DRAKE L. REV. 643, 652 (2022) (“Our citizenry behaves as if the Constitution means whatever the U.S. Supreme Court says it means . . . [C]onstitutional law at any given moment is what the Judiciary determines it to be.”).

<sup>97</sup> See generally Sumrall, *supra* note 20.

### B. Three Important Features of Judicial Self-Aggrandizement

Three important features of judicial self-aggrandizement are worth stressing: its bipartisan character; it is not new and is a feature of many courts; and that it can benefit the executive branch. First, Josh Chafetz describes judicial self-aggrandizement as a “bipartisan” and “ideological project.”<sup>98</sup> As evidence, Chafetz points to the lack of pushback from any current Justice to the Court’s aggrandizing tendencies.<sup>99</sup> Pointing to a recent controversy—John Roberts’s refusal to appear before the Senate Judiciary Committee to discuss Court ethics reform—Chafetz emphasized that “nothing stopped Justices Sonia Sotomayor, Elena Kagan or Ketanji Brown Jackson from volunteering to testify, but they did not.”<sup>100</sup>

Second, that judicial self-aggrandizement is not a strictly new phenomenon is evidenced in one of our writings about Taft. Taft was responsible for instilling principles of judicially monitored politics into practice.<sup>101</sup> His creation of the “intelligible principle” test for nondelegation<sup>102</sup> permitted the judiciary to help police the separation of powers between Congress and the Executive.<sup>103</sup> The judiciary’s role as the arbiter of separation-of-powers disputes derives from multiple developments including Taft’s judicial self-aggrandizement. This phenomenon is not new. Moreover, the Warren Court engaged in judicial self-aggrandizement in *Cooper*, where the Court deployed a norm (judicial supremacy) to justify an outcome and reify its position over other state officials.<sup>104</sup>

Finally, judicial self-aggrandizement can benefit the executive branch.<sup>105</sup> The prime example may be the Court’s approach to the unitary executive theory. The Court has deployed the idea of “presidential representation” to

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<sup>98</sup> Chafetz, *The First Name*, *supra* note 2.

<sup>99</sup> *See id.* (“Republican-appointed justices dominate the court and have for many decades, but their Democratic-appointed colleagues—while dissenting in many individual opinions—evinced no desire to contest the underlying disdain for other institutions or elevation of their own.”).

<sup>100</sup> *Id.*

<sup>101</sup> Sumrall, *supra* note 20, at 31–44.

<sup>102</sup> *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

<sup>103</sup> *See* Sumrall, *supra* note 20, at 44 (“By articulating a single, desperately vague standard of nondelegation, Taft ensured the Court would maintain an important role in determining when other governing institutions violated its rules.”).

<sup>104</sup> *See* Chemerinsky, *supra* note 37, at 1476.

<sup>105</sup> *See, e.g.,* Baumann, *supra* note 21, at 503–04 (acknowledging that the Court’s project of judicial self-aggrandizement can benefit the President, even though it also centralizes power in the judiciary at Congress’s expense).

argue for limitations on Congress's ability to structure federal agencies.<sup>106</sup> This gives the President a freer hand to remove agency heads but also rationalizes (provides permission for) the Court's approach to restructuring aspects of the administrative state.<sup>107</sup> This is not to say that judicial self-aggrandizement will always spare the executive, however.<sup>108</sup>

These three features of judicial self-aggrandizement mediate much of the confusion around the concept. With this foundation, we can ask probing questions about the nature of judicial power in the Roberts Court era.

### C. Judicial Self-Aggrandizement in the Roberts Court Era

Given the bipartisan and tenured nature of judicial self-aggrandizement, what can it reveal about the Roberts Court? Research on this subject demonstrates that judicial self-aggrandizement is not new. Nonetheless, the literature suggests that the Roberts Court has elevated judicial self-aggrandizement to new heights. These are claims that should be evaluated and scrutinized. But that kind of scrutiny can be understood only with a clear understanding of judicial self-aggrandizement in mind.

One of us has described the Court's tendency towards judicial self-aggrandizement in the administrative law context.<sup>109</sup> The Roberts Court's flirtations with the nondelegation and major questions doctrines have prompted judges to embrace openly cynical and declinist claims about Congress's ability to function.<sup>110</sup> Justice Neil Gorsuch offers a prime example: "If Congress could *hand off all its legislative powers* to unelected agency officials, it '*would dash the whole scheme*' of our Constitution and enable intrusions

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<sup>106</sup> See, e.g., *Seila L. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2184, 2203 (2020) ("[T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation . . . [Therefore] [t]he President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'"). See generally JOHN A. DEARBORN, *POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION* 1–3 (2021) (demonstrating that the idea of "presidential representation" has helped to validate presidential power).

<sup>107</sup> See Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022) (arguing that the Court's "internally contradictory jurisprudence," whereby it empowers the executive through the unitary executive theory while at the same time limiting agency discretion, is a jurisprudence that empowers courts).

<sup>108</sup> See, e.g., Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1817 (2023) ("The Court's jurisprudence reduces administrative government in some places but defends and expands it in others.").

<sup>109</sup> See generally Baumann, *supra* note 21.

<sup>110</sup> See *id.* at 472 ("[Gorsuch's] approach, what I call 'Americana administrative law,' justifies strong assertions of judicial power with cynical or declinist views of Congress."); *cf. id.* at 470 ("But Gorsuch's cynicism is all implication; he never provided any evidence that Congress was avoiding accountability in passing the relevant portion of the OSH Act.").

into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.”<sup>111</sup> This is a pitch for judicial self-aggrandizement that depends on the need for the judiciary to oversee “lawmakers” who “*may be tempted to delegate power to agencies to ‘reduc[e] the degree to which they will be held accountable for unpopular actions.’*”<sup>112</sup>

Other courts’ advocacy for the nondelegation doctrine might resemble juristocracy or, depending on your priors, judicial activism. But Gorsuch exemplifies a new approach that dials up the volume on judicial self-aggrandizement; he “framed a transfer of power from the political branches to the Court in paternalistic terms.”<sup>113</sup> Another federal judge felt entirely at ease declaring that Congress is “missing in action.”<sup>114</sup> Justifying an expansive approach to judicial power by demeaning a coequal branch of government is now typical.

These observations are not limited to the administrative law landscape. Josh Chafetz documents other examples running the gamut from election law to congressional oversight.<sup>115</sup> Overall, the Roberts Court has adopted a mode of judicial reasoning that assumes and justifies its own role over American life by demeaning other constitutional actors and aggrandizing courts.

#### CONCLUSION

The recent flurry of scholarship diagnosing the increasing role of the judiciary in politics uncovers a real phenomenon. The judiciary is accruing power at an alarming rate. The difficulty comes in accurately describing and diagnosing changes in judicial power across time. Judicial aggrandizement is one important dimension of modern judicial power. The Roberts Court is exceptional in its willingness to deploy rhetoric justifying its role outside and above the separation of powers and demean other constitutional actors in a way that few previous Courts would have dared. Future work will focus on the nuances of judicial aggrandizement and judicial power. In short, “[w]e need to pay attention to what kind of institution the Court is becoming.”<sup>116</sup>

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<sup>111</sup> *Id.* at 470.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 487 (quoting from the remarks of Judge Neomi Rao).

<sup>115</sup> See generally Chafetz, *The New Judicial Power Grab*, *supra* note 22.

<sup>116</sup> Paul Baumgardner & Calvin TerBeek, *The U.S. Supreme Court Is Not a Dahlian Court*, 36 *STUD. AM. POL. DEV.* 148, 150 (2022).