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Putting the Constitution Above Party: The Modern Supreme Court, Jurisprudential Policy Alliances, and Institutional Orders

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Research Article

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Abstract

Law and American Political Development scholars rely on "regime theory" to understand constitutional politics. This paper offers the first sustained historical critique of regime theory. This approach posits that same-party Supreme Court justices function as the agents of elected elites, writing into law the preferences of the "dominant national coalition" that placed them on the Court. Drawing on archival and overlooked primary source materials, this paper argues that regime theory struggles to explain presidential, party, and judicial politics from the New Deal forward. The paper's second goal is developing an alternative historical framework: *jurisprudential policy alliances* and a measurement strategy. After delineating competing policy alliances' emergence and development prior to the New Deal, the paper simultaneously tests regime theory and jurisprudential policy alliances against the evidence from FDR to George W. Bush. The policy alliances approach correctly predicts the justices' orientation on the Court in 30 of 35 confirmations; regime theory, in 16 of 35. The paper concludes with an analytic discussion that summarizes the limitations of regime theory, suggests a revamped political development approach to Supreme Court politics that places the justices at the center, and charts avenues for theory-building and future empirical research.

As the Supreme Court's term came to a close in 1992, conservatives could hardly believe it. On June 24, a Court stocked with *eight* justices appointed by Republican presidents ruled that school prayer remained unconstitutional.[1] Conservatives were "sickened" by the opinion, one that upheld liberal Warren Court rulings from the 1960s.[2] Five days later, they were devastated. The Court handed down *Planned Parenthood v. Casey*, a case that saw Reagan, Bush, Nixon, and Ford appointees join forces to save the core of *Roe v. Wade*. Twelve years in, the Reagan revolution had failed to reorder the Supreme Court. One cut to the quick: "let us hear no more about the court's being 'conservative,'" the "Reagan/Bush Supreme Court is decidedly not conservative."[3]

Fast forward 30 years. The presidency and control of Congress have toggled back and forth between the two parties. There are now six justices appointed by Republican presidents. Yet these justices are far more reliably conservative than their predecessors. Just in the past 5 years, this cohort of Republican justices has finally overturned *Roe v. Wade*, strengthened religious liberty rights, and held affirmative action in higher education unconstitutional—to skim only the surface.[4] When President Trump and conservatives attack the Court (often singling out Justice Amy Coney Barrett for particular opprobrium), it is for taking positions that 1990s conservatives would have considered a good deal preferable to the status quo.[5]

Regime theory, the predominant historical-institutionalist framework in the law and courts subfield, struggles to explain this consequential development in Supreme Court politics.[6] For regime theorists, the outcome of interest—Supreme Court policymaking—is best understood as part and parcel of presidents and political parties. The justices are part of a "dominant national coalition," that is, a *regime*, and they write into law the legal policy preferences of party leaders,

[1] *Lee v. Weisman*, 505 US 577 (1992). In addition to Chief Justice Rehnquist, Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, and Thomas were all Republican appointees. Justice Byron White, appointed by President Kennedy, was the sole Democrat on the Court.

[2] "Kennedy's Prayer Decision Stuns Conservatives," *Human Events* (hereafter *HE*), July 4, 1992, 4–5.

[3] Daniel E. Troy, "A Difference of Opinion," *Policy Review*, Summer 1992, 27–33.

[4] See Margaret Talbot, "The Delusions of John Roberts," *New Yorker*, August 10, 2026, https://www.newyorker.com/magazine/2026/08/17/john-roberts-profile.

[5] John Fritze, "Veteran Legal Conservatives Rush to Justice Barrett's Defense Amid MAGA Backlash," *CNN*, March 7, 2025, https://www.cnn.com/2025/03/07/politics/amy-coney-barrett-maga-backlash/index.html. It is the legal conservative "establishment" that defends the Court in the face of these attacks. "Federalist Society Leader Defends 'Demonstrably Conservative' Coney Barrett," *The Hill*, March 12, 2025, https://thehill.com/regulation/court-battles/5189611-leonard-leo-amy-coney-barrett/.

[6] As detailed below, there are multiple versions of regime theory. I am focused on the dominant strain of regime theory that law and courts scholars articulate.

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particularly the "presidential wing" of their associated party.[7] Given this electoral connection, the Court is essentially "a majoritarian institution," one with democratic imprimatur—thus, it should rarely be out of step with the regime's policy preferences, of which the justices are the judicial reflection, and even then not for long.[8]

Bracketing the question of the Rehnquist and Roberts Courts' democratic bona fides, it is hard to identify a presidents-and-parties based regime of the past 30 years, a dominant national coalition that the current Republican justices are serving. The past three decades of American politics have been marked by deep polarization and back-and-forth control of the two institutional paths to the Court (the presidency and the Senate). There has been no *regime* even as the Court finally became majority *conservative* (rather than simply Republican) during President Trump's first term. Put differently, even as the past two decades have seen each justice's ideological valence fully and finally align with the president who nominated them—regime theory's central assumption—a dominant national coalition or regime they are clearly serving has dissipated.[9] In light of these developments, prominent regime theorists have questioned their framework's ability to explain Supreme Court politics. One notes that "lessons learned over the course of American constitutional history" are "not play[ing] out in the same way" in an "era of severe party polarization."[10] Another highlights that the Reagan "regime" inaugurated in 1980 "has been increasingly unable to win national Presidential majorities since 1992."[11] And the founder of modern regime theory concedes that "regime theory paint[s] a poor picture of constitutional politics during the late twentieth century and the first decades of the twenty-first century."[12] Beyond presidents and parties—beyond, that is, electoral competition—other factors seem to be driving this consequential rightward shift in Supreme Court politics. To better understand what drove the slow-boil conservative capture of the Court, we need to push past explanations that foreground electoral regimes.

Building on prior scholarly critiques of regime theory, this paper argues that its predominant strand—call it the *presidents-and-parties framework* (PPF)—needs significant revamping and updating.[13] The PPF depicts the justices as agents of the dominant national coalition; they are vessels for legal policy preferences of same-party elected elites, above all the "presidential wing" of the coalition. The empirical claim here is that regime theory struggles to explain *not only* the past generation of Supreme Court politics, but much of its development from the New Deal forward. If, for example, FDR's New Deal regime set the template for the Democratic justices' policymaking, it is unclear why legal liberalism swiftly splintered into two competing orientations in the 1940s. PPF has a further difficulty: explaining why a Republican president, Dwight Eisenhower, appointed two of the most liberal justices of the twentieth century (Earl Warren and William Brennan), and two others whom liberals saw as *improvements* over their Democratic predecessors. As delineated below, the former were not, as many regime theorists claim, Eisenhower's "mistakes," nor were the latter moderate conservatives. More broadly, Eisenhower's administration was moderately liberal, including on civil rights—whereas a counterfactual President Adlai Stevenson would have insisted on keeping Southern Democrats in the New Deal regime, thus cabining his nominees' racial liberalism. Regime theory also struggles to explain Nixon's and Ford's presidencies, most of their Supreme Court appointments, and the overall constitutional politics and public law of the 1970s. And as sketched above and detailed below, even the Reagan regime—what should be a most-likely case for

[7]Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6, no. 2 (1957): 279–95. For the most influential modern understanding, see Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7, no. 1 (1993): 35–73.

[8]See Lucas Powe, *The Supreme Court and the American Elite, 1789-2008* (Cambridge, MA: Harvard University Press, 2009), ix.

[9]One scholar affiliated with regime theory recently argued that the Supreme Court of the past generation is notable for its *lack* of connection to sustained political majorities. Kevin McMahon, *A Supreme Court Unlike Any Other* (Chicago: University of Chicago Press, 2024), 2–3. Moreover, as noted above and fleshed out below, regime theorists invariably invoke Dahl's depiction of the Court as part of a "dominant national alliance" (regime theorists render it as "dominant national coalition"). Dahl, "Decision-Making in a Democracy," 293. Yet one of the most prominent regime theorists recently set forth at some length how Dahl's framework comes up short. Keith Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence: University Press of Kansas, 2019), 8–9. Another classic work that underpins regime theory is Burnham's theory of realigning (or "critical") elections that, in regime theory's schema, augur a new governing regime that will appoint sympathetic justices to the Court. See Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: W. W. Norton & Company, 1970). However, Burnham explicitly noted in 1991 that the "present order"—which he dated to 1968—was one characterized by "divided government," and indeed conceded that the "Reagan Revolution remained incomplete." Walter Dean Burnham, "Critical Realignment: Dead or Alive?", in *The End of Realignment? Interpreting American Electoral Eras*, ed. Byron Shafer (Madison: University of Wisconsin Press, 1991), 101–40, 125–27. Despite the fact that regime theorists have not taken Burnham's 1991 counsel, there has been no realigning election since this concession and there has been no "dominant national coalition" controlling Congress and the White House since 1992 (indeed, GOP presidential candidates have won the popular vote only *twice* since 1992 and parties have held control of both insecurely—only for a few years at a time). David Mayhew, moreover, has persuasively critiqued the empirical support for "critical" or realigning elections in American political history. David Mayhew, *Electoral Realignments: A Critique of an American Genre* (New Haven: Yale University Press, 2002). Above and beyond the close electoral competition between the parties over the past 30 years, it is equally hard to divine an ideological dominance to conservatism since 1980, especially in the twenty-first century: Among much else conservatives complained about, George H.W. Bush signed the Americans with Disabilities Act and the Civil Rights Act of 1991; Clinton governed as a liberal in his first 2 years (the Brady Bill (gun control), 1993 tax increase for top earners, the Family and Medical Leave Act, and greatly diversifying the cabinet), increased the minimum wage (1996), and created the State Children's Health Insurance Program (1997); George W. Bush expanded the welfare state via Medicare Part D and the federal government's role in education via No Child Left Behind; Obama passed the most significant pieces of social and economic legislation since the 1970s (the Affordable Care Act and Dodd-Frank); and Biden's first 2 years saw multiple progressive pieces of legislation. Whether considered electorally or ideologically, the concept of a "regime" or "dominant national coalition" has lost its analytical leverage as applied to American politics since the early 1990s, inclusive or exclusive of the justices.

[10]Howard Gillman, "Party Coalitions and Supreme Court Politics: Additional Lessons from Whittington's *Repugnant Laws*," *Georgetown Journal of Law and Public Policy* 19 (2021): 405–23, 407.

[11]Jack Balkin, "The Recent Unpleasantness: Understanding the Cycles of Constitutional Time," *Indiana Law Journal* 94, no. 1 (2019): 253–96, 264.

[12]Mark Graber, "Judicial Supremacy and the Structure of Partisan Conflict," *Indiana Law Review* 50, no. 1 (2016): 141–80, 167. Graber persuasively adds: "By implicitly treating the structure of constitutional politics at the time of the Warren Court as a constant rather than as a variable, neither the grand constitutional nor regime theory identify or analyze the contemporary political foundations of judicial power." Ibid., 149.

[13]Thomas Keck, "Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools," *Law & Social Inquiry* 32, no. 2 (2007): 511–44, 522; Paul Frymer, "Law and American Political Development," *Law & Social Inquiry* 33, no. 3 (2008): 779–803; Steven Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008), 22–57; Paul Baumgardner and Calvin TerBeek, "The US Supreme Court is Not a Dahlian Court," *Studies in American Political Development* 36, no. 2 (2022): 148–50. An attempt to quantify and test regime theory found that, in the context of invalidating federal statutes, the Court was *not* working with a "dominant governing regime." Matthew Hall, "Rethinking Regime Politics," *Law & Social Inquiry* 37, no. 4 (2012): 878–907. See also Warren Snead and Kumar Ramanathan, "Conditioning the Counter-Majoritarian Difficulty: Parties and Judicial Power," *Perspectives on Politics* (forthcoming); Rogers Smith, "Is Chief Justice John Roberts an Institutionalist? A Historical Institutionalist Analysis," *ANNALS of the American Academy of Political and Social Science* 713, no. 1 (2024): 68–87.

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the theory—often does not fit comfortably with the development of American law and politics after 1980.

A second goal of this paper is concept formation. Drawing on Rogers Smith and Desmond King's work alongside Hans Noel's scholarship, the paper sets forth a typology of the modern justices as the institutional leaders of *jurisprudential policy alliances*.[14] Rather than looking to presidents and parties to gauge a given justice's (or Court's) politics, this approach focuses on how a jurisprudential policy alliance constructs—and, critically, then evolves—direct claims on what the Constitution means and the consequent nature and scope of public law.[15] As important is the following scope condition: jurisprudential policy alliances are a modern phenomenon kicking off with the Progressives and then responded to by constitutional conservatives.[16] Rather than the modern justices being primarily conceived as party actors—for example, judicial agents, mediating intra-coalitional disputes, or disciplining national "outliers"[17]—we have good reason to expect that those selected for the Supreme Court care most deeply about public law policy as a distinct set of concerns that are often orthogonal to party politics, whether a presidential faction or otherwise.[18] A corollary of this conceptual development is that the justices have significant, if no doubt bounded, agency to (re)construct constitutional law according to their worldviews—they do not take their cues first and foremost from aligned party leaders.[19] In brief, jurisprudential policy alliances "carry" and then embed the tenets on the Court as an "institutional order."[20]

Leveraging untapped archival materials and overlooked primary sources throughout, this paper proceeds as follows.[21] The first section details the precepts of regime theory with a focus on PPF. The following section articulates a typology of the three most prominent jurisprudential policy alliances that have manifested on the Court over the past century: living constitutionalism, constitutional conservatism, and an orientation we can call incrementalism. As detailed, these policy alliances are ideal types, not meant to capture every permutation under their conceptual umbrella. This section also sets forth a measurement strategy. The next four sections form the paper's empirical core. After sketching the policy alliances' emergence from the Progressives to the New Deal, these sections test regime theory from FDR to George W. Bush while also subjecting jurisprudential policy alliances to a "proof-of-concept" feasibility test. (It is worth emphasizing here that to keep the narrative moving, some footnotes contain pertinent contextualizing information.) The findings are stark: even coding regime theory's predictions generously, this framework correctly predicts only 16 of 35 confirmations from 1937 to 2006. The jurisprudential policy alliances approach correctly predicts the justices' orientation on the Court 30 times across 35 confirmations (see Table 1). The final section is an analytic discussion that summarizes the limitations of the dominant strain of regime theory and suggests a revamped political development approach to Supreme Court politics, one that places the justices at the center. In that spirit, the conclusion calls for a new, collective endeavor by American political development (APD) scholars: to emphasize our methodological comparative advantage—archival data—and to theory-build in this area. The hope is that the approach set forth here clears the ground for testing a variety of frameworks that promise to throw into sharper relief the past and present of American public law.

1. Regime theory, presidents, and parties

Regime theory grew out of two opposed streams of thinking that appeared in legal scholarship and political science in the 1950s and '60s: academic lawyers' anxiety about the Warren Court's aggressive judicial review vis-à-vis political scientists' majoritarian view. That is, in these years, political scientists began to question why legal academics were so concerned about the "counter-majoritarian difficulty"—the need to justify the unelected justices striking down the public law of the elected branches.[22] Building on Robert Dahl's influential 1957 article arguing that the Court was part of the "dominant governing [coalition]," supplementing Martin Shapiro's showing that the Court makes legal policy ("political jurisprudence"), and leaning on Walter Dean Burnham's theory of "critical" or realigning elections, Mark Graber's classic 1993 article laid the foundation for what would come to be called regime theory, particularly the PPF approach.[23] Leveraging the counter-majoritarian difficulty as a foil, Graber's core claim was that the Supreme Court is essentially a majoritarian institution that exercises power "only when the dominant national coalition is unable or unwilling to settle some public dispute."[24]

[14]See Desmond King and Rogers Smith, *Still a House Divided: Race and Politics in Obama's America* (Princeton: Princeton University Press, 2011), 7–14; Hans Noel, *Political Ideologies and Political Parties in America* (New York: Cambridge University Press, 2013).

[15]Imbuing the justices with greater agency is compellingly developed vis-à-vis the nineteenth-century Supreme Court in Gregory Elinson, "Judicial Partisanship and the Slaughterhouse Cases: Investigating the Relationship Between Courts and Parties," *Studies in American Political Development* 31, no. 1 (2017): 24–46. For another salient example from this time period, see Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *American Political Science Review* 96, no. 3 (2002): 511–24.

[16]The recent divisions between "Establishment" legal conservatives (e.g. the Federalist Society) and populist conservatives are varieties within the larger constitutional conservative order, a feature long true of conservatives and their Constitution. See Ken Kersch, *Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism* (New York: Cambridge University Press, 2019).

[17]See Powe, *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000).

[18]See Rogers Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82, no. 1 (1988): 89–108.

[19]Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97, no. 3 (2003): 483–99.

[20]King and Smith, *Still a House Divided*, 16–19.

[21]With the notable exception of Kevin McMahon's work, regime theorists overwhelmingly rely on secondary sources and primary sources (e.g. newspaper articles and publicly available presidential speeches), but rarely consult archival materials (e.g. presidential libraries, justices' and judges' papers, activists' records). Kevin McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004); *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (Chicago: University of Chicago Press, 2012).

[22]Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), 16.

[23]Dahl, "Decision-Making in a Democracy"; Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York: Free Press, 1964); Burnham, *Critical Elections and the Mainsprings of American Politics*; Graber, "The Nonmajoritarian Difficulty." In addition to the scholarship cited below, for work building on Graber, see Howard Gillman and Cornell Clayton, eds, *The Supreme Court in American Politics: New Institutionalist Interpretations* (Lawrence: University Press of Kansas, 1999); Howard Gillman and Cornell Clayton, "Introduction," in *The Supreme Court in American Politics: New Institutionalist Interpretations*, eds Gillman and Clayton (Lawrence: University Press of Kansas, 1999), 1–14; Terri Peretti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999); Cornell Clayton and David May, "A Political Regimes Approach to the Analysis of Legal Decisions," *Polity* 32, no. 3 (1999): 233–52; Jack Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87, no. 6 (2001): 1045–109; Ronald Kahn and Ken Kersch, eds, *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006); Whittington, *Repugnant Laws*; Dave Bridge, *Pushback: The Political Fallout of Unpopular Supreme Court Decisions* (Columbia: University of Missouri Press, 2024).

[24]Graber, "The Nonmajoritarian Difficulty," 36.

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The justices and their "policymaking," Graber theorized, "should normally mirror the beliefs of the presidential or elite wing of the dominant national coalition"—the justices "assist" the dominant national coalition; its "wishes often become the justices' commands."[25] As the most extensive effort to theorize regime theory puts it: "the regime politics paradigm" starts "with the assumption that the Supreme Court is part of, and rarely deviates from, the dominant majority coalition."[26] Or, as another key PPF article argues, the justices should be understood as "temporally extended representatives of *particular parties*, and hence, of popular understandings about public policy and the Constitution."[27] One leading regime theorist, quoting another regime theorist, analyzes the Court this way: how the justices vote "is the expression and vindication of those political views deliberately 'planted' on courts by the policy-conscious presidents and senators."[28] This was and remains the pith of the dominant strain of regime theory, which is in turn the predominant historical-institutionalist framework in the law and courts literature.[29]

As it developed over the 1990s and into the 2000s, regime theory was also deeply influenced by Stephen Skowronek's work on regimes and, even more so, his theory of presidents and their reconstruction of, or location in, "political time."[30] As reconfigured by regime theorists, their framework viewed the electoral consolidations of Skowronek's "reconstructive" presidents as heralding an era of *judicial* entrenchment that later breaks down and is replaced by a new president-led regime.[31] As a result, PPF still more explicitly privileged the "presidential wing" of the dominant coalition as the best predictor of regime-affiliated justices' constitutional politics.[32] One effort to systematize regime theory put it: "the phrase often repeated by the regime politics literature is that the Supreme Court advances the preferences of the 'presidential wing.'"[33]

Most, if not all, regime theory scholarship analyzes constitutional politics from the New Deal forward: FDR's New Deal reconstruction and Reagan's conservative regime. Regime theory conceptualizes the Democratic Party, its presidents, and their justices from FDR forward as essentially liberal, a New Deal-cum-Great Society liberal regime.[34] By that same measure, those presidents "affiliated" with the regime—for example, Truman and JFK—will appoint "affiliated justices" who will "implement" the reconstructive president's "constitutional vision."[35] Regime theory expects "opposition presidents," like Eisenhower and Clinton, "not to appoint strongly ideological representatives of their parties' positions."[36] The Republican Party, its presidents, and justices are depicted as conservative—from Eisenhower's moderate conservatism to Nixon's Southern Strategy and "New Right regime," and Reagan's full-bore conservatism.[37]

As a theoretical framework, regime theory is elegant. At first blush, it seems manifestly correct: the Court *was* mostly liberal from the second New Deal to 1980, and it *did* become more conservative after Reagan's election. And it promised an analytical richness that quantitative approaches cannot provide. At least in theory, a comparative advantage of regime theory was its excavation of the Court's most high-profile cases, where it made significant policy in contrast with amassing the justices' votes and

[25]Ibid., 39, 44. The importance of the Court as assisting a dominant national governing coalition was underscored by Graber in another article. Mark Graber, "Constructing Judicial Review," *Annual Review of Political Science* 8 (2005): 425–51, 427–28.

[26]Bridge, *Pushback*, 25.

[27]Balkin and Levinson, "Understanding the Constitutional Revolution," 1067 (emphasis added). Keith Whittington argues from a less-deterministic account while still in the PPF register. For him, the justices act within the "boundary constraints" of the regime while still exercising "significant autonomy"—or at least "some modicum of independence and discretion." See Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* (Princeton: Princeton University Press, 2007), 27; Whittington, *Repugnant Laws*, 288. Revising his prior thinking, Whittington has softened regime theory's agentic claim—he sees the justices as "partners." Whittington, *Repugnant Laws*, 288. Nevertheless, regime theory scholarship almost uniformly concentrates on high-profile cases and rarely (besides Whittington's *Repugnant Laws*) delineates when and under what scope conditions (indeed, in which particular cases) the justices exhibit the autonomy this theoretical concession allows for.

[28]Howard Gillman, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism," in *Supreme Court and American Political Development*, eds Ronald Kahn and Ken Kersch, 138. See also Jack Balkin and Sanford Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *Fordham Law Review* 75, no. 2 (2006): 489–535, 490 ("Presidents appoint judges and Justices to the federal judiciary who are thought to share the broad political agenda of the political party led by the President").

[29]See, in addition to the examples delineated below, Howard Gillman, "Courts and the Politics of Partisan Coalitions," in *Oxford Handbook of Law and Politics*, eds Keith Whittington et al. (New York: Oxford University Press, 2008), 644–62, 655 (emphasizing "the efforts of the presidential wing of the Democratic Party after 1960 to transform the federal judiciary so that it would become an ally in promoting New Frontier/Great Society liberalism"); McMahon, *Nixon's Court*, 8–9 ("Supreme Court decisions" are in large part the "byproducts of the dominant political coalition that put the justices in place"); Keith Whittington, "Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *American Political Science Review* 99 (2005): 583–96, 584, 593 (theorizing "judicial review by an allied court" acting as a "judicial agent" that "can be understood as a vehicle of regime enforcement"); Terri Peretti, *Partisan Supremacy: How the GOP Enlisted Courts to Rig America's Election Rules* (Lawrence: University Press of Kansas, 2020) (coalition leaders "empower and staff courts to be allies who support the party's interests").

[30]Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Belknap Press of Harvard University Press, 1997). Regime theorists often cite two pieces of his, one solo-authored and another written with Karen Orren. One laid the ground for what Orren and Skowronek would call "intercurrence" or the multiple orders thesis—i.e. that not all institutions develop on the same timeline, and their actions may abrade each other. Stephen Skowronek, "Order and Change," *Polity* 28, no. 1 (1995): 91–96. The other lays out a theory of regimes focused not on the Court but what might be called a political order. Karen Orren and Stephen Skowronek, "Regimes and Regime Building in American Government: A Review of the Literature on the 1940s," *Political Science Quarterly* 113, no. 4 (1998): 689–702, 695. Skowronek and Orren's conceptualization substantially differs from, and is more sophisticated than, regime theory's deployment of the concept.

[31]For regime theory scholarship that emphasizes the importance of the president-Supreme Court connection, see Whittington, *Political Foundations*; Peretti, *Partisan Supremacy*, 7–33.

[32]It is worth emphasizing here that my aim is not to test the periodization convention of (for example) "the New Deal order," but the PPF claim that a dominant national coalition existed and used the justices to transmit its legal policy preferences. Balkin and Levinson, "Understanding the Constitutional Revolution," 1073 ("a conservative Republican hegemony during the 1980s and early 1990s that *produced* judges and Justices sympathetic with Reagan's vision") (emphasis added); Cornell Clayton and J. Mitchell Pickerill, "The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence," *Georgetown Law Journal* 94, no. 5 (2006): 1385–426, 1423 (the Burger and Rehnquist Courts were "faithful allies of the New Right regime" putatively inaugurated by Nixon).

[33]Bridge, *Pushback*, 32.

[34]Balkin and Levinson, "The Processes of Constitutional Change," 490, 492, 495 ("The New Deal revolution was the product not so much of Justice Owen Roberts's switch in time in 1937 as Franklin D. Roosevelt's ability to appoint nine New Dealers to the U.S. Supreme Court between 1937 and 1942"; "Thus, the Warren Court, like the Roosevelt Court, worked hand in hand with the Democratic administrations of the time"; Arthur Goldberg was "one of the most liberal" justices and Abe Fortas was "equally liberal"). See also McMahon, *Reconsidering Roosevelt on Race*.

[35]Whittington, *Political Foundations of Judicial Supremacy*, 73.

[36]Jack Balkin, "Why Liberals and Conservatives Have Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time," *Texas Law Review* 98, no. 2 (2019): 215–66, 225.

[37]See Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism, Volume II: Rights and Liberties* (New York: Oxford University Press, 2016), chaps. 8–10; Clayton and Pickerill, "The Politics of Criminal Justice," 1385–426; Gillman, "Party Politics and Constitutional Change," 138–68.

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dispositions in all the non-unanimous merits cases (as quantitative judicial vote scores do). As regime theorists persuasively argued, quantitative vote scores produce thin accounts of the justices' politics and policymaking or simply restate an unremarkable claim (policy preferences affect legal outcomes), something that scholars have understood since Progressives forged the modern social science disciplines.[38]

But the contours of a given regime and how exactly the justices are part of it remain hazy. Regime theory scholarship "codes" or analyzes the Court's and various justices' public law commitments post hoc. The justices are variously conceived of as in alignment with the "presidential wing," but at other times the "legislative wing." Or the Court's majority is working with a "dominant national coalition" (at times, a bipartisan coalition) that disciplines "regional" outliers (like the Warren Court with respect to the South). Sometimes the justices are theorized as acting in concert with various "groups," sometimes "moderates"—regime theorists at times even rely on quantitative models to explain a justice's politics.[39] As the one regime theorist who has done the most work since Graber's classic piece to flesh out the tenets of regime theory admitted: "a concept as amorphous as 'the regime' is admittedly tough to nail down."[40] One regime theorist has abandoned the framework in favor of "constitutional regimes," a concept that is difficult to derive testable hypotheses from.[41] Or, as another PPF regime theorist recently put it: "The regime politics model is not, of course, without its weaknesses. It remains undertheorized, insufficiently tested, and incapable of explaining the specific doctrinal choices that the Court makes, including some that the regime would oppose."[42] Finally, in that same vein, a leading regime theorist exhorted regime theorists to "develop more focused arguments about why this framework is better than others at explaining judicial politics; they will also need to defend against the suspicion that any court action might be interpreted, post hoc, as reflecting some political advantage to governing coalitions."[43]

As the empirics below show, regime theory often obscures what the justices on the modern Supreme Court self-consciously see as *their* job. That is, what is critically missing from PPF's focus on presidents and parties is how the *justices* think of their fundamental task: interpreting the Constitution alongside their notions of the nature and scope of public law.[44] If we want to better understand the politics of Supreme Court decision-making, we need to pay more careful attention to the justices' worldviews. Party ideologies have been fluid since the New Deal, but jurisprudential policy alliances are more durable, if malleable, markers across time. And we have good theoretical reasons to expect that these worldviews are a better predictor of the justices' constitutional politics and public law preferences than presidential and party politics.

2. Jurisprudential policy alliances and institutional orders: concept formation and measurement strategy

"I am and always have been a conservative," an up-and-coming lawyer declared in his 1985 Department of Justice job application. Cutting his teeth on "the writing of William F. Buckley" and "*National Review*," Samuel Alito continued, "in college, I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions." Adding that he was a member of the Federalist Society, Alito highlighted his work at the Office of the Solicitor General. In that role, he argued "the Constitution does not protect a right to an abortion" and that "racial and ethnic quotas" violated the Fourteenth Amendment.[45] No one had to guess what Alito's political priors were, and the contents of his public law worldview were little mystery.

That is, Alito's policy alliance and how it was likely to embed itself on the Court via his opinions and votes were strongly signaled: he was first and foremost a conservative motivated by his constitutional beliefs, and a Republican second. As noted above, a jurisprudential policy alliance devises a clear claim on the Constitution's meaning and the nature and scope of public law. That is, a policy alliance sets out to rewire what is constitutional common sense or, at least, what are politically plausible claims on the content of constitutional law—then embed this understanding on the Court as a public law iteration of what King and Smith call

[38]Howard Gillman and Cornell Clayton, "Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutionalist Approaches*, eds Gillman and Clayton (Chicago: University of Chicago Press, 1999), 1–14; Dorothy Ross, *The Origins of American Social Science* (New York: Cambridge University Press, 1991), 448–58.

[39]Powe, *The Warren Court and American Politics*, 398; Graber, "The Nonmajoritarian Difficulty," 37–43; Bridge, *Pushback*, 31–35, 139.

[40]Bridge, *Pushback*, 282. It appears that Bridge is the only regime politics scholar who has worked to formalize the framework (PPF or otherwise) into testable hypotheses. But his theoretical framework is strictly time-bound and assumes pre-polarization parties with a "dominant" (presidential) faction that the Court rewards while disappointing or angering the junior partner. Bridge, *Pushback*. This work is praiseworthy insofar as it is the first attempt to systematize regime theory. However, Bridge's case studies (school prayer, criminal rights, abortion, and busing) mark a time when the Democratic Party was realigning. If so, it is difficult to see what purchase the framework gives us on today's ideological parties. At the same time, even taking Bridge's framework on its own terms, it is also unclear why, if the justices are party agents, they would actively contribute to fracturing the party's coalition (never mind that the Warren Court's liberal majority was bipartisan). Nor can this be chalked up to judicial ideology. Bridge dismisses constitutional ideologies—"It does not even matter what any justice's overall judicial ideology may be (e.g. progressive, originalist, etc.)." Bridge, *Pushback*, 50. Bridge's downplaying of the justices' public law worldviews is consistent with the PPF corpus. For a rare example to the contrary, see Howard Gillman, "The Court as an Idea, Not a Building (or a Game)," in *Supreme Court Decision-Making: New Institutionalist Approaches*, eds Gillman and Clayton (Chicago: University of Chicago Press, 1999), 78–86. Two other scholars claim that a "justice could be truly committed to law and yet sensitive to the dominant values of the political regime." Clayton and May, "A Political Regimes Approach to the Analysis of Legal Decisions," 245. At the same time, however, regime theorists claim that judicial opinions "are shaped by (but in turn can also shape)" the "regime." Ibid., 246. This is no doubt true on some level, but it is unclear how this constitutive interaction could be tested social scientifically.

[41]Jack Balkin, *The Cycles of Constitutional Time* (New York: Oxford University Press, 2020). Balkin disclaims the PPF framework because of the "waning of political time." Ibid., 22–23. Balkin argues for a "constitutional regime," which he defines as "far more than the presidency." Ibid., 24. For Balkin, a "constitutional regime features a dominant party, with a reigning set of commitments of ideology and interest; a particular structure of party competition; the development of judicial doctrines reflecting the regime's commitments; new forms of state-building; and interactions between social movements, civil society organizations, and the party system." Ibid., 24. However, it is unclear how much this differs from standard regime theory insofar as the regime, whatever the modifier, is a "dominant party" and a "reigning set" of ideological "commitments" that sits alongside judges creating public law "reflecting the regime's commitments." Ibid.

[42]Peretti, *Partisan Supremacy*, 47.

[43]Gillman, "Courts and the Politics of Partisan Coalitions," 658. This concern is warranted. As fleshed out below, regime theorists most always speak in terms of partisan coalitions (as the above reflects), but when necessary to explain canonical cases (especially *Brown v. Board of Education*), the framework shifts to a nonpartisan governing regime. See, e.g., Clayton and Pickerill, "The Politics of Criminal Justice," 1390 (*Brown* as "the policy preferences of a national political coalition" as set against "recalcitrant local southern communities"); Powe, *The Warren Court and American Politics*, 490 (same sectional analysis); Balkin and Levinson, "Understanding the Constitutional Revolution," 1067 (the bipartisan duo of Justices Douglas and Brennan as "promot[ing] the constitutional values of the Democratic party for decades"); Bridge, *Pushback*, 45 (characterizing *Brown* as "majoritarian").

[44]King and Smith, *Still a House Divided*, 16–19.

[45]Samuel Alito DOJ Application, available at https://www.archives.gov/files/news/samuel-alito/accession-060-97-761/Acc060-97-761-box1-Alito.pdf.

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an "institutional order."[46] Emerging before the modern party system, jurisprudential policy alliances are not primarily concerned with furthering partisan goals but make a more fundamental claim grounded in (re)defining American constitutionalism and public law via first principles.[47] First built by political actors, these alliances are taken up, refined, and, at times, extended by aligned legal elites—for example, legal academics, activist-lawyers, legal interest groups—and reworked into *theories* of constitutional and public law for the justices to use in making (or blocking) new policy. Jurisprudential policy alliances are "carriers" of potential institutional orders unless and until they embed in the form of sustained Supreme Court majorities.[48]

This approach builds on and extends Hans Noel's work on the distinct developments of political ideologies and political parties. We can understand the elite political actors who make up jurisprudential policy alliances as an iteration of what Noel calls "coalition merchants"—the public intellectuals, academics, judges, and activists who specialize in public law.[49] As with Noel's ideologues (coalition merchants), these constitutional specialists seek to define what their policy alliance stands for well before it becomes associated with one of the two major parties. With regard to public law, these actors' goal is institutional capture—for them, the Supreme Court and its judicial mandates are the prize. And as with all-purpose coalition merchants, their public law compatriots view parties as simply a vehicle, a means to the end of governing authority.[50] Put differently, parties matter, but they are not the fundamental institutional variable that regime theory claims.

So, when a jurisprudential policy alliance and its coalition merchants secure durable representation on the Court through the appointment of policy-aligned justices, it creates an institutional order—living constitutionalism and constitutional conservatism being the paradigmatic modern examples. An institutional order is a stable but evolving configuration of constitutional and public law understandings that leverage these interpretive commitments ("theories") that aligned justices use, quite sincerely, to justify policymaking by the Court. These theories and public law claims are embodied by justices, entrenched via opinions and agenda-setting, and reproduced through the hiring of clerks who go on to work in elite legal institutions, especially legal academia. As shown below, strong and weak forms of living constitutionalism were so entrenched by its policy alliance that it was a *cross-partisan* principle throughout the post–World War II era. In short, jurisprudential policy alliances, once institutionalized, generate preferred public law via a logic that is sometimes at odds with the interests of the presidents and parties that ostensibly placed them there (especially prior to late-twentieth-century party sorting and polarization). Finally, an institutional order does not, of course, eliminate disagreement within an order—there are varieties of constitutional conservatism and various preference intensities among liberal and progressive justices. But given their deep connection to ideas about public law, their primary external referent is not political parties, but political ideologies—commitments that generally hold allies together in precisely the cases that end up on the front page of the *New York Times* the next day.[51]

The first modern jurisprudential policy alliance to appear was living constitutionalism. Living constitutionalism was the public law offshoot of William James's and John Dewey's (among others) pragmatism—a philosophy flowering at the turn of the twentieth century and powering the emergent Progressivism.[52] With adherents in both political parties, the fundamental claim of living constitutionalists was that public law was contingent, always capable of being updated, and forward-looking. Living constitutionalism welcomed the modern social sciences and rejected the notion that judges must be restricted to the traditional toolkit of the lawyer or bounded by historical understandings of constitutional limitations.[53] For the Progressives who constructed it, that the Constitution and public law evolved rather than being fixed in place was tantamount to an empirical claim—this was simply the way the social and economic world, to say nothing of the law, worked.[54] Upon embedding on the Court in the 1940s, one strand of this alliance evolved into a normative institutional order as a subset of FDR's living constitutionalist justices—a vanguard—seized the initiative. This prescriptive living constitutionalism saw the Constitution and the Court's role more in moral (rather than empirical) terms as they created new rights for sympathetic individuals and groups. The Warren Court famously extended this vanguard's project via the "rights revolution."[55] Since the Warren Court, the justices have not done much to innovate living constitutionalism theoretically.[56]

Constitutional conservatism is living constitutionalism's mirror image. Thus, it emerged in direct response to living constitutionalism in the 1920s.[57] With adherents in both parties as well,

[46]King and Smith, *Still a House Divided*.

[47]See Sidney Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993).

[48]Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 83–85.

[49]Noel, *Political Ideologies and Political Parties in America*, 32–33.

[50]See Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel, and John Zaller, "A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics," *Perspectives on Politics* 10, no. 3 (2012): 571–97.

[51]See Lee Epstein and Jeffrey A. Segal, "Measuring Issue Salience," *American Journal of Political Science* 44, no. 1 (2000): 66–83.

[52]James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (New York: Oxford University Press, 1986); Charles Forcey, *The Crossroads of Liberalism: Croly, Weyl, Lippmann and the Progressive Era, 1900-1925* (New York: Oxford University Press, 1961); Eldon Eisenach, *The Lost Promise of Progressivism* (Lawrence: University Press of Kansas, 1994); Sidney Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* (Lawrence: University Press of Kansas, 2012); Karen Orren and Stephen Skowronek, *The Policy State: An American Predicament* (Cambridge, MA: Harvard University Press, 2017). It is worth briefly noting that the major constitutional amendments passed during the "Progressive era"—the income tax, direct election of senators, women's suffrage—codified ideas that long predated the Progressives, and many were already adopted in state-level versions. See Robinson Woodward-Burns, *Hidden Laws: How State Constitutions Stabilize American Politics* (New Haven: Yale University Press, 2021). At the same time, the Progressives' complaint about Lochner-style cases reinforced their already existing, politically created living constitutional orientation. Calvin TerBeek, *Enemy Establishments: How the Hundred-Year War to Control America's Institutions Polarized Its Politics* (Princeton: Princeton University Press, forthcoming 2027), ch. 2. That is to say, neither the era's amendments nor Lochner epitomized Progressives' constitutional and public law worldview.

[53]Eisenach, *Lost Promise*; Laura Kalman, "In Defense of Progressive Legal Historiography," *Law & History Review* 36, no. 4 (2018): 1021–88; Laura Kalman, *Legal Realism at Yale, 1927-1960* (Chapel Hill: University of North Carolina Press, 1986).

[54]Kloppenberg, *Uncertain Victory*; Calvin TerBeek, "The Search for an Anchor: The Living Constitution from the Progressives to Trump," *Law & Social Inquiry* 46, no. 3 (2021): 860–89.

[55]See Morton Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill & Wang, 1998); Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

[56]For example, Justice Kennedy's majority opinion in *Obergefell v. Hodges* (2015) relies on and reads much like a Warren Court opinion.

[57]See Michael Lienesch, "Creating Constitutional Conservatism," *Polity* 48, no. 3 (2016): 387–413; Joseph Postell and Johnathan O'Neill, "Introduction: The Conservative Response to Progressivism," in *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era*, eds Postell and O'Neill (New York: Palgrave Macmillan, 2013), 1–11; TerBeek, *Enemy Establishments*, ch. 6.

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the bedrock claim of constitutional conservatives was and is that the governing framework and public law are fixed in place. The baseline for constitutional knowledge and the document's proper interpretation is the founding era and the Framers' timeless political thinking, their "original meaning" (even if this analysis is often ahistorical).[58] As a policy alliance, constitutional conservatives are instinctively opposed to expansive congressional, judicial, and bureaucratic public law that runs up against (their understanding of) the original design for the governing framework's structures.[59] As one of its most influential champions put it in 1986, "You see, quite often fundamental constitutional principles prove to be stumbling blocks to the many groups always pushing for different policies and programs."[60] Especially in the wake of the 1960s and 1970s rights revolution, constitutional conservatives called on the justices to negate liberal public law or, failing that, treat "original" rights (e.g. religious liberty) as on par with those later created (e.g. civil and gay rights).[61] Over the twentieth century, this jurisprudential policy alliance slowly evolved into a theory—originalism. Originalism served as both a theory and "political practice" that distilled a clear set of conservative, not simply Republican, political commitments.[62] While it was first embedded in Reagan's Department of Justice as an institutional order, originalism—and the broader conservative legal movement it served as the ideological glue for—was developed by and for conservatives rather than the Republican Party qua party.[63]

As shown below, from Eisenhower to George H.W. Bush, the Republican Party and constitutional conservatism rarely overlapped at the presidential level. Only when conservatives fully took hold of the GOP in the 1990s did Republican presidents appoint conservative, rather than simply Republican, justices down the line. Put differently, many postwar GOP justices—for example, John M. Harlan, Potter Stewart, Sandra Day O'Connor, David Souter—manifested a third worldview: *incrementalism*.[64] Nascent in the first few decades of the twentieth century but emergent on the New Deal Court, incrementalism is in effect an anti-constitutional ideology. Incrementalism rejects sweeping claims on the Constitution and the nature of public law. Too often conflated with judicial restraint (and sometimes conservatism) on the bench, incrementalism is rather a type of legal liberalism: the judicial incrementalist *accepts that the law evolves*.[65] Unlike post-New Deal living constitutionalists, however, incrementalists emphasize what they see as judges' cabined ability to make effective public policy. Rights revolutions and counter-revolutions are their antithesis. This alliance was fleshed out and led by Justice Felix Frankfurter and his law clerks who went into legal academia, especially Alexander Bickel.[66] Harvard Law School was its institutional home, and its canonical texts include(d) Hart and Sacks's *The Legal Process* (1958), Herbert Wechsler's "Toward Neutral Principles of Constitutional Law" (1959), and Bickel's *The Least Dangerous Branch* (1962). However, unlike its competitors to the right and the left, it never achieved status as an institutional order because it lacked a *political* constituency that would do sustained ideological battle for it.

That is, for incrementalists, the law has content independent of policy, ideology, and party politics. The traditional toolkit of the lawyer—for example, text, precedent, history, common law doctrines—serves as a guide for cautious policymaking as opposed to the large-scale policymaking goals that conservatives and progressives ask of their jurisprudential policy alliances. Given that incrementalists are technocrats—experts in law—these justices were more likely to be prevalent before the more ideological jurisprudential policy alliances infiltrated the parties. Further, because incrementalists are fundamentally small-p progressive—public law should develop common-law style—and products of elite law schools, they are predisposed toward a cabined political liberalism. Put differently, this was the jurisprudential "house ideology" of the postwar liberal Establishment that slowly lost out to the polarized constitutional alliances to their right and left in the 1980s and after.[67] So, as the ideological policy alliances gain more traction, we should expect to see incrementalists become unacceptable to constitutional conservatives, full stop, while also appearing insufficiently expansive for liberals. In short, though there were incrementalist texts by legal elites into the 1990s (e.g. Cass Sunstein, *One Case at a Time* (1999)), they did not have a widespread following. And as suggested above and shown below, its last two jurisprudential manifestations—Sandra Day O'Connor and David Souter—proved too little for latter-day progressives and too much for constitutional conservatives.

2.1. Measurement strategy

As a historical measure of a justice's predicted politics on the Supreme Court, a jurisprudential policy alliance approach looks first to a justice's pre-nomination writings and statements. Rather than the president's partisanship or the party ideology of the regime, a justice's pre-nomination speeches, writings, judicial opinions, and the like provide a direct line into their constitutional and public law orientation. This is an attachment we should expect to be "sticky."[68] If a given justice's pre-confirmation archival material is the best source, post hoc oral histories and memoirs should be

[58] See Jonathan Gienapp, *Against Constitutional Originalism* (New Haven: Yale University Press, 2024); Kersch, *Conservatives and the Constitution*.

[59] Postell and O'Neill, "Introduction: The Conservative Response to Progressivism."

[60] Edwin Meese Remarks, February 1986, Box 17, Folder University of Dallas, Meese Papers, Hoover Institution.

[61] At an October 1982 Christian School Coalition Meeting attended by Reagan administration officials and representatives from the Moral Majority, conservatives argued: "Religious civil rights should be a priority of the U.S. Civil Rights Commission equal to racial civil rights." Memorandum by Blackwell, January 17, 1983, Blackwell File, Box 23, Folder Reviving the Winning Coalition, Reagan Presidential Library (hereafter RRPL).

[62] Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75, no. 2 (2006): 545–75; Logan Sawyer, "Principles and Politics in the New History of Originalism," *American Journal of Legal History* 57, no. 2 (2017): 198–222.

[63] Teles, *Rise of the Conservative Legal Movement*; Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago: University of Chicago Press, 2008); Calvin TerBeek, "'Clocks Must Always Be Turned Back': *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism," *American Political Science Review* 115, no. 3 (2021): 821–34; Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015); Gienapp, *Against Constitutional Originalism*, 242–43.

[64] My conceptualization of this orientation is informed by Mark Tushnet, *Who Am I to Judge? Judicial Craft Versus Constitutional Theory* (New Haven: Yale University Press, 2025).

[65] Incrementalism has some resonance with "judicial restraint," an often-vague label. Richard Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* 100, no. 4 (2012): 519–56.

[66] G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," *Virginia Law Review* 59, no. 2 (1973): 279–302.

[67] See TerBeek, *Enemy Establishments*, chaps. 3 and 4.

[68] See Noel, *Political Ideologies and Political Parties*, 33–34. The ostensible phenomenon of judicial "drift"—a justice's behavior going "against type"—is grounded in a simplistic measurement strategy. The claim employs a party-based baseline that assumes what PPF asserts: since the New Deal, Republican appointees *should* be conservative because the framework codes the GOP as such. As the empirics below show, and as discussed in the

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avoided for operationalization purposes as much as feasible. Often enough, these forms of evidence are not reliable barometers—they reimagine the past, consciously or not, in the interest of telling a linear story that squares with the present or how one wishes to be perceived, politically and personally.[69]

There may not always be clear pre-nomination evidence. For example, Justice James C. McReynolds's papers and materials are sparse, Justice Owen Roberts destroyed his, and Justice David Souter's papers will not be available until 50 years from the date of his recent death. Where the archival materials run out or are unavailable, a jurisprudential policy alliance measurement strategy looks next to a nominee's confirmation testimony, evidence that can be more revealing than often supposed. Souter's confirmation testimony, for example, contained clear signals that he would be a moderate liberal—an incrementalist—something conservatives recognized during his hearings. In the absence of either, an alternative is to look at those governing elites, activists, and interest groups that most vocally *oppose* a nominee—they are incentivized to spot potential ideological enemies. This third-order evidence can be a more reliable indicator than the politics of a president (or presidential wing) and the associated regime. For example, regime theory would predict that President Reagan's nominees should be strong conservatives across the board.[70] However, his nomination of Sandra Day O'Connor—who, while a pragmatic Republican legislator, had said little jurisprudentially—brought immediate angst, even anger, from conservatives.[71] Based on their own research (overlooked by most media outlets), they accurately predicted that O'Connor might be a Republican, but she would not be a conservative on the bench. However, this third-order evidence is less useful post-1987, when Robert Bork's nomination spurred an explosion of interest group attention (after Bork there was widespread and vocal opposition to every nominee).[72]

In short, as much as possible, this strategy privileges the direct measure of the nominee's own claims and statements as the most reliable predictor of their judicial politics. What's more, this locks the framework into a commitment prior to the coding and analysis. This is distinguishable from regime theory, which engages in post hoc narrative analysis.

The upshot of this measurement strategy squares with what we know about the justices. Of course, they are often identified to some extent with one party or the other. But it is unclear why we should expect the justices to think of themselves as *primarily* part of a partisan coalition, nor why scholars should privilege this conceptualization of them. Indeed, a range of non-regime theory scholarship directly and indirectly shows that the justices are professionalized to—and do—think about law as a form of politics separate and apart from partisan politics.[73] At the same time, as

conclusion, the measurement strategy employed here separates party from ideology rather than conflating the two.

[69]Mary Jo Maynes, Jennifer L. Pierce, and Barbara Laslett, *Telling Stories: The Use of Personal Narratives in the Social Sciences and History* (Ithaca, NY: Cornell University Press, 2008).

[70]See Balkin and Levinson, "Understanding the Constitutional Revolution," 1073 (arguing for "a conservative Republican hegemony during the 1980s and early 1990s that produced judges and Justices sympathetic with Reagan's vision"); Clayton and Pickerill, "The Politics of Criminal Justice," 1411 ("we would expect … a more 'conservative' pro-state-power direction" with appearance of Republican regime). See also Ibid. at 1391–92.

[71]Prudence Flowers, "'A Prolife Disaster': The Reagan Administration and the Nomination of Sandra Day O'Connor," *Journal of Contemporary History* 53, no. 3 (2018): 391–414.

[72]Charles Cameron and Jonathan Kastellec, *Making the Supreme Court: The Politics of Appointments, 1930-2020* (New York: Oxford University Press, 2023), 30–31.

[73]See Michael Bailey and Forrest Maltzman, "Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the US Supreme Court," *American Political Science Review* 102, no. 3 (2008): 369–84; Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998), 23–33, 165–67; Forrest Maltzman, James Spriggs II, and Paul Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).

Table 1. The Two Frameworks' Predictions and the Justices' Orientations on the Court, 1937–2006

Justice	President (Party)	PPF Prediction	JPA Prediction	Orientation on the Court	Prediction Borne Out
Black	FDR (D)	Liberal	Living Const.	Living Const.	Both
Reed	FDR (D)	Liberal	Incrementalist	Incrementalist	**JPA**
Frankfurter	FDR (D)	Liberal	Incrementalist	Incrementalist	**JPA**
Douglas	FDR (D)	Liberal	Living Const.	Living Const.	Both
Murphy	FDR (D)	Liberal	Living Const.	Living Const.	Both
Stone (CJ)	FDR (D)	Liberal	Living Const.	Living Const.	Both
Byrnes	FDR (D)	—	—	—	Excluded*
Jackson	FDR (D)	Liberal	Incrementalist	Incrementalist	**JPA**
Rutledge	FDR (D)	Liberal	Living Const.	Living Const.	Both
Burton	Truman (D)	Liberal	Incrementalist	Incrementalist	**JPA**
Vinson (CJ)	Truman (D)	Liberal	No prediction	Incrementalist	Neither†
Clark	Truman (D)	Liberal	Incrementalist	Incrementalist	**JPA**
Minton	Truman (D)	Liberal	Living Const.	Incrementalist	Neither
Warren (CJ)	Eisenhower (R)	Moderate Conserv.	Living Const.	Living Const.	**JPA**
Harlan	Eisenhower (R)	Moderate Conserv.	Incrementalist	Incrementalist	**JPA**
Brennan	Eisenhower (R)	Moderate Conserv.	No prediction	Living Const.	Neither†

(*Continued*)

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Table 1. (*Continued.*)

Justice	President (Party)	PPF Prediction	JPA Prediction	Orientation on the Court	Prediction Borne Out
Whittaker	Eisenhower (R)	—	—	—	Excluded*
Stewart	Eisenhower (R)	Moderate Conserv.	Incrementalist	Incrementalist	**JPA**
White	JFK (D)	Liberal	Incrementalist	Incrementalist	**JPA**
Goldberg	JFK (D)	Liberal	Living Const.	Living Const.	Both
Fortas	LBJ (D)	Liberal	Living Const.	Living Const.	Both
Marshall	LBJ (D)	Liberal	Living Const.	Living Const.	Both
Burger (CJ)	Nixon (R)	Conservative	Incrementalist	Mixed Approach	Neither
Blackmun	Nixon (R)	Conservative	Living Const.	Living Const.	**JPA**
Powell	Nixon (R)	Conservative	Incrementalist	Incrementalist	**JPA**
Rehnquist	Nixon (R)	Conservative	Const. Conserv.	Const. Conserv.	Both
Stevens	Ford (R)	Conservative	Living Const.	Living Const.	**JPA**
O'Connor	Reagan (R)	Conservative	Incrementalist	Incrementalist	**JPA**
Rehnquist (CJ)	Reagan (R)	Conservative	Const. Conserv.	Const. Conserv.	Both
Scalia	Reagan (R)	Conservative	Const. Conserv.	Const. Conserv.	Both
Kennedy	Reagan (R)	Conservative	Living Const.	Mixed Approach	Neither
Souter	G.H.W. Bush (R)	Conservative	Incrementalist	Incrementalist	**JPA**
Thomas	G.H.W. Bush (R)	Conservative	Const. Conserv.	Const. Conserv.	Both
Ginsburg	Clinton (D)	Liberal	Living Const.	Living Const.	Both
Breyer	Clinton (D)	Liberal	Living Const.	Living Const.	Both
Roberts (CJ)	G.W. Bush (R)	Conservative	Const. Conserv.	Const. Conserv.	Both
Alito	G.W. Bush (R)	Conservative	Const. Conserv.	Const. Conserv.	Both
Predictions borne out		**PPF: 16/35**	**JPA: 30/35 (30/33 conditional†)**		

Notes: PPF = presidents-and-parties framework; JPA = jurisprudential policy alliances; Living Const. = living constitutionalism; Const. Conserv. = constitutional conservatism; CJ = chief justice. The unit of analysis is a Senate confirmation to the Supreme Court between 1937 and 2006. There were 37 such confirmations—excluding the two (*) yields $N = 35$. Given his service as associate and chief justice, Rehnquist is scored twice, once for each confirmation. Stone appears once because only his 1941 elevation to chief justice falls within the time period under investigation. The three coded columns were constructed following these decision rules.

PPF Prediction Decision Rules. The presidents-and-parties framework predicts that a justice will "mirror the beliefs of the presidential or elite wing of the dominant national coalition." Graber, "The Nonmajoritarian Difficulty," 39. See also Gillman, "Party Politics and Constitutional Change," 138 (how the justices vote "is the expression and vindication of those political views deliberately 'planted' on courts by the policy-conscious presidents and senators"); Balkin and Levinson, "The Processes of Constitutional Change," 489–535, 490 ("Presidents appoint judges and Justices to the federal judiciary who are thought to share the broad political agenda of the political party led by the President"). The PPF predictions are thus based on what the regime theory framework claims justices will do on the Court. In line with regime theory's scholarship, I code Eisenhower's justices not as conservatives but as moderate conservatives for PPF. This decision is also based on regime theory scholarship. See Balkin, "Why Liberals and Conservatives Have Flipped," 225 (expecting "opposition presidents" like Eisenhower and Clinton "not to appoint strongly ideological representatives of their parties' positions"); Gillman, "Party Politics and Constitutional Change," 145, 158 ("Stewart was a moderate Republican" and "it is unlikely that liberal constitutionalism would have emerged" without JFK and LBJ's "efforts"). Put differently, a moderate conservative prediction would be borne out by a justice whose orientation on the Court was closer to constitutional conservatism than living constitutionalism; none of Eisenhower's four (scored) justices did. This same generosity extends to Clinton's two appointees: each is coded as a correct PPF prediction even though regime theory predicts moderately liberal justices from an "opposition" president. Breyer's jurisprudence is arguably a moderate liberalism; Ginsburg was a liberal through and through. Overall, then, PPF predictions are scored as generously as possible while keeping the frameworks' categories commensurable. Otherwise, the justices are coded as liberal or conservative according to regime theory scholarship's predictions. See Balkin and Levinson, "Understanding the Constitutional Revolution," 1071; Peretti, *Partisan Supremacy*, 9–33; Balkin and Levinson, "The Processes of Constitutional Change," 492. In sum, a PPF prediction is scored as borne out when "Liberal" corresponds to a living constitutionalist orientation on the Court and "Conservative" to a constitutional conservative orientation; incrementalism, a moderate liberalism, satisfies neither.

JPA Prediction Decision Rules. These predictions are coded from pre-nomination materials under the measurement strategy delineated above. In short, the decision rule privileges the materials in the following order: (1) the nominee's pre-nomination writings, speeches, and judicial opinions; (2) if those are unavailable, confirmation testimony; (3) if both are unavailable, the identity and stated grounds of the nominee's most vocal opponents (used only before 1987, when post-Bork opposition to every nominee became routine). The prediction is fixed before—and is thus independent of—the coding of the justice's orientation on the Court. The following sections apply these decision rules to each confirmation in turn.

Orientation on the Court. This column was coded based on the justice's votes and opinions in high-salience constitutional cases, the extrajudicial statements and writings post-confirmation (much of which is cited in the text), and the scholarly consensus among political scientists and constitutional law professors. See the Appendix for the cases and scholarly sources used for each justice's coding.

Robustness. PPF has no incrementalist category. One might therefore object that the JPA framework penalizes PPF for a category it never used, and that a Democratic-appointed incrementalist should count as a liberal, making regime theory directionally correct in those cases. Setting to the side that regime theorists reject this non-binary thinking (for example, classifying Frankfurter as one of the "most conservative Democratic appointees," see Balkin and Levinson, "The Processes of Constitutional Change," 492), applying this lenient coding decision rule raises PPF's hit rate to 24/35 (69 percent). Applying this same leniency to JPA flips one case (Minton) and raises it to 31/35 (89 percent). But the remaining PPF misses are telling: they are all Republican "mistakes" between 1953 and 1990. That is, PPF misses are at the level of its own theoretical framework: parties and presidents. The four JPA misses are of a different kind: in two (Vinson and Brennan) the pre-confirmation evidence runs out, and in two (Burger and Kennedy) the justices' records on the Court were mixed such that they do not fit cleanly into the orientations.

*Byrnes is excluded from scoring because he resigned after 15 months to direct wartime mobilization, thus leaving too thin a judicial record to classify. Given Byrnes's subsequent conservatism (e.g. opposition to *Brown*), this exclusion benefits PPF's tally. Whittaker, who suffered from mental health issues and resigned from the Court after only five terms, does not (in my estimation) have a discernible jurisprudential orientation.

†Where the pre-nomination evidence was insufficient to ground a prediction—Vinson and Brennan (discussed below)—no JPA prediction is recorded. These cases are nonetheless scored as JPA failures. Conditional on a prediction being made, JPA is borne out in thirty of thirty-three cases, a 91 percent prediction hit rate.

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Gregory Elinson, Vanessa Baird, and Richard Pacelle (among others) have shown, the justices are agenda-setters who signal to litigants their policy interests and then self-consciously craft desirable public law.[74] So to fully appreciate the justices' primary political animation, theorizing about Supreme Court politics should place their constitutional and public law worldviews front and center.

As Table 1 shows, the two frameworks' predictions analyzed here diverge on sixteen of the thirty-three confirmations for which they both make a prediction. Of those sixteen confirmations, a jurisprudential policy alliance framework correctly predicts fourteen, while regime theory correctly predicts none. Tellingly, the last divergent prediction between the two frameworks is Souter's 1990 confirmation. From Thomas's confirmation the following year forward—the point at which the two major parties substantially absorbed the two major policy alliances (while incrementalism was on the wane)—the frameworks agree. However, this convergence appears right as the regime necessary to PPF is no longer dominant—that is, there is no longer a *regime*. Finally, while the jurisprudential policy alliance approach can explain both the divergence and subsequent convergence, regime theory has to reckon with a plethora of "mistakes" that presidents, particularly Republicans, ostensibly made.[75] This should be of concern for a theoretical framework that is grounded in presidents and parties. The balance of the paper aims to provide the requisite empirical ballast.[76]

3. Jurisprudential policy alliances and the justices prior to the New Deal and the modern party system

If living constitutionalism as an empirical claim was developed primarily by Progressive public intellectuals and non-legal elites, some justices did manifest this evolving worldview before their confirmation. For all the attention to Justice Oliver Wendell Holmes as the epitome of Progressive constitutionalism, there are more salient examples.[77] Louis Brandeis and Benjamin Cardozo, placed on the Supreme Court by presidents from both parties (Woodrow Wilson and Herbert Hoover, respectively), exemplified living constitutionalism's initial iteration as an empirical claim.[78] As an attorney, Brandeis invoked "sociological jurisprudence" via the eponymous Brandeis Brief. Submitted in a 1908 Supreme Court case, the brief was almost entirely reliant on social and medical science. The brief, "by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality."[79] Brandeis also published a pre-confirmation law review article approvingly noting there had been a recent shift in judges' thinking: they were paying more attention to "existing social needs" and the "facts of life." The increased melding of law and legal education with "economics and sociology" pointed toward a less "static" law.[80] On the Court, Brandeis embodied living constitutionalism as an empirical claim *and* foreshadowed its normative turn, perhaps most saliently in his de facto dissent in *Whitney v. California* (1927), an early modern free speech case.[81]

Influenced by pragmatism, Cardozo's pre-nomination writings presaged his tenure on the Court: the "great generalities of the constitution" evolved. Rejecting the finality of "the meaning and intent of the lawmakers," and quoting an academic he admired, Cardozo's *The Nature of the Judicial Process* argued that legal "rules and principles" were not "final truths" but "working hypotheses" always subject to updating.[82] If Cardozo found the legal realists to be "priests of the new gospel of juridical salvation," he was pleased they rejected the "petrifying rigidity" that marked premodern legal thinking.[83] In an unpublished opinion in *Home Building and Loan Association v. Blaisdell* (1934), Cardozo reinforced living constitutionalism as an empirical claim.[84] In those portions ultimately incorporated into the majority opinion, Cardozo argued that judges must not be blind to the "economic and social changes wrought by the industrial revolution"—changes that made it "necessary for government at this day to do a thousand things that were beyond the experience or the thought of a century ago." The "process of [this] evolution was too strong to [be] set back."[85] Another Republican-appointed justice, Harlan F. Stone, later elevated to chief justice by FDR, reinforced living constitutionalism as empiricism. As Columbia Law School's dean, Stone was interested in modernizing the law. The Supreme Court "ought not" be solely "absorbed in the technique of law."[86] Instead, as Stone told the conservative American Bar Association early in his Supreme

[74]Elinson, "Judicial Partisanship and the Slaughterhouse Cases"; Vanessa Baird, *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda* (Charlottesville: University of Virginia Press, 2007); Richard Pacelle, *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration* (Boulder, CO: Westview Press, 1991).

[75]As to Democratic justices, regime theorists explain Truman's appointees' lack of strong liberalism with another post hoc story: "reward[ing] friends and cronies." Balkin and Levinson, "The Processes of Constitutional Change," 493.

[76]The decision rules for coding of the justice's orientation on the Court are set forth in the note to Table 1; the cases and sources are listed in the appendix. In short, a jurisprudential policy alliances approach privileges those constitutional and statutory interpretation questions that implicate rights claims and high-profile public law (e.g. Title VII discrimination cases). Put differently, as with regime theory, this approach is focused on those cases that overwhelmingly end up on the front page of the *New York Times* because these are cases that allied coalition merchants care most about (as opposed to an ERISA or tax code case). See n. 51.

[77]Holmes explicitly eschewed Progressivism and pragmatism. See Oliver Wendell Holmes to Felix Frankfurter, February 7, 1912, in *Holmes & Frankfurter: Their Correspondence, 1912-1934,* eds. Robert Mennel and Christine Compston (Hanover: University Press of New England, 1996), 3; Holmes to Harold Laski, September 17, 1916, in Mark DeWolfe Howe, ed., *Holmes-Laski Letters: Volume I, 1916-1925* (Cambridge, MA: Harvard University Press, 1953), 17. Holmes was made into a Progressive by his influential admirers who prized his epigrammatic vivisections of the formalist Supreme Court opinions they saw as epitomizing bad public law. See Brad Snyder, *The House of Truth: A Washington Political Salon and the Foundations of American Liberalism* (New York: Oxford University Press, 2017).

[78]Another Woodrow Wilson nominee shows the potential of looking at who most loudly protested a nomination in the absence of archival materials. Later a stalwart anti-New Dealer, James C. McReynolds was easily confirmed to the Court. Notably, he was opposed by a handful of Progressive senators from both parties—including one who made a "three-day speech against" his confirmation. "McReynolds Confirmed," *New York Times*, August 30, 1914, 14.

[79]Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 209.

[80]Louis Brandeis, "The Living Law," *Illinois Law Review* 10, no. 7 (1915–16): 461–71.

[81]Melvin Urofsky, *Louis Brandeis: A Life* (New York: Pantheon Books, 2009), 557–58, 575, 578, 580.

[82]Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 10–23. It is worth recalling that legal realism, of similar vintage as living constitutionalism, was preoccupied with private law rather than public law. Kalman, *Legal Realism at Yale*, 52.

[83]Margaret Hall, ed., *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon, 1947), 7–46.

[84]Andrew Kaufman, *Cardozo* (Cambridge, MA: Harvard University Press, 1991), 493–503.

[85]Andrew Kaufman, "Benjamin Cardozo on the Supreme Court," *Cardozo Law Review* 20, no. 4 (1999): 1259–74, 1266–67.

[86]Harlan Stone, *Law and Its Administration* (New York: Columbia University Press, 1915), 37.

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Court tenure, modern "social and economic conditions" informed by "reading and research in fields extra-legal" were now, or should be, the guide.[87] One of the "Three Musketeers" (with Brandeis and Cardozo) on the Court, during the Great Depression and First New Deal, Stone's concurrences and dissents took a pragmatic view of the economic emergency.[88]

Rather than viewing themselves as happily in the midst of a conservative Lochner era, well before the New Deal, conservatives worried about the inroads of living constitutionalism on the Court and in the academy.[89] In 1920, former president and soon-to-be chief justice William Howard Taft warned fellow conservatives that "a new school of constitutional construction" might be working its way onto the Court via justices like Brandeis.[90] These living constitutionalists on and off the bench were treating the Constitution as "a mere scrap of paper."[91] On the Court, Taft helped President Harding select new justices.[92] Reinforcing that jurisprudential policy alliances spanned political parties, Taft scouted for justices with "sound views"—that is, conservative ones—rather than simply touting Republicans.[93] The Democrat Pierce Butler, still a corporate lawyer but future anti-New Deal justice (one of the "Four Horsemen"), worried with the American Bar Association that "college and university professors" had "condemned" the Constitution as "archaic" because it blocked too many of their preferred policy reforms.[94] This constitutional conservatism, still loosely theorized, also marked the pre-nomination thinking of future Justice George Sutherland. A Harding nominee and another of the New Deal's judicial horsemen, he also worried about the "false teaching" taking place in the modern research university and law schools—the "framers of the Constitution" had set forth an "organic structure" whose "underlying principles" contained "enduring wisdom."[95] If partisanship was not a strong predictor of these justices' eventual judicial behavior, their invocations of a 30,000-foot jurisprudential policy alliance suggest the potential of incorporating this concept into an APD approach to Supreme Court politics.

Parallel to this, another future nominee suggested how incrementalism might appear on the Court. Capped by his acceptance of the New Deal in 1937, Charles Evans Hughes was a moderate progressive as a politician and in both of his stints on the Court.[96] Appointed as associate justice by Taft and reappointed as chief justice by Hoover (he left the Court to pursue elected politics), his constitutional politics were signaled by his pre-nomination thinking. In a 1907 speech to the Elmira (NY) Chamber of Commerce, he recognized realistically that "the Constitution is what the judges say it is," but judges should not ignore the lessons of history.[97] In a series of lectures at Yale—"Conditions of Progress in Democratic Government"—published the same year he was confirmed to the Court (1910), Hughes's progressive moderation was apparent. Hughes was fully comfortable with the growing in fits-and-starts administrative state. His technocratic concern was to make it more efficient.[98]

In sum, as the Great Depression gave way to FDR and the New Deal, the jurisprudential policy alliances that would cohere (or attempt to) as institutional orders on the Supreme Court appeared, though tangential to the party system and presidential politics. Living constitutionalism manifested, but mostly as an empirical claim that the law necessarily evolved. Constitutional conservatism looked back to a gauzy "intent" of the framers and their Constitution of 1787 while expressing skepticism of a law that evolved.[99] Via Hughes, incrementalism came into soft focus—insofar as it had coalition merchants, they were elite good-government reformers and Progressive Republicans.[100] But via FDR's appointees to the New Deal Court, living constitutionalism was about to evolve towards its full-on Warren Court manifestation while incrementalism's cautious liberalism took on jurisprudential form.[101]

4. The New Deal Court and evolution of embedded institutional orders, 1937–1952

As is well known, via his nine appointments, FDR remade the Supreme Court after it capitulated to the New Deal via the Constitutional Revolution of 1937. As is also well known, FDR's first six nominations—Justices Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, and James Byrnes—were chosen based on their support for the New Deal rather than a judicial philosophy as such.[102] This party-first consideration set the stage for legal liberalism to fracture after 1937. Led by a vanguard of FDR's appointees and encouraged by liberal elites, living constitutionalism morphed from an empirical claim to a normatively charged institutional order. But it was also a subset of FDR's appointees who developed a mature incrementalism. This suggests the limitations of regime theory. A presidents-and-parties approach, where the justices-as-agents assist partisan elites with their legal policy goals and follow the constitutional politics of a reconstructive president, cannot capture these consequential developments. Nor, as the following shows, does it make much sense to view any of these justices as conservative—that orientation to the Constitution was marginalized for decades after 1937.

Spurred on by ascendant liberals (especially dozens of newly formed civil rights and civil liberties interest groups), Douglas and Black, stalwarts of the living constitution over the next two decades,

[87]Stone, "Fifty Years' Work of the United States Supreme Court," *ABA Journal*, August–September 1928, 428–36.

[88]Samuel Konefsky, *Chief Justice Stone and the Supreme Court* (New York: Macmillan, 1945), xxv–xxvi.

[89]See Postell and O'Neill, "Introduction: The Conservative Response to Progressivism"; Victoria Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97, no. 3 (2009): 751–99.

[90]William Howard Taft, "Mr. Wilson and the Campaign," *Yale Review*, October 1920, 1–25, 19–20.

[91]Taft to Elihu Root, December 21, 1922, Box 166, Folder Taft 1915–22, Elihu Root Papers, Library of Congress.

[92]Jonathan Lurie, *The Chief Justiceship of William Howard Taft, 1921-1930* (Columbia: University of South Carolina Press, 2019), 44–46.

[93]Ibid., 46.

[94]Pierce Butler, "Some Opportunities and Duties of Lawyers," *ABA Journal*, September 1923, 585.

[95]George Sutherland, "Law and the People," *Constitutional Review* 2 (1918): 90–96. See also Sutherland, "The Courts and the Constitution," *Annual Report of the ABA* (1912): 371–92.

[96]See Merlo Pusey, *Charles Evans Hughes, Volumes 1 & 2* (New York: Macmillan, 1951), 195–96, 201, 604–06.

[97]Charles Evans Hughes, *Addresses of Charles Evans Hughes, 1906-1916, with an Introduction by Jacob Gould Schurman* (New York: GP Putnam's Sons, 1916), 185.

[98]Hughes, *Conditions of Progress in Democratic Government* (New Haven: Yale University Press, 1910), 6, 11–12, 18–19, 33 *et seq*. For pertinent examples of Hughes as an incrementalist on the Court, see Tushnet, *Who Am I to Judge?*, 46–59.

[99]Postell and O'Neill, "Introduction: The Conservative Response to Progressivism."

[100]Otis L. Graham Jr., *An Encore for Reform: The Old Progressives and the New Deal* (New York: Oxford University Press, 1967).

[101]Prior to the New Deal, there can be conceptual overlap between living constitutionalism and incrementalism such that one could argue Cardozo was at times more an incrementalist on the Court. See Kaufman, *Cardozo*, 491–508.

[102]Cameron and Kastellec, *Making the Supreme Court*, 78–79.

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were soon joined by FDR's Attorney General Frank Murphy.[103] In a 1939 speech publicized by the American Civil Liberties Union, Murphy spoke "In Defense of Democracy."[104] For Murphy, the most salient feature of the Constitution was the "singular emphasis" on "personal liberty." In fact, the Bill of Rights was really "expressing a philosophy of human living"—little wonder Charles Beard deemed it Murphy's "manifesto."[105] FDR's former top lawyer presaged not only his confident liberalism on the Court but also living constitutionalism's increasingly normative valence. He saw his job on the Court as "espousing a 'humanistic and humanitarian philosophy'" and "articulating the moral standards" the Constitution compelled.[106] This is identifiably different from the empirical pre-New Deal living constitutionalism.

Justice Black articulated this evolution in *Chambers v. Florida* (1940): "No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."[107] Liberal elites, overjoyed that the justices were making social policy they approved of, proclaimed that Black's opinion in *Chambers* "will ring with power as long as liberty and justice are cherished in our country."[108] Harlan Stone, as associate and chief justice, also pointed up living constitutionalism's evolution.[109] In dissents by the soon-to-be chief justice—opinions that would shortly command a majority after outside pressure from liberal interest groups—the Constitution took on a spiritual form. Constitutional civil liberties were "but guaranties of the freedom of the human mind and spirit." More than that, the Constitution was not just a framework for governing but "an expression of faith."[110]

On the heels of that, the living constitutionalists added another member, Wiley Rutledge, a former law school dean and DC Circuit Court of Appeals judge. Appointed to replace James Byrnes—who likely would have been a constitutional conservative had he served longer than 15 months on the Court—Rutledge's time on the appeals court foreshadowed his normatively charged living constitutionalism on the Supreme Court.[111] On the Court, as Justice Rutledge explained, "in the sense of the legally relevant standard, justice is and must be fluid. Likewise with the law." If "the law finds itself at odds with the moral sense of the community," that tempted "revolution." Those judges and legislators who could "catch the vision" of the collective moral sense were, in turn, "worthy to give [the] people their laws or judgment."[112]

Over the course of the 1940s, the new living constitutionalism powered as many majority opinions as it could and appeared in dissent when it could not.[113] Liberals, if not all Democrats, cheered them on. It was time to move past "learned plea[s] for total abandonment of constitutional questions." Of course, the Court should not be "a *legislature*"—but because it was "a *law-making* agency," the justices should be "politically and socially alert."[114] Charles Beard, in an about-face from his prior thinking, now had it that the framers were deeply interested in the "human rights" they "defined and wr[ote] down in the Constitution itself."[115] (Justice Black read, cited, and admired Beard.)[116] Another liberal intellectual, Charles Merriam, argued that with the Court now an institution under liberal control, it should create new constitutional rights focused on "liberty—self-expression—the unfolding of the human personality" and "social justice."[117] Encouraged and influenced by liberal interest groups and intellectuals, the vanguard on the New Deal Court was setting the stage for the Warren Court's social justice-infused living constitutionalism.[118]

If this group of FDR's justices wanted the Court to lead, others, including some liberal legal academics, were less sure about that path in the wake of the Constitutional Revolution of 1937. Signaling the desire for a liberal incrementalism to appear, one scholar worried in the *Michigan Law Review* that the "newly reconstituted" Court forced law professors to wonder about "the true role of the Court in constitutional interpretation."[119] While elite law professors struggled with "The Search for Objectivity in Constitutional Law" throughout the 1940s, Felix Frankfurter and Robert Jackson devised an answer via a mature incrementalism—here were coalition merchants-turned-justices at work from inside the Court.[120] Jackson, FDR's solicitor general and attorney general, reinforced the fracturing of legal liberalism. As attorney general, Jackson wrote a book arguing that, regarding economic policy,

[103] ACLU Press Release, June 14, 1940, Roger Baldwin Files, Correspondence, Volume 2089, ACLU Records, Seeley G. Mudd Library, Princeton University. As a senator, Black put his living constitutionalism on display. Roger K. Newman, *Hugo Black: A Biography* (New York: Fordham University Press, 1997), 157. It is also worth highlighting that Black's living constitutionalism could at times take on the form of a simplistic textual literalism and that his jurisprudence took a conservative turn late in his career. See, e.g., Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review* 2, no. 1 (1949): 5–173; Newman, *Hugo Black; Katz v. US*, 389 US 347 (1967); *Goldberg v. Kelly*, 397 US 254 (1970).

[104] See M.B. Schnapper to Lucille Milner, October 26, 1939; Milner to Schnapper, October 30, 1939, located in Roger Baldwin Files, Labor and Liberal Organizations, Volume 2089, ACLU Records.

[105] Frank Murphy, "In Defense of Democracy," 1939, Roger Baldwin Files, Labor and Liberal Orgs., Volume 2089, ACLU Records.

[106] J. Woodford Howard, *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968), 339. Murphy's words to his brother are in the nested quote.

[107] 309 US 227, 241.

[108] Charles Beard, *The Republic: Conversations on Fundamentals* (New York: Viking Press, 1943), 239.

[109] Stone was making good on the promise of a footnote in a run-of-the-mill 1938 case. *US v. Carolene Products*, 304 US 144, n. 4 (1938). The footnote announced that while the Court would hand off its economic policymaking power to administrators and legislators, it would create new social policy via the Bill of Rights. See William Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953, Oliver Wendell Holmes Devise, Vol. 12* (New York: Cambridge University Press, 2006), 116–42.

[110] *Minersville School District v. Gobitis*, 310 US 586, 604, 607 (1940) (Stone, J., dissenting); *Jones v. Opelika*, 316 US 584, 617, 622 (1942) (Stone, C.J., dissenting). On liberal groups' criticism, see Melvin Urofsky, "Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies," *Duke Law Journal* 37, no. 1 (1988): 71–113.

[111] Wiecek, *The Birth of the Modern Constitution*, 105–06, 112–13.

[112] Wiley Rutledge, *A Declaration of Legal Faith* (Lawrence: University of Kansas Press, 1947), 15, 17.

[113] See, e.g., *Thornhill v. Alabama*, 310 US 88, 95 (1940) (Murphy opinion); *Bridges v. California*, 314 US 252 (1941) (Black opinion); *Glasser v. US*, 315 US 60, 69–70 (1942) (Murphy opinion); *Skinner v. Oklahoma*, 316 US 535, 536 (1942) (Douglas opinion); *US v. Lovett*, 328 US 303, 315–318 (1946) (Black opinion); *Marsh v. Alabama*, 326 US 501, 509 (1946) (Black opinion); *Craig v. Harney*, 331 US 367, 374 (1947) (Douglas opinion); *Lee v. Mississippi*, 332 US 742, 745–746 (1948) (Murphy opinion). For a full-fledged treatment of the growth of civil rights and liberties in the 1940s, see Wiecek, *The Birth of the Modern Constitution*, 116–284.

[114] Alexander Pekelis, "The Supreme Court Today," *New Republic* (hereafter *TNR*), April 17, 1944, 522–25 (emphasis in original).

[115] Beard, *The Republic*, 37, 40, 115, 130, 237. See Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).

[116] See *Everson v. Board of Education*, 330 US 1, n. 5 (1947); *Adamson v. California*, 332 US 46, 89 n. 15 (1947); Newman, *Hugo Black*, 274, 283, 363.

[117] Charles Merriam, *On the Agenda of Democracy* (Cambridge, MA: Harvard University Press, 1941), xiii, xiv, 10, 50, 104.

[118] Horwitz, *The Warren Court*, xii, 114–15.

[119] Vincent Barnett, "Constitutional Interpretation and Judicial Self-Restraint," *Michigan Law Review* 39, no. 2 (1940): 213–37, 213.

[120] George Braden, "The Search for Objectivity in Constitutional Law," *Yale Law Journal* 57, no. 4 (1948): 571–94.

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the judge should take a backseat to the legislator and administrator.[121] On the bench, Jackson joined Frankfurter in exemplifying incrementalism.[122] Along with Frankfurter, Jackson is at times misclassified as a conservative. These justices, however, are better understood as incrementalists, unsure that the Court was well-placed to make social policy via the Bill of Rights and the Fourteenth Amendment.

Frankfurter's incrementalism was predictable.[123] In his days as a Harvard law professor, Frankfurter noted that he was "excluded" from the legal realist "club" because he "care[d] too much about history."[124] Frankfurter, in other words, took seriously the idea that law had substance independent of politics and preferences. This orientation already came through in 1922 after the Supreme Court struck down a federal tax on firms that employed child labor. "Humanity," Frankfurter wrote in the *New Republic*, "is not the test of constitutionality." Defending the Court's decision, he added, "We must pay a price for federalism."[125] His approach also manifested the following year when Frankfurter critiqued a fellow progressive for emphasizing the "social" consequences of the Court's policymaking to the exclusion of the "legal question" at issue.[126] Shortly after joining the Court, Frankfurter was annoyed with "these evangelical lads"—the living constitutionalists—who insisted that what was just was constitutional.[127] Because of this orientation, Frankfurter was quickly coded by liberal elites and early judicial behaviorists as a "conservative" justice.[128] This says more about the predominance of liberalism than about Frankfurter's judicial behavior. He (and Jackson) allowed for the law to slowly evolve via a common law process, an orientation that runs up against how conservatives were just then fighting back against these constitutional developments.[129]

In sum, by the dawn of the 1950s, FDR's and Truman's justices had splintered legal liberalism into rival judicial orientations.[130] This is a development regime theory cannot account for given its manifestation *within* New Deal liberalism—that is, within the party-based regime spawned by FDR. A normative living constitutionalism that aimed to make over public law and create new constitutional rights asserted itself. The living constitution vanguard's referent was not Democratic Party elites as such, but liberal interest groups, intellectual elites, and their own sense of constitutional mission. What regime theorists also gloss over—or, following judicial behaviorists' coding conventions, classify as conservatism—is the other strand of legal liberalism: the incrementalism epitomized by Frankfurter and Jackson.[131] If constitutional conservatism often had its say on the Court in the 1920s and '30s, conservatives had no voice on the Supreme Court for decades after 1941.[132] Simply put, legal liberalism, via the living constitutionalists and incrementalists who soon occupied nearly every seat on the Court, was dominant. These justices were not simply assisting the New Deal regime inaugurated by FDR and extended by Truman. These justices were charting divergent liberal legal policymaking paths—one cautious, the other sure of its legal policymaking know-how.

5. Presidents, parties, and jurisprudential policy alliances, 1953–1980

A Republican president, Dwight D. Eisenhower, appointed two of the twentieth century's most liberal justices, Earl Warren and William Brennan. Regime theorists attribute this to Eisenhower's "mistakes" in judgment—often accompanied by a claim that his administration was a laggard on, or a reluctant advocate of, civil rights—because his appointments run up against their theoretical claims.[133] Regime theorists are mistaken. The archival and primary sources cast significant doubt on these claims while suggesting the empirical leverage a jurisprudential policy alliance approach provides.

Warren was vocally and publicly liberal prior to his nomination. A progressive since his 1920s entry into California politics, Warren championed liberalism throughout the 1940s. When he addressed Republican audiences, he exhorted them to embrace modern liberalism.[134] When the *New York Times* asked a variety of governing elites and intellectuals, "What is Liberalism?" Warren answered by dividing the world into "three groups—reactionary, progressive,

[121] Robert Jackson, *The Struggle for Judicial Supremacy* (New York: Knopf, 1941).

[122] See Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (New York: Norton, 2022); Philip Kurland, "Justice Robert Jackson: Impact on Civil Rights and Civil Liberties," *University of Illinois Law Forum* 1977, no. 2 (1977): 551–76.

[123] An incrementalist on the Court who often agreed with Frankfurter, Stanley Reed further signals the fracturing of legal liberalism. He was a thoroughgoing supporter of the New Deal and had a general orientation toward an evolving law. See Stanley Reed Address, October 1, 1935; Reed Address, January 25, 1936, Box 229, Folder Speeches of DOJ Members, Homer Cummings Papers, Small Special Collections Library, University of Virginia.

[124] Michael Parrish, *Felix Frankfurter and His Times: The Reform Years* (New York: Free Press, 1982), 228.

[125] Felix Frankfurter, "Child Labor and the Court," *TNR*, July 26, 1922, 248–51.

[126] Frankfurter to Bruce Bliven, June 20, 1923, Reel 28, Frankfurter Papers, Library of Congress.

[127] Snyder, *Democratic Justice*, 415, 541.

[128] "Frankfurter v. Stone," *TNR*, June 24, 1940, 843–44. Suggesting the extent to which constitutional conservatism had no effective representation on the Court, early judicial behaviorists characterized Frankfurter as a "right-wing" justice. C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948), 29.

[129] Snyder, *Democratic Justice*; Wiecek, *The Birth of the Modern Constitution*, 116–284. See Johnathan O'Neill, *Conservative Thought and American Constitutionalism Since the New Deal* (Baltimore: Johns Hopkins University Press, 2022).

[130] From a regime theory perspective, Truman's four nominees should have been full-blown New Deal liberals. Whittington, *Political Foundations of Judicial Supremacy*, 73 (those presidents "affiliated" with the regime will appoint "affiliated justices" who will "implement" the reconstructive president's "constitutional vision"). Setting aside Truman's Vinson and Minton (neither of whom was the predicted liberal), Truman's other two nominees were incrementalists. Harold Burton, selected to have at least one Republican on the Supreme Court, is another data point regarding the marginalization of conservatism and ascendance of incrementalism. A Frankfurter law clerk noted that even if Burton "was as eager as the next man" to do away with *Plessy v. Ferguson* in *Brown v. Board of Education*, "stare decisis is for him a serious phrase with real meaning." E. Barrett Prettyman to Frankfurter, February 21, 1955, Box 1, Folder Frankfurter Correspondence, Prettyman Papers, University of Virginia Law Library; see also Mary Frances Berry, *Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court, 1945-1958* (Westport, CT: Greenwood Press, 1978). Nominated by Truman in 1949, Tom Clark is often conceptualized as a Warren Court conservative. See Gillman, "Party Politics and Constitutional Change," 145. But Clark was an incrementalist, and occasionally a living constitutionalist depending on the issue before the Court. Benjamin Lauderdale and Tom S. Clark, "The Supreme Court's Many Median Justices," *American Political Science Review* 106, no. 4 (2012): 847–66, 860. Given his tenure as Truman's attorney general, this was in line with his pre-confirmation worldview. See Tom C. Clark, "Civil Rights: The Boundless Responsibility of Lawyers," *ABA Journal*, August 1946, 453–57.

[131] Gillman, "Party Politics and Constitutional Change," 145.

[132] See Kersch, *Conservatives and the Constitution*.

[133] Regime theorists claim that "opposition presidents" like Eisenhower and Clinton should appoint politically moderate justices: we should expect them "not to appoint strongly ideological representatives of their parties' positions." Balkin, "Why Liberals and Conservatives Have Flipped," 225. Eisenhower, then, should have appointed moderately conservative justices rather than strongly conservative ones. Either way, Warren and Brennan pose significant problems for regime theory. For characterizations of Warren and Brennan as mistakes, see Balkin and Levinson, "Understanding the Constitutional Revolution," 1067; Bridge, *Pushback*, 50.

[134] See, e.g., T.R.B., "Washington Notes," *TNR*, July 10, 1944, 43.

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and radical." He was a "progressive," while many "conservatives are in fact reactionaries." Also presaging his unapologetic progressivism on the Court, Warren highlighted his concern with "the welfare of others" and the "changed conditions of human need." What's more, Warren identified "[c]ivil rights, representative government, and equality of opportunity" as areas of concern pre-confirmation.[135] This was not moderate Republicanism, to say nothing of moderate conservatism.

More than that, despite the oft-repeated quote, there is no good evidence that Eisenhower ever said Warren and Brennan were his two biggest presidential "mistakes."[136] Beyond Warren's public advocacy, Eisenhower was well aware of his nominee's views. In an October 1953 letter to his brother Milton, Eisenhower dismissed conservatives who were opposed to Warren's nomination. Warren, he wrote, was "definitely a liberal-conservative; he represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court."[137] Indeed, Eisenhower described Warren to a close friend as "a man whose philosophy of government was something along the lines of my own."[138] As the president saw it, Warren brought "statesmanship" to the Court, a philosophy informed by the "hard knocks of personal experience, private and public." Eisenhower, too, swatted away those he deemed "reactionaries"—particularly the conservative publisher of the *Chicago Tribune*, Robert "Colonel" McCormick—for criticizing his choice of Warren. To Eisenhower's mind, these conservatives were living in the past and did not appreciate that the GOP must be a "progressive organization or it is sunk."[139]

If Warren was a full-steam-ahead liberal on the Court, it would be a mistake to characterize Eisenhower and his administration as conservative, moderate or otherwise.[140] This extended to *Brown v. Board of Education* and civil rights. Attorney General Herbert Brownell and his Justice Department advocated for overturning *Plessy v. Ferguson* when the Supreme Court asked for briefing on re-argument in *Brown*. As one of Eisenhower's biographers puts it, "Nor is there much evidence that Ike resented Warren's handling of *Brown*."[141] Indeed, the day after the Court issued its decision in *Brown*, "Eisenhower called the District of Columbia commissioners and urged their help in making the national capital a desegregation model."[142] Brownell praised the living constitutionalism of *Brown* and highlighted that Warren was the "sort of great man," as opposed to simply "a great lawyer," the administration had sought in a chief justice.[143] For these Republicans, the Constitution contained "living principles" that allowed the country to "advance in our standards of what is reasonable and right."[144]

It should not be surprising that administration officials routinely pointed to an incremental, if still contemporaneously impressive, list of civil rights policy implementation. In addition to implementing desegregation of the military, Eisenhower's administration created the federal Commission on Civil Rights and upgraded the Civil Rights Section to a full Division in the Department of Justice (DOJ).[145] Beyond extending Social Security to agricultural and domestic workers (occupations disproportionately African American), the Civil Rights Section in the DOJ actively engaged with "9,000 complaints" of rights abuses. The DOJ, too, pressed Congress to establish a "public defender system" so that anyone, "regardless of race or means," who was charged with a federal crime had an attorney.[146] If this merely skims the surface of the administration's incremental advances on civil rights—the 1957 and 1960 civil rights acts are also often glossed over—it serves as at least a partial explanation for why Eisenhower secured nearly 40 percent of Black voters in 1956.[147] And it throws into sharper relief the limitations of regime theory's framework.

Similarly, regime theory's focus on the "presidential wing" of the coalition overlooks the relevant historical counterfactual to the Eisenhower administration: how a President Adlai Stevenson would have governed. Stevenson was a Democrat but not a liberal, racially or generally. In a 1952 letter to Virginia's governor (a fellow Democrat), he expressed his frustrations with impatient "civil rights groups," and he routinely voiced annoyance at the "extremism" of Northern civil rights activists. Legislative proposals for a Fair Employment Practices Commission needed to be shelved—it "could not be passed anyway." Indeed, in a Richmond, Virginia speech, he praised "the Constitution of the Confederacy" as a "valuable heritage" while mourning with them the "bleak years" of Reconstruction.[148] Again and again, publicly and privately, to audiences national and local, Stevenson emphasized that the Democrats could work out their "disagreements" on "desegregation" while keeping the South in the Democratic coalition.[149] Taken

[135]"What is Liberalism?", *New York Times Magazine*, April 18, 1948, 10–11.

[136]The popularizer of this putative quote—"When Eisenhower was asked later if he had made any mistakes while he had been president, he replied: 'Yes, two, and they [Warren and Brennan] are both sitting on the Supreme Court'"—is Henry Abraham, *Justices, Presidents, and Senators: A History of the US Supreme Court Appointments from Washington to Bush II* (Lanham, MD: Rowman & Littlefield, 2008), 273. For support, Abraham cites Elmo Richardson, *The Presidency of Dwight D. Eisenhower* (Lawrence: Regents Press of Kansas, 1979). However, Richardson sources the quote as something Eisenhower said "years later" after he left the White House. Ibid., 108. Indeed, in the very sentence after the alleged post-presidency quote, Richardson notes that the "mistakes" line is a running "joke" that "several other presidents" also ostensibly made. Ibid. In any case, there is no evidence in the Eisenhower Presidential Library of this quote that I, other researchers, or the archivists there have located. In short, verifications of the putative quote are based on oral histories or informal conversations that postdate Eisenhower's death—and they do not agree on when it was said, if Eisenhower was referring to just Warren or both justices, or if this was standard-issue post-presidential humor. See Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (Lawrence: University Press of Kansas, 2010), 139.

[137]DDE to Milton Eisenhower, October 9, 1953, Box 14, Folder Correspondence, Milton Eisenhower Papers, Eisenhower Presidential Library (hereafter DDEL). See also William Hitchcock, *The Age of Eisenhower: America and the World in the 1950s* (New York: Simon & Schuster, 2018), 224.

[138]Hitchcock, *Age of Eisenhower*, 229.

[139]DDE to Milton Eisenhower, October 9, 1953, Box 14, Folder Correspondence, Milton Eisenhower Papers, DDEL; Cornelius Cotter, "Eisenhower as Party Leader," *Political Science Quarterly* 98, no. 2 (1983): 255–83.

[140]This is drawn out in John W. Compton, "Manufacturing a Protestant Consensus: Religion and Regime Entrenchment in the Eisenhower Era," *Studies in American Political Development* 37, no. 1 (2023): 127–45.

[141]Hitchcock, *Age of Eisenhower*, 228.

[142]Robert Burk, *The Eisenhower Administration and Black Civil Rights, 1953-1961* (Knoxville: University of Tennessee Press, 1984), 144.

[143]Martin Agronsky, "Nov. 30, 55, Talk with Merlo Pusey," Box 68, Folder 9, Agronsky Papers, Library of Congress.

[144]See, e.g., Brownell Address, June 2, 1954, Box 154, Folder Speeches 1954 (4), Brownell Papers, DDEL.

[145]"Administration Civil Rights Program," 1957, Box 10, Folder Civil Rights (1), Bryce N. Harlow Papers, DDEL.

[146]Brownell Address, March 18, 1954; Brownell Address, June 4, 1954. Both located in Box 154, Folder Speeches 1954 (3), Brownell Papers, DDEL.

[147]Final Report, January 1961, Box 47, Folder Final Reports, William P. Rogers Papers, DDEL. See Mark Stern, "Presidential Strategies and Civil Rights: Eisenhower, the Early Years, 1952-54," *Presidential Studies Quarterly* 19 (1989): 769–95; "For Whom Did Negroes Vote in 1956?", *CQ Almanac 1957* (Washington, DC: Congressional Quarterly, 1958), 554–56. The interaction of the Cold War and the push for civil rights also contributed to this incremental progress. Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).

[148]Walter Johnson, ed., *The Papers of Adlai Stevenson, Volume 4: Let's Talk Sense to the People, 1952-1955* (Boston: Little, Brown, 1974), 41, 48, 89, 106–09.

[149]Ibid., 291, 517–20, 528; Seymour Harris et al., eds, *The New America by Adlai Stevenson* (New York: Harper, 1957), 4–5, 112; Walter Johnson, ed., *The Papers of Adlai*

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together, a presidents-and-parties approach cannot account for the counterfactual President Stevenson. Here was a Democrat who likely would have accomplished less on civil rights than Eisenhower while appointing justices who needed the Southern Democrats' sign-off.

Liberals were pleased when Eisenhower announced his second nominee, John M. Harlan, as Justice Jackson's replacement (they also highlighted that nine of eleven votes against his confirmation came from conservatives, both Democratic and Republican).[150] As a New York corporate lawyer, Harlan was the embodiment of Establishment or Modern Republicanism. He organized lawyers on behalf of the 1948 GOP ticket of Thomas Dewey and Earl Warren and served on a New York City bar committee on civil rights.[151] Even if Harlan would not be in the Warren Court's vanguard, it shades the historical record to cast him as a conservative. A judicial incrementalist, Harlan understood that the law evolved even as he hoped it would do so at a measured pace. Beyond his sophisticated defense of unenumerated fundamental rights (substantive due process) in the context of sexual privacy, Harlan characterized proper "constitutional adjudication" as analogous to the "common-law approach to legal development."[152] This was not constitutional conservatism at the time or as it was later articulated via originalism. As with Harlan, Eisenhower's fifth and final nominee, Potter Stewart, was a racial moderate and supporter of desegregation, drew opposition from Southern Democrats, and was committed to paced progress.[153] This came through at his confirmation hearings. Stewart defended *Brown v. Board*, characterized the Court as "a policy making body," and argued, using the commerce clause as his example, that "the genius of the framers" was writing constitutional text "applicable to a changing and growing society."[154]

Eisenhower's third nomination was his second so-called mistake: William Brennan. Brennan poses a potential challenge for the jurisprudential policy alliance measurement strategy. His biographers suggest Brennan did not clearly articulate his policy preferences before his nomination.[155] What we can say is this: once his nomination was announced, an Eisenhower administration official did highlight that Brennan was "a man with lots of progressive ideas." And liberals in real time saw that Brennan was "far superior" to anyone the regime-affiliated Truman appointed to the Court.[156] At his confirmation hearing, Brennan avoided answering segregationist Senator James O. Eastland's (D-MS) question-cum-declaration that the Constitution "has a fixed and definite meaning." Brennan offered that the "application of the Constitution is a problem of applying to living matter the cases that come before us."[157] In the least, there is little evidence that he was expected to be even a moderate conservative (what regime theory predicts), and further archival research may reveal that his pre-confirmation worldview aligned with his living constitutionalism on the bench.[158]

Taken together, the foregoing cannot be squared with regime theory. Neither Eisenhower, his administration, nor his justices were conservatives, moderate or otherwise. Indeed, conservatives were consistently angry with Eisenhower and his administration—to say nothing of the Warren Court. They repeatedly insisted that the "principles of constitutional conservatism, as opposed to 'me-too-ism,'" must capture the Republican Party.[159] Neither can regime theory account for the President Stevenson counterfactual. Given that he was committed to keeping the South in the Democratic coalition, the justices he appointed may have been—would have likely been—less liberal than Eisenhower's, given the preferences of powerful senators like Eastland and Richard Russell. Finally, it is also unclear how regimes (dominant national coalitions) can be at one time bipartisan, as is argued regarding Eisenhower and *Brown*, but otherwise grounded in the Democratic Party when considering his administration's predecessors and successors.[160] Here, too, the post hoc approach of regime theory is problematic. The upshot is this: in these years Supreme Court politics were not primarily structured by party politics and presidents but, as with the New Deal Court, by the debate between the living constitutionalist vanguard and incrementalists' paced progress.

Stevenson, Volume 6: Toward a New America, 1955-1957 (Boston: Little, Brown, 1976), 66–67, 70, 79, 99, 151–52, 226.

[150]Eugene Gressman, "The New Justice Harlan," *TNR*, April 4, 1955, 9–10; Tinsley Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (New York: Oxford University Press, 1992), 90–91.

[151]Yarbrough, *Great Dissenter*, 71–74.

[152]John M. Harlan, "Thoughts at a Dedication: Keeping the Judicial Function in Balance," *ABA Journal*, October 1963, 943–45. For Harlan's defense of substantive due process, see *Poe v. Ullman*, 367 US 497, 522–55 (1961).

[153]"Harassing the Court," *TNR*, May 18, 1959, 2; Gayle Binion, "Justice Potter Stewart on Racial Equality: What it Means to Be a Moderate," *Hastings Constitutional Law Quarterly* 6, no. 3 (1979): 853–909. Eisenhower's fourth nominee, Charles Whittaker, retired for health reasons after five terms that had no discernible jurisprudential throughline and is thus excluded from Table 1.

[154]Nomination of Potter Stewart, Hearings Before the United States Senate Judiciary Committee, April 9, 1959, 14, 16, 35.

[155]See Stern and Wermiel, *Justice Brennan*, 59–60.

[156]"An Experienced Judge for Supreme Court," *US News & World Report*, October 12, 1956, 70–73; "The Ninth Justice," *TNR*, October 8, 1956, 5; Daniel Berman, "Mr. Justice Brennan," *Nation*, October 13, 1956, 298–300.

[157]Nomination of William Brennan, Senate Judiciary Committee, 85th Congress, 1st Session, February 27, 1957, 36, 38–39.

[158]See Stern and Wermiel, *Justice Brennan*, 71–95.

[159]Ben Moreell to Bruce Alger, April 9, 1965, Box 1, Folder 6, ACA Records, Wisconsin Historical Society (hereafter WHS). *National Review* also repeatedly condemned Eisenhower's brand of Republicanism. Brent Bozell, "Repeal of the Constitution?", *National Review* (hereafter *NR*), December 29, 1956, 9–10, 23; "No Trips to Newport," *NR*, September 28, 1957, 270.

[160]Because *Brown* cannot be easily explained by regime theory, a "national political coalition"—rendered as bipartisan—is often conceptually substituted as forcing the South's hand. Clayton and Pickerill, "The Politics of Criminal Justice," 1390; Graber, "The Nonmajoritarian Difficulty," 71. Kevin McMahon makes the strongest case for regime theory vis-à-vis *Brown*. McMahon, *Reconsidering Roosevelt*. However, regime theory's emphasis on presidents complicates the theory's reach here as well. If FDR was not a racial conservative by the standards of his time, neither he nor his administration charged hard for civil rights. See Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue* (New York: Oxford University Press, 2009 [1979]); Nancy Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of FDR* (Princeton: Princeton University Press, 1983). The NAACP, to give one salient example, repeatedly asked the administration to do more to protect soldiers returning from World War II (to little avail), and the Biddle DOJ complained about the "howl" from the NAACP when the Justice Department did not submit an amicus brief in the Texas white primary case (*Smith v. Allwright* (1944)). If Biddle thought the legal "question is a close one," the Court did not. While FDR and his attorney general worried about how "Texas and the South" would respond to an administration amicus brief, the justices struck the white primary down 8-1—another disconnect between the "presidential wing" and the justices it appoints. More than that, Biddle lamely and publicly tried to justify the internment of "Japanese-Americans" during World War II: the "relocation centers were not designed as places of internment but as places of refuge." The New Dealers were also respectful of constitutional structures vis-à-vis race while they pressed past them in the economic regulation realm. States' rights in regard to racial equality still had a strong hold. Biddle implored friendly audiences to remember his Justice Department labored under the limits of "our jurisdiction" in this area of the law. Walter White to Biddle, January 5, 1944, Box 6, Folder 8; Biddle to FDR, October 30, 1943, Box 3, Folder 57; Biddle Address, November 11, 1943, Box 11, Folder 43. All located in Biddle Papers, Georgetown University. In short, if FDR moved the ball forward, it is difficult to draw a tight connection between his administration and *Brown*.

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5.1. The Warren Court's vanguard

A key claim of regime theory is that the Supreme Court is not a counter-majoritarian institution. Rather, the Court's policymaking enjoys democratic imprimatur given its relationship with the elected officials of the regime—they are simply writing into law their preferences. However, this majoritarianism is not readily apparent when we consider public opinion data relative to the Warren Court and its 1960s rights revolution. Setting aside the well-known backlash to *Brown*, it is unclear how meaningfully majoritarian the Warren Court's policy was. To give just two examples, a string of high-profile decisions holding school prayer unconstitutional and creating a new Constitution for the criminally accused were unpopular with large swaths of the population.[161] And over the course of the 1960s, public opinion of the Warren Court's body of policymaking grew increasingly unfavorable.[162]

Theorizing the Court as majoritarian is also at odds with how liberal elites and the Warren Court's vanguard contemporaneously characterized the justices' role in policymaking. In the early 1950s, liberals grew frustrated when the New Deal Court, held back by Frankfurter, Jackson, and Reed, was not a "bold instrument of constitutional policy." The Court should never "dare to doubt" its ability to push policy forward, nor should it hesitate to second-guess elected officials' policymaking.[163] Pleased with the Warren Court's work as the 1950s closed out, liberal intellectuals and governing elites now characterized the Court's role as using "law itself [as] a powerful teacher." Indeed, in its hands, the law "embodies the moral purpose of society."[164]

This aligned with how Warren and his vanguard colleagues viewed constitutional law and their role in shaping it. In a *Fortune* piece on the future of law, Warren had it that law was "simply a more mature and sophisticated" form of social policy vis-à-vis a "child['s]" early life "judgment that this or that 'isn't fair.'"[165] Given that law at bottom had a moral mission, Warren dismissed the notion that a judge should pursue objectivity—that was a "fantasy," neither the law nor the Constitution could be "neutral."[166] Justice Douglas told his audience at NYU's law school that those with even a passing familiarity with legal history knew that the "words of the Constitution gain meaning and content from the value judgments one puts into them." He expressed impatience with those "judges [who] have a bramble bush which they call the law and behind which they stay." They used "law" as an excuse to "prevent them from doing justice."[167] At the University of Tennessee's law school, Justice Hugo Black reminded them that lawyers had a "responsibility as the guardian" of the law and Constitution. And lawyers, particularly those on the Court, would police the state and "mark the boundaries beyond which the Government shall not go. (Applause)."[168] The architect of the rights revolution, Justice Brennan, summed up the confidence of the Warren Court's vanguard. In a remarkable address, Brennan maintained that the law was "coming alive as a living process" to "changing human needs." And if neither Congress nor the president was acting with sufficient speed, the Court had an institutional responsibility. If the choice was "no one doing it at all," then the Court "must finally act." Brennan saw the Court's role as the conscience of the nation. "Just as an individual may be untrue to himself," so too "may society be untrue to itself." The Court must "keep the community true to its own fundamental principles."[169]

If the Warren Court's jurisprudential revolution was not always in line with the median American voter, this was not cheap talk. The vanguard followed through on the bench during the 1950s.[170] Neither liberal elites nor the vanguard of the Warren Court, drawn from both parties, viewed their role as the foot soldiers in a Democratic Party regime. Rather, they were ideological leaders for liberalism.[171] This is another point of American political development that regime theory struggles to square. Along with liberal elites, the bipartisan liberal vanguard saw that the Court might be an institutional (and moral) leader *because* of the bipartisan congressional coalition of conservative Republicans and Southern Democrats. This "unholy alliance," liberal governing elites and interest group leaders routinely complained, too often blocked necessary legislation.[172] That the party system was slowly realigning on ideological grounds not only complicates the notion of a liberal Democratic regime undergirding the Warren Court—it also points toward why the justices believed they could light the path forward for liberals.[173] Rather than the Court eliding the counter-majoritarian difficulty, given the institutional blockage in Congress, the justices saw themselves as pushing ahead of elected elites who were moving too slowly.

Neither is it clear that the Warren Court's 1962 to 1969 remaking of constitutional law—truly a revolution—was in lockstep with a seamless New Frontier-Great Society regime. If President Johnson's liberalism and judicial appointments prove a tight fit with regime theory expectations, JFK's do not.[174] Kennedy's first ideological commitment was to technocratic liberalism and he was mindful, like Stevenson, of keeping the South in the Democratic coalition.

[161] Amy Lerman, "Rights of the Accused," and Angelo Gonzales, "School Prayer," in *Public Opinion and Constitutional Controversy*, eds Nathaniel Persily et al. (New York: Oxford University Press, 2008), 41–61, 62–80.

[162] Compare Gallup Organization, Gallup Poll # 1963-0675: Satisfaction/1964 Presidential Election, Question 9 with Louis Harris & Associates Poll: July 1968, Question 18 (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1968).

[163] "What the Court Has Destroyed," *TNR*, June 18, 1951, 5–6; Gressman, "The Tragedy of the Supreme Court," *TNR*, September 3, 1951, 10–13.

[164] Gerald Johnson, "The Flight From Liberty," *TNR*, June 15, 1959, 14; Chester Bowles, "Has the North Clean Hands?", *TNR*, July 6, 1959, 6–7.

[165] Earl Warren, "The Law and the Future," *Fortune*, November 1955, 106–107, 221, 226, 229–31.

[166] Earl Warren, *The Memoirs of Chief Justice Earl Warren* (New York: Doubleday & Co., 1977), 322.

[167] William O. Douglas, "The Bill of Rights Is Not Enough," *NYU Law Review* 38, no. 2 (1963): 207–42, 236, 240.

[168] Hugo Black, "The Lawyer and Individual Freedom," *Tennessee Law Review* 21, no. 3 (1950): 461–71, 467.

[169] Stern and Wermiel, *Justice Brennan*, 233–34.

[170] Gerald Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369–98, 390. See also Tom S. Clark, "The Separation of Powers, Court Curbing, and Judicial Legitimacy," *American Journal of Political Science* 53, no. 4 (2009): 971–89.

[171] Chester Bowles Address, April 10, 1949, Part IV: Box 2, Folder 11, ADA Records, WHS; T.R.B., "Washington Wire," *TNR*, November 26, 1956, 2.

[172] Policy Commission Draft, June 4, 1949, Part IV: Box 3, Folder 1, ADA Records; Bowles Address, April 10, 1949, Part IV: Box 2, Folder 11, ADA Records, WHS. See also T.R.B., "Washington Wire," *TNR*, November 26, 1956 ("conservative Republicans" and the "Southern minority" were "standing in the way of [the] national conscience in the matter of civil rights and better schools"); Edgar Kemler, "New Civil Rights Block: A Bi-Partisan Development," *Nation*, January 28, 1956, 64 (insisting that "liberal Democrats" should "defy the Southern leaders" and join forces with the Modern Republicans).

[173] Noel, *Political Ideologies and Political Parties in America*.

[174] Although almost no one was surprised, at his confirmation hearings Thurgood Marshall insisted that "the Constitution was meant to be a living document." Nomination of Thurgood Marshall, Hearings Before the United States Senate Judiciary Committee, 90th Congress, 1st Session, July 13 et seq., 1967, 49. Abe Fortas, Johnson's other justice, was a dedicated New Dealer and an admirer of the Warren Court's handiwork. See Abe Fortas, "Mr. Justice Douglas," *Yale Law Journal* 73, no. 6 (1964): 917–19; Laura Kalman, *Abe Fortas: A Biography* (New Haven: Yale University Press, 1990), 160.

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This is why liberals routinely complained about his administration.[175] Kennedy's racial politics were moderate to conservative. Until his June 1963 conversion on civil rights—which came *after* his two Supreme Court appointments—he viewed civil rights leaders as just another interest group to be appeased and grumbled that the Student Nonviolent Coordinating Committee were "sons of bitches."[176] Because JFK was interested in keeping his electoral coalition together, JFK's judicial appointments for seats in the South were, as liberals complained, "disastrous" (in contrast to Eisenhower's "appointment of integration supporters to Southern federal courts").[177] And because Kennedy was not particularly interested in nominating a vanguard justice, labor lawyer Arthur Goldberg's nomination to the Court, the rights revolution's all-important fifth vote, was more contingent than overdetermined by a JFK-led regime.[178]

In sum, painting JFK's and LBJ's administrations as partners in an uninterrupted regime exaggerates the former's liberalism, and in any case, Justice Byron White, Kennedy's other nominee, does not conform to this approach's expectations.[179] More broadly, the Warren Court's living constitutional vanguard, drawn as it was from both parties, did not view its role as merely assisting Democratic elected elites. Rather, these justices viewed their role as leaders. And the justices did lead via the rights revolution, often getting out in front of public opinion. Thus, it is unclear that either majoritarianism or regime theory best captures the Warren Court's policymaking.

5.2. Nixon's Court and the 'New Right regime'

Regime theory paints Nixon as a conservative, the presidential progenitor of the "New Right regime" that Reagan's 1980 election consolidated.[180] But Nixon is difficult to pin down as a conservative, New Right or otherwise. Homing in on Nixon's often-exaggerated "Southern Strategy," his private thoughts and psychology, and his failed nominations of Southern judges Clement Haynsworth and G. Harrold Carswell—defeated by bipartisan majorities—obscures Nixon's ideological heterodoxies.[181] Both contemporaneous commentators and scholars highlight that Nixon was a coalitional politician who chased the median voter. Insofar as there was a Southern Strategy in 1968, it targeted the Rim South—Nixon looked to steer a course between Humphrey's continuation of the Great Society and Wallace's conservative populism that had a clearer racial edge.[182] For all the attention to Patrick Buchanan's role in the White House as embodying Nixon's racial conservatism, this overlooks that Nixon often ignored his memoranda, while Buchanan admitted that defending Nixon's policies to conservatives was like a "Christian marching into the Lion's Den."[183]

Thus, it is not surprising that looking to the actual policy of his administration reveals Nixon as "the institutional father of affirmative action"—his administration implemented and extended it in the race and gender contexts and "sent budgets to Congress that increased agency appropriations for civil rights enforcement from $75 million to $2.6 billion in 1972."[184] Nixon also oversaw a vast expansion of the administrative state, including the Environmental Protection Agency (EPA), Bureau of Alcohol, Tobacco, and Firearms (ATF), and Occupational Safety and Health Administration. What's more, as David Mayhew highlights, "in the regulatory area, Nixon's years produced more legislation than any period since the New Deal."[185] Conservatives, quickly displeased with the policy output of his administration, denounced him as a "tired, tergiversating tramp"[186]; by 1972, they decided to primary him.[187] The claim, then, is *not* that Nixon was a liberal, racial or otherwise. Rather, the claim is that he was not a conservative—as conservatives themselves contemporaneously grumbled—and thus difficult to cast as inaugurating a New Right regime.

Nixon's ideological heterodoxy is reflected in the ideological pluralism of his justices (and the administration's scattershot approach to nominating them).[188] Only one of his four justices, William Rehnquist, was a thoroughgoing conservative, as would be expected of a New Right regime.[189] Nixon's choice for chief justice, Warren Burger, had an ambiguous pre-confirmation constitutional worldview. He morphed from a "'liberal Minnesota Republican' on civil rights" in the 1950s to a moderate conservative on the

[175] ADA Press Release, August 27, 1960, Box 12, Folder 4, Joseph Rauh Papers, Library of Congress; James Giglio, *The Presidency of John F. Kennedy,* 2nd ed., revised (Lawrence: University Press of Kansas, 2006), 11, 20–22.

[176] Giglio, *John F. Kennedy*, 17, 43; David Yalof, *Pursuit of Justice: Presidential Politics and the Selection of Supreme Court Justices* (Chicago: University of Chicago Press, 1999), 70–81.

[177] Giglio, *The Presidency of John F. Kennedy*, 45; Burk, *The Eisenhower Administration*, 199.

[178] It is also worth noting that new rights for labor—a critical component of the New Deal coalition—were ancillary to both the Warren Court's rights revolution and the Great Society. Julian Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society* (New York: Penguin Press, 2015), 167–68. As to Goldberg, his living constitutionalism on the Court was suggested by his confirmation hearings. There, he insisted that "we have a Constitution wisely conceived and broadly drafted, that can apply the meaning of the men who drafted it and take into account modern conditions." Nomination of Arthur Goldberg, Hearings Before the United States Senate Judiciary Committee, 87th Congress, 2nd Session, September 11 and 13, 1962, 26.

[179] White had little interest, before or during his time on the Court, in "articulating a constitutional vision." Dennis Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: Free Press, 1998), 444 (quoting Jeffrey Rosen). Rather, White's incrementalism on the Court was foreshadowed prior to his nomination via his non-ideological pragmatism. Ibid., 31, 233, 258–59, 269, 325–26.

[180] Clayton and Pickerill, "The Politics of Criminal Justice," 1386–87, 1410. For a nuanced account, grounded in the archival materials, of Nixon and his relationship to the Supreme Court, see McMahon, *Nixon's Court*.

[181] Dean Kotlowski, "Trial by Error: Nixon, the Senate, and the Haynsworth Nomination," *Presidential Studies Quarterly* 26, no. 1 (1996): 71–91; Jordan Alexander, "Striving for Civil Rights: Senator Edward W. Brooke, President Richard Nixon's Southern Strategy and the Supreme Court," *Journal of Supreme Court History* 46, no. 2 (2021): 206–28. Regime theory scholarship rarely considers that LBJ approached busing gingerly, and Robert F. Kennedy opposed it as a remedy. As George McGovern accurately noted, Democrats were not "excited about busing, either." Dean Kotlowski, *Nixon's Civil Rights: Politics, Principle, and Policy* (Cambridge, MA: Harvard University Press, 2001), 42.

[182] Ripon Society, *The Lessons of Victory* (New York: Dial Press, 1969), 148; Kotlowski, *Nixon's Civil Rights*, 8–20; Paul Frymer and John D. Skrentny, "Coalition-Building and the Politics of Electoral Capture During the Nixon Administration: African Americans, Latinos, and Labor," *Studies in American Political Development* 12, no. 1 (1998): 131–61; Gerard Alexander, *Race and the Republicans* (unpublished manuscript), chap. 4.

[183] On these points and more regarding Nixon's complicated relationship to racial politics, see Kotlowski, *Nixon's Civil Rights*, 18–40.

[184] Hugh Davis Graham, "Richard Nixon and Civil Rights: Explaining an Enigma," *Presidential Studies Quarterly* 26, no. 1 (1996): 93–106, 95. See John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press, 2002); Kotlowski, *Nixon's Civil Rights*.

[185] David Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002* (New Haven: Yale University Press, 2005), 85.

[186] Rusher to Bozell, March 6, 1969, Box 11, Folder 13, William Rusher Papers, Library of Congress.

[187] Ben Moreell to James E. Price, April 8, 1969, Box 2, Folder 5, ACA Records, WHS; "The Ashbrook Candidacy," *NR*, January 21, 1972, 18–22.

[188] McMahon, *Nixon's* Court, 146–48, 161–64, 207–11.

[189] "The Rehnquist Fight," *NR*, December 3, 1971, 1339. Rehnquist's conservatism manifested in multiple ways prior to confirmation. See, e.g., William Rehnquist, "Letter to the Editor," *Washington Post*, February 14, 1970, A14.

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DC Circuit Court of Appeals in the 1960s.[190] Burger's ambiguity was such that he was lauded at his confirmation hearing by liberal senators—including Edward Kennedy and Birch Bayh—and approved by an overwhelming vote (74-3).[191] Burger was in the *Roe v. Wade* majority and evolved from something of an incrementalist to a more conservative jurisprudence over time, though conservatives never embraced him as one of their own.[192] Thus, Burger is a case where both regime theory's PPF prediction and a jurisprudential policy alliance framework are stymied.

Lewis Powell, an elite corporate lawyer who wrote the famous "Powell Memo," had a pre-nomination record closer to incrementalism than constitutional conservatism.[193] On the Court, he was in the *Roe v. Wade* majority, wrote the key opinion that constitutionalized affirmative action, and joined (and concurred in) a decision holding that Texas could not deny undocumented children a free public education.[194] Justice Harry Blackmun is yet another post hoc Republican "mistake," given that his living constitutionalism is a mismatch with the theorized New Right regime. But his tenure as a federal court of appeals judge clearly signaled his jurisprudential policy alliance. In an opinion regarding corporal punishment of prisoners, Blackmun wrote that the Eighth Amendment's meaning was not only "flexible," but that "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" were "useful and usable" standards to judge its contemporary meaning.[195]

Finally, as with Nixon, President Gerald Ford runs up against the theorized New Right regime. Ford and his administration were moderate technocrats, closer to Eisenhower's Modern Republicanism.[196] This was why Reagan challenged him for the party's nomination in 1976 and nearly captured it. Ford's attorney general, Edward Levi, not only supported gun control—"objections" to it do not fit "modern urban life"—but he publicly rejected constitutional conservatives' originalism, at that point trying to embed itself in the legal academy to compete with living constitutionalism.[197] In one speech, Levi rejected the notion that "knowledge of the original understanding will solve all our contemporary controversies."[198] In fact, as early as 1948, Levi's "An Introduction to Legal Reasoning" made clear his incrementalist bent.[199] Here, too, we see the limitations of party-based accounts. A Republican attorney general, part and parcel of the presidential wing of a putative New Right regime, told constitutional conservatives their core public law claim was wide of the mark.

For its part, the New Right made clear their frustration with Ford and his administrative appointees—they "have been female, black, Jewish or from the Harvard faculty. Ethnics, conservatives, and Wallace-ites have gotten nothing."[200] It might not be surprising, then, that Ford's lone Supreme Court appointee, John Paul Stevens, emerged as a liberal on the Court. In the 1940s, Stevens clerked for Justice Rutledge and encouraged his boss to take bold action as constitutional challenges to segregation reached the Court.[201] As a federal court of appeals judge, he viewed the Fourteenth Amendment's due process clause "as a source of substantive rights," long a sticking point for constitutional conservatives.[202] And another scholar's analysis revealed that *Judge* Stevens's "doctrinal positions" on unenumerated rights, gender discrimination, and election law were predictive of what Justice Stevens did when faced with those issues on the Court.[203]

In short, it is not clear that Nixon's and Ford's tenures mark a New Right regime. Setting aside that the New Right movement emerged after Nixon's resignation, the GOP in these years was deeply cleaved between Establishment Republicans and conservatives.[204] The Senate's bipartisan rejection of two of Nixon's nominees also drives home that a new regime—an entrenched governing vision—had not taken hold. By that same token, Nixon's and Ford's Court appointees ran from living constitutionalist (Blackmun and Stevens) to incrementalist (Powell). Burger, a betwixt-and-between conservative, would maneuver to keep himself in the Court's

[190] Laura Kalman, *The Long Reach of the 1960s: LBJ, Nixon, and the Making of the Contemporary Supreme Court* (New York: Oxford University Press, 2017), 187–88; *McDonald v. US*, 312 F.2d 847 (D.C. Cir. 1962).

[191] Kotlowski, "Trial by Error," 73.

[192] See "Warren Burger, RIP," *NR*, July 31, 1995, 17. The most revealing portrait of Burger as chief justice is Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon & Schuster, 1979).

[193] The Powell Memo is the famous 1971 memorandum he authored as a leading partner at Hunton & Williams for the head of the US Chamber of Commerce's Education Committee (i.e. for the Fortune 500 firms he often advised). One historian credits it with helping reawaken corporate America to Friedmanite capitalism. Kim Phillips-Fein, *Invisible Hands: The Businessmen's Crusade Against the New Deal* (New York: W. W. Norton, 2009), 156–93. However, when Powell invoked the "American economic system" (or the "free enterprise system"), he meant managerial capitalism—the country's largest firms. See Francis X. Sutton, *The American Business Creed* (Cambridge, MA: Harvard University Press, 1956); Mark Mizruchi, *The Fracturing of the American Corporate Elite* (Cambridge, MA: Harvard University Press, 2013), 144–57 (noting that at the time Fortune 500 firms were cleaved between a social responsibility orientation and the slow turn to shareholder value). The memorandum's overriding concern, under the heading "Sources of the Attack," was that the "most disquieting voices joining the chorus of criticism come from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians." Powell to Eugene Sydnor, August 23, 1971, 2–3, at http://www.reuters.com/investigates/special-report/assets/usa-courts-secrecy-lobbyist/powell-memo.pdf. The neoliberalism interpretation aside, the memorandum's valence does not clearly cut toward conservatism as opposed to the liberal Establishment fending off attacks from the New Left. More pre-nomination evidence cuts in favor of predicting Powell would be what he was on the bench: an incrementalist, indeed a liberal in high-profile cases. As a civic leader, Powell was able to fend off massive resistance in Richmond, Virginia post-*Brown*, and the schools stayed open (if not desegregated). See John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.: A Biography* (New York: Fordham University Press, 2001). He was also a thoroughgoing establishmentarian. Beyond Richmond and leading a white-shoe law firm, he was the president of a liberalizing ABA that endorsed federally funded legal services in 1965, and a leader in other national legal organizations. Ibid. Here, too, this was not conservatism as *conservatives* understood their worldview.

[194] Mark Tushnet, "Justice Lewis F. Powell and the Jurisprudence of Centrism," *Michigan Law Review* 93, no. 6 (1995): 1854–84.

[195] *Jackson v. Bishop*, 404F.2d 571, 579 (8th Cir. 1968). For more on Blackmun's liberalism as a federal court of appeals judge, see Linda Greenhouse, *Becoming Justice Blackmun* (New York: Times Books, 2005), 33–34.

[196] See Scott Kaufman, *Ambition, Pragmatism, and Party: A Political Biography of Gerald R. Ford* (Lawrence: University Press of Kansas, 2017); Richard Norton Smith, *An Ordinary Man: The Surprising Life and Historic Presidency of Gerald R. Ford* (New York: Harper, 2023).

[197] Address, April 6, 1975, Box 124, Folder Levi Speeches, Hutchinson Files, Ford Presidential Library (FPL). See Sawyer, "Principles and Politics in the New History of Originalism."

[198] Address, December 2, 1975, Box 124, Folder Levi Speeches, Hutchinson Files, FPL.

[199] Edward Levi, "An Introduction to Legal Reasoning," *University of Chicago Law Review* 15, no. 3 (1948): 501-75.

[200] "Ford's 'Base Broadening' No Way to Save GOP," *HE*, March 22, 1975, 1.

[201] Bill Barnhart and Gene Schlickman, *John Paul Stevens: An Independent Life* (DeKalb: Northern Illinois University Press, 2010), 69–72, 166–67.

[202] Christopher E. Smith, *John Paul Stevens: Defender of Rights in Criminal Justice* (Lanham, MD: Lexington, 2015), 13.

[203] Stefanie Lindquist, "Supreme Court Prequel: Justice Stevens on the Seventh Circuit," *Northwestern University Law Review* 106, no. 2 (2012): 715–42.

[204] See Geoffrey Kabaservice, *Rule and Ruin: The Downfall of Moderation and the Destruction of the Republican Party, From Eisenhower to the Tea Party* (New York: Oxford University Press, 2012); Laura Kalman, *Right Star Rising: A New Politics, 1974–1980* (New York: W.W. Norton, 2010).

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majority, and the lone constitutional conservative (Rehnquist) often found himself in dissent. Rather than a conservative Supreme Court, there was a steady pace of liberal constitutional rulings over the 1970s—for example, abortion rights, gender (sex) equality, constitutionalizing affirmative action, blessing disparate impact discrimination claims, expanding the scope of religious liberty for religious minorities, and further separating church and state.[205] This is further difficult to square with a posited New Right regime.

6. The Reagan regime and jurisprudential policy alliances

The Reagan regime is a most-likely case for regime theory. "If the case does not [conform to expectation], there is a basis for revising or rejecting the theory."[206] As regime theorists see it, President Reagan's 1980 election brought on a period of "conservative Republican hegemony," extending into Donald Trump's presidency, as Reagan reconstructed American politics.[207] But as highlighted at the outset and fleshed out below, a hegemonic regime and a thoroughly conservative Supreme Court are belied by the complexity of presidential, party, and judicial politics in 1980 and into the twenty-first century.

As a revolution, Reagan's was grounded more in myth-making (by both conservatives and liberals) than in significant institutional and policy accomplishments.[208] Conservatives complained in real political time that the revolution was far more rhetorical than substantive. Even before Reagan took office, New Right leaders were in revolt: "The Republican Party is a fraud. It's a social club where the rich people go to pick their noses."[209] Not simply the party apparatus, conservatives did not even have control over the White House, where Establishment Republicans like Chief of Staff James Baker kept their revolution in check.[210] When conservatives in the administration tried to implement colorblindness as the standard for bureaucratic and statutory public law (and thus for public and private employment), Establishment Republicans in the Cabinet allied with elite corporate managers to keep race- and gender-conscious affirmative action as the status quo.[211] Attempts to reorient the EPA, ATF, and Interior and Education departments toward conservatism met with minimal success.[212] Beyond the often overlooked data point that Reagan raised taxes four times, the welfare state *grew* over his two terms, and the public sector workforce grew.[213] Thus, in 1987, *National Review* complained with only some exaggeration that Reagan's purported revolution had amounted to little more than "managing the social revolution imposed by statists."[214] In short, if the Reagan years were marked by "conservative hegemony," conservatives failed to notice this control.

So, it should not be surprising that two of Reagan's four justices were Republicans rather than conservatives—and the two Republicans would routinely anger the latter, especially in the high-profile cases where the Court made policy on the cultural issues they most deeply cared about. Conservatives knew right away that Reagan's first nominee, Arizona state court judge Sandra Day O'Connor, "did not share Reagan's social values."[215] Before her confirmation hearings, over two dozen conservative interest groups sent the White House a telegram to voice their opposition to O'Connor.[216] *Conservative Digest* ran a critical cover story (the nomination was Reagan's "First Broken Promise"), and a North Carolina doctor saw "victory slipping away"—already by 1981, O'Connor's nomination was of a piece "with so many non-conservatives appointed to key positions."[217]

Conservatives grasped this because they vetted O'Connor's pre-confirmation record more thoroughly than the administration. The key to her incrementalist constitutional politics was not in her judicial opinions or published writing: she had written only thirty opinions (dealing with state law issues) and two nondescript law review articles.[218] But O'Connor had, enterprising conservative journalists and activists discovered, supported the Equal Rights Amendment, voted to authorize new administrative agencies as a state legislator, and keynoted an address to a liberal women's group.[219] Her confirmation hearing was also revealing. O'Connor testified that she "believe[d] in the exercise of judicial restraint," and would approach the interpretation of statutes on a "case-by-case basis"—that is, judicious incrementalism. Asked by Senator Orrin Hatch (R-UT) if she would follow precedent or "the intent of the framers of the Constitution," O'Connor agreed that historical understandings were "vitally important." Yet, invoking *Brown v. Board* and *Plessy v. Ferguson,* she noted that discovering the framers' intent was a "process that unfolds" over time.[220] In short, O'Connor revealed herself to be who she was on the Court, a

[205]See Vincent Blasi, ed., *The Burger Court: The Counter-Revolution that Wasn't* (New Haven: Yale University Press, 1983). No doubt, the Burger Court moved rightward—reviving capital punishment (after first ruling it unconstitutional); halting the further constitutionalization of welfare rights; and cabining school busing and school-finance remedies. But if the Burger Court was not as liberal as the Warren Court, one has to squint to see a *conservative* Court in these years (unless the measurement strategy is deviations from the Warren Court's baseline).

[206]Henry Brady and David Collier, eds, *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Lanham, MD: Rowman & Littlefield, 2010), 339.

[207]Balkin and Levinson, "Understanding the Constitutional Revolution," 1073; Peretti, *Partisan Supremacy*, 9–33.

[208]Skowronek noted this in regard to the limitations of Reagan's ability to reconstruct American politics. Skowronek, *The Politics Presidents Make*, 31–32, 414–29.

[209]Myra MacPherson, "The New Right Brigade," *Washington Post*, August 10, 1980, F2.

[210]See "Ronald Reagan Won the Election, Now He's Lost the White House," *Conservative Digest*, February 1982, 2–3.

[211]John A. Dearborn, "Contesting the Reach of the Rights Revolution: The Reagan Administration and the Unitary Executive," *Studies in American Political Development* 39, no. 1 (2025): 83–109; Hugh Davis Graham, "Civil Rights Policy," in *The Reagan Presidency: Pragmatic Conservatism and Its Legacies*, eds W. Elliott Brownlee and Hugh Davis Graham (Lawrence: University Press of Kansas, 2003), 283–92.

[212]Gareth Davies, *See Government Grow: Education Politics from Johnson to Reagan* (Lawrence: University Press of Kansas, 2007), 246–276; Jeffrey Stine, "Natural Resources and Environmental Policy," in *The Reagan Presidency: Pragmatic Conservatism and Its Legacies*, eds W. Elliott Brownlee and Hugh Davis Graham (Lawrence: University Press of Kansas, 2003), 233–56; James Skillen, *This Land Is My Land: Rebellion in the West* (New York: Oxford University Press, 2020); Wendy Martinek et al., "Jackboots or Lace Panties? The Bureau of Alcohol, Tobacco, and Firearms," in *The Changing Politics of Gun Control*, eds John Bruce and Clyde Wilcox (Lanham, MD: Rowman & Littlefield, 1998), 17–44.

[213]Davies, *See Government Grow*, 212; Judith Gueron and Edward Pauly, *From Welfare to Work* (New York: Russell Sage, 1991); Nelson Lichtenstein and Judith Stein, *A Fabulous Failure: The Clinton Presidency and the Transformation of American Capitalism* (Princeton: Princeton University Press, 2023), 257; Ruchir Sharma, *What Went Wrong with Capitalism* (New York: Simon & Schuster, 2024), 52.

[214]Lawrence Uzzell, "Running the Rights Scam at DOE," *NR*, March 13, 1987, 40–42.

[215]Flowers, "A Prolife Disaster," 399.

[216]Ibid.

[217]"O'Connor Choice Breaks Reagan Promise, Made in Haste and Harms Coalition," *Conservative Digest*, August 1981, 8; J. Clarke to Edwin Meese, July 8, 1981, WHORM Alpha File, Folder O'Connor [1 of 6], Ronald Reagan Presidential Library.

[218]Brooksley Landau to Strom Thurmond, September 8, 1981, Box OA 8254, Folder O'Connor (1), Quint Files, RRPL.

[219]Jay Menefee to Meese, September 4, 1981, WHORM Alpha File, Folder O'Connor [5 of 6]; Thurmond to Reagan, July 7, 1981, WHORM Alpha File, Folder O'Connor [1 of 6], RRPL.

[220]Nomination of Sandra Day O'Connor, Hearings Before the Senate Judiciary Committee, 97th Congress, 1st Session, September 9–11, 1981, 60, 84–86, 108.

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culturally moderate incrementalist who prized the paced development of public law.[221] Pointing up conservatives' lack of sway with Republican senators, O'Connor was confirmed 99-0.

Known quantities, Reagan's elevation of Justice Rehnquist to chief justice, alongside his nomination of federal appeals court judge Antonin Scalia, excited conservatives.[222] If Rehnquist was the first postwar constitutional conservative on the Court, Scalia was the second, as conservatives recognized prior to his nomination.[223] On the bench, Scalia became a jurisprudential and political champion of constitutional conservatives' institutional order, and he worked hard to popularize originalism for a broader audience.[224] Scalia would set the baseline for what conservatives expected in Supreme Court justices from every nomination afforded a Republican president.

Rehnquist and Scalia both confirm regime theory and a jurisprudential policy alliance approach. But both approaches struggle with the heterodox libertarianism of Justice Anthony Kennedy, if for different reasons.[225] Regime theory would expect Kennedy to be a thoroughgoing conservative.[226] Yet, that Kennedy, a little-known federal appeals court judge from Sacramento, was even nominated undercuts regime theorists' claims of conservative hegemony or a dominant national coalition 7 years after Reagan's election.[227] Reagan's first choice for the seat, Robert Bork, was rejected by a bipartisan alliance of moderate Republicans and Democrats because of his deep conservatism and open embrace of the Reagan administration's official constitutional philosophy: originalism.[228] Kennedy's libertarian jurisprudence—supportive of, for example, constitutional rights for both gay persons and gun owners—overlaps with both living constitutionalism and constitutional conservatism.[229] Little remarked upon, his confirmation hearings suggested that Kennedy might have been even more liberal than he turned out to be. The famously progressive Harvard law professor Laurence Tribe, after analyzing Kennedy's judicial decisions as a federal appeals court judge, testified that his opinions "demonstrate a genuine commitment to the idea of a living constitution."[230] Kennedy himself testified on his own behalf that there was "an unwritten Constitution," one that contained "additional commitments to liberty and freedom" that made the Constitution "a living reality."[231] Perceptive conservatives saw that Kennedy would be unpredictable: he had never been "a featured speaker at a Federalist Society convention." Nor did his judicial opinions suggest that he had been "repelled" by the Warren Court.[232] He was a Republican, but they were correct to worry that he would not be an across-the-board constitutional conservative. In sum, Kennedy was not a conservative on the bench (thus regime theory fails), but neither was he the consistent living constitutionalist his confirmation hearings suggested. If Kennedy did at times have a moral view of constitutional law, his overall record prevents coding him as a correct jurisprudential policy alliance approach prediction.

6.1. The Bushes and the Court's cultural liberalism

For regime theory, Vice President George H.W. Bush's 1988 election marks a seamless extension of conservative hegemony.[233] Yet, for conservatives, Bush's presidency was closer to Ford and Nixon's Republicanism. The list of Bush's heterodoxies was shorter than Nixon's and Ford's, but still too long: the Americans with Disabilities Act, the Civil Rights Act of 1991, enforcing the Community Reinvestment Act, education policy that was "liberal," taking the side (in conservatives' estimation) "of speeding drunk felon Rodney King," and weakness on gun rights.[234] Bush was also responsible for another round of "sage-brush rebellion" in the western United States because he nominated a moderate for the EPA.[235] When an aging neoconservative (Irving Kristol) had the temerity to argue that Bush was the leader of the conservative movement, it was fighting words. He was "*not* the leader," and anyone who "considers himself a member of the tribe" would know that.[236] By 1991, conservative annoyance had become anger. Bush had not merely "jettisoned" conservatives; he was now "dangerous to America and conservatives."[237]

Nevertheless, regime theory expectations are that Bush would appoint thoroughly conservative justices because he was the leader of the dominant national coalition.[238] Justice Clarence Thomas and his jurisprudence match theoretical expectations for both regime theory and a jurisprudential policy alliance approach.[239] Regime theory, however, must chalk up Justice David Souter's moderately liberal judicial politics—that is, his incrementalism

[221] Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (New York: Ecco, 2005).

[222] "Justice Scalia's Cheerleaders," *New York Times*, July 23, 1986, B6; James J. Kilpatrick, "Monster Rehnquist Finally Confirmed," *HE*, October 4, 1986, 8.

[223] Steven Teles, "Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment," *Studies in American Political Development* 23 (2009): 61–83.

[224] Richard Hasen, "Celebrity Justice: Supreme Court Edition," *Green Bag*, Winter 2016, 157–73.

[225] Kennedy points up the necessity of a clear measurement strategy. PPF scholarship conceives of him as conservative or heterodox depending on the context. See, e.g., Kahn and Kersch, "Introduction," and Thomas Keck, "From *Bakke* to *Grutter*: The Rise of Rights-Based Conservatism," in *The Supreme Court*, eds Kahn and Kersch, 1, 428–32. On the increasing importance of jurisprudential vetting in Republican nominations—ideological vetting, Federalist Society influence—see McMahon, *A Supreme Court Unlike Any Other*, 3–4.

[226] Balkin and Levinson, "Understanding the Constitutional Revolution," 1073; Peretti, *Partisan Supremacy*, 9–33.

[227] Regime theorists often note that Reagan was hemmed in by the Democratic majority in the Senate with regard to the Bork nomination. This is true, yet regime theory has no explanation for why Reagan, at the height of his powers and with a Republican Senate, picked an incrementalist in 1981 (O'Connor). If regime theory needs an opposition Senate to explain Kennedy, then the "regime"—the dominant national coalition—is not a relevant variable.

[228] Michael Kinsley, "Conservatives Have Their Own Brand of Judicial Activism," *Wall Street Journal*, August 8, 1985, 23. See United States Senate Committee on the Judiciary, Nomination Hearings of Robert H. Bork, September 1987, 103, 132–33, 155, 251–52, 264, 276–77.

[229] See *District of Columbia v. Heller*, 554 US 570 (2008); *Obergefell v. Hodges*, 576 US 644 (2015).

[230] Nomination of Anthony Kennedy, Senate Judiciary Committee, 100th Congress, December 16, 1987, 325. After Bork's defeat, Reagan nominated a right-libertarian federal appeals court judge, Douglas Ginsburg, whose nomination was derailed after reports that Ginsburg smoked marijuana while a professor at Harvard Law School.

[231] Ibid., 742.

[232] Maggie Gallagher, "Here Comes the Judge," *NR*, December 18, 1987, 33, 60.

[233] Peretti, *Partisan Supremacy*, 8–9.

[234] Llewellyn Rockwell, Jr., "Some Domestic Lowlights of the Bush Administration," *NR*, November 30, 1992, 38–39.

[235] "Bush Policies Re-Ignite Sagebrush Rebellion," *HE*, December 15, 1990, 3–4; Warren T. Brookes, "EPA's Reilly Continues His War on Private Property," *HE*, August 3, 1991, 11.

[236] "George Bush Is *Not* The Conservatives' Leader," *HE*, June 22, 1991, 1, 7 (emphases in original).

[237] "Where Do Conservatives Go From Here?", *HE*, February 23, 1991, 12–22.

[238] Peretti, *Partisan Supremacy*, 7–8.

[239] See, e.g., Clarence Thomas, "Toward a Plain Reading of the Constitution: The Declaration of Independence in Constitutional Interpretation," *Howard Law Journal* 30, no. 4 (1987): 983–95; Clarence Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!," *Yale Law & Policy Review* 5, no. 2 (1987): 402–12.

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(sometimes living constitutionalism)—as still another presidential "mistake."[240] Leading up to his confirmation hearings, conservatives were unsure of Souter's constitutional politics. Some ran with a dissent he wrote as a state court judge that seemed to indicate he was a "devoted believer" in originalism; others were more circumspect.[241] But as soon as they heard his testimony before the Judiciary Committee, conservatives' "worst fears" were verified.[242] The first indication that he would not be a constitutional conservative was this statement: "I believe that the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy." The Bill of Rights was "not simply" limited to "specific rights." It was also predictable that Souter would refuse to join the Rehnquist Court's "federalism revolution" of the 1990s. "The commerce power," Souter testified, "has grown" so expansive that it "would probably have astonished the Founders." As he saw it, the "authority given to the National Government through the 14th amendment, which again, was inconceivable to the Framers of the 10th [amendment]" counseled against reinvigorating states' rights.[243]

Regime theory emphasizes the Court's revival of federalism in the 1990s, highlighting it as a classic case of judicial enforcement of a regime's political commitments.[244] Empirically, however, this judicial revolution lacked punch—the lower federal courts did not use these opinions to constrain the federal government, nor did these decisions much excite conservatives.[245] At the same time, regime theorists often gloss over the justices' cultural liberalism in these years, even as the Court had seven to eight Republican justices in the 1990s.[246] As noted above, it is difficult to overstate the anger conservatives felt in the wake of *Casey* in June 1992. After "twelve years of making judicial appointments," they could not get *Roe* overturned: the "Reaganites must be called to account."[247] More ominously, some asked, "why are we duty-bound to obey this command of the Court."[248]

Regime theory, too, sits awkwardly with a GOP-dominated Court protecting gay persons from "animus" for the first time. In *Romer v. Evans* (1996), the justices ruled unconstitutional a state constitutional amendment that barred state and local governments from protecting gay persons against discrimination based on sexual orientation. As was recognized at the time by gay rights activists, *Romer* was "the most important victory ever for lesbian and gay rights."[249] Spurred by Justice Scalia's animated dissent, conservatives saw the decision as sending "a bone-chilling message." In addition to "weeping and praying," they argued that the "war for American culture has entered a new, climactic stage."[250] In other words, a Court stocked with Republicans was again betraying them. The Virginia Military Institute decision from that same year, ending the military college's male-only admissions policy, sealed it. After the VMI decision came down—and rather than reveling in a reinvigorated Tenth Amendment—conservatives saw a Court that "is (at best) one vote away from being an engine of radical left-wing social change."[251]

During the 1990s, then, conservatives fully appreciated that a Republican Supreme Court was far from sufficient to achieve their legal policy aims. Capturing the Court, and other key institutions, was going to "require a great deal more than politics as usual."[252] They now insisted that there be no more GOP Supreme Court nominees who did not have "an established commitment to the conservative legal movement."[253] This, too, was another aspect of originalism as a "political practice"—it served as a signal that a potential judge or justice was not simply a Republican, but a constitutional conservative first and foremost.[254] As the 2000 presidential election approached, a future George W. Bush-appointed court of appeals judge summed up their collective wish. Closing with "a prayer" at a Federalist Society meeting, William Pryor supplicated, "Please God, no more Souters."[255]

But there almost was another Souter. After President George W. Bush's reelection, Justice O'Connor, who had just saved affirmative action and extended protection for gay rights, announced her retirement.[256] To replace her, Bush nominated Harriet Miers, a former corporate attorney from Texas, then his White House counsel.[257] Even as Leonard Leo, on leave from the Federalist Society to serve as Bush's "point man" on the nomination, tried to reassure conservatives that Miers would not be another Souter, a wellspring of conservative resistance demanded that Bush replace O'Connor with a true believer.[258] On Fox News, Rush Limbaugh reminded conservatives, "[w]e're in a war politically," so it was necessary to be sure they were flipping O'Connor's incrementalist seat.[259] His hand forced by conservatives, Bush backed down and nominated a known quantity, Judge Samuel Alito. In short, even a president as conservative as Bush (and a largely conservative GOP) sits uncomfortably with regime theory's privileging of the party's "presidential wing." It is difficult to discern which Republican faction, wing, or group Bush was favoring by picking Miers before reversing course at conservatives' behest. Even at this

[240] Balkin and Levinson, "Understanding the Constitutional Revolution," 1069.

[241] "Conservative Legal Experts Impressed with Souter's Record," *HE*, August 4, 1990, 1, 17; Tinsley Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* (New York: Oxford University Press, 2005), 124.

[242] "Judge Souter Panders to Liberal Senators," *HE*, September 29, 1990, 1, 17.

[243] Nomination of David Souter, Senate Judiciary Committee, 101st Congress, September 13–19, 1990, 54, 55, 62.

[244] Cornell Clayton and J. Mitchell Pickerill, "Guess What Happened on the Way to Revolution? Precursors to the Supreme Court's Federalism Revolution," *Publius: The Journal of Federalism* 34, no. 3 (2004): 85–114; Balkin and Levinson, "Understanding the Constitutional Revolution," 1073.

[245] Brannon Denning and Glenn Reynolds, "Lower Court Readings of *Lopez*, or What if the Court Held a Constitutional Revolution and No One Came?", *Wisconsin Law Review* (2000): 369–402. Nor, outside a few libertarian law professors who wanted the Court to push *Lopez* further, were conservative elites much animated by these cases regime theorists hold up as epitomizing their framework.

[246] Clinton appointed Ruth Bader Ginsburg (1993) and Stephen Breyer (1994).

[247] Robert George, "The Moral Fragility of Constitutionalism," *First Things*, January 1993.

[248] Russell Hittinger, "When the Court Should Not Be Obeyed," *First Things*, October 1993.

[249] David Dunlap, "The Gay Rights Ruling in Colorado," *New York Times*, May 21, 1996, A21.

[250] "High Court Performs Arrogant Act of Judicial Tyranny," *HE*, May 31 & June 7, 1996, 1.

[251] Steven G. Calabresi, "Out of Order," *Policy Review*, September/October 1996, 14–22.

[252] "High Court Rips Constitution in Sweeping Ruling on VMI," *HE*, July 5, 1996, 1.

[253] John McGinnis, "Original Thomas, Conventional Souter," *Policy Review*, Fall 1995, 24–29.

[254] See Post and Siegel, "Originalism as a Political Practice."

[255] William Pryor Address, Federalist Society, July 11, 2000 at https://web.archive.org/web/20030803105145/http:/www.ago.state.al.us/speeches.cfm?Item=Single&Case=8.

[256] See *Grutter v. Bollinger*, 539 US 306 (2003); *Lawrence v. Texas*, 539 US 558 (2003).

[257] Bush first nominated Roberts to replace O'Connor, but when Rehnquist died in 2005, Bush renominated him for the center seat.

[258] Jeanne Cummings, "Point Man for Miers Juggles Allegiances," *Wall Street Journal*, October 26, 2005, A4.

[259] "Rush Limbaugh Reacts to Miers Nomination," Fox News, October 4, 2005, https://www.foxnews.com/transcript/rush-limbaugh-reacts-to-miers-nomination.

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late date of conservative capture of the Republican Party, the conservative jurisprudential policy alliance needed to exercise a veto over a same-party president's potential mistake.

7. Conclusion

The central aim of this paper is to offer the first sustained historical critique of regime theory from the New Deal to George W. Bush. Regime theory staked its claim on a historical orientation to better understand Supreme Court politics. Yet, regime theory often relied on, as Paul Frymer puts it, "political context" rather than sustained historical evidence.[260] Putting the framework's hypotheses to the test against archival and primary source materials reveals a significant gap between theory and empirics. As shown in Table 1, it is often difficult to line up post-New Deal presidential and party politics—the posited politics of the regime(s)—with same-party justices' constitutional policymaking. There are $N = 35$ confirmations from 1937 to 2006. A jurisprudential policy alliance approach correctly predicts the justices' behavior on the Court just over 85 percent of the time (30/35). By contrast, regime theory correctly predicts the justices' behavior less than half the time (16/35).

If FDR remade the Supreme Court, what, exactly, "New Deal liberalism" meant as a judicial philosophy was up to his justices to work out on their own rather than simply a reflection of regime politics. Reagan (and, following him, George H.W. Bush) tried to remake the Supreme Court but failed to sweep away the old regime because half of their justices rejected the new regime's theory of originalism. Beyond these two reconstructive presidents—presidents that are critical to the framework—regime theory in turn relies on a stylized history of presidential politics that sits awkwardly with the political records of Eisenhower, Stevenson, JFK, Nixon, and Ford.

Regime theory leveraged a theory of the politics presidents make (Skowronek's political time) and adapted it as one that could equally well account for the politics the Supreme Court makes—or, when that model failed to hold, downplay it in favor of a still more difficult to pin down "constitutional regime."[261] But this adaptation of presidential politics obscures the development of Supreme Court politics. Canvassing the historical materials further shows that the justices' politics, from the New Deal to George H.W. Bush, often fail to match theoretical expectations. Only in the 1990s, after polarization fully cleaved the parties ideologically, did Democratic and, finally, Republican presidents stop making "mistakes" when they nominated justices. That is, though regime theory claims to explain constitutional politics dating back to (at least) the New Deal, it is only since the Clinton–George W. Bush years that the justices' expected constitutional politics reliably align with its presidents-and-parties approach. But just when this aspect of regime theory began matching expectations, a dominant national coalition that these ideologically predictable justices could be connected to evaporated.

Ironically, regime theory as currently conceived is rather similar to quantitative approaches to judicial politics: coding (as such) a dichotomous and static liberal Democratic Party and conservative GOP from FDR forward and predicting that the justices would follow suit.[262] But the number of confirmations from FDR through Bush's nomination of Alito ($N = 35$) is tractable. APD scholars might use their comparative advantage—concept formation and leveraging archival and primary source materials—to disentangle a blunt conflation of party identification and ideology and refine our understanding of constitutional politics. If quantitative models of judicial voting behavior might puzzle over why certain justices "drifted" from their expected politics based on partisan identification, APD scholars can ask richer questions. What is more, that it was Republican justices—for example, Warren, Brennan, Blackmun, Stevens, O'Connor, Kennedy, Souter—who time and again "drifted" suggests that the conflation of Republicanism and conservatism is limited as a measurement strategy.

If the goal is to explain Supreme Court politics over time, this paper posits that we should place jurisprudential policy alliances and the institutional orders they embed on the Court at the center. Importantly, jurisprudential policy alliances developed outside of presidential and party politics according to their own public law logics. With adherents in both parties, jurisprudential policy alliances grew out of and alongside modern American ideologies—Progressivism-cum-liberalism and conservatism—that slowly and only later captured party politics.[263] So a jurisprudential policy alliances approach and measurement strategy focuses on the justices' constitutional and public law worldview while placing party identification on the back burner. A jurisprudential policy alliances approach is not infallible; some justices confound it. Its scope begins with the twentieth century, and it makes no claim on nineteenth-century constitutional politics—where regime theory may be at its strongest predictive power.[264]

With these caveats, for APD scholars, this paper strongly suggests that a jurisprudential policy alliance approach could form the conceptual base of a reinvigorated historical approach to Supreme Court politics. And by allowing for a third category or ideal type—incrementalism—the measurement strategy set forth above avoids having to retrofit incrementalists into a liberal-Democratic or conservative-Republican framework that runs up against their pre- and post-confirmation politics. Put differently, what the above suggests is that modern American constitutional politics developed via ideologically charged justices leading the way, tangential to party politics as such.[265] A willful living constitutionalism, aided by an incremental, moderate liberalism, was hegemonic across the partisan board from FDR to Reagan—from, that is, the New Deal Court to the Burger Court (save for Justice Rehnquist and perhaps Chief Justice Burger). The "conservative" justices from these years—for example, Felix Frankfurter, Byron White, Lewis Powell—were unrecognizable as such to conservatives, then or today. As highlighted by Alito's Justice Department application, constitutional conservatives viewed their enemy as anyone, whether Democratic or Republican, whether living constitutionalist or incrementalist, who did not subscribe to their understanding of public law. This was because, as they correctly predicted time and again, a Republican justice could not necessarily be counted on to make conservative policy on the Court. The problem with the Warren

[260] Frymer, "Law and American Political Development," 781.

[261] Balkin, *The Cycles of Constitutional Time*, 24–26.

[262] See Lee Epstein et al., "The Judicial Common Space," *Journal of Law, Economics, & Organization* 23, no. 2 (2007): 303–25; Lee Epstein, Andrew Martin, Kevin Quinn, and Jeffrey Segal, "Ideological Drift Among Supreme Court Justices: Who, When, and How Important," *Northwestern University Law Review* 101, no. 4 (2007): 1483–541.

[263] See Noel, *Political Ideologies and Political Parties in America*.

[264] See Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas"; Elinson, "Judicial Partisanship and the Slaughterhouse Cases."

[265] It is worth reinforcing that, rather than a claim limited to what is knocking around in the justices' heads, jurisprudential policy alliances are necessarily collectives of elite coalition merchants (legal academics, lower court judges and justices, interest groups, activist-attorneys, movement publications, and so on).

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and Burger Courts, and the issue with the Rehnquist Court's cultural liberalism in the 1990s, was not that their policymaking flowed from presidents and the party they led, but that too many justices from *both* parties were not conservative.

Reframing the inquiry along these lines underscores a number of questions that have not been or cannot be answered via extant approaches. Outside of presidents and parties, what were the institutions and ideas—that is, the developmental paths—that allowed legal liberalism to so thoroughly displace constitutional conservatism in the 1940s that the only intra-Court debate was over which form of judicial liberalism would mark constitutional politics? That is, instead of asking why the New Deal and Warren Court justices did not take a more progressive stance, we might mine their papers to better appreciate just how thoroughly legal liberalism had routed constitutional conservatism. Rather than forcing the relative liberalism of Justices Frankfurter, Harlan, and Clark into a conservative box, we might understand William Rehnquist as the first (constitutional) conservative to be placed on the Court in nearly half a century.[266] By that same token, rather than abrading the historical record to classify Eisenhower, his administration, and the justices he appointed as conservative or "mistakes," we might ask how these Republicans came to share the broad and deep consensus on a living, evolving Constitution.

Closer to today, if we take seriously that the Rehnquist Court's culturally liberal decisions in the 1990s and early 2000s—*Lee v. Weisman, Casey, Romer, VMI, Lawrence v. Texas,* and *Grutter v. Bollinger*—were the cases most important to conservatives, rather than assuming away that this was a time of conservative hegemony, what does this tell us about these *Republican* legal elites' continued ability to thwart the *conservative* legal movement and the Federalist Society's legal policy goals? And what might the collective constitutional politics of Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Ketanji Brown Jackson tell us about the development of living constitutionalism? That is, given the sense that the latter two are more outspokenly progressive than Clinton's nominees—something quantitative voting scores might have a hard time distinguishing—what might this tell us about not simply the Democratic Party but wider elements of the progressive legal movement? Extending that, as the elite legal academy and elite attorneys have moved further to the left, can they produce a Democratic Supreme Court justice with still more progressive politics—is there a potential Justice Brennan for the twenty-first century among Biden's lower court nominees?[267] And as the Court has morphed from a Republican supermajority to a *conservative* supermajority, what does the resurgence of natural law and "post-liberalism" tell us about the future of constitutional conservatism?[268] What might we be able to predict about the next evolution of constitutional conservatism?

These questions suggest that reconfiguring the regime theory framework is potentially generative for better understanding the past, present, and future of American political development. Presidents, parties, and senators of course must not be jettisoned, but the justices should be at the center, or at least closer to it. Finally, the hope is that this article spurs a collective effort of APD scholars to theory-build in this area—the jurisprudential policy alliances framework is my effort to begin that scholarly conversation. Whatever the framework going forward, the above lays bare the need for a methodologically, theoretically, and empirically richer understanding of American constitutional development.

Supplementary material. The supplementary material for this article can be found at https://doi.org/10.1017/S0898588X26100455.

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[266]Excluding (perhaps) James Byrnes, Pierce Butler (1922) was the last constitutional conservative to make it onto the Court before Rehnquist.

[267]Adam Bonica et al., "The Legal Academy's Ideological Uniformity," *Journal of Legal Studies* 47, no. 1 (2018): 1–43; Adam Bonica et al., "The Political Ideologies of American Lawyers," *Journal of Legal Analysis* 8, no. 2 (2016): 277–335.

[268]See Kersch, *Conservatives and the Constitution*. McMahon identifies this development as a Court "unlike any other in American history." McMahon, *A Supreme Court Unlike Any Other*, 2. This account emphasizes polarization and the counter-majoritarian Senate in the confirmation process. Ibid., 2–4.

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