CHAPTER 1

Judicial Review in the Puzzle of American Constitutionalism

The lionization of *Marbury v. Madison* as a triumph for the impartial rule of law sticks in the throat like a hair on a biscuit. In *Marbury*, the Supreme Court pronounced the power of judicial review—the authority to void laws inconsistent with the Constitution—and did so by striking down a statute that broadened the Court’s jurisdiction. At first blush, it might seem that a decision in which the justices’ purported fealty to the Constitution required them to act against their own self-interest would be a natural candidate to illustrate judicial independence and celebrate dispassionate legal reasoning. Yet when put in the historical context of 1803, uncritical praise for *Marbury* as an exemplar for apolitical constitutional decision-making is unjustified.

In his first month as chief justice of the United States, John Marshall continued in his prior role as Federalist John Adams’s secretary of state. Holding two jobs proved too much. Marshall failed to execute one of his last responsibilities as secretary of state, to deliver a judicial commission to a newly minted justice of the peace, William Marbury. Marbury was a “midnight judge” installed by the Federalists to pack the courts with political allies before the transfer of power to President-elect Thomas Jefferson and the Democratic-Republicans who ousted the Federalist majority in the Election of 1800.1 James Madison, Jefferson’s new secretary of state, refused to deliver the commission.2 Marbury applied to the Supreme Court directly for a writ of mandamus to command the commission’s delivery. Marbury relied on the Judiciary Act of 1789 for
the Court’s authority to issue the writ. After cobbling together a tortured reading of the law and the Constitution, the Federalist-controlled Supreme Court rejected Marbury’s petition, asserting that the act unconstitutionally enlarged the Court’s original jurisdiction.

Undeniably, *Marbury* was crafty judicial maneuvering. The Court avoided colliding with a political tidal wave that threatened the Supreme Court’s power. The justices forestalled dealing a blow to their co-partisan and hedged against the risk of issuing an order that the president, buoyed by another rout of the Federalists in the congressional elections of 1802 and 1803, might refuse to honor. And while *Marbury* is striking evidence of judicial acquiescence to emerging political orders, the decision tells only half the story. A few days after *Marbury*, the Supreme Court upheld the law repealing the Judiciary Act of 1801, one in a pair of court reform measures passed by the new Jeffersonian coalition in Congress that undid the Federalists’ 1801 court-packing scheme. The new Democratic-Republican majority ejected Federalist judges by abolishing the Federalists’ recently created circuit courts, cancelled a Supreme Court term, reinstated Supreme Court justices’ arduous traveling appellate-court duties known as “circuit riding,” and restored the Supreme Court’s full membership complement to six after Federalists shrunk it to five to preempt a Jefferson appointment. The reality of 1803 upends the myth of *Marbury*. Far from avoiding politics, the Supreme Court capitulated to the new political order to preserve institutional capital. This moment in early American history challenges notions that politics and constitutional law are severable.

Was *Marbury* an extraordinary event of personalities or a prologue to American constitutional law as politics by another name? Are courts special institutions where logic prevails and precedent controls, or are courts institutions captured by politicians in robes? For years, constitutional law professors have waxed poetic about the virtues of the Supreme Court as a countermajoritarian institution that defends minority rights. Some scholars have spilled considerable ink impugning judicial review as too muscular or as deviating from democratic processes when the Court invalidates the majority’s will. Regarding constitutional interpretation, some scholars argue that the Constitution has a discoverable, objective meaning driven by language, history, and tradition—often tightly controlled by the original authors’ understanding of the text. Meanwhile, many other constitutional scholars reject interpretive schools that are shackled to dead hands, championing a constitution whose meaning evolves through time.
What is the institutional role of federal courts and the nature of constitutional law? This book argues that constitutional law is best understood through the diachronic lens of American Political Development (APD) and the concept of political time. This book uses the lens of American Political Development to better understand the relationship between dominant political coalitions, social movements, and the evolution of constitutional law. American constitutional law reflects the ideological commitments of dominant political regimes and intervening popular movements. In the long run, the Constitution is a vessel that holds a meaning that is only as virtuous as the enfranchised public is good.

Dominant regimes are formed by transformative presidencies, creating a set of governing principles that remake the political order for decades. In this sense, constitutional doctrine is a distillation of partisan politics. Moreover, just as political priorities dramatically change between the breakdown of a coalition and the emergence of a new order, constitutional principles are often sloughed off as ideological commitments change from one dominant regime to another. Unlike traditional legal scholarship analyzing American constitutional law, this book is not juricentric. Rather than approaching constitutional law in a manner that views courts as guardians of the Constitution and the central players in jurisprudential development, this work understands federal courts and the law they produce to be in dialogue with many other political actors.

This book examines how cyclical politics translated into constitutional jurisprudence through the time period between 1824 and 2022. While the book will provide a brief glimpse into the transition from the first party system that emerged between 1800 and 1828 and the rise of Jacksonianism, it primarily begins in the 1820s to capture the period when durable party structures began to emerge in the United States.7

Every election disrupts the status quo, but some elections manifest a sharp break from long-standing, prevailing norms and endow an incoming coalition with a mandate to refashion notions of legitimacy, rearrange institutional relationships, and establish a set of dominant ideological principles that shape the polity for years. The elections of 1800, 1828, 1860, 1932, and 1980 all represent order-shattering events that ushered in new, decades-long ideological regimes. These elections followed tumultuous events that large segments of the voting public perceived as national betrayals. The preexisting political order’s inability to meet the exigencies of difficult periods in American history revealed that the regime was beyond repair. Political time is the measurement of these recurrent patterns.8
These periods between reconstruction and disjunction also align with trajectories in constitutional jurisprudence. Far from revealing a distinction between law and politics, a careful study of America’s ideological regimes shows a tight relationship between the governing visions established by regime politics and the course of constitutional doctrine. However, the relationship between the two is more complex than what simply holding the mirror of opinion polls up to American constitutionalism might reveal. The judiciary does not merely reflect public sentiment or democratic demands at any given time. Instead, this book proffers that constitutional law is the byproduct of regime principles, institutional relationships, and the time-sensitive ordering of policy developments that produce new politics, causing the dominant regime to innovate and evolve. Federal courts, which are the products of the regimes that make them, are not institutions on a path separate from the rest of the nation’s politics but have historically been and should normatively be governing partners that assist the regime in state building by articulating national values and disciplining outliers from the reigning order. The Supreme Court’s function is to discipline others in service of the reigning political order. However, when the Court strays too far from the political mores of the moment and becomes a serious impediment to the regime’s state-building ambitions, the Court will either capitulate or become a destabilizing force threatening the constitutional order.

**CONSTITUTIONALISM AND AMERICAN POLITICAL DEVELOPMENT**

American Political Development is the study of American politics through an exhaustive examination of political history. However, APD scholars do not seek to record history only to understand historical events and players. Instead, they want to explore history to identify patterns and processes of change. Instead of focusing on short-term, isolated questions about cause and effect, American Political Development inquiries tend to “trace[] institutional, ideological, and organizational patterns over long stretches of time” to avoid the biases that can emerge from studies of narrow, event-driven cause-and-effect relationships. Studying law, politics, and society with a bias toward events that are related in close temporal proximity provides a mere snapshot of how the American state works.

Students of APD construct time differently from the way historians and constitutional scholars have traditionally tended to. Historians, for exam-
ple, often identify moments that possess social, political, and cultural commonalities and organize periods like “the Era of Good Feelings,” “the Gilded Age,” or “the Progressive Era.” Similarly, legal academics often refer to changes in constitutional doctrine according to or make thematic assessments of constitutional law fixed to a chief justice’s tenure, like “the Warren Court” or “the Rehnquist Court.” Such approaches to constitutional law are minimally helpful in answering questions about the Supreme Court and turns in constitutional jurisprudence like:

• How could the Waite Court, which gutted civil rights protections in the Civil Rights Cases, rule in favor of Yick Wo’s race discrimination claim three years later?

• How could justices who championed the laissez-faire “Lochner era” strike down a law regulating bakery working conditions in Lochner v. New York, then uphold both mandatory vaccination mandates in Jacobson v. Massachusetts and milk dealer license requirements in Lieberman v. Van de Carr?

The world of APD approaches time and periodization somewhat differently. More than just trying to unearth the historical record, APD focuses on the conditions that usher in significant shifts in politics, with an emphasis on institutions, structures, and regimes, and then seeks to understand how political development moves through time rather than homing in on how political events unfolded in relatively isolated, one-off timeframes. Thus, APD focuses less on “secular time” (i.e., the chronological passing of time) and emphasizes “political time.” Political time measures ideological regimes between cyclical resets of the national zeitgeist’s trajectory.

Another cornerstone of APD scholarship is a focus on path dependency and the idea that the ordering of events is consequential. History matters. The sequence and spillover of policy choices matter because “policies produce politics.” APD scholars aspire to identify critical junctures in institutional and policy maturation that can help explain why later developments occurred and to offer insights into why some potential roads of institutional and policy evolution were left untraveled.

The methods and lenses that constitute the core of APD scholarship are ripe for application to the study of constitutional law and judicial institutions. While American Political Development richly covered ground in studying the presidency and the bureaucracy in the first two decades of its coming-of-age beginning in the mid-1980s, law and APD was a relatively less active subfield until the mid-2000s. Keith Whittington’s Political Foundations of Judicial Supremacy from 2007 is
inarguably the seminal book in the field exploring the American judiciary through national political development, and it taps into themes similar to those explored in this book. Whittington used a political regime framework to analyze how the courts and elected officials have worked to create and maintain judicial supremacy in the American system. In contrast, this book assesses political regimes’ ideological commitments and critical decision points to explore the causal mechanisms between the ballot box, social movements, political party development, and constitutional jurisprudence. Similarly, Jack Balkin’s 2020 book, *The Cycles of Constitutional Time*, also focuses on recurrent features in American politics to explain how the rise and fall of partisan coalitions, political polarization, and economic inequality contribute to constitutional dysfunction and shifting attitudes towards judicial review. Despite major works like Whittington’s and Balkin’s and despite American Political Development enjoying greater attention from political scientists in the past two decades, one scholar described Balkin’s book as “one of the first major attempts to apply [APD] to the judiciary, particularly the Supreme Court.” This book continues to fill that gap.

American Political Development research, in its most general terms, differs from the work of traditional historians in a number of important ways. It attempts to identify patterns and causal mechanisms that account for outcomes in American history, to identify significant events in history and assess their longer-term significance, and to provide an understanding of how historical patterns reemerge while simultaneously acknowledging that contingent effects can create nuanced differences between pattern iterations. Through this kind of analysis, APD scholars can identify pathways of development that can help explain political outcomes and structural changes to American politics and constitutionalism through time. In this sense, there is a deep relationship between historians and APD researchers who value rich historical data and political scientists who value identifying cause-and-effect relationships. Unlike historians, APD work is acutely focused on the timing and context of structural changes through long periods of time. Differing from many political scientists, APD scholars do not emphasize generalizable relationships between variables. This book shares many of the same goals of historians and political scientists who study the Supreme Court insofar as it labors to synthesize bodies of literature from historians, political scientists, and legal academics in addition to unique primary sources. However, rather than considering the Court as an institution standing alone, this work considers the Supreme Court’s
institutional behavior and the development of constitutional doctrine vis-à-vis the presidency and the ordering of partisan regime-building.

Ultimately, law and APD can help reveal the role of courts in the wake of transformative events that produce durable shifts in governing authority. Law and APD can canvass the relationship between the judiciary’s power and the coordinate branches. However, it can also tease out a better understanding of how courts participate in state building. And by focusing on history and institutions rather than the social and cultural dynamics of narrowly defined eras or individual members of the judiciary, law and APD scholarship can also help explain why cultural attitudes do not necessarily translate into constitutional change or how constitutional principles evolve in the wake of major economic challenges, political strife, social movements, and war—while also exploring how new, long-term governing principles emerge from these crises. For APD scholars, the ideas and values arising from national emergencies and national inflection points are of major consequence. These kinds of reformational ideas, which have multi-generational purchase power, can and should be treated as quasi-institutions unto themselves.

Because the Supreme Court’s institutional capacity more readily positions it to pump the brakes on public policy than to accelerate it, the Court has been cast by some observers as operating in a legal arena disjointed from the political branches and without a role as an active part of state building. This is a mistake. The Court has been a critical partner alongside the coordinate branches and regime-allied stakeholders in state building. This institutional playmaking is lost in legal scholarship that too often attempts to draw a distinction between law and politics by relying on reductive definitions of the latter. Under any accurate description of politics, the courts are necessarily political. Politics is more than the lowbrow business of individual policy fights; politics also includes the crosswinds of structural and social forces at work. Politics is much more than partisanship; politics are the core ideological commitments and the Overton windows that have shaped American political thought for decades in ways that mirror prevailing regimes. This book’s goal is to be neither deductive by assuming the existence of constitutional cycles nor an exercise of straight legal history that analyzes constitutional doctrine in secular time. Instead, this book aims to import American Political Development, with its dynamic understanding of politics in time, to shed light on the fact that Supreme Court is one of multiple important forces in shaping American political regimes.
POLITICAL AND CONSTITUTIONAL TIME

When legal academics bookend meaningful periods in judicial decision-making, the standard points of reference tend to be a collection of Supreme Court terms named after the presiding chief justice. While shorthand citations to the Warren Court or the Roberts Court might be a useful heuristic for identifying some jurisprudential themes, they obscure the decades-long continuity of ideological commitments in the American body politic. Instead, constitutional law develops in a distinct constitutional time, which is driven by the core tenets of the party systems that created them.

Ideological regimes begin with reconstructive moments and elections during which there are calls for fundamental changes to how American government operates and how public policy is thought of and advanced. Historically in American politics, these shifts coincide with the election of new, reconstructive presidents—Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, Ronald Reagan—who fashioned American politics to reflect their ideological vision. Reconstructive leaders emerge when the preexisting party system is weak and disassembling, allowing them to repudiate the dominant coalition and redefine the fundamental principles of national government. Reconstructive presidential leaders take advantage of the preceding partisan regime, which collapses on the weight of its own success. These disjunctive coalitions are vulnerable because the terms and conditions for governing laid out years before to address earlier political crises become threadbare and cannot meet contemporary emergencies and dilemmas.

This is not to say that oppositional parties or crosscurrent political movements never find electoral or policy success. Instead, when they do, opposition parties and countervailing social movements interrupt rather than disrupt the partisan regime by avoiding direct conflict with the prevailing regime through the politics of triangulation.

These periods of ideological dominance and coalitional durability are reflected in constitutional law. As Robert Dahl wrote, regular turnover at the Supreme Court allows new political regimes to appoint judges that render decisions consistent with the ideological preferences of the political branches. Thus, “the policy views dominant on the Court are never for long out of line with the policy views dominant among law-making majorities.”\(^\text{17}\) Therefore, according to Dahl, “it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices...
would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”

One of Dahl’s contemporaries, Robert McCloskey, offered additional evidence for Dahl’s view. First published in 1960, McCloskey’s *The American Supreme Court*, offered a treatment of Supreme Court jurisprudence showing how constitutional rules often reflected the mores of justices’ times. This book taps into parallel themes but applies political science methods to identify the causal mechanisms and recurrent patterns in institutional development and American constitutionalism.

A regime theory of the Supreme Court and American constitutionalism contrasts with the concept of the “countermajoritarian difficulty” proffered by Alexander Bickel’s 1962 book, *The Least Dangerous Branch*. In that highly influential work, Bickel suggested that judicial review was “deviant” with respect to democratic values because, when judges exercise judicial review, courts undo the majority’s will as expressed through a representative legislature. But one law professor’s “difficulty” was the virtue of others. Because Bickel was writing about a supposed countermajoritarian judicial disposition during the federal courts’ jurisprudential crusade against Jim Crow and racial discrimination, the term, repurposed to represent the courts’ role in protecting vulnerable minorities from the tyranny of the majority, became venerated in liberal legal circles. For decades, the legal academy took the proposition that courts acted as a countermajoritarian bulwark as received wisdom. As this book lays out, the constitutional displacement of segregation was made possible not by the majesty of judges acting out of principle and against popular will but by a constitutional order shaped by ideological commitments, majoritarian politics, and social movements.

More contemporary literature provides evidence of majoritarian constitutionalism like the regime thesis this book advances. Jeffery Rosen’s historical analysis of the Court concludes that “the Supreme Court has followed the public’s views about constitutional questions throughout its history.” Legal historian Michael Klarman surmised that the number of the Supreme Court’s countermajoritarian “interventions can best be described as marginal.” Barry Friedman masterfully traces the way the public mood influences constitutional decision-making. Other academics, like Gerald Rosenberg, have argued that courts are more apt to follow public opinion than act counter to it because courts lack the capacity to initiate social change. Even if it is assumed that Dahl and his contemporaries were correct, slower turnover rates on the Supreme Court sometimes render the Court sluggish to reflect changing social
and political moods. This trend notwithstanding, there is evidence that even without a steady turnover in Court membership, public opinion influences justices’ opinions. Whether by membership turnover or shifting preferences mirroring broader societal change, judicial review often sanctions the policy positions taken by the dominant coalition.

The following chapters will identify and explore the partisan regimes in American politics, beginning with the fall of the first party system and the rise of Jacksonian politics with the election of Andrew Jackson in 1828. Each chapter considers the core principles articulated by reconstructive leadership that animated the national government during each regime. From there, the chapters unearth the relationship between the regimes’ root philosophies and how that governing worldview underpins the constitutional jurisprudence of the era, thus drawing the connection between ordinary politics and a longer arc of constitutional development.