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Administrative Action as Law: A Natural Law Response to the Judicial Aggrandizement Critique of Separation of Powers Jurisprudence

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The Supreme Court's 2023-24 term reopened an old argument about which branch gets to referee the separation of powers, and a growing number of scholars, along with three sitting justices, now say the judiciary has claimed too much of that job for itself. This article argues the critique is half right. Courts should not be the only referee, but the fix is not to strip them of the role altogether. It is to bring administrative agencies onto the field too, using the ordinary tools of agency governance to push Congress back toward doing its own work.

1. Introduction

Washington periodically rediscovers the complaint that Congress does not do its job. Bills stall in committee, must pass legislation gets folded into omnibus packages nobody reads in full, and hard policy calls (on everything from workplace safety to artificial intelligence) get handed off to agencies that were never elected to make them. This complaint is old enough that one scholar now calls it a piece of "Americana," a recurring national story about a legislature that has lost either the will or the capacity to legislate.[1]



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Courts have tried to answer this. Over the past decade, the Supreme Court revived two doctrines aimed squarely at Congress's habit of delegating: the nondelegation doctrine, which limits how much lawmaking power Congress can hand off to agencies in the first place, and the major questions doctrine, which demands unmistakably clear statutory language before an agency can claim authority over an especially consequential policy area.[2] Both doctrines share a premise, that federal courts are the right institution to push Congress back into the business of writing actual laws.

That premise is now under attack, and not only from academic critics. During the 2023-24 term, three sitting justices used their own opinions to warn the Court itself had gone too far. Justice Ketanji Brown Jackson accused the majority of "aggrandizing power in the Judiciary and the Executive, to the detriment of Congress" in the presidential immunity case.[3] Justice Sonia Sotomayor, dissenting in a case about agency adjudication, called the majority's move a judicial "power grab" and warned that "[j]udicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches."[4] And Justice Elena Kagan, writing after the Court overturned decades of deference to agency interpretations, accused her colleagues of swapping "a rule of judicial humility" for "a rule of judicial hubris."[5]

This article takes that critique seriously, without accepting all of it. Courts can overreach when they police the separation of powers, nobody elected federal judges to run Congress's calendar. But the answer is not to tell courts to stand down entirely, because the United States was never meant to have a system where one branch acts free of any check. What that fix actually requires is a second institution capable of doing part of this work alongside the courts. Administrative agencies, this piece argues, are that second institution. Not despite being part of the executive branch, but because of the everyday tools of governance they already hold.

2. Background

To understand why anyone thinks courts have overstepped, it helps to see what problem the courts were trying to solve in the first place. The standard account runs like this: individual members of Congress have strong incentives to delegate broad authority to agencies and then quietly lobby those same agencies on behalf of favored constituents or donors. That arrangement lets a single legislator claim credit for results without going through the messy, compromise heavy process of actually passing a law with 535 colleagues. As one scholar [now a federal judge] put it before joining the bench, delegating "allows opportunities for members [of Congress] to assert 'particularized control' over

administration," sidestepping the collective action headaches built into the legislative process.[6] A generation earlier, constitutional scholar John Hart Ely made much the same point more bluntly: it is simply easier, and more politically rewarding, to play "errand-boy-cum-ombudsman" than to do the hard work of legislating.[7]

Assume that story is roughly accurate, plenty of commentators across the political spectrum do.[8] The next question is who should push back against it. The Supreme Court's answer, developed mainly through the nondelegation and major questions doctrines, has been: the courts should. The nondelegation doctrine bars Congress from handing off lawmaking power altogether unless it supplies an "intelligible principle" to guide the agency. The major questions doctrine goes further, requiring Congress to speak with unusual clarity before a court will read a statute as delegating authority over an especially significant policy question.[9] Together with recent decisions on presidential removal power, agency adjudication, and deference to agency interpretations, these doctrines add up to the judiciary positioning itself as the primary enforcer of a functioning separation of powers.

That positioning is exactly what critics object to. Professors Nikolas Bowie and Daphna Renan argue that modern separation of powers law rests on a "misunderstanding," the idea that the Constitution contains unwritten but judicially enforceable limits on how one branch may interfere with another.[10] They label this the "juristocratic" view and argue it displaced an older "republican" understanding, under which Congress and the President worked out constitutional boundaries through the ordinary give and take of legislating, not through judicial say so.[11] Josh Chafetz has made a similar argument in sharper language, accusing the Court of deploying "anti-Congress rhetoric" to aggrandize itself at the political branches' expense.[12] So many versions of this critique now exist that two other scholars, Allen Sumrall and Beau Baumann, built an entire taxonomy just to keep the competing terms, judicial supremacy, juristocracy, judicial activism, judicial self-aggrandizement, straight.[13]

3. Analysis

3.1 Core Argument

The judicial aggrandizement critique gets something right and something wrong, and the gap between the two matters a great deal.

It gets something right in recognizing that courts should not be the only institution responsible for keeping Congress honest. The Constitution built three coequal branches specifically so that no single one would be trusted to police itself, let alone to police the other two alone. A system where courts are the only backstop against congressional abdication quietly

recreates the very problem the framers tried to avoid, concentrated and unchecked authority, just relocated from Congress to the judiciary.

But the critique goes too far when some of its strongest versions suggest courts should have no role at all in enforcing separation of powers limits. That position comes uncomfortably close to recreating the British model the framers deliberately rejected. Under classical parliamentary sovereignty, as constitutional theorist A.V. Dicey described it, Parliament has "the right to make or unmake any law whatever," and no court may "override or set aside" its legislation.[14] The American framers built something different on purpose. As Justice Clarence Thomas has put it, drawing on the founding debates, one of the "fundamental differences between our Government and the British Government" is that Parliament was supreme and Congress is not.[15] James Wilson made the same point at Pennsylvania's ratifying convention, contrasting Blackstone's account of unchecked parliamentary power with the American innovation of "an overruling constitution" that constrains the legislature itself.[16] A Congress completely free from judicial check would function, in practice, like a mini Parliament, exactly the arrangement the Constitution was written to prevent.

Neither pole is right, then. Courts should not be the only referee, and they should not be benched entirely either. The way out of that bind is to add a second player: administrative agencies, working alongside courts rather than replacing them.

This requires borrowing an old idea and applying it somewhere unfamiliar. In the natural law tradition running from Aristotle through Thomas Aquinas, the purpose of law is not merely to punish or permit, it is to instill virtue in the people subject to it.[17] Aquinas defined law as "an ordinance of reason for the common good," and both he and Aristotle treated law's proper effect as habituating people toward good character.[18] Consider Aristotle's own example: a soldier punished for cowardice on the battlefield is pushed, again and again, to act bravely, and through repetition that mimicry can harden into the genuine habit of courage.[19] Law works on legislators the same way it works on soldiers, by repeatedly putting them in situations that reward the right behavior and penalize the wrong kind, until the right behavior becomes habitual rather than exceptional.

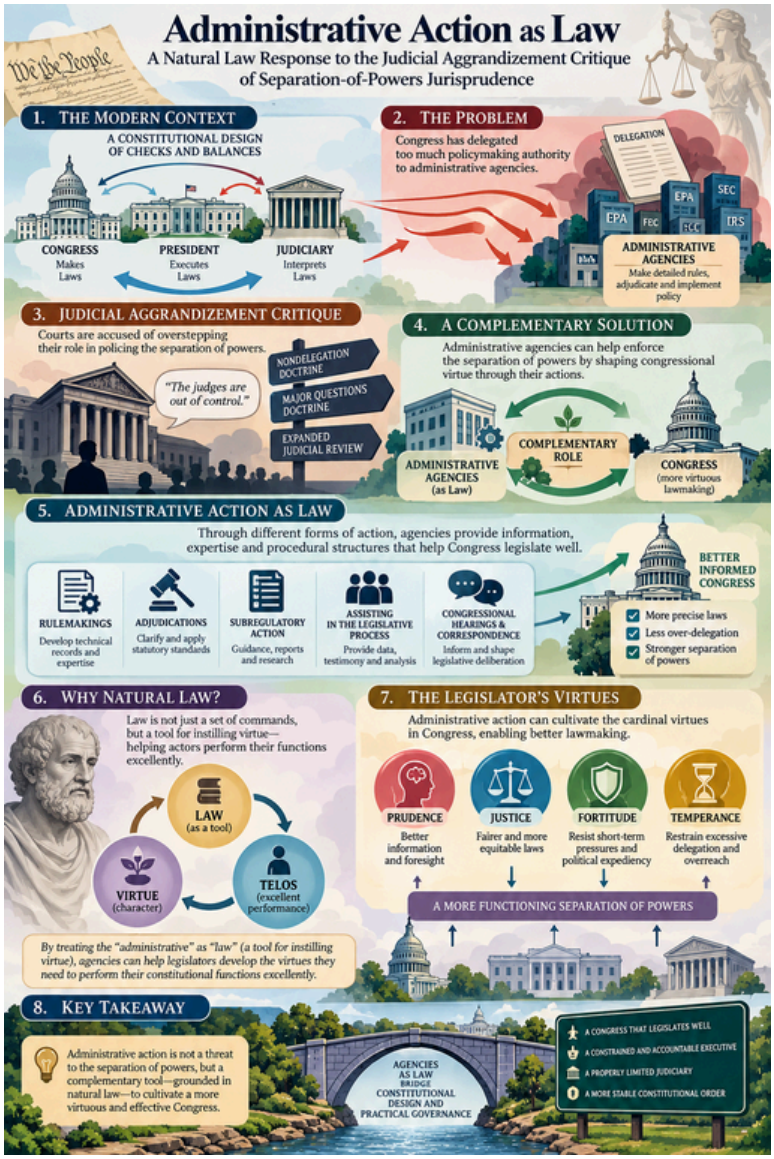
If that is what law does, then the everyday output of federal agencies already qualifies as law in this fuller sense, and agencies already hold an enormous toolkit for using it. Rulemaking is the most obvious example. Formal rulemakings, though rare today, involve trial like cross examination that can publicly expose

when an agency official believes Congress, not the agency, should be making a given call.[20] Informal rulemakings, the vast majority of what agencies do, offer subtler opportunities: the stakeholder outreach process lets officials signal directly to the public and to White House staff that a given problem needs a clearer statute, generating exactly the kind of political pressure that pushes Congress to act.[21] Even rule preambles, which already carry "authoritative status for guiding the courts and the public" about how a regulation should be read, could be repurposed to speak to legislators as directly as they speak to regulated industry.[22]

Agency adjudications offer a second channel. Courts have long permitted agencies to make policy through case by case adjudication, not just rulemaking, and that same adjudicatory power could be aimed at legislators' own conduct.[23] The Securities and Exchange Commission, for instance, already has statutory authority to bar people from membership in a securities exchange when doing so serves the public interest.[24] There is no obvious reason that power has to stop at private citizens. Given that dozens of members of Congress have reported financial transactions overlapping with their own committee work in recent years, an agency willing to use its adjudicative authority more assertively could apply real pressure against congressional insider trading.[25]

Subregulatory action, FAQs, enforcement manuals, policy statements, interpretive guidance, is a third, quieter tool. None of it technically changes the law, but small shifts in how an agency answers a frequently asked question, or which practices an enforcement manual flags for scrutiny, send unmistakable signals about what behavior the agency expects, including from legislators who interact with it.[26] Agencies also shape legislation more directly than most people realize: they routinely draft proposed statutory language, weigh in on pending bills, and lend Congress the subject matter expertise it often lacks.[27] That informal seat at the table gives agency officials real leverage to push back on delegations they consider dangerously broad, or to insist a bill build in mechanisms, like the Congressional Accountability Act's creation of the Office of Congressional Workplace Rights, that make Congress answerable to outside oversight rather than only to itself.[28] Congressional hearings and written correspondence, usually understood as tools Congress uses to supervise agencies, can run in the other direction too: agency testimony can flag the need for clearer legislation, and agencies could, in principle, request information from legislators the same way legislators already request it from them.[29]

None of these tools require new legislation or a novel doctrine. They are the ordinary business of federal agencies, simply redirected. And they map onto the four cardinal virtues the natural law tradition identifies, prudence, justice, fortitude, and temperance, each of which a legislator needs to perform the job well.[30] Agencies can build prudence by treating congressional hearings as teaching moments, laying out policy options and asking legislators to choose between them rather than supplying a ready made answer.[31] They can build justice by flagging delegations that run past constitutional limits, and by declining to indulge private lobbying from individual members absent evidence of genuine institutional support.[32] They can build fortitude by using rule preambles and hearing testimony to make clear a problem needs congressional resolution, forcing legislators to face politically uncomfortable decisions rather than quietly offloading them.[33] And they can support temperance, the virtue least discussed but not least important, by extending the same kind of oversight to legislators' personal conduct that Congress already expects agencies to submit to.[34]



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3.2 Counter arguments and Limitations

The most obvious objection is one of incentives: why would an agency ever use its power to reduce Congress's dependence on that very agency. An official who nudges legislators toward reclaiming policymaking authority is, in effect, working to shrink the agency's own influence. That problem is real and cannot be waved away. The honest answer is that meaningfully instilling virtue in Congress may first require instilling more of it inside the agencies themselves, a harder and slower project of building an administrative culture that values constitutional restraint over turf.[35] Until that culture exists more broadly, this proposal describes a capacity agencies could exercise, not one most currently have much appetite to use.

A second, sharper objection concerns legitimacy. Agencies are part of the executive branch. Letting them police Congress risks handing one political branch a supervisory role over another, exactly the kind of interbranch overreach separation of powers doctrine is supposed to prevent, just relocated from the judiciary to the presidency. This objection has force, but it misreads what is being proposed here. The claim is not that agencies should formally adjudicate Congress's compliance with the Constitution the way a court might. It is that agencies, exercising the ordinary executive powers they already lawfully hold, can create incentives and pressures that make virtuous legislative behavior more likely, informal influence rather than formal command. A system of three coequal branches, each checking the others in different ways, is not made less legitimate by adding a second, complementary check. It is made more consistent with its own design.[36]

A third concern is one of scale. Even granting that agencies could nudge legislators toward better habits, is that nudge strong enough to matter against the political incentives pulling the other way. Probably not on its own. But this proposal was never meant to replace judicial enforcement, it is meant to work alongside it. Judicial limits on Congress's ability to insulate agency officials from presidential removal, for example, already expose those officials to more direct political accountability, which in turn gives them a stronger personal incentive to push politically difficult decisions back onto Congress rather than absorbing them.[37] Courts and agencies can reinforce each other's efforts rather than compete for the same job.

4. Implications

If agencies begin treating their ordinary tools as instruments for shaping legislative behavior, the biggest practical shift would happen quietly, inside institutions that rarely make headlines. Agency general counsels and rule drafters would start asking a question they do not currently ask systematically: does this preamble, this FAQ, this hearing testimony, do

anything to clarify for Congress where the constitutional line sits. That is a modest ask compared to overhauling doctrine, and it is one within reach of agencies as they exist today.

Congressional committees have a role to play as well, even if an uncomfortable one. Committees that currently treat agency testimony purely as a source of technical information could start treating it as a signal about institutional design, paying closer attention when an agency official flags that a statute is too vague, or that a delegation goes further than the agency itself thinks wise. That kind of attentiveness costs nothing and requires no new legislative authority.

Courts, for their part, do not need to retreat to make room for this second check. If anything, decisions that increase presidential accountability over agency officials, removal power cases chief among them, indirectly strengthen the incentive structure this proposal depends on, by making agency officials answerable in ways that push them to hand hard calls back to Congress rather than absorb political risk themselves.[38]

Key Takeaways

1. The judicial aggrandizement critique is right that courts should not be the sole enforcer of the separation of powers, but wrong to suggest courts should have no role at all.
2. Administrative agencies already possess the tools, rulemaking, adjudication, subregulatory guidance, legislative assistance, hearings, to complement judicial efforts by encouraging Congress to reclaim its lawmaking function.
- This approach draws on the natural law understanding of law as an instrument for instilling virtue, applying that idea to legislators through the ordinary business of agency governance rather than new doctrine.
- The proposal faces real limits, misaligned agency incentives and legitimate concerns about interbranch overreach chief among them, but functions as a complement to, not a substitute for, judicial review.

5. Conclusion

The 2023-24 Supreme Court term forced a question that had been building in the background of separation of powers scholarship for years: has the judiciary claimed too central a role in policing the boundary between Congress and the agencies it creates. The critics raising that question are not wrong to worry. But the answer is not to strip courts of a job the framers never intended any single branch to perform alone. It is to recognize that administrative agencies, through the unglamorous mechanics of rulemaking, adjudication, guidance documents, and congressional testimony, already hold tools capable of doing some of that work themselves.

Treating the administrative as a form of law, one built, like all law in the older tradition, to shape character as much as conduct, offers a way to relieve courts of sole responsibility for a job the Constitution always meant to distribute among coequal branches. Getting there will take a shift in how agency officials understand their own everyday work. But the tools for that shift already exist. What is missing, for now, is the will to use them.

References

[1] Beau J. Baumann, "Americana Administrative Law," Georgetown Law Journal 111 (2023): 465, 486.

[2] Chad Squitieri, "Who Determines Majorness?," Harvard Journal of Law and Public Policy 44 (2021): 463, 469-72; West Virginia v. EPA, 597 U.S. 697, 723 (2022).

[3] Trump v. United States, 603 U.S. __ (2024) (Jackson, J., dissenting).

[4] Securities and Exchange Commission v. Jarkesy, 603 U.S. __ (2024) (Sotomayor, J., dissenting).

[5] Loper Bright Enterprises v. Raimondo, 603 U.S. __ (2024) (Kagan, J., dissenting).

[6] Neomi Rao, "Administrative Collusion: How Delegating Diminishes the Collective Congress," New York University Law Review 90 (2015): 1463, 1484.

[7] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge, MA: Harvard University Press, 1980), 131.

[8] Baumann, "Americana Administrative Law," 486-87, 516.

[9] Squitieri, "Who Determines Majorness?," 469-72.

[10] Nikolas Bowie and Daphna Renan, "The Separation-of-Powers Counterrevolution," Yale Law Journal 131 (2022): 2020, 2024-25.

[11] Bowie and Renan, "Separation-of-Powers Counterrevolution," 2025, 2030.

[12] Josh Chafetz, "The New Judicial Power Grab," Saint Louis University Law Journal 67 (2023): 635, 648.

[13] Allen C. Sumrall and Beau J. Baumann, "Clarifying Judicial Aggrandizement," Pennsylvania Law Review Online 172 (2023): 24, 24-36.

[14] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan, 1964), 3-4.
[15] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).
[16] Department of Transportation v. Association of American Railroads, 575 U.S. 43, 74-75 (2015) (Thomas, J., concurring in the judgment).
[17] Thomas Aquinas, Summa Theologiae I-II, Q. 90, art. 4; I-II, Q. 94, art. 3.
[18] Aquinas, Summa Theologiae I-II, Q. 90, art. 4; Robert P. George, Making Men Moral: Civil Liberties and Public Morality (Oxford: Oxford University Press, 2022), 26.
[19] Aristotle, Nicomachean Ethics, trans. Robert C. Bartlett and Susan D. Collins (Chicago: University of Chicago Press, 2011), bk. 2.2, 28.
[20] Aaron L. Nielson, "In Defense of Formal Rulemaking," Ohio State Law Journal 75 (2014): 237, 240, 243.
[21] U.S. Department of Labor, Wage and Hour Division, news release, accessed via dol.gov.
[22] Kevin M. Stack, "Preamble as Guidance," George Washington Law Review 84 (2016): 1252, 1256-57.
[23] Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947).
[24] 15 U.S.C. sec. 78f(c)(2).
[25] Alicia Parlapiano, Adam Playford, and Kate Kelly, "These 97 Members of Congress Reported Trades in Companies Influenced by Their Committees," New York Times, September 13, 2022.
[26] U.S. Department of Labor, Wage and Hour Division, "Questions and Answers About the Minimum Wage," dol.gov.
[27] Christopher J. Walker, "Legislating in the Shadows," University of Pennsylvania Law Review 165 (2017): 1377, 1378-79.
[28] Office of Congressional Workplace Rights, "The Congressional Accountability Act," ocwr.gov.
[29] Todd Garvey, Mark J. Oleszek, and Ben Wilhelm, "Congressional Oversight and Investigations," Congressional Research Service, updated December 13, 2023, 1.
[30] Aquinas, Summa Theologiae I-II, Q. 61, art. 1.
[31] Aristotle, Nicomachean Ethics, bk. 2.1, 26.
[32] Gary Lawson, "Delegation and Original Meaning," Virginia Law Review 88 (2002): 327, 354-55.
[33] R. George Wright, "Constitutional Cases and the Four Cardinal Virtues," Cleveland State Law Review 60 (2012): 195, 196.
[34] Rebecca Ballhaus, "Strip Clubs, Lewd Photos and a Boozy Hotel: The Toxic Atmosphere at Bank Regulator FDIC," Wall Street Journal, November 13, 2023.
[35] Chad Squitieri, "Administrative Virtues," Administrative Law Review 76 (2024): 599.
[36] The Federalist No. 51 (James Madison).
[37] Christopher J. Walker and Aaron L. Nielson, "Congress's Anti-Removal Power," Vanderbilt Law Review 76 (2023): 1, 4 n.6.
[38] Walker and Nielson, "Congress's Anti-Removal Power," 4 n.6.

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