JUDICIAL PHILOSOPHY AND DECISION MAKING

JUSTICES DO NOT MAKE DECISIONS in a vacuum. Principles of *stare decisis* dictate that the justices follow the law of previous cases in deciding cases at hand. But, a variety of legal and extra-legal factors have also been found to affect Supreme Court decision making.

Judicial Philosophy, Original Intent, and Ideology

judicial restraint
A philosophy of judicial decision making that argues courts should allow the decisions of other branches of government to stand, even when they offend a judge's own sense of principles.

judicial activism
A philosophy of judicial decision making that argues judges should use their power broadly to further justice, especially in the areas of equality and personal liberty.

Legal scholars long have argued that judges decide cases based on the Constitution and their reading of various statutes. Determining what the Framers meant—if that is even possible today—often appears to be based on an individual jurist's philosophy.

One of the primary issues concerning judicial decision making focuses on what is called the activism/restraint debate. Advocates of **judicial restraint** argue that courts should allow the decisions of other branches to stand, even when they offend a judge's own sense of principles. Restraintists defend their position by asserting that the federal courts are composed of unelected judges, which makes the judicial branch the least democratic branch of government. Consequently, the courts should defer policy making to other branches of government as much as possible.

Restraintists refer to *Roe* v. *Wade* (1973), the case that liberalized abortion laws, as a classic example of **judicial activism** run amok. They maintain that the Court should have deferred policy making on this sensitive issue to the states or to the other branches of the federal government—the legislative and executive—because their officials are elected and therefore are more receptive to the majority's will.

Advocates of judicial restraint generally agree that judges should be strict constructionists; that is, they should interpret the Constitution as it was written and intended by the Framers. They argue that in determining the constitutionality of a statute or policy, the Court should rely on the explicit meanings of the clauses in the document, which can be clarified by looking at the intent of the Framers.

Advocates of judicial activism contend that judges should use their power broadly to further justice, especially in the areas of equality and personal liberty. Activists argue that it is the courts' appropriate role to correct injustices committed by the other branches of government. Explicit in this argument is the notion that courts need to protect oppressed minorities.[51]

Activists point to *Brown* v. *Board of Education* (1954) as an excellent example of the importance of judicial activism.[52] In *Brown*, the Supreme Court ruled that racial segregation in public schools violated the equal protection clause of the Fourteenth Amendment. Segregation nonetheless was practiced after passage of the Fourteenth Amendment. An activist would point out that if the Court had not reinterpreted pro-

visions of the amendment, many states probably would still have laws or policies mandating segregation in public schools.

Although judicial activists are often considered politically liberal and restraintists politically conservative, in recent years a new brand of conservative judicial activism has become prevalent. Unlike their liberal counterparts, whose activist decisions often expanded the rights of political and legal minorities, conservative activist judges view their positions as an opportunity to issue broad rulings that impose conservative political beliefs and policies on the country at large.

Some scholars argue that this increased conservative judicial activism has had an effect on the Court's reliance on *stare decisis* and adherence to precedent. Chief Justice William H. Rehnquist even noted that while "*stare decisis* is a cornerstone of our legal system . . . it has less power in constitutional cases."[53]

Models of Judicial Decision Making

Most political scientists who study what is called judicial behavior conclude that a variety of forces shape judicial decision making. Of late, many have attempted to explain how judges vote by integrating a variety of models to offer a more complete picture of how judges make decisions.[54] Many of those models attempt to take into account justices' individual behavioral characteristics and attitudes as well as the fact patterns of the case.

Behavioral Characteristics. Originally, some political scientists argued that social background differences, including childhood experiences, religious values, education, earlier political and legal careers, and political party loyalties, are likely to influence how a judge evaluates the facts and legal issues presented in any given case. Justice Harry A. Blackmun's service at the Mayo Clinic often is pointed to as a reason that his opinion for the Court in *Roe* v. *Wade* (1973) was grounded so thoroughly in medical evidence. Similarly, Justice Potter Stewart, who was generally considered a moderate on most civil liberties issues, usually took a more liberal position on cases dealing with freedom of the press. Why? It may be that Stewart's early job as a newspaper reporter made him more sensitive to these claims.

The Attitudinal Model. The attitudinal approach links judicial attitudes with decision making.[55] Simply stated, the attitudinal model holds that Supreme Court justices decide cases according to their personal preferences toward issues of public policy. Among some of the factors used to derive attitudes are a justice's party identification,[56] the party of the appointing president, and the liberal/conservative leanings of a justice.[57] For example, under the attitudinal model, a liberal justice appointed by a Democratic president would be more likely to decide an abortion case in favor of the pro-choice point of view. A conservative justice appointed by a Republican president, then, would most likely favor measures to support a free-market economy. Both justices would then manipulate the law to support these ideological beliefs.

The Strategic Model. Some scholars who study the courts now are advocating the belief that judges act strategically, meaning that they weigh and assess their actions against those of other justices to optimize the chances that their preferences will be adopted by the whole Court.[58] Moreover, this approach seeks to explain not only a justice's vote but also the range of forces such as congressional/judicial relations and judicial/executive relations that also affect the outcome of legal disputes.

Public Opinion. Many political scientists have examined the role of public opinion in Supreme Court decision making.[59] Not only do the justices read legal briefs and hear oral arguments, but they also read newspapers, watch television, and have some knowledge of public opinion—especially on controversial issues.

Whether or not public opinion actually influences some justices, public opinion can act as a check on the power of the courts as well as an energizing factor. Activist periods on the Supreme Court generally have corresponded to periods of social or economic crisis. For example, the Marshall Court supported a strong national government, much to the chagrin of a series of pro–states' rights Democratic-Republican presidents in the early crisis-ridden years of the republic. Similarly, the Court capitulated to political pressures and public opinion when, after 1936, it reversed many of its earlier decisions that had blocked President Franklin D. Roosevelt's New Deal legislation.

The courts, especially the Supreme Court, also can be the direct target of public opinion. When *Webster* v. *Reproductive Health Services* (1989) was about to come before the Supreme Court, the Court was subjected to unprecedented lobbying as groups and individuals on both sides of the abortion issue marched and sent appeals to the Court. Earlier, in the fall of 1988, Justice Harry A. Blackmun, author of *Roe* v. *Wade* (1973), had warned a law school audience that he feared the decision was in jeopardy.[60] This in itself was a highly unusual move; until recently, it was the practice of the justices never to comment publicly on cases or the Court.

Speeches such as Blackmun's put pro-choice advocates on guard. When the Court agreed to hear *Webster,* the pro-choice forces mounted one of the largest demonstrations in the history of the United States—more than 300,000 people marched from the Mall to the Capitol, just across the street from the Supreme Court. In addition, full-page advertisements appeared in prominent newspapers, and supporters of *Roe* v. *Wade* (1973) were urged to contact members of the Court to voice their support. Mail at the Court, which usually averaged about 1,000 pieces a day, rose to an astronomical 46,000 pieces per day, virtually paralyzing normal lines of communication.

The Court also is dependent on the public for its prestige as well as for compliance with its decisions. In times of war and other emergencies, for example, the Court frequently has decided cases in ways that commentators have attributed to the sway of public opinion and political exigencies. In *Korematsu* v. *U.S.* (1944), for example, the high Court upheld the obviously unconstitutional internment of Japanese American citizens during World War II.[61] Moreover, Chief Justice William H. Rehnquist himself once suggested that the Court's restriction on presidential authority in *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), which invalidated President Harry S Truman's seizure of the nation's steel mills,[62] was largely attributable to Truman's unpopularity and that of the Korean War.[63]

Public confidence in the Court, as with other institutions of government, has ebbed and flowed. Public support for the Court was highest after the Court issued *U.S.* v. *Nixon* (1974).[64] At a time when Americans lost faith in the presidency, they could at least look to the Supreme Court to do the right thing. Although the numbers of Americans with confidence in the courts has fluctuated over time, in 2004, 46 percent of those sampled by Gallup International had a "great deal" or "quite a bit" of confidence in the Supreme Court.[65]

The Supreme Court also appears to affect public opinion. Political scientists have found that the Court's initial rulings on controversial issues such as abortion or capital punishment positively influence public opinion in the direction of the Court's opinion. However, this research also finds that subsequent decisions have little effect.[66] As Table 10.8 reveals, the public and the Court often are in agreement on many controversial issues.

TABLE 10.8 The Supreme Court and the American Public

In recent years, the Court's rulings have agreed with or diverged from public opinion on various questions, such as:

Issue	*Case*	*Court Decision*	*Public Opinion*
Should homosexual relations between consenting adults be legal?	*Lawrence* v. *Texas* (2003)	Yes	Maybe (50%)
Should members of Congress be subject to term limits?	*U.S. Term Limits* v. *Thornton* (1995)	No	Yes (77% favor)
Is affirmative action constitutional?	*Grutter* v. *Bollinger* (2003) *Gratz* v. *Bollinger* (2003)	Yes	Yes (64%)
Before getting an abortion, whose consent should a teenager be required to gain?	*Williams* v. *Zbaraz* (1980)	One parent	Both parents (38%) One parent (37%) Neither parent (22%)
Is the death penalty constitutional?	*Gregg* v. *Georgia* (1976)	Yes	Yes (72% favor)

Source: Table compiled from R-Poll, LEXIS-NEXIS.