

The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft

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In his first four years as Chief Justice of the United States, William Howard Taft convinced Congress to pass two reform bills that substantially enhanced the power of the federal courts, the Supreme Court, and the Chief Justice. In this article, I explore the causes and the consequences of those reforms. I detail how Taft's political entrepreneurship—specifically the building of reputations, the cultivation of networks, and the pursuit of change through measured action—was instrumental in forging judicial autonomy and, subsequently, how that autonomy was employed to introduce judicial bureaucracy. By asking both how judicial reform was accomplished and what judicial reform accomplished, I offer an analytically grounded and historically rich account of the politics surrounding two of the most substantively important legislative actions relating to the federal judiciary in American history. In the process, I also draw attention to a largely neglected story of political development: the politics surrounding the building of the federal judiciary as an independent and autonomous institution of governance in American politics.

“The spirit of speed and efficiency lurking in the corpulent form of an ex-President of the United States has entered the Court and broken up its old lethargy.”

—Herbert Little in *The American Mercury* (1928)

When, after an extensive career in politics, William Howard Taft finally achieved his lifelong goal and was appointed Chief Justice of the United States in 1921, the judiciary was, in Taft's own words, “likely to be swamped, and delay of justice” was “inevitable” (Taft 1922b, 34). The courts, highly decentralized and still using cumbersome procedures like automatic appeals to the Supreme Court, were lagging behind the pace of change across the rest of America. When, after a relatively short tenure on the bench, Taft resigned from the Court in 1930, the federal courts, the Supreme Court, and the Chief Justice were each significantly more independent, more autonomous, and more

powerful than they had previously been. Thus, it does not seem an exaggeration to say that, in only nine years on the Court, Taft had surpassed even his own wish of “reasonable betterment by practical means” (Taft 1916–17, 10).

Judicial reform arrived in two installments.¹ The first came in 1922, when, at the suggestion and urging of Taft, Congress provided 24 additional district court judges; granted the Chief Justice authority to transfer judges from overstuffed districts in one circuit to understaffed districts in other circuits²; and established the “Conference of Senior Circuit Judges” (later known as the Judicial Conference), an annual meeting of the nation's top judges that, under the direction of the Chief Justice, would survey the state of judicial affairs and make proposals to Congress (42 Stat. 837). The second came three years later, when, again at the suggestion of Taft but this time at the urging of both

¹Taft's reform platform actually consisted of three proposals, but, since the third leg—authorization for the Supreme Court to promulgate a set of uniform instructions governing judicial proceedings in courts across the nation (48 Stat. 1064)—did not gain congressional approval until 1934 (four years after Taft had left the Court and passed away) and was not actually accomplished until the “Federal Rules of Civil Procedure” became effective in 1938, I focus only on the first two legs here.

²Such authority, which was contingent upon the approval of the senior circuit judges from both circuits involved in the transfer, complemented another power conferred by the 1922 act: the ability of senior circuit judges to transfer judges between districts within a given circuit.

Taft and his Court brethren, Congress passed the Judiciary Act of 1925,³ which drastically redefined the role of the Supreme Court by converting much of its obligatory jurisdiction into certiorari (or discretionary) jurisdiction (43 Stat. 936). The former established the Chief Justice as the “head” of the entire judicial branch and imposed greater structural hierarchy within the court system; the latter unburdened the Court and allowed it to return to its “higher function”—interpreting the Constitution.⁴ With these two reform thrusts, Taft sparked a “double revolution” (Starr 1991–92, 965): he not only accomplished what a decade earlier would have seemed an impossibility—he had laid the groundwork for the federal judiciary in general, and the Supreme Court in particular, to become a powerful institution of American governance—but also accomplished it in a manner that had theretofore been unseen—with active judicial intervention in the legislative process.

In this article, I seek to determine both the causes and consequences of Taft’s judicial reforms.⁵ In doing so, I ask two key questions about the politics of institutional development during the 1920s. First, *how*, despite both the “fury” surrounding the Court at the time (Ross 1994) and the potential for “a durable shift in governing authority” (Orren and Skowronek 2004, 123) inherent in Taft’s reform proposals, was judicial reform accomplished? Second, *what*, in terms of concrete and enduring changes for the exercise of judicial power in American politics, did judicial reform accomplish?

In answering these questions, I proceed as follows. First, I outline two existing explanations of judicial reform and, finding that these approaches fail to capture the character of the Taft reforms accurately, summarize an alternative paradigm—Daniel P. Carpenter’s theory of “bureaucratic autonomy” (2001). Second, transferring Carpenter’s conceptual frame from agencies to courts, I explain the passage of the landmark judicial reforms of the 1920s as the result of Taft’s construction, or “forging,” of *judicial* autonomy. In particular, I emphasize the importance of three features of Carpenter’s exposition of the more widely used concept of “political entrepreneurship” (Shein-

gate 2003)—the building of organizational reputations, the cultivation of multiple networks, and the pursuit of change through measured action—in constructing political legitimacy for the federal judiciary. Third, I examine how Taft’s reforms transformed the judiciary by introducing “executive principle” and other trappings of modern bureaucracy. Finally, I offer some concluding thoughts about how we might use the Taft example as a window into a broader, but as yet unexplored, subject: the process of “building” the judiciary as an independent and autonomous institution of governance in America.

Acknowledging the fact that the judiciary, no less than Congress or the president, is one of American government’s “separated institutions *sharing* powers” (Neustadt 1990, 29), my focus on the development of judicial capacity fits within the recent historical-institutionalist movement toward understanding judicial authority—and, in particular, the power of judicial review—as a politically constructed feature of American politics (Gillman 2002; Graber 1993; Whittington 2005).⁶ However, reaching beyond judicial review (and beyond deciding cases entirely) to the variety of other ways in which—the variety of other functions through which—courts and judges exercise power, my concern is less with *how* judges rule⁷ than with the conditions that make it possible *for* judges to rule. That is to say, recognizing that judicial institutions are built of far more varied and complicated components than simply the written opinions of judges, I am interested in the politics surrounding the development of those components—the politics of altering the institutional environment of courts and judges through changes in, for example, jurisdiction, organizational structure, or budgeting.

In sum, this article tells two stories (or, perhaps more accurately, two sides of the same story): how political entrepreneurship was exercised in forging *judicial autonomy* and, to a lesser extent, how that autonomy was employed to introduce *judicial bureaucracy*.⁸ The former is the story of an entrepreneur

³The statute is also known as the “Judges’ Bill” because judges—Supreme Court justices, in fact—authored and testified in favor of it.

⁴Though, in practice, only a relatively small percentage of the Court’s work involves constitutional interpretation.

⁵I draw here on a number of previous accounts of Taft’s actions as Chief Justice (Buchman 2003; Fish 1975; Hartnett 2000; Mason 1984; Murphy 1961; Murphy 1962a; Post 1998b).

⁶There is also a large body of formal-quantitative literature concerned with similar themes both in the United States (de Figueiredo and Tiller 1996; Segal 1997) and abroad (Helmke 2002; Ramseyer and Rasmusen 1997).

⁷This is the central focus of recent comparative inquiries into phenomena such as “juristocracy,” “judicialization,” and “constitutionalization” (Hirschl 2004; Shapiro and Stone Sweet 2002; Tate and Vallinder 1995).

⁸This does not mean the judiciary was wholesale made into a bureaucracy; rather, it simply means that familiar features of bureaucracy were embedded within the judiciary. Given its variety of distinctly un-bureaucratic institutional features—the fact that

framing the terms of political debate and guiding innovation, the latter of an entrepreneur consolidating his innovations into comprehensive and enduring institutional change (Sheingate 2003, 188–89). The combination of these two narratives results in a detailed account of the causes and consequences of two of the most substantively important legislative actions relating to the federal courts in American history.⁹ In addition, by extending Carpenter’s framework to an institution for which it was not designed, the article provides an opportunity not only to reconsider the concept of “autonomy”—whether there might be variance within it, different actors capable of producing it, or a greater range of resources that can aid those actors in doing so—but also to assess its strength and applicability as an explanation for the historical development of American political institutions more generally.¹⁰

Theorizing Judicial Reform

Existing work offers two possible explanations for the passage of Taft’s judicial reforms. The first explanation emphasizes the alignment of preferences between the judges gaining power and the elected officials authorizing the power grant (Buchman 2003; Gillman 2002). On this view, Congress authorized Taft’s reforms because the prevailing congressional majority agreed with the substantive jurisprudential commitments of the judiciary and realized that it too would benefit from increased judicial power. Since a Republican majority endorsed a conservative ideology that the Taft Court shared and would likely advance, it sacrificed little by vesting greater discretion and increased policymaking authority in the federal judiciary. For the most part, this approach embodies a “Congress-centered” perspective (Cameron 2005).¹¹

judges are not directly accountable for the content of their rulings, not subject to democratic controls such as elections or reappointment, and not hired or fired at the will of a superior—it is virtually impossible that the judiciary could ever fully become a bureaucracy in the Weberian sense. My focus, therefore, is on the ways in which the judiciary acquired *bureaucratic character*.

⁹Equally transformative episodes of institutional development might include the creation of the Interstate Commerce Commission in 1887, the Cannon Revolt of 1910, or the establishment of the Executive Office of the President in 1939.

¹⁰In this way, I am quite consciously and explicitly engaged in the enterprise of “theory-building.” That it is to say, I am concerned with “noting complex relationships in one setting and then seeing how far other settings can be understood in those same terms” (Scheppele 2004, 391).

¹¹Frankfurter and Landis (1928) is a paradigmatic example.

Regarding the judiciary as a “passive bystander” that is “always acted upon and rarely much of an actor” (Cameron 2005, 186), it focuses on the congressional delegation of institutional authority to courts (Whittington and Carpenter 2003, 495–96). With Congress in the foreground and the judiciary relegated to the background, judicial reform is portrayed as an externally driven process.

The second explanation emphasizes the assertion of judicial prerogative over law and courts through formal decisions settling legal disputes.¹² By this account, judicial capabilities were augmented because the Taft Court made decisions that directly increased judicial power, decisions that were treated as binding because judges were part of the “legal pantheon,” where matters of law were expected to be decided. In contrast to the “Congress-centered” perspective, this approach might be considered “Court-centered” (Cameron 2005).¹³ Under this view, judicial preemption effectively results in congressional abdication of institutional authority for reform (Whittington and Carpenter 2003, 496–97). The Court unilaterally determines the contours and extent of judicial power, with little or no interference from other political actors. Here, the story unfolds internally with the Court alone in the foreground and all other forces, including Congress and the rest of the judicial branch, in the background.

Under “Congress-centered” explanations, we should expect substantial and independent congressional interest in judicial reform; under “Court-centered” explanations, we should expect a landmark judicial decision embodying or announcing significant change. In the Taft case, however, we see neither. Congress, short of two functionalist responses to increasing caseload pressure in the second decade of the twentieth century (38 Stat. 790; 39 Stat. 726),¹⁴ seemed largely uninterested in any judicial reform, let alone far-reaching institutional transformation.¹⁵ The Court, meanwhile, issued no significant constitutional

¹²One representation of this view is what Shapiro (1981, 1–64) refers to as the “prototype” of courts. Of course, Shapiro does not subscribe to such a view himself but, instead, develops it as a caricature to be deconstructed.

¹³McCloskey (2000) is a standard embodiment.

¹⁴Taft (1916–1917, 14) viewed these earlier congressional responses as unacceptable: “From time to time some remedial measure is adopted, but only by piecemeal. Some steps have been taken but nothing radical although the subject calls for broad measures.”

¹⁵Taft himself observed that “[d]ependence upon action of Congress to effect reform . . . has not brought the best results” (1922a, 607), blamed Congress for not providing the judiciary “with adequate machinery for the prompt and satisfactory dispatch of

or statutory decision concerning any issues involved in the reforms. Rather, both Congress and the Court were important but not unitary actors: congressional approval was required for increased discretion, but judicial influence was instrumental in convincing legislators to acquiesce (Whittington and Carpenter 2003, 497). Moreover, although existing Congress-centered and Court-centered approaches offer explanations for how and why we get judicial reform at all, neither can explain why we get it when we do or why we get it in the form we do. At least in the Taft case, neither can explain the timing or shape of the reforms that ultimately result (Carpenter 2001, 35).

In order to understand how and why landmark judicial reform occurred in the 1920s, we need to move beyond simplistic explanations like “preference alignment” and “judicial assertion.” Attempting to do precisely that, I draw on 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” (2001, 4). For a bureaucratic agency to gain autonomy, it must satisfy three conditions (Carpenter 2001, 15). First, it must be politically differentiated—it must have “preferences, interests, and ideologies” distinct from those who seek to control it. Second, it must develop “unique organizational capacities—capacities to analyze, to create new programs, to solve problems, to plan, to administer programs with efficiency, and to ward off corruption.” Third, it must possess political legitimacy, developed through strong organizational reputations and grounded in multiple networks.¹⁶ Each of these conditions arises through “political entrepreneurship”—actions taken by “creative, resourceful, and opportunistic leaders whose skillful manipulation of politics somehow results in the creation of a new policy or bureaucratic agency, creates a new institution, or transforms an existing one” (Sheingate 2003, 188). Those leaders—entrepreneurs—serve a multitude of functions in Carpenter’s narrative. Most prominently, they enable their agencies to develop reputations and cultivate networks, but they also bring the authority to innovate; influence the media and public perception; “induce

business” (1921, 453), and chided legislators for “too much politics . . . and not enough sincere effort and efficiency” (1916–1917, 16) in judicial reform.

¹⁶To be effective, reputations must be grounded in actual capacity; similarly, networks must be rooted in multiple and diverse political affiliations that cut across traditional cleavages such as party, region, and class.

national politicians to consider (and in many cases pass) laws that otherwise would never have been entertained” (Carpenter 2001, 33–34); and, recognizing that their influence is not absolute, “act in measured ways” (Carpenter 2001, 15).

To be sure, entrepreneurs are not omnipotent.¹⁷ They cannot create change in any or all situations; they do not act independently of or removed from historical circumstances. Taft, for instance, was simultaneously operating within two overlapping political orders (Orren and Skowronek 2004): first, a Progressive era state-building climate that valued the very aims of professional expertise, scientific administration, and managerial efficiency he once desired to embed in the executive and now sought to entrench in the judiciary (Arnold 1998, 3–51; Chandler 1977; Skowronek 1982); and, second, a post-World War I national mood of ambivalence toward centralization that was both enthusiastic about the opportunities offered by an expanded national government and worried about the disintegration of local government that might accompany such expansion (Post 2002).¹⁸ Yet, while entrepreneurs do not act in a vacuum, neither do they sit idly by and wait for propitious moments of structural convergence. Rather, they engage in acts of “creative recombination” (Sheingate 2003, 198), actively creating or fostering the arrival of such moments and then strategically reinterpreting them if and when they do occur. That is to say, entrepreneurs are “engaged in a constant search for political advantage,” a constant search for “speculative opportunities” (Sheingate 2003, 186)—overlays, cleavages, and fissures, for example—that are pregnant with possibilities for change but require an act of leadership in order for any to materialize. As a result, theories involving entrepreneurship do not necessarily privilege agency over structure; rather, they combine the two considerations in order to explain the processes of political and institutional development.

Although used to explain “Congress and the executive, state and local politics, policy innovation,

¹⁷Cf. Orren and Skowronek (2004, 199–200): “At the level of agency, the polity is filled with institutions, whose officers hold historically derived mandates for action, and with persons affected by the exercise of that authority, who may occasionally call it to account. In this construction, political actors matter most as agents, not causes. Their activities do not by themselves determine the course of political development, but they reverberate with greater or lesser effect throughout the whole to make political development, durable shifts in authority, possible.”

¹⁸Incidentally, this same mood is also reflected in the Taft Court’s substantive due process and federalism jurisprudence (Post 1998a, 2002).

and collective action” (Sheingate 2003, 187–88), entrepreneurship has not yet been used as a prism for understanding the judiciary. The reason is certainly not one of applicability. Indeed, the forging of judicial autonomy was not at all historically inevitable but, rather, a gradual and continuous political process spurred, shaped, and perpetuated by a cautious and strategic political entrepreneur. It is that process—of creation and construction, of contestation and compromise—I attempt to recover here.

Forging Judicial Autonomy

To say that Taft was instrumental in the forging of judicial autonomy is not to say that the judiciary of the early twentieth century resembled the clerical bureaucracy of the antebellum period (Carpenter 2001, 37–64). To be sure, the judiciary Taft took over in 1921 was institutionally superior in at least a few key ways, though perhaps institutionally inferior in others, to the Post Office Anthony Comstock joined and the Department of Agriculture Gifford Pinchot entered. As a constitutionally specified branch of the federal government, the judiciary was already autonomous in certain ways. For instance, even amidst murmurings of court-curbing, the independence of federal judges to issue legal rulings without threats to their office, their families, or their lives was well established. Thus, unlike Comstock or Pinchot, Taft inherited a branch that was, in no small part due to the freedom of opinion afforded judges by life tenure, largely politically differentiated. In other words, despite owing their nomination to a president and their confirmation to a collection of senators, judges were not required to fall in line with the preferences of either. Yet just as judges were thought autonomous enough to make legal decisions,¹⁹ they were not, as indicated by the fact that the judiciary’s budget was still controlled by the Attorney General, thought sufficiently autonomous to make administrative decisions. Despite recognition as the “third branch,” the pre-1920 judiciary was neither capable of planning and administering its own programs nor responsible for the regulation of its internal affairs. Even within the context of Article III judicial independence, therefore, there is room for more or less (and different types of) autonomy, and the 1920s were a critical juncture in moving the judiciary, and

particularly the Court, into a new and higher realm of that autonomy.

The challenges before Taft as he took the helm of the Court, then, were to develop (or, at the very least, refine) unique organizational capacity and to establish political legitimacy for an institution that possessed little of either. It was a pair of challenges he had long recognized and to which he had devoted substantial attention as a law professor, as a judge, and as president.²⁰ By the time Taft adopted the cause of judicial reform as Chief Justice, however, the Court—though still firmly supported by pro-business and Old Guard Republicans—had already made numerous enemies in Congress from its invalidation of state and federal economic regulation (Ross 1994); over the course of Taft’s nine years as Chief Justice, it would only make more. Indeed, from 1922–24 alone, there were 11 separate “court-curbing” proposals from angry Progressives (Nagel 1965; Rosenberg 1992),²¹ including aggressive attempts to rein in the Court by Senators Robert La Follette (R-WI) and William Borah (R-ID) in 1922 and 1923, respectively.²² Yet even as Taft had congressional foes (especially in the Senate), he also had many congressional friends (especially in the House), as well as a series of three conservative Republicans (Warren Harding, Calvin Coolidge, and Herbert Hoover) in the White House. Moreover, with the judiciary struggling to deal with the massive spike in litigation (*New York Times* 1921a),²³ Taft could point to real problems in

²⁰In addition to judicial reform and the creation of the Commerce Court in 1910, Taft also championed executive reform, establishing a “Commission on Economy and Efficiency,” during his time in the White House (Arnold 1998, 26–51; Skowronek 1982, 263–267).

²¹Four such Progressives—William Borah (R-ID), George Norris (R-NE), Thomas Walsh (D-MT), and John Shields (D-TN)—were among the fifteen members of the Senate Judiciary Committee. Recognizing the problem, Taft led an uphill, behind-the-scenes battle to reorganize the committee along more favorable ideological lines. His attempt was rebuffed, however, when Frank Kellogg (R-MN), one of the two senators he favored for appointment to the committee, was defeated for reelection in 1922 (Mason 1984, 95).

²²La Follette, who later advocated court-curbing during his third-party bid for the presidency in 1924, suggested a constitutional amendment authorizing Congress to reenact federal statutes nullified by the Court; Borah promoted legislation requiring a seven-member Court majority to declare an act of Congress unconstitutional (Ross 1994, 191–232).

²³A function of, among other things, increased government regulation of the national economy; the growing federalization of crime (narcotics, smuggling, auto-theft, and white-slave trafficking); the “mass of litigation growing out of the war” (Taft 1922b, 36); and, with the ratification of the Eighteenth Amendment (Prohibition) and the passage of the Volstead Act, a multitude of prosecutions against organized crime and alcohol distribution.

¹⁹Obviously, this type of autonomy had been building since the tenure of John Marshall, if not before.

need of a solution.²⁴ The result was that, when Taft decided to reintroduce his judicial reform platform as Chief Justice, the climate for such measures seemed to hold promise as well as present pitfalls.

In explaining how, within this political environment, Taft induced Congress to acquiesce and provide increased discretion and authority to the Chief Justice specifically and the federal judiciary more generally, I draw on three key elements of entrepreneurship: the building of organizational reputations, the cultivation of multiple networks, and the pursuit of change through measured action. Throughout his reform campaign, Taft's project was not simply employing the resources available to him but generating those resources he needed but did not possess. As a result, his entrepreneurship entailed not only lobbying but also quite a bit more—not least framing debate, guiding innovation, and consolidating immediate gains into lasting institutional change.

Reputations. As a prominent national political figure for nearly two decades, Taft brought a set of reputations with him to the Court. Far from universal, these conceptions were varied, diverse, and a source of great controversy.²⁵ His time as president alone offered contrasting portraits of a would-be reformer, on the one hand, and a weak and bumbling amateur, on the other (Arnold 2003; Barber 1985, 150–59). As Chief Justice, Taft layered new images atop the old, less supplanting his prior reputations than complicating their caricatures and correcting their distortions. Perhaps striving to redeem his failed presidency in the eyes of political elites and the public, perhaps because he had long yearned to be Chief Justice and simply wanted to fulfill his duties with honor, Taft developed a personal reputation as an efficient and effective administrator who cut printing costs, demanded payment of required fees from delinquent lawyers, and reorganized his staff to trim waste and better serve his needs (Mason 1984, 193, 269). Tackling traditionally boring administrative details “with great relish,” Taft not only organized the Associate Justices into committees for

internal business²⁶ but also assigned opinions according to a variety of practical criteria, including age, health, backlog of cases, and rate of production (Mason 1984, 193–97, 206–209).²⁷

Taft's innovations inside the Court not only augmented the formal and informal powers of the office of the Chief Justice but also gained him a measure of respect among legislators and fellow judges. The latter group, knowing that Taft was “plugged-in” to the politics of the capital, often wrote to suggest possible changes they hoped he would champion (Mason 1984, 122). 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, with some members, it did. Voting in favor of the 1922 reforms, one congressman 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” (*Congressional Record* 1922, 166). Another replied to Taft's gratitude for his support by citing both his “personal regard” for the Chief Justice and the “value I place upon any suggestion that you may make.”²⁹ To be sure, not all congressmen felt such adulation toward Taft, but for those who did, their trust in the Chief Justice was seemingly 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 Court's institutional reputation for filling a valuable niche in the political system. Despite the fact that the “countermajoritarian critique” of the 1890s intensified after the turn of the century, the Court's ability both to supervise state governments and outlive governing coalitions furnished it with enough diffuse political support to beat back even its staunchest opponents (Whittington 2006). Although these opponents—chiefly Progressives and the American Federation of Labor—excoriated the

²⁴Taft (1916–1917, 11) lamented that the caseload increase had “swamped a system that was adopted in more primitive times and was adapted to conditions of a people living in rural rather than urban communities.”

²⁵While an editorial in *The New York Times* (1916) explicitly called for Woodrow Wilson to place Taft on the Court after the death of Justice Joseph Lamar, later editorials in Progressive publications such as *The Nation* (1921) and *The New Republic* (1920, 1921) sharply criticized Taft's appointment (or prospective appointment) as Chief Justice.

²⁶Justice Louis Brandeis, who had experience with financial matters, served on the Accounts Committee while Justice Willis Van Devanter, the Court's expert on legal procedure, served on the Rules Committee.

²⁷Even opinion-writing, if the assignment power could be used to promote unanimous (or near unanimous) opinions, was seen as a tool of efficient judicial administration. For his part, Taft tried to stem the tide of mutiny by dissenting extremely infrequently, even when he disagreed with the outcome (Danelski 1986; Post 2001, 1283–1284).

²⁸James F. Smith, Letter of October 19, 1921 to William Howard Taft, cited in Mason (1984, 122).

²⁹George S. Graham, Letter of February 20, 1925 to William Howard Taft, cited in Mason (1984, 123).

lower courts for their unresponsiveness (Murphy 1962b, 48–53; Ross 1994), Taft maintained that the judiciary's problems stemmed less from objectionable decisions than inefficient administration.³⁰ As a result, he claimed, the necessary remedy was not the curtailment of judicial power but managerial innovation.³¹ Among other things, he increased the Court's control over the responsibilities of the Clerk, demanded quicker writing of opinions and scheduling of cases, attempted (albeit unsuccessfully) 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 (Mason 1984, 195). Attempting to make promptness at the Supreme Court "a model for the courts of the country" (Starr 1991–92, 964), Taft exhibited "no patience with judges who did not do their work properly" (Pringle 1939, 992). Consequently, he not only reduced the period between the filing and hearing of a suit from 15 months to 11 but also broke records for the number of cases decided by the Court in his initial year as Chief Justice (Mason 1984, 195). Thus, by framing his innovations as efficiency measures designed both to increase judicial efficacy as well as preserve the "dignity and influence of the Court" (Whittington 2006), Taft successfully invoked Progressive era aims in order to sidestep trenchant and vocal critiques of federal judicial power offered by Progressives themselves.³²

Networks. With his lengthy resume in politics, Taft possessed "an intricate web of vast personal relations" before he ever donned his Supreme Court robe (Mason 1984, 121). Upon joining the Court, Taft exploited these networks to persuade not only members of Congress and fellow judges³³ but also

presidents, newspaper editors, and lawyers.³⁴ When Republicans took back the White House in 1920, Taft offered Warren Harding extensive advice on the matter of judicial appointments (Murphy 1961, 1962a). Despite his appointment as Chief Justice, Taft remained in his advisory role—albeit with mixed success—during the subsequent presidential administrations of Calvin Coolidge and Herbert Hoover.³⁵ Although Coolidge in particular seemed to tire of Taft's meddling, he nonetheless allowed the Chief Justice to draft a section of his 1923 State of the Union Address expressing support for increased certiorari jurisdiction (Hartnett 2000, 1674) and even directly suggested that Congress pass Taft's reforms (Mason 1984, 113).

Looking to extend his networks beyond Pennsylvania Avenue, Taft curried favor with the media and key interest groups during his time as Chief Justice. Contacting newspaper editors directly, he encouraged (and received) press support of his proposals (*New York Times* 1924a, 1924b, 1925), provided written critiques of his opponents, urged editorials against a proposal to withdraw the Court's diversity jurisdiction, and generally utilized (manipulated?) the press to inform lawmakers and the public about his reforms and to repel future attacks against them (Mason 1984, 127–29).³⁶ Similarly, Taft spared no effort to enlist the support of organizations of lawyers (*New York Times* 1922a, 1922b, 1923c), especially the American Bar Association (ABA), of which he had served as President for the year following his departure from the White House and from which he had aggressively campaigned for the same reforms he would later secure as Chief Justice. The rise of legal professionalism in the early twentieth century had helped establish the ABA as a powerful interest group (Hurst 1950, 287–91, 359–67; Sunderland 1953), and the organiza-

³⁰"Federal Judges doubtless have their faults, but they are not chiefly responsible for the present defects in the administration of justice in the Federal Courts" (Taft 1922a, 607).

³¹Taft also guarded against moves that he perceived might dilute the Court's prestige, including issues relating to judicial salaries, diplomatic rank, and social protocol at official state functions. Similarly, as a way of acknowledging the Court's "public responsibility," Taft set standards for the attire, behavior, and opinion-writing style of his fellow justices (Mason 1984, 267–271).

³²Needless to say, the judicial reforms of the 1920s had a complicated and uneasy relationship to Progressivism. Although they were framed in Progressive terms, they were offered by a Progressive apostate (Taft) and resisted by many Progressives in Congress who disliked the Court's anti-Progressive jurisprudence.

³³Facing the tremendous challenge of unifying lower court judges behind reform, Taft sent personal letters to every district judge asking for suggested reforms in judicial procedure, to every circuit judge requesting information and advice on any problems with

overcrowded dockets, and to every state supreme court chief justice proposing to bring all courts of last resort closer together (Murphy 1962a, 454).

³⁴Cf. Carpenter (2001, 27), observing that entrepreneurs are best positioned if they "know both political elites and the grass-roots constituencies."

³⁵From soliciting names of candidates from lawyers, politicians, and newspapermen to ushering his favored nominees (Pierce Butler) through the confirmation process to discouraging the nomination of candidates unsympathetic to his own views (Benjamin Cardozo and Learned Hand), Taft had a greater hand in selecting both his colleagues and his subordinates than perhaps any other Chief Justice before or since. Cf. Carpenter (2001, 26–27) on establishing ideal-typical criteria and drawing candidates from multiple personnel networks.

³⁶Cf. Carpenter (2001, 363–364) on the role of the media in the construction of autonomy.

tion proved a crucial ally in Taft's reform campaign. Employing a unique strategy to combat opposition to his expansion of the Court's certiorari jurisdiction, Taft convinced the ABA to tell Congress that the bill was too technical even for lawyers. As a result, ABA lobbyist Thomas Shelton reasoned, Congress should defer to the judiciary, pass the bill, and observe its effects in action. Besides certiorari, Taft also succeeded in persuading the bar to resist congressional measures he opposed, such as the withdrawal of diversity jurisdiction and the restriction of judicial discretion in jury trials (Mason 1984, 129–31), and to support his call for revising procedural rules (Shelton 1925).

In addition to exploiting his own networks,³⁷ Taft carefully dispatched his fellow justices to take advantage of their networks. In 1924, 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 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 residents and Holmes the “circuit justice” for the First Circuit³⁸—along with him to a House Appropriations subcommittee hearing for symbolic support (Mason 1984, 126–27). In both situations, Taft was astute enough to realize that his reputation and his networks were not the only ones carrying political capital, not the only ones capable of building political legitimacy.

Measured Action. Taft's active lobbying for his judicial reforms triggered various reactions, including strong opposition from those who thought his advocacy of a bill advancing his own power (in front of a congressional committee no less!) violated norms of judicial propriety. To some, Taft's influence with legislators—calling the chairmen 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 at best, an outright violation of separation of powers at worst (Mason 1984, 122–26). Sensitive to the dangers of negative perception, Taft had Justice

Van Devanter assure Congress that no justice—not even the Chief Justice—wanted to enter the legislative field. He downplayed his own role in the reform effort and minimized his rivalry with the Senate. He portrayed the reforms as a response to real problems rather than judicial aggrandizement and stressed the “broadly felt benefits of a more efficient federal bench” (Buchman 2003, 13). 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—ostensibly taken to preempt opposition to a fortified Court—Taft demonstrated his willingness to compromise. When he realized that his proposal for a “flying squadron” (Taft 1922a, 601) of two new “roving” judges per circuit (for a total of eighteen “judges at large”) would fail to gain approval, he endorsed a milder version that provided additional judges to 21 specific districts without upsetting local patronage arrangements (Murphy 1962a, 455–58). Astutely aware that Congress could take away the newfound power to transfer judges between districts, Taft urged senior circuit judges to use the power cautiously (Mason 1984, 106). In general, Taft recognized that reform could be fleeting and aimed to set his innovations on the firmest possible ground. His ultimate goal was not just more judges or a lighter workload but an improved and empowered judiciary; his focus was not on gaining power in the short-term but on consolidating it for the long-term.

Toward Judicial Bureaucracy

The sum total of Taft's reforms was a judiciary—a lower court hierarchy, a Supreme Court, a Chief Justiceship—transformed. Though not all of Taft's innovations became consistent features of judicial governance, the three main changes—the reorganization of the federal court system under the Chief Justice, the establishment of the Judicial Conference, the radical expansion of certiorari jurisdiction³⁹—persist today, more than 75 years after Taft left the Court. If part of entrepreneurship is consolidating the immediate gains of innovation into significant and lasting change, then Taft was most certainly an entrepreneur par excellence.

³⁷Among Taft's other efforts to establish or exploit networks were 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) (Mason 1984, 273–286).

³⁸Each justice is assigned to preside, on behalf of the Court, over emergency appeals arising from one or more of the nation's thirteen judicial circuits.

³⁹The expansion was certainly radical. In 1924, cases within the Court's obligatory jurisdiction represented 40% of all filings; by 1930, such cases represented only 15% of all filings (Casper and Posner 1976, 20).

The genius of Taft's reforms was that they recognized a central problem—the fact that Congress had created a hierarchy of courts but not a hierarchy of judges (Frankfurter and Landis 1928, 218)—and set out to rectify it. Desiring both centralization and managerial efficiency, Taft envisioned a judicial hierarchy 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. Upon becoming Chief Justice, Taft is said to have referred to himself as “the head of the judicial branch of government” (Murphy 1962a, 453). Such a position seems uncontroversial today,⁴⁰ when we are accustomed to seeing the Chief Justice testify annually before Congress on the state of the judiciary,⁴¹ but it was distinctly peculiar in 1921, when the Chief Justice was considered little more than the “first among equals.” With the federal judiciary lacking a unified structural “body,” it made little sense to consider anyone the titular, let alone functional, “head.” In order to overcome the perception of the clerical Chief Justice, Taft needed to overcome the reality of the judiciary as a collection of functionally disparate courts and geographically dispersed judges. Surmounting these obstacles required nothing less than the transformation of the third branch into a hierarchical and centrally managed institution capable of understanding and actively addressing its own needs, faults, and weaknesses. Of course, given the national ambivalence toward centralization of government associated with the “return to normalcy,” such a transformation needed to be framed in terms that would assuage rather than exacerbate fears about national consolidation.⁴² Accordingly, appealing to the Progressive era romance with the science of organization and management, Taft emphasized his desire to infuse “executive principle” (Taft 1921, 454)—practices or procedures explicitly designed to increase administrative precision and efficiency—into the tasks and governance of the judicial branch.

⁴⁰Not least because, with two recent exceptions (Resnik and Ruger 2005; Ruger 2004), the role and powers of the Chief Justice have been underestimated and understudied by political scientists and legal academics alike.

⁴¹We might say that this function, begun by Warren Burger and continued by William Rehnquist and now John Roberts, is a legacy of Taft's model of the Chief Justiceship.

⁴²Cf. Post (2002, 1604), noting that the Taft Court's unique conception of itself as “transcending the dichotomy between federal and state spheres of sovereignty” and subsequent “failure to conceptualize judicial centralization as an issue of federalism” resulted in jurisprudential decisions that aggressively expanded federal judicial power over economic regulation.

By granting Taft the authority to transfer judges from overstuffed districts in one circuit to understuffed districts in another circuit, the 1922 act allowed the Chief Justice to place “the judges of the country where they can do the most good” (Taft 1922b, 35). Such a turn to “executive management” of judges not only meant that the “whole Federal judicial force of the country would be strategically employed” (Taft 1916–17, 17) but also marked the beginning of Taft's seemingly uphill battle to shift the allegiance of federal judges from their states to the nation. As the new judicial allegiance—aided in large part by the collegiality of the Judicial Conference—took hold, lower court judges increasingly looked to the Chief Justice for relief from crowded dockets and for general guidance in conducting judicial business. In response, Taft's congressional opponents voiced fears about consolidating the power of the entire judicial system in the Chief Justice. To do so, they claimed, risked converting a government of laws into a government of men—or, in this case, a government of one man (Mason 1984, 101–106). While Taft was correct in denying that he was as powerful as his model judge, the Lord Chancellor of England (*New York Times* 1922b), it is certainly true that he was more powerful—as a politician, as an administrator, and certainly as a policymaker—than most of his predecessors had been.

By authorizing the annual meeting of senior circuit judges that soon became known as the Judicial Conference, the 1922 act not only offered the Chief Justice a position from which to promote and comment on legislation related to the federal judiciary but also made him the unequivocal “head of the Federal judicial system” (Taft 1916–17, 14). Viewing the Conference as a means to achieve solidarity, Taft was convinced that, if individual judges from across the nation could meet (a nearly unprecedented event), exchange information, and garner advice from those facing similar problems, then the disparate judges of America would be well on their way to comprising a unitary judicial “team” (*New York Times* 1922b).⁴³ Emphasizing “the ordinary business principles in

⁴³Calls for “teamwork” (one of Taft's favorite slogans as Chief Justice) and the metaphorical conception of the judiciary as a “team” were crucial to the development of a shared judicial allegiance. In turn, it was precisely this allegiance that convinced lower court judges to surrender a substantial measure of their *individual* autonomy in exchange for enhanced *institutional* autonomy vis-à-vis the other branches of government. Cf. Carpenter (2001, 23–25) on the role of entrepreneurs in the construction, articulation, and rhetorical selling of “bureaucratic culture”—“the metaphorical complex of language and symbols which defines the self-understanding of an agency.”

successful executive work” (Taft 1916–17, 16), Taft used the Conference to require judges to file reports indicating the business completed and that remaining on the docket (Taft 1921, 454; Taft 1922a, 601; Taft 1922b, 34), collect statistics on judicial workload and productivity (Taft 1916–17, 16), and generally supervise judicial administration throughout the nation (*New York Times* 1923a, 1923b, 1924c). With the guiding hand of Taft and under the direction of the initial Conferences, therefore, the judiciary became a piece of “quasi-executive” machinery—“reforged with a capacity for self-study, criticism, and reform” (Starr 1991–92, 966). Judges were, as Taft had long wished they would be, “independent in their judgments, but . . . subject to some executive direction as to the use of their services” (Taft 1922b, 35).

By limiting the automatic right of appeal to the Supreme Court and expanding the types of cases that could be heard only with the justices’ assent, the Judiciary Act of 1925 gave the Court near-complete control over its docket for the first time in history.⁴⁴ Offering an alternative much preferred to the possibility of restricting jurisdiction, the shift toward certiorari review was considered “the best and safest method” (Taft 1922a, 603) for simultaneously easing the Court’s workload and protecting its authority. In fact, since it solved the problem of increasing caseload pressure by decreasing the number of cases the Court was *required* to hear rather than the number it was *permitted* to hear (Taft 1922b, 35), the shift actually enhanced the authority of the Court by dramatically increasing its discretion to pick and choose cases of interest.⁴⁵ With such a complete and thorough revision of its jurisdiction (Taft 1922a, 603; Taft 1922b, 35; Taft 1925–26, 12), the Court was finally able to “exercise absolute and arbitrary discretion with respect to all business but constitutional business” (Taft 1916–17, 18).⁴⁶ The fact that this revision was prompted and undertaken by the justices themselves only further established the Court’s ability to participate in policy-making that substantially affected it.

⁴⁴The docket control is only “near-complete” because the Act did preserve mandatory jurisdiction in a few select types of cases—at least until 1988, when the right of appeal to the Court was virtually eliminated (102 Stat. 662).

⁴⁵Analyses of agenda-setting and the Court’s certiorari process have further illuminated the importance of this development (Pacelle 1991; Perry 1991).

⁴⁶Despite Taft’s assurances to the contrary, the Court immediately exercised such discretion with regard to “constitutional business” as well, routinely declining to hear cases raising constitutional issues.

The judiciary Taft left in 1930 was thoroughly unlike the one he had joined nine years earlier.⁴⁷ The centralization of administrative authority, establishment of the Judicial Conference, and expansion of certiorari jurisdiction not only empowered the office of the Chief Justice but also catalyzed the emergence of a self-governing judiciary. By creating “explicit institutional structures designed to facilitate reform” (Fish 1975, 123–24) and embedding the spirit of executive principle within those structures, Taft was able to entrench both structural hierarchy and managerial efficiency within the judicial branch. Moreover, since the structures created were judicial structures—staffed, operated, and evaluated by Taft and his judicial teammates—they simultaneously buttressed judicial autonomy and implanted elements of judicial bureaucracy. After more than a century of being excluded from the politics of policymaking for their own institution, judges had finally earned the authority to build the judiciary.

Building the Judiciary

As a result of dynamic and sustained political entrepreneurship, William Howard Taft’s lifelong campaign to reform the judiciary eventually yielded dividends. Interestingly, his earlier reform efforts as president did not. Indeed, the contrast between Taft’s unqualified success in achieving judicial reform as Chief Justice and his dismal failure in achieving either tariff or administrative reform as president could not be more striking. In tariff reform, Taft was a clumsy president lacking political awareness and prone to misuse of strategic resources (Arnold 2003). Attempting to reform civil administration, the army, and business regulation, he was simultaneously burdened by the commitments of Theodore Roosevelt and paralyzed by the fear that any action he might take would alienate some faction of his party (Skowronek 1982; Skowronek 1997, 252–59). The result was that each of Taft’s attempts at reform while president was defined largely by “confrontation” with Congress (Skowronek 1982). The fact that he approached judicial reform in a different manner—more measured, more strategic, and with more external support—suggests a process of political learning from his presidential struggles. More

⁴⁷Had Taft lived a few more years he would have witnessed a judiciary transformed even further by two other initiatives he had devised and championed: the creation of the Federal Rules of Civil Procedure and the construction of an independent building for the Supreme Court.

cognizant of his own strengths and weaknesses as well as the surrounding political environment, Taft worked tirelessly to develop personal and institutional reputations, cultivate networks of interest groups and the media, and act in measured ways to avoid alienating others. Together, these actions instigated the two-step process described in this article: first, the construction of political legitimacy necessary for the forging of judicial autonomy, which facilitated the passage of Taft's reforms; and, second, with the consolidation of those reforms, the introduction of judicial bureaucracy, which in turn further enhanced judicial autonomy.

At the end of the day, how do we really know that it is Taft's entrepreneurship and not some other factor—the shift to unified Republican government with the election of Warren Harding in 1920, to cite one possibility—that is responsible for the creation of new programs, the passing of laws that would not otherwise have been considered by Congress, and an increase in both jurisdiction and discretionary administration? One way to probe such a question is to consider a simple counterfactual: in the absence of Taft, would such changes still have occurred? Since caseload pressure was mounting, some sort of reform was probably inevitable at some point. But, given the extent of Taft's entrepreneurship, it undoubtedly would have taken a substantially different shape: less empowering of the Chief Justice, without any provision at all for a Judicial Conference, and—if the pre-Taft reforms of 1911 (38 Stat. 790) and 1913 (39 Stat. 726) are any indication—more piecemeal in jurisdictional housecleaning. In other words, it would hardly have been the institutionally transformative reform Taft delivered. After all, with both the creation of the Conference and the shift to certiorari jurisdiction, Taft conceived definite programs and launched them—from drafting legislation to influencing legislators to testifying at congressional hearings (*New York Times* 1921b, 1921c, 1921d, 1922b); accordingly, the prospects for replication without his entrepreneurship seem dim.

Just as Taft's entrepreneurship was pivotal, so too was it unique. Though certainly similar to Comstock and Pinchot, Taft followed no established script for transforming a political institution. In fact, Taft's precise brand of entrepreneurship suggests a number of possible extensions and modifications to Carpenter's theory of how and why autonomy develops. First, and perhaps most crucially, Taft's quest for judicial autonomy demonstrates that there is more variance within the phenomenon of autonomy—that there are more types and gradations of autonomy—than Car-

penter's seemingly dichotomous exposition of the concept allows. The fact that the pre-Taft judiciary possessed decisional but not organizational or administrative autonomy implies that there are potentially fruitful lines of inquiry about autonomy other than simply whether an institution does or does not possess it. We might ask, for instance, what kind of autonomy a particular institution has developed or to what degree an institution has attained a specific type of autonomy. Such questions show that autonomy exists not simply as a matter of black and white but, rather, as a political phenomenon with multiple shades of gray. Similarly, given that Taft focused his attention on refining organizational capacity and constructing political legitimacy without a corresponding drive to increase political differentiation, we see that Carpenter's three central features of autonomy may develop temporally separate from one another. Differentiation, capacity, and legitimacy, it seems, need not be a "package deal."

Second, though undeniably crucial in the forging of bureaucratic autonomy within the Post Office and the USDA, officials at the "mezzo-level" (Carpenter 2001, 18–23) are not the only actors capable of autonomy-forging entrepreneurship. As Chief Justice, Taft was certainly positioned differently than Carpenter's bureau and division chiefs. In theory, his formal position more closely resembled department executives and cabinet secretaries; in practice, however, he did not let a magisterial conception of his office confine him to a purely ceremonial role. Through frequent contact with fellow judges about the business of the federal courts, on the one hand, and extensive interaction with politicians, interest groups, and the media, on the other, Taft not only acquired the intimate knowledge needed to innovate, experiment, and engage in the process of political learning but also organized coalitions that would support his initiatives. In each case, Taft, though far from a mezzo-level official, acted in the spirit of one. Furthermore, his ability to fuse the strengths of mezzo-level and executive-level positions into a unique conception of the Chief Justiceship offered unique opportunities. Combining the two roles gave Taft the ability, for instance, to articulate an organizational metaphor (like an executive) and to implement it (like a mezzo-level official) simultaneously (Carpenter 2001, 23–25). The lesson here is that officials at the top of an organizational chart, in addition to those in the middle, can be effective advocates for autonomy as well—but only to the extent that they are committed to the mission and success of the particular institution they lead. In this regard, it is crucial that the Chief Justice is not, like Cabinet sec-

retaries, a political appointee who holds his position only at the pleasure of the president. Whereas political appointees rarely know much, if anything, about the substantive work of their agencies, Taft was intimately familiar with the daily functioning of the judiciary; whereas political appointees are seldom invested in the long-term vitality of their agencies, Taft was dedicated to keeping the judiciary—an institution he had long yearned to lead—sufficiently strong and independent to discharge its constitutional functions.

Third, institutional reputations are not the only ones relevant to the construction of political legitimacy; personal or individual reputations can be equally instrumental. In Taft's case, it is not only the Court's reputation as a much-needed and well-functioning institution that begins to build legitimacy among members of Congress and judges alike but also the Chief Justice's reputation as a capable administrator of that institution. Fourth, and finally, networks can be viable sources of support and persuasion even if they are secondary—that is, even if they are networks not of the entrepreneur himself but of someone to whom the entrepreneur is networked. We see this in Taft's deft utilization of his brethren's professional history, partisan affiliation, legal expertise, and geographic background in order to placate opposition and secure the approval necessary for the passage of desired measures.

As the importance of these strategic maneuvers makes clear, the transformation of the institutional judiciary did not occur without controversy, without contestation, or without compromise; rather, it emerged from the cauldron of ordinary politics. Indeed, if there is a broader lesson from Taft's story, it is about the politics of institutional development—more specifically, about the place of judicial capacity in narratives of institutional development. The judiciary, we see from Taft's successful reform campaign, is simultaneously a participant in the struggle for political power as well as an object in it, its capacity simultaneously the agent and outcome of institutional change. The influence of judges in institutional development is neither trumped by that of Congress nor restricted to interpretive activity alone. Judicial capacity, then, grows from more than simply constitutional decisions or the exercise of judicial review; it also derives from interaction with political elites, from empowering legislation, and from public, media, and interest-group support. The judiciary 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. Phrased more technically, we might say that judicial capacity is not simply an independent variable but a dependent one as well.

Framing this insight as a question, we might ask how the process of building the American judiciary unfolded. My concern here is with the creation, consolidation, expansion, and reduction of the structural and institutional capacities needed to respond to and intervene in the political environment.⁴⁸ Such a focus encompasses several features of the institutional judiciary, including, but not limited to, standing, jurisdiction, expansion or contraction of courts, judicial discretion, organizational structure, procedural rules, staffing, budgets, and physical space. Since these structural features allow courts to hear cases, craft and modify legal rules, and render authoritative judgments, they make it possible for judges to settle political, legal, and policy disputes that have concrete effects on individuals, corporations, government, and the nation as a whole. Given the role of the judiciary in, among other things, spurring the growth of an industrial economy (Bensel 2003, 289–354), constituting American citizenship (Smith 1997), and privileging certain rights and liberties at the expense of others (Kersch 2004), understanding the historical development of the institution has obvious substantive import.

Yet, despite such importance, scholars of American political development do not often speak of the judiciary as an institution that was, in any meaningful sense, built. At present, we have developmental accounts of the bureaucracy and the administrative state (Carpenter 2001; Skowronek 1982), Congress (Schickler 2001; Swift 1996; Zelizer 2004), and the presidency (Moe 1985; Skowronek 1997) but know relatively little about the historical processes contributing to the building of the federal judiciary (or even just the Supreme Court) as an independent and autonomous institution of governance in the American political system.⁴⁹ Part of the problem is that, with a few exceptions (Barrow, Zuk, and Gryski 1996; Cameron 2005; Fish 1973; Frymer 2003; Gillman 2002; Johnson 2004; McGuire 2004; Orren 1976), political scientists ostensibly think of courts as institutionally thin, as lacking the complex institutional features—actors, structures, and rules—that make other political institutions worth studying. While the

⁴⁸I am influenced here by Skowronek's (1982, 10) definition of "state building" as the process by which "government officials seeking to maintain power and legitimacy try to mold institutional capacities in response to an ever-changing environment." Cameron (2005, 189) has a similar definition of "judicial power."

⁴⁹Two attempts that, if read in conjunction, *might* be useful are McCloskey (2000) and Posner (1996). There are also a number of studies focusing on similar themes in specific eras (Holt 1989; Kutler 1968; Wiecek 1969).

legislative branch has a hierarchical system of committees and subcommittees and the executive branch has a vast bureaucracy comprising layers of political appointees and civil servants, 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.⁵⁰

As the Taft case demonstrates, however, this view of the judiciary as simply an Article III abstraction that does not itself develop over time is misguided. As an institution, the federal judiciary is at least as complex—and its historical development at least as dynamic—as Congress, the presidency, or the federal bureaucracy. Indeed, looking back at the indeterminacy of Article III⁵¹ and the politics of the early republic, we see that the development of an active and interventionist third branch of government was far from a foregone conclusion. The American judiciary, that is to say, was not born independent, autonomous, and powerful; rather, it had to become so, largely through a continuous process that was both politically determined and politically consequential.⁵² The story of judicial institution building, in other words, is not a single moment of revelation but a series of battles—of which the Taft episode is a single, albeit critical, one—in Congress and courts over the politics of institutional development. It is the story of how the judiciary, long outlined in pencil rather than pen, was, perhaps more so than the legislature or the executive, built—piece by piece, from the ground up, as part and parcel of American political development.

⁵⁰Although largely ignored by political scientists, the institutional context of the judiciary has received attention from legal academics. Much of this literature, however, focuses on fairly specific legal rules and narrow tracts of judicial administration rather than the causes and consequences of structural and institutional innovation within the judicial branch. Notable exceptions include the work of Burbank (1982, 1999, 2004), Geyh (2002, 2006), Hartnett (2000), Resnik (1982, 2000, 2003), Rubin (2002, 2005), Ruger (2004), and Subrin (1987).

⁵¹The “judicial article” does little more than indicate that there is a “judicial Power of the United States” and that such power is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It creates a Supreme Court but gives no indication of how many individuals will compose it. It outlines the types of cases to which the judicial power “shall extend” but qualifies even those grants of jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.” In general, it declares that a judicial power exists but offers scant guidance about the precise nature, contour, or extent of that power.

⁵²I borrow this sentence formulation from Wood: “Americans were not born free and democratic in any modern sense; they became so—and largely as a consequence of the American revolution” (1991, ix).

Acknowledgments

I thank Doug Arnold, Peri Arnold, Beau Breslin, Steve Burbank, Michael Cutrone, Doug Edlin, Chris Eisgruber, Megan Francis, Paul Frymer, Fred Greenstein, Ed Hartnett, Gary Jacobsohn, Ken Kersch, Dave Lewis, Richard Morgan, Robert Post, Christen Romanick, Ted Ruger, Kim Scheppele, Jim Stoner, Rick Valelly, Keith Whittington, Emily Zackin, seminar participants at Princeton, and three anonymous reviewers for helpful suggestions, conversations, and feedback. An earlier version of this article was presented at the 2006 annual meeting of the New England Political Science Association, Portsmouth, NH.

Manuscript submitted 5 December 2005

Manuscript accepted for publication 30 June 2006

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