Building the Judiciary:
William Howard Taft and the Politics of Institutional Development

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Introduction

Juristocracy, as we know from the work of Ran Hirschl and others, now affects power, politics, and public policy in a variety of democratic systems across the globe.[1] The very notion of "juristocracy," the very possibility of rule by judges, however, assumes that courts and judges are institutionally equipped to rule—or, at the very least, that they can or will become so. This assumption is not only unspoken but also unexplored. In other words, in seeking to understand *how* judges rule, we have largely neglected the conditions that make it possible *for* judges to rule. Thus, although there are accounts to explain how and why juristocracy emerges, the political consequences of it, its effect on individual rights or structures of power, and the critical role played by judicial review, there is little attention paid to the *structural* or *institutional foundations* of juristocracy.

Part of the problem is that political scientists ostensibly think of courts as institutionally "thin." That is to say, they think of courts as lacking the complex institutional features—actors, structures, and rules—that make legislatures, executives, and bureaucracies worth studying. While the executive branch has a vast federal bureaucracy comprising layers of political appointees and civil servants and the legislative branch has a hierarchical system of committees and sub-committees, the judicial branch has only some courts, some judges, and some clerks—or so the lack of attention to the institutional context of the judiciary would have us believe. But the judiciary is not as institutionally thin as a first glance might suggest. Indeed, the construction of judicial power and authority—the *building* of judiciaries as governing institutions—is both politically determined and politically consequential. Moreover, it involves more than simply constitutional decisions or the exercise of judicial review. In fact, the political construction of the judiciary as an institution is antecedent to the political construction of judicial review; the former undergirds the latter, making its existence politically viable as well as potentially powerful. In what follows, I attempt to provide a brief introduction to the notion of "judiciary-building" and, applying Daniel P. Carpenter's work on bureaucratic autonomy to the judicial reforms of William Howard Taft in the 1920s, explore a single moment in the continuing and contested process of building the American judiciary.

Building the Judiciary

Looking back at the early republic, we see that the development of a powerful, activist, interventionist third branch of government was far from a foregone conclusion. Indeed, building the American judiciary was a continually contested political process. The story is one of a series of political and legal battles over the contour of the judicial power and the institutional structure of the judicial branch. It is a story about the politics of courts

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[1] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions," *Law and Social Inquiry* 25 (2000): 91-148.

entering new legal arenas, gaining autonomy, and conserving or expanding influence. In short, it is a story about the politics of institutional development. At present, we have developmental accounts of the bureaucracy and administrative state,[2] Congress,[3] and the presidency,[4] but not of the judiciary.[5] There are, of course, many narratives about the growth or political foundations of judicial power, but they often attribute the development of judicial authority to landmark constitutional law cases or, more recently, focus the majority of their attention on the development of the power of judicial review.[6] A focus on constitutional law and judicial review is certainly understandable, but it nonetheless obscures (or ignores?) the ways in which the judiciary, much like its rival political institutions, was built piece-by-piece, from the ground up, as part and parcel of American political development and state-building.

What does it mean to "build" the judiciary? If state-building is the process by which "government officials seeking to maintain power and legitimacy try to mold institutional capacities in response to an ever-changing environment,"[7] then judiciary-building, by extension, is merely this process as it relates to the construction, consolidation, expansion, or reduction of the institutional capacities and structural features of the judicial branch. Several features of the institutional judiciary are relevant here: standing, jurisdiction, expansion or contraction of courts, judicial discretion, hierarchy or centralization in the court system, rules governing judicial procedure. To be sure, political scientists have occasionally touched on these concerns,[8] but we still lack a holistic narrative about the historical processes

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[2] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*; Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge: Cambridge University Press, 1991); Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton, NJ: Princeton University Press, 2001).

[3] Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton, NJ: Princeton University Press, 2001).

[4] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Harvard University Press, 1997).

[5] One attempt that *might* be placed under this rubric is Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, third edition – 2000). For an excellent history focusing on similar themes in a specific era, see Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: The University of Chicago Press, 1968).

[6] See, for example, Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35-73; Mark A. Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Review," *Constitutional Commentary* 12 (1995): 67-92; Mark A. Graber "Establishing Judicial Review?: *Schooner Peggy* and the Early Marshall Court" *Political Research Quarterly* 51 (1998): 221-239; Mark A. Graber, "The Problematic Establishment of Judicial Review," in *The Supreme Court and American Politics: New Institutionalist Approaches*, eds. Howard Gillman and Cornell Clayton (Lawrence, Kansas: University Press of Kansas, 1999); Keith E. Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," *Polity* 33 (2001): 365-395; Keith E. Whittington, *The Political Foundations of Judicial Supremacy* (Princeton, NJ: Princeton University Press, forthcoming). For two examples of the quantitative judicial politics literature on the subject, see John M. De Figueiredo and Emerson H. Tiller, "Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary," *Journal of Law and Economics* 39 (1996): 435-462; Pablo Spiller and Emerson H. Tiller, "Invitations to Override: Congressional Reversals of Supreme Court Decisions," *International Review of Law and Economics* 16 (1996): 503-521.

[7] Skowronek, *Building a New American State*, 10.

[8] See, especially, Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *American Political Science Review* 96 (2002): 511-524; Karen Orren, "Standing to Sue: Interest Group Conflict in the Federal Courts," *American Political Science Review* 70 (1976): 723-741. Also see Ken I. Kersch, "The Reconstruction of Constitutional Privacy Rights and the New American State," *Studies in American Political Development* 16 (2002): 61-87; Paul Frymer, "Acting When Elected

contributing to the building of the judiciary as an autonomous institution. Examining any single feature in isolation from the others may offer the lineage of a particular feature over time, but it fails to account for the dimensions and extent of judicial power at any given time. In other words, we may gain a detailed understanding of individual building blocks of judicial power, but we have little sense of what those blocks are actually building. In order to gain a more comprehensive picture of judicial power, we must conceptualize standing, jurisdiction, and the other features as part of an institutional configuration. (Of course, this is not to say that such building blocks must develop uniformly or with a consistent goal in mind; indeed, in all likelihood, they do not. Standing may be broadened just as jurisdiction is narrowed, the judiciary centralized even as it is expanded). Understanding the configuration of these features offers the possibility of a more synthetic view of judicial power both at individual moments in history and across the span of American political history.

Taft's Reforms

One particularly critical moment in the building of the American judiciary occurred when Chief Justice William Howard Taft sought congressional approval to reform the judiciary in the early 1920s.[9] By the time Taft assumed the Chief Justiceship in 1921, the federal courts were in "dire need of modernization." They were highly decentralized, using outmoded procedures (such as automatic appeals to the Supreme Court), and suffering from "clogged dockets and delayed judgments."[10] In less than a decade, the criminal caseload of the federal judiciary had swelled by nearly 800%.[11] Several sources conspired to contribute to the massive increase in litigation: increased government regulation of the national economy; the growing federalization of crime (narcotics, smuggling, auto-theft, and white-slave trafficking); the first cases of income tax violations; the prosecution of espionage cases lingering from World War I; the rise in civil litigation from cancelled wartime contracts; and, of course, with the ratification of the Eighteenth Amendment (Prohibition) and the passage of the Volstead Act, prosecutions against organized crime and alcohol distribution.[12] Constitutional issues were increasingly buried under minor ones. At the Supreme Court alone, the average time from filing to hearing was more than fourteen months,[13] causing Taft

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Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85," *American Political Science Review* 97 (2003): 483-499. For broader overviews of judicial administration generally, see Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: The MacMillan Company, 1928); Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton, NJ: Princeton University Press, 1973).

[9] For the full story of Taft's reform effort, I draw largely from Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (Lanham, MD: University Press of America, 1984). See also, Walter F. Murphy, "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," 1961 *Sup. Ct. Rev. 159* (1961); Walter F. Murphy, "Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration," *The Journal of Politics* 24 (August, 1962): 453-476; Peter G. Fish, "William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers," 1975 *Sup. Ct. Rev.* 123 (1975); Edward A. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill," 100 *Colum. L. Rev* 1643 (2000); Jeremy Buchman, "Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925," 24 *Just. Sys. J.* 1 (2003). For the classic and most extensive Taft biography see Henry F. Pringle, *The Life and Times of William Howard Taft* (New York: Farrar & Rinehart, 1939), esp. 992-1007.

[10] Mason, 88.

[11] See Deborah J. Barrow, Gary Zuk, and Gerard S. Gryski, *The Federal Judiciary and Institutional Change* (Ann Arbor, MI: The University of Michigan Press, 1996), 32. On the issue of workload, also see Gerhard Casper and Richard A. Posner, *The Workload of the Supreme Court* (Chicago: American Bar Association, 1976).

[12] Mason, 89-90.

[13] Ibid, 108.

to plead with Congress for relief so that the Court "might write better opinions and less of them."[14]

Well in advance of the workload crisis of the 1920s, Congress had passed a series of acts granting the Court increased control over its docket. Before 1891, the Court was obligated to decide all cases brought before it. With the landmark Evarts Act, however, some this burden was alleviated. Although the post-1891 Court still had mandatory appellate jurisdiction over some cases from the circuit courts, it also possessed the ability to review all other circuit court rulings by either receiving certification by the court of appeals or by granting certiorari. In 1914, Congress expanded the Court's certiorari jurisdiction to state supreme courts; two years later, it passed remedial legislation empowering the Court to cut down on cases of minor importance. These piecemeal reforms notwithstanding, the federal judiciary still possessed only limited power to enact rules governing its own operation. And even these limited powers—standing and access requirements and a set of disparate procedural guidelines—were the subject of congressional delegation and subject to legislative checks. With both the structure and functioning of the federal judiciary directly affected (if not controlled) by the political branches, reform needed to come from Congress. But, as Alpheus T. Mason notes in his judicial biography of Taft, the combination of partisan politics and a standing desire to control the judiciary led Congress down the path of least resistance. The result of congressional inaction was simply to thrust the campaign for judicial reform largely into the private sphere.[15]

As part of both the private sphere (as a law professor) and the public serve (as a judge, as president, and ultimately as Chief Justice), Taft outlined a three-part plan for judicial reform: first, the reorganization of the federal judiciary under the direction of the Chief Justice; second, the reduction of mandatory review jurisdiction and corresponding increase in discretionary review jurisdiction; and third, the simplification and standardization of legal codes and procedure. By reorganizing the federal judiciary, Taft sought to establish the Chief Justice as the "head" of the entire judicial branch and impose greater structural hierarchy within the court system. Two measures, in particular, were put forth to accomplish such aims: the creation of a "judicial conference," composed of the senior judge from each circuit and chaired by the Chief Justice, to survey the state of judicial affairs and make proposals to Congress; and the endowment of the Chief Justiceship with broad powers to transfer judges to districts or circuits in need of additional personnel. By substituting greater discretionary review jurisdiction for decreased mandatory review jurisdiction, Taft hoped to unburden the Supreme Court and allow it to return to its "higher function," that of applying, constructing, and interpreting the Constitution. He imagined not only a Court that would have "absolute and arbitrary discretion with respect to all business but constitutional business," but also a judicial process that, with the introduction of "executive principle," would be more streamlined and efficient.[16] By consolidating the almost 100 different systems of judicial procedure in existence at the time into a "single form of civil action," Taft aspired to collapse the long-standing distinction between suits of law and suits of equity,[17] to make codes of procedure more simple and effective, and to ensure that cases turned on the merits rather than procedural technicalities.[18]

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[14] William Howard Taft, "Three Needed Steps of Progress," 8 *American Bar Association Journal* (1922), 35-36.
[15] Mason, 88-90.
[16] Ibid, 61-64.
[17] Ibid, 115.
[18] Ibid, 52-53.

Each of the three features of Taft's reform package ultimately passed Congress, but only the first two occurred on his watch and during his life. In 1922, at the suggestion and urging of Taft, Congress provided for twenty-four additional district court judges, allowed the Chief Justice to transfer judges from over-staffed districts to under-staffed ones, and established the "Conference of Senior Circuit Judges," an annual meeting of the nation's top judge to be chaired by the Chief Justice.[19] In 1925, again at the suggestion of Taft but this time at the urging of both Taft and his Court brethren, Congress passed the so-called "Judges' Bill" (so named because judges authored and testified in favor of it), which drastically redefined the role of the Supreme Court by converting much of its mandatory jurisdiction into discretionary jurisdiction.[20] In 1934, four years after Taft had left the Court and passed away, Congress authorized the third leg of Taft's reform initiative: the creation of the "Federal Rules of Civil Procedure," a set of uniform instructions governing judicial proceedings in courts across the nation.[21] Each reform required congressional action; each, in essence required Congress to approve measures that increased the power of the federal judiciary, the Supreme Court, or the Chief Justice. Given the struggles between Congress and the Court during the few first decades of the twentieth century[22] and the potential power shifts inherent in Taft's reforms, how did Taft secure easy congressional passage of these measures? Why did Congress approve structural reforms that would clearly and substantially enhance the power of a rival branch?

At least two theories might be offered to explain Taft's success in securing the necessary congressional support. One theory, drawn from Howard Gillman's article on the expansion of the judiciary in the late nineteenth century (see also Buchman), emphasizes the alignment of *preferences* between the judges gaining power and the elected officials authorizing the power grant. On this theory, Congress authorized Taft's reforms because the prevailing congressional majority endorsed a conservative Republican ideology that the Taft Court shared and would likely advance. Accordingly, Congress sacrificed little (and, in fact, had the potential to gain much) by vesting increased authority in the federal judiciary. A second theory, drawn from Martin Shapiro's "prototype" of courts, emphasizes the existence of a foundational level of *respect* for and *deference* to the judiciary on matters of law. By this account, Congress authorized Taft's reforms simply because Taft was a judge and judges were considered part of the "legal pantheon." The problem with these two conceptions is not so much that they are incorrect as it is that they are incomplete—at least with regard to the Taft reforms. Obviously, some degree of preference alignment—or, at the very least, the *appearance* of it—is necessary to understand the surrender of institutional authority from one branch to another. Similarly, as we shall see, congressional respect for and deference to the judiciary was certainly a crucial factor in the success of Taft's reforms. The question in the Taft case, however, is less *if* preferences were aligned than *how* they became (or were perceived to be) so; it is less *if* respect and deference existed than *how* they came about or *why* they were relied upon. Neither preference alignment nor prevailing notions of respect and deference existed ex ante or emerged spontaneously; rather, in both cases, they were

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[19] 42 Stat. 837 (September 14, 1922).
[20] 43 Stat. 936 (February 13, 1925).
[21] 48 Stat. 1064 (June 19, 1934).
[22] See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890-1937* (Princeton, NJ: Princeton University Press, 1994); Stuart S. Nagel, "Court-Curbing Periods in American History," 18 *Vand. L. Rev.* 925 (1965).

constructed. Only by understanding this careful and strategic process can we understand Taft's success in persuading Congress to accede in the augmentation of judicial power.

The question, in essence, is how Taft gained for the judiciary the ability to take action according to its own wishes rather than those of other institutional actors. In answering this question, I draw on Daniel P. Carpenter's notion of "bureaucratic autonomy," said to occur "when bureaucrats take action consistent with their own wishes, actions to which politicians and organized interests defer even though they would prefer that other actions (or no action at all) be taken."[23] Modifying Carpenter's theoretical frame to accommodate courts instead of bureaucracies, judges rather than bureaucrats, I seek to explain Taft's success in constructing, or "forging," *judicial* autonomy. My explanation relies of six features of Carpenter's account: the attainment of political legitimacy, formed through the building of organizational *reputations* and the cultivation of multiple *networks*; political entrepreneurship through *innovation* and *measured action*; centralized control over the recruitment and selection of *personnel*; and a judicial culture strengthened through the articulation of *organizational metaphors*.

Political Legitimacy – *Reputations*. Throughout his entire reform campaign, Taft relied heavily on two reputations—his personal reputation for being a competent chief justice and the judiciary's institutional reputation for commitment to law and justice. Taft's personal reputation was as an efficient and effective administrator. Beginning early in his tenure at the Court, he was known as an economizer who cut printing costs, demanded payment of required fees from delinquent lawyers, and reorganized his staff to trim waste and better serve his own needs.[24] A few years later, after organizing the Associate Justices into committees for internal business and dividing their labor based on each justice's substantive area of expertise, he added to his mantle the reputation of being a wise manager, of tackling traditionally boring administrative details "with great relish."[25] With such favorable reviews, Taft not only augmented the formal and informal powers of the office of the Chief Justice,[26] but also gained a measure of respect among legislators and fellow judges. The latter, for instance, believing that Taft might be omnipotent and knowing that he was certainly "plugged-in" to the politics of the capital, often wrote to suggest possible changes they hoped he would champion.[27] One judge, desiring a change in one of Taft's reforms, wrote glowingly to the Chief Justice of his confidence that Taft's "counsel and advice will have great weight" in Congress.[28] And, indeed, with some members, it did. To various congressmen, Taft's approval—and the reputation behind it—functioned as a sort of proxy or "heuristic" for how they should vote. One congressman voting in favor of Taft's reforms remarked of Taft and his fellow justices that, "it seems to me that those gentlemen are of such high character that we could without much alarm follow their advice and suggestion."[29] Another replied to Taft's thanks for his support by citing both his "personal regard" and the "value I place upon any suggestion that you may make."[30] To be sure, not all congressman

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[23] Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton, NJ: Princeton University Press, 2001).
[24] Mason, 269, 193.
[25] Ibid, 193-197. This division of labor resulted, for instance, in Justice Louis Brandeis on the Accounts Committee and Justice Willis Van Devanter on the Rules Committee.
[26] Ibid, 269.
[27] Ibid, 122.
[28] James F. Smith to WH Taft, 10/19/1921, cited in Mason, 122.
[29] 62 *Cong. Rec* 1, 67th Congress, 2nd session, 166, cited in Mason, 123.
[30] George S. Graham to WH Taft, 2/20/1925, cited in Mason, 123.

felt such adulation toward Taft (a fact that will be explored later), but for those who did, their trust in and of the Chief Justice was ostensibly an integral factor in their decision to support his reform efforts.

Even more central to the acquisition of political legitimacy than Taft's personal reputation as a competent Chief Justice was the judiciary's institutional reputation for commitment to law and justice. As Taft himself noted, Congress had previously "shown itself…quite willing to follow suggestions" regarding judicial matters from the judiciary.[31] At least part of the reason for such deference was the public perception of the judiciary and the tasks it performed as necessary features of American government.[32] Taft himself believed in these ideals, in the notion that the separation of powers required keeping each power sufficiently "strong and independent" to "fulfill [its] constitutional purpose."[33] Thus, as a way of acknowledging the judiciary's "public responsibility," he set standards for judicial attire, the conduct of attorneys at the bar, the behavior of his colleagues, and the style of opinion-writing. Similarly, he guarded against moves that he perceived might "jeopardize the Court's dignity" or reputation, including a raise of Cabinet-level salaries and diplomatic rank above the judicial salaries and issues of social protocol relating to official state functions.[34]

In addition to ensuring the reputation of the Court as a prestigious institution, he set out to preserve for the judiciary its reputation for even-handed distribution of justice. Believing that "judicial paralysis undermined the public's faith in the judiciary," Taft innovated, making promptness "a model for the courts of the country."[35]Accordingly, he increased Supreme Court control over the responsibilities of the Clerk, demanded quicker writing of opinions and scheduling of cases, unsuccessfully attempted to shorten the summer recess, rejected his brethren's desire to reduce the pace and rigor of work, and revised the Court's internal rules about the logistics of hearing appeals.[36] In general, Taft exhibited "no patience with judges who did not do their work properly"[37] and, perhaps as a consequence, broke records regarding the number of cases decided in his first year as Chief Justice.[38] Such production, combined with heightened stature and a demand for efficiency, gave both Taft and his judiciary the reputations necessary for the construction of political legitimacy.

Political Legitimacy – *Networks*. Of course, reputations alone do not legitimacy make. Only when combined with multiple, cross-cutting networks of support do reputations lead to political legitimacy. Fortunately for Taft, his networks of support were even stronger and more stable than his reputations. Despite the strictures of "judicial proprieties," Taft "exploited an intricate web of vast personal relations"[39] and exerted "enormous influence on legislators, Presidents, Cabinet members, editors, lawyers, and friends."[40] When, after eight years of Democratic administration under Woodrow Wilson, Republicans took back the White House in 1920, Taft became an adviser to Warren

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[31] Taft, "Three Needed Steps of Progress," 36.
[32] Mason, 194.
[33] Kenneth W. Starr, "William Howard Taft: The Chief Justice as Judicial Architect," 60 *U. Cin. L. Rev.* 963 (1991-1992), 964.
[34] Mason, 267-271.
[35] Starr, 964.
[36] Mason, 194-196.
[37] Pringle, 992.
[38] Mason, 195.
[39] Ibid, 121.
[40] Ibid, 287.

Harding, a practice that—despite Taft's appointment as Chief Justice—continued, albeit to mixed effect, during the presidential administrations of Calvin Coolidge and Herbert Hoover.[41] Coolidge, in particular, proved particularly useful by making a "direct invitation to Congress to pass" Taft's reforms in 1924.[42] Taft curried similar favor—or, at the very least, visibility—with newspaper editors through direct communication during his time as Chief Justice. He encouraged press support of his proposals, provided critiques of his opponents, urged editorials against a proposal to withdraw the Court's diversity jurisdiction, and generally employed the press to inform lawmakers and the public about his reforms and to repel future attacks against them. Even more importantly, Taft spared no effort to enlist the support of organizations of lawyers, including the American Bar Association (ABA), which he had previously served as President.[43] Because of its combination of "intimate knowledge and geographic dispersion,"[44] the ABA proved a crucial ally in the reform campaign, particularly in response to critics. Employing a unique strategy to combat opposition to his expansion of the Court's certiorari jurisdiction, Taft dispatched the ABA to tell Congress that the bill was "too technical" even for lawyers. As a result, the association reasoned, Congress should defer to the judiciary, pass the bill, and observe its effects in action.[45] Taft also succeeded in stimulating the bar's opposition to other detested congressional measures (such as the withdrawal of diversity jurisdiction and the restriction of judicial discretion in jury trials) and in encouraging it to support his favored measures, including the revision of rules of procedure.[46]

Among Taft's other efforts to establish or exploit networks were his attendance at a multitude of dinner parties, his participation in numerous voluntary organizations, his back-channel involvement in partisan politics (assessing the credentials of Republican candidates), and his intervention in diplomatic relations (encouraging American membership in the International Court of Justice).[47] In addition, Taft carefully delegated his fellow justices to exploit their networks, biography, and expertise. Instead of testifying before the Senate Judiciary Committee himself, he sent Justices George Sutherland (a former ABA president and Senate Judiciary Committee member), James McReynolds (a Democrat), and Willis Van Devanter (the Court's best expert on jurisdiction). When an opportunity to purchase a Boston law library presented itself, Taft brought Justices Oliver Wendell Holmes and Louis Brandeis—both Massachusetts natives and Holmes the presiding Supreme Court justice over the First Circuit—along with him.[48] In both situations, Taft was astute enough to understand that his reputation and his networks were not the only ones carrying political capital, not the only ones capable of building political legitimacy.

Entrepreneurship – *Innovation.* Taft's campaign for changes in "court organization, jurisdiction, administration, and procedure" led to the "creation of explicit institutional structures designed to facilitate reform."[49] In other words, it led to the creation of new

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[41] Ibid, 138. See also, generally, Murphy, "In His Own Image."
[42] WH Taft to HD Taft, 12/7/1924, cited in Mason, 113. See also Mason, 143, discussing Taft's mixed results with influencing Coolidge's decisions—encouraging him to veto a bill restricting the role of judges in charging juries but failing to get him behind the movement for increased judicial salaries.
[43] Mason, 127-129, 275-277.
[44] Buchman, 15.
[45] Mason, 112.
[46] Mason, 129-131.
[47] Ibid, 273-286.
[48] Ibid, 126-127.
[49] Fish, "Conservative Politicians as Chief Judicial Reformers," 123-124.

programs, the passing of laws not otherwise considered by Congress, and an increase in both jurisdiction and discretionary administration.[50] In gaining congressional approval for these reforms, Taft reiterated his belief—consistent since his days as president—that Congress should empower the Supreme Court to reform itself.[51] "The judges," Taft observed, "are constantly engaged in applying rules of procedure, and they more than anyone else are advised of the defects in an existing code, and with power to amend rules originally adopted by them, they can mold the code as actual work under it shows the necessity."[52] Citing the fact that Congress had always delegated the power of making rules to the Court, Taft further remarked that there was "no reason why…the Supreme Court…should not be authorized and directed to do it."[53] With these comments, Taft was essentially inviting Congress to conserve its own time and delegate reform to the Court, which possessed greater expertise over these types of issues. Even while Congress was still considering whether to delegate, however, the executive branch had already decided to do so. Harry M. Daugherty, Harding's Attorney General, relied extensively on Taft's comments and advice, going so far as to request the Chief Justice draft the first version of a bill creating the judicial conference.[54] With not only the judicial conference but also the certiorari jurisdiction, Taft brought a definite program and launched it—from drafting the relevant legislation to influencing legislators to attending and testifying at hearings.

Entrepreneurship – *Measured Action.* Taft's active lobbying and campaigning for his judicial reforms "provoked varied reactions," including strong opposition from those who thought his advocacy of a bill advancing his own power (in front of congressional committees no less!) violated norms of judicial propriety. To some, Taft's influence with legislators—calling the chairman of the House and Senate Judiciary Committees after the annual judicial conference and requesting authority to devise a plan to address new problems, for example— "seemed presumptuous." A skilled political entrepreneur like Taft, however, was sensitive to the dangers of negative perception. To combat this problem, he had Justice Van Devanter assure Congress that no justice—including Taft—wanted to enter the legislative field.[55] He downplayed his own role in the reform effort and minimized his rivalry with the Senate. He portrayed his reform as a response to real problems rather than judicial aggrandizement and stressed the "broadly felt benefits of a more efficient federal bench."[56] He presented the justices as a united front and allayed fears that judicial authority would be wielded arbitrarily. In addition to each of these moves—taken to preempt opposition to an empowered Court and possibly to forestall court-curbing[57]—Taft also took measured action to apply pressure through leverage rather than fiat. When he realized that his aggressive proposal for the appointment of two new "roving" judges per circuit would fail to gain congressional approval, he endorsed a milder version that provided additional judges to twenty-one specific districts without upsetting local patronage arrangements.[58] Astutely aware that Congress could take away the judiciary's newfound power to transfer

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[50] Cf. Carpenter on program transfer and discretionary administration, 34.
[51] Fish, "Conservative Politicians as Chief Judicial Reformers," 116.
[52] WH Taft to CH Paul, 8/28/1925, cited in Mason, 116.
[53] William Howard Taft, "Possible and Needed Reforms in the Administration of Justice in the Federal Courts," 8 *American Bar Association Journal* (1922), 604.
[54] Mason, 98-99; Murphy, "A Study in Judicial Administration," 456.
[55] Mason, 122-126.
[56] Buchman, 13.
[57] Ibid, 10-13.
[58] Mason, 97-102; Murphy, "A Study in Judicial Administration," 455-458.

judges between districts, Taft urged cautious use of such power among his fellow judges.[59] Finally, in angling for the creation of federal rules of procedure, Taft framed the measure not as a judicial power-grab but as deference to the policy wishes of Congress: "It is not a delegation of great power to the Supreme Court….Congress can lay down the fundamental principles that should govern, and then the Court can fill out the details."[60] In all of these cases, it is clear that Taft's focus was not on the gain of power in the short-term but on the consolidation of it for the long-term.

Personnel. Taft's concern with judicial personnel—both at the Supreme Court and lower courts—rapidly became one of his preoccupations as Chief Justice. Given his emphasis on judicial "teamwork" (to be explored in the next section), it seems quite logical that Taft wanted to control the players on his team.[61] In order to facilitate the appointment of "loyal teammates" in the federal judiciary, he maintained "close ties" with the executive branch, especially the Attorney General.[62] For Taft, the ideal-typical "loyal teammate" was a non-Progressive with prior judicial service who shared his commitment to repelling assaults on the Constitution through constitutional conservatism.[63] His influence in securing such individuals during the Coolidge and Hoover administrations was only slightly "less than complete,"[64] especially on disfavored candidates where he wielded influence "bordering on a power of veto."[65] From soliciting names of candidates from lawyers, politicians, and newspapermen to discouraging the nomination of candidates unsympathetic with his own views (Benjamin Cardozo and Learned Hand) to ushering his favored nominees through the confirmation process (Pierce Butler), Taft was more active in selecting his colleagues and subordinates than perhaps any other chief justice before or since.[66] He viewed his role as that of an "impartial adviser," claiming only to provide an objective opinion about which candidates were acceptable and unacceptable and not pushing one candidate meeting his criteria over another.[67] For lower court positions, in particular, Taft devoted considerable energy into finding judges that would carry out the Supreme Court's decisions, particularly on controversial policy issues.[68] His desire was to unite the federal judiciary into a "national" institution that functioned as an organized, unified, harmonious system.[69] In addition to staffing courts with likeminded jurists (and eliminating those who were not likeminded),[70] another prime objective was establishing "smoother relations within the judicial system."[71] To this end, Taft sent personal letters to every district judge asking for suggestion on reforms in judicial procedure, to every circuit judge requesting information and advice on

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[59] Mason, 106.
[60] Taft, "Three Needed Steps of Progress," 35.
[61] Murphy, "A Study in Judicial Administration," 459-460.
[62] Mason, 171.
[63] Ibid, 163-164. Cf. Carpenter on ideal-typical traits, 26-27.
[64] Mason, 171.
[65] Ibid, 179-180.
[66] Mason, 161-173; Murphy, "A Study in Judicial Administration," 460. Cf. Carpenter on drawing candidates from multiple personnel networks, 26.
[67] Ibid, 173-174. See also Murphy, "A Study in Judicial Administration," 460, quoting Taft's statement that he had a "right" to provide the president with information about a candidate if he might find it useful.
[68] Mason, 178; Murphy, "A Study in Judicial Administration," 473. Cf. Carpenter on candidates behaving according to agency wishes, 26-27.
[69] Mason, 190.
[70] Taft regarded certain members of the "team," including Justices Holmes and Brandeis, as detriments to teamwork and, at his more ambitious moments, as "targets" for removal. Ibid, 161.
[71] Murphy, "A Study in Judicial Administration," 453.

any problems with overcrowded dockets, and to every state supreme court chief justice proposing to bring all courts of last resort closer together.[72] Just as Taft had a penchant for "massing the Court"[73]—producing unanimous opinions, discouraging dissents, and maintaining cordial inter-chamber relations—so too did he have a desire for massing the *courts*.

Organizational Metaphors. The main thrust of Taft's aim in "massing the Court" and in controlling judicial personnel was to promote "teamwork" in the federal judiciary. "Teamwork" became Taft's favorite slogan as Chief Justice,[74] and the "team" became his preferred metaphor for the judiciary.[75] Since Taft believed teamwork would give "weight and solidarity" to judicial decisions, he took extensive measures to ensure that the Court in particular and the judiciary in general were each characterized by a spirit of teamwork. In addition to general congeniality and individualized attention, Taft persuaded by example, discouraged dissents, and exploited personal charms—all in a larger attempt to "mass the Court."[76] Securing teamwork, however, required more than presence and charisma; as we shall see later, it also required the introduction of what Taft regarded as "executive principle"[77]—centralized control and attention to administrative detail.[78] Thus, following his assignment of justices to internal committees based on biography and expertise (discussed above), he also divided the substantive labor of the Court's work—the actual cases—based on the interest, expertise, and ability of the justices as well as their respective ages, health, backlog of cases, and rate of production. The division of labor broke-down as follows: Taft shared patent cases with Justices John Clarke and Joseph McKenna, Justice Louis Brandeis shouldered tax cases, Justice James McReynolds was in charge of admiralty issues, Justice Willis Van Devanter dealt with land claims and Indian affairs, and Justice George Sutherland handled disputes over boundaries and water rights.[79] With each member of the Court performing a different duty and contributing in his own way, each was a valuable—and valued—member of the team.[80] Even actual opinion-writing, if the assignment power could be used to promote unanimous (or near unanimous) opinions, was seen as an opportunity to promote "efficiency, unanimity, and harmonious relations"[81] on the Court. Of course, there were many obstacles to teamwork, including health (of Taft and his brethren) and personal idiosyncrasies. For his part, Taft tried to stem the tide of mutiny on the Court by dissenting extremely infrequently, even when he disagreed with the case outcome.[82] Turning his

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[72] Ibid, 454.
[73] Mason, 233.
[74] "Teamwork" is also said to be one of the reason that Taft preferred the Chief Justiceship to the "futility" of the presidency. Mason, 232.
[75] Earlier in his career, Taft also referred to the judiciary as a "machine" and spoke of "judicial machinery." Mason, 14-15. This same metaphor, however, was later used pejoratively by Taft's opponents to signify their criticism of the intent of his reforms. Mason, 104. Perhaps not coincidentally, Taft abandoned the "machine" metaphor for the more friendly (and more aspirational?) "team" metaphor.
[76] Ibid, 198.
[77] Taft, "Adequate Machinery for Judicial Business," 453-454.
[78] Murphy, "A Study in Judicial Administration," 455.
[79] Mason, 206-209.
[80] Despite the perception of equal distribution, Taft regularly assigned a greater load to himself (even as he grew older and his health began to fail him) to compensate for other justices. Ibid, 231.
[81] Ibid, 212.
[82] Ibid, 223; see also, Robert Post, "The Supreme Court Decision as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," 85 *Minn. L. Rev.* 1267 (2001), 1283-1284 (placing the proportion of Taft Court decisions that were unanimous at 84%).

attention to the federal judiciary more broadly, Taft viewed the judicial conference as a mechanism to allow the Chief Justice to "come into touch with the Federal Judges of the country, so that we may feel more allegiance to a team and do more teamwork."[83] If individual judges from across the nation could meet, exchange information, and garner advice from judges facing similar problems, then the disparate judges of America would be well on their way to comprising a unitary judicial team.

Towards Judicial Bureaucracy

Using bureaucratic methods, William Howard Taft gained for the federal judiciary a measure of autonomy it had never before seen. Using that autonomy, Taft proceeded to infuse in the judiciary a degree of efficiency it had never before known. By 1925, two of the three legs of his reform platform had been enacted by Congress—only the revision of rules of procedures eluded him—and Taft's power as a politician and an administrator was greater than any Chief Justice before him. With the creation of the judicial conference and the expansion of discretionary jurisdiction, Taft found himself well-equipped not only to modernize the judiciary, which he had done with his reforms, but also to bureaucratize it, which he would do with the *fruits* of his reforms. Two features of judicial administration during this period[84] seem particularly "bureaucratic": the centralization of the federal judiciary under the Chief Justice and the introduction of "executive principle" into the judicial task.

Taft's vision of a unified judicial team "demanded central control."[85] He identified a problem—the fact that Congress had created a hierarchy of courts but not a hierarchy of judges[86]—set about to rectify it. His solution, of course, was a bureaucratic structure for the judiciary. And, as all students of Max Weber know and as Taft learned from his time as president, central to bureaucratic structures is hierarchy. The construction of Taft's judicial hierarchy was premised on the notion that the Chief Justice should be not only the most important judicial officer in the nation but also the operational director of the federal judiciary. Indeed, upon becoming Chief Justice, Taft is said to have referred to himself as "the head of the judicial branch of government."[87] "If the Chief Justice is to have the duty and responsibility for the Federal judicial force of the country," he declared in 1914, "he should have an adequate force of subordinates to enable him to discharge it."[88] In addition to the increased number of subordinates provided by 1922 bill, Taft's reforms enabled a marked increase in the power and authority of the Chief Justice. The judicial conference, for instance, put the Chief Justice in contact with judges from across the nation, offered him an opportunity to promote legislation and revision, and made him the "political head of the Federal court system."[89] Although it failed to bring the Chief Justice's authority in line with Taft's model judge, the Lord Chancellor of England, it did enlarge both his stature and his power. As inferior judges increasingly looked to the Chief Justice for relief from crowded

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[83] WH Taft to HD Taft, 12/30/1921, cited in Murphy, "A Study in Judicial Administration," 454.
[84] For a discussion of judicial bureaucratization in the contemporary era and a review of surrounding literature, see Christopher E. Smith, *Judicial Self-Interest: Federal Judges and Court Administration* (Westport, CT: Praeger Publishers, 1995), 95-121.
[85] Murphy, "A Study in Judicial Administration," 455.
[86] Ibid.
[87] Ibid, 453.
[88] Cited in Mason, 97.
[89] Murphy, "A Study in Judicial Administration, 458.

dockets and for general guidance in conducting judicial business,[90] Taft's opponents voiced fears about giving "great and unlimited and dangerous power to the Chief Justice."[91] Consolidating the power of the entire judicial system in the Chief Justice, they claimed, risked converting a government of laws into a government of men—or, in this case, a government of *one man*.[92] While Taft was correct in denying that he was as powerful as his enemies claimed, it is certainly true that he was more powerful—as a politician and as an administrator—than most of his predecessors had been. The irony here is great: the man who had rejected a broad interpretation of his "prerogative" power as president had fought for and won a broad interpretation of that same power as Chief Justice.[93]

In addition to imposing centralized control on the judiciary, Taft infused "executive principle" into the judiciary.[94] Believing that good administration was the key to good law enforcement, Taft (through his reforms) introduced into judging "the ordinary business principles in successful executive work."[95] This meant requiring judges to file reports indicating the business dispatched and remaining on the docket, collecting statistics on judicial workload and productivity, and overseeing judicial administration throughout the nation.[96] Under Taft, the judiciary was "reforged with a capacity for self-study, criticism, and reform."[97] The "quasi-executive" machinery the Chief Justice had desired was, by the end of the time at the Court, fully at his disposal. His vision—that judges "should be independent in their judgments, but…subject to some executive direction as to the use of their services"[98]—had, due largely to his own efforts, become a reality.

Conclusion

Taft's judicial reforms represent only one moment in a broader process of building the judiciary, but the case nonetheless suggests that judicial power grows from more than simply constitutional decisions or the exercise of judicial review; indeed, it also derives from interaction with political elites, from empowering legislation, from public, media, interest-group, or constituent support, and from political contestation and compromise. Phrased more technically, we might say that judicial power is not only an independent variable but also a dependent one. Judicial power does, of course, act upon politics, but it is equally *acted upon by* politics; it is created by politics and, thus, an object of it. This process of creation and construction, of contestation and compromise—this is the process of building the American judiciary.

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[90] Mason, 105-106.
[91] 62 *Cong. Rec.* 5, 67th Congress, 2nd session, 4853, cited in Mason, 101
[92] Mason, 101-102.
[93] Ibid, 234.
[94] Ibid, 100, 120.
[95] Cited in Mason, 62.
[96] Murphy, 456; Mason, 106.
[97] Starr, 966.
[98] Taft, "Three Needed Steps of Progress," 35.