

Reinvigorating Regime Politics

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Abstract

This paper seeks to reinvigorate the theory of regime politics in the judiciary among legal scholars, taking into account the critiques offered. The paper reviews the extant literature on regime politics, including its origins, before examining the criticisms this approach engendered. The valid concerns highlight the limited development of regime politics as a theory, despite the empirical work conducted in this tradition. This paper aims to address that shortcoming, explicitly identifying the underlying assumptions of regime politics theory and then developing testable hypotheses based on those assumptions.

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The theory of regime politics among law and courts scholars can trace its origins back to Dahl's (1957) article on the Supreme Court's close connection to the governing coalition. In the article, Dahl argues that the Court is rarely out of line with the preferences of popular majorities, suggesting that concerns about a "countermajoritarian difficulty" (Bickel 1962) are unnecessary. Dahl's argument about the Court's connection to popular preferences was picked up and expanded on by numerous subsequent scholars, generating in particular a wave of work in the 1990s and early 2000s that sought to advance a theory of regime politics in the judiciary (Graber 1993; Clayton and May 1999; Gillman 2002; Pickerill and Clayton 2004; Whittington 2005, 2007). This work fit well with the rise of new institutionalism in the study of courts, seeking to contextualize the actions of courts within their larger political environment. By 2007, though, serious criticisms of regime politics began to emerge. Keck (2007a, 2007b) in particular raised concerns about the relatively loose way in which regime politics was conceptualized in this work. Hall (2012) found that predictions about the exercise of judicial review generated by regime politics did not match the Court's observed behavior.

Even these critiques, though, acknowledge that regime politics as an approach offers a potentially persuasive and powerful way to understand the actions of the judiciary (Hall 2012, 900; Keck 2007b, 540). The call for a more rigorous and nuanced theory of regime politics has largely gone unaddressed, however. Hall and his coauthors, for example, continue to offer empirical insight into the operation of regime politics and judicial review (2012; Hall and Black 2013; Hall and Ura 2015), but do not themselves seek to reformulate regime politics theory. The

purpose of this article is to develop a testable theory of regime politics that accounts for the criticisms raised while still incorporating the central insights of past work.

One of the important steps in doing so is to expand the inquiry beyond judicial review as exercised by the U.S. Supreme Court. Though the bulk of the literature is focused on the Supreme Court, the entire judiciary in the United States is worthy of study and the relationship between regimes and courts at all levels ought to be of interest to political scientists. In many ways, as I will establish, the Supreme Court declaring laws unconstitutional are circumstances in which regime influence will be the most inconsistent. Is it possible, then, to develop a theory of regime politics that can be applied to courts of all levels (and indeed all countries) that does not devolve into generalizations that become ultimately useless? One that is open to the varied methodological traditions within the discipline of political science? That is the task this article takes up.

Doing so does not take place in a vacuum, but in the context of a theoretically rich tradition of the study of courts. I will draw on extant literature to specify the premises of the theory of regime politics before moving on to generate a set of testable hypotheses. I then offer an initial test of these hypotheses through two brief qualitative case studies. Though preliminary, this revised theory of regime politics is one which accounts for the criticisms and limitations of existing work while providing a clear direction forward for developing greater insight into the ways in which the judiciary is embedded within the larger political system.

The Development of Regime Politics

Dahl (1957) is the typical starting point for understanding the theory of regime politics. Rejecting the dominant concern among legal scholars about countermajoritarianism in the judiciary, Dahl makes the claim that the actions of the Supreme Court are rarely out of alignment with popular preferences for long. This is a result, he argues, of the relatively frequent replacement of justices on the Court by presidents. “[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority” (Dahl 1957, 285).

From this, we can see the initial outlines of an understanding of the relationship between the Supreme Court and the other branches of government. The appointment power means that the dominant lawmaking majority will, over time, bring the membership of the Supreme Court into ideological alignment with their views. Dahl tests this claim by looking at how soon after enactment federal laws were declared unconstitutional. Almost half were declared unconstitutional more than four years after passage, with the bulk of those decided in less time coming during the New Deal. This approach sets up both the strengths and the weaknesses of the subsequent theory. The connection between the elected branches and the Court relies on fairly uncontroversial assumptions about the behavior of both politicians and judges. Dahl makes reference to the “legitimacy powers” of the Court that are at stake when acting contrary to the preferences of the current lawmaking majority (1957, 294). At the same time, the test of the theory offered by Dahl is only roughly sketched out and leaves many remaining questions about the conditions under which the Court will act against the lawmaking majority. Lawmaking majorities, for example, are short-lived for Dahl and don’t consider how longer term control of

government might shift the conclusions. From these initial insights, the theory of regime politics in the judiciary emerges.

Though Dahl's insight can be seen in the work of scholars such as McCloskey (1960) and Shapiro (1964), the theory of regime politics received more careful treatment beginning in the 1990s as new institutionalism offered a competing paradigm to the dominant behavioralism. Graber's 1993 article critiquing the countermajoritarian literature is often identified as the beginning of this trend. He was not interested in individual decision-making, but rather the institutional influences on the Court. Graber argues that legislative majorities can actually welcome and even invite judicial review by the Supreme Court. "Historically, the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute...prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address" (Graber 1993, 36). This points to relevant majorities that extend over longer periods of time than the four years to which Dahl referred, but it remains only loosely specified.

Regime politics, as a theory, received some of its most careful consideration in Clayton and May (1999). Clayton and May offer regime politics as an approach that can unite new institutionalists of varying approaches. The "political regimes" approach, as they call it, "suggests that judicial attitudes and strategies in decision making are both constituted and constrained by the broader context within which the Court operates" (Clayton and May 1999, 234). Central to this theory is the notion that what "the law" means to different justices is a function of the views of the relevant institutionalized actors who selected them and constrain or support their ability to act. They are careful, though, to avoid the conclusion that "judges are

deciding cases on the basis of personal policy preferences or strategic calculations about their power relative to the other branches” (Clayton and May 1999, 244–45). They leave open the possibility that judges might sincerely be attempting to interpret the law, while still being responsive to the values of a political regime. This political regimes approach calls for focusing analysis on “how these institutions are related to the values embedded in the political regime by examining the articulation of legal positions in elections, party platforms, the judicial selection process, case disposition in lower courts, or the positions taken by the solicitor general, members of Congress, state governments or interest groups in direct litigation” (Clayton and May 1999, 248). Like those before them, though, the concept of political regime itself remains unclear and largely unexamined. When does a regime begin and how can we tell when it ends? How cohesive do political actors need to be in order to constitute a “regime?”

A spate of work incorporating a regime politics approach followed. In 2002, Gillman examined the ways in which political parties, particularly those that might be characterized as regimes due to the longevity of their control, actively and consciously sought to remake the federal judiciary in ways that would advance their long-term goals. He concludes with a call to “locate the scope and direction of judicial decision making into a broader analysis of party systems and partisan control of those institutions that are responsible for the jurisdiction and staffing of courts” (Gillman 2002, 522). Lovell (2003) explored the ways in which Congress uses statutory ambiguity or legislative deferrals to pass the responsibility for decisions on to the judiciary. This understanding calls for greater attention to the subtle ways in which Congress interacts with the judiciary. Pickerill and Clayton (2004; see also Clayton and Pickerill 2006; Whittington 2001) argue that the Rehnquist Court’s decisions in federalism cases can best be understood through the lens of regime politics, highlighting the emphasis on federalism among

the Republican coalition for decades prior to the explosion of federalism decisions in the 1990s. This emphasis played an important role in the selection of nominees as well as the organization of interest groups bringing legislation. From a theoretical standpoint, Pickerill and Clayton build on the critical election literature of political science and the constitutional order literature of the legal academy (2004, 241). Both focus on regimes that may be dominant for generations, but Pickerill and Clayton note that during periods of less regime stability, conflicting values and greater deference to the judiciary may very well occur (2004, 242).

Whittington (2005, 2007) adopted a similar approach in examining the connection between regime power and the judiciary. Where Gillman (2002) focused on how regimes might strengthen the courts in order to continue their power after electoral defeat, Whittington explores the incentives to expand judicial authority even while still in control. The ability of courts to overcome obstructions faced by regimes encourages judicial supremacy through what Whittington calls “friendly judicial activism” (2005, 594). As with the earlier work, Whittington draws connections between the judicial review of the Supreme Court and the political branches that enable and, indeed, empower the Court.

Critiques Emerge

As the regime politics approach gained more traction within the discipline of political science and began to spread to the legal academy as well, some notes of caution were sounded. Most prominently, Keck (2007a, 2007b) raised serious concerns about the potential for overreach in the claims made by regime politics scholars. In particular, Keck was concerned that a regime politics approach could obscure the very real possibility of independent action by the courts. The

“proposition that governing coalitions dictate the results of the Court's decisions...is wrong, because the governing coalition is so often divided on important matters that the justices will have multiple acceptable alternatives in most cases” (Keck 2007b, 517). Keck does not suggest that regimes do not influence judicial decisions- just that the connection to the regime is not the only, or even the most important, relationship to consider with regard to judicial review. He argues that the exercise of judicial review is simultaneously “a tool of partisan entrenchment, a reflection of policy agreement, and an expression of legal principle” (Keck 2007a, 321). Failure to attend to the conditions under which independent action occurs leaves us with an inaccurate sense of the dependency of courts on political regimes. For Keck, the central empirical question of regime politics ought to be “whether--or to what degree, or under what conditions--judges are likely to act independently of the wishes of other power holders” (2007b, 540). Dynamics such as the jurisprudential regimes of Richards and Kritzer (2002) suggest that legal evaluation and commitments will exercise their own influence on how judges decide that reaches beyond the narratives of attitudinalism or regime politics.

Implicit in Keck's critique is the sense that the theory of regime politics is underdeveloped and underspecified even as the work itself often provides nuance and explanatory power. That is, Keck suggests that both the dependent variable (independent action rather than regime influence) and some of the independent variables (law and jurisprudential regimes rather than just political regimes) need to be recalibrated or at least made more explicit. Hall's (2012) effort to empirically test some of the claims of regime politics theory regarding judicial review runs into a similar challenge. Hall finds four possible reasons advanced by regime politics scholars for the exercise of judicial review- “(1) blame avoidance, (2) regime entrenchment, (3) regime fulfillment, or (4) regime maintenance” (2012, 882). These lead to two

circumstances in which judicial review should be more likely to occur- “when (1) the ideology of the Court converges with that of the sitting elected branches (suggesting that the Court need not fear sanctions or nonimplementation), and (2) the ideology of the sitting elected branches diverges from that of the elected branches that enacted a statute (suggesting that the sitting branches want the statute to be invalidated)” (Hall 2012, 885). Hall finds that most invalidations by the Supreme Court do not meet these criteria, even when he relaxes some of the assumptions about regimes, parties, and appointments (but see Hall and Ura 2015 for evidence of an effect at the certiorari stage). Hall and Black (2013) subsequently find no relationship between the ideological distance between the federal and state governments and the likelihood of the Court exercising judicial review. Both of these findings point to a more countermajoritarian role for the Court than most regime politics scholars posit. Hall notes some caution about these conclusions. He allows that the “quantitative analysis of regime politics may involve methodological assumptions that run counter to the approach itself,” particularly the two-dimensional ideology scores used (Hall 2012, 899). But he also highlights the very real problems this poses for a regime politics approach. Since some of the claims are, as Keck argues, “nonfalsifiable” this creates problems for regime politics as a theory (2007b, 533).

I would raise two other concerns with the regime politics approach not previously identified. Though referring to courts generally and occasionally making motions to suggest the influence of regimes on lower courts, the overwhelming emphasis within the literature has been on the United States Supreme Court. This is not surprising given the close connection between the regime politics literature and the countermajoritarian debate about judicial review that is likewise centered on the Supreme Court, but this obfuscates more than it clarifies. By placing such a single-minded focus on only one legal institution, many other dynamics that may offer

deeper insight into how courts broadly speaking are political institutions are missed. The Supreme Court is certainly the most visible court in the United States and arguably in the world. This visibility is going to affect the ability of the Court to act independently, both freeing it at times and constraining it at others. The selection of justices to life terms brings its own set of dynamics that are not universally shared in judiciaries in the United States, to say nothing of court systems in other countries. We should expect that the variety of selection systems used for judiciaries will have some impact on how courts interact with regimes. By focusing exclusively on the Supreme Court, we learn more about that institution, but those lessons do not necessarily translate more broadly. If considering the possibility of independent judicial action is important, as Keck suggests, so too is a thorough consideration of regime politics in action at all levels of the courts.

The second concern is the predominant focus on judicial review to the exclusion of the other types of cases courts handle.¹ While there are good reasons to explore the exercise of judicial review, both from a democratic theory perspective and from an institutional power perspective, declaring laws unconstitutional remains a relatively limited part of the work of the judiciary. Even on the Supreme Court, cases involving judicial review are dwarfed in volume by statutory interpretation cases. At the lower levels of courts, this distinction becomes even more stark. By broadening not only the types of courts included in regime politics analysis, but also the types of cases, regime politics can offer further insight.

¹ Obviously there are prominent exceptions to this. Lovell (2003), for example, explored statutory ambiguity rather than judicial review.

It is worth noting that despite the concerns they raise, both Keck and Hall acknowledge the value of a regime politics approach to studying courts. Considering regime politics draws attention to the broader context within which courts operate and situates courts explicitly within the political system. To do this well calls for more careful and rigorous theory development, which builds on the work that has come before.

Revising Regime Politics

My purpose here is to offer a testable theory of regime politics that can move the scholarship in this field forward in a fruitful way. This theory ought to be amenable to both quantitative and qualitative approaches. It should be broad enough to apply to many different situations without becoming so generalized that it is no longer useful in generating predictions. And it ought to be explicit in both its assumptions and the hypotheses it generates so as to allow for future development. This is no small task, of course, but fortunately it is not necessary to begin from scratch. The work that has come before is hardly atheoretical and offers a tremendously valuable starting point. Developing such a theory does, however, require making explicit what has at times been implicit and drawing some boundaries that may well be contested. The benefit of this is greater attention to exactly what is being studied and greater clarity about what the findings might mean. To do this, this article will begin by developing as explicitly as possible the predicates for the theory, most of which will likely be uncontroversial even for those approaching the study of courts from different backgrounds. A set of testable hypotheses will then be derived from these predicates. As noted above, particular attention will be paid to generating hypotheses in a way that is inclusive of all levels of courts, not just the Supreme Court and not only in the context of the United States.

Assumptions

The theory of regime politics rests on six main assumptions. The first of these is the notion that the judiciary is a political institution. This rejects what is practically a strawman argument at this point that the courts are simply mechanistic legal institutions deriving outcomes from either pure reason or higher law. This is not to suggest, though, that the law does not matter for the judiciary, which can be an easy mistake to make. It simply asserts that decisions made by courts take into account something beyond just “the law.” Or perhaps it would be more accurate to say that what “the law” is, is itself a function of politics. This is a point that will be developed at greater length shortly.

The second assumption is that selectors of judges will tend to select judges who share their ideological position. To be clear, in order for regime politics to be a theory that offers us insight into the judiciary, this assumption does not need to always hold. Nor does ideology need to be the sole force in the selection of judges. Experience, reputation, and coalition-building can all exercise a powerful influence on the selection of judges. However, the theory is built on the assumption that most of the time, most judges share the broad ideological perspective of those who select them, whether that be executives, legislatures, or the public. This perception is widely accepted within political science going at least as far back as Dahl (1957). As an assumption, it has continued to find purchase in political science, such as in the Judicial Common Space scores developed by Epstein et al. (2007). There are certainly circumstances when selectors misjudge the ideological commitments of those they select or intentionally choose those whose views differ, but the theory of regime politics treats these as exceptions rather than the norm. It is also important to recognize that the diversity of ideological views

within the selectorate may well influence which ideological perspective judges share, a point to which I will return shortly.

The third assumption is that judges, when faced with situations requiring interpretation on their part, will interpret legal texts and rules in ways that are consistent with their ideological preferences. Though this premise is drawn from the attitudinal research on judicial decision making that emphasizes the role of ideology (e.g. Segal and Spaeth 2002), the assumption here should not be read as arguing that law never matters or that ideology is the only relevant variable. Indeed, as Bailey and Maltzman (2011) and others find, law does matter independently in constraining the legally and politically acceptable options that judges have before them. Ignoring the fact that courts are legal as well as political institutions is one of Keck's (2007a, 2007b) primary critiques of regime politics theory. However, interpretation is quite common in the act of judging and even sincere efforts at interpretation will reflect the underlying world view of the judge or judges making the decision. This does not mean that any outcome is possible, but it does mean that among the legally plausible outcomes, judges will tend to select those interpretations that are most closely aligned with how they see the world.

The fourth assumption is derived directly from the second and third. If selectors choose judges who share their ideology and judges make decisions that are informed by their own ideology, then it might be said that judges will decide cases in ways that are consistent with the preferences of the regime that appointed them. This immediately runs into some complications, however. More recent work on attitudinal decision making by judges such as Martin and Quinn (2002) focuses on changes in ideology over time. That is, it cannot be assumed that a judge's ideology is fixed permanently upon appointment. It is possible that the ideology of the judge will change over time. It is also possible that the ideology of the appointing regime will change

over time. None of this completely undermines the assumption that judges will tend to vote in ways consistent with their appointing regime, but it does highlight the importance of not overstating that assumption. It is also critical to point out that this premise does not claim that judges *always* vote in ways that are consistent with regime preferences. There will be deviations from this expectation both as a result of legal constraints and as a result of disagreement within regimes about preferences. Therefore, a more accurate description of this assumption is that judges will tend to, when legally possible, decide cases in ways that are consistent with the clear preferences of the regime that appointed them.

The fifth assumption is related to judicial hierarchy. The focus here is specifically on the United States, though this assumption can be applicable to other countries with some minor modifications. Courts within the United States operate in a nested, quasi-hierarchical manner. This allows courts higher up in the hierarchy to overturn the decisions of courts lower in the hierarchy and for interplay between federal and state court systems. The U.S. Supreme Court and state supreme courts are at the top of the hierarchy depending on the subject matter of the case. However, this hierarchical control is not perfect (McNollgast 1994; Songer, Segal, and Cameron 1994). Often analyzed from a principal-agent perspective, research finds compliance among federal appeals court judges with current Supreme Court majorities but not necessarily with older precedent from majorities no longer in power (Westerland et al. 2010). This suggests that more than just policy preferences are at play, with law exercising influence in decision-making (see, for example, Hettinger, Lindquist, and Martinek 2007; Scott 2006) It should be noted, though, that very few of these studies extend further down the hierarchy than the appellate courts (Haire, Lindquist, and Songer 2003 use appellate decisions to provide insight into federal district court decisions) and it is even more rare to find social scientific analysis incorporating

state courts at any level into the hierarchical approach. Most of the conclusions about the efficacy of judicial hierarchy are drawn from cases either with enough resources to file an initial appeal or of sufficient interest to justices on the Supreme Court to warrant granting certiorari. This limits the confidence we can have about the dynamics of hierarchy across federal and state systems, but the existing work is at least suggestive that there is some compliance by lower courts, but with some remaining degree of independence as suggested by McNollgast (1994). As a result, we should expect lower courts to continue to operate at least somewhat independently of higher courts as long as they do not stray too far afield on issues of importance to appellate courts. For purposes of regime politics, this means both that regime influence at the highest levels of courts will still lead to imperfect outcomes at lower levels and that regime influence may matter even if different regimes control higher level courts than lower level courts.

The next premise is an effort to define regimes with some more clarity than has come before. For my purposes, the term regime here refers to a political organization that holds political power in the relevant jurisdiction over multiple election cycles. There are four component parts to this definition. The first is that a regime must be a political organization. That is, it must be a group of people or an institution with an explicit purpose of using the political system to achieve goals. This can include political parties, but they are not the only type of political organization that is relevant. Business groups or political machines could qualify as regimes if they meet the characteristics described. The second component is holding political power. Power is obviously a tricky concept to specify in detail, but Moe (2005) offers some guidance on how the concept might be made manageable. Moe highlights two ways in which power might be exercised- agenda control and protecting the status quo- that can serve for a rough sense of what power must be exercised in order for a regime to be present (2005, 226–

28). The third component calls for attention to be paid to the relevant jurisdiction of the regime. Overlapping regimes can (and do) co-exist. State-level regimes may not align with federal regimes, but if they meet the other elements discussed, they should still be regarded as regimes. The fourth and final component of regimes is durational. In order to be considered a regime, the organization must wield political power over multiple election cycles. The strength of the regime will obviously vary depending on just how many election cycles are won, but one electoral victory does not establish a regime, nor does the loss of one election cycle necessarily signal the end of a regime.

This is obviously not presented as the only possible way to characterize regimes, nor is it necessarily easy to identify regimes that meet this definition. In some circumstances, political power may exist even when electoral defeat occurs and would thus still be considered a regime. Likewise, politically powerful, but short-lived movements may exercise real influence on the judiciary but not be categorized as a regime. Power, in particular, may be read more broadly than presented here. Acknowledging these critiques is not to dismiss them, but simply accept that some choices inevitably have to be made. A relatively narrow definition of regime is selected here, but one that will hopefully avoid creating the conclusion that regimes always win and courts can never act independently (Keck 2007b, 533–35).

There is one final assumption to specify. The regime potentially exercising influence is the one that controls selection of the courts within the part of the judicial hierarchy being studied. In one sense, this is straightforward. A regime that controls a city would not exercise direct influence over the selection of a U.S. Supreme Court justice, since they have no formal role in that selection. This assumption, however, focuses attention not only on the *de jure*, but also the *de facto* selection process. Control of the U.S. House of Representatives, for example, is

unlikely to translate into much regime influence over the judiciary since selection is primarily in the hands of the president with some influence by the Senate. The regime controlling the office of the presidency, then, is the relevant one to consider. In the states, even though some courts may have local elections to select judges as the de jure method, governors may routinely appoint judges to vacancies in a way that makes the state level regime the de facto selector. Attention to the actual exercise of power is necessary to better understand how and when regime influence occurs.

Table 1: Regime Politics Assumptions

Assumption 1	Judiciary is a political institution
Assumption 2	Selectors tend to select judges who share their ideology
Assumption 3	Judges tend to interpret law in ways consistent with their ideology
Assumption 4	Judges will tend to decide cases, when legally possible, in ways consistent with the clear preferences of appointing regime
Assumption 5	Courts in the U.S. operate in a nested, quasi-hierarchical manner
Assumption 6	Regimes are political organizations that hold political power in the relevant jurisdiction over multiple election cycles
Assumption 7	The regime exercising influence is the one that controls selection of the courts within the part of the judicial hierarchy being studied.

Hypotheses

From these premises, it is possible to derive a number of testable hypotheses that can offer a richer understanding of the operation of regime politics in the judiciary. The first hypothesis builds on the assumptions that selectors tend to choose judges who share their ideology, that judges will decide cases in ways that reflect their own ideology, and that judges therefore decide cases in ways consistent with their appointing regime's clear preferences. It is reasonable to expect regimes in power for longer periods of time to have more opportunity to select judges. This should mean that the number of judges sharing the ideology of the

controlling regime (and acting upon that ideology) increases as the regime remains in power. That is, the influence that the regime has on the judiciary through the appointment of like-minded judges varies with the length of time the regime can select judges.

Hypothesis 1: Regime influence on the judiciary will increase as the length of time the regime is in power increases.

It is important to be as clear as possible about what is meant by regime influence, since it is a key concept in many of the subsequent hypotheses as well. Regime influence as used here means that the regime gets the outcome they prefer in cases before the courts. Building on Moe's (2005) concept of power already discussed, regime influence is detectable through decisions made by courts that either assist the regime with agenda setting or assist in maintaining the (regime supported) status quo. Accepting this understanding of regime influence does not mean accepting that any decision that goes the regime's way is de facto evidence of regime influence. It is possible that a judge acting in a legally motivated way, and therefore presumably not influenced by the regime, may reach a conclusion that the regime prefers. Indeed, it may well be impossible to distinguish between these motivations in all cases. By conceptualizing regime influence in this way, though, it allows the testing of a variety of hypotheses. If these hypotheses are supported by the evidence, then it should lead to a more confident inference that regime influence is present. With the first hypothesis, for example, decisions favorable to the regime may appear earlier in the regime's lifetime, but we can have greater confidence that a higher frequency of such decisions later in the regime's cycle are more likely to be a consequence of regime influence through the mechanism of judicial selection.

The second hypothesis builds on those same assumptions, but is instead focused on the selection process. Much of the work on regime politics has focused exclusively on the U.S.

Supreme Court, whose justices are nominated by presidents and confirmed by the Senate to what are effectively life terms. In other courts, however, the selection process varies significantly. Some judges are elected while some are appointed by commissions, legislatures, or executives. The process of nomination for elections also varies from strong party control to nonpartisan races. One advantage of expanding the application of regime politics beyond the Supreme Court or even the federal judiciary is that institutional characteristics of the selection process can be studied comparatively. Looking at regime politics in this way suggests that regime influence is likely to be affected by the amount of control regime supporters have over selection.

Hypothesis 2: Regime influence on the judiciary will increase when control of selection of the judiciary is in the hands of regime supporters.

This can be conceptualized along a sliding scale- the more direct the control, the greater the influence. If, for example, the relevant question is when state supreme courts are subject to regime influence, states with gubernatorial appointments are more likely to reflect influence from the governor's regime than those whose selection is handled by a merit selection committee whose members are appointed by a variety of political actors. Regime influence is more likely in elections where the regime controls whose name gets listed on the ballot. If the assumption about appointing judges who share the regime's ideology holds, then this increased control over selection should translate into more favorable rulings. At the federal level, the amount of control over selection by a regime might vary with time. At points when one political party holds unified control of government, we should expect judges selected during this period to be most conducive to regime influence. Under divided government, though, regime influence would be less extensive. Scholars can characterize different jurisdictions or different historical periods as experiencing more or less control of selection and then compare those to confirm whether regime

influence is more or less apparent. Doing so can provide a clearer understanding of what political conditions might lead to greater independence for judges.

Institutional control of the selection process is not the only relevant consideration, though. Regime coherence matters as well. In any sizeable democratic political community, a regime is likely to be a coalition whose members are not in full agreement on all matters. This affects regime influence on the judiciary in two ways. First, when regimes are more internally divided over critical issues, then it is reasonable to expect that the judges selected will reflect those divisions and also act less cohesively. That is, there should be less evidence of regime influence and more independent action. On the other hand, when ideological cohesiveness is high within a regime, then measurable regime influence on the judiciary should also increase.

Hypothesis 3: Regime influence on the judiciary will increase as the ideological cohesiveness of the appointing regime increases.

Ideological cohesiveness can be measured at the federal level through tools like NOMINATE scores. Similar measures are not available in a widespread way for state and local governments, but careful historical research can provide scholars with the means to evaluate whether (and when) a regime is more or less ideologically cohesive. Understanding this can better illuminate the conditions under which judges are able to act independently, the primary issue that Keck (2007a, 2007b) was concerned regime politics failed to address.

There is a second way in which the ideology of the regime can be considered when it comes to regime influence on the courts. Even where there are ideological differences between regime partners, there are likely to be some issues upon which there is agreement. That is what

holds the regime coalition together. Where regime members share common ground, so too should judges appointed by the regime. These considerations lead to the fourth hypothesis.

Hypothesis 4: Regime influence on the judiciary will be most evident in subject areas of greatest ideological agreement within the regime.

That is, we should not necessarily expect regime influence uniformly across all issue areas addressed by courts. In those areas subject to the greatest disagreement or disinterest within the regime, judges will be less likely to act in ways that signal regime influence. Other influences such as law or the judge's own ideology are more likely to impact outcomes in these cases. Evaluating this requires assessing the core points of agreement within regimes. These could be drawn from prominent campaign messages or from speeches while in power. For example, though the Democratic regime of the 1930s was divided on many issues, government involvement in economic regulation was central to how the regime formed and prospered electorally.

Other issues where regime influence may be evident are not necessarily ideological in character. Some court decisions can help keep regimes in power while others potentially threaten to undermine that power. This dynamic has driven a significant part of the literature on regime politics- it is connected fundamentally to the countermajoritarian dilemma presented by judicial review. One response that regime politics has provided to questions about why regimes would allow judicial review is that it is exercised when the regime thinks it is safe or desirable to do so (e.g. Gillman 2002; Graber 1993; Whittington 2007). By moving beyond judicial review, as suggested above, it is also possible to examine when issues may arise that are key to regime power though less immediately visible. If a court decision or action would threaten the continued dominance of the appointing regime, the theory predicts that judges would decide in

ways favoring the regime, regardless of law or ideology. This is a strong version of the theory and there are reasons to conclude that it does not capture all of the dynamics likely at play. First, this hypothesis might only hold where regime control over the selection of judges is strong, as laid out in Hypothesis 2. That is, where selection is entirely in the control of the regime, they would be more likely to appoint those who feel closely connected to the regime's interests. Even this does not address all concerns, though. Worry about the status of the appointing regime is a prospective consideration, not a retrospective one. Given that this hypothesis moves beyond shared ideology as a motivation, there must be clear reasons for judges to have an interest in the continued survival of the regime itself. Judges might be more likely to decide in this way when it threatens not only the regime's survival but their own continued position on the bench. Long terms or high rates of reelection/reappointment across regime changes should insulate judges from the pressure to protect the regime's interests. Conversely, short terms and high turnover would align judge's interests with those of the regime in order to maintain power.

Hypothesis 5: Regime influence on the judiciary will be evident in ways that help the regime maintain power regardless of ideology or law where regime control of selection is the greatest and there are short terms on the bench.

This immediately suggests that the U.S. Supreme Court, with life terms, is one of the courts least likely to reflect this dynamic. Though the Court may support regime interests when ideologically aligned with the justices, they are unlikely to be focused on protecting regime interests at the expense of the law. State courts, on the other hand, may be more likely to meet these conditions. Fear of removal can exercise a powerful influence on how closely tied courts are to regimes.

The next hypothesis considers how long this influence may be expected to continue. Regimes rise and fall over time. How long will the influence on the judiciary last after a regime is defeated? Can the new regime begin exercising influence immediately? The answer to these questions should rest on how quickly new regimes can replace the judges. In systems with short terms of office, new regimes can work relatively quickly to replace judges from the previous regime. Norms about turnover also matter in this consideration. If the norm is for judges to remain in office largely unopposed even if the terms are short, then it will be more difficult for the new regime to overturn the work of the regime that came before.

Hypothesis 6: The length of time that regime influence on the judiciary continues to operate after regime defeat depends on the length of terms and turnover in office.

The period of time in which regime influence can be expected to appear in the judiciary is not necessarily aligned perfectly with the time period during which the regime is electorally dominant. It is a lagging indicator. Hypothesis 1 suggests that regime influence on the judiciary will not necessarily immediately be present, while Hypothesis 6 suggests that it should continue even after the regime suffers electoral defeat.

Because our judicial system is nested hierarchically as noted in Assumption 5, there are two other hypotheses that ought to be considered as a part of a theory of regime politics. The first is to evaluate which regime is the relevant regime to consider in the analysis. For the U.S. Supreme Court, for example, is it the regime controlling a Congressional majority? Or the party of the president? For state and local courts, the question becomes even more complex. Is the state, county, or city level regime the relevant one to consider? Since influence on the judiciary is predicated on influencing who sits on the bench, this is most readily answered by looking to the regime in control of selection.

Hypothesis 7: Regime influence will reflect the regime in control of the selection of the courts within that part of the judicial hierarchy.

Paying attention to this dynamic can help tease out the influences of different regimes at different levels of courts. Finding a state trial court that decided in a way that benefitted a federal regime would not be evidence of regime influence under this theory because the federal regime does not control selection of the state trial court judges. Likewise, a favorable U.S. Supreme Court ruling for a city-level regime should not be interpreted as evidence of regime influence since there is no plausible control of the selection process by that city-level regime. This becomes particularly helpful and worth testing where there may be a distinction between de jure and de facto selection methods. If the de jure selection method is election by county, but the de facto selection process is gubernatorial appointment, the regime exercising influence should be the state level one.

The final hypothesis addresses the potential interactions between regimes and between different levels of courts. As discussed earlier, higher courts within the American court system can exercise some measure of (imperfect) control over lower courts. Different regimes may influence different levels of courts, particularly between state and federal courts. A federal regime may influence federal courts but have no say in how state courts operate. A theory of regime politics that looks beyond just the U.S. Supreme Court must account for potential conflicts between regimes at different levels of government.

Hypothesis 8: Courts higher in the judicial hierarchy will be more likely to constrain lower level courts when there is regime conflict between the different levels of government.

Building off the literature discussed in Assumption 5, this hypothesis suggests that conflict between regimes may make issues decided by lower courts important enough to appellate courts to trigger action. If, for example, the federal regime is at odds with the state level regime that controls judicial appointments in the state, then federal courts would be more likely to both hear and overturn decisions of those state courts. Where regimes are in alignment, higher level courts are less likely to get involved.

Table 2: Regime Politics Hypotheses

Hypothesis 1	Regime influence on the judiciary will increase as the length of time the regime is in power increases.
Hypothesis 2	Regime influence on the judiciary will increase when control of selection of the judiciary is in the hands of regime supporters.
Hypothesis 3	Regime influence on the judiciary will increase as the ideological cohesiveness of the appointing regime increases.
Hypothesis 4	Regime influence on the judiciary will be most evident in subject areas of greatest ideological agreement within the regime.
Hypothesis 5	Regime influence on the judiciary will be evident in ways that help the regime maintain power regardless of ideology or law where regime control of selection is the greatest and there are short terms on the bench.
Hypothesis 6	The length of time that regime influence on the judiciary continues to operate after regime defeat depends on the length of terms and turnover in office.
Hypothesis 7	Regime influence will reflect the regime in control of the selection of the courts within that part of the judicial hierarchy
Hypothesis 8	Courts higher in the judicial hierarchy will be more likely to constrain lower level courts when there is regime conflict between the different levels of government.

Conclusion

Each of the preceding hypotheses builds on the excellent work already done on regime politics, but seeks to clarify and specify it in ways that can further advance scholarship.

Consideration of these dynamics offers a richer understanding of how regime politics and the

judiciary interact. The next step, of course, is to put these hypotheses to the test. How do they perform? Do the federalism decisions from the Rehnquist Court support the regime politics theory of Pickerill and Clayton (2004)? Did the courts of Daley-era Chicago offer evidence of regime influence? A first glance suggests that in these cases, at least, the hypotheses of regime politics have some weight to them.

For the federalism cases from 1992-2004, the increased ideological cohesiveness of the Republican party (Hypothesis 3) combined with lengthy control of the office of the presidency by Republicans (Hypothesis 2) made regime influence more likely. Pickerill and Clayton (2004) present evidence of the centrality of federalism to the Republican coalition, making it an area of significant ideological agreement within the coalition (Hypothesis 4). As a consequence, this is an area where we would expect to see regime influence emerge. However, that influence will be constrained by the long terms served by the justices and Democratic control of the Senate for large swaths of time (Hypothesis 5). Even this brief foray into the subject suggests the potential for a more nuanced and richer understanding of just how regimes matter for the judiciary than earlier work.

Moving beyond the U.S. Supreme Court, the courts of Cook County in Illinois appear to fit with these hypotheses as well. The long mayoral reign of Richard J. Daley from 1955 to 1976 was combined with control of the Cook County Democratic Central Committee resulting in widespread power and influence (Hypothesis 1). Daley's role in approving candidate names on the Democratic ballots meant that even though he did not have a formal role in the selection of judges, his informal role was tremendously important (Royko 1971, 64; Tuohy and Warden 1989, 45–46) and thus supports Hypothesis 2. Judges in Cook County served relatively short terms while the regime exercised significant control over the selection process. Given those

dynamics, it is not a surprise to see circumstances where these courts acted to advance the interests of the regime, such as protecting regime supporters through refusing to sign the formal presentment from a grand jury (Biles 1995, 179–80). This is consistent with Hypothesis 5. And the increasing divide between the federal government’s priority of racial inclusiveness and Daley’s continued segregation meant that federal courts stepped in on a number of occasions, most prominently with the Shakman Decrees, to limit and restrict the flexibility of the Daley regime (Hypothesis 8). Though further work is of course necessary to compellingly test these hypotheses in action, even the cursory review presented here is sufficient to highlight the ways in which thinking about courts in this way can help reformulate and redirect the questions we ask about regime politics.

In both of these cases, the theory of regime politics does not predict unrestrained regime influence in the judiciary. The influence that occurs is contextual and moderated by other political factors. This is the promise of regime politics as a lens for understanding the judiciary—a way to combine the insight that politics matters for the judiciary with a nuanced and balanced understanding of how and when those politics actually come into play. With the more clearly defined and developed theory of regime politics presented here, scholars can now use this to advance our understanding of the intersection of law and politics.

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