BOOKS | BOOKSHELF

‘Judicial Fortitude’ Review: Time for Congress to Do Its Job

Imagine a world where the legislative branch actually legislates, courts interpret laws and executive agencies faithfully execute them. Yuval Levin reviews “Judicial Fortitude” by Peter J. Wallison.

Peter J. Wallison. **PHOTO:** ENCOUNTER BOOKS

By Yuval Levin
Jan. 2, 2019 6:53 p.m. ET

The American constitutional system is out of order. The basic shape of its dysfunction has been clear for decades, though its causes may seem obscure. At the core of the problem is the emergence, over the course of a century, of a fourth branch of government neither conceived by nor desired by the framers of the Constitution: a network of administrative agencies that combine legislative, executive and judicial powers and therefore threaten the integrity of the constitutional framework and the basic rights of the American people. This fourth branch was the brainchild of the early progressives and has generally advanced the agenda of the left, so conservatives have long been wary of it.

But conservatives often misdiagnose the process by which the administrative state has arisen. We emphasize the hyperactivity of the executive and judicial branches, and these are certainly part of the problem. But hiding in plain sight is a deeper cause: the willful underactivity of the legislative branch. In an effort to avoid hard choices and shirk responsibility, Congress enacts vague statutes that express broad goals, empower executive agencies to fill in the practical details, and leave courts to clean up the ensuing mess. The result can look like executive overreach and judicial activism, but the root of the problem is legislative dereliction.

To see that, however, is not yet to propose a solution. Congress is derelict because its members choose to be, so what can constitutionalist reformers do about it? Peter Wallison, a conservative legal scholar and senior fellow at

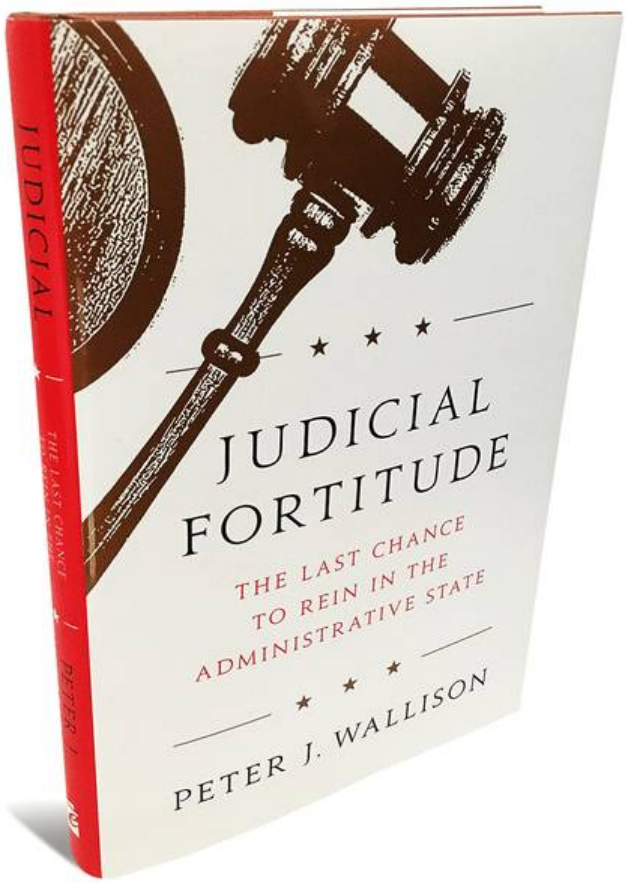

PHOTO: WSJ

JUDICIAL FORTITUDE

By Peter J. Wallison
Encounter, 189 pages, $23.99

the American Enterprise Institute, has stepped forward with a persuasive answer, and at just the right time. His book "Judicial Fortitude" argues that the dereliction of Congress is enabled by the failure of the courts to enforce the separation of powers, and so to insist that only Congress can make laws.

Deference to the elected branches (and therefore to the will of the people) can be a judicial virtue. But in setting out the purpose of the courts, in Federalist 78, Alexander Hamilton argued that judges would also sometimes have to resist popular pressures that might deform the constitutional system. In the passage from which Mr. Wallison draws his title, Hamilton wrote that "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." The particular crisis we now face can be hard to perceive because it takes the form of a delegation of legislative authority to administrative agencies. But it is no less a deformation of the system, because the courts acquiesce to this delegation.

Mr. Wallison's timely argument comes at the outset of what looks likely to be a period of conservative dominance of the federal courts—especially the Supreme Court. Yet conservatives have been divided over what originalist judges should prioritize. Should restraint be their watchword, so that courts allow public policy around disputed issues to be set by politicians answerable to voters? Or should originalist judges actively defend individual rights against encroachment by politicians who use public power

to trample them?

Mr. Wallison sidesteps that debate by insisting that a certain kind of judicial activism is actually a necessary precondition to judicial restraint and to any form of originalism: Judges must make sure that each branch of government does no more but also no less than the job the Constitution assigns it. "If Congress were permitted to delegate its exclusive legislative authority to the administrative agencies in the executive branch," he writes, "the separation of powers would be a nullity and the dangers to liberty envisioned by the Framers could become a reality." To avoid that, judges must insist that Congress engage in actual legislating by preventing it from handing over its power to regulatory agencies.

This would involve, in his telling, putting real teeth behind the doctrine of nondelegation, which the courts have sometimes articulated but never really enforced. And it would involve reversing a set of Supreme Court precedents—especially *Chevron v. Natural Resources Defense Council* (1984) and *Auer v. Robbins* (1997)—that require courts to defer to administrative-agency interpretations of statutes, even when those interpretations are dangerously vague and expansive. Rather than agencies deciding what laws mean in contested cases, Mr. Wallison insists, courts must decide, and in ways that compel Congress to pass statutes that are less vague and more prescriptive. In other words, Congress should actually legislate, courts should really interpret laws and executive agencies should faithfully execute them. Imagine that.

Giving concrete form to this "nondelegation doctrine" remains an implausible prospect—as Supreme Court majorities of every flavor over two centuries have failed to hand down such opinions. But curbing the deference to regulators granted by *Chevron* and *Auer* is not only imaginable but also downright likely given the Supreme Court's new majority. In fact, the Court last month accepted for review a case that might open a path toward the reversal of *Auer* in 2019. *Kisor v. Wilkie* involves an obscure question about Veterans Affairs disability benefits, but the Court has clearly taken it up to reconsider the wisdom of *Auer*, and Mr. Wallison's argument would strongly encourage the justices to take back the role of the courts as interpreters of law in a way that could move Congress to also reclaim its own proper role.

"Judicial Fortitude" is a wise, important and accessible manual for the badly needed revival of our constitutional system. The challenge Mr. Wallison describes is immense, but the appeal of his project is that it offers protections against both an overactive and an underactive Court. It sets out not policy goals but constitutional ones. It would respond to congressional dereliction not by having the Court take up an agenda Congress won't advance but by pursuing the restoration of our constitutional architecture: Mr. Wallison offers up judicial fortitude as a way to recovering meaningful legislative responsibility.

Mr. Levin is the editor of National Affairs and the Hertog Fellow at the Ethics and Public Policy Center.

Appeared in the January 3, 2019, print edition as 'Time for Congress To Do

Its Job.'