CHAPTER ONE

The Puzzle of Judicial Institution Building

When the United States Supreme Court convened for the first time in history at the Royal Exchange Building in New York City on February 2, 1790,[1] it was a sorry scene, and even the justices knew it. With only four of George Washington's initial six nominees bothering to show up and the Court lacking even a single case to hear,[2] Chief Justice John Jay and his three colleagues in attendance—associate justices James Wilson, William Cushing, and John Blair—spent the session devising procedures for the conduct of actual business. The justices could not have known then that they would have no such business for another eighteen months,[3] but, in retrospect, the dearth of activity demonstrated how the Court's institutional beginnings were inauspicious and suggested that its likelihood of exerting any measurable direction on the course of American life was slim.

When, more than two hundred years later, the Court convened for one of the most dramatic moments in its history at its own building in Washington, D.C., on December 11, 2000, it was a stunning spectacle, and all of America knew it. With Chief Justice William Rehnquist at the helm, all nine justices sat at attention for the day's lone case, an election dispute summoned from the Florida Supreme Court, a thorny little matter known as *Bush v. Gore*.[4] The justices steadfastly focused their questions on the arcane interstices of finely wrought election procedures, but, with two of the nation's leading lawyers—future solicitor general Ted Olson and former government litigator David Boies—arguing and many citizens subsequently listening in via an immediately released (and nationally broadcast)

[1] The Court's first meeting was actually scheduled for February 1, only to be postponed a day when some of the justices experienced transportation difficulties en route to New York.

[2] Robert Harrison declined the commission, preferring his job as chancellor of Maryland; John Rutledge, though confirmed as a justice, neglected to show up for a single session of the Court before resigning to become Chief Justice of the South Carolina Court of Common Pleas. Washington would subsequently nominate James Iredell to take Harrison's place; Rutledge, replaced in 1791 by Thomas Johnson, would later return to the Court through a recess appointment to the chief justiceship, only to have his nomination rejected by the Senate.

[3] The Court's first decision came in *West v. Barnes*, 2 U.S. 401 (1791) (holding that a writ of error to remove a case from a lower court to the Supreme Court could issue from the clerk of the Supreme Court alone).

[4] 531 U.S. 98 (2000) (declaring the Florida Supreme Court's scheme for recounting presidential election ballots a violation of the Equal Protection Clause of the Fourteenth Amendment).

audio recording,[5] the remarkable and incontrovertible fact that a presidential election hung in the balance raised the possibility that the Court sat at the apex of not just the American judiciary but the entire American political system.

The dissimilarity between these two snapshots in the Court's history could not be more profound. With several distinguished men having refused appointment and the docket languishing without any substantial business,[6] the Court of the late eighteenth century was a feeble institution. It lacked prestige, respect, and power; it had no building, a small budget, and was largely controlled and handicapped by the other branches of government. By contrast, with persistent struggles over judicial nominations and recurrent attempts to restrict jurisdiction over controversial issues (abortion, flag burning, and gay marriage, for instance), the Court of the early twenty-first century is clearly considered significant enough to warrant a fight. It is not only prestigious and revered but also powerful, politically important, and highly contentious; it hears and decides cases in its own "marble temple," has a significant budget, and is sufficiently independent from the other branches to govern its own affairs. How did such a dramatic evolution occur? How did the federal judiciary in general, and the Supreme Court in particular, transcend its early limitations and become a powerful institution of American governance? How, in other words, did we move from a Court of political irrelevance to one of political centrality? Those are the principal questions driving this book.

From Judicial Exceptionalism to Architectonic Politics

The conventional wisdom about—the "textbook" answer to—these sorts of questions emphasizes federal judges, specifically Supreme Court justices, wielding the power of constitutional interpretation. *Marbury v. Madison* is decided, (invalidating Section 13 of the Judiciary Act of 1789 as in conflict with Article III).[7] and judicial review exists. *Cooper v. Aaron* is decided,[8] and judicial supremacy exists. In this understanding, judicial power expands when judges issue opinions that di-

[5] The previous week, the Court had agreed, for the first time in its history, to release audiotapes immediately following oral arguments in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (requesting clarification from the Florida Supreme Court regarding its decision forbidding Florida Secretary of State Katherine Harris from certifying election results until manual recounts had been completed). Prior to that decision, standard protocol was to release audiotapes of oral arguments only at the conclusion of each term; since *Bush v. Gore*, the Court has considered—and, in many cases, authorized—same-day release of oral argument audiotapes from high-profile cases when specificially asked to do so by a news organization. At the same time, all requests for the Court to provide a live audio feed of oral arguments, including ones made during the 2000 election controversy, have been denied.

[6] Moreover, after only six years as the nation's first chief justice, Jay, while negotiating a treaty overseas, resigned from the Court upon his election as governor of New York.

[7] 5 U.S. 137 (1803).

[8] 358 U.S. 1 (1958) (declaring that the Supremacy Clause of Article VI requires state officers to enforce the decisions of the Supreme Court).

rectly expand it. Courts—and, most often, the Supreme Court—unilaterally determine the contours and extent of judicial power with little or no interference from other political actors. The story of the federal judiciary's transformation unfolds internally, with the Court occupying the central position, constitutional interpretation the central tool, and all other actors and forces relegated decidedly to the background.

In part, this emphasis on judicial prerogative stems from a prevailing but problematic ethos of "judicial exceptionalism." Endemic to far too much scholarly work in public law, judicial politics, and American political development, this ethos manifests itself in the twin suppositions that the judiciary is institutionally separate from and institutionally thin when compared to other political institutions. First, given their lifetime tenure, their officially "nonpartisan" identity, and, most important, their unique role in interpreting the Constitution, we tend to treat judges as though they were endowed with some sort of special status that elevates them above—or at least distinguishes them from—"ordinary" politics and politicians. Conflating the Constitution and the Court,[9] we largely assume—despite sustained political debate over this perspective from the earliest days of the republic to today[10]—that the hallowed status of the former automatically and necessarily redounds to the latter, thereby isolating, insulating, and revering the Court simply because of its contested place as the "Platonic guardian" of the constitutional order. Second, with a few exceptions,[11] we ostensibly think of courts as lacking the com-

[9] There is, of course, Charles Evans Hughes's famous and oft-repeated aphorism, "We are under a Constitution, but the Constitution is what the judges say it is." Though Hughes would subsequently serve two nonconsecutive stints on the Court—as an associate justice (1910–16) and, after a failed presidential bid in 1916 and four years as secretary of state (1921–25) under Warren Harding and Calvin Coolidge, as chief justice (1930–41)—he actually uttered this sentiment while governor of New York. According to Hughes himself, the remark, delivered "extemporaneously" in a speech given before a chamber of commerce in Elmira, New York, on May 3, 1907, was not intended to frame constitutional interpretation as "a matter of judicial caprice" but to emphasize "the importance of maintaining the courts in the highest public esteem as our final judicial arbiters." For the full text of the speech, see Charles Evans Hughes, *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (New York: Putnam's, 1908), 133–46; for Hughes's clarifying statements (accompanied by the relevant portion of the speech), see *The Autobiographical Notes of Charles Evans Hughes*, ed. David J. Danelski and Joseph S. Tulchin (Cambridge, MA: Harvard University Press, 1973), 143–44.

[10] Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: St. Martin's Press, 1994); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007).

[11] See, among others, Deborah J. Barrow, Gerard S. Gryski, and Gary Zuk, *The Federal Judiciary and Institutional Change* (Ann Arbor: University of Michigan Press, 1996); Charles M. Cameron, "Endogenous Preferences about Courts: A Theory of Judicial State Building in the Nineteenth Century," in *Preferences and Situations: Points of Intersection Between Historical and Rational Choice Institutionalism*, ed. Ira Katznelson and Barry R. Weingast (New York: Russell Sage Foundation, 2005), 185–215; Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton, NJ: Princeton University Press, 1973); Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97 (2003): 483–99; Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the

plex institutional features—namely, collections of structures and rules that serve to influence behavior and regulate the exercise of power—that make political institutions worth studying. While the 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.[12] The combined effect of these two perspectives—simultaneously overestimating the judiciary's position and underestimating its depth relative to other political institutions—is to obscure the variety of ways in which courts and judges both gain and exercise power.

As we shall see, judicial power grows from more than merely constitutional decisions or the exercise of judicial review; indeed, it more commonly and more foundationally derives from interaction with political elites, from empowering legislation, and from public, media, and interest group support. Judicial power is likewise expressed not simply through jurisprudential constructions such as the "clear and present danger" test or the "state action" doctrine but more frequently (albeit less dramatically and less controversially) through procedural mechanisms such as removal and rule making.[13] Thus, even if the traditional focus on "rule by judges" may be warranted in some respects,[14] it takes for granted the ways in which

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United States, 1875–1891," *American Political Science Review* 96 (2002): 511–24; Lori A. Johnson, "Institutionalization of the Judicial Branch," paper presented at the 2004 Western Political Science Association Meeting, Portland, Oregon, 2004; Lori A. Johnson, "Who Governs the Guardians? The Politics of Policymaking for the Federal Courts," PhD diss., University of California–Berkeley, 2004; Kevin T. McGuire, "The Institutionalization of the U.S. Supreme Court," *Political Analysis* 12 (2004): 128–42; and Karen Orren, "Standing to Sue: Interest Group Conflict in the Federal Courts," *American Political Science Review* 70 (1976): 723–41.

[12] Although largely ignored by political scientists, the institutional context of the judiciary has received attention from legal academics. Much of this literature, however, has focused 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 Stephen B. Burbank, "The Architecture of Judicial Independence," 72 *Southern California Law Review* 315 (1999); Stephen B. Burbank, "Procedure, Politics and Power: The Role of Congress," 79 *Notre Dame Law Review* 1677 (2004); Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006); Judith Resnik, "Managerial Judges," 96 *Harvard Law Review* 374 (1982); and Judith Resnik, "The Programmatic Judiciary: Lobbying, Judges, and Invalidating the Violence against Women Act," 74 *Southern California Law Review* 269 (2000).

[13] For the "clear and present danger" test, see *Schenck v. United States*, 249 U.S. 47 (1919) (upholding the Espionage Act of 1917 against claims that it violated freedom of speech as protected by the First Amendment); for the "state action" doctrine, see *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the Civil Rights Act of 1875 as beyond the power granted to Congress by Section 5 of the Fourteenth Amendment).

[14] For recent comparative analyses of "juristocracy," "judicialization," and "constitutionalization," see, among others, Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University

courts and judges become institutionally equipped to rule.[15] In seeking to understand *how* judges rule, we have largely neglected the conditions that have made it possible *for* judges to rule;[16] in emphasizing how the judiciary acts *upon* politics, we have minimized the ways in which it is equally acted upon *by* politics.[17] Thus, even as we know a great deal about the political consequences of judicial power, its effect on structures of power or individual rights, and its expression through constitutional review, we lack a holistic narrative about the historical processes contributing to the rise of the federal judiciary (or even just the Supreme Court)

Press, 2002); and C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

[15] Recent attempts to think about these issues have led some scholars to talk about the "institutionalization" of the federal judiciary. See Johnson, "Institutionalization of the Judicial Branch"; Johnson, "Who Governs the Guardians?"; and McGuire, "The Institutionalization of the U.S. Supreme Court." For theories of institutionalization applied to other political institutions, see Nelson Polsby, "The Institutionalization of the U.S. House of Representatives," *American Political Science Review* 62 (1968): 144–68; and Lyn Ragsdale and John J. Thies, "The Institutionalization of the American Presidency, 1924–92," *American Journal of Political Science* 41 (1997): 1280–1318. Largely because the term carries the conceptual baggage of these prior iterations—attempts that are concerned more with identifying the point(s) at which individual institutions satisfy discrete criteria and become "institutionalized" than with tracing the myriad and often non-linear steps in institutional development—I purposefully eschew the language of institutionalization.

[16] There is, of course, a growing—and most impressive—historical-institutionalist literature on the circumstances and conditions surrounding the consolidation, augmentation, and contraction of judicial authority in America, but this work, which seeks to generate strategic explanations of how and why institutions do or do not share, surrender, and grant power to rival institutions, tends to focus almost exclusively on the political foundations necessary for the development and exercise of judicial review. For leading works in this genre, see Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas"; Howard Gillman, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism," in *The Supreme Court and American Political Development*, ed. Ronald Kahn and Ken I. Kersch (Lawrence: University Press of Kansas, 2006), 138–68; Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35–73; Mark A. Graber, "Federalist or Friends of Adams: The Marshall Court and Party Politics," *Studies in American Political Development* 12 (1998): 229–66; Keith E. Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," *Polity* 33 (2001): 365–95; Keith E. Whittington, " 'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 96 (2005): 583–96; and Whittington, *Political Foundations of Judicial Supremacy*.

[17] For work that takes account of the political environment surrounding judicial power but is still, at heart, interested in explaining why judges make certain decisions and not others rather than how judges become powerful in the first place, see Cornell W. Clayton and J. Mitchell Pickerill, "The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence," 94 *Georgetown Law Journal* 1385 (2006); Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004); Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," 82 *Virginia Law Review* 1 (1996); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004); Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004); J. Mitchell Pickerill and Cornell W. Clayton, "The Rehnquist Court and the Political Dynamics of Federalism," *Perspectives on Politics* 2 (2004): 233–48; and Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2002).

as an independent and autonomous institution of governance in the American political system.[18]

As a result, my central concern in this book is with what might be called "architectonic" politics: the politics of actors seeking to shape the structures of government in order to further their own interests. After all, as political scientists (and sociologists) have recognized since Peter Bachrach and Morton Baratz's seminal 1962 article on the "second face of power,"[19] the processes that define and the structures that surround institutions determine, in no small part, both what those institutions will look like and what they will do. This insight is already central to existing developmental accounts of Congress,[20] the presidency,[21] and the federal bureaucracy.[22] For each of these institutions we know how and why it acquired the role, structure, and powers it did. We know why certain actors delegated specific powers to particular institutions at precise times and how those actors overcame constraints and seized upon opportunities for transformative action. The result is more than isolated conceptions of why the House of Representatives reformed itself, when presidential power is at its greatest, and how the Post Office became autonomous; rather, it is a more holistic and macrolevel understanding of how the growth and evolution of governmental power—how the expansion and refinement of "the state"—shaped and was shaped by politics and policy making at various points in American history. Given the role of the American judiciary in, among

[18] Two attempts that, if read in conjunction, are marginally useful in this regard are Robert G. McCloskey, *The American Supreme Court*, 5th ed., rev. by Sanford Levinson (Chicago: University of Chicago Press, 2010) and Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge, MA: Harvard University Press, 1996); for an older and somewhat more dated account through 1925, see Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1928). Of course, there are also historical analyses of these processes (or something akin to them) in specific eras, citations to which are scattered throughout the next six chapters.

[19] Peter Bachrach and Morton S. Baratz, "Two Faces of Power," *American Political Science Review* 56 (1962): 947–52.

[20] Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton, NJ: Princeton University Press, 2001); Elaine K. Swift, *The Making of an American Senate: Reconstitutive Change in Congress, 1787–1841* (Ann Arbor, MI: University of Michigan Press, 1996); Julian Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948–2000* (Cambridge: Cambridge University Press, 2004).

[21] Terry Moe, "The Politicized Presidency," in *The New Direction in American Politics*, ed. John E. Chubb and Paul E. Peterson (Washington, DC: Brookings Institution Press, 1985), 235–71; Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Harvard University Press, 1997).

[22] Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982). For a theoretically rich but less historically oriented account, see Terry M. Moe, "The Politics of Bureaucratic Structure," in *Can the Government Govern?* ed. John E. Chubb and Paul E. Peterson (Washington, DC: Brookings Institution Press, 1989), 267–329.

other things, spurring the growth of an industrial economy,[23] constituting national citizenship,[24] and advancing certain forms of individual rights and liberties at the expense of others,[25] understanding the historical development of the institution—understanding the process by which its power was constructed—has obvious substantive import.[26] Yet when scholars of American political development speak of the judiciary at all,[27] rarely do they speak of it as an institution that was, in any meaningful sense, a product of architectonic politics.[28]

As this book will demonstrate, however, any view of the judiciary as simply a constitutional abstraction that does not itself develop over time is misguided. As an institution, the federal judiciary is composed of far more varied and complicated

[23] Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877–1900* (Cambridge: Cambridge University Press, 2003), 289–354 (on the judicial construction of an unregulated national market).

[24] Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997).

[25] Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004).

[26] Cf. Gordon S. Wood, "The Origins of Judicial Review," 22 *Suffolk University Law Review* 1293, 1304 (1988), lamenting that we have "no history of the emergence of the independent judiciary at the end of the eighteenth and beginning of the nineteenth centuries—perhaps because we take a strong independent judiciary so much for granted"; and Mark A. Graber, "Establishing Judicial Review: *Marbury* and the Judicial Act of 1789," 38 *Tulsa Law Review* 609, 646 (2003), noting that we would learn much about the development of judicial power "by examining the legislative debates over the structure of the federal judiciary that have taken place throughout American history." Part of my project, of course, is to begin to write precisely the history to which Wood refers utilizing precisely the sources suggested by Graber.

[27] Although there is an abundance of scholarship approaching the judiciary from the standpoint of American political development, much of it focuses on constitutional law and doctrine to the exclusion of changes in the judiciary as an institution. See, for example, Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press, 1991); Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press, 1998); Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (Cambridge: Cambridge University Press, 2011); Victoria C. Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton, NJ: Princeton University Press, 1993); Keck, *The Most Activist Supreme Court in History*; Kersch, *Constructing Civil Liberties*; George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge: Cambridge University Press, 2003); McMahon, *Reconsidering Roosevelt on Race*; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996); Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* (Ann Arbor: The University of Michigan Press, 2001); Karen Orren, *Belated Feudalism: Labor, Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988); and Smith, *Civic Ideals*.

[28] For relatively specific treatments of this idea outside the American political development tradition, see Barrow, Gryski, and Zuk, *The Federal Judiciary and Institutional Change*; 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; and Charles R. Shipan, *Designing Judicial Review: Interest Groups, Congress, and Communications Policy* (Ann Arbor: University of Michigan Press, 1997).

components than simply the written opinions of judges; its structural architecture is at least as complex—and its historical development at least as dynamic—as that of Congress, the presidency, or the federal bureaucracy. Indeed, looking back at the indeterminacy of Article III,[29] which declares that a judicial power exists but offers scant guidance about the precise nature, contour, or extent of that power, 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.[30] The story of the judiciary's transformation, in other words, is not a single moment of revelation but a series of battles over law, courts, and the politics of institutional development. It is the story of how the judiciary, long outlined in pencil rather than pen, was built—piece by piece, from the ground up, as part and parcel of American political development.

The Puzzle of Judicial Institution Building

At the heart of this book is the puzzle of "judicial institution building"—the puzzle of understanding how the process of "building" the judiciary unfolded over the course of American political development. By "judicial institution building," I mean *the creation, consolidation, expansion, or reduction of the structural and institutional capacities needed to respond to and intervene in the political environment*.[31] In particular, I focus on the construction, destruction, and renovation of three building blocks that are both common and essential to all political institutions[32]: a

[29] At a mere 369 words, Article III (the judicial article) is the shortest and vaguest of the articles establishing the three branches of the federal government. For purposes of comparison, Article I (the legislative article) is 2,247 words and Article II (the executive article) is 1,011 words. The entire 1787 Constitution is more than 4,300 words, so Article III accounts for less than one-tenth of the document as a whole. In terms of actual content, the article indicates that there is a "judicial Power of the United States," 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," and that it "shall extend" to (among other categories of disputes) "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." At the same time, it gives no indication of how many individuals will compose the Supreme Court and qualifies its grants of jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."

[30] I borrow this sentence formulation from Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1991), ix: "Americans were not born free and democratic in any modern sense; they became so—and largely as a consequence of the American revolution."

[31] I am influenced here by Stephen Skowronek's 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." See Skowronek, *Building a New American State*, 10. For a similar definition of "judicial power," see Cameron, "Endogenous Preferences about Courts," 189.

[32] Although institution building is often conceived strictly as a process of positive growth (empowerment), I include negative growth (limitation) in my conception as well. If our goal is to understand the politics surrounding the development of judicial power, then surely the reduction or abolition of

set of discrete and specific *functions*,[33] which are performed by a group (or variety of groups) of *individuals*,[34] who are themselves aided by a collection of concrete operating *resources*.[35] This tripartite foundation encompasses several features of the institutional judiciary, including—but not limited to—jurisdiction, procedural rules, and judicial discretion (functions); expansion or contraction of courts, organizational structure, and formal institutional entities such as the Judicial Conference or the Administrative Office of the Courts (individuals); and budgets, buildings, and legal reports or books (resources). Together these features allow courts to hear cases, craft and modify legal rules, and render authoritative judgments; in turn, they make it possible for judges to settle political, legal, constitutional, and policy disputes that have concrete effects on citizens, corporations, government, and the nation as a whole.[36]

My goal is to uncover both the causes and consequences of institutional innovation and modification—of changes in functions, individuals, and resources—within the judiciary.[37] As such, I ask three broad questions about judicial reform

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particular facets of that power is relevant and important. After all, just as building a structure involves erecting or remodeling certain features, so too might it involve razing others. See Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004), 123, eschewing the Whiggish "assumption of progress between past and present" and defining political development as a "durable shift in governing authority." That said, the trajectory of judicial power in America has been consistently and undeniably upward.

[33] *Functions* refers to the number and types of cases that courts can or must hear as well as the manner in which those courts are empowered, encouraged, and permitted to dispose of them.

[34] *Individuals* refers to the number and location of judges and other judicial personnel (clerks, marshals, administrators), as well as the way in which said personnel are hired, fired, organized, and supervised.

[35] *Resources* refers to the amount, source, and type of appropriations granted to the judiciary (including any specific conditions, limits, or incentives placed on or around the use of those appropriations) as well as legal materials and the availability of office space, courtrooms, and courthouses.

[36] On the importance of these seemingly mundane structural features, see Frankfurter and Landis, *The Business of the Supreme Court*, 2: "The mechanism of law—what courts are to deal with which causes and subject to what conditions—cannot be dissociated from the ends that law subserves. . . . After all, procedure is instrumental; it is the means of effectuating policy." For similar assertions applied to legislative development, see Schickler, *Disjointed Pluralism*, 3, noting that "as any legislature evolves through time, little is more fundamental to its politics than recurrent, often intense, efforts to *change*" the body's "complex of rules, procedures, and specialized internal institutions"; and Zelizer, *On Capitol Hill*, 3, arguing that process is "more than a technical backdrop to the *real* political action."

[37] Throughout the book I focus my consideration on Article III courts, largely (though not wholly) leaving aside so-called Article I courts, which include the Tax Court and various administrative law entities that adjudicate disputes over congressionally created rights; Article II courts, which operate as military commissions; and Article IV courts, which exist in American territories such as Guam and the Virgin Islands. While it is no doubt true that these other quasi-judicial bodies are important in the broader landscape of American politics, the fact that they are not established under Article III and therefore neither subject to the constraints (adversarial proceedings for live disputes only) nor in possession of the benefits (life tenure during good behavior) of Article III tribunals raises a somewhat distinct set of analytic issues. For the Supreme Court's official delineation of acceptable uses of non–Article III courts and explication of the key distinctions between Article III and non–Article III courts, see *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50 (1982)

from the commencement of the new government in 1789 through the close of the twentieth century. First, *why* was judicial institution building pursued? Who were the important actors, and what goals were they seeking to attain? Second, *how* was judicial institution building accomplished? What challenges presented themselves, and what events or actions were needed to surmount them? Third, *what* did judicial institution building achieve? What were the concrete and enduring changes in the exercise of judicial power?[38] My focus here is less on what the judiciary does vis-à-vis other political institutions than on what is done to the judiciary both by external actors and by its own members; my interest is less in how the judiciary wields power and authority in any particular jurisprudential or policy area than in the analytically antecedent matter of how it gradually became structurally and institutionally equipped to exert power and authority across a range of areas.

If that process was not overseen by judges, then by whom? If it was not executed through constitutional interpretation and judicial review, then through what? Because of the manner in which Article III effectively delegates judicial institution building to Congress,[39] the chief actors are representatives and senators, the critical actions congressional statutes that are often called (either at the time or in retrospect) "Judiciary Acts." Yet even as the ultimate form of judicial institution building is predominantly legislative, the character of the process leading up to and politics surrounding it is relatively diverse, with presidents, judges, attorneys general, legal academics, bar association leaders, and other notable political actors all playing substantial roles in generating ideas, drafting proposals, and actively working either for or against reform even if, at the conclusion of the process, their actions are validated by and formalized through congressional action. For their part, constitutional interpretation and judicial review are no doubt important, but they are not only less important than action taken by the policy branches but also important less as avenues of institution building than as either context for it, with judicial decisions influencing the strategic environment within which institution building takes place, or extensions of it, with judges frequently acting in the existing stream of politically determined institution building (even if adding their own power-consolidating flourishes to it) and very rarely venturing outside it.

At base, the puzzle of judicial institution building is fundamentally about a series of contested questions of institutional design and delegation. In making choices

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(invalidating the jurisdiction granted to bankruptcy courts under the Bankruptcy Act of 1978 as an unconstitutional exercise of congressional authority to establish inferior tribunals under Article III).

[38] Although I ask three sets of questions about the politics of institutional development, I offer a theoretical account for only the first two. The third set of questions—focused on consequences rather than causes—is no doubt crucially important (and it receives notable treatment in each subsequent chapter). But, given the context-dependent nature of the consequences of institution building, it is exceedingly difficult—and, indeed, likely undesirable—to craft a generalizable theory to explain them.

[39] Article III, Section 1 vests judicial power in the Supreme Court "and in such inferior Courts as *the Congress* may from time to time ordain and establish" (emphasis added). This follows the enumeration of the power "To constitute Tribunals inferior to the supreme Court" granted to Congress in Article I, Section 8.

about whether, when, and in what way to build the judiciary, political actors are driven by one or more of three goals: satisfying substantive regime commitments (policy), consolidating partisan strength and preserving electoral support (politics), and maintaining a functionally efficient judicial branch (performance).[40] While housekeeping measures are largely uncontroversial, occurring often and easily, more significant policy, political, and performance institution-building efforts face constraints—both practical obstacles and political contestation—that inhibit reform of the institutional judiciary. These constraints are overcome and reform made possible through two catalysts for change: significant political events and strategic political action. While events resulting in increases in judicial workload or a large-scale crisis in American society may help to prompt widely supported change, only pivotal elections that reorder political settings or reorient political incentives are capable of breaking down the constraints that inhibit transformative action. In the absence of such an election, entrepreneurs can overcome the constraints upon reform provided their identity, ideas, and tactics are each carefully tailored to the task at hand.

Over the course of American history, the precise substance of each of these three institution-building aims—policy, politics, and performance—has varied widely, but the overriding purpose has remained constant: to use the judiciary to further some end that would otherwise be difficult or even impossible to realize. Whether hoping to promote the growth of a commercial economy, the protection of minority rights, or the defeat of organized labor, political actors have pursued institution building to reallocate power either horizontally (between branches of the federal government) or vertically (between federal and state governments) in the hope that the federal judiciary would be more amenable than other institutions to their particular policy preferences. Among other plans, institution builders have entrenched their policy preferences past the duration of the current political regime by stacking newly created judgeships with like-minded individuals and expanded federal jurisdiction or broadened the causes for removal from state courts in order to shift particular classes of disputes from hostile forums where their interests are unlikely to be represented to friendlier forums more receptive

[40]I should note that, while either policy or political goals might be considered part of a "regime politics" approach to institution building, the two aims do not always act in concert with each other. To say simply that regimes are building the judiciary may be true, but it ignores the process by which different regime interests come to the fore and the ways in which they may conflict, coincide, and combine in unique and often unpredictable ways. For the touchstone of the "regime politics" genre, much of which is concerned with tracking external political influences on judicial decision making at various points of American history, see Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker," *Journal of Public Law* 6 (1957): 279–95. For more recent iterations, see Clayton and Pickerill, "The Politics of Criminal Justice"; Gillman, "Party Politics and Constitutional Change"; and Pickerill and Clayton, "The Rehnquist Court and the Political Dynamics of Federalism." For a critique of that literature as it applies to the exercise of judicial review, see Thomas M. Keck, "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?" *American Political Science Review* 101 (2007): 321–38.

to their desired ends.[41] Independent of—or, perhaps in advance of—whatever substantive outcomes they might seek to foster, political actors have also used institution building to consolidate their own power. In this vein, political institution building has alternately been seen as an opportunity to build the party apparatus by distributing patronage positions (judges, marshals, and clerks, for example) to campaign supporters so as to solidify a base of electoral support heading into the next election cycle,[42] and as a mechanism to foist divisive issues onto the judiciary (whether by drafting vague statutes in need of judicial interpretation, including specific provisions authorizing judicial review, or expanding the reach of federal jurisdiction), thereby enhancing electoral prospects by sidestepping contentious and coalition-disrupting political decisions.[43] Finally, political actors have consistently employed institution building to maintain a well-functioning and efficient judicial branch. Such action has often emerged out of the recognition of performance benefits unique to judicial governance (the application of uniform and consistent rules across agencies or states, the information advantage in assessing the concrete effects of policy afforded by being an ex post mover[44]) as well as attempts to solve performance defects of both endemic (rising caseloads) and isolated (sick judges, inconvenient times and locations of court sessions) proportions.[45]

Since—aside from functionalist and nonsubstantive housekeeping measures, which regularly proceed without impediment—institution building holds the potential to be both partial between contending ideological visions (disproportionately benefiting or harming one political party, interest group, or segment of the population) and transformative in scope (fundamentally altering or radically reconfiguring the institution), the process can be quite controversial and encounter substantial resistance from party leaders, organized interests, and ordinary citizens alike. Against both this sort of political opposition and practical obsta-

[41] Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas."

[42] Barrow, Zuk, and Gryski, *The Federal Judiciary and Institutional Change*; Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven, CT: Yale University Press, 1997), citing "personal" as one of three presidential agendas in lower court staffing.

[43] This type of action not only allows elected officials to cast the judiciary as a scapegoat for problematic outcomes but also facilitates their ability to say one thing (to extremists) and simultaneously do another thing (for moderates). See Graber, "The Nonmajoritarian Difficulty"; and Lovell, *Legislative Deferrals*. Of course, Congress regularly delegates power to bureaucratic agencies for similar reasons. See, for example, David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transactions-Cost Approach to Policy Making under Separate Powers* (New York: Cambridge University Press, 1999); John D. Huber and Charles R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (New York: Cambridge University Press, 2002); and Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3 (1987): 243–77.

[44] James T. Rogers, "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction," *American Journal of Political Science* 45 (2001): 84–99.

[45] To the extent that rectifying these sorts of functional inadequacies is regularly seen as either or both a matter of good governance or a form of constituent service to assuage the frustration of citizens and interest groups, performance-oriented institution building occasionally manifests policy or political concerns indirectly.

cles including the limited time of legislative sessions, the presence of seemingly more pressing matters (both foreign and domestic) on the national agenda, and the technicality of the issues involved, two distinct catalysts—significant political events and strategic political action—have managed to push institution building forward.

Significant events have prompted successful institution building in two distinct ways. Some events, including those contributing to an increase in judicial workload (as in the case of territorial expansion or the passing of significant regulatory legislation) or prompting a crisis in American society (as in the case of economic distress or national political scandal), have helped to facilitate institution building. By prompting calls for, raising awareness about, and generally transcending the inertia and disinterest that might otherwise surround institution building, such events often place on the political agenda largely uncontested initiatives that are likely, though by no means certain, to be viewed favorably by relevant political actors. Beyond merely bringing high-support but low-salience reforms to fruition, other events—specifically, elections that either fundamentally reshape the political environment or substantially alter the calculations of actors within it—have proved independently capable of triggering institution building by surmounting the political barriers surrounding it. Whether by encouraging lame-duck leaders to entrench their substantive policy interests in the judiciary, inviting new leaders to consolidate their electoral support and fortify their party apparatus, substantially weakening an obstructionist minority, elevating politicians with slightly different preferences as their intracoalition predecessors, or convincing moderate actors that the political tides were headed in one direction as opposed to another, pivotal elections have provided ripe opportunities for outgoing, incoming, and existing actors to place their stamp on the shape of the federal judiciary.

When facilitating events have not brought uncontested reform to the fore and triggering events (namely, pivotal elections) have not eliminated potential constraints upon judicial institution building, the entrepreneurship of cautious and strategic political actors has occasionally been successful. Somewhat more difficult—and thus less common—than reforms that emerge in the aftermath of significant events, entrepreneurial reforms have nonetheless proved both transformative and extremely long-lasting.[46] Seeking to resolve rather than simply avoid the collision of rival goals and interests that is endemic to institution building, political entrepreneurs have influenced decisions through and neutralized opposition with some combination of their individual identities, ideas, and tactics. When armed with favorable reputations, embedded in crosscutting networks of support, and possessing a natural constituent base among members of a particular party, region of the country, or substantive interest area, entrepreneurs gain credibility for reform efforts, insulate themselves against certain types of attacks and oppo-

[46]Indeed, as we shall see, three of the most important institution-building statutes in American history—the Judiciary Act of 1789 (in chapter 2), the Circuit Courts of Appeals Act of 1891 (in chapter 5), and the Judiciary Act of 1925 (in chapter 6)—were each prompted by political entrepreneurship.

sition, and generally acquire the political capital necessary to enable institution building. Through the articulation of ideas that other actors either support, are neutral toward, or are mildly skeptical of rather than staunchly opposed to, entrepreneurs avoid squandering capital over radical reform proposals. By framing the terms of debate, reconciling contradictory preferences, accommodating and incorporating multiple perspectives, engineering compromises through measured action, building coalitions, constructing political legitimacy, and influencing the media and public perception, entrepreneurs overcome ambivalence and contestation by manipulating actors and the diverse set of interests that surround them.[47] Engaged "in a constant search for political advantage,"[48] entrepreneurs are perpetually looking for "speculative opportunities"—overlays, cleavages, and fissures—that are pregnant with possibilities for change but require an act of leadership in order for any to materialize. And once they find or create such opportunities, entrepreneurs employ targeted strategies sensitive to the surrounding environment at that precise moment in time in order to forge successful political action through politically stable coalitions rather than politically infirm factions.[49]

Conceptualizing the federal judiciary as both a central actor in and an outcome of politics, as simultaneously a participant and object in the struggle for political power, we see that the institution has been designed and constructed in ways that both embody political choice and engendered political change. It has been built because elected politicians consistently and continuously saw it in their interest to build it, and it has been built in ways that converted a woefully inchoate institution into a firmly established one.[50] Far from a clean or consensual process, this transformation of the institutional judiciary did not occur without controversy, without contestation, or without compromise; rather, it emerged from the cauldron of ordinary politics.

Toward a Developmental Account of Judicial Power

Occurring during unified and divided government; under Republicans, Democrats, Federalists, and Whigs; when the Supreme Court was striking down many federal and state laws and when it was striking down few, judicial institution building—far from limited to specific years or spans of years—has been consistent throughout American history and across traditional categories of political analy-

[47] Carpenter, *The Forging of Bureaucratic Autonomy*, 14–17, 27–35; Adam D. Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," *Studies in American Political Development* 17 (2003): 188.

[48] Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," 186.

[49] Sheingate refers to this as a process of "creative recombination." Ibid., 198.

[50] Throughout much of early American history, in fact, the judiciary lacked the ability to undertake even basic tasks of institutional maintenance, with Congress routinely passing legislation on matters such as the times and locations of court sessions and contingency plans in the event sitting judges grew ill.

sis. The bulk of such institution building, however, has yielded alterations that more closely resembled institutional tinkering than institutional transformation. These reforms have come often, but they have also come piecemeal. Provisional in aim and limited in scope, they modify the problems they address only for a short time and, even then, only at the margins. Frequently, these measures are explicitly framed as temporary expedients—with the promise of more significant reform at a later date—but eventually become fairly permanent (and outdated) fixtures in the landscape of the institutional judiciary. And although it is true that changes that may initially appear insignificant often accumulate and can, with the passage of time, become important in their own right, the development of the institutional judiciary has largely been defined by a small set of transformative—and, for the most part, highly contested—reforms rather than by a larger set of inferior and consensual ones. Inferior episodes are important, but their function is largely to fill in details after landmark episodes outline the role, structure, and powers of the federal judiciary. Given the increased level of political contestation, those landmark episodes are obviously more atypical, often occurring unpredictably, occasionally in fits and spasms after long periods of inactivity and mundane change. Though fewer in number, these episodes are also greater in stature, inducing the "durable shift[s] in governing authority" that denote consequential change in the American political system.[51]

My general approach to creating a developmental account of judicial power, then, embeds case studies of a series of transformative moments within a more deeply contextual understanding of the process in the historical period under consideration.[52] In surveying the universe of institution-building episodes,[53] I identify as transformative those episodes that, whether purposefully or inadvertently, influenced either the concrete and tangible state of the institutional judiciary itself or the character of the architectonic politics that surround the building of it in a fashion that is both broad-based and enduring.[54] For each such institution-building

[51] Orren and Skowronek, *The Search for American Political Development*, 123.

[52] This means, of course, that I do not treat every conceivable instance of institution building that has occurred since the nation's founding. I do, however, supplement my detailed process tracing of transformative moments by recapping numerous other episodes at the end of each section and by noting yet more in assorted footnotes throughout the ensuing chapters.

[53] Using two systematic "sweeps" of American history, I compiled a database of such episodes from 1789 to 2000. Sweep 1 relied on keyword searches—*judge*, *court*, *justice*, and *judicia!* (which includes *judicial* and *judiciary*)—of Lexis-Nexis Congressional Universe to locate legislation directly related to courts and judges. Sweep 2 supplemented this already substantial collection with an extensive review of secondary literature, including histories of both the federal courts generally and the Supreme Court specifically, political and constitutional histories of particular time periods, analyses of judicial policy making in discrete areas, legal casebooks and treatises, studies of judicial organization and administration, and empirically grounded arguments for and against judicial power. I borrow this two-pronged strategy from David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990* (New Haven, CT: Yale University Press, 1991).

[54] By *broad-based*, I mean relevant not simply for individual actors, regions, or policy domains but for the nation (and the place of judicial power within it) as a whole. Under this criterion, the authorization of a single judge—or even several judges—in an individual state or circuit would not be labeled as

episode or set of episodes treated in the successive chapters, I utilize a range of primary source materials (including legislative records, judicial decisions, private correspondence between relevant actors, personal memoirs, and media coverage) to reconstruct the architectonic politics of institutional development—the opportunities seized and wasted, the obstacles overcome and stumbled upon—as they occurred at the time. Drawing upon the work of historians who have pieced together the detailed record behind some of these events, on the one hand, and the work of legal academics who have traced the possible interpretations and concrete ramifications of those events, on the other, I not only integrate the diverse and often uneven treatment of judicial institution building but also bring a historical-institutionalist perspective to bear on the politics of altering the institutional environment of courts and judges in America.

Since institutions operate within a broader political climate that both engenders and constrains action, I endeavor this task with an eye toward other narratives of American political, economic, social, legal, constitutional, and ideological development. Of course, acute events such as the Civil War and the Great Depression are important as potential engines of change, but so too are macrosocial processes such as the rise and fall of political parties; the transformation from an agricultural to an industrial economy; the shifting balance of power between federal and state authorities; the changing nature of citizenship and democratization of political power; the increased solicitude for civil rights and liberties; and the evolution and interaction of intellectual currents such as populism, progressivism, liberalism, and conservatism. For my purposes, these developments are relevant not simply as background history but as forces that bring judicial institution-building initiatives to the agenda, structure debates over them, and serve as possible sites of consonance or friction between advocates and opponents of particular episodes of them. In so doing, they serve to delineate the basic contours of architectonic politics in each era, with distinct periods in the history of institution building defined and demarcated by what I take to be the dominant mode of institution-building activity at the time.[55] To the extent that these modes are inextricably intertwined with—and, indeed, often direct responses to—the overarching tensions and debates of their time, the politics of institution building simply cannot be understood in a historical vacuum.

Ultimately, whatever the animating issues and whatever the resulting mode, transformative and inferior episodes of institution building have combined to pro-

transformative while the creation of a slate of new judges or the establishment of an entirely new tier of judges to be distributed across the nation would. By *enduring*, I mean responsible for changes that either persisted for an extended period of time themselves or left a substantial long-term legacy in their wake. Under this criterion, a statute in operation for several decades would be considered transformative while one repealed after only a few years would not—unless it was sufficiently influential in that short time to instigate subsequent changes in political structures, behavior, or outcomes.

[55] As a result of this approach, not every chapter explores each of the three key building blocks—functions, individuals, resources—of the institutional judiciary. Each of those building blocks was a salient feature of reform activity at *some point* but none were especially salient at *all points*.

duce a developmental path for judicial capacity that has been overwhelmingly, though not irreversibly, upward. Largely a function of the fact that—regardless of their specific goals—politicians have often viewed the judiciary as a potential partner in, rather than an obstacle to, their governing coalitions, empowering institution building is usually favored by leaders of the prevailing coalition and resisted by leaders of the opposite coalition. Even when the political majority is at odds with the judiciary, that antagonism generates fewer attempts at limiting judicial power than at reshaping judicial power,[56] often prompting reform proposals from judicial allies hoping to improve judicial performance in such a way that neutralizes opposition.[57] With this recognition that courts and judges can be useful regime partners animating the institution-building impulses of political actors, judicial independence, autonomy, and power have increased steadily and drastically since the founding of the nation. This result, though seemingly obvious today, was, in retrospect, anything but predictable. Indeed, one need look no farther than the heap of discarded, failed, and repealed attempts at judicial reform throughout American history to realize that the shape of the contemporary judiciary was hardly preordained.[58] In other words, a different judiciary—in terms of functions, individuals, or resources—was readily possible. Judicial institution building was not the result of fate or destiny but the architectonic work of influential political actors seeking to advance their own objectives. Indeed, the building of the American judiciary was not at all historically inevitable but, instead, a contingent and continuous political process. It is that process—of policy, politics, and performance; of constraints and catalysts; of elections and entrepreneurship—I attempt to recover here.

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This book proceeds as follows. In chapters 2 through 7, I excavate both the causes and consequences of judicial institution building from the the time of the founding to the close of the twentieth century. In each chapter, I explicate why judicial institution building was pursued, how it was accomplished, and what it achieved in a particular historical time period, characterizing each period according to the central mode of institution building (as expressed in chapter subtitles) during the

[56] For further elaboration of this point and a more general treatment of the recurrent strands of hostility to judicial power, see Stephen M. Engel, *American Politicians Confront the Court: Opposition Politics and the Changing Responses to Judicial Power* (Cambridge: Cambridge University Press, 2011).

[57] Although there have been many attempts to limit judicial power, very few have been successful in any meaningful sense. See Stuart S. Nagel, "Court-Curbing Periods in American History," 18 *Vanderbilt Law Review* 925 (1965); and Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369–98. Of those "court-curbing" measures that have been successful, many were oriented more around controlling litigation than around reducing judicial power. See Dawn M. Chutkow, "Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts," *Journal of Politics* 70 (2008): 1053–64. For a critique of the prevalence and utility of concepts like "court curbing" in the judicial politics literature, see chapter 8.

[58] Cf. Frankfurter and Landis, *The Business of the Supreme Court*, 4: "Familiarity with political institutions breeds indifference to their origin."

years that constitute it. Taken together, these six chapters offer a historically rich narrative that not only describes the institutional development of the judiciary but also offers analytically grounded explanations of how it happened, why it happened when it did, why it happened in the form it did, and why, from the perspective of American constitutional democracy, it mattered at all. In chapter 8, I synthesize and contextualize within contemporary debates my empirical story about the architectonic politics of judicial institution building as well as reflect upon the lessons of the more than 200 year historical lineage of the institutional judiciary for our understanding of judicial power in America.

In chapter 2, I examine the *establishment* of the judiciary from the beginning of George Washington's first term as president in 1789 to the end of Thomas Jefferson's first term in 1805. Seeking to add flesh to the bare bones of Article III, politicians in the early republic wrestled with the most basic questions of institutional design—what the judiciary should look like, how it should operate, and what it should do. As a result, against the backdrop of the uncertainty surrounding postrevolutionary America and the developing conflict between the rival ideological visions of Hamiltonianism and Jeffersonianism, debates about judicial reform were, at base, debates about the foundations—the core functions, the crucial individuals, and the vital resources—necessary to launch an entire branch of the federal government. Judicial institution building during this era occurred in three stages: a landmark policy compromise guided by a political entrepreneur capable of overcoming political opposition and building a viable coalition in the First Congress (1789); a failed attempt at wholesale performance reform followed by a handful of piecemeal adjustments (1790–99); and, sparked by the emergence of a new governing coalition, a flurry of policy and political institution building that, after much sound and fury, merely reestablished the status quo (1800–1805). In light of these episodes, I argue that judicial institution building in the early republic was motivated by the policy desire of proto-Federalist legislators to encourage a commercial economy, Supreme Court justices' performance-oriented concerns about the propriety and utility of serving on circuit courts, and the Jeffersonian attempt to reconstruct American politics without the interference of a Federalist-dominated judiciary. It was then enabled by the political entrepreneurship of Oliver Ellsworth and by the transfer of power from Federalists to Jeffersonians after the election of 1800; it resulted in the skeleton of what would eventually (and perhaps surprisingly) become an independent, autonomous, and powerful judiciary.

In chapter 3, I examine the *reorganization* of the judiciary from the beginning of Thomas Jefferson's second term as president in 1805 until just prior to the Compromise of 1850. Declining to modify the basic contours of the institutional judiciary established in the early republic, Jeffersonian- and Jacksonian-era politicians attempted instead to manipulate those contours to their own advantage. Intertwined in no small part with territorial expansion and the politics of statehood admission, judicial reform attempts focused primarily on arranging states in circuits and ensuring regional geographic representation on the Supreme Court. Here, judicial institution building occurred in four stages: the initial Jeffersonian

expansion of the circuit system to seven circuits and the Supreme Court to seven justices (1805–8), the failed National Republican attempt to add three more circuits and three more justices (1809–28), the failed Whig attempt to consolidate the Third and Fourth Circuits (1829–35), and a quick resolution to multiple decades of stalemate with the Jacksonian establishment of eighth and ninth circuits and eighth and ninth seats on the Court (1836–50). In light of these episodes, I argue that judicial institution building in the ages of Jeffersonian and Jacksonian democracy was motivated by Western complaints about performance problems deriving from the lack of judicial presence in newly admitted states, the proto-Whig National Republican desire to empower the judiciary as a policy-making ally, and the Jacksonian dream of solidifying a Democratic Court. It was then enabled (when it was not impeded by the clash of rival policy and political goals) by a combination of congressional unawareness and Democratic victories in the 1834 midterm and 1836 presidential elections; it resulted in the reorganization of the judicial system so as to privilege Jacksonian, Democratic, and Southern slaveholding interests.

In chapter 4, I examine the *empowerment* of the judiciary from the Compromise of 1850 (admitting California into the Union as a free state and unofficially signifying the beginning of the political crisis leading to the Civil War) to the Compromise of 1877 (settling the disputed 1876 presidential election between Samuel J. Tilden and Rutherford B. Hayes and representing the formal end of Reconstruction). Having seen how Jacksonians reshaped the judiciary according to their interests, Civil War and Reconstruction Republicans set about molding the judiciary according to theirs. Given the increasing sectionalism of the era, satisfying those interests necessitated a judiciary that was more national in outlook and more forceful in the exercise of power. With the conflict over slavery and the remarkable events of the most violent and radical period of American history very much in the foreground, judicial institution building occurred in four stages: the partisan and sectional fight over the structure of the institutional judiciary and the character of judicial power vis-à-vis slavery (1850–64), the Republican reliance on removal provisions and the writ of habeas corpus to protect federal officials and freed slaves from biased Southern courts immediately following the Civil War (1865–67), the consolidation of a Republican-friendly Supreme Court through ameliorative reforms aimed at specific problems of judicial performance (1866–69), and the dramatic nationalization of judicial power and Republican adoption of the federal judiciary as a partner in economic policy making (1870–77). In light of these episodes, I argue that judicial institution building during the Civil War and Reconstruction was motivated mostly by Republicans seeking to transform and then empower the judiciary as a partner in, and enforcer of, national policy making; enabled by Northern and Republican dominance of national politics following the election of Abraham Lincoln and the secession of the Southern states; and resulted in a vast expansion of federal judicial power.

In chapter 5, I examine the *restructuring* of the judiciary during the period of Republican dominance from the inauguration of Rutherford B. Hayes in 1877 to the inauguration of Woodrow Wilson in 1913. Forced to react to the vast wartime

and postwar expansion of judicial power in order to maintain a minimal level of judicial effectiveness, Gilded Age and Progressive Era politicians reconsidered and then reconfigured the original 1789 framework. The focus of reform, then, was less the extent of judicial power than the structural logic and internal consistency of the institutional judiciary more broadly. Amid the parallel drives to cement an industrial economy and create an administrative state, judicial institution building occurred in two stages: the Gilded Age attempt to unburden the Supreme Court by appointing a new slate of judges to staff circuit courts (1877–91) and the Progressive Era unification and synchronization of all laws concerning the judiciary in one statute (1892–1914). In light of these episodes, I argue that judicial institution building in the Gilded Age and Progressive Era was advocated by Republicans seeking to satisfy the performance goal of an efficient and expeditious judicial system by alleviating the Supreme Court's workload, Democrats seeking to reduce the judicial workload and limit corporate access to the federal courts, and progressives who favored simplifying, streamlining, and standardizing various features of the institutional judiciary. It was then made possible by the political entrepreneurship of New York senator William Evarts and the widespread (but mistaken) impression that a performance reform was automatically insignificant housekeeping; it resulted in the creation of an entirely new level of the federal judicial hierarchy, the abolition of circuit courts, and the end of circuit riding by Supreme Court justices.

In chapter 6, I examine the *bureaucratization* of the judiciary during the quarter century between the dawn of World War I in 1914 and the dawn of World War II in 1939. With the judiciary having grown substantially in both size and power, and with the Gilded Age and Progressive Era restructuring having failed to alleviate problems completely, interwar and New Deal reformers turned to administrative management. In so doing, they both insulated the federal judiciary from potentially dangerous (and increasingly unnecessary) relationships with the other branches of government and signaled the arrival of a more autonomous and self-governing branch. In conjunction with the vast expansion of regulatory government, judicial institution building occurred in three stages: the forging of judicial autonomy over the Supreme Court's docket and creation of a policy-making body within the judicial branch (1913–29), the realization of a twenty-year American Bar Association goal to vest the authority to promulgate uniform rules of civil procedure in the hands of the justices (1930–35), and the complete separation of the judiciary's budget and administration from the executive branch control of the Department of Justice (1936–39). In light of these episodes I argue that judicial institution building in the interwar and New Deal years was prompted by a variety of performance concerns about the workload and administration of the judicial branch, enabled by separate instances of political entrepreneurship by William Howard Taft and Homer Cummings as well as limited opposition to moderate reform following Franklin Delano Roosevelt's landslide victory in the 1936 presidential election and subsequent ill-fated Court-packing plan, and resulted in the metamorphosis of the federal judiciary into a self-governing policy-making insti-

tution with not only its own interests but also the capability to pursue and satisfy those interests.

In chapter 7, I examine the *specialization* of the judiciary from the start of World War II in 1939 to the election of Bill Clinton's presidential successor in 2000. Coming out of the New Deal, when the federal government assumed theretofore unknown powers in American politics and the federal judiciary acquired theretofore unseen control over its own operations, the politicians of modern America broadened the institutional portfolios of courts and judges with a series of specialized functions and individuals. Far from eroding the gains judges had made in terms of centralized administration during the 1920s and '30s, this deepening of the bureaucratic tendency toward division of labor merely cemented the critical role of judicial power in performing the intricate and versatile duties of modern governance. Alongside the growth of (and rising challenges to) both the administrative regulatory state and American political and economic supremacy in the world at large during this time, judicial institution building occurred in three stages: the enhancement and expansion of judicial adjuncts both to execute administrative duties for and to relieve the growing caseload burden on federal district court judges (1939–79), the reorganization of existing courts and judges in order to develop and utilize expertise to handle the particularly complicated matter of patent law (1969–98), and the creation of a new tribunal to provide some measure of judicial scrutiny over the increasingly important domains of domestic surveillance and intelligence gathering (1972–2000). In light of these episodes, I argue that judicial institution building in modern America was pursued by legislators, judges, and academics seeking to modify the judiciary so as to enable it to serve (and, in one case, check) a bigger and (by any measure) more interventionist government more expertly. It was then made possible by the lack of any substantial opposition to seemingly consensus structural innovation, by the recognition of a workload crisis sufficiently threatening to judicial capacity so as to make moderate reform (offered following the failure of more aggressive reform) uncontroversial, and by a facilitating event creating a bipartisan, cross-institutional reform coalition; it resulted in the simultaneous refinement of judicial capacity and adaptation of the federal judiciary to a growing set of institutional responsibilities.

As these modes suggest, the history of judicial institution building has essentially alternated between fundamental transformation (the creation of the judicial system in the early republic, the widespread extension of jurisdiction and broad nationalization of judicial power during the Civil War and Reconstruction, the institutional thickening of judicial administration during the interwar and New Deal years) and more modest adaptations in the aftermath of such transformation (the geographic reshuffling of the circuit system during the eras of Jeffersonian and Jacksonian democracy, the renovation of founding-era judicial hierarchy in the Gilded Age and the Progressive Era, the assignment of various judicial prerogatives according to an elaborate division of labor in modern America). Instead of transforming the institutional judiciary every generation, political actors appear first to adjust it in response to the previous transformation before turning

to landmark change once again. If such adjustments fail—or if, as often happens, the political environment changes in such a way that renders them moot[59]—then reformers pursue more widespread and systemic institution-building initiatives. Considered longitudinally, the fact that periods of empowerment were followed by modification rather than retrenchment—the fact that successive periods have, for the most part, built upon rather than torn down or canceled out one another—has resulted in a long-term trend line for judicial capacity marked less by alternating peaks and valleys than by a progressive and consistent increase. Tracing out the evolution of the institutional judiciary as a holistic and ongoing process that has unfolded over the course of American political development, then, we see that judicial independence, autonomy, and power have increased steadily and drastically since the time of the founding.

With this historical trajectory as a foundation, I conclude, in chapter 8, in two ways: first, by looking backward to assess, in empirical terms, the place of the judiciary in America's past; and, second, by looking forward to reflect, in normative terms, on the place of the judiciary in America's future. I illustrate how both political rhetoric and academic exegesis about the Supreme Court embody a fundamentally incorrect presumption about the judiciary being, in any sense, external to politics. In place of that presumption, which leads to a series of faulty and misleading arguments about the relationship between judicial power and democratic politics, I offer a conception that not only locates the judicial branch squarely within the political arena but also places substantially greater emphasis on its cooperation rather than conflict with other actors and institutions in that arena. Such a reality, I contend, should equally be seen as normatively desirable by those seeking to protect judicial independence from democratic politics, those seeking to promote judicial accountability to democratic politics, and those seeking to solidify and revitalize the participation of "the people" in democratic politics.

[59] As Frankfurter and Landis, 107, observe, "great judiciary acts, unlike great poems, are not written for all time."