

Americana Administrative Law

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On January 13, 2022, the Supreme Court blocked the Biden Administration's vaccine-or-test mandate, a measure meant to save thousands of lives amid a once-in-a-century pandemic. Justice Gorsuch's concurrence suggested that the Court's decision vindicated the nondelegation doctrine, even if indirectly. Gorsuch argued that Congress could not be left to its own devices because open-ended delegations corrupt congressional incentives. The Gorsuch concurrence marks the triumph of a new pitch for judicial self-aggrandizement this Article calls "Americana administrative law." Rather than hyping the threat of executive aggrandizement, nondelegationists are deploying cynical and declinist notions of Congress to justify judicial self-aggrandizement. The "Americana" in Americana administrative law comes from nondelegationists' attempt to restore an idealized Congress that has never worked as cleanly as they suppose. Beyond the nondelegation doctrine, the administrative law literature often justifies judicial interventions with claims of congressional "gridlock," partisanship, and decline.

This Article has two main contributions. First, this Article describes the rise of Americana administrative law from the "constitutional politics" around the nondelegation doctrine. I provide a genealogy for this approach and frame it as a pitch for judicial self-aggrandizement. Second, this Article provides a corrective. The courts are neither above nor outside separation-of-powers conflicts. They are instead participants in the ongoing interbranch contest for the ability to determine outcomes. Americana administrative law ignores much of what we know about Congress. Congress is an evolving body at the end of a centuries-long experiment with legislatures. It has developed "hard" and "soft" powers that allow it to realize its agenda and defend itself from the other branches. This Article argues that the law and the literature should drop the pretense that judicial doctrine can "fix" an institution as complex as Congress.

* Appellate Attorney, United States Department of Justice. © 2023, Beau J. Baumann. The views expressed in this Article are mine alone. I appreciate the helpful feedback and encouragement I received from Josh Chafetz, Daniel Walters, Allen C. Sumrall, Kannappan Sampath, Casey Chalbeck, Ali Shan Ali Bhai, and Victoria Inojosa. Josh deserves special thanks for his years of helpful mentorship and for teaching me much of what I know about Congress. I also deeply appreciate the willingness of Chris Walker and Emile Shehada to run a blog post discussing this Article in the *Yale Journal on Regulation Notice & Comment* blog. See Beau J. Baumann, *Americana Administrative Law*, *YALE J. ON REGUL.: NOTICE & COMMENT* (Feb. 17, 2022), <https://www.yalejreg.com/nc/americana-administrative-law-by-beau-j-baumann/> [<https://perma.cc/BU8R-YF77>]. Finally, I appreciate the hard work of the students at *The Georgetown Law Journal*, whose work continually exceeded my wildest expectations.

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INTRODUCTION

In November 2021, the Biden Administration mandated that businesses with at least 100 employees require either full COVID-19 vaccinations or weekly COVID-19 testing as a condition of employment.¹ The Biden Administration drew on delegated authority under the Occupational Safety and Health Act of 1970 (OSH Act).² The Supreme Court blocked the mandate in January 2022.³ It applied the major questions doctrine, which requires that Congress speak clearly when delegating power of economic or political significance.⁴ As a result, a mandate meant to save thousands of lives never went into effect.⁵

To block the mandate, the Court had to use a more aggressive version of the major questions doctrine.⁶ As Cass Sunstein has suggested, there are now two major questions doctrines much as there are two canons of constitutional avoidance.⁷ A few months before the vaccine-or-test case, the Court framed the major questions doctrine as a rule of *construction*.⁸ Construction is how we give meaning to vague text after determining the text's linguistic meaning or semantic content.⁹ If, after a text is interpreted, the relevant statute is still vague, then rules of construction will carry the day.¹⁰ The Supreme Court's per curiam opinion in the vaccine-or-test case applied the major questions doctrine more like a supercharged

1. See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 663 (2022) (per curiam) (the "vaccine-or-test case").

2. See *id.*; see also 29 U.S.C. §§ 651–678.

3. See Nat'l Fed'n of Indep. Bus., 142 S. Ct. at 663. By statute, the courts consolidated challenges to the vaccine-or-test requirement in the Sixth Circuit, which dissolved another court's stay of the requirement. See *id.* at 664 (citing *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021)). The Supreme Court granted emergency relief and stayed the requirement's enforcement. See *id.* at 662. The Court's per curiam opinion effectively ended the litigation around the requirement.

4. See *id.* at 665.

5. See *id.* at 666 (noting that the federal government projected, before the Omicron variant, that the vaccine mandate would save over 6,500 lives).

6. See Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (comparing two versions of the major questions doctrine, one "weak" and the other "strong").

7. See *id.* (explaining that the weak doctrine cabins deference to agency interpretations while the strong doctrine dictates that agencies "will lose" when they construe statutory ambiguity to give them new powers); Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 332 (2015) (discussing two different versions of constitutional avoidance doctrine: one for avoiding actual unconstitutionality and the other for avoiding serious constitutional questions).

8. See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (per curiam) (describing the major questions doctrine as a rule of construction in a case about an early COVID response measure) (the "eviction moratorium" case).

9. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010).

10. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (instructing, in the context of *Auer* deference, that "deference can arise only if a regulation is genuinely ambiguous" and emphasizing that "when we use that term we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation").

rule of *interpretation*.¹¹ It was applied at the beginning of the Court's analysis to limit the semantic meaning of the OSH Act's text.¹²

The Court's application of that more aggressive version of the major questions doctrine was decisive when dealing with an emergency action within the semantic bounds of what the OSH Act otherwise allowed.¹³ After it deployed the major questions doctrine, the Court gingerly engaged with the text of the Act. But its emphasis on the major questions doctrine was noticeable.¹⁴ The Court did not claim, as it did with the eviction moratorium case just months earlier,¹⁵ that the plain meaning of the OSH Act dictated the Court's holding on its own.

For whatever reason, the *per curiam* opinion did not justify this shift in the application of the major questions doctrine. Instead, the Court imposed its super-charged version without explanation. The Court did not explain whether its major questions doctrine is grounded in some claim about how Congress "speaks" in statutes or whether the Court believed it was nudging Congress to draft with greater specificity.¹⁶

The Court's silence is understandable. After all, the relevant statute in the vaccine-or-test case predates the major questions doctrine by several decades,¹⁷ so

11. See *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (*per curiam*) (applying the major questions doctrine at the outset of the Court's analysis, with no prior finding of ambiguity in the relevant text).

12. See *id.* While the distinction between an interpretive rule and a rule of construction might seem academic, it has proven outcome determinative whenever the Court has applied the major questions doctrine to broad statutes in contexts where Congress has traditionally given the Executive Branch significant latitude. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022) (applying the major questions doctrine at the beginning of the Court's analysis to narrow a capacious, but not ambiguous, grant of authority in the Clean Air Act); see also *id.* at 2614 (acknowledging that the challenged and hypothetical agency action was within the semantic meaning of the Clean Air Act's text).

13. See *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (stating that, after the application of the major questions doctrine, the question was whether the OSH Act "plainly authorizes the Secretary's mandate"); see also *West Virginia*, 142 S. Ct. at 2614 (acknowledging that the plain meaning of the relevant statutory text encompassed the challenged and hypothetical agency action, but ignoring that plain meaning because of the major questions doctrine).

14. See *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665–67.

15. See *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488–89 (2021) (*per curiam*).

16. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 911 (2013) (distinguishing between "interpretive tools [that] seem designed merely to reflect how Congress actually drafts" and others that "seemed more proactively aimed at affecting how Congress should draft in the future"); Solum, *supra* note 9, at 113 (discussing "rules of thumb" that "point judges and other legal actors to facts about the way language works"). In the *West Virginia* decision a few months later, the Court reiterated its stance that the major questions doctrine is built on a descriptive claim about how Congress legislates on significant issues. 142 S. Ct. at 2607–09. The Court did not, however, reckon with the reams of scholarship questioning whether Congress actually speaks clearly when legislating on "major" questions. See, e.g., Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1947–48 (2017) (arguing that the major questions doctrine is oddly divorced from a fleshed-out claim about how Congress functions or how it can function in the future).

17. The major questions doctrine emerged in *MCI Telecomms. Corp. v. AT&T Co.*, decided over two decades after Congress enacted the OSH Act. See 512 U.S. 218, 229 (1994); see also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory*

Congress was hardly on notice that it had to “speak clearly” lest its enactment be narrowed.¹⁸ And Congress “has almost never expressly stipulated the level of, or fact of, deference to be given to implementing agencies.”¹⁹ So the major questions doctrine cannot rest on a descriptive claim about how Congress actually legislates. It appears likely—on what is a point of speculation—that the Court may have been unable to maintain a majority under any of the available explanations for its use of the major questions doctrine.²⁰ When it came to a justification, the Court opted only for a deafening silence.

The Court’s opaque per curiam contrasted with Justice Gorsuch’s candid concurrence, which was joined by Justices Alito and Thomas.²¹ Gorsuch suggested that the Court’s cryptic per curiam enforced the values of the nondelegation doctrine, combined with constitutional avoidance.²² The Occupational Safety and Health Administration (OSHA) statute, he suggested, would be unconstitutional if it “really *did* endow OSHA with the power it asserts.”²³ But the nondelegation doctrine has been in a “zombie” state for almost a century.²⁴ And unlike the tight-lipped majority, Justice Gorsuch apparently felt that vindicating a long-zombified doctrine during a pandemic required justification—he needed a pitch for the judiciary to halt the vaccine-or-test mandate.

Gorsuch’s pitch turned on a cynical view of Congress. To justify this new use of the major questions doctrine, Gorsuch argued that statutory ambiguity occurs when lawmakers avoid making tough calls: “The nondelegation doctrine ensures

Interpretation, 102 MINN. L. REV. 2019, 2034 (2018) (“The major questions doctrine first emerged as a distinguishable technique of statutory interpretation in [the *MCI* case].”).

18. See John Stoehr, *To These Republican Justices, Mass Death Is Okie-Dokie*, ED. BD. (Jan. 14, 2022), <https://www.editorialboard.com/to-these-republican-justices-mass-death-is-okie-dokie/> [https://perma.cc/KFB4-6B32] (interview with Professor Josh Chafetz). Professor Josh Chafetz criticizes the Court:

[The Supreme Court] say[s] this is all about returning power to Congress. (In effect, they’re saying, “Surely if Congress meant to allow the agency to address such a major question, it would have said so explicitly in statutory text.”) But Congress had no way of knowing when it wrote the statute (a) precisely what issues would arise or (b) whether the justices would decide those issues were “major” So this isn’t actually about respecting Congress’s wishes – after all, Congress chose to write broad language against the backdrop of a generally applicable deference regime.

Id.

19. Heinzerling, *supra* note 16 (arguing that the major questions doctrine runs contrary to how Congress actually legislates on major questions).

20. Nothing in the Court’s later *West Virginia* decision changes the analysis contained in this Article. To the contrary, the Court wrote what was, effectively, a stare decisis decision that did not illuminate much about the major questions doctrine. See 142 S. Ct. at 2607–10 (framing the major questions doctrine as a settled canon of interpretation without dealing with the doctrine’s academic critics).

21. See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring).

22. See *id.* at 667–69.

23. *Id.* at 669.

24. Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. 417, 419 n.6 (2022) (writing that nondelegation “has essentially been a zombie doctrine since 1935”).

democratic accountability by preventing Congress from *intentionally* delegating its legislative powers to unelected officials. *Sometimes lawmakers may be tempted to delegate power to agencies to ‘reduc[e] the degree to which they will be held accountable for unpopular actions.’*²⁵

Lawmakers, Gorsuch asserted, face too many incentives to give away their power to federal agencies.²⁶ Under those circumstances, the Court could not leave Congress to guard against the excesses of its own delegations.²⁷

Gorsuch argued that the only way to curb Congress from delegating away its own decisionmaking authority was for the Court to resist those delegations: “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 into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.”²⁸ While Gorsuch framed a transfer of power from the political branches to the Court in paternalistic terms, he had the audacity to frame his version of the major questions doctrine as protecting Congress from its own worst impulses.²⁹ (*Spare the rod and spoil the Congress!*)³⁰ 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. By suggesting that the Court was helping to correct Congress’s worst impulses—impulses assumed or imagined on Gorsuch’s part—the concurrence perfected the art of congressional gaslighting.³¹

Elsewhere, Gorsuch has suggested that requiring greater specificity from Congress will promote deliberation, the protection of minority rights, fair notice, and accountability.³² And under Gorsuch’s intellectual leadership, the Court is

25. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (alteration in original) (emphasis added) (quoting Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147, 154 (2017)).

26. *See id.*

27. *See id.*

28. *Id.* (emphasis added) (quoting *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring)). The throughlines between the vaccine-or-test and *West Virginia* cases is reinforced by the self-referencing citations in Gorsuch’s later *West Virginia* concurrence. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2619–20 (2022) (Gorsuch, J., concurring) (citing to the vaccine-or-test and eviction moratorium cases).

29. *See Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring).

30. *See Proverbs 13:24* (King James) (“He that spareth his rod hateth his son: But he that loveth him chasteneth him betimes.”).

31. “Gaslighting” refers to a practice of psychological abuse through which abusers force victims to question their perception, memory, and sanity for the sake of preserving the victims’ subservience to their abusers. *See Kenji Yoshino, Acts of Oblivion*, 72 STAN. L. REV. ONLINE 65, 70 (2020) (reviewing BERNADETTE MEYLER, *THEATERS OF PARDONING* (2019)). The term is a callback to *Gas Light*, a 1938 play (and its 1944 film adaption) in which the protagonist is made to question her own reality by the plot’s antagonist. *See id.* Here, I use the term to suggest that the Supreme Court has been blatantly accruing power at Congress’s expense and obfuscating this reality with rhetoric casting itself as Congress’s savior.

32. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting).

convinced of the righteousness of forcing Congress to cosplay its own *Schoolhouse Rock!* vision.³³ But unlike in other episodes in the administrative law canon, Gorsuch has abandoned a workable dialogue with Congress.³⁴ The major questions doctrine is unpredictable because the Court has left both the trigger (whether an agency action is “major”) and the fix (the necessary level of clarity Congress must use in assigning a question to an agency) ambiguous.³⁵ And even if the Court offered clarity, it is hard to believe that the Justices genuinely think that Congress can be so easily affected. Scholars take a dim view of the odds that Congress’s register of communication ever meets the Court’s expectations.³⁶ So the Court’s cases do not appear to be about Congress. Instead, it is increasingly evident that the Court is pursuing an anti-administrativist agenda with thinly reasoned rules of statutory interpretation.³⁷

Gorsuch has so effectively weaponized his disdain for legislative politics that, between the vaccine-or-test case and his earlier dissent in *Gundy v. United States*,³⁸ most of the Court has either undersigned his cynical take on Congress or else communicated their kinship with it.³⁹ This fact, combined with the per curiam opinion’s conspicuous lack of explanation, suggests that the conservative bloc of the Court is using the major questions doctrine as a tonic for congressional fecklessness. All the while, the major questions doctrine is overseeing a massive

33. See Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794 (2015) (discussing lawyers’ tendency to project their *Schoolhouse Rock!* model on Congress). Justice Barrett, for her part, acknowledged that Congress has departed from the *Schoolhouse Rock!* model but argued as an academic that modern textualists may ignore the realities of legislative practice. Amy Coney Barrett, Essay, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2197, 2210–11 (2017) (referencing *Schoolhouse Rock: America—I’m Just a Bill Music Video* (Disney Educational Productions, 1975), <https://www.youtube.com/watch?v=OgVKvqTlItto>).

34. See Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 150–52 (2020) (arguing that scholars have missed the important 1930s dialogue between the Supreme Court and Congress and that this dialogue led to an important constitutional settlement around the New Deal).

35. See Stoehr, *supra* note 18.

36. See, e.g., Heinzerling, *supra* note 16.

37. See, e.g., *id.* at 1937–38; see also Caroline Cecot, *Congress and Cost–Benefit Analysis*, 73 ADMIN. L. REV. 787, 822 (2021) (suggesting that the Court’s “view that less regulation is desirable” seems “to play a role in the Court’s recent interest in” revitalizing nondelegation).

38. See 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (“Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem.”).

39. Chief Justice Roberts joined Gorsuch’s *Gundy* dissent, and Justice Kavanaugh has separately communicated his appreciation for Gorsuch’s approach. See *id.* at 2131; Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (writing that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases”). All six conservative appointees on the Court signed on to the *West Virginia* opinion. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2596 (2022). Because the Court added little new reasoning, it seems that the Court has settled on an all-powerful major questions doctrine that is silent on most of the particulars. The Court now is so comfortable with the supercharged major questions doctrine that it sees no need to address the critics of Justice Gorsuch’s approach.

shift in interpretive authority from agencies to the Supreme Court.⁴⁰ For that reason alone, the literature must examine Gorsuch's focus on Congress.⁴¹

This Article has two objectives. First, it tracks the rise of Gorsuch's justification for nondelegation through the lens of "constitutional politics."⁴² His approach, what I call "Americana administrative law," justifies strong assertions of judicial power with cynical or declinist views of Congress.⁴³ This perspective resembles the Justices' "disdain" for the political branches and for legislative politics in particular.⁴⁴ As this Article describes, Americana administrative law was advanced by nondelegationists such as Judge Neomi Rao as an alternative to the arguments that had failed miserably for most of the prior century.⁴⁵ Congress, the argument goes, is partisan, gridlocked, ineffective, unproductive, and in

40. See Heinzerling, *supra* note 16, at 1937 (arguing that the Court has used the major questions doctrine to take "interpretive power from an administrative agency . . . and ke[ep] it for itself").

41. See *id.* ("The [different versions of the major questions doctrine] are striking enough for their rearrangement of the *Chevron*-dominated relationship between the courts and administrative agencies; however, they are even more noteworthy, and troubling, for their rearrangement of the relationship between the courts and Congress.").

42. See JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 15–16 (2017) (introducing "constitutional politics" to conceptualize interbranch contestations over the right to decide questions).

43. See, e.g., Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465–66 (2015) (arguing for a revived nondelegation doctrine by suggesting that delegations have wreaked havoc on Congress by devolving power and attention away from the "collective Congress"); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10–11 (1993) (arguing for a nondelegation doctrine premised on the idea that Congress has failed to flesh out its enactments, which has led to a transfer of power to unelected bureaucrats); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926–27 (2020) (justifying a nondelegation doctrine by juxtaposing the Congress of today with a mythic Congress of yesterday, which "tightly controlled" the administrative state); Adam J. White, *Democracy, Delegation, and Distrust: Congress and the Presidency in the Age of Trump*, HOOVER INST.: DEFINING IDEAS (Mar. 12, 2019), <https://www.hoover.org/research/democracy-delegation-and-distrust> [<https://perma.cc/TG6C-HU6W>] (blaming congressional dysfunction on "Congress's broad delegations of power [that] defy *The Federalist's* premises"); John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 5, 10–12 (2022) (justifying nondelegation by suggesting that delegations corrupt our political system and lead to polarization); Mark Strand & Timothy Lang, *Can the Courts Make Congress Do Its Job?*, NAT'L AFFS., Summer 2021, at 73, 73 ("[Nondelegation] is important because although the framers envisioned Congress as being the foremost branch under the Constitution, power has been shifting . . . toward the executive branch. Much of the blame for this development lies with Congress itself."); see also Cass, *supra* note 25, at 197 (objecting to delegations because they allow lawmakers to accrue power without accountability).

44. See, e.g., Josh Chafetz, Essay, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L. J. 125, 127–28 (2021) (arguing that the Roberts Court displays a "judicial disdain for Congress and its representative role and an architectonic project of judicial empowerment at the legislature's expense" (footnote omitted)); Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 2 (2012) ("Sometimes the Justices seem barely able to hide their disdain for the other branches of government."); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85 (2001) (noting early certain nascent modes of disrespect that the Supreme Court directs toward Congress). The Justices' "disdain" for Congress seems to be related to the widely held idea of congressional decline. See DAVID R. MAYHEW, *THE IMPRINT OF CONGRESS 2* (2017) ("*Declinism*, a view that the old days were better, is a theme in many accounts [of Congress]." (emphasis added)).

45. See *infra* Part III.

decline.⁴⁶ (Note that the elite lawyers, journalists, and academics of any given generation for a century have dabbled in congressional declinism.⁴⁷) Congressional decline or fecklessness is blamed on delegations, and the only tonic is judicial interventions to reorder congressional incentives.⁴⁸ For example, one popular theory posits that delegations distract lawmakers from the “collective Congress” by requiring follow-up appropriations and oversight.⁴⁹ That theory relies on a fraught idea of Congress and many unsupported suppositions, but few congressional scholars have grappled with it at length.⁵⁰ Regardless of the details, these arguments are always advanced to justify a transfer of power to the judiciary.

This mode of thinking is ubiquitous within and without the administrative law literature. An article recently published in the *Harvard Law Review* begins as follows: “Congress, mired by partisan gridlock, has delegated sweeping authority to the President and, even when not in gridlock, has only infrequently checked the President when they share a political party.”⁵¹ The author casually references congressional decline as if it were a fact of nature.⁵² She connects decline and delegations,⁵³ but what is the nature of that connection? If, as the literature has shown, Congress has delegated since the Founding, the author is implicitly juxtaposing today’s Congress with one that never existed.⁵⁴ That’s the “Americana” in Americana administrative law.

46. See, e.g., McGinnis & Rappaport, *supra* note 43 (discussing a Congress beset by polarization in setting up a justification for the nondelegation doctrine).

47. See MAYHEW, *supra* note 44, at 1 (“American intellectuals—journalists, academics, and the rest—have not been fans [of Congress].”); *id.* at 2 (listing examples of scholars’ criticism of Congress (first citing GEORGE B. GALLOWAY, CONGRESS AT THE CROSSROADS (1946); then citing JAMES MACGREGOR BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE (1949); then citing JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); then citing ROBERT BENDINER, OBSTACLE COURSE ON CAPITOL HILL (1964); then citing JOSEPH S. CLARK, THE SAPLESS BRANCH (1964); then citing ROGER H. DAVIDSON, DAVID KOVENOCK & MICHAEL O’LEARY, CONGRESS IN CRISIS: POLITICS AND CONGRESSIONAL REFORM (1966); then citing HAYNES JOHNSON & DAVIS S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT (1996); then citing JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES (2006); and then citing THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006))).

48. See, e.g., McGinnis & Rappaport, *supra* note 43 (offering up the nondelegation doctrine as a tonic for congressional decline).

49. Rao, *supra* note 43, at 1465–67.

50. See *infra* Section III.B.2.

51. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 940 (2022) (emphasis added).

52. See *id.* at 946 (“Although Congress has enacted some significant legislation, engaged in oversight, and even impeached two Presidents, the general view is that Congress’s prominence has diminished.”).

53. See *id.*

54. See generally Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the first Congress delegated with abandon); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (examining the rulemaking powers of the federal boards of tax commissioners and finding that the

Americana administrative law is characterized by the literature's kitsch preoccupation with a Congress that never existed as cleanly as some nondelegationists suppose.⁵⁵ Unsubstantiated claims of congressional decline are increasingly deployed in the literature to defend judicial supremacy.⁵⁶ These claims are often paired with grandiose assertions about the law's ability to reorder congressional incentives and "fix" our politics.⁵⁷ As a recent article argues, nondelegationists are relying on a "Field of Dreams Theory" that lacks evidentiary support.⁵⁸

The second objective of this Article is to reveal that those who dabble in Americana administrative law rely on wrongheaded claims about Congress. The evidence suggests (1) that Justice Gorsuch's cynical take on lawmakers' incentives is impossibly thin⁵⁹ and (2) that Congress is well-situated to carry out its agenda through a number of "hard" and "soft" powers.⁶⁰ Scholars have concluded that Congress delegates for a host of reasons, all of which must be ignored to justify judicial self-aggrandizement.⁶¹ Legislative productivity is a hotly contested

Founding generation permitted a sweeping rulemaking power); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021) (examining the historical record and concluding that, to the Founding generation, delegations were a necessary tool of state building).

55. Cf. Gluck et al., *supra* note 33 (discussing lawyers' propensity to believe in an idealized Congress that "may never have accurately described the lawmaking process in the first place").

56. *See infra* Part II.

57. *See, e.g.*, McGinnis & Rappaport, *supra* note 43 (claiming that the nondelegation doctrine can help limit rising levels of polarization).

58. *See* Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4045079 [<https://perma.cc/W6GK-HNZE>] (noting that some believe reinvigorating the nondelegation doctrine "would create sufficient incentives for Congress to do its work differently (and presumably better)"); *id.* (manuscript at 9) (concluding that "[w]hile the Field of Dreams Theory might seem facially plausible, and although its promised result may seem desirable at first glance, it ultimately suffers from a lack of evidence" (footnotes omitted)).

59. *See* EDWARD H. STIGLITZ, *THE REASONING STATE* 15 (2022) (exploring the literature that criticizes any accounts of delegations which hinge on legislators' ability to dupe voters (first citing Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); and then citing ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 78 (2007)).

60. CHAFETZ, *supra* note 42, at 3.

61. *See, e.g.*, Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 642 n.41 (2018) (providing an overview of the literature focused on explaining why Congress delegates). This Article uses the phrase "judicial self-aggrandizement" instead of the increasingly fashionable "juristocracy." *See, e.g.*, Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2083 (2022) (describing the "juristocratic turn" in the doctrine of separation of powers). Although an earlier draft of this Article referred to Americana administrative law as advancing "juristocracy," the intervention of Allen Sumrall revealed that my earlier usage perhaps elided fine distinctions between juristocracy, justification, and judicial supremacy as those terms have come to be used in the American Political Development literature. *See generally* RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (providing a theory of "juristocracy" in a comparative analysis of different countries' slide toward increasing judicial power). As an alternative, I use the phrase "judicial self-aggrandizement," in a nod to Sumrall's own recent work. *See* Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 5–6 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119098 [<https://perma.cc/LJZ6-7MZN>] (diagnosing the nondelegation doctrine as a project of "judicial aggrandizement" and "judicial institution building").

subject, but recent scholarship suggests that the perception of declining productivity may be overstated. Some evidence suggests that a healthy amount of policymaking is happening in fewer pieces of legislation.⁶² Another study focusing on the rates of bill failures concludes that deadlock is rising, but within historically normal reaches.⁶³ On appropriations and oversight, there are contested but strong cases to be made that Congress is well-positioned to simultaneously influence federal agencies and maintain its own agenda.⁶⁴ And some scholars familiar with the nondelegationist literature have even tried to show that Congress's "hard" and "soft" power tools do not devolve power away from the collective Congress.⁶⁵

Although this Article is mainly concerned with revealing Americana administrative law's antediluvian qualities, it briefly touches on several larger issues that cannot be meaningfully resolved here. For example, these issues implicate the norm of faithful agency.⁶⁶ Although judges have long framed doctrines around "nudging" Congress, Americana administrative law may be qualitatively different from prior examples. Justice Gorsuch's slide into a rhetoric of "judicial populism" may augur a departure from faithful agency.⁶⁷ The current Court's

62. See generally Sean Farhang, *Legislative Capacity & Administrative Power Under Divided Polarization*, DÆDALUS, Summer 2021, at 49 (showing that the widely held conception of declining legislative productivity is illusory).

63. See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 97 (2015) ("To the extent that recent Congresses fit the broader pattern established in the postwar period, we might be on safe ground That is an empirical judgment that can only be confirmed in the future.").

64. See, e.g., Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1190–91 (2018) (arguing that the literature overstates how Congress's policymaking role vis-à-vis the President is declining and showing that oversight hearings are "a powerful tool to influence administration"); Matthew B. Lawrence, *Congress's Domain: Appropriations, Time, and Chevron*, 70 DUKE L.J. 1057, 1059–60 (2021) ("Through this 'hands that feed' dynamic, Congress has made annual appropriations a domain where the House of Representatives and the Senate have enduring, independent power and in which each house enforces compliance with 'law' . . . through the threat of retribution in the appropriations cycle.").

65. Compare Feinstein, *supra* note 64, at 1190–91, 1194 (arguing that the available data does not suggest that oversight undermines or distracts from the collective Congress), with Rao, *supra* note 43, at 1467 (arguing that "[d]elegations fracture the collective Congress because they create administrative discretion that individual members [of Congress] can control and influence").

66. See, e.g., Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1567–69 (2010) (discussing the "faithful agent mode" of interpretation); Andrew Hessick, *Faithful Agent Theories of Interpretation*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 11, 2021), <https://www.yalejreg.com/nc/faithful-agent-theories-of-interpretation/> [<https://perma.cc/8Y7K-ZLS8>] ("When people say that courts should act as faithful agents, they are really making a claim about the type of power courts exercise when interpreting statutes They are saying that, in their view, the judicial power requires courts to interpret statutes in a way that implements the will of Congress"). Because the norm of faithful agency is somewhat contested, it may be more constructive to ask whether Americana administrative law is compatible with the value of "democratic accountability" that tempers the role of judicial power in the realm of statutory construction. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, *LEGISLATION AND STATUTORY INTERPRETATION* 185 (3d ed. 2022) (listing "democratic accountability"—"whereby interpreters defer to decisions made by the popularly elected legislators who enact statutes"—as one of three "legitimizing norms" in statutory interpretation).

67. See Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 284 (2021) ("*Judicial populism* uses political populism's tropes, mirrors its traits, and enables its practices. Like

commitment to such a tenured and constitutionally inflected norm is beyond the reach of this Article, yet the newer Justices' own musings on the faithful agency norm do, perhaps, speak for themselves.⁶⁸

Because the literature abets Americana administrative law, I conclude by suggesting that scholars would do well to drop their grandiose claims that administrative law can predictably reorder congressional incentives. Congress is an ever-evolving and self-sustaining entity. Administrative law scholars should instead collaborate with experts on Congress to project reality onto the Supreme Court. As the vaccine-or-test case shows, public health, among other things, is on the line.

Part I of this Article lays a groundwork for what follows. It makes the case that ideas and claims about Congress have always been a central feature of administrative law doctrines. Congress's centrality is guaranteed by the dynamic of "constitutional politics" at work in the administrative law canon. Part II argues that Americana administrative law is now a force to be reckoned with in the courts and in the academy. This Part also ties Americana administrative law to several related strands of the literature. These works focus on the Court's disdain for the political branches and the realities of legislative politics.

Part III argues that Americana administrative law grew out of the constitutional politics around the nondelegation doctrine. In my telling, nondelegationists grew increasingly dissatisfied with the zombified state of the nondelegation doctrine. So they devised a new argument that would justify a supercharged nondelegation doctrine based on Congress's role. This Part partially focuses on the work of Judge Neomi Rao, whose approach focuses on congressional incentives.⁶⁹ In

political populism, judicial populism insists that there are clear, correct answers to complex, debatable problems. [Judicial populism] disparages the mediation and negotiation that characterize democratic institutions and rejects the messiness inherent in a pluralistic democracy. Instead, it simplifies the issues legal institutions address and claims special access to a true, single meaning of the law.").

68. See, e.g., Barrett, *supra* note 33, at 2208–11 (contrasting the more common idea of faithful agency with the version shared by Justice Scalia and, by implication, Justice Barrett herself).

69. My discussion of Neomi Rao's works is not meant to suggest that she has been a substantive pioneer. Rao capitalized on a long line of works stretching back decades. See, e.g., SCHOENBROD, *supra* note 43 (arguing that the political branches have ceded decisionmaking authority to bureaucrats and then taken credit for the decisions the bureaucrats make); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 302 (2d ed. 1979) (arguing that "vagueness in legislative enactments" is attributable in part to "malfeasance in legislative drafting"); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 *UCLA L. REV.* 740, 742–43 (1983) (arguing that the flaw in the 1970 Clean Air Act is that "it is based upon an important misconception about how statutes can work to achieve their goals" and that it imposes incredible difficulties while allowing lawmakers to take credit for bureaucratic efforts). Rao's main contribution is rhetorical; her theory of the collective Congress was an appealing repackaging of ideas that were previously unpalatable to courts and academics. See generally David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 *CARDOZO L. REV.* 731 (1999) [hereinafter Schoenbrod, *Delegation*] (discussing and then responding to the mainstream administrative law establishment's evaluations of the Schoenbrod take on delegations and lawmakers' incentives). Rao also provided the most throughgoing constitutionalization of those earlier works' political morality. Cf. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 *HASTINGS L.J.* 371, 376–77 (2022) (arguing that modern administrative law is shot through with thinly veiled political morality).

Part IV, I provide an overview of the congressional scholarship to show Americana administrative law's deficiencies. The literature reveals that Congress is a constantly evolving institution with a set of hard and soft powers. This literature establishes that most claims behind Americana administrative law are imagined. In the Conclusion, I argue that Americana administrative law ought to give way to a more realistic view of Congress that is necessarily inconsistent with calls for judicial self-aggrandizement.

I. THE CENTRALITY OF CONGRESS IN OUR ADMINISTRATIVE LAW

This Part argues that administrative law is shot through with descriptive claims about Congress. Its purposes are (1) to show the centrality of such claims to administrative law doctrine and (2) to explain why claims about Congress have played such a large role. This context will help readers understand that Americana administrative law is part of something that might be charitably called a tradition of constitutional dialogue or, less charitably, as epicycles of anti-administrativism.⁷⁰ Because administrative law is a stage for the separation-of-powers contest—that is, for constitutional politics—claims about Congress have been deployed over and over to justify the allocation of authority among the branches.⁷¹ Americana administrative law, properly understood, is simply an attempt at judicial self-aggrandizement that tracks historical patterns of argumentation around the administrative state.⁷²

One supposition of this Article is that Congress is—as a factual matter—both a subject and object of administrative law doctrine. This supposition is not meant to suggest that the administrative law canon reflects a healthy understanding of Congress or that administrative law doctrine can achieve an increasingly grandiose agenda of remaking Congress.⁷³

A. CONGRESS AS A SUBJECT AND AN OBJECT OF ADMINISTRATIVE LAW DOCTRINE

For better or worse, claims about Congress—indeed, claims about all three branches—drive the administrative law canon.⁷⁴ Administrative law defines the capacity for government to act and the legal restraints on administration.⁷⁵ This discipline naturally begets claims about the branches' incentives, capacities, and

70. See Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3, 6 (2017).

71. See *infra* notes 92–99 and accompanying text.

72. See generally Sumrall, *supra* note 61 (arguing that the rise of the nondelegation doctrine resulted from an attempt at judicial self-aggrandizement).

73. See *infra* Parts II–IV (arguing that Americana administrative law is descriptively wrong about Congress and is unlikely to produce any desirable outcomes on its own terms).

74. See, e.g., Walters & Ash, *supra* note 58 (manuscript at 3) (“At the heart of the contemporary debates over administrative, regulatory, and constitutional law lies an alluring theory of a lost political economy: one where Congress takes on responsibility for the development of law and public policy, taking back some of the turf yielded to administrative agencies within an increasingly powerful executive branch.”).

75. See Elizabeth Fisher & Sidney Shapiro, *Disagreement About Chevron: Is Administrative Law the “Law of Public Administration”?*, 70 DUKE L.J. ONLINE 111, 112 (2021).

deficiencies. As to Congress, administrative law asks whether Congress has given an agency the “legal authority to act” *and* whether the agency has the “capacity to fulfill the legislative mission that Congress has assigned to it.”⁷⁶

For example, administrative law’s ongoing preoccupation with the concept of deference is loaded with claims about Congress.⁷⁷ In the canonical *Chevron* case, the Supreme Court adopted an across-the-board presumption that when Congress creates ambiguities in federal statutes it means to implicitly delegate authority to federal agencies to fill in the gaps.⁷⁸ As Thomas W. Merrill, a leading *Chevron* expert, described in his account of the doctrine, this implicit-delegation theory was a “revolution” when it was handed down.⁷⁹ But *Chevron*’s implicit-delegation claim is now widely acknowledged to be a fiction.⁸⁰ It lays down an across-the-board presumption that Congress means to delegate when it writes ambiguous texts.⁸¹ *Chevron* is a fiction because most do not believe that Congress *literally* intended to delegate *every single time* that it writes something ambiguous.⁸² After all, some ambiguity is just baked into the legislative process.⁸³ But labeling *Chevron* a fiction is not to suggest that *Chevron* is somehow wrong—fictions are common in administrative law and have to be evaluated by what they capture.⁸⁴ Decades later, Justice Kagan defended the fiction behind the *Auer* deference doctrine, which mirrors the *Chevron* fiction, as a matter of congressional intent and included a claim that statutory ambiguity is an inevitable byproduct of the legislative process.⁸⁵ Still, the *Chevron* doctrine, perhaps the most important case in the administrative law canon, is driven by a contested

76. *Id.*

77. See, e.g., Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92, 96, 100 (2021) (explaining the author’s opposition to *Chevron* deference by reference to his views about congressional gridlock).

78. See *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

79. THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 74 (2022).

80. See *id.* at 75.

81. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (defining *Chevron* as “an across-the-board presumption that, in the case of ambiguity, agency discretion is meant”).

82. See *id.* at 517 (arguing that *Chevron* is a fiction).

83. See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) (“The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction.”).

84. See *What We Mean When We Say That the Major Questions Doctrine Is “Made Up,”* ADMINWANNABE.COM (July 1, 2022), <https://adminwannabe.com/?p=109> [<https://perma.cc/MVY2-VJ75>] (“[T]he question isn’t whether *Chevron* is a fiction. Fictions do pervade the law. Again, the question is whether *Chevron* obscure[s] more than in [sic] captures . . .”).

85. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) (plurality opinion) (“We have explained *Auer* deference . . . as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.”); *id.* (“Congress . . . routinely delegates to agencies the power to implement statutes by issuing rules But Congress almost never explicitly assigns responsibility to deal with that problem Hence the need to presume, one way or the other, what Congress would want.”).

claim about congressional intent (along with an analysis of the comparative virtues of agencies and courts in interpreting federal statutes).⁸⁶

Over the last decade, the administrative law literature has reexamined the allocation of interpretive power between the Judicial and Executive Branches.⁸⁷ Some oppose agency deference because they believe that cases such as *Chevron* alienate the “authority to ‘say what the law is’” from the judiciary.⁸⁸ On the other side, there have always been claims that *Chevron* appropriately lodges authority within the political branches in service of, among other things, expertise and accountability.⁸⁹ And these debates always feature competing claims that try to make sense of congressional silence, ambiguity, and vagueness.⁹⁰ Ultimately, the “who decides” question from the vaccine-or-test case involved various claims about Congress.⁹¹

Administrative law is a stage for the “constitutional politics” of the moment—perceptions about Congress are always being dragged into the field.⁹² As Josh Chafetz has written, the three branches of government “are involved in constant contestation, not simply for the substantive outcomes they desire, but also for the authority to determine those outcomes.”⁹³ Institutions in the American system accrue power through successful pitches for public support.⁹⁴ And despite their self-presentation, courts are players in this contest:

[T]here are *three* branches in the federal system, and there is no reason to think that one of them is free of institutional interests and agendas merely by virtue of the fact that its members wear robes. But it is nonsense with a purpose: institutions in the American constitutional order gain power over time as a function of their successful contention for public support.⁹⁵

86. See MERRILL, *supra* note 79, at 78 (“Reduced to [its] essence, [*Chevron* is] a strong invocation . . . of the distinction between law and policy. Courts should concern themselves only with enforcing the law; policy is for politically accountable institutions like legislatures and agencies.”).

87. See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018) (documenting a boiling undercurrent of *Chevron* skepticism that heated up considerably in the 2010s).

88. See, e.g., *id.* at 111–12 (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring)).

89. See, e.g., Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002); Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1288–90 (2008).

90. See generally Walker, *supra* note 87 (discussing the various statutory and constitutional arguments against heightened-deference regimes).

91. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (“The central question we face today is: Who decides?”).

92. CHAFETZ, *supra* note 42, at 16–18.

93. *Id.* at 18.

94. See *id.* at 15–26.

95. Chafetz, *supra* note 44, at 128; see also *id.* at 150 (“But of course, the courts are not neutral arbiters of separation-of-powers conflicts; they are *players* in separation-of-powers conflicts. The judiciary, too, is a governing institution, with institutional goals and agendas.”).

Courts have many tools at their disposal: they can draw on the judiciary's pedigree to justify an outward display of self-importance, they can time their judicial opinions to achieve their preferred outcomes, and they can use the nonpartisan language of the law as a device to demean the political branches.⁹⁶

The judiciary benefits from its own rhetoric that places it above separation-of-powers disputes and cements judicial power.⁹⁷ In living memory, it has been widely assumed that the Supreme Court ought to restructure settlements between the political branches whenever those branches deviate from the Court's evolving conception of their prerogatives.⁹⁸ This conception of judicial power itself sprung from notions about a particular Congress. As the story is told by Nikolas Bowie and Daphna Renan, the gears of what they call "*juristocratic* separation of powers" were greased with opposition to a Reconstruction Congress that was criticized for its "tyrann[y]" and its deviation from the Founding.⁹⁹

The political branches have their own tools. The President's ability to command the public's attention with institutional prestige and with the "bully pulpit" is always cited.¹⁰⁰ The same goes for the President's leadership role within his or her party, which is itself a factor of the President's public standing.¹⁰¹ And as recent scholarship has suggested, the presidency has benefitted from powerful ideas such as "presidential representation"—the idea that the presidency is the only office elected on a nationwide basis and is therefore the only office that can truly embody the national good.¹⁰² John Dearborn's recent book on presidential representation suggests that it was deployed by Progressives who viewed the Executive as an alternative to the parochialism of Congress.¹⁰³

96. *See id.* at 139 (noting that the judiciary will draw on the legacy of figures such as Chief Justice John Marshall to remind the public of its pedigree); *id.* at 144–45 (noting the courts' timing of their opinions in separation-of-powers disputes can help them achieve their desired outcomes); *id.* at 142 ("Judicial institutions, the Court says, need this information to do justice; Congress, on the other hand is likely to just be engaged in fishing expeditions—and, anyway, the legislative job doesn't actually require access to *all* 'potentially relevant evidence.'"); *see also id.* at 143 ("Note the contrast here with Roberts's portrayal of the judiciary. Courts are deliberative and make decisions based on 'all the facts.' . . . Congress and the president have an ongoing institutional rivalry; the Court just calls balls and strikes." (footnotes omitted)).

97. *See id.* at 143; Sumrall, *supra* note 61, at 19 ("Judicial self-aggrandizement is best understood as a mechanism of institutional change or constitutional change. Importantly, judicial decisions can reify courts as political actors even [if] the decisions do not result in any formal institutional change, like a new jurisdictional statute or increase in resources.").

98. *See* Bowie & Renan, *supra* note 61, at 2024–25.

99. *Id.* at 2025, 2027–28, 2075; *see also* Sumrall, *supra* note 61, at 34 (arguing Chief Justice Taft's project of judicial supremacy flowed from his belief that "a strong and independent judiciary would be better to stave off [problems of wealth distribution] than Congress").

100. *See, e.g.,* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 73 (2017) (emphasizing the significant role of presidential speech in American political life).

101. *See* CHAFETZ, *supra* note 42, at 29.

102. *See* JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 1–2 (2021).

103. *See id.* at 39–40.

Finally, Congress has several “hard” and “soft” powers to defend itself.¹⁰⁴ These tools all have their roots in the Anglo-American tradition and have evolved to maintain legislative power.¹⁰⁵ Congress can legislate, but that power is subject to judicial review and presidential vetoes.¹⁰⁶ Despite the public’s preoccupation with legislative productivity, legislating is not a dependable tool for winning over the public.¹⁰⁷ Aside from legislating, Congress’s hard powers include “the power of the purse, the personnel power, and the contempt power.”¹⁰⁸ Its soft powers include “the freedom of speech or debate, the disciplinary power over [law-makers], and the cameral rulemaking power.”¹⁰⁹

The unending contest for outcomes and decisionmaking authority turns on representations about the participants’ comparative virtues and weaknesses. If one branch rises or falls in public estimation, that is bound to affect the status quo. One salient example involves the law of removal. In several cases on the President’s power to remove executive officials, the Court has deployed the idea of presidential representation.¹¹⁰ In *Seila Law*, the Court held that the head of the Consumer Financial Protection Bureau must be removable, contrary to congressional design.¹¹¹ To justify the Court’s holding, Chief Justice Roberts argued that it was “the Framers” who “made the President the most democratic and politically accountable official in Government” by requiring the President to be “elected by the entire Nation.”¹¹² In *Seila Law*, the idea of presidential representation was so powerful that it gave cover to the Court and blocked the consideration of offsetting values.¹¹³ This is just one example of the importance of constitutional politics.

This Article reveals that the Supreme Court and the literature have adopted cynical or declinist views about Congress. That is concerning because a declining assessment of Congress has been a cause of instability in the administrative law

104. CHAFETZ, *supra* note 42, at 3 (“Hard power is, quite simply, ‘the ability to coerce.’ . . . Soft power, by contrast, is ‘the ability to get what you want through attraction rather than coercion or payments.’” (footnote omitted)).

105. *See id.* at 4–5; *see also id.* at 4 (“And if one hopes to understand the political context in which a power is exercised in the present, then one must think about how the current web of institutional actions and interactions at any given time has come to be.”).

106. *See id.* at 2.

107. *See id.* (“Broadening the scope beyond legislation is essential After all, legislation must meet Article I, section 7’s bicameralism and presentment requirements. If a president has enough allies in . . . Congress, then bills she opposes are unlikely to reach her desk”); *id.* (“For anyone concerned about the power of the other branches or about Congress’s ability to press its own position as against theirs, then, legislation is a singularly unpromising route.”).

108. *Id.* at 3.

109. *Id.*

110. *See, e.g., Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020).

111. *See id.* at 2203–04.

112. *Id.* at 2203.

113. *See* Emerson, *supra* note 69, at 373, 376 (arguing that political morality is central to cases such as *Seila Law*).

field.¹¹⁴ In many ways, administrative law depends on the centrality of Congress for stability.¹¹⁵

B. EPICYCLES OF ANTI-ADMINISTRATIVISM AND CONGRESSIONAL DECLINISM

Scholars have noted that our current upheaval strikes a note of familiarity with the past. They have pointed out that the last decade of tumult is in many ways a repeat of previous battles over power and the administrative state.¹¹⁶ Then, as now, any line between the issues of constitutional law and administrative law was artificial.¹¹⁷ Both areas are features of a negotiation between the branches over the administrative state.¹¹⁸

Claims about Congress have always driven power plays in the administrative law landscape.¹¹⁹ Over a century ago, the expansion of the administrative state was motivated in part by the Progressive-Era belief that Congress could not meet the needs of the moment. Congress was often framed as an obstacle to national progress:

The Progressive vision of a nationally focused politics, tackling issues facing the whole country, encountered an obstacle: locally oriented politics. And the chief source of that type of politics was believed to be the institution of Congress. The legislative branch was the subject of constant Progressive scorn, with legislators perceived as incapable of looking beyond their localities to think about what the nation as a whole needed.¹²⁰

This emphasis on Congress as a retrograde institution was publicly juxtaposed with other ideas such as presidential representation and judicial supremacy.¹²¹

During the Progressive Era and at the beginning of the New Deal, the Supreme Court used the heavy artillery of constitutional rhetoric in a dialogue with

114. See *infra* notes 145–47 and accompanying text.

115. See *infra* Section I.B.

116. See generally Metzger, *supra* note 70 (labeling the conservative bloc of the Supreme Court as “anti-administrativist” and arguing that it is a callback to a 1930s-era skepticism of the administrative state); JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012) (presenting the period from the New Deal to the 1950s as a period in which administrative law and politics were endogenous, while noting the importance of public and governmental conceptions of Congress).

117. See Rodriguez & Weingast, *supra* note 34, at 149 (saying of the New Deal-Era controversies that the “separation” between “constitutional law issues” and “administrative law issues” is “artificial and misleading”).

118. See *id.* at 150 (“We argue that a major part of the controversy between the Supreme Court and the New Deal was a negotiation, even if tacit, over this issue—the framework for extending constitutional rights of due process.”); *id.* (criticizing “internalists,” the “scholars who emphasize the doctrinal elements of these constitutional controversies, rather than the political considerations”).

119. See *supra* Section I.A.

120. DEARBORN, *supra* note 102, at 39.

121. See, e.g., *supra* notes 101–03 and accompanying text; *supra* notes 96–98 and accompanying text.

Congress.¹²² Although the Court was unwilling to enforce nondelegation directly, it used the rhetoric of nondelegation to pursue other second-order goals such as due process and better congressional drafting.¹²³ In one case, the Court conditioned the permissibility of delegations on whether the legislature had created adequate procedures to control agencies' discretion.¹²⁴ And in a series of cases, the Court seemed to be groping for better drafting from Congress to signal whether lawmakers had delegated to agencies the authority to prescribe penalties flowing from statutory commands.¹²⁵ This all proceeded from an effort by the Court to negotiate with Congress the terms of a rising administrative state. Eventually, Congress met the Court halfway.¹²⁶ Meanwhile, the dialogical emphasis on procedure and due process¹²⁷ redounded to the benefit of agencies in the form of perceived legitimacy.¹²⁸ Although Congress passed the Walter-Logan Act, which would have empowered the judiciary, President Roosevelt vetoed that legislation and ended the immediate prospect of judicial management over the administrative state.¹²⁹

Lawmakers too were affected by their perception of Congress's role in public administration. As Senator J. William Fulbright saw it, the "basic problem" was "one of combining a strong executive with the maintenance of legislative supremacy."¹³⁰ And Senator Robert La Follette Jr. gave voice to lawmakers' shared concern about Congress "los[ing] its constitutional place in the Federal scheme."¹³¹

122. See Rodriguez & Weingast, *supra* note 34, at 150 (emphasizing the "dialogic nature" of New Deal-Era disputes, by which the Court and Congress worked on an "evolution of doctrine and legislative practice").

123. See *id.* at 150, 211.

124. See *Wichita R.R. & Light Co. v. Pub. Utils. Comm'n*, 260 U.S. 48, 58–59 (1922) ("The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.").

125. See generally Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 170 (2022) (describing the Court's opinions which led Congress to develop a drafting convention that would explicitly telegraph when an agency was delegated the power to prescribe penalties).

126. See Rodriguez & Weingast, *supra* note 34, at 151–52.

127. See *id.* at 150 ("[A] major part of the controversy between the Supreme Court and the New Deal was a negotiation, even if tacit, over this issue—the framework for extending constitutional rights of due process. The constitutional solution was the invention of procedural due process").

128. See GRISINGER, *supra* note 116, at 6 ("A rich case law defined the boundaries of administrative due process, and, by 1940, agency officials could defend themselves against claims of administrative lawlessness and 'absolutism' by pointing to masses of evidence that administrators were thoroughly bound by existing rules and procedures that judges had repeatedly endorsed. Courts consistently deferred to the agencies' authority and expertise and declined to intervene in any but the most egregious cases." (footnote omitted)).

129. See DAVID H. ROSENBLOOM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946–1999*, at 7, 15 (2000) ("Theoretically, Congress also could have sought to rely on the federal courts to supervise administration more thoroughly. However, the Walter-Logan Act was ultimately defeated partly because it took this tack.").

130. *Id.* at 1 (quoting H.R. DOC. NO. 79-36, at 20 (1945)).

131. *Id.* (quoting Robert M. La Follette Jr., *Congress Wins a Victory Over Congress*, N.Y. TIMES MAG., Aug. 4, 1946, at 11).

By the mid-1930s, a bipartisan group of lawmakers eyed the expanding administrative state with discomfort and perceived that they had been displaced in terms of policymaking primacy.¹³² Because the New Deal and the Roosevelt Administration were still broadly popular, these lawmakers adopted the nonpartisan language of law and process to attack the legitimacy of outcomes at federal agencies.¹³³

Congressional committees adopted militant anti-administrativist rhetoric against bureaucrats and the New Deal agencies.¹³⁴ Congressperson Earl Michener hit a note of tyrannophobia when he complained about “bureaucrats gone mad with power” who “usurp power belonging to the Congress” and “promote ‘a dangerous centralization of governmental power in the administrative branch.’”¹³⁵ Lawmakers claimed that agencies were engaged in unusual procedures that put pressure on due process, even as agency procedures were becoming uncontroversial.¹³⁶ Lawmakers opposed substance, but they increasingly relied on the language of administrative procedure and due process to galvanize the public against the administrative state.¹³⁷ This process, which started in the late 1930s and increased through the early 1940s, led to a bipartisan movement against the excesses of the administrative state.¹³⁸ The Executive Branch defended its own prerogatives at the same time. Agency officials built a record of rigorous agency decisionmaking that was mobilized and ratified through the Attorney General’s Committee on Administrative Procedure.¹³⁹

At one point, the political branches abandoned the Progressive-Era emphasis on congressional ineptitude and—amid the threats of fascism abroad—embraced the separation of powers.¹⁴⁰ The urgency that must have been palpable was captured by Congressperson Mike Monroney:

132. See GRISINGER, *supra* note 116, at 4–5, 14–16, 18–19; ROSENBLUM, *supra* note 129, at 7 (“By the end of the 1930s, Congress considered federal administration to be very powerful, somewhat menacing, and inadequately controlled.”).

133. See GRISINGER, *supra* note 116, at 7 (“Although administrators often had the law on their side, critics offered their own definitions of administrative due process, based not in strict adherence to legal definitions but in broader ideas of how government officials ought to behave. Complaints about administrative illegality and excessive zeal offered a language for condemning the administrative state without directly challenging the substance of the regulatory scheme.”); *id.* at 16 (“Theirs was an argument based in the substance as well as the procedures of administration, but, by expressing their concerns in legal language, critics helped frame bureaucracy, and bureaucrats, as illegitimate and lawless on the basis of their procedure.”).

134. See *id.* at 18–19 (discussing the Dies Committee, which began in 1938 to target bureaucrats and which continued with force in the wartime years).

135. ROSENBLUM, *supra* note 129, at 7 (quoting 86 CONG. REC. H4534 (Apr. 15, 1940) (statement of Rep. Michener)); see also Eric A. Posner & Adrian Vermeule, *Tyrannophobia* 1–2 (Univ. of Chi. Pub. L. & Legal Theory Working Paper No. 276, 2009) (describing tyrannophobia, “the fear of dictatorship” which “looms large in the American political imagination”).

136. See GRISINGER, *supra* note 116, at 20–21.

137. See *id.* at 7, 9.

138. See *id.* at 4.

139. See *id.* at 16.

140. See Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 38–47 (2022) (describing the President’s Committee on Administrative Management and its move toward constitutionalism, which was motivated by anti-fascism).

Representative democracy is on trial. We must make it work and make it work well. Around the world the lights of democracy have gone out. They burn here alone, bright enough to rekindle the fires of freedom and democracy Remember, gentlemen, that in other countries overseas, where dictators have taken over, they took over when the legislative branches of those nations disintegrated and failed The representative system is the best guardian of the people's liberty in the world.¹⁴¹

The shift, prompted by world events, was toward representative government and strengthening Congress. This shift culminated in two decisions. First, the administrative state would be placed under the legal restraints found in the Administrative Procedure Act of 1946 (APA).¹⁴² Second, Congress would be reorganized and strengthened that same year through the Legislative Reorganization Act of 1946.¹⁴³ Both laws envisioned a leading role for Congress in defining agencies' legal authority and their capacity to act on legislative mandates.¹⁴⁴

* * *

The nation faces a similar disequilibrium to the one that occurred in the early twentieth century. Administrative law these days is always dancing between its Scylla and Charybdis, presidential administration and judicial self-aggrandizement.¹⁴⁵ In that earlier tumult, a realistic view of Congress and a move to strengthen it were central to the eventual settlement.¹⁴⁶ The Supreme Court's dialogue with Congress helped broker a reasonable middle ground between the

141. ROSENBLOOM, *supra* note 129, at 15 (quoting 92 CONG. REC. 10041 (1946)).

142. 5 U.S.C. §§ 551, 553–559, 701–706; see Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 106–07 (2021) (“The APA is the fundamental charter of the modern administrative state. Its enactment in 1946 marked a constitutional moment at which Congress, the President, and the Supreme Court accepted broad delegations of policymaking authority to agencies, but only if the agencies were procedurally constrained and subject to judicial oversight.”).

143. See GRISINGER, *supra* note 116, at 10.

144. See ROSENBLOOM, *supra* note 129, at ix (“[Congress] self-consciously framed a comprehensive role for itself in federal administration.”); Kovacs, *supra* note 142, at 115 (“The APA is premised on Congress having the authority to arrange the administrative state.”); *id.* at 117 (“[T]he APA reflects Congress’s proper constitutional role as the primary creator, organizer, and controller of the administrative state.”); *id.* (“Concerned that it had lost control over the growing federal bureaucracy, Congress enhanced its oversight of federal agencies by moving agency oversight from ad hoc investigatory committees to a smaller number of standing committees.”); *id.* at 117–18 (“The [Reorganization] Act ‘promised to end administrative abuses of authority by restoring Congress to its rightful place of primacy over the administrative state.’” (footnote omitted)).

145. Compare Kovacs, *supra* note 142, at 104 (arguing that presidential administration and unilateralism are an existential threat to American democracy, leading us down the path “toward authoritarianism”), with Emerson, *supra* note 17, at 2022–24 (arguing that the judiciary is assuming new power through administrative law doctrines such as the major questions doctrine), and Bowie & Renan, *supra* note 61, at 2028 (arguing that “juristocra[cy]” is problematic insofar as it developed in response to Reconstruction and displaced a “republican” sense of the separation of powers).

146. See *supra* notes 122–29 and accompanying text; see also *supra* notes 140–44 and accompanying text.

demands of politics and due process. Today, congressional declinism and cynicism for legislative politics are so ubiquitous that—as in the vaccine-or-test case—these notions are cited as justifications for presidential unilateralism and judicial self-aggrandizement.¹⁴⁷ And that is the natural result of congressional declinism. A declinist or cynical view of one branch of government will naturally lead toward the strengthening of its competitors.¹⁴⁸ This Article turns on that perspective and a particular view of how we got here. In any event, our views of Congress will be, in my estimation, central to the next settlement.

II. THE TRIUMPH OF AMERICANA ADMINISTRATIVE LAW

As in the early twentieth century, notions about Congress built on cynicism and decline have ushered in the triumph of Americana administrative law.¹⁴⁹ In 2021, for example, scholars pushed the rhetoric of congressional decline to justify shifts in power toward the judiciary.¹⁵⁰ The literature has laid the groundwork for the Court, which is striking down federal enactments using the logic of Americana administrative law.¹⁵¹

Before proceeding, it is necessary to explain Americana administrative law as a concept. Americana administrative law describes an idea of legislative decline that motivates an accretion of decisionmaking authority toward either the Judicial Branch or the Executive Branch.¹⁵² It is an idea that might be framed as one about institutional choice (that is, it is “responsible for the choice of a set of institutional arrangements”).¹⁵³ This Article follows the view that ideas about institutional choice “act as background variables that support and structure political developments.”¹⁵⁴

147. See *infra* Part II.

148. See generally Bowie & Renan, *supra* note 61 (discussing the rise of a juristocratic separation of powers, motivated by a negative view of Congress generally and of the Reconstruction Congress in particular).

149. Many of the arguments below must be prefaced with a note on terminology. Above, I have defined Americana administrative law as a mode of argumentation in the register of constitutional politics that is deployed to justify juristocracy. See *supra* notes 70–72 and accompanying text. And I wrote that it is defined by (1) its preoccupation with an idealized Congress and (2) a call for judicial interventions to reorder congressional incentives. See *supra* Section I.A. In comparison, it is essential to note what I am not including in my analysis and in my criticisms.

In 2020, Jonathan Adler and Christopher Walker published a piece arguing that Congress ought to return to regularly reauthorizing old statutes. See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1937 (2020). Although the authors justify their approach by reference to contestable notions of congressional inactivity, their focus is on Congress’s ability to resurrect a legislative tool with a deep pedigree. See *id.* They avoid using either inaction or polarization to justify a juristocratic nondelegation doctrine. Accordingly, the Adler/Walker proposal is beyond the scope of this Article’s criticisms. See also Richard L. Revesz, *Congress and the Executive: Challenging the Anti-Regulatory Narrative*, 2018 MICH. ST. L. REV. 795, 798–99, for an article agreeing that gridlock is leading to the accrual of power in the presidency but avoiding the siren song of judicial intervention.

150. See *infra* Section II.A.

151. See *supra* notes 1–15 and accompanying text (discussing the vaccine-or-test case).

152. See *supra* notes 42–58 and accompanying text.

153. DEARBORN, *supra* note 102, at 26.

154. Sumrall, *supra* note 61, at 28 (characterizing the work of DEARBORN, *supra* note 102, at 21).

The work of Americana administrative law in courts is not strictly legal—in the sense that legal reasoning involves the application of precedents to facts—but performs a rhetorical function that structures jurists’ impulses and legitimates outcomes.¹⁵⁵

This Part illustrates the what—the prevalence of Americana administrative law in various elite legal circles. Part III explains the why—how the constitutional politics of the nondelegation doctrine gave rise to Americana administrative law.

A. AMERICANA ADMINISTRATIVE LAW IN THE ACADEMY

The examples below are all illustrative of how Americana administrative law has become pervasive in the literature. Even where scholars do not support judicial intervention, they have adopted cynical or declinist notions of Congress. On October 1, 2021, the C. Boyden Gray Center held a conference to discuss “Presidential Administration in a Polarized Era.”¹⁵⁶ The themes of presidential administration¹⁵⁷ and congressional stagnation¹⁵⁸ featured prominently. A remark that Congress has “largely walked away from being a serious legislative body in favor of a constituent service role that avoids hard choices” was typical.¹⁵⁹ A sitting federal judge even said that Congress is “missing in action” and implied that her views on the nondelegation doctrine were connected to this theory of congressional decline.¹⁶⁰ Some panelists offered judicial review of agency actions as a tonic for congressional decline.¹⁶¹

155. Cf. DEARBORN, *supra* note 102, at 24 (arguing that the durability of American political institutions rests on “implicit and explicit causal beliefs held by key actors about how particular institutional arrangements will function”).

156. See *Presidential Administration in a Polarized Era*, GEO. MASON. UNIV.: C. BOYDEN GRAY CTR. (Oct. 1, 2021), <https://administrativestate.gmu.edu/event/presidential-administration-in-a-polarized-era/> [<https://perma.cc/ZR72-L4MR>].

157. See, e.g., C. Boyden Gray Ctr., *Panel 1: Presidential Administration & Political Polarization*, VIMEO (Oct. 1, 2021) [hereinafter PAPE Panel 1] (remarks of Michael B. Rappaport), <https://vimeo.com/630172096> (arguing that polarization is caused by presidential unilateralism); C. Boyden Gray Ctr., *Panel 2: Kagan’s “Presidential Administration” After 20 Years*, VIMEO (Oct. 1, 2021) [hereinafter PAPE Panel 2] (remarks of Kristin E. Hickman), <https://vimeo.com/630173949> (noting that presidential power and the balance of power among the branches is a valid cause of concern).

158. See, e.g., PAPE Panel 1, *supra* note 157 (remarks of Richard J. Pierce, Jr.) (arguing that Congress is unlikely to meaningfully assert itself without anything short of an overhaul of the political system); see also *id.* (contrasting our polarized political moment with the “good old days” when American politics worked more cleanly); PAPE Panel 2, *supra* note 157 (remarks of Kathryn E. Kovacs) (noting that Congress cannot combat presidential unilateralism); *id.* (remarks of Kristin E. Hickman) (arguing that the Executive Branch has accrued power because “Congress and the courts have walked away from their own authority”).

159. PAPE Panel 2, *supra* note 157 (remarks of Kristin E. Hickman).

160. C. Boyden Gray Ctr., *Conversation with D.C. Circuit Judge Neomi Rao, Hosted by Jennifer Mascott*, VIMEO (Oct. 1, 2021), <https://vimeo.com/630175739> (remarks of the Honorable Neomi Rao) (asserting that Congress is “missing in action” and implying that this view of Congress informs her views on nondelegation).

161. See, e.g., PAPE Panel 1, *supra* note 157 (remarks of Michael B. Rappaport) (arguing that polarization can be combatted with the nondelegation doctrine); *id.* (arguing that polarization can be combatted by reconfiguring the heightened-deference doctrines).

Over the summer of 2021, the American Academy of Arts and Sciences published an issue of *Dædalus* focused on the administrative state.¹⁶² This administrative law jubilee drew submissions from many of the field's leading luminaries. Many of the collected works repeated the popular notion that Congress is the "Broken Branch" or otherwise assumed that Congress was deteriorating.¹⁶³ One piece framed delegations as the byproduct of a badly gridlocked Congress, instead of as a natural byproduct of legislating.¹⁶⁴ These notions of Congress were provided to support the claim that the administrative state "distorts not just the marketplace, but also family life, community, and religious practice."¹⁶⁵ The point of that piece was that a weak and divided Congress has failed to guard its own prerogatives and has delegated authority to avoid making tough calls.¹⁶⁶ The goal, the author suggested in grandiose terms, must be "[r]estoring Congress as the central lawmaking body" with a return to the separation of powers.¹⁶⁷ The irony, of course, was that the author had elsewhere suggested that legislative restoration could be pursued only through judicial self-aggrandizement.¹⁶⁸

In early 2021, the *Duke Law Journal Online* published a piece by Richard J. Pierce, Jr. on *Chevron* deference and political polarity.¹⁶⁹ Pierce wrote that *Chevron* deference is correct on the legal merits, but he still opposes the doctrine because it combines with polarization to create instability.¹⁷⁰ The demand of deference amid partisan flip-flopping on healthcare, immigration, and climate change is, according to Pierce, too much to ask.¹⁷¹ But his piece went further and suggested that the root of the problem is simply that "Congress has lost its ability to address problems by enacting legislation."¹⁷²

162. See generally *The Administrative State in the Twenty-First Century: Deconstruction and/or Reconstruction*, DÆDALUS, Summer 2021.

163. Peter L. Strauss, *How the Administrative State Got to This Challenging Place*, DÆDALUS, Summer 2021, at 17, 29; see also Aaron L. Nielson, *Deconstruction (Not Destruction)*, DÆDALUS, Summer 2021, at 143, 147 (asserting that Congress is "less willing or able to enact major legislation"); Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, DÆDALUS, Summer 2021, at 155, 155 (noting offhandedly that Congress "has arguably lost much of its lawmaking ambition"). But see Farhang, *supra* note 62 (unpacking many of the administrative law literature's perceptions about Congress).

164. See Neomi Rao, *The Hedgehog & the Fox in Administrative Law*, DÆDALUS, Summer 2021, at 220, 233.

165. *Id.* at 232.

166. See *id.* ("Instead [of legislating], Congress has delegated substantial authority to agencies, authority that agencies increasingly use to impose federal mandates that implicate matters of life and death, religious practice, marriage, and the family.").

167. *Id.* at 233.

168. See generally Rao, *supra* note 43 (arguing that a strong nondelegation doctrine must reorder congressional incentives).

169. See Pierce, Jr., *supra* note 77, at 92.

170. See *id.*

171. See *id.* at 100.

172. *Id.* at 105.

At a Federalist Society event, Philip Hamburger—a leading authority for the conservative bloc of the Supreme Court¹⁷³—asked his interlocutor, Nicholas Bagley, how he could think that the Constitution would omit a nondelegation principle.¹⁷⁴ He quipped that he “can’t imagine [Bagley has] such a high view of legislative judgment as to think that that’s a good idea.”¹⁷⁵ This exchange was a poignant one, precisely because it coincided with a year in which the Supreme Court pointedly refused to engage with a rising mountain of scholarship¹⁷⁶ poking holes in the nondelegation doctrine.¹⁷⁷ What Hamburger demonstrated in that interaction was that it would be difficult to convince anyone that delegations could be left to the political branches. Today’s Congress, so the thinking goes, can hardly be left to its own devices.

These are just the bigger administrative law events of 2021. Americana administrative law is also reinforced in smaller events sponsored by initiatives such as the Federalist Society’s Article I Initiative, which has the mission “to restore Congress to its rightful place in the Constitutional order.”¹⁷⁸

While the next Section of this Article describes how Americana administrative law became so prominent in the literature, these examples show its reach. At many of the most significant administrative law gatherings of the year, there were scholars who accepted notions of congressional decline without significant push-back and then used those notions to justify judicial self-aggrandizement. That a sitting federal judge thought it appropriate in an academic forum to blithely assert that another branch was “missing in action” was the culmination of a long process that has normalized Americana administrative law.¹⁷⁹ Although scholars have long tracked the judiciary’s disdain for the political branches, it seems different that a field has weaponized cynical and declinist notions of Congress to justify judicial empowerment.¹⁸⁰ This trend is even more troubling considering the seamless transition of Americana administrative law to the courts.¹⁸¹

173. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2140 n.62 (2019) (Gorsuch, J., dissenting) (citing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 378 (2014)).

174. See The Federalist Soc’y, *Non-Delegation? Or No Divesting? Art. I, Sec. 1 at the Founding and Today*, YOUTUBE (May 17, 2021), https://www.youtube.com/watch?v=L_-OSLuNOIM.

175. *Id.* at 1:07:05.

176. See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (opportunistically citing Ilan Wurman, *Nondelegation at the Founding*, 130 *YALE L.J.* 1490, 1502 (2021) without discussing the critiques of the nondelegation doctrine to which Wurman was responding).

177. See *supra* note 54 and accompanying text (citing scholars who have recently second-guessed the originalist bona fides of the nondelegation doctrine).

178. *About Article I Initiative*, ARTICLE I INITIATIVE, <https://articleiinitiative.org/about-article-i-initiative/> [<https://perma.cc/F5RQ-LL9L>] (last visited Jan. 17, 2023).

179. See *supra* notes 160 and accompanying text.

180. See *supra* notes 20–36 and accompanying text.

181. This will all be discussed below, but this transition was added by the work of Neomi Rao. See *infra* Section III.B. Rao authored two important articles in the vein of Americana administrative law. See generally Rao, *supra* note 43 (arguing that delegations, among other congressional activities, distract from the “collective Congress”); Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 *FLA. L. REV.* 1 (2018) (same). Later, President Trump nominated her to head the Office of Information and Regulatory Affairs. See Tim Devaney, *Trump Nominates*

B. AMERICANA ADMINISTRATIVE LAW IN THE COURTS

Justice Gorsuch has embraced Americana administrative law and has brought most of the Supreme Court along for the ride.¹⁸² His campaign has played out in only a handful of cases over the last few years. Gorsuch’s bluntness may prompt observers to draw a sharp line between Gorsuch (along with Justices Alito and Thomas) and the rest of the Court’s conservative bloc. But that distinction would be a mistake. Gorsuch’s success is owed to the Court’s preexisting disdain for the political branches. As scholars have noted, that disdain is an important feature of the Roberts Court Era.¹⁸³ And more specifically, Gorsuch’s Americana administrative law is propelled by the Court’s disdain for legislative politics.¹⁸⁴ So all the groundwork was already laid for Americana administrative law before Gorsuch ever arrived at the Court. His campaign, then, might be viewed as one of honesty in laying out the conservative bloc’s justifications for their own self-empowerment.

1. Disdain for the Political Branches

There is good reason to think that the declinism now commonplace in the administrative law field is part and parcel to a broader zeitgeist. A decade ago, Pamela Karlan suggested in a foreword to the *Harvard Law Review* that “the Roberts Court has lost faith in the democratic process, and that doubt affects its decisions in ways both large and small.”¹⁸⁵ Karlan thought this turn was the ultimate renunciation of the Warren Court’s optimistic take on politics and the transformative handiwork of the Great Society Congress.¹⁸⁶

That loss of faith led to a noticeable change in the Supreme Court’s approach to the national legislature: “The Justices no longer treat Congress as an indispensable partner in realizing constitutional commitments.”¹⁸⁷ So when the handiwork of the 111th Congress—which faced the 2008 financial crisis and legislated at levels not seen since the Great Society Congress¹⁸⁸—came before the Court, the

Regulatory Chief, HILL (Apr. 7, 2017, 5:22 PM), <https://thehill.com/regulation/administration/327912-trump-nominates-regulatory-chief> [<https://perma.cc/SNB7-NZ3L>]. Rao’s later ascension to the D.C. Circuit appears to have legitimized that earlier work. As of the fall of 2022, both papers have, combined, been cited over 130 times according to Google Scholar. But all the while, there have been few serious attempts to grapple with Rao’s work, although some have signaled their skepticism. *See, e.g.*, Stiglitz, *supra* note 61, at 643 n.41.

182. *See supra* notes 21–36 and accompanying text.

183. *See infra* notes 185–96 and accompanying text.

184. *See infra* notes 232–38 and accompanying text.

185. Karlan, *supra* note 44, at 29.

186. *See id.* at 22–29.

187. *Id.* at 29.

188. *See* Thomas E. Mann, *Books Closed on the 111th Congress, What to Expect in the 112th*, BROOKINGS (Dec. 27, 2010), <https://www.brookings.edu/blog/up-front/2010/12/27/books-closed-on-the-111th-congress-what-to-expect-in-the-112th/> [<https://perma.cc/NEJ3-Z827>] (“This close was consistent with a two-year legislative record whose productivity ranks with the Congresses empowered by the landslide elections of FDR and LBJ in . . . 1932 and 1964 respectively.”); Lisa Lerer & Laura Litvan, *No Congress Since 1960s Has Impact on Public as 111th*, BLOOMBERG (Dec. 22, 2010, 6:47 PM), <https://www.bloomberg.com/news/articles/2010-12-22/no-congress-since-1960s-makes-most-laws-for-americans-as-111th>.

Justices' opinions "manifested a pervasive disrespect for, and exasperation with, Congress."¹⁸⁹ In a passage of his opinion on the Affordable Care Act that presaged the rise of the major questions doctrine, Chief Justice Roberts argued that any attempts by Congress to push the use of its powers are cause for suspicion.¹⁹⁰ Famously, the Chief Justice engaged in a colloquy about the dangers of congressional aggrandizement that could end with a congressional mandate to buy vegetables.¹⁹¹ Giving several examples, Karlan argued that the Court had taken a dim view of Congress's intentions and its actions.¹⁹²

There has only been a crescendo of disdain since 2012. Justice Scalia, before his death, wrote that the "modern Congress" is "sailing close to the wind" by "entering an area of questionable constitutionality"—"*all the time*."¹⁹³ Justice Alito's concurrence in *Department of Transportation v. Association of American Railroads* struck a similar tone and previewed the coming of Americana administrative law.¹⁹⁴ Alito complained that the political branches had grown too accustomed to delegating governmental operations to private actors.¹⁹⁵ He suggested that the "Government" was looking to pass the buck on important legislative decisions to insulate itself from accountability.¹⁹⁶ And of all this disdain, the Court's worst barbs are reserved for Congress. The Justices have reserved their worst disdain for Congress and the realities of the legislative process.

2. Disdain for Legislative Politics

There is a vibrant literature identifying and then diagnosing judges' disdain for Congress. Professor Josh Chafetz, for example, has documented how the courts have denigrated legislative purposes to elevate the judiciary as a nonpartisan and uninterested referee in separation-of-powers conflicts.¹⁹⁷ In the Trump-Era cases

189. Karlan, *supra* note 44, at 44.

190. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) ("Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." (alteration and omission in original) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))).

191. See Karlan, *supra* note 44, at 48 ("Whatever our eating disorders, the Chief Justice worried about a Congress with an insatiable appetite, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'" (quoting *Sebelius*, 567 U.S. at 554)).

192. See *id.* at 44, 53–54, 64 ("Across a broad range of cases, the Court expressed a suspicion of the political process . . .").

193. *Id.* at 66 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 248 (2012)).

194. See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 56–65 (2015) (Alito, J., concurring).

195. See *id.* at 57.

196. *Id.* ("One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress [delegates operations to private actors].").

197. See Chafetz, *supra* note 44 (calling the Supreme Court's case law around congressional records requests "an architectonic project of judicial empowerment at the legislature's expense"); *id.* at 128 ("[T]he courts worked assiduously to position themselves as standing outside of—indeed, above—separation-of-powers conflicts."); *id.* ("[T]his judicial self-aggrandizement has come at the expense of Congress, which has not only been described in uniformly unflattering terms in the [relevant judicial]

on congressional information requests, the Supreme Court juxtaposed self-flattery with denigrating language about Congress to elevate itself above separation-of-powers conflicts.¹⁹⁸ The Court stated that courts “need . . . information to do justice” while Congress “is likely to just be engaged in fishing expeditions.”¹⁹⁹ In a series of cases, the Chief Justice expressed a view that—in Chafetz’s description—“Congress . . . is feral—driven by emotion . . . rather than reason and seeking dominance rather than accommodation.”²⁰⁰

In the domain of campaign finance, the Court has exhibited a similar disdain for lawmakers’ role.²⁰¹ In one case, the Chief Justice argued that lawmakers, left to their own devices, would engage in self-dealing: “Campaign finance restrictions that pursue other objectives [than eradicating *quid pro quo* corruption or its appearance], we have explained, impermissibly inject the Government ‘into the debate over who should govern.’ And those who govern should be the *last* people to help decide who *should* govern.”²⁰²

This argument, for all its intuitive appeal, departs from the Constitution, which vests control of elections in Congress.²⁰³ And it has the effect, again, of placing the courts above the political branches in separation-of-powers disputes in a way that seems to justify judicial self-aggrandizement.²⁰⁴

Separately, the literature has also tried to explain this congressional disdain. As suggested earlier, Chafetz offers the view that the Court uses this rhetoric to justify judicial power.²⁰⁵ Others in the literature have identified lawyers’ “tendency to project their own values onto Congress and, finding Congress sorely wanting, to treat it with a good deal of contempt.”²⁰⁶ As a great scholar of Congress suggested, the reason that lawyers loathe legislative politics is precisely

opinions but has also been impeded from carrying out one of its central functions: the use of oversight . . .”).

198. *See id.* at 139.

199. *Id.* at 142.

200. *Id.*

201. *See generally* Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73 (exploring judicial aggrandizement in campaign finance law).

202. *Id.* at 73 (alteration in original) (quoting *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion)).

203. In his article, Chafetz explains:

As a preliminary matter, it should be noted that, wherever Roberts has gotten this standard—perhaps he has been reading John Hart Ely?—it is not from a close reading of the Constitution itself. After all, the Constitution makes each house of Congress the final judge of the “Elections, Returns and Qualifications” of its members, and it allows each house to expel members with a two-thirds vote . . .

And that brings us to the true danger in Roberts’ claim: the premise that the Court stands outside of, and indeed above, the structures and processes of governance.

Id. at 74–75 (footnotes omitted).

204. *See id.* at 75.

205. *See* Chafetz, *supra* note 44, at 143.

206. Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1125 (2011).

that elite lawyers are professionalized to prize the orderliness and reason-giving nature of judicial reasoning.²⁰⁷ The modes of legislative reasoning—the “political theatre”—are cast in opposition to the legalist ideal.²⁰⁸ This comparison between the legal and legislative modes casts ambiguity in a poor light. While a lawyer appearing in court is graded on saying exactly what she means in as few words as possible, that same lawyer must as a legislator entertain some structurally induced ambiguity and engage with the public in less precise language. Think back to the vaccine-or-test case.²⁰⁹ One could look at the underlying statutory delegation as a decision by Congress to give the maximum latitude to an expert agency in a time of crisis. But Justice Gorsuch instead framed such deference as a craven political move to avoid hard choices.²¹⁰ That view, influenced by the perspective of an elite lawyer such as Justice Gorsuch, justifies judicial self-aggrandizement over deference in a time of emergency.

Courts’ disdain for lawmakers is problematic precisely because it is easily construed as disdain for the public on whose behalf they labor.²¹¹ And in the last decade, disdain has been mainstreamed—especially in the administrative law literature. Judge Neomi Rao’s work before she joined the bench provides an important example. As discussed below, Rao put forth a justification for judicial interventions against delegations with a theory of the collective Congress.²¹² That theory presumed the cynicism and distrust of the legislative process that Justice

207. *See id.* at 1128–29 (arguing that academics start from the mistaken presumption that “because members of Congress are lawyers, they do and should speak in the voices of lawyers or judges”). This perspective is, of course, only supercharged among appellate judges:

The current Justices [of the Supreme Court] spent much of their lives being rewarded for a particular intellectual approach. That approach can stand them in good stead when it comes to technical legal issues But many of the constitutional cases before the Supreme Court are there precisely because they raise hard questions that cannot be answered simply by bringing technical acumen to bear. In these cases, Justices whose stock-in-trade has been their doctrinal acuity or their articulation of a particular interpretive method may continue to elevate lawyerly technique over alternative ways of thinking about the Constitution.

Karlan, *supra* note 44, at 67 (footnote omitted).

208. *See generally* Josh Chafetz, *Congressional Overspeech*, 89 *FORDHAM L. REV.* 529 (2020) (discussing the misguided tendency of many to view legislative speech as “political theater” and to ignore the role of such “overspeech” in the institution of Congress).

209. *See supra* notes 1–6.

210. *See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

211. *See* David E. Pozen, *Constitutional Bad Faith*, 129 *HARV. L. REV.* 885, 911 (2016) (“Impugning the faith of Congress or the President veers dangerously close, on a pluralist or purely majoritarian account of representative democracy, to impugning the faith of the people in whose name they have been acting.”).

212. Rao, *supra* note 43, at 1465 (“Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress. The Constitution creates what I term the ‘collective Congress’—the people’s representatives may exercise legislative power only collectively.”).

Gorsuch drew on in the vaccine-or-test case.²¹³ To Rao, delegations stemmed from lawmakers' eagerness to avoid decisionmaking.²¹⁴ And delegations were a feedback loop; they gave lawmakers incentives to focus on other tasks that Rao considers peripheral—for example, oversight and appropriations—instead of the hard task of lawmaking.²¹⁵ Rao implies that, given sky-high incumbency rates, the public is being swindled by lawmakers with broken incentives. Rao's focus on how delegations obscure the lanes of accountability between lawmakers and their constituents only doubles down on the insult directed at citizens.²¹⁶

3. Americana Administrative Law and Justice Gorsuch

The nomination of then-Judge Neil Gorsuch was a critical moment in the rise of Americana administrative law. His take on lawmakers' motives would, in his mind, justify judicial self-aggrandizement. The test case was *Gundy*,²¹⁷ which kicked off a renewed campaign in favor of revitalizing the long-moribund nondelegation doctrine.²¹⁸ *Gundy* concerned a nondelegation challenge to the Sex Offender Registration and Notification Act (SORNA).²¹⁹ Because it focused on a

213. As Rao explains:

Delegation, however, provides numerous benefits to legislators by allowing them to influence and to control administration. Individual legislators thus have persistent incentives to delegate, because they can serve their personal interests by shaping how agencies exercise their delegated authority. By providing individual opportunities for legislators, delegation realigns the ambitions of congressmen away from Congress and the constitutional lawmaking process. Lawmakers may prefer to collude, rather than compete, with executive agencies

Id. at 1465–66.

214. *See id.*

215. *See id.* at 1465–66, 1471 & n.23.

216. *See* STIGLITZ, *supra* note 59 (exploring the literature that criticizes any accounts of delegations which hinge on legislators' ability to dupe voters).

217. *See generally* *Gundy v. United States*, 139 S. Ct. 2116 (2019) (plurality opinion) (rejecting a nondelegation challenge to the Sex Offender Registration and Notification Act).

218. *See* Walters, *supra* note 24, at 419–20 (“Before [*Gundy*], the nondelegation doctrine was little more than an academic topic After *Gundy*, all of that changed Speculation about where the Court might be going on nondelegation has since reached a fever pitch.” (footnote omitted)). Justice Gorsuch dissented and was joined by both Chief Justice Roberts and Justice Thomas. *See Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting). Justices Alito and Kavanaugh have separately communicated their interest in the broader project of nondelegation. *See, e.g., id.* at 2131 (Alito, J., concurring in the judgment) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (writing, somewhat cryptically, that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases”). Although little is known about Justice Barrett’s views on nondelegation, court watchers have speculated that she may be a moderate. *See, e.g.,* Jonathan H. Adler, *Amy Coney Barrett’s “Suspension and Delegation,”* REASON: VOLOKH CONSPIRACY (Oct. 18, 2020, 7:32 PM), <https://reason.com/volokh/2020/10/18/amy-coney-barretts-suspension-and-delegation/> [<https://perma.cc/VBA5-3CHL>] (arguing that Justice Barrett is likely to embrace “more targeted delegation-based arguments”).

219. *See Gundy*, 139 S. Ct. at 2121 (plurality opinion).

wide-open grant of authority to the Attorney General,²²⁰ Court watchers thought the case was central to a broader conservative movement against the administrative state.²²¹ Ultimately, Justice Kagan’s plurality opinion applied the lenient “intelligible principle” standard and held that SORNA’s registration requirements “easily pass[ed] constitutional muster.”²²² The Court noted that the realities of modern government demand flexibility where Congress decides to “delegate power under broad general directives.”²²³ In that respect, the opinion was a rebuke to the nondelegation movement.

But Gorsuch’s dissent showcased much of what would later be deployed in the vaccine-or-test case. He wrote that SORNA “scrambles” our constitutional design by providing the “nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens.”²²⁴ Gorsuch offered up a formalist’s argument premised on the separation of powers.²²⁵ That section of the dissent adds little to the previous cases that have flinched at the prospect of enforcing the nondelegation doctrine. But the energy in Justice Gorsuch’s dissent picked up when he turned to the normative justifications for a supercharged nondelegation doctrine.²²⁶

A strong nondelegation doctrine is, Gorsuch argued, critical to maintaining accountability.²²⁷ Otherwise, “[I]legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue.”²²⁸ Here, Gorsuch is using his cynical take on legislative motives to justify a reverse-*Chevron* mindset. Whereas *Chevron* assumed that ambiguity is a choice for delegation to an expert and accountable federal agency, Gorsuch sees a legislator avoiding the tough calls.²²⁹

220. *See id.*; *see also* 34 U.S.C. § 20913(d) (“The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . .”).

221. *See, e.g.,* Nicholas Bagley, ‘Most of Government is Unconstitutional,’ N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html>; Mark Joseph Stern, *The Supreme Court May Revive a Legal Theory Last Used to Strike Down New Deal Laws*, SLATE (Mar. 5, 2018, 12:26 PM), <https://slate.com/news-and-politics/2018/03/supreme-court-may-revive-non-delegation-doctrine-in-gundy-v-united-states.html> [<https://perma.cc/97P7-QMN6>].

222. *Gundy*, 139 S. Ct. at 2121–23 (plurality opinion). Although a more detailed discussion of the Court’s opinion in *Gundy* is beyond the scope of this Article, the Supreme Court avoided the nondelegation doctrine by adopting a narrow read of SORNA’s delegations of authority. *See* Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 169 (2019). In that sense, Gorsuch was complaining about the Court’s deployment of the constitutional avoidance canon. *See id.* at 174.

223. *Gundy*, 139 S. Ct. at 2123 (plurality opinion) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

224. *Id.* at 2131 (Gorsuch, J., dissenting).

225. *Id.* at 2133–34.

226. *See id.* at 2134–35.

227. *See id.* at 2135.

228. *Id.*

229. *Compare id.* at 2133 (arguing that it would undermine the Constitution “if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to

Before *Gundy*, courts had deferred to the political branches to police the outer bounds of Congress's own delegations. One defense of that deference is that Congress, in a Madisonian system of checks and balances, is better positioned to guard its own interests.²³⁰ Gorsuch turned that argument upside down:

The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch. Besides, enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone.²³¹

That is the boldness of Americana administrative law in short. Gorsuch is suggesting that Congress cannot be left to its own devices because of its incentives to kowtow to the Executive.²³² I will also discuss the origins of this idea,²³³ but it is important to emphasize just how radical an argument this is. Justice Gorsuch has predicated a judicial power grab on a view that lawmakers cannot be expected to see to Congress's own interests. He is selling a version of judicial self-aggrandizement that would trample any deference to the people's representatives, while framing himself as a champion of Congress's (and by extension, the public's) best interests.²³⁴ Only the Court can right the ship of state.²³⁵

Gorsuch's approach draws on a tradition of disdain described above.²³⁶ His patronizing language toward a Congress that "couldn't be trusted" places lawmakers, in the reader's mind, in a position below the Court.²³⁷ Accordingly, this

realize its goals"), with *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (emphasizing how deference is grounded in the belief that Congress delegates decisionmaking authority to agencies with expertise).

230. See, e.g., Rao, *supra* note 43, at 1469 ("[U]nder the conventional view, political competition between Congress and the President should provide the necessary checks and incentives against excessive delegation.").

231. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

232. For a recent review of and critical response to this kind of thinking, see generally David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1 (2018), which defines and analyzes constitutional loyalty. The authors suggest that each branch has provided evidence where they operate in their own interests because of "basic architectural choices about how branches and agencies are set up." *Id.* at 64. They also juxtapose the assumption that judicial independence is an objectively desirable end, full stop and without exception, with the "measure of consensus" that "a polarized Congress does not, and cannot, serve the nation well." See *id.* at 72–73, 75.

233. See *infra* Part III.

234. This rhetorical move on Justice Gorsuch's part equates with a kind of "judicial populism" described by the Supreme Court's critics. See, e.g., Bernstein & Staszewski, *supra* note 67 ("Populist leaders claim to represent the will of a morally pure people against a corrupt, out-of-touch, or unresponsive elite.").

235. See *id.* ("[Judicial populism] claims special access to a true, single meaning of the law.").

236. See *supra* Sections II.B.1–2.

237. *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting); cf. Chafetz, *supra* note 44, at 128 ("The judiciary's self-presentation as standing outside of the interbranch contest for power is meant to make it appear more trustworthy, and the courts therefore accrue more power precisely to the extent that the public buys into this self-presentation.").

language, loaded with cynicism, elevates the Court above the political branches in this separation-of-powers controversy.²³⁸ Gorsuch's pitch is well-calculated toward justifying judicial intervention over Congress's own chosen path on delegations.

Gorsuch has two pitches for self-empowerment here: accountability and a cynical view of Congress.²³⁹ The most obvious observation about Gorsuch's approach is that it is not originalist. There is little public meaning analysis in Gorsuch's opinion. There are a few throwaway citations to the Federalist Papers and Locke but nothing that would establish that the Founding generation shared his views about the separation of powers.²⁴⁰ The entire opinion operates off a few structural inferences. Gorsuch jumps from all the difficulties the Founders *explicitly* baked into Article I—bicameralism, a public process, and so on—to reading in a judicially enforced prohibition on delegations that guards against congressional fecklessness.²⁴¹ My own read of Gorsuch's opinion is that he is more influenced by the contemporary writers he cites to—Schoenbrod, Lawson, and Rao—than by Madison, Hamilton, or Locke.²⁴²

Beyond the methodological issues, it is hard to assess Gorsuch's pitches because of their vagueness. The accountability argument is commonplace but thin. Note how his argument on accountability manifests in a patronizing and cynical tone toward the political branches: “These opportunities for finger-pointing *might prove temptingly advantageous for the politicians involved*, but they would also threaten to ‘disguise . . . responsibility for . . . the decisions.’”²⁴³ Beyond the tone, what should be made of this argument? Was there any doubt, for example, that the public understood who was responsible for the OSHA vaccine-or-test mandate? Of course not. Virtually all the coverage around the mandate correctly described it as the “Biden” mandate.²⁴⁴ Take SORNA. If the Supreme Court had struck down the capacious grant of authority in that statute on nondelegation grounds, how would that have clarified the lines of accountability? Instead of Gorsuch's hypothetical finger-pointing between the political branches, both Congress and the Executive could just blame the Court or else obscure the post-ruling status quo.

238. See Chafetz, *supra* note 44, at 128.

239. See *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting).

240. See, e.g., *id.* at 2133–34 nn. 21–28, 30, 32.

241. Compare *id.* at 2134 (discussing Article I's requirements), with *id.* at 2135 (jumping to Justice Gorsuch's gloss on what those requirements mean and inferring another implicit requirement in the form of the nondelegation doctrine).

242. See, e.g., *id.* at 2134–35 nn.28–29, 31 (first citing SCHOENBROD, *supra* note 43, at 99; then citing Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002); and then citing Rao, *supra* note 43, at 1478).

243. *Id.* at 2135 (omissions in original) (emphasis added) (quoting Rao, *supra* note 43, at 1478).

244. See, e.g., Kevin Breuninger & Spencer Kimball, *Supreme Court Blocks Biden Covid Vaccine Mandate for Businesses, Allows Health-Care Worker Rule*, CNBC (Jan. 13, 2022, 8:39 PM), <https://www.cnbc.com/2022/01/13/supreme-court-ruling-biden-covid-vaccine-mandates.html> [https://perma.cc/FL7Q-WVTV].

And the cynicism is a thin account of what motivates legislators to delegate. Even if we stipulate that some legislators sometimes delegate to avoid making tough calls or to game the agency-level implementation of ambiguous statutory commands, Gorsuch does not offer a way to determine when that happens. And the cynical take on Congress does not describe the varied reasons for delegating. There is a certain amount of “structure-induced ambiguity” built into legislating.²⁴⁵ That is the amount of ambiguity just baked into the legislative process because of the precarious nature of written language in a bicameral legislature.²⁴⁶ It is often hard to tell whether ambiguity is structurally induced or intentional.²⁴⁷ And when legislators intend to delegate, their motivations are complex and many. Legislators seek to delegate to leverage agencies’ expertise.²⁴⁸ There is also good reason to think that delegations are sometimes meant to capitalize on “the credible rationality and transparency afforded by administrative procedures.”²⁴⁹ A full discussion on what motivates legislators to delegate is beyond the scope of this Article. But the point for our purposes is to expose Gorsuch’s perilously thin account of legislative motives.

Although the Court has yet to vindicate Gorsuch’s call for a new nondelegation doctrine, its logic seems to have been channeled into the major questions doctrine. That doctrine requires that Congress speak clearly when an agency claims the power to resolve a major question of social or economic significance.²⁵⁰ And recently, this doctrine has helped make concrete the Court’s skepticism of agency pronouncements of new regulatory authorities in ambiguous statutory delegations.

III. THE CONSTITUTIONAL POLITICS OF THE NONDELEGATION DOCTRINE: THE RISE OF AMERICANA ADMINISTRATIVE LAW

After the vaccine-or-test case, Americana administrative law is the future at the Supreme Court. The Court is increasingly prone to using cynical or declinist views of Congress to justify nondelegationist readings of statutes. This Part describes the rise of Americana administrative law. The ideas that Justice Gorsuch later used were developed years before *Gundy* and the vaccine-or-test

245. Nourse, *supra* note 206, at 1128–29 (explaining “structure-induced ambiguity” as a concept and noting that the “structure of legislative institutions increases the likelihood and value of semantic imprecision”); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019) (plurality opinion) (noting that “Congress almost never explicitly assigns responsibility to deal with” the problem of ambiguity).

246. *See* Nourse, *supra* note 206, at 1129.

247. *See id.*

248. *See, e.g.,* JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1, 23–24 (1938) (arguing that “the administrative process springs from the inadequacy of a simple tripartite form of government” and that Congress delegates because of “the need for expertness”); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 445 (2008) (“One of the most common defenses of delegation to agencies is that agencies possess technical expertise that Congress lacks.”).

249. Stiglitz, *supra* note 61, at 637.

250. *See generally* Heinzerling, *supra* note 16 (discussing the rise of the major questions doctrine as a “power” canon).

case. Americana administrative law comes from the need for a “pitch” on the constitutional politics of the nondelegation doctrine.²⁵¹

* * *

The nondelegation doctrine remains hotly debated, and much of that debate hinges on how we frame the history. Nondelegationists tell a distinct story of the “Constitution-in-exile.”²⁵² The Court, they say, has long accepted the premise of nondelegation and gave up on it because of the “practical concerns about the necessity of delegation in a complex modern society” during and after the New Deal.²⁵³ Judge Neomi Rao, in opening her most noteworthy article, started with a paean to nondelegation: “The nondelegation doctrine is ‘unquestionably a fundamental element of our constitutional system’ and, despite claims of its death and general judicial indifference, it persists in legal challenges and law reviews.”²⁵⁴

This approach links nondelegation to a fabled history that preceded judicial abnegation. Revisionists argue that the nondelegation doctrine was a weak constitutional inference that never played a serious role in constitutional adjudications outside of one fateful year.²⁵⁵ Worse (from a nondelegationist perspective), the revisionists are increasingly advancing arguments to suggest that nondelegation’s originalist bona fides are nonexistent.²⁵⁶ The narrative upshot of this framing is that nondelegation has a freakish backstory—it is a peerless doctrine adopted without serious analysis and which was seldom applied.

My own view straddles these two accounts. For most of American history, the nondelegation doctrine has been less a legal doctrine with teeth than a means of public reasoning about the role of administration in our constitutional system. The Court’s campaign on the nondelegation doctrine from 1892²⁵⁷ to 1935 was rhetorical.²⁵⁸ The *rhetorical nondelegation doctrine* allowed the Supreme Court

251. See *infra* Sections III.A–B.

252. Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83, 84 (reviewing SCHOENBROD, *supra* note 43) (“[F]or 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty”).

253. Rao, *supra* note 43, at 1473–74.

254. *Id.* at 1464 (footnotes omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

255. See generally Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017) (reviewing over two thousand nondelegation cases and concluding that the nondelegation doctrine has never served as a meaningful check on delegations of power outside of 1935).

256. See *supra* note 54 and accompanying text (citing scholars who have recently second-guessed the originalist bona fides of the nondelegation doctrine); see also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (advancing an early argument against the existence of the nondelegation doctrine).

257. See generally *Field v. Clark*, 143 U.S. 649 (1892) (kickstarting a multi-decade fixation with the nondelegation doctrine).

258. See Rodriguez & Weingast, *supra* note 34, at 150 (casting “the controversy between the Supreme Court and the New Deal” as a “negotiation” over “the framework for extending constitutional rights of due process”); Baumann, *supra* note 125, at 172–74 (providing evidence that 1920s legal advisors to the Senate saw the nondelegation doctrine as a “paper tiger”).

to achieve second-order goals: due process and better drafting from Congress.²⁵⁹ My own research has revealed a dialogical relationship between Congress and the Court in the 1920s.²⁶⁰ The Court, concerned with notice for regulated parties, pressed for some clue as to when Congress intended for agencies to have the power to prescribe penalties for statutory mandates.²⁶¹ Congress responded with a drafting convention that placated the Court.²⁶² Later, the Court enforced the nondelegation doctrine in two New Deal-Era cases for the first time ever.²⁶³ But the Court provided notes for Congress on drafting and on the kinds of processes that would justify open-ended delegations.²⁶⁴ Congress took the hint and drafted laws that the Court upheld.²⁶⁵ These dialogues were the point of the rhetorical nondelegation doctrine.

Despite this history, the dialogical quality of the nondelegation doctrine has been overlooked.²⁶⁶ Decades later, the nondelegation doctrine became a favorite of some figures associated with a deregulatory movement.²⁶⁷ Nondelegation was for many a “never-ending hope.”²⁶⁸ That movement has pushed for a rejuvenation of the nondelegation doctrine.²⁶⁹ But the Court has still refused to strike down a statute on nondelegation grounds for nearly a century.²⁷⁰

The issue with nondelegation was not—until recently²⁷¹—an interpretive one. Almost every Justice for a century has agreed to the existence of some nondelegation principle flowing from Article I.²⁷² But as was the case during the era of the

259. See Rodriguez & Weingast, *supra* note 34, at 150 (noting that a key component of interbranch conflict in the early twentieth century was a focus on the need for due process in the administrative state); see also Baumann, *supra* note 125, at 170–74 (providing evidence that the Senate adopted a drafting convention to placate the Supreme Court’s opposition to agency delegations).

260. See Baumann, *supra* note 125, at 170–75; see also Rodriguez & Weingast, *supra* note 34, at 152.

261. See Baumann, *supra* note 125, at 171–74 (linking “The Turney Memo” to the so-called “force of law” drafting convention that grew out of the Supreme Court’s pre-New Deal nondelegation decisions); see also Rodriguez & Weingast, *supra* note 34, at 150.

262. See Baumann, *supra* note 125, at 170–75.

263. See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

264. See Rodriguez & Weingast, *supra* note 34, at 151 (arguing that the Supreme Court in *Panama Refining* and *Schechter Poultry* “articulated a ‘how-to manual’ of sorts—that is, a set of instructions for Congress to follow in order to ensure that administrative discretion would be properly cabined and channeled”).

265. See *id.* (arguing that the National Labor Relations Act “met the Court’s prescriptions of the ‘how-to manual’ by detailing a set of elaborate procedures for the agency to follow in order to implement public policy”).

266. See *id.* at 151–52.

267. See, e.g., Whittington & Iuliano, *supra* note 255, at 387–88 (“In recent decades, many conservative scholars and lawyers have called for a revival of the nondelegation doctrine that they see as having been cast aside in the constitutional revolution of the early twentieth century.”).

268. Walters, *supra* note 24, at 423.

269. See Whittington & Iuliano, *supra* note 255, at 387–88.

270. See Walters, *supra* note 24, at 423.

271. See *supra* note 54 and accompanying text (citing scholars who have recently second-guessed the originalist bona fides of the nondelegation doctrine).

272. Cf. Walters, *supra* note 24, at 424–25 (“Until just the last twenty years, most observers accepted that there was, in fact, an implicit limitation on delegation of the legislative power in the framers’

rhetorical nondelegation doctrine, the Court has been unwilling to vindicate nondelegation directly. The nondelegation doctrine’s “zombie” status stems from a unique dynamic pitting a thin *constitutional assumption* against the demands of *constitutional politics*.²⁷³

Having decided the interpretive question, the only thing restraining the Justices is the constitutional politics—the allocation of decisionmaking authority to enforce the perceived nondelegation principle.²⁷⁴ For many reasons, the Justices have not felt comfortable enforcing a strong nondelegation doctrine.²⁷⁵ Some have suggested that nondelegation is unwieldy.²⁷⁶ Because the line between “legislative” and “executive” powers is murky, a supercharged nondelegation doctrine risks inconsistent applications.²⁷⁷ Further, deference has always had some appeal. In a Madisonian system of separation of powers, some naturally prefer to leave a nondelegation principle in the political branches’ hands with the hope that they will limit their own excesses in the name of their institutional interests.²⁷⁸ And, critically, there is no clear “ask” as there was in those earlier Progressive and New Deal Eras. Back then, the Court had specific requests of Congress and the political branches.²⁷⁹ As two scholars have recently suggested, the Court did everything but provide Congress with a drafting guide.²⁸⁰ But today there is no similar dialogue with clear deliverables for Congress.

original understanding, even if the boundaries of this limitation were murky in practice.”); *see also id.* at 426 (noting that, despite “rear-flank attacks on the pedigree” of nondelegation, “the Court has long acted as if there is such a thing as the nondelegation doctrine”).

273. *See id.* at 419 n.6 (writing that nondelegation “has essentially been a zombie doctrine since 1935”).

274. *See, e.g.,* Rao, *supra* note 43, at 1465 (noting that the Court has adopted a “tolerance” for delegations, relying on the notion that delegations are “essential in a complex society, and . . . [that] structural checks and balances will deter excessive delegations because Congress will jealously guard its lawmaking power from the executive”).

275. *See Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion) (arguing that if the delegation at issue in *Gundy* “is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs”).

276. *See, e.g.,* Jennifer L. Mascott, *Gundy v. United States: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 3 (2018) (“The imprecision of such a [nondelegation] standard . . . has caused some scholars to contend that even if the Constitution embodies a nondelegation doctrine, the standard is not administrable and, thus, is unenforceable by courts.”). Mascott here is summarizing a common viewpoint in the academy, *see id.* at 3 n.13 (citing Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321–23 (2000)), that she ultimately disagrees with through an appeal to other areas in the public law canon, *see id.* (“But the challenge of formulating a clear test to administer a textually imprecise constitutional standard has not prevented the Court from enforcing numerous other open-ended constitutional requirements.”). Regardless, the administrability problem associated with the nondelegation doctrine has a deep pedigree. *See, e.g.,* Baumann, *supra* note 125, at 176–77 (restoring the text of a memo advising Congress in 1929 that the nondelegation test had increasingly devolved into a test of convenience because the Court’s general pronouncements provided “little value as a test for doubtful cases”).

277. *See id.*

278. *See* Rao, *supra* note 43, at 1469.

279. *See* Rodriguez & Weingast, *supra* note 34, at 151.

280. *See id.*; *see also supra* note 264 and accompanying text.

To overcome nondelegation's zombified state, nondelegationists have offered various pitches that would justify an accrual of decisionmaking authority in the hands of the judiciary. These pitches—the executive and congressional frames for nondelegation—are an exercise in framing. Americana administrative law comes from these pitches, with the second pitch being developed around Congress to counter the failures of the first.²⁸¹

A. THE EXECUTIVE FRAME

Traditionally, nondelegationists have hyped the threat of executive aggrandizement at Congress's expense when arguing for a supercharged nondelegation doctrine.²⁸² This argument for judicial intervention—the *executive frame* for nondelegation—is an argument premised on the Court's ability to maintain a balance of powers.²⁸³ It suggests that executive power is now wildly out of bounds with the presidency established at the Founding.²⁸⁴ Laden in the executive frame is the belief, influential both in the literature and in the public discourse, that Congress can do little against the efficiency and purpose of the Executive.²⁸⁵

The executive frame has gained episodic judicial support.²⁸⁶ In 2013, Chief Justice Roberts dissented in a noteworthy case involving *Chevron* deference.²⁸⁷ The Chief condemned the mixture of executive, legislative, and judicial powers in agencies as “the very definition of tyranny.”²⁸⁸ He lamented that “[t]he administrative state ‘wields vast power and touches almost every aspect of daily life’” in a way that “[t]he Framers could hardly have envisioned,”²⁸⁹ and emphasized the existence of “thousands of pages of regulations” and “hundreds of federal

281. Compare *infra* Section III.A. (exploring the executive frame), with *infra* Section III.B. (pivoting to the congressional frame).

282. See, e.g., Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 251–52 (2010) (arguing that the legal community's fear of executive aggrandizement is caused by the failure to police delegations and suggesting that this reality has falsely impugned the reputation of the unitary executive theory).

283. See Eric A. Posner, *Balance-of-Powers Arguments and the Structural Constitution* 9–11 (Coase-Sandor Inst. for L. & Econ. Working Paper No. 622, 2012) (noting that scholars use “balance-of-power” arguments in the delegation context).

284. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 7, 15, 32 (2010); see also PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 2–3 (2009).

285. See, e.g., ALEXANDER BOLTON & SHARECE THROWER, *CHECKS IN THE BALANCE: LEGISLATIVE CAPACITY AND THE DYNAMICS OF EXECUTIVE POWER* 3 (2022) (discussing the widespread “[p]essimism . . . regarding legislatures' ability to redress encroaching executive power”).

286. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (lamenting that his anxiety about deference has been “heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”).

287. *City of Arlington*, 569 U.S. at 312–28 (Roberts, C.J., dissenting).

288. *Id.* at 312 (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).

289. *Id.* at 313 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

agencies poking into every nook and cranny of daily life.”²⁹⁰ These phobias about executive largess and invasiveness were meant to justify judicial checks on delegations. Judicial activism is warranted, on this view, by the judiciary’s “duty to police the boundary between the Legislature and the Executive,” lest the administrative state accrue power and impose tyranny.²⁹¹

Chief Justice Roberts is not alone in his deployment of the executive frame. According to Justice Thomas, the judiciary’s hands-off approach to nondelegation has effectively “sanctioned the growth of an administrative system” that “finds no comfortable home in our constitutional structure.”²⁹² Justice Gorsuch, before joining the Supreme Court, similarly argued that the modern approach to delegations allows “executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution.”²⁹³

But despite the ubiquity of the executive frame, it has failed as a pitch for nondelegation for a century.²⁹⁴ The executive frame is ill-suited for a judiciary with a soft spot for the command and decisiveness of executive leadership.²⁹⁵ And the Madisonian rejoinder—the argument that Congress, and not courts, should police the outer bounds of delegations—proved somewhat effective against judicial ambitions in the twentieth century, whatever its inherent weaknesses.²⁹⁶ For these reasons, the shortcomings of the executive frame were cited by proponents of its alternative.²⁹⁷

The most important of the limitations on the power of the executive frame is the Court’s sporadic and idiosyncratic support for the presidency. In a recent congressional hearing, experts on Congress told legislators that the number one thing they had to know about the Roberts-Era judiciary is that it is pro-executive and anti-Congress.²⁹⁸ While this “pro-executive” stance may seem antithetical to the Court’s deregulatory stance, the Justices seem willing to distinguish between the presidency and unelected bureaucrats. Administrative law scholars have noted

290. *Id.* at 315.

291. *Id.* at 327.

292. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring in judgment).

293. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

294. *See, e.g., Whittington & Iuliano, supra* note 255, at 383 (“The federal courts never posed a significant obstacle to the development of the administrative state and the delegation of extensive policymaking authority to executive officials.”).

295. *See Note, Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1132 (2021) (noting that the nondelegation doctrine places pressure on the Roberts Court’s pro-executive stance); *see also Article One: Strengthening Congressional Oversight Capacity: Hearing Before the H. Select Comm. on the Modernization of Cong.*, 117th Cong. 56 (2021) [hereinafter *Article One Hearing*] (statement of Professor Josh Chafetz).

296. *See, e.g., Rao, supra* note 43, at 1469 (“[U]nder the conventional view, political competition between Congress and the President should provide the necessary checks and incentives against excessive delegation.”).

297. *See id.* at 1476.

298. *See Article One Hearing, supra* note 295 (“[F]rankly, the Federal judiciary has been hostile to Congress for decades. It has been hostile to any kind of assertion of congressional power [T]he Federal judiciary is pro executive [sic] and anti-Congress and it has been for decades”); *see also Note, supra* note 295.

that the furors of “anti-administrativism” are directed toward bureaucracy, not toward presidential power itself.²⁹⁹ And despite some academics’ concerns with executive aggrandizement, the Supreme Court seems unfazed:

Many scholars believe that the executive branch has become too powerful. The executive branch is vastly more powerful today than it was at the founding, and in recent years presidents have made strong claims as to their constitutional powers, including the power to disregard acts of Congress. Yet the courts do not regard the presidency as too powerful. *Courts frequently worry about legislative encroachment on the presidency . . .*³⁰⁰

This failure of the executive frame set in just after the judiciary’s pronouncements in 1935.³⁰¹ Just the next year, in *United States v. Curtiss-Wright Export Corp.*,³⁰² the Court had to rule on a congressional resolution that would have allowed for an embargo against Bolivia or Paraguay if an embargo would have helped “contribute to the reestablishment of peace” between the two countries.³⁰³ The corporation that challenged the resolution’s underlying delegation of authority must have thought it had a decent chance after the Court’s prior stand against New Deal legislation.³⁰⁴ But the Court’s ascendant nondelegation doctrine was, in *Curtiss-Wright*, cast against the Court’s regard for the Executive Branch, and in particular its willingness to embrace the imperial presidency in the context of foreign affairs.³⁰⁵ Rather than strike down the congressional resolution, the Court did an about-face and upheld it.³⁰⁶ Those decisions of yesteryear were, the Court suggested, limited to the domestic sphere.³⁰⁷

The executive frame has been a failure. But it is an important subject in this Article because it set up the development of an alternative that has, in turn, laid the groundwork for Americana administrative law.

B. THE CONGRESSIONAL FRAME

The nondelegationists’ smartest insight over the last thirty years was to realize that any take on nondelegation stands on a descriptive theory of Congress, as well as a normative theory about how Congress ought to relate to the other

299. See, e.g., Posner, *supra* note 283, at 1.

300. *Id.* (emphasis added) (footnote omitted).

301. See generally *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (striking down a portion of the National Industrial Recovery Act on nondelegation grounds); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (same).

302. 299 U.S. 304 (1936).

303. Joint Resolution of May 28, 1934, ch. 365, 48 Stat. 811, 811; *Curtis-Wright Exp. Co.*, 299 U.S. at 313–14.

304. See Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 6–8 (1973).

305. See Note, *supra* note 295, at 1133 (arguing that the Roberts Court is again conflicted about the tension between nondelegation and foreign affairs exceptionalism).

306. *Curtiss-Wright*, 299 U.S. at 329.

307. See *id.* at 315, 320, 324.

branches.³⁰⁸ That realization launched what I call the *congressional frame*.³⁰⁹ Dejected by the failure of the executive frame to capture the judicial imagination, nondelegationists developed a new pitch with a focus on Congress.

The congressional frame flips the narrative of nondelegation by shifting the focus on lawmakers' incentives.³¹⁰ The idea, at a high level of abstraction, is that delegations have corrupted congressional incentives so that legislators cannot be left to police the outer bounds of their own delegations.³¹¹ If properly deployed, this articulation deflects the Madisonian rejoinder and broader themes of deference.³¹² Adherents argue that Congress's design has been undone by the rise of the administrative state and the distractions for legislators that federal agencies have caused.³¹³ This genre combines a narrative of congressional impotence with a call for a judicial intervention to reorder congressional incentives.³¹⁴ The congressional frame sometimes, but not always, involves some reference to polarization as a justification for a strong nondelegation doctrine.³¹⁵ And its logic has spread beyond nondelegation to other areas of the administrative law canon.³¹⁶ For example, the literature on the major questions doctrine posits that the doctrine is a valid kick start for a Congress with declining productivity.³¹⁷

While Americana administrative law depends on certain atmospheric qualities that exist independently of nondelegation—disdain for the political branches,

308. Cf. Nourse, *supra* note 206, at 1122 (“Theories of statutory interpretation not only imply descriptive theories of Congress, but also normative theories about how Congress should relate to courts or agencies.”).

309. See, e.g., Rao, *supra* note 43, at 1465; SCHOENBROD, *supra* note 43, at 9–11 (arguing that delegations weaken the lawmaking procedures laden in Article I); Walker, *supra* note 43, at 934 (“Beyond formalism, an important source of criticism of the amount of delegation persisting under the current nondelegation doctrine centers on the impact delegation has on the political process.”); White, *supra* note 43 (noting an argument that congressional dysfunction is caused by “Congress’s broad delegations of power [that] defy *The Federalist’s* premises”); McGinnis & Rappaport, *supra* note 43 (justifying nondelegation by suggesting that delegations corrupt our political system and lead to polarization).

310. See, e.g., Rao, *supra* note 43, at 1465 (“Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress.”).

311. See *id.*

312. See Rao, *supra* note 181, at 3 (“The modern administrative state has marginalized Congress—or perhaps more accurately, by creating the modern administrative state, Congress has marginalized itself.”).

313. See Rao, *supra* note 43 (“Delegation, however, provides numerous benefits to legislators by allowing them to influence and to control administration. Individual legislators thus have persistent incentives to delegate, because they can serve their personal interests by shaping how agencies exercise their delegated authority.”).

314. See *id.* at 1508 (arguing that delegations’ corrupting effect justifies a new and robust nondelegation doctrine).

315. See, e.g., *id.* at 1467.

316. See, e.g., Pierce, Jr., *supra* note 77, at 92–93 (arguing simultaneously that *Chevron* was correct when decided but wrong given today’s polarization and legislative dysfunction).

317. Jonathan H. Adler, *A “Step Zero” for Delegations* (justifying the major questions doctrine by pointing to “Congress’ increased unwillingness (or inability) to engage in regular lawmaking”), in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE* 161, 163, 166 (Peter J. Wallison & John Yoo eds., 2022).

congressional declinism, and so on—the congressional frame is an idea that has weaponized those impulses in the context of the nondelegation doctrine.

1. Early Beginnings

Several thinkers from the 1960s to the 1990s developed an argument about political accountability that has influenced the rise of the congressional frame.³¹⁸ They suggested that “allowing Congress to delegate freely allows [lawmakers] to claim responsibility for the act of delegating—as if it were the same as the actualization of policy—and then avoid responsibility for the actions of the delegee when things go wrong.”³¹⁹ This argument is the academic encapsulation of Justice Gorsuch’s point about finger-pointing discussed above.³²⁰

That accountability-based reasoning was increasingly tied to nondelegationist thinking in the 1990s. David Schoenbrod’s sharp-elbowed “reply to [his] critics” is an example.³²¹ Reeling from the criticism of Jerry Mashaw, Dan Kahan, and Peter Schuck relating to an earlier book, Schoenbrod felt it necessary to lay out his theory for the dangers of delegations.³²² His emphasis on nondelegation flows from the “[i]ndirect democracy” established by the “elitist[]” Founders.³²³ To Schoenbrod, our indirect democracy depends on mechanisms that force the right incentives for legislators:

Indirect democracy works only if the people’s elected representatives assume personal responsibility for the key decisions on the scope of government. To impose such responsibility, the Framers, elitists though they were, structured the Constitution to force members of Congress to take responsibility for decisions to increase the scope of government.³²⁴

There are the obvious ways that the constitutional structure enforces accountability: the bicameralism requirement and the recording of congressional votes, for example.³²⁵ Schoenbrod’s beef with delegations reflects a commitment to accountability that goes beyond the architecture for Congress provided for in the Constitution.³²⁶ More than twenty years after this piece was published, Schoenbrod’s focus on how delegations corrupt Congress appears prescient. It is

318. See Walters, *supra* note 24, at 433 & nn.81–85 (first citing THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 92 (1969); then citing MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989) (1977); then citing SCHOENBROD, *supra* note 43, at 10; then citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132–33 (1980); and then citing Peter H. Aranson, Ernest Gellhorn & Glenn O. Robinson, *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 56 (1982)).

319. *Id.* at 433.

320. See *supra* notes 243–44.

321. See Schoenbrod, *Delegation*, *supra* note 69, at 731.

322. See *id.* at 732.

323. *Id.* at 731.

324. *Id.*

325. See *id.* (discussing Article I of the Constitution); see also U.S. CONST. art. I, §§ 1, 5.

326. See Schoenbrod, *Delegation*, *supra* note 69, at 731–32.

also a memorable piece because of its argumentative style and its directness in service of the thesis that delegations harm democracy.³²⁷

There are several things worth noting about this early take on the congressional frame for nondelegation. First, pointing to accountability as a value ascertainable from the actual text of the Constitution only makes the lack of a more explicit nondelegation feature in Article I more striking. There is little supporting a move beyond the explicit accountability-forcing features of the Constitution unless you buy into Schoenbrod's other premises. Second, the work of revisionist law professors and historians has established that Congress was always delegating.³²⁸ This literature cuts against Schoenbrod's entire framing—that the properly functioning Congress was corrupted by the modern onset of delegations. The irony, of course, is that Schoenbrod was responding to the criticisms of Jerry Mashaw, who is the dean of the revisionist school of thought on delegations.³²⁹ In any event, readers during this period never have a good idea of when Congress was working as it ought to. A preoccupation with an idealized Congress that never existed became a defining feature of the congressional frame. Schoenbrod is one of the first authors who put the “Americana” in Americana administrative law.

In the judiciary, a prototype of Americana administrative law was sketched by Justice Rehnquist in the *Benzene* case.³³⁰ The Court's majority held that an OSHA standard limiting benzene exposure failed to make the findings required by the OSH Act.³³¹ Rehnquist wrote a concurrence and argued that Congress had violated the nondelegation principle by delegating key risk-management decisions to OSHA.³³²

As Justice Gorsuch would decades later with the same underlying statute,³³³ Rehnquist flipped the narrative. The *Benzene* case was not about Congress's decision to rely on expertise on a complex issue involving health and science. Instead, the OSH Act involved a decision by Congress to avoid the tough calls: “It is difficult,” he wrote, “to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult . . . to hammer out in the legislative forge.”³³⁴ Rehnquist continued to suggest that contemporary politics produced partisanship³³⁵ that unduly gave Congress the

327. *See id.*

328. *See, e.g.,* Mortenson & Bagley, *supra* note 54, at 277, 281–82.

329. *See generally* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (uncovering a lost history of administrative law in the nineteenth century).

330. *See generally* *Indus. Union Dep't v. Am. Petrol. Inst. (Benzene)*, 448 U.S. 607 (1980).

331. *See id.* at 662 (plurality opinion).

332. *See id.* at 672 (Rehnquist, J., concurring in the judgment).

333. *See supra* notes 21–31.

334. *Benzene*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment).

335. *See id.* (“If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated.”).

incentive to avoid making the hard choices of legislating.³³⁶

Rehnquist's opinion in the *Benzene* case has influenced the trajectory of the Roberts Court. Beyond the striking similarities between Rehnquist's concurrence and Justice Gorsuch's opinions from *Gundy* and the vaccine-or-test case,³³⁷ Justice Kavanaugh has cited Rehnquist as an important nondelegationist influence.³³⁸ Rehnquist's rhetoric is an important ingredient in what would blossom into Americana administrative law. Rehnquist had not integrated his cynicism and disdain for the legislative politics behind the OSH Act with the literature discussed above.³³⁹ But that merger would be necessary for Americana administrative law to take off.

2. Neomi Rao's Collective Congress

Those early beginnings for the congressional frame have led to a number of newer versions, including Judge Neomi Rao's collective Congress. Before Rao was a D.C. Circuit judge, she was an academic who focused on the concept of dignity in the law.³⁴⁰ Shifting gears, Rao in 2015 published an article that proposed a new way of thinking about the nondelegation doctrine.³⁴¹ Rao had a clear familiarity with the early academic works on the congressional frame. Her innovation was in marrying that work with a sanitized version of congressional disdain and in marketing the combined package as a justification for judicial self-aggrandizement through the nondelegation doctrine.

Rao diagnosed all the problems with the executive frame. To her, the executive frame depended on a formalistic view of power in separation-of-power disputes. Whatever power the administrative state accrued, Congress lost.³⁴² To Rao, this was a recipe for disaster when it came to nondelegation. She saw that it has never been clear that the judiciary is willing to intervene to enforce the nondelegation doctrine if Congress can fight its own battles.³⁴³ And the executive frame did little against what she called the "conventional view"; the idea that "structural checks

336. *See id.* ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.").

337. *Compare id.* at 674–75 (critiquing the Court's failure to enforce the nondelegation doctrine), with *Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting) (similarly complaining about the "intelligible principle misadventure" and the Court's failure to enforce the nondelegation doctrine).

338. *See Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's opinion built on views expressed by then-Justice Rehnquist some 40 years ago . . . Like Justice Rehnquist's opinion 40 years ago, Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in further cases.").

339. *See supra* notes 318–27.

340. *See, e.g., Neomi Rao, On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 204 (2008) ("Despite its lofty appeal, human dignity as a constitutional principle may undermine individual rights and liberty.").

341. *See generally Rao, supra* note 43 (expanding the traditional understanding of the nondelegation doctrine to focus on how delegation runs counter to the "collective Congress").

342. *See id.* at 1465.

343. *See id.* at 1471–72 (suggesting that courts have been unwilling to "police the boundaries of permissible delegations, in part because Congress can protect its own lawmaking power simply by withdrawing delegations or legislating more specifically").

and balances will deter excessive delegations because Congress will jealously guard its lawmaking power from the executive.”³⁴⁴

The better argument, from Rao’s vantage, is that delegations “unravel[] the institutional interests of Congress.”³⁴⁵ To Rao, the Constitution set up the collective Congress: “The Constitution creates what I term the ‘collective Congress’—the people’s representatives *may exercise legislative power only collectively* Members will be invested in the difficult process of lawmaking for the public good because this is the only way to exercise power.”³⁴⁶

The collective Congress is a heuristic.³⁴⁷ Before breaking down what the collective Congress is and how Rao uses it, it is important to state up front that this is not an argument based on public meaning originalism.³⁴⁸ The methodology is murky but could be described as a structural constitutional inference backed by some soft intentionalism.³⁴⁹ Rao turns to Locke and Montesquieu because the Framers had “studied” them, but draws strained inferences from their most general writings.³⁵⁰ She turns to Rousseau, despite noting that “there is less evidence of his influence on the Framers.”³⁵¹ Rao constitutionalized her fraught understanding of what Congress is—a factory for producing legislation.

344. *Id.* at 1465.

345. *Id.*

346. *Id.* (emphasis added).

347. See Rao, *supra* note 181, at 1 (framing the collective Congress as a “framework for analyzing a range of separation of powers questions”).

348. Rao’s vaguely historical methodology resembles Philip Hamburger’s and evokes Adrian Vermeule’s description of the latter’s methodology:

Given his historical interests, the most obvious possibility is that Hamburger means to advance an originalist claim But this has already been done as well as it can be, and in any event I don’t believe that’s what Hamburger is getting at. If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789 and on the ratification debates, and far less time on subterranean connections

Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1551 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (footnotes omitted).

349. See Rao, *supra* note 181, at 8 (discussing Locke and Montesquieu because the Framers studied their political theory).

350. See *id.* Much of what Rao relies on are statements about the importance of national legislatures in Republican government. See *id.* at 9 (quoting Locke, who said that it is “in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body”); *id.* (“Rousseau similarly explained, ‘this act of association produces a moral and collective body, composed of as many members as there are voices in the assembly, which receives from this same act its unity, its common *self*, its life, and its will.’” (quoting JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 53 (Robert D. Masters ed., Judith R. Masters trans., St. Martin’s Press, Inc. 1978) (1762)). Another bucket of Rao’s citations points out that legislatures serve as a kind of melting pot in republican government. See *id.* at 10 (“The legislature provides the possibility of uniting a disparate group of people into one society—one government—by providing a forum for negotiation and mediating diverse interests.”).

351. *Id.* at 8.

To Rao, the key design decision was to place legislative power in the hands of a large, public-facing, and bicameral legislature.³⁵² That, combined with strained readings of pre-Founding writers and the idea that the Constitution refers to the legislature in the collective sense (as “the Congress”), amounts to a principle of collectivity that, Rao says, can justify other previously unmade constitutional inferences.³⁵³ For example, Rao infers from these features that the kind of influence lawmakers can wield over agencies through means like appropriations is somehow constitutionally verboten.³⁵⁴ This inference exists almost entirely apart from the congressional scholarship emphasizing these tools’ importance to Congress’s ability to engage in a separation-of-powers contest.³⁵⁵ Because the Constitution requires Congress to act collectively when legislating, any legislative activity that diverts its focus on collective action is suspect.³⁵⁶ Rao emphasizes that the term “*congress*” stems “from the Latin word *congrēdi* or *congressus*,” without telling us the import of that etymology.³⁵⁷ She argues that the Founders intentionally avoided the term “parliament,” but provides no citation for that claim and no explanation for why the decision should matter.³⁵⁸ There’s a certain hand-waving quality to the arguments that are meant to establish the collective Congress. But the point, for our purposes, is just to communicate Rao’s focus on a legislative power that needs to be exercised collectively.

Rao places most of her emphasis on the Founders binding up the power to enact new statutes behind bicameralism and other requirements. That point is, of course, anodyne. But even if the Founders desired to tie up the power of Congress to legislate, Rao seems to proceed to the unheralded point that the Founders meant to tie up all of Congress’s powers into the collective.³⁵⁹ This is one of the biggest differences between Rao and congressional scholars. The latter group recognizes that the Founders were deeply influenced by legislative practices in Parliament, specifically Parliament’s clashes with the Crown.³⁶⁰ That background helped inform a richer blend of powers—the power of the purse, oversight, the contempt power, and the freedom of speech or debate—that Rao’s work

352. *See id.* at 26–31; *see also id.* at 11 (“Collective lawmaking ensures the greatest security for equal application of the laws because it provides a mechanism for negotiating people’s different interests.”).

353. *See id.* at 32–37.

354. Rao, *supra* note 43, at 1467, 1491–92.

355. *See generally* CHAFETZ, *supra* note 42 (arguing that Congress’s hard and soft powers are all necessary to engage the public and the other branches in separation-of-powers contests).

356. *See* Rao, *supra* note 43.

357. Rao, *supra* note 181, at 33.

358. *See id.*

359. *See* Rao, *supra* note 43, at 1465; Rao, *supra* note 181, at 3 (“The Constitution vests all legislative power in Congress, but congressional lawmaking is now often the exception, rather than the rule.” (footnote omitted)).

360. *Compare* CHAFETZ, *supra* note 42, at 4 (explaining that a study of Congress’s powers ought to begin with a discussion of “conflicts between Parliament and the Stuart Crown”), *with* Rao, *supra* note 43, at 1492–95 (justifying the author’s idea of the “collective Congress” with recourse to inferences derived from constitutional text and imputed Founding-Era intent).

ignores.³⁶¹ For example, the Founders were influenced by parliamentary oversight and set out early to operationalize oversight—and its associated powers—in committees.³⁶²

Rao's fixation on collective legislating endangers congressional power. Rao is mostly concerned with legislative productivity, a preoccupation that flows from her idea of what Article I establishes.³⁶³ This is, of course, a perspective opposed to how congressional experts conceive of Congress's role.³⁶⁴ Recently, the congressional scholarship has turned toward focusing on Congress's other powers precisely because lawmaking is subject to judicial review and a presidential veto.³⁶⁵ Because of those constitutional limitations, enacting new statutes will almost always be a dicey means for Congress to do constitutional politics, to engage the other branches of government to win over the public.³⁶⁶ Rao ignores a full conception of Congress's litany of powers, but she also goes much further.

Rao infers from her conception of the collective Congress that Congress's other powers are little more than distractions.³⁶⁷ To Rao, delegations create a feedback loop of appropriations and oversight that devolves power and attention away from lawmaking:

Delegation, however, provides numerous benefits to legislators by allowing them to influence and to control administration. Individual legislators thus have persistent incentives to delegate, because they can serve their personal interests by shaping how agencies exercise their delegated authority. By providing individual opportunities for legislators, delegation realigns the ambitions of congressmen away from Congress and the constitutional lawmaking process.³⁶⁸

The collective Congress depends on the vesting clause of Article I and inferences resulting from bicameralism and presentment.³⁶⁹

Rao never framed the collective Congress as an empirical approach—the work is pure theory. She is calling on that longer strand of literature discussing

361. See CHAFETZ, *supra* note 42, at 2–3 (explaining that Congress's powers encompass more than just legislating).

362. See Chafetz, *supra* note 208, at 537 (discussing the St. Clair hearings in 1792 that were set up to investigate a Native American “defeat of an army force”).

363. See Rao, *supra* note 43, at 1466 & n.5 (referring to the “*constitutional* lawmaking process” (emphasis added)).

364. See CHAFETZ, *supra* note 42, at 2 (“Broadening the scope beyond legislation is essential if one truly hopes to understand Congress’s ability to have an impact on our national political life.”).

365. See *id.* (“After all, legislation must meet Article I, section 7’s bicameralism and presentment requirements . . . [F]or anyone concerned about the power of the other branches or about Congress’s ability to press its own position as against theirs, then, legislation is a singularly unpromising route.”).

366. See *id.*

367. See *supra* note 215 and accompanying text.

368. Rao, *supra* note 43.

369. See *id.* at 1467 (“Just as the Constitution vests executive power in a unitary executive, it vests legislative power in a collective Congress. Members of Congress can exercise their lawmaking power only together, through deliberation and majority (or supermajority) action.”); *supra* note 352 and accompanying text.

lawmakers' incentives,³⁷⁰ but she has no evidence to suggest that delegations inhibit the collective Congress. So it is no surprise to realize that her claims are out of step with history. The lead-up to the enactment of the APA and the Legislative Reorganization Act of 1946³⁷¹ show that lawmakers increasingly fought for Congress despite rampant delegations.³⁷² And in that contest for authority between the branches, lawmaking was the worst available tool for Congress. Congress tried to rein in the administrative state with the Walter-Logan Act, but that bill was vetoed by President Roosevelt.³⁷³ The way Congress could assert its agenda in the national policymaking debate was through oversight, appropriations, and its engagement with the public over the power of agencies.³⁷⁴ Although the ultimate settlement was codified in statutes, that outcome could be achieved only after a decade or more of sustained public engagement—of constitutional politics. And as explained below, Rao's theories about delegations and about congressional motivations do not accurately capture Congress after 1946 either.³⁷⁵

At any rate, Rao's focus on the corrupting influence of delegations obviates all the issues arising from the executive frame. The Madisonian rejoinder is ineffective against Rao's congressional frame precisely because it posits that delegations corrupt congressional incentives.³⁷⁶ The effect of this approach is something like congressional gaslighting.³⁷⁷ Rao frames the judiciary as helping to restore Congress³⁷⁸ while she advocates for gutting Congress's output and restricting its most effective tools for asserting itself.³⁷⁹ And there is nothing hard behind Rao's assertions. It is all framed as a clinical discussion of incentives: "Lawmakers

370. Rao, *supra* note 43, at 1477–79 (collecting citations).

371. *See supra* Section I.B.

372. *See* GRISINGER, *supra* note 116, at 10; *see also supra* note 144 and accompanying text.

373. *See* ROSENBLUM, *supra* note 129 ("Theoretically, Congress also could have sought to rely on the federal courts to supervise administration more thoroughly. However, the Walter-Logan Act was ultimately defeated partly because it took this tack.").

374. *See, e.g.*, GRISINGER, *supra* note 116, at 4–5 ("As Americans increasingly eyed government power itself as the thing to be regulated, members of Congress joined prominent lawyers, academics, and industry groups in criticizing administrators' failure to offer due process to the parties before them.").

375. *See infra* Part IV.

376. *See* Rao, *supra* note 43, at 1466 (arguing that the congressional frame means that Congress may stop minding its institutional prerogatives such that "the Madisonian checks and balances will not prevent excessive delegations"); *id.* at 1467 ("The conventional view conceives of institutional competition between the Congress and the President—but delegations fracture the collective Congress, allowing for collusion between members of Congress and administrative agencies and eroding the structural rivalry that could check excessive delegations.").

377. *See supra* note 31.

378. *See* Rao, *supra* note 43, at 1467 ("Both delegations and polarization create an asymmetry—they diminish Congress by providing members with individual opportunities, while at the same time fortifying the unitary executive and aligning the personal, institutional, and party interests of the President.").

379. *See* *Trump v. Mazars USA, LLP*, 940 F.3d 710, 748–53 (D.C. Cir. 2019) (Rao, J., dissenting) (advocating for a restrictive take on Congress's investigatory powers in the middle of a dispute with the Executive); Rao, *supra* note 43, at 1467 (advocating for a renewed nondelegation doctrine that could be used to fell some as of yet unclear number of federal enactments).

*may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations.*³⁸⁰

Rao's tone of detachment is important here precisely because, as shown below, the literature makes a compelling case that Congress is well-positioned to realize its agenda with tools like appropriations that Rao cavalierly regards as distractions.³⁸¹ Rao's work is not temporally removed from that work on Congress. So it is hard to explain Rao's approach. These issues are beset by Rao's loose approach to methods. Her move to de-emphasize aspects of congressional power such as appropriations flouts Founding-Era expectations about how Congress would carry out its agenda.³⁸² Rao avoided these concerns in her work.

My sense is that Rao's approach, detached from the literature as it may be, speaks to a common lawyerly view of Congress that casts it in a cynical or declinist light. Rao notes that her views are only reinforced by the reality of congressional polarization.³⁸³ And her focus on congressional declinism is mirrored in the academy.³⁸⁴ But beyond declinism, Rao's views of lawmakers' incentives are unmistakably cynical.³⁸⁵ Delegation, she asserts, gives self-interested lawmakers the means to advance their private interests over public ones, "undermin[ing] democratic accountability" in the process.³⁸⁶

Whatever it is that pulls people toward the collective Congress, it has been a successful heuristic. When congressional scholars point out that a Rao-like focus on the collective Congress is doomed to failure, administrative law scholars have doubled down and suggested that lawmaking must be the focus of an effort to restore Congress to its rightful state.³⁸⁷ "The collective Congress," the thinking goes, "must also regularly legislate."³⁸⁸ Although congressional scholars have hardly engaged with Rao's work,³⁸⁹ she successfully changed how even nonideological administrative law scholars think. The congressional role has been

380. Rao, *supra* note 43, at 1466 (emphasis added).

381. *See infra* Part IV.

382. *See, e.g.,* Lawrence, *supra* note 64, at 1064 ("Founding-era documents emphasize the Framers' expectation that Congress's appropriations power would play a critical role in the separation of powers. Contemporary courts and commentators have validated that expectation." (footnote omitted)).

383. *See* Rao, *supra* note 43, at 1467 ("Moreover, party polarization exacerbates the problem by shifting the interests of legislators away from Congress as an institution and toward identification with political party.").

384. *See, e.g., supra* notes 156–61 and accompanying text.

385. *See* Stiglitz, *supra* note 61, at 643 n.41 (citing Rao as an example of a "class of theories argu[ing] that the administrative state represents a cynical ruse perpetrated on voters by elected officials").

386. Rao, *supra* note 43, at 1466, 1492.

387. *See, e.g.,* Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1104–05 (2018) (reviewing CHAFETZ, *supra* note 42).

388. *Id.* at 1105.

389. A review of the citations to Rao's work in the fall of 2022 indicates that her influence is mostly in the administrative law and constitutional law literatures and in administrative law professors' works that touch on Congress. *See, e.g.,* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1380–81, 1381 n.9 (2017) (citing Rao, *supra* note 43, at 1504, for a line about the threat of "administrative collusion").

reduced to a narrow conception of lawmaking and is backed by contested notions that Congress is unproductive.³⁹⁰ Decline and cynicism are now laying the groundwork for a judicial intervention to reorder congressional incentives.

3. Doubling Down

I do not want to overstate Rao's influence, but I do think she served as an important bridge between the academy and the courts. Adam White, who serves as the co-executive director of the center on administrative law Rao founded,³⁹¹ perceived the rise of Americana administrative law and wrote of "the deforming effect that previous Congresses' delegations of power to the executive branch can have on subsequent Congresses."³⁹² White made poignant observations that parallel Rao's doctrinal moves:

Whether individual congressmen vote to delegate broad powers to the executive due to partisan loyalty, or because congressmen expect to obtain greater political benefit from overseeing the executive than from legislating in detail, the result is a Congress that is everywhere extending the sphere of the executive branch's activity, rather than its own.³⁹³

White, to his credit, provided a thicker account of how lawmakers were failing to rein in President Trump within appropriations disputes.³⁹⁴ But the importance of Americana administrative law was not lost on him:

If this alternative view of the relationship between regulation and legislation is accurate, then it has major ramifications for the way that we think of the Nondelegation Doctrine. As Justice Scalia observed in *Mistretta*, conservative judges shy from invoking the Nondelegation Doctrine to strike down statutes broadly delegating regulatory power because they believe that it is better to concede the issue to the legislative process than to assert judicial power on such an indeterminate question. But if Congress's own gridlock is itself *exacerbated* by the courts' hands-off approach, then prudence may counsel in

390. This dichotomy between the congressional and administrative law literatures is illustrated by Christopher Walker's review of Josh Chafetz's book, *Congress's Constitution*. See generally Walker, *supra* note 387. Chafetz argues that to understand Congress's role in the separation of powers, we must turn our focus *away* from a preoccupation with legislating. CHAFETZ, *supra* note 42, at 2 ("For anyone concerned about the power of the other branches or about Congress's ability to press its own position as against theirs, then, legislation is a singularly unpromising route."). Walker, in reviewing Chafetz's book, took issue with this perspective and, with an invocation to Neomi Rao, suggested both that Congress is not legislating enough and that "all of [Congress's legislative powers] exist principally to help facilitate Congress's core legislative activity." Walker, *supra* note 387, at 1105.

391. See Adam J. White, GEO. MASON UNIV.: C. BOYDEN GRAY CTR. (Aug. 7, 2022), <https://administrativestate.gmu.edu/leadership/adam-j-white/> [<https://perma.cc/DNC9-TXTJ>]; *About the Gray Center*, GEO. MASON UNIV.: C. BOYDEN GRAY CTR., <https://administrativestate.gmu.edu/about/> [<https://perma.cc/WP8J-58AV>] (last visited Jan. 20, 2023).

392. White, *supra* note 43.

393. *Id.*

394. See *id.*

favor of judges asserting the nondelegation doctrine more energetically—at least for long enough to help bring Congress out of its cul-de-sac.³⁹⁵

Later, Christopher Walker emphasized in a book review for a work on Congress how important it was to focus on the collective Congress.³⁹⁶ And, of course, Gorsuch went on to cite Rao’s work on the collective Congress to justify his take on Americana administrative law.³⁹⁷

Rao’s work has had an influence on scholars and judges despite there being little hard support for her central claims: that delegations are changing congressional incentives for the worse, that delegations divert attention and power from the collective Congress, and so on.³⁹⁸ But there is a more fundamental issue. Even if we accept all these contentions, no one has adequately explained how enhanced judicial review will fix a wayward Congress.³⁹⁹ On this point, a quote from Richard Pierce is instructive:

Gosh if we create these incentives, we’ll get a completely different [Congress]. That’s equivalent to saying if we put a billion dollars at the end of the hundred-yard dash and tell Dick Pierce if he runs it in 10 seconds he’s got it, Pierce will . . . really start training hard. . . Not gonna happen!⁴⁰⁰

Americana administrative law proceeds on a faith that judicial review can “fix” our politics, but there is nothing to suggest that the Court or the law writ large can fix a body as complex and ever-changing as Congress.⁴⁰¹ The conspicuous failure of nondelegationists to try to back the normative case for Americana administrative law is telling. The project, it seems, has more to do with lawyers’ disdain for Congress and their embrace of judicial self-aggrandizement than in affecting congressional incentives.

IV. CONGRESS AS A LEGISLATURE

Having explored Americana administrative law, this Article now discusses what that zeitgeist obscures. Although a systematic discussion of Congress’s capacities is beyond the scope of this Article, this Part discusses a framework that

395. *Id.*

396. See Walker, *supra* note 387.

397. *Gundy v. United States*, 139 S. Ct. 2116, 2135 n.31 (2019) (Gorsuch, J., dissenting) (citing Rao, *supra* note 43, at 1478).

398. See, e.g., Rao, *supra* note 43, at 1482–84 (asserting that delegations and appropriations divert attention from the “collective Congress” without providing any hard evidence suggesting that lawmakers are less likely to engage in acts of collective lawmaking or, as Rao suggests, are less likely to check federal agencies).

399. Cf. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693, 1736 (2015) (discussing the lack of hard evidence that any of the proposed remedies for political polarization would help the underlying problems).

400. PAPE Panel 1, *supra* note 157, at 34:15 (remarks of Richard J. Pierce, Jr.).

401. Daniel Walters and Elliott Ash recently completed an empirical examination of the potential of the nondelegation doctrine to “change congressional behavior” and found only anemic support for Americana administrative law’s prescriptions. See Walters & Ash, *supra* note 58 (manuscript at 9–11).

can be applied. The best way to treat the pathologies described in this Article is to provide a more wholesome view of what Congress is. Congress is a legislature existing at the end of an Anglo-American experiment that predates the republic.⁴⁰² As scholars of Congress have described in vivid detail, Congress is constantly evolving to the circumstances of partisanship and the separation of powers.⁴⁰³

The likes of Justice Gorsuch and Judge Rao make their case for nondelegation by presuming the existence of some properly functioning Congress that delegations corrupted.⁴⁰⁴ But Congress has delegated from the beginning.⁴⁰⁵ At times, Congress's ability to leave an "imprint" on the nation was itself dependent on its ability to delegate major issues to federal agencies.⁴⁰⁶ Delegations are a critical part of what legislatures do apart from any cynical or self-serving explanations.

As described above, the worrisome draw of Americana administrative law is enhanced by an atmospheric faith in the narrative of congressional decline.⁴⁰⁷ To combat Americana administrative law, it is incumbent on the administrative law literature to begin a conversation with congressional scholars. But discussing congressional decline is a notoriously fraught endeavor.⁴⁰⁸ A good first step for framing this discussion comes from the late-and-great Barbara Sinclair:

[C]riticisms [of Congress] must be evaluated in the context of what we expect of Congress. What do we ask Congress to do? We ask it to pass legislation that is both responsible (i.e., effective in handling the problem at issue) and responsive to majority sentiment, and to do so through a legislative process that is deliberative and inclusive on the one hand and expeditious and decisive on the other. And we ask Congress to do this in public.⁴⁰⁹

In her framing, Sinclair acknowledged that Congress could "never succeed completely" and would accept "inherent contradictions . . . and some tough

402. See generally CHAFETZ, *supra* note 42 (providing rich histories for several legislative powers that go back centuries to parliamentary practice).

403. See generally BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (5th ed. 2017) (describing how Congress responded to polarization by centralizing power in congressional leadership and changing committee and floor tactics).

404. See, e.g., Rao, *supra* note 181, at 3 (laying blame at the feet of the "modern" administrative state's creation without pinpointing when Congress was corrupted or explaining how the first Congresses avoided the administrative state's corrupting influence); *id.* at 77–78.

405. See, e.g., Mortenson & Bagley, *supra* note 54, at 281 ("[E]arly Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct. Many of those laws would have run roughshod over any version of the nondelegation doctrine now endorsed by originalists.").

406. See MAYHEW, *supra* note 44, at 1, 3–4 (arguing that one must approach Congress's historical record with a focus on the "imprint" it has left on various issues); *id.* at 44 (arguing that Congress helped leave an imprint on post-Civil War industrial growth by creating and delegating to new federal agencies like the Interstate Commerce Commission and the Federal Reserve Board).

407. See *supra* Part III.

408. See generally Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703 (grappling with whether declinist narratives are supported by the evidence).

409. *Id.* at 704.

trade-offs.”⁴¹⁰ But it was important to her to avoid kitsch attachments to an idealized Congress that probably never existed in the first place.⁴¹¹ To address the concerns caused by Americana administrative law, with its focus on lawmakers’ incentives, we might add to Sinclair’s formulation that we ask that Congress be able to mind the store on delegations and its other institutional prerogatives. If one’s focus is on constitutional politics, that necessarily requires that Congress be able to engage the other branches for the public’s support.

This Part focuses on Congress’s motivations to guard its own prerogatives and its ability to do so. As discussed above, the congressional literature has made a compelling case that scholars must expand their focus beyond legislating, to Congress’s “hard” and “soft” powers.⁴¹² This perspective avoids Rao’s obsession with the legislative productivity of the collective Congress in favor of a richer view of how Congress can push and pull in a separation-of-powers framework.⁴¹³

A focus on a specific kind of legislative capacity is required. Institutional capacity “is the ability of an institution to execute the core functions of its mission.”⁴¹⁴ Congressional decline, properly posed, is a question of legislative capacity. But various kinds of capacity matter. One recent typology distinguishes between “*resource capacity*” and “*policymaking capacity*.”⁴¹⁵ The former is the tangible kind of legislative capacity focusing on staff, funds, and other human resources.⁴¹⁶ Policymaking capacity is concerned with Congress’s ability to “influence the development and implementation of public policy.”⁴¹⁷ These two measures of legislative capacity will help frame the discussion about Congress’s ability to mind the store on delegations and realize its agenda despite executive and judicial power plays.

This first Section below explains that Congress is constantly evolving, changing its internal capacities and operations to better achieve its agenda. Because Congress is responding to external stimuli larger than any public law doctrine, the upshot of this perspective is that courts and scholars cannot predictably reshape Congress with doctrinal fixes. The second Section provides a short sketch of Congress’s capacities to help establish that it is reasonably well-situated to achieve its agenda. Both Sections are meant to be provisional—this Article only means to suggest that Congress’s current standing is not nearly as dire as suggested by the narrative of congressional declinism.

410. *Id.*

411. *See id.* (“Of late, the 1950s Congress has made a comeback, being portrayed as some sort of golden age of effective bipartisan decision making. In fact, Congress in the 1950s was a body controlled by independent and often conservative committee chairs, chosen on the basis of seniority and not accountable to anyone.”).

412. *See, e.g.,* CHAFETZ, *supra* note 42, at 2–3.

413. *See id.*

414. BOLTON & THROWER, *supra* note 285, at 6.

415. *Id.*

416. *See id.*

417. *Id.*

A. CONGRESS AS AN EVOLVING ENTITY

One distinctive feature of Americana administrative law is its ability to pull on widely held notions of congressional decline.⁴¹⁸ Elite lawyers have bought into the notion that Congress is declining across several metrics.⁴¹⁹ Whether the focus is on polarization, executive encroachment, or legislative productivity, these concerns are missing the point. The one thing that great scholars of Congress have shown is that Congress is constantly evolving to face new challenges.⁴²⁰ And, importantly, that evolution is organic and not the product of judicial meddling.⁴²¹ While declinist concerns ignore Congress's ability to respond to external stimuli, they also downplay how Congress has already dealt with the same issues in the past.

One of Barbara Sinclair's many accomplishments was the idea of "unorthodox lawmaking."⁴²² To Sinclair, Congress had evolved quickly with the onset of hyperpolarization and party-based homogeneity. Although the 1950s Congress is often portrayed as a lost golden age, it was "controlled by independent and often conservative committee chairs, chosen on the basis of seniority and not accountable to anyone."⁴²³ Power was in the congressional committees.⁴²⁴ That system allowed for some significant legislation (think the legislation establishing the federal highway system) to pass on a bipartisan basis.⁴²⁵ But by the 1970s, "[t]he internal structure of both chambers had been transformed."⁴²⁶ Congress increasingly relied on broader participation from junior members inside and outside of committees.⁴²⁷ With the devolution toward individual members, there was a relative decline in the power of the committee chairs and, eventually, a concomitant rise in party leadership's authority.⁴²⁸ The 1980s were defined by "the emergence in the House of strong, policy-oriented party leadership that was more involved and more decisive in organizing the party and chamber, setting the House agenda,

418. See *supra* Part II.

419. See *supra* notes 20–37 and accompanying text.

420. See generally CHAFETZ, *supra* note 42 (providing thick origin stories for a long list of congressional powers, each demonstrating that both Parliament and Congress developed these powers over time to engage the public and compete in a separation-of-powers dynamic).

421. The examples that Chafetz provides were not, à la Gorsuch, the product of judicial meddling. See, e.g., *id.* at 45–49 (discussing the development of the power of the purse as the result of clashes between Parliament and the Crown). To the contrary, Chafetz has been clear that the Supreme Court has not always served to protect Congress's interests in conflicts with the Executive. See *Article One Hearing*, *supra* note 295 (statement of Professor Josh Chafetz) ("[F]rankly, the Federal judiciary has been hostile to Congress for decades. It has been hostile to any kind of assertion of congressional power . . . [T]he Federal judiciary is pro executive [sic] and anti-Congress and it has been for decades.").

422. See generally SINCLAIR, *supra* note 403 (introducing the idea of "unorthodox lawmaking" to describe our contemporary leadership-led Congress that deviates in ways procedural and substantive from the realities of the 1950s-era Congress).

423. Sinclair, *supra* note 408, at 704.

424. See *id.* at 704–05.

425. See *id.* at 705.

426. *Id.*

427. See *id.* at 706.

428. See *id.*

and determining legislative outcomes.⁴²⁹ Sinclair's insight was that ideologically homogenous parties have every incentive to cede maximum authority to leadership.⁴³⁰

Sinclair's work reveals that Congress evolved in response to ideological polarization. Noticeably, Sinclair posited that Congress's evolution was motivated by institutional goals. Members would centralize power in leadership precisely because they needed to achieve their agendas in a period of polarization.⁴³¹ Sinclair's work focused on the 1950s through the present day.⁴³² Although Congress delegated rampantly during that period, lawmakers were still motivated to structure Congress around their collective goals.⁴³³ And while some may object to the leadership-focused mode that has beset Congress on accountability or transparency grounds, it is hard to imagine what judicial review could do to reorder congressional incentives without a concomitant decline in polarization.

Congress evolved in response to other external facts besides polarization. Although nondelegationists emphasize the threat of executive aggrandizement, Congress evolved to defend its prerogatives while it delegated to build the administrative state. In an excellent recent article, Jesse Cross and Abbe Gluck built out a detailed account of the "congressional bureaucracy."⁴³⁴ Cross and Gluck discussed a host of nonpartisan offices that "provide[] . . . specialized expertise that helps make congressional lawmaking possible."⁴³⁵ This bureaucracy was "explicitly founded . . . so that Congress could reclaim and safeguard its own powers against an executive branch that was itself using knowledge and expertise to encroach on the legislative process and congressional autonomy."⁴³⁶ Congress, acutely aware of its diminishing comparative capacities vis-à-vis the Executive Branch, built up a cadre of agency-like offices that would help Congress maintain its prerogatives.⁴³⁷ Cross and Gluck focus on nine institutions within the bureaucracy, including the Congressional Research Service (CRS), the House and Senate Office of the Legislative Counsel, and the Office of the Law Revision

429. *Id.*

430. *See id.* ("When the majority party is homogenous, its members have the incentive to grant the Speaker significant new powers and resources and to allow her to use them aggressively, because the legislation she will pass through these powers and resources is broadly supported in the party.")

431. *See id.* at 706–07.

432. *See id.* at 703 (comparing contemporary Congresses to the Congresses of the 1950s and concluding congressional pessimism is overblown). *But see* 703–04 (acknowledging that recent events have tested the author's optimism).

433. *Compare id.* at 705–07 (arguing that after the 1950s, power in Congress was devolved away from committee chairs, first toward individual members and then centralized in the leadership), with Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1109–10 (2021) (diagnosing an increase in delegations from the 1960s onwards and a parallel change in the character of Congress's delegations toward the expansive).

434. *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1543 (2020).

435. *Id.* at 1543–44.

436. *Id.* at 1546.

437. *See id.*

Counsel (OLRC).⁴³⁸ These offices now do the necessary work to enable legislating in a professional and nonpartisan fashion.⁴³⁹ As Cross and Gluck concluded, the congressional bureaucracy belies congressional declinism.⁴⁴⁰ Congress has—in a century in which delegations were rampant—been sufficiently motivated by its own institutional interests to build a sprawling bureaucracy, bring expertise into the legislative process early, and achieve a “salutary *internal separation of powers*” dispersing power internally to nonpartisan officials.⁴⁴¹

The Cross–Gluck vision also problematizes Rao’s collective Congress. To Rao, delegations give lawmakers too many opportunities to avoid the collective job of legislating.⁴⁴² But Congress, staring down the barrel of delegations and an increasingly powerful Executive Branch, decided to devolve power internally and in a way that was not public facing.⁴⁴³ And no one today would seriously dispute the effectiveness of that decision; the CRS and the OLRC provide *critical* support for lawmakers.⁴⁴⁴ If anything, the call of most serious students of Congress is to increase legislative capacity by strengthening the congressional bureaucracy.⁴⁴⁵ That Rao is second-guessing the practical experience of legislators expressly operating in the interest of Congress should prompt skepticism for Rao’s approach. The way Congress fights back against the other branches is not through the collective Congress but by building its own capacities.

The reason I am focusing on Sinclair, Cross, and Gluck is because they encapsulate something that scholars on Congress know intuitively but which can be missed by scholars in other areas: Congress is an evolving body that exists at the end of a centuries-long Anglo-American project in legislating.⁴⁴⁶ Josh Chafetz has provided a rich catalogue of Congress’s extensive powers and can trace many to parliamentary practices that predate the republic by centuries.⁴⁴⁷ Noticeably, these powers do not stem from judicial nudging; Congress developed them to respond to changes in the separation of powers and to maintain Congress’s

438. *See id.* at 1544.

439. *See id.* at 1613–16 (discussing the virtue of nonpartisanship that pervades the congressional bureaucracy).

440. *See id.* at 1547 (“[T]he bureaucracy offers something of an antidote to the rampant cynicism about Congress as an institution.”).

441. *Id.*; *see also id.* at 1608 (“Congress’s decisions to restructure itself via nonpartisan offices in the 1940s and 1970s were primarily motivated by its desire to check executive power and reassert itself in the lawmaking, budget, tax, and oversight processes.”); *id.* (“But Congress’s internal institutions disperse lawmaking power within Congress even more, by removing swaths of it from members and political staff entirely. Simultaneously, the congressional bureaucracy prevents that power from being centralized in any single political office.”).

442. *See* Rao, *supra* note 43.

443. *See* Cross & Gluck, *supra* note 434, at 1547 (“But despite the recent changes to the modern legislative process, the congressional bureaucracy still does its work—it just happens at points earlier in the process and further from the public eye.”).

444. *See id.* at 1560 (noting the importance of the CRS as “Congress’s ‘think tank’”).

445. *See, e.g., id.* at 1565 (noting, with dismay, the failure of Congress to expand its own capacity).

446. *See, e.g.,* CHAFETZ, *supra* note 42, at 45–50 (showing how the parliamentary origins “power of the purse” evolved against a backdrop of antagonism between the English crown and Parliament).

447. *See, e.g., id.* at 152–67 (similarly providing roots for the contempt power in parliamentary tussles with the King).

role.⁴⁴⁸ One reason my mind rebels against the point of Americana administrative law is precisely because of this history. Although it is natural for lawyers to reach for the courts for all kinds of social ills, a call for judicial remedies ignores our best accounts of what motivates Congress. And the judiciary is just another player in separation-of-powers controversies.⁴⁴⁹ We cannot fix Congress's ability to fight for itself in our system by empowering its competitors.⁴⁵⁰

B. CONGRESSIONAL CAPACITY: WHAT WE KNOW ABOUT CONGRESS

The previous Section discussed the evolving nature of Congress. This Section means to provide a roadmap for future scholarship. To combat Americana administrative law, the administrative law scholarship ought to start dealing more explicitly with congressional scholarship, specifically the works focused on Congress's motivations to assert itself and its ability to do so.⁴⁵¹ That first question about motives is a difficult one but it can be answered with thick accounts of Congress persisting and evolving to realize its agenda alongside the rise of the administrative state.⁴⁵² The second question focuses on congressional capacity.⁴⁵³

The administrative law literature is in the grips of thin accounts of legislative motivations and congressional capacity.⁴⁵⁴ Administrative law would be better served by relying on congressional scholars. There is plenty of work to be done, but several scholars are already providing a base for future study. They have provided accounts of congressional productivity, partisanship, oversight, and appropriations that push back on much of what is baked into Americana administrative law.⁴⁵⁵

Institutional capacity refers to “the ability of an institution to execute the core function of its mission.”⁴⁵⁶ Those studying congressional capacity focus on the

448. See, e.g., *id.* at 64–65 (explaining that Congress responded to the problem of executive impoundments by enacting the Impoundment Control Act); *id.* at 175 (demonstrating that Congress began experimenting with new criminal liabilities because of an increase in its workload and to keep up with the evolving circumstances of the nineteenth century); *id.* at 215–16 (showing how Senator Mike Gravel used the speech and debate privilege to read portions of the Pentagon Papers into the Congressional Record, thereby counteracting executive secrecy in the foreign affairs context); *id.* at 302 (arguing in summation that Congress's powers have allowed lawmakers to engage the public and increase its own powers vis-à-vis other branches).

449. See Chafetz, *supra* note 44, at 128 (“Of course, this is nonsense: there are *three* branches in the federal system, and there is no reason to think that one of them is free of institutional interests and agendas merely by virtue of the fact that its members wear robes.”).

450. Cf. Posner, *supra* note 283, at 4, 12–13, 41–42 (noting that judicial attempts at balancing the power between different branches are fraught).

451. See, e.g., CHAFETZ, *supra* note 42, at 1–2.

452. See *supra* Part I (discussing the constitutional politics of the early half of the twentieth century with a focus on Congress's role in an eventual settlement in 1946); *supra* Section IV.A (discussing an approach to Congress that emphasizes its history of evolving in response to external stimuli).

453. See BOLTON & THROWER, *supra* note 285, at 6.

454. See *supra* Section I.A.

455. See, e.g., *infra* Sections IV.B.1–3.

456. BOLTON & THROWER, *supra* note 285, at 6.

ability of lawmakers to legislate.⁴⁵⁷ But they also focus on the functions of representation and constituent services.⁴⁵⁸ In a recent book about congressional capacity, the authors distinguished between “resource capacity” and “policymaking capacity.”⁴⁵⁹ The former concept refers to “the tangible materials and human capital legislatures can acquire, usually through financial means, to carry out their core tasks.”⁴⁶⁰ It is the tangible infrastructure of lawmaking. Policymaking capacity, by comparison, refers to “the opportunities afforded to legislatures to influence the development and implementation of public policy.”⁴⁶¹ Here, congressional scholars focus on how the institutional Congress structures the ability of lawmakers to influence policymaking: “[o]versight hearings, agenda power, legislative vetoes, appointment and confirmation powers.”⁴⁶²

One way to examine institutional capacity is by focusing on the congressional bureaucracy.⁴⁶³ There is too little work discussing the interrelationships between Congress’s two bureaucracies—the congressional bureaucracy and the administrative state. By studying the congressional bureaucracy’s effect on Congress’s agenda vis-à-vis federal agencies, administrative law scholars could better understand Congress’s institutional capacities across time.

Administrative law scholars might help deflate the pull of Americana administrative law by pivoting toward the congressional scholarship on productivity, oversight, and appropriations.⁴⁶⁴ Contrary to declinists’ contentions, all three areas show reasons to think that Congress’s policymaking capacity still allows it to maintain its role vis-à-vis the administrative state and the Executive Branch more broadly.

1. Productivity

Congressional declinism is often framed in terms of legislative productivity—of enacting new statutes.⁴⁶⁵ Even where that is not the explicit criterion, Americana administrative law is often implicitly framed around declining congressional productivity. But declinist works and Americana administrative law are relying on fraught ideas about congressional productivity.

Productivity is a transparently divisive subject in the literature on Congress.⁴⁶⁶ Recently, Sean Farhang has cast some cold water on the declinist narrative.⁴⁶⁷ As Farhang noted, “legislative productivity is generally measured by political

457. *See id.*

458. *See id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.* at 7.

463. *See generally* Cross & Gluck, *supra* note 434 (discussing the congressional bureaucracy, a set of nonpartisan offices that help Congress legislate).

464. *See infra* Sections IV.B.1–3.

465. *See, e.g.,* McGinnis & Rappaport, *supra* note 43, at 7–8.

466. *See* Binder, *supra* note 63, at 86 (noting that “legislative scholars disagree about the nature of Congress’s legislative challenges” and are divided on the issue of legislative gridlock).

467. *See generally* Farhang, *supra* note 62.

scientists as a function of the number of statutes passed per Congress in combination with some measure of the laws' significance.⁴⁶⁸ Under that metric, Farhang agreed that the number of significant statutes has been declining amid rising rates of polarization.⁴⁶⁹ But Farhang found that Congress has simply been fitting more substantive lawmaking content into fewer statutes.⁴⁷⁰

Under Farhang's first and crudest alternative measure, estimated number of pages in "significant regulatory laws enacted per Congress," productivity has kept pace with polarization.⁴⁷¹ He entertained the possibility that "[p]erhaps polarization's effect on the legislative process generates longer bills without correspondingly greater regulatory substance."⁴⁷² Next, Farhang examined a more complex set of data dealing with legislative commands⁴⁷³ and found "long-run growth in productivity in parallel with growing polarization."⁴⁷⁴ The third and final measure Farhang used focused on the degree of specificity of regulatory content.⁴⁷⁵ Farhang again found that the specificity figure rose in tandem with polarization.⁴⁷⁶ The conclusion was clear:

Legislative productivity is a complicated concept. These data suggest that, over time, *Congress packed more substantive regulatory policy into fewer statutes*. It was less productive in some ways, and more productive in others. The literature on the effect of polarization on legislative productivity and oversight, and by direct extension the effect of polarization on administrative power, would be served by a more systematic theoretical and empirical grasp of the meaning of these multiple dimensions of legislative productivity.⁴⁷⁷

Farhang's work illustrates a trend toward nuance on the question of legislative productivity. Several years ago, Sarah Binder used an approach for measuring productivity that focused on "stalemate[s]" on issues raised in Congress.⁴⁷⁸ Binder concluded that levels of legislative deadlock have risen but that they remain within historically normal bounds.⁴⁷⁹

468. *Id.* at 52.

469. *See id.* at 52–53.

470. *See id.* at 56.

471. *Id.* at 53.

472. *Id.* at 53–54.

473. *See id.* at 54 ("A second approach to legislative content focuses on actual regulatory commands . . . [C]oders read each law and counted each separate regulatory command, producing a variable measuring the sum of discrete requirements and prohibitions imposed on regulated entities.").

474. *Id.*

475. *See id.* ("The specificity variable is constructed as a word count with respect to *only the portions of each statute that lay out the substantive regulatory policy specifying what conduct is prohibited or mandated* The specificity measure registers important differences between a spare command and one with extensive elaboration." (footnote omitted)).

476. *See id.* ("By this measure, we again see long-run growth in productivity in parallel with growing polarization.").

477. *Id.* at 56 (emphasis added).

478. *See Binder, supra* note 63, at 91.

479. *See id.* at 91, 92–93.

2. Oversight

It is just as important to emphasize the tools that Congress can use to realize its agenda. A recent article by Brian Feinstein makes the case that oversight is one such tool.⁴⁸⁰ Feinstein is skeptical that lawmaking can provide a complete picture of Congress's tools in separation-of-powers disputes.⁴⁸¹ He used a dataset of 14,431 agency "infractions" to test whether agencies respond to oversight.⁴⁸² Feinstein found that oversight hearings provide "Congress with a powerful tool to influence administration."⁴⁸³ Oversight "change[s] agency behavior for a statistically significant 18.5% of infractions, relative to otherwise similar infractions for which oversight does not occur."⁴⁸⁴ One relevant finding is that oversight is shaped by the preferences of Congress and the relevant agency.⁴⁸⁵ "Essentially, committees—mindful that their parent chamber's preferences may differ from their own—make strategic decisions concerning which agencies they take to task and which they ignore."⁴⁸⁶ As Feinstein notes, this "subtle majoritarian dynamic" offers a "rejoinder" to scholars like Rao who emphasize how delegations and their resulting oversight efforts devolve attention or power away from the collective Congress.⁴⁸⁷

3. Appropriations

The power of the purse is one of the toughest congressional tools to get one's arms around. Political scientists and congressional scholars have developed a rich body of scholarship discussing the practices governing appropriations.⁴⁸⁸ But the appropriation power has been "marginaliz[ed]" in public law scholarship, "which has largely ignored issues of agency funding."⁴⁸⁹ Recently, however, there have been a few works that provide models for future research.

480. See generally Feinstein, *supra* note 64.

481. In his article, Feinstein stated:

When scholars typically discuss Congress's role, they tend to focus on [Congress's] well-known, direct powers: primarily its lawmaking function, along with appropriations and appointments . . . [Y]et mechanisms, like oversight, that lie beyond those delineated in the Constitution remain underappreciated—despite the significant resources that Congress expends performing these functions. Given this incomplete picture, it is not surprising that the received wisdom holds that Congress's role in policymaking, relative to that of the President, is diminished.

Id. at 1190 (footnotes omitted).

482. *Id.* at 1191.

483. *Id.*

484. *Id.* at 1192.

485. See *id.* at 1191–92.

486. *Id.* at 1191.

487. *Id.* at 1240–41.

488. E.g., RICHARD F. FENNO, JR., *THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS* (1966); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991).

489. Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1082 (2021) (citing Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2186 (2016)).

One such recent work was Matthew Lawrence's article on "disappropriation."⁴⁹⁰ Lawrence provided a long history of a rising trend: Congress "has repeatedly failed to appropriate funds necessary for the government to honor permanent, statutory payment commitments (or entitlements), thereby forcing the government to break those commitments."⁴⁹¹ He suggests that such disappropriations are a natural result when Congress "creat[es] permanent but temporarily funded commitments" that pits its "legislative power to command payment in dissonance with its appropriations power to permit expenditure."⁴⁹² But importantly for this Article, disappropriations preserve a majoritarian congressional influence over executive implementation and leadership control.⁴⁹³ This area of the literature is embryonic, but Lawrence's work suggests that Congress's trend toward disappropriations preserves its authority vis-à-vis the Executive Branch. It also puts pressure on Rao's theory that delegations pervert congressional incentives and devolve attention and power away from the collective Congress.⁴⁹⁴

4. Last Thoughts on the Collective Congress

Parts of the literature discussed above place pressure on key parts of Rao's collective Congress. At the same time, the collective Congress lacks support in the literature. For example, a recent paper evaluated constituent services, specifically focusing on a dataset that included thousands of congressional requests to federal agencies.⁴⁹⁵ The authors asked whether lawmakers in Congress spend new resources on constituent services as they accrue experience and seniority.⁴⁹⁶ Someone with Rao's approach might suspect that lawmakers spend new resources on constituent services because of the incentives Rao describes.⁴⁹⁷ To the contrary, the authors of the study concluded that lawmakers devote a greater share of their resources to lawmaking as they gain experience.⁴⁹⁸ This conclusion cuts against the collective Congress. When given the resources, lawmakers today will devote them toward the substance of lawmaking, regardless of delegations.

490. See Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 1, 4–5 (2020).

491. *Id.* at 4 (footnote omitted).

492. *Id.* at 6.

493. See *id.*

494. See *supra* notes 362–69 and accompanying text.

495. See generally Devin Judge-Lord, Justin Grimmer & Eleanor Neff Powell, *The Effects of Shifting Priorities and Capacity on Policy Work and Constituency Service: Evidence from a Census of Legislator Requests to U.S. Federal Agencies* (Apr. 15, 2022) (unpublished manuscript), <https://judgelord.github.io/corr/corr.pdf> [<https://perma.cc/ER3K-WYB3>].

496. See *id.* at 3.

497. See Rao, *supra* note 43, at 1481 (noting that delegations free up time for lawmakers to devote more time to constituent services rather than engage in lawmaking).

498. See Judge-Lord et al., *supra* note 495, at 3 ("Legislators increasingly prioritize policy work as they gain institutional power, but the capacity they gain allows them to increase their volume of policy work without decreasing the volume of constituency service."); *id.* at 4 ("[W]e find evidence that legislators prioritize policy work as they acquire institutional power.").

* * *

I have framed much of this Part with caution because Congress is such a complicated and dynamic body. But the literature leaves me confident in two things. First, law professors should not traffic in declinist or cynical narratives about Congress. A blithe acceptance of those narratives, let alone a call for judicial self-aggrandizement, is not supported by the full record of congressional scholarship. Second, Rao's collective Congress undermines a complete approach to Congress. Apart from the bizarre methodological bases for that idea, there is a lack of evidence backing up her simplest claim: that delegations devolve attention or power from the collective Congress. The powers that Rao is most skeptical of are the ones that give Congress a fighting chance in the twenty-first century.

CONCLUSION

Just a few months after the vaccine-or-test case, in *West Virginia v. EPA*, the Supreme Court curtailed a nonexistent program that would have reduced greenhouse gas emissions under authority vested in the EPA by Congress in the Clean Air Act.⁴⁹⁹ The Court held that although the plain meaning of the text of the Clean Air Act would have allowed for the hypothesized agency action, the text must give way to the major questions doctrine.⁵⁰⁰ This time, the Court did not dwell on justifications. It framed its decision, again, on an imputed and flamboyantly fictional account of how Congress legislates.⁵⁰¹ For his part, Justice Gorsuch wrote separately concurring in the outcome.⁵⁰² But Gorsuch's concurrence lacked the flair of his work in either *Gundy* or the vaccine-or-test case. Gorsuch still believed that the major questions doctrine served constitutional ends, but there was no point in banging everyone over the head with that connection. The ends of Americana administrative law can and have been met by quieter, more inconspicuous means.⁵⁰³

We have reached the high point of Americana administrative law, when the Court's antipathy for Congress can be discreetly framed as a matter of stare decisis.⁵⁰⁴ Although the roots of Americana administrative law are in nondelegation,⁵⁰⁵ the major questions doctrine offers a more discreet alternative for judicial self-aggrandizement at Congress's expense. To overcome this status quo, this Article has documented the conservative legal movement's pitch for judicial self-aggrandizement over many decades and in the opinions of the conservative

499. 142 S. Ct. 2587, 2615–16 (2022).

500. *See id.* at 2608, 2614.

501. *See id.* at 2608, 2610 (discussing the major questions doctrine but ignoring all criticism of its facially neutral premise).

502. *See id.* at 2616 (Gorsuch, J., concurring).

503. *See id.* at 2616–18 (framing the major questions doctrine with constitutional roots).

504. Despite torrents of criticism after the vaccine-or-test case, the majority saw no need to justify the core claim of its major questions doctrine, which few have defended—that Congress speaks clearly when legislating on major questions. *See id.* at 2609 (majority opinion).

505. *See supra* Section III.B (discussing Americana administrative law as part of nondelegationists' shift of focus toward congressional declinism).

Justices. Americana administrative law purposely weaponizes a declinist and cynical take on Congress to justify the accretion of power in the judiciary. We are just now unpacking the consequences of this decisive reallocation of decision-making authority.⁵⁰⁶ Nonetheless, this Article argues that we can fix much of what ails our public law doctrine by adopting a more realistic view of Congress. Necessary to this tonic is the pride of place that must be given to scholars of Congress and their work. Gone are the days when administrative law scholars could safely opine on their ability to reform Congress with doctrinal fixes. If Americana administrative law is to be replaced, the administrative law field must give up the pretense that it can somehow diagnose and treat whatever may be ailing a body as complex as Congress. And much the same can be said for the Supreme Court, which only fleetingly pretends to be maintaining its historical role as Congress's agent in a scheme of legislative supremacy.

506. As two scholars recently stated:

The Court's new approach allows political parties and political movements more broadly to effectively amend otherwise broad regulatory statutes outside of the formal legislative process by generating controversy surrounding an agency policy. The new major questions doctrine provides additional mechanisms for polarization by judicially solidifying polarization into the courts' interpretation of statutes. It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. And it operates as a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective.

Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 1) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 [<https://perma.cc/B7H6-G4AF>]).