JUDICIAL PREFERENCES AND AGGRANDIZEMENT EFFECTS

Jason Marisam[*]

INTRODUCTION

Scholars and commentators are increasingly portraying the Supreme Court as self-aggrandizing and imperialistic.[1] These aggrandizement commentaries claim that the Roberts Court is "systematically empowering its own institution at the expense of others,"[2] "stripping power from every political entity except the Supreme Court itself,"[3] and "accruing power at an alarming rate."[4] Other scholars have treated these aggrandizement claims as a significant development in constitutional law theory and scholarship.[5] But neither the aggrandizement commentaries nor any responsive assessments fully attempt to answer a couple of important questions: what is judicial aggrandizement, and what causes it?

On the definitional point, the aggrandizement commentary can be confusing, sometimes coding as a power grab, cases where the Supreme Court declined to overturn a legislative action.[6] While the separation-of-powers concept of aggrandizement is ambiguous, this essay defines judicial aggrandizement as a change that gives courts more power to set or influence policy relative to other government decision-makers. Judicial opinions that shape policy outcomes by invalidating a statute, recognizing

[*]Associate Professor, Mitchell Hamline School of Law.

1. Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635 (2023); Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125 (2021); Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PENN. L. REV. ONLINE 24 (2023).

2. Chafetz, *New Judicial Power Grab*, *supra* note 1, at 636.

3. Lemley, *supra* note 1, at 97.

4. Sumrall & Baumann, *supra* note 1, at 42.

5. Jacob Eisler, *Polarized Countermajoritarianism*, 26 U. PENN. J. OF CONST'L L. 665 (2023); Andrew Coan, *Too Much, Too Quickly?*, U.C. DAVIS L. REV. (forthcoming), *available at*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714188.

6. *See, e.g.,* Lemley, *supra* note 1, at 110 (discussing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019)).

a constitutional right, or lowering the amount of judicial deference to other branches are examples. This essay focuses on judicial self-aggrandizement by the Supreme Court—that is, Supreme Court decisions that give the Court more policy-making power relative to other government actors.

As for a causal explanation, a nonpartisan judicial preference to maximize the institutional power of the Court is not the main cause of judicial aggrandizement.[7] What then is? This essay argues that judicial aggrandizement occurs when the relevant legal background conditions do not align with the justices' preferences. Start with the assumption that justices vote for outcomes based on their preferences, which are often but not always ideological. If the legal background conditions align with the majority's preferences, the justices do not need to assert power to produce their preferred outcomes. But, if those conditions do not exist, the justices must assert power to create their preferred legal conditions. This produces judicial aggrandizement.

To illustrate, imagine most justices prefer legal outcome X and vote based on that preference. Whether their actions will have an aggrandizing effect depends on whether existing laws already produce X. If a statute codifies X and the justices vote to uphold it, they are simply affirming the status quo enacted by other government actors. There is no judicial aggrandizement. But, if there is no law codifying X and the justices vote to create X by constitutionalizing a new right, they are exercising power and removing a policy issue from other government actors. In this instance, there is judicial self-aggrandizement. In both instances, though, the justices' goal is not to increase their own power. Rather, their goal is to maintain or produce legal outcome X.

The essay refers to this explanation as the "aggrandizement effects" theory, to emphasize that aggrandizement is not the goal itself but the effect of other judicial preferences and background conditions. If this theory is accurate, it calls into question the extent to which the Roberts Court is systemically self-aggrandizing. Even when most of the justices act like conservative ideologues at a consistent rate, they are not producing opinions with aggrandizing effects at the same rate. In some cases, their conservative preferences have had aggrandizing effects, while in other cases it is the liberal dissenters whose positions would have had such effects. If this point seems obvious and intuitive, it is one that has

7. *See generally* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

been missed, or at least not fully understood and grappled with, in the recent commentary on Supreme Court aggrandizement.

The aggrandizement effects theory also has prescriptive and normative implications for how we should think about and respond to the Court's opinions when they have aggrandizing effects. The word "aggrandizement" has negative connotations. To label the Roberts Court as self-aggrandizing is to accuse it of something bad. From this normative perspective, it might make sense to curb the Court's power and condemn continued self-aggrandizement. But, if the primary source of the Court's errors is not a desire for more power but biased conservative preferences, bluntly reducing the Court's power could prove misguided and even unintentionally exacerbate conservative bias in policy outcomes. Counterintuitively, more judicial aggrandizement might be beneficial and a sign that the Court has become a healthier institution, provided the Court's new aggrandizing opinions reflect a more balanced or countervailing liberal ideology.

This essay proceeds as follows. Part I defines and illustrates judicial aggrandizement. It then explains that judicial aggrandizement is a descriptive phenomenon empty of normative content, with any normative assessment turning on the application of a separate theory to the facts of the cases. Part II presents the aggrandizement effects theory. It also rebuts the leading alternative theory, which posits that the Court issues self-aggrandizing opinions because of an institutional preference for more power. Part III discusses the prescriptive and normative implications of the aggrandizement effects theory. Part IV concludes.

I. DEFINING JUDICIAL AGGRANDIZEMENT AND ITS CONTINGENT NORMATIVE IMPLICATIONS

Judicial aggrandizement is a change that gives the Court more power to set or influence policy relative to other government decision-makers.[8] On this definition, an opinion striking down a statute as unconstitutional has an aggrandizing effect because it removes some policy issues from Congress and enables the Court to shape those outcomes. An opinion recognizing a novel constitutional cause of action is also aggrandizing because it gives the Court powers to set policy in a new space. It is not aggrandizing for the Court to affirm the status quo or to shift power from itself to other government actors. While some commentary has focused

8. *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1028-29 (2008).

on the Court's rhetoric as a source of judicial self-aggrandizement,[9] this essay focuses on policy-making power.

Just because a case is considered a landmark in a field or has a substantial impact on the development of constitutional doctrine does not mean it has an aggrandizing effect. For example, the Court's opinion in *Colegrove v. Green*,[10] holding that constitutional claims of malapportioned districts were non-justiciable, did not have an aggrandizing effect. It left map-drawing policy to state legislatures. The Court's opinion to the contrary in *Baker v. Carr*[11] had a substantial aggrandizing effect. It established this policy-making domain as one where the Court would set parameters and exert substantial influence.

Judicial aggrandizement is a descriptive phenomenon with no independent normative content by which we can judge an individual case. If all we knew about *Baker* and *Colegrove* was that one had an aggrandizing effect and the other did not, we would have no basis to determine which one was better. There are normative theories about the types of policy questions judges should claim for themselves. But even the stingiest theory recognizes at least some instances where courts should assert power. For any individual case, we would need to know the facts and background conditions, plus have a separate normative theory, to determine whether an assertion or increase of judicial power was desirable. Anyone judging these cases based on a normative prior against judicial aggrandizement might be surprised, and perhaps disheartened, to learn that many see the aggrandizing *Baker v. Carr* as one of the most democratically important and desirable decisions in the Court's history.[12]

Shifting to a systems level and focusing on the aggregate and comparative level of the Court's power complicates the picture, but even this perspective does not give us the full information we need to assess whether judicial aggrandizement is good or bad. One might think aggregate aggrandizement is bad because the Court consistently makes bad or biased decisions. This normative assessment, though, depends more on the Court's biases than on the fact of any systemic aggrandizement.[13] Alternatively, one might think that unelected justices should not exercise too much power. But even here, judicial aggrandizement is only bad if one assumes that the Court is starting off with about the right amount of power or too much of it.

9. *See generally* Chafetz, *New Judicial Power Grab*, *supra* note 1.
10. 328 U.S. 549 (1946).
11. 369 U.S. 186 (1962).
12. *See* Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 4 (2012).
13. *See* Coan, *supra* note 5.

Political background conditions also affect a normative assessment of judicial aggrandizement. Aggrandizement that tilts the share of power in the Court's favor might not be the Court's fault or even undesirable, all things considered. Political actors could have incentives to turn to the Court to take policy questions away from them.[14] Or it could be that the political actors are dysfunctional, and the public is putting pressure on the Court to solve problems that the elected officials cannot. In theory, this point could hold true even if the Court expanded its power far beyond anything we have seen. Imagine that members of Congress are focused on fomenting negative partisanship against their political enemies and are completely deadlocked during several policy crises, while the president is a corrupt and dangerous buffoon with no respect for democratic process. The Supreme Court steps into the void and finds itself the hub of wise, good government. Many people might prefer a less powerful Court, but under the circumstances they might accept a more imperial Court as the least bad option.

Putting aside this fanciful hypothetical, the point is that aggrandizement itself, even in the aggregate, is not proof of systemically bad judicial actions. That assessment requires mapping a separate normative theory onto background conditions and facts.

II. THE AGGRANDIZEMENT EFFECTS THEORY

In presenting the aggrandizement effects theory, this Part first discusses the role of judicial preferences in Court decision-making. It then explains how these preferences interact with legal background conditions to produce aggrandizing opinions. This Part concludes by rebutting an alternative theory of Court aggrandizement that posits the Court as an institutional actor with a power-maximizing agenda.

A. Judicial Preferences

A predominant view of judicial behavior sees the Supreme Court justices as motivated by their preferences, with a specific focus on ideological preferences.[15] The idea is simply that justices have ideological preferences, and they make decisions to advance those preferences. They rank and weigh their preferences for different policy outcomes. On

14. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2009).

15. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

matters of interpretation, they favor the one that best advances their preferences.

This does not mean that the justices are pure ideologues who enact their preferred policies without constraint. Procedurally, justices can only act through the cases on their docket. Structurally, there are political checks, such as Congress's power to override statutory interpretations.[16] Legal norms can also limit the range of acceptable actions. Justices may also care about many things other than ideology, such as their reputations among public constituencies and political and legal elites. These reputational concerns may limit the set of outcomes the justices find acceptable or push them to adopt a ruling narrower than their ideological preferences. On the whole, though, there is strong support for the proposition that the justices tend to vote in favor of their ideologically preferred outcomes, with a varying and idiosyncratic degree of reputational concern and other preferences at play.[17]

While there are many potential ideologies that could inform a judicial decision, scholars often focus on partisan ideology. Stephanopoulos and Hasen, for example, have separately described the partisan ideology underlying recent election and voting cases, with Hasen describing the Court's "pro-partisanship turn" and Stephanopoulos explaining that the Court's "actions are consistent with the recommendations of conservative elites" and "empirically benefit the Republican Party, whose presidents appointed a majority of the sitting Justices."[18] Similarly, Epstein has demonstrated a significant gap between the votes of Republican appointees and Democratic appointees, especially in voting rights cases.[19]

While ideological preferences often explain Supreme Court decisions, justices can have, and vote based on, nonideological preferences, such as minimizing workload or decreasing the number of uninteresting cases that land on their docket.[20] Nothing in the aggrandizement effects theory depends on whether the justices are voting based on ideological or nonideological preferences. This essay focuses on ideological preferences because that is a predominant theory of judicial behavior and explains many recent cases, but the aggrandizement effects

16. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1992).

17. *See* SEAGAL & SPAETH, *supra* note 15.

18. Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50 (2020); Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 178 (2020).

19. Lee Epstein, *Partisanship "All the Way Down" on the U.S. Supreme Court*, 51 PEPP. L. REV. 489 (2024).

20. *See* Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901 (2015).

theory would apply even in cases where the prevailing preferences were not ideological.

B. Judicial Preferences and Legal Background Conditions

Aggrandizement is a function of judicial preferences and legal background conditions. Whether the Court's opinion in a case will have an aggrandizing effect depends on whether the relevant legal background conditions align with the majority's preferred outcome. Imagine a hypothetical constitutional right, Right X. The progressive justices favor the existence of Right X; the conservatives oppose it. Which set of justices will look like judicial aggrandizers depends on the legal background conditions. If Right X has not been codified, the progressive justices voting in favor of constitutionally recognizing Right X are acting as aggrandizers. However, if legislatures have codified Right X, the conservative justices opposed to the right and voting to constitutionally override the statutes are acting as aggrandizers.

To make this grounded in the real world, even when the conservative justices on the Roberts Court are consistently acting like biased ideologues, they are not consistently acting like judicial aggrandizers. In some cases, the conservative position has had an aggrandizing effect; in others, it is the liberal dissenting position that would have had that effect.

Consider some of the Court's major voting rights and election law cases, which are often cited as examples of aggrandizement in the recent literature. In *Shelby County v. Holder*,[21] the conservative majority relied on vague notions of state dignity to strike down section 4 of the Voting Rights Act (VRA),[22] effectively ending the statute's preclearance regime. The background condition was one of significant regulation, with the Department of Justice exercising authority to review and "preclear" all new rules created by covered jurisdictions with a history of voter suppression.[23] Given this legal background, the conservative majority's preference for less regulation produced an opinion with an aggrandizing effect. The Court took power away from Congress and asserted its own power to determine a policy design question about the existence of a preclearance regime.

Campaign finance cases, such as *Citizens United v. Federal Election Commission*,[24] are another area where the conservative majority's

21. 570 U.S. 529 (2013).
22. 42 U.S.C. § 1973(b).
23. *Shelby County*, 570 U.S. at 536-40.
24. 558 U.S. 310 (2010).

opinions have had aggrandizing effects. The legal background condition in these cases was one of regulation, with statutes limiting a range of campaign finance activities. The majority's preference for less regulation produced opinions with aggrandizing effects, as the Court invalidated statutory provisions.

But the Roberts Court has also decided major voting cases where the liberal position was the one that would have had the aggrandizing effect. In *Rucho v. Common Cause*,[25] a conservative 5-4 majority held that partisan gerrymandering claims are not justiciable in federal court.[26] The losing liberal position would have recognized such claims and increased the Court's power to set mapmaking policy at the expense of state legislative power.[27] The liberal position was aggrandizing; the controlling conservative position was not.

The losing liberal position again would have produced more aggrandizement in *Brnovich v. Democratic National Committee*,[28] where the dissenting liberals would have used section 2 of the VRA to invalidate a couple of Arizona's election regulations. The case marked the first time the Court addressed the application of section 2 of the VRA to election administration time, place, and manner rules, such as those on collecting and counting ballots.[29] The conservative majority developed a multi-factor test that is deferential to state legislatures and makes it hard for plaintiffs seeking to invalidate state election rules that place discriminatory barriers on casting ballots.[30] The liberal dissenters would have made it easier for plaintiffs and invalidated the provisions at issue.[31] That is, the liberal dissenters would have been aggrandizers.

In short, neither a conservative nor a progressive judicial ideology will consistently generate judicial aggrandizement. It is the majority's preferences, coupled with unaligned background conditions, that produce opinions with aggrandizing effects.

C. The Problem with the Institutional Theory of Judicial Self-Aggrandizement

Chafetz is perhaps the leading proponent of an alternative theory of judicial self-aggrandizement. Chafetz sees judicial self-aggrandizement

25. 588 U.S. 684 (2019).
26. *Id.* at 718.
27. *Id.* at 721-751 (Kagan, J., dissenting).
28. 594 U.S. 647 (2021).
29. *Id.* at 653.
30. *Id.* at 669-75.
31. *Id.* at 690-730 (Kagan, J., dissenting).

as the product of a competition for power among governing institutions. Chafetz's theory is based on the view that the Court "is a governing institution, with institutional goals and agendas."[32] One of those goals is "judicial self-aggrandizement"[33]—that is, to accrue power at the expense of other governing institutions. This goal can transcend partisanship and lead Republican and Democratic justices to form majorities that bolster the Court's power.

Chafetz is right that an institutional methodology can yield insights into the Court's behavior. Where this theory goes wrong, though, is that increased power is not a consistent institutional goal for the Court. Start with the claim that the justices are motivated to act in the interests of the Court as an institution. There are reasons why this might hold true. The life-tenured justices might perceive the Court's interests as their own or they might have personal, strategic reasons for acting in line with the Court's institutional interests.[34] Certainly, there are cases where an institutional perspective has more explanatory force than partisan ideology. Chafetz, for example, documents cases where a shared institutional interest in persuading the public and elites that the Court is a trustworthy institution can explain the Court's rhetorical choices. However, the problem with relying on institutional interests to predict or explain judicial self-aggrandizement is that there is little reason to assume that power maximization is consistently in the Court's institutional interests.

A leading theory on government institutions posits that institutions, or actors within them, are motivated by their core missions.[35] Institutions build up internal expertise and competence to fulfill their missions, and institutional actors may take satisfaction in fulfilling those missions. While institutional actors will jealously guard against attempts to infringe on the powers necessary to fulfill their core missions, they are not simply motivated by power and do not look to expand their power for the sake of it. Institutions tend to prioritize tasks that align with their core missions and shun or shirk tasks that fall outside them.

Applied to the Court, one can imagine that the justices will jealously guard their role as the ultimate expositors of the meaning of the Constitution, but that does not mean they consistently seek to self-

32. *See* Chafetz, *Strategies*, *supra* note 1, at 150.

33. *Id.*

34. *See* David Fontana & Aziz Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1 (2018).

35. *See* Fontana & Huq, *supra* note 34; *see also* James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (1989).

aggrandize in constitutional law or any other area. There is no bipartisan group of justices committed to recognizing more constitutional rights or increasing the level of constitutional scrutiny because doing so is the most certain way to boost the Court's power at the expense of other government actors. As Levinson has put it: "No judge is ideologically committed to the platform of 'more constitutional law' irrespective of its content."[36] Rather than unite in a shared institutional interest of more constitutional law, the justices spar over the substance and reach of constitutional law based on ideological differences.

The Court also routinely gives up power in areas that do not fit its core mission or are less interesting to the justices. Consider the *Erie* doctrine. If the Court wanted to massively increase its power, it could overturn *Erie* and start the project of developing a general federal common law, which would apply to the tens of thousands of diversity cases pending in the federal courts each year. This would dramatically reduce the power of states to set substantive law applicable in federal courts and boost the power of the Supreme Court. The Court, though, has no interest in this power-maximizing project. Fontana and Huq similarly have described a bipartisan commitment to narrow available judicial remedies in different types of cases based on "the judiciary's *institutional* interest in stanching the flow of certain kinds of litigation."[37] This is not the behavior of an institution that prioritizes self-aggrandizement.

Empirically, if there were a strong institutional interest in self-aggrandizement, we would expect to see a bipartisan bloc of power-maximizing justices who consistently vote together in favor of self-aggrandizement. There is no evidence of such a voting coalition on the Court. Every Court watcher knows there are partisan or ideological voting blocs on the Court. But there is scant evidence of a power-maximizing group of justices who vote across partisan lines to maximize the Court's power.

It has become especially common for scholars to observe that the Court is self-aggrandizing in the fields of voting and election law and administrative law.[38] The discussion in the previous part shows how the Roberts Court has not consistently self-aggrandized in voting rights and election law cases. Instead, the Court's behavior fits the aggrandizement effects theory. The same is true for administrative law.

36. Levinson, *supra* note 7, at 963.

37. *See* Fontana & Huq, *supra* note 34, at 73.

38. *See* sources cited *supra* note 1; *see also* Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2023 SUP. CT. REV. 1 (2023).

The primary aggrandizement claim for administrative law is that the Roberts Court has systemically cut back on deference to agency interpretations. It has done this through its support of a robust major questions doctrine, in cases like *West Virginia v. Environmental Protection Agency*,[39] and through its elimination of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*.[40] Collectively, this makes it more likely that the Court will set aside executive actions on important policy issues.

Descriptively, this account is accurate. But what is the causal mechanism? Is it judicial ideology or an institutional interest in power? For a couple of reasons, it is clear ideology is doing more work, in line with the aggrandizement effects theory and not the institutional power theory.

First, in these administrative law cases, the Court has divided along partisan ideological lines, with the conservatives rolling back deference and the liberals voting in favor of maintaining longstanding deference doctrines. Heinzerling, for example, describes a conservative majority pushing "a judicial agenda hostile to a robust regulatory state."[41] Second, this account overlooks that the Roberts Court has declined to reduce agency deference in other contexts, where the politics were different. In *Federal Communications Commission v. Fox Television Stations*,[42] the conservative 5-4 majority rejected the argument that it should apply greater scrutiny when reviewing an agency action that changed the agency's prior policy position. Under a deferential arbitrary and capricious review, the Court upheld a George W. Bush-era FCC order that changed the agency's policy on fleeting expletives in broadcasts.[43] The dissenting liberals, though, would have overturned the reactionary FCC order, using a more searching application of arbitrary and capricious review.[44] That is, the dissenting liberals would have aggrandized the Court at the expense of the executive. This again shows that the deference question divides the Court along partisan lines. It also shows that the conservative Court majority is not simply looking to increase its power over agencies by reducing agency deference across the board. Rather, it is looking to reduce deference when doing so aligns with its ideological goals.

39. 597 U.S. 697 (2022).
40. 603 U.S. ___, 144 S.Ct. 2244 (2024).
41. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017).
42. 556 U.S. 502 (2009).
43. *Id.* at 505-30.
44. *Id.* at 546-67 (Breyer, J., dissenting).

Overall, theoretically and empirically, the institutional power theory is less robust than the aggrandizement effects theory. While the aggrandizement effects theory rests on sound assumptions about the causal force of judicial preferences in Supreme Court opinion, the institutional power theory rests on shaky assumptions about institutional behavior and power-maximizing motivations. In addition, when digging into the cases, the institutional power theory falls apart as a causal explanation. There is no power-maximizing coalition on the Court. There are ideological coalitions whose preferences yield opinions that sometimes have aggrandizing effects.

III. IMPLICATIONS

A major assumption in the aggrandizement commentary is that the Court's self- aggrandizement is undesirable. A natural implication of this view is that we should think about ways to fix judicial aggrandizement and should want the Court to become less aggrandizing. Under an aggrandizement effects theory, though, a focus on aggrandizement homes in on a somewhat arbitrary side effect of the Court's behavior. If the justices' staunchly conservative ideology is the primary source of the Court's errors, any fixes should target that causal feature. An errant focus on aggrandizement itself can lead to misguided prescriptions and poor normative judgments.

Prescriptively, consider the proposal that Congress strip the Court of jurisdiction to check its aggrandizement.[45] This solution makes sense under an institutional power theory of the Court's behavior. Under that view, an institutional preference for power consistently produces self-aggrandizing opinions, which can tilt the balance of power too far in the Court's favor. Congress can hold the Court in check and restore a balance of power by stripping the Court's jurisdiction in some areas. But if the primary cause of the Court's errors is not an institutional hunger for power but biased judicial ideologies, jurisdiction stripping may do nothing to correct these errors and could exacerbate them.

Consider that a significant part of the Court's docket consists of reviewing agency actions. Congress could eliminate the Supreme Court's jurisdiction over some of these cases, while perhaps leaving intact the role of lower federal courts.[46] This would reduce the Court's power, while still allowing for a judicial check on the executive. But if the real problem with the Court's decisions in this domain is a conservative deregulatory bias, a

45. *See* Lemley, *supra* note 1, at 115.

46. *See* Richard Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2013).

jurisdiction-stripping fix could make matters worse if regulated entities challenged agency actions in circuits where they were likely to draw panelists even more conservative than the justices.

For jurisdiction stripping to solve the problem of conservative bias, Congress would have to better target its actions. For example, Congress could strip the Supreme Court of jurisdiction to review administrative law decisions by the D.C. Circuit. By statute and practice, many administrative law cases originate in the D.C. Circuit. It is plausible that, on the whole, the judges on the circuit have ideological preferences that are more diverse and balanced than the justices' preferences. If Congress gave the D.C. Circuit the final word in some types of administrative law cases, it could reduce conservative bias. It is beyond the scope of this essay to explore the feasibility and all the pros and cons of such targeted jurisdiction stripping. The main point here is that a blunt prescription of jurisdiction stripping can reduce the Court's power but fail to get at the primary driver of bias and error in the Court's decisions.

A similar point applies when normatively evaluating Supreme Court opinions. Under an institutional power theory, it might make sense to hold a normative prior against self-aggrandizing opinions and to criticize the Court when it issues such opinions. But, if we assume that the primary problem with the Court is not a consistent preference for power but a consistent preference for conservative positions, it changes how we should think about judicial aggrandizement. First and foremost, from this perspective, we should want the Court to move toward the left to correct the conservative bias. Such a left-leaning tack would be a welcome development, even if it incidentally had aggrandizing effects. Imagine if the liberals won a redo of *Rucho*, for example. It would be misguided to criticize this new *Rucho* opinion on aggrandizement grounds. Instead, we might want to applaud the Court's corrective leftward tack. Put another way, more judicial aggrandizement in this era can be good, provided it is the product of a countervailing moderate or liberal ideology.

IV. CONCLUSION

This essay's main claim is that judicial aggrandizement occurs when background conditions do not align with judicial preferences. If background conditions align with the majority's preferences, the justices do not need to assert power to create their preferred outcomes. If aligned conditions do not exist, the justices must assert power to create their preferred outcomes. This causal theory runs contrary to the theory that judicial aggrandizement is the product of power-hungry justices or a

power-maximizing judicial institution. If this causal theory is correct, it has significant prescriptive and normative implications. It suggests that blunt reduction of Court power is a misguided prescription for what ails the Court. It also suggests that the term "aggrandizement" itself is laden with too much negative baggage. Under some conditions, more judicial aggrandizement might be a sign of a healthier Supreme Court.