The Supreme Court

And Its Political Role
The Shroud of Mystery

The distinctive stripes on chief Justice Rehnquist’s robe which he wore during the impeachment trial of Clinton was modeled on costume of the British Lord Chancellor from a theatre production Rehnquist saw in 1995.

While they may convey an aura of gravitas, they are really mere theatrics.
There is a sense of mystery surrounding the Supreme Court that starts with the robes and spreads through the secrecy that imbues most of its proceedings.

The robes provide also convey a sense that the justices are the transmitters of truth rather than mere mortals with personal opinions and biases.
The Court’s Insulation from the Public

- Life-time appointments.
- Anonymity.
  - No television allowed during oral arguments.
  - Few Interviews given.

The Supreme Court is clearly the least democratic and most insulated of our three branches. They are non-elected, serve for life and have little accountability to the public. Ironically, however, the court has often been the nation’s greatest protector of those with traditionally little political voice.
What the Courts Do

• Interpret laws, including the basic law of the land: The Constitution
  – Thus, might declare a legislative law unconstitutional.

• Courts, however, are passive, meaning they can not initiate action:
  “real cases, real people”

• The Supreme Court chooses which cases to hear and typically picks ones they think involve fundamental Constitutional rights.
The Courts and the American People

The following slides illustrate some of the ways the Supreme Court has deeply affect the lives of millions of ordinary citizens.
The Court’s Impact On American Life

Some Key SC Decisions

• 1857  Said slaves are property with no rights.

• 1896  Said “separate but equal” for Blacks and Whites are constitutional.

• 1876  Said corporations are citizens, and have the same rights.

• 1919  Said freedom of speech could be curtailed if it created a “clear and present danger”.

Despite its undemocratic nature and the relative obscurity of the justices themselves, the court has had a tremendous impact on American life as court decisions indicates this and the following slides indicate.
The Court’s Impact On American Life

Some Key SC Decisions

• 1944  Said it was okay to put Japanese in Internment camps throughout the course of WWII.

• 1954  Reversed itself and said separate school are inherently unequal

• 1963  Said you have a constitution right right to counsel

• 1966  Said you must be read your rights when you are arrested
The Court’s Impact On American Life

Some Key SC Decisions

• 1971  Said schools must bus students across town to achieve integration.

• 1970  Said women have a right to an abortion.

• 1976  Overturned some campaign contribution limits claiming “money talks”.

• 1978  Overturned some forms of Affirmative Action.
The Court’s Impact On American Life

Some Key SC Decisions

• 1990  Overturned a law making it a crime to burn the flag.

• 1995  Overturned a federal ban on guns near schools.

• 1996  Overturned a constitutional amendment in Colorado which had banned gay rights legislation in the state.
The Court’s Impact On American Life

Some Key SC Decisions

• 2000  Forbid student led prayers at football games and graduation.


• 2007  Upheld Federal Ban on Partial Birth Abortion.
Where did the Court Get its Immense Power to Shape Governmental Policy?
Article III

• Short and vague.
• “Congress may establish other courts “as it sees fit”.
• Number of justices not established
• No mention of judicial review.

The Constitution says very little about the Supreme Court. The entire section on the judiciary is only about 3/4 of a page.
Two Major Issues

• Judicial Review
  – Refers to the power of the court to declare laws unconstitutional. Not mentioned in the Const.
  – Why should 9 old men overrule Congress in all its wisdom? Not

• Judicial Activism
  – Refers to the courts making public policy rather than strictly interpreting law.
  - Why should the Court set policy? Some argue for “judicial restraint.”
Judicial Review

• Refers to the power of the S.C. to declare federal and/or state laws unconstitutional.
  i.e. - U.S. vs. Lopez (1995)
  overturned the Gun Free Zones Act

• Not mentioned in the Constitution.

If the Constitution does not say the Court can rule laws unconstitutional, you should wonder how the court got this immense power?
The idea of precedent (also known as common law) is not mentioned in the Constitution but was simply borrowed from the English system of law where it had been long used. The idea is that courts should try to interpret the law in ways consistent with previous court decisions in similar cases.
The Precedent of Marbury vs. Madison (1803)

Marbury v. Madison is an extraordinary court case that gave birth to the court’s power of judicial review. During the court’s first 15 years of existence, it had little power and justices often quit out of a sense of boredom and lack of purpose. Chief Justice John Marshall changed all of that when in ruling against his friend Marbury, he declared an obscure law related to the case unconstitutional. Marbury who had been appointed to be a federal judge by the previous president and confirmed by the Senate had sued Secretary of State James Madison for refusing to the sign papers which would have made his appointment official. Madison had no justification for this, but did not want Marbury on the bench because he was from the Federalist Party. Though Madison and the new president, Jefferson the did not endorse the idea of judicial review, they were happy to see Marbury lose his case. Thus, they may have not realized the power the court had just handed itself. The ruling stood, and thus became a precedent for the court’s right to declare laws unconstitutional (judicial review.)
Judicial Review

As judicial review has no direct basis in the constitution and is simply based on precedent, some legal conservatives say such as the Dean of Stanford’s School of Law, Larry Kramer say it should be done away with despite it long tradition.
Judicial Activism

A term used to describe policy making by judges.

Examples:

Swann vs. Board of Education:
*Required busing for integration*

Miranda v. Arizona:
*Police must read you your rights.*

Roe v. Wade:
*Women have a right to an abortion.*

Declaring a law unconstitutional is generally considered activist, yet judicial activism is not confined to judicial review. The above examples do not involve declaring any laws unconstitutional but are considered activist because the decisions seemed to go beyond simply interpreting the Constitution or did so in such a broad manner that it is hard for some to see the connection. In some ways the court seems to have created new rights. The Constitution for example says nothing about abortion nor about a right to have your rights read to you.

The first two of the the cases above are also considered activist because they not only identified an unjust situation (segregations in the Swann case) but also came up with the solution (busing). Those who argue for judicial restraint would say that the court should have left it up to the legislature to determine how to solve the problem of segregation.
Adjudication vs. Legislation
How judiciaries differ from legislatures.

• The “passive” nature of the courts.

• The difference between “making law” and “interpreting the law”.

Courts are supposed to interpret the law, not make the law - but sometimes the distinction can become hazy. When the courts said women have a right to an abortion, did they “discover” a right implied by the Constitution, or did they simply create a new right? It is hard to say.

The notion of adjudication also differs from legislation in that law makers have every right (and obligation) to fight for what they personally want and support. Judges on the other hand are supposed to put their personal beliefs aside and simply determine what the law itself implies. Whether a judge if personally thinks abortion is moral or not should be irrelevant (in theory). The judge should neutrally needs to decide if they agree with past rulings that the Constitution implies a right of privacy and then whether this right extends to abortion.
Adjudication vs. Legislation

My fundamental commitment, if I am confirmed, will be to totally disregard my own personal belief.

William Rehnquist

This quote captures the spirit of how what judges do is different from what legislators do. We would never expect Nancy Pelosi to disregard her personal belief when fighting for legislation.
Over the last four or five decades conservatives have been upset with what they consider activist courts. They say the courts have gone beyond their proper duty and have simply invented new rights. They implored the courts to take a more restrained approach and rely on the idea of “original intent” to guide them. Original intent involves trying to determine what our founders intended when they wrote the Constitution rather than applying modern standards to the Constitution. In other words, if the founders did not intend gays to have the right to marry, then there can be no constitutional right.
Adjudication vs. Legislation

Since the Constitution of the United States says nothing about this subject [homosexuality], it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions.

Scalia’s dissent on ruling overturning Amendment 2

Here, Scalia says the court has no business making a ruling for or against gay marriage because the Constitution does not discuss it. It is therefore up to legislatures to either allow it or forbid it.
Adjudication vs. Legislation

- Conservatives
  - Legal Conservatives: Argue for judicial restraint.
  - Social conservatives: May want to use court for conservative social ends, and thus support an activist court.

- Liberals
  - With a socially conservative court will liberals begin to argue more for judicial restraint?

However, legal conservatives are sometimes at odds with social or religious conservatives. Now that we have a somewhat more conservative court, some conservatives now want a more activist court that would overturn abortion laws, prevent gay marriage, overturn environmental legislation, and stop racially based school assignments.

Not surprisingly, some liberals are doing a similar about face as well and now see the virtues of judicial restraint. Otherwise, they may witness 40 years of liberal court rulings come undone.
Switching Roles?

This cartoon makes fun of the new conservative majority of the court ruling that free speech does not apply to a student with a sign at a school sponsored event that said “Bong Hits for Jesus”.

Acrimony and the Confirmation Process

Politics and the Court Today
(The Court’s Shifting Balance)
Acrimony and the Confirmation Process

- Bork (1987)

Much of today’s bitter division in Congress between the parties can be tied to the acrimony that has developed over the confirmation process. Traditionally, presidents picked who they wanted on the Supreme Court (when a vacancy opened) and the Senate confirmed them unless they were seen to be grossly unfit.

This deference to presidential prerogative began to change when Ronald Reagan nominated Robert Bork, who was well qualified in terms of experience, but so ideologically conservative that Democrats could not bear to confirm him.
Acrimony and the Confirmation Process

"We are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.”

Robert Bork

(arguing against the activist decisions of the Warren Court during is confirmation hearings)

Democrats feared that Bork would work to undo affirmative action, busing, the right to an abortion, and the defendant rights that had all been hallmarks of the Court in the previous decades.
Acrimony and the Confirmation Process

"Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government."

Ted Kennedy on Bork

Kennedy’s quote captures the bitterness of the debate.

Reagan was eventually forced to withdraw Bork’s nomination, leaving the Republicans feeling wounded and angry.
Round two of the confirmation wars came when George H. Bush nominated Clarence Thomas, who though an African American, was almost as conservative as Bork. Since he would become the first African American on the court it would be a little more risky and difficult for Democrats to come out strongly against him.

It looked like he would be easily confirmed until a former assistant of his, Anita Hill, testified that Thomas had sexually harassed her in quite obscene ways while she worked for him.
Acrimony and the Confirmation Process

“...as far as I'm concerned, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the US Senate rather than hung from a tree.”

Thomas responding to Anita Hill’s Allegations

Bork lashed out at the accusations and was eventually confirmed by the Republican majority in the Senate.
Acrimony and the Confirmation Process

- Bork (1987)
- Thomas (1991)
- Clinton’s Appellate Judges (1992-2000)
- Meirs (2005)
- Alito and Roberts (2006)

Battles wage on. During the Clinton years, Republicans retaliated against Democrats who had held up a number of Bush’s nominations for the lower courts by in turn refusing to confirm dozens of Clinton’s appointees which left a large number of vacancies of the courts creating a huge backlog in federal cases.

In 2005, Bush nominated Harriet Meirs, a personal friend of the president and a devout Christian conservative; yet, someone who was seen by most of the legal profession as grossly under qualified. After much flack from Democrats, the press, and even many Republicans, Bush eventually withdrew the nomination and appointed Samuel Alito and later John Roberts to the Court.
Thus, during the Bush administration the Court has gone through an important transition as Chief Justice Rehnquist and moderate Sandra Day O’Connor stepped down are were replaced by .....
….two conservatives, Alito and Roberts.
As you can see from this chart, O’Connor was a swing vote in the middle.
Ideology on the Court

<table>
<thead>
<tr>
<th>Justice</th>
<th>Liberal Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevens</td>
<td>64.2</td>
</tr>
<tr>
<td>Souter</td>
<td>60.2</td>
</tr>
<tr>
<td>Ginsberg</td>
<td>60.2</td>
</tr>
<tr>
<td>Breyer</td>
<td>57.9</td>
</tr>
<tr>
<td>Kennedy</td>
<td>39.2</td>
</tr>
<tr>
<td>Alito</td>
<td>???</td>
</tr>
<tr>
<td>Roberts</td>
<td>???</td>
</tr>
<tr>
<td>Thomas</td>
<td>30.7</td>
</tr>
<tr>
<td>Scalia</td>
<td>27.3</td>
</tr>
</tbody>
</table>

Source: Lawrence Baum

Now the more conservative Kennedy (no relation to liberal senator Ted) is the swing vote.
So far Kennedy has side more often with the conservatives.

Despite some conservative decisions it seems the chief Justice Roberts is trying to fashion the court along traditionally conservative lines - that is one that generally supports judicial restraint. It is not clear that he will lead the court to any major overturning of Roe v. Wade for example.

Just remember, love is temporary, judges are for life.
Are Original Intent and Judicial Restraint Always Compatible?

Narrowing of the Commerce Clause:
  - gun control
  - environmental regulation

reversing the trend from McColluch vs. Maryland