

THE OBAMA PRESIDENCY AND THE ROBERTS COURT: SOME HINTS FROM POLITICAL SCIENCE

POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY. By Keith E. Whittington.¹ Princeton: Princeton University Press, 2007. Pp. xii + 303. \$ 37.50.

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Every law student learns that judicial review is a counter-majoritarian institution. Why then do politicians put up with it?³ Robert Dahl's answer was that judicial review wasn't really countermajoritarian after all, as long as we pay attention to a national governing coalition that holds sustained power over a long enough time.⁴ Keith Whittington offers another answer: Politicians *like* judicial review. It gives them another instrument for advancing their policy agendas.⁵ Or, more precisely, politicians

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3. Law students also learn that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), hardly presented knock-down arguments for judicial review, that the Constitution provides several mechanisms that politicians could use to assert control (sometimes indirect, sometimes direct) over the judiciary, and that the only one politicians use to do so is the power to nominate and confirm sympathetic justices to the Supreme Court. What this amounts to is that politicians do indeed put up with judicial review.

4. Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). Writing in 1957, Dahl focused on governing coalitions that controlled Congress and the executive branch. When government is divided, as it was during most of the final quarter of the twentieth century, there is no majority for judicial review to counter, at least when political parties divide over issues subject to judicial review. (When they do, someone with significant political power is bound to like what the courts do.)

5. It also gives them a convenient punching bag—a target for cheap-talk criticism whereby criticizing the courts allows them to score points with some constituencies that dislike what the courts have done without actually doing anything about the underlying policies because, for example, actually doing something would annoy other constituencies the politicians care about, as Mark Graber argued in a major article that set out the

like judicial review for that reason often enough to make them quite wary of doing away with the mechanism on those occasions when it annoys them. This essay is more a set of reflections provoked by Whittington's analysis than a book review: After summarizing Whittington's account, I draw on Whittington's insights to offer my speculations about the future of judicial review under an Obama presidency. But, for those who want a bottom-line assessment, I offer my judgment that Whittington's work is one of a handful of works on constitutional history and theory written in the last decade that everyone interested in those subjects should read.

Focusing on presidential support for (and occasional opposition to) judicial review, Whittington relies heavily on the schema offered by Stephen Skowronek, who (oversimplifying) identifies two categories of what he calls political time and four general types of presidencies.⁶ Start with political time. Every year (in ordinary time) we can see a political order—a set of institutions and policy and ideological commitments—in place. After an initial period in which a political order or regime works to get its footing,⁷ a successful regime becomes resilient (to use Skowronek's term), sustaining itself over a reasonably long period.⁸ Presidents are routinely elected from only one of the major parties, for example, and even presidents from the other party who manage to scrape into office basically accept the resilient order's premises.⁹ Eventually, though, regimes decay. Their institutional innovations become routinized. Office-holders who at one point may have been enthusiastic promoters of the regime's constitutional vision become mere functionaries working a day job.¹⁰ The regime's policy agenda may get exhausted, with bad policies replacing the generically similar bold ones that gave the

line of analysis that Whittington develops. Mark Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. IN AM. POL. DEVEL.* 35 (1993). Note, though, that Whittington focuses on presidential choices, treating the president as the leader of a coalition with legislative support.

6. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

7. I should note that political scientists distinguish between political orders and political regimes in ways that may be helpful for their inquiries but that are in my view irrelevant to those of constitutional scholars. Whittington uses the term "regime."

8. Success is not guaranteed, of course, a point to which I will return.

9. Think here of Dwight Eisenhower and to some degree Richard Nixon, with respect to the New Deal/Great Society regime.

10. For my observations about this phenomenon in connection with the Reagan/conservative regime of the late twentieth century, see Mark Tushnet, *What Difference Do Ideas Make?*, 87 *TEX. L. REV.* 447 (2008) (reviewing STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008)).

regime its oomph. And the regime's ideological commitments may become stale or merely words that politicians mouth without really believing or acting on them. So, the second period of political time is one in which a previously robust regime becomes vulnerable.

Now, as to Presidents. *Reconstructive* presidents, to use Skowronek's term, initiate what become resilient regimes,¹¹ while *affiliated* ones attempt to perpetuate those regimes while simultaneously seeking to put their own stamp on the regime. Reconstructive presidents and, even more, affiliated ones engage in a politics of "articulation," setting out the regime's commitments and vision.¹² (Think here of Ronald Reagan as the reconstructive president followed by either of the Bushes as affiliated ones, or Franklin Roosevelt and any of his Democratic successors.) *Preemptive* presidents sometimes are elected while a regime is resilient and do their best to undermine it—make it vulnerable—but sometimes are elected as a regime is degenerating.

Whittington works out the implications of this schema for judicial supremacy with helpful case studies.¹³ Consider first reconstructive presidents. They are elected when the prior regime has degenerated to the point of exhaustion, and seek to initiate bold changes in institutions and constitutional visions. But even if they are elected and have substantial, even overwhelming, support in Congress, they are almost certain to face a judiciary skeptical of their initiatives. After all, the Justices in place will have been appointed during the prior regime and, as we will see, will have spent a fair amount of energy developing constitutional doctrines compatible with that regime's constitutional vision. As Whittington puts it, "the Court seeks to consolidate inherited constitutional understandings in the late stages of a declining regime" (p. 72), and will have "cement[ed] constitutional understandings at odds with those of the ascending administrations" (p. 73).

This is obviously a prescription for constitutional confrontation. A reconstructive president will come up with some innova-

11. For obvious reasons, reconstructive presidents are rare.

12. Again, for reasonably obvious reasons, the odds are against an affiliated president doing as good a job of articulation as a reconstructive one, but affiliated presidents have to try if they are to regard themselves, and are to be regarded by political elites, as people of substance.

13. His arguments are a bit too formulaic for my taste, but he does an extremely good job of showing readers the broad outlines of the political foundations of judicial supremacy, as the title of his book promises.

tion, which the old Court will believe cannot survive constitutional scrutiny according to the doctrines it has developed. It will cast constitutional shadows over the reconstructive president's proposals, sometimes to the point of invalidating policies central to the nascent regime. And the President will respond by challenging the Court, sometimes directly by proposing institutional changes in the practice of judicial review, and sometimes indirectly by asserting an independent "departmentalist" power to act on the president's own constitutional understandings in the face of a court's contrary understandings. The examples Whittington offers are mostly familiar, but are cast in a new light by his analysis: Franklin Roosevelt's Court-packing plan,¹⁴ and Abraham Lincoln's and Edwin Meese's challenge to the theory of judicial supremacy.¹⁵

Affiliated presidents face a different situation. The new constitutional regime is in place, and the affiliated president's job is to preserve and even extend the scope of its institutions and constitutional understandings as circumstances change. Here Dahl's analysis has its real bite. Affiliated presidents have allies, not enemies, in the courts, because the resilience of a new regime means that at some point old Justices are replaced by new ones appointed by reconstructive or affiliated presidents.

What can the courts do for a resilient regime? Presidents and Congress have limited time and political energy. They will spend them on what they regard as central issues. But at any time there will be "outliers"—geographic regions as yet uncommitted to the regime's constitutional understandings, or substantive areas that plainly require change if those understandings are to become deeply implanted in society, yet politically too touchy

14. Notably, Roosevelt's supporters described the Court-packing plan as part of a struggle against what they called the "old Court." The term has become standard, but the earliest use I have been able to track down is by Robert Jackson in a letter written in 1950. See Mark Tushnet, with Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1896 (1991) (quoting Jackson's letter). My guess is that Jackson had used the term earlier, probably in ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941), but a quick look at the book's preface and conclusion didn't turn up the term.

15. Presidents who *seek* to reconstruct the constitutional order may not succeed overall, and part of their failure may be that their challenges to the courts fall flat. I believe that the Reagan Revolution did achieve some changes in the constitutional order, though not as extensively as Reaganites had hoped. For my analysis, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (1999). It isn't clear to me that Skowronek's scheme handles this possibility well, but perhaps that's because failures of this sort are rare: After all, by hypothesis the prior regime has degenerated and, though it might stagger on for a while, eventually something new—a reconstructive presidency—will replace it.

or relatively unimportant to Congress. "For the affiliated leader, enhancing judicial authority to define and enforce constitutional meaning provides an efficient mechanism for supervising and correcting those who might fail to adhere to the politically preferred constitutional vision" (pp. 105-06). The courts can serve as a convenient but essentially administrative mechanism for bringing these outliers into the constitutional order.¹⁶

In addition, the courts may have rhetorical resources unavailable to presidents. Their obligation to explain their decisions, and the fact that they make decision after decision, means that they have an opportunity to develop a reasonably general account of the resilient regime's constitutional understandings. In Whittington's words, "It is the classic task of judges within the Anglo-American tradition . . . to render new decisions and lay down new rules that can be explicated as a mere working out of previously established legal principles" (p. 84). Presidents, in contrast, only sporadically make speeches illuminating those understandings.

More boldly, affiliated presidents may try to use the courts to "overcome[e] gridlock" (p. 124) caused by the strategic positions recalcitrant opponents of the new constitutional regime may occupy. And, if not "use the courts," at least rely on the courts to take the initiative, because "[t]he Court can sometimes move forward on the constitutional agenda where other political officials cannot" (p. 125). "[C]oalition leaders might be constrained by the needs of coalition maintenance," but "judges have a relatively free hand" (p. 125). This "use" of the courts, though, poses risks. The courts may push the regime's constitutional principles further and faster than is politically wise, and the regime's political leaders may find themselves on the defensive. Indeed, in this way the courts can contribute to making a resilient regime vulnerable, which may be part of the story about the Warren Court and the demise of the New Deal/Great Society regime.¹⁷

16. This is the central, and correct, argument in L. Scot Powe's account of the Warren Court. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000). Powe argues that the Warren Court took as its targets Southern race policies and scattered cultural policies at odds with the constitutional premises prevailing elsewhere in the political system.

17. "Part of" only, though. It would be a mistake to exaggerate how much a court can do to undermine a resilient regime. My guess is that the most likely story is that courts don't get the memo about a regime's vulnerabilities soon enough, and go on their merry way articulating and extending the regime's principles without realizing that they are sapping rather than enhancing the regime's power.

Preemptive presidents face a special strategic problem. Sometimes they take office because they manage to persuade the public that they remain committed to a resilient regime's constitutional vision even if in their hearts they want to transform the regime.¹⁸ At other times they take office as a regime becomes vulnerable, but do not themselves have the program, vision, or charisma to be reconstructive presidents themselves.¹⁹ They are likely to face opposition in Congress and to some degree in the courts. But they can turn divided government to their advantage by seeking judicial confirmation of executive prerogative. The judges in place might be sympathetic to such claims for doctrinal and political reasons. They will have "inherited from affiliated administrations" (p. 169) doctrines supporting executive authority. And, though Whittington doesn't make this point explicitly, they may see the preemptive president as an accident, soon to be replaced by an affiliated one whose exercises of presidential power they will want to endorse. Finally, preemptive presidents need to get their authority from somewhere when they face congressional opposition, as they will. They don't have much of their own, but they can try "to borrow from the authority of the courts in order to hold off their political adversaries" (p. 195).

One final point before I move to some speculations about the future of judicial supremacy. Whittington emphasizes the growth of judicial supremacy during the twentieth century, both in terms of the judges' self-understanding and, perhaps more importantly, in terms of the degree of political commitment to judicial supremacy (p. 25). He suggests that politicians have had increasingly strong reasons to support the Supreme Court. The reconstructive presidency of Ronald Reagan was less ambitious than that of Franklin Roosevelt (p. 232), assuring the American people that Reagan's policies would strengthen rather than destroy the social safety nets that Roosevelt and Lyndon Johnson's regimes had created. Even a reconstructive president could hope that the Supreme Court would assist in articulating regime principles in the way the Court ordinarily does for affiliated presidents. Further, drawing again on Skowronek's account of the

18. Again the protean figure of Richard Nixon comes to mind. He certainly presented himself as accepting the principles of modern liberalism and even as extending them to new domains such as the environment, and yet he also saw how Barry Goldwater's candidacy and Southern strategy presented opportunities to build a conservative Republican party that might displace the New Deal/Great Society regime.

19. I would describe Bill Clinton in those terms.

ways in which regimes leave a residue even after they have been displaced, Whittington describes the doctrinal thickening that occurred during the twentieth century with respect to essentially every possible ideological and political commitment a President could have (p. 283). Doctrinal thickening means that every member of a ruling coalition will have some basis in constitutional law for its assertions that the Constitution requires satisfaction of its policy preferences, *and* that the Court cannot possibly satisfy all the demands on it.²⁰ So, for the future, we might expect Presidents to have increasingly ambivalent views about the Supreme Court. In the twenty-first century, the Supreme Court will be useful and annoying to every President—useful because the Court can serve to articulate regime principles and can do some policy work that Presidents would rather not expend time and political capital on, and annoying because the Court's failure to satisfy all the demands emanating from a President's political supporters will put pressure on the President to do something about the Court.

I have merely sketched the schema that Whittington develops with much more nuance and detail, but even the sketch should convey the power of the analysis. Can it help us think about the Roberts Court and the Obama presidency?

Barack Obama appears to have the potential to be a reconstructive president. He ran as the candidate of change, the party controlling the presidency had been almost completely discredited, and Obama's party had gained control of Congress even before his election and his coattails expanded the Democratic party's congressional majorities. From Whittington's schema we might expect confrontations between the Obama administration and the federal courts. Building on foundations laid during the Rehnquist era, the Roberts Court might find that some "green energy" initiatives amounted to regulatory takings. Requiring that individuals purchase health insurance might be found to violate constitutionally protected interests in personal autonomy. More likely, some peripheral details in some Obama policy initiatives might bump up against Rehnquist-era constitutional doctrines.²¹

20. Think here of *Kelo v. City of New London*, 545 U.S. 469 (2005), and, more generally, of the limited nature of the Rehnquist Court's so-called takings and federalism revolutions. For my account of these matters, see MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005).

21. A strategic-minded Court might take on the Obama presidency only on the peripheries so that the Court could assert its *authority* to supervise policy on constitutional

The president might respond with challenges to the courts. We might see a new Court-packing plan.²² Or, noting the sharp reduction in the Court's merits-docket in the past decade, Congress and the president might reduce the Court's budget—for example, by cutting the number of law clerks each justice is authorized to hire. Or, drawing on proposals recently made on the Right, Congress might make the job of Supreme Court Justice less attractive in other ways, with the dual goals of encouraging Justices to retire and of lowering public esteem for the Court.²³ And, of course, the President and his surrogates could re-articulate departmentalist constitutional theories, asserting that the Supreme Court's views on constitutional issues are interesting and worthy of consideration but do not displace the independent judgments reached by the President and Congress. Assuming that the Obama presidency does become reconstructive, eventually the Supreme Court will give in, exhausted in the struggle or re-populated by new Justices in tune with the new constitutional regime.

The difficulty with this analysis, though, is that we live life forward but understand it only in retrospect.²⁴ As a candidate, Barack Obama spoke of change, and an astute and careful reader of his speeches might be able to extract a governing philosophy and constitutional vision from them. But, for now, we do not really know what that vision will turn out to be as events shape his presidency. Nor can we know what policy initiatives, if any, will provoke confrontations with the courts. The list could go on, but the central point is that we cannot know whether an Obama presidency will in fact be reconstructive.

How does a failed attempt at a reconstructive presidency fit into Whittington's and Skowronek's schema? It would seem that in retrospect they would see such a presidency as a preemptive

grounds, without going so far that the administration would respond forcefully.

22. I have noted occasional expressions in the Left-liberal blogosphere indicating that some there understand that the number nine is not written into the Constitution's description of the Supreme Court. Perhaps, though, the Court's size has been fixed by convention, or at least there may be a constitutional convention barring changes in the Court's size motivated (solely?) by a desire to alter outcomes as predicted by politicians.

23. See, e.g., David Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007); Nelson Lund & Craig S. Lerner, *Precedent Bound?*, NATIONAL REVIEW ONLINE, March 6, 2008, available at http://www.nationalreview.com/comment/lund_lerner200603060828.asp.

24. Or, in Kierkegaard's more precise formulation, "life can never really be understood in time simply because at no particular moment can I find the necessary resting-place from which to understand it backwards." 1 SÖREN KIERKEGAARD, JOURNALS AND PAPERS 450 (Howard V. Hong & Edna Hong eds., 1967).

one.²⁵ Yet that simply doesn't feel right, if only because no matter how badly an Obama presidency might go, the Reagan Republican revolution seems quite unlikely to start up again: It's going to be too difficult for Republicans to regain control of Congress within the relevant time frame.

This suggests that, however much Whittington's schema can help us understand constitutional history and theory and alert us to some things we might pay attention to during an Obama presidency, its predictive utility may be low.²⁶ Perhaps, as Skowronek and Whittington each suggest in their own ways, the possibilities of reconstructive presidencies have all but disappeared anyway. Judicial supremacy may have become so entrenched by now that no President would sensibly take it on, particularly if the courts blocked presidential policies only on the margins.²⁷ Skowronek ends his book expressing the hope that his categories might be made obsolete by political innovations introduced by creative Presidents who would be neither reconstructive nor preemptive. So, too, for the patterns of interaction between Presidents and courts. The Obama presidency may be as interesting for students of the courts as was the Reagan presidency.²⁸

25. Skowronek writes of a politics of "permanent preemption." SKOWRONEK, *supra* note 6, at 442.

26. In saying this, though, I must acknowledge Skowronek's stunning insight published in 1993, that Bill Clinton faced a real risk of impeachment. *See id.* at 444 (asserting that preemptive presidents face "the high risk of suffering the ultimate disgrace of impeachment"), 445 ("The threat of impeachment figures prominently in the politics of preemption"), 446 ("Clinton comes to the politics of preemption as a matter of course.").

27. It may be that an Obama-led Democratic party will change from the structure it had during the Reagan revolution as a coalition of interest groups, but the interest groups will remain important within even a transformed party. And some of those groups remain strongly committed to a vision of judicial supremacy shaped by their experience with the Warren Court and its immediate successor. I should add that some interest groups remain important even within the more ideologically coherent Republican party.

28. "Interesting" does not necessarily have positive connotations.