External Factors

In addition to internal bargaining, strategic approaches (as well as others) take account of political pressures that come from outside the Court. We consider three sources of such influence: public opinion, partisan politics, and interest groups. While reading about these sources of influence, keep in mind that one of the fundamental differences between the Supreme Court and the political branches is the lack of a direct electoral connection between the justices and the public. Once appointed, justices may serve for life. They are not accountable to the public and are not required to undergo any periodic reevaluation of their decisions. So why would they let the stuff of ordinary partisan politics, such as public opinion and interest groups, influence their opinions?

Public Opinion. To address this question, let us first look at public opinion as a source of influence on the Court. We know that the president and members of Congress are always trying to find out what the people are thinking. Conducting and analyzing public opinion polls is a never-ending task, and those who commission the polls have a good reason for this activity: the political branches are supposed to represent the people, and incumbents’ can jeopardize their reelection prospects by straying too far from what the public
wants. But federal judges—including Supreme Court justices—are not dependent on pleasing the public to stay in office, and they do not serve in the same kind of representative capacity that legislators do.

Does that mean that the justices are not affected by public opinion? Some scholars assert that they are and offer three reasons for this claim. First, because justices are political appointees, nominated and approved by popularly elected officials, it is logical that they should reflect, however subtly, the views of the majority. It is probably true that an individual radically out of step with either the president or the Senate would not be nominated, much less confirmed. Second, the Court, at least occasionally, views public opinion as a legitimate guide for decisions. It has even gone so far as to incorporate that consideration into some of its jurisprudential standards. For example, in evaluating whether certain kinds of punishments violate the Eighth Amendment’s prohibition against cruel and unusual punishment, the Court proclaimed that it would look toward “evolving standards of decency,” as defined by public sentiment.

The third reason relates to the Court as an institution. Put simply, the justices have no mechanism for enforcing their decisions. Instead, they depend on other political officials to support their positions and on general public compliance, especially when controversial Court opinions have ramifications beyond the particular concerns of the parties to the suits.

Certainly, we can think of cases in which the Court seems to have embraced public opinion, especially under conditions of extreme national stress. One such case occurred during World War II. In Korematsu v. United States (1944) the justices endorsed the government’s program to remove all Japanese Americans from the Pacific Coast states and relocate them to inland detention centers. It seems clear that the justices were swept up in the same wartime apprehensions as the rest of the nation. But it is equally easy to summon examples of the Court handing down rulings that fly in the face of what the public wants. The most obvious examples occurred after Franklin Roosevelt’s 1932 election to the presidency. By choosing Roosevelt and a Democratic majority in Congress, the voters sent a clear signal that they wanted the government to take vigorous action to end the Great Depression. The president and Congress responded with many laws—the so-called New Deal legislation—but the Court remained unmoved by the public’s endorsement of Roosevelt and his legislation. In case after case, at least until 1937, the justices struck down many of the laws and administrative programs designed to get the nation’s economy moving again.

And, in fact, some scholars remain unconvinced of the role of public opinion in Court decision making. After systematically analyzing the data, Helmut Norpoth and Jeffrey A. Segal conclude, “Does public opinion influence Supreme Court decisions? If the model of influence is of the sort where the justices set aside their own [ideological] preferences and abide by what they divine as the vox populi, our answer is a resounding no.” What Norpoth and Segal find instead is that Court appointments made by Richard Nixon in the early 1970s caused a “sizable ideological shift” in the direction of Court decisions (see figure 1-5). The entry of conservative justices created the illusion that the Court was echoing public opinion, and not that sitting justices modified their voting patterns to conform to the changing views of the public.

This finding reinforces yet another criticism of this approach: that public opinion affects the Court only indirectly through presidential appointments, not through the justices’ reading of public opinion polls. This distinction is important, for if justices were truly influenced by the public, their decisions would change with the ebb and flow of opinion. But if they merely share their appointing president’s ideology, which must mirror the majority of the citizens at the time of the president’s election, their decisions will remain constant over time. They would not fluctuate, as public opinion often does.

The question of whether public opinion affects Supreme Court decision making is still open for discussion, as illustrated by a recent article, “Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why).” The authors find that when the


“mood” is liberal (or conservative), the Court is significantly more likely to issue liberal (or conservative) decisions. But why that is so, as the article’s title suggests, is anyone’s guess. It could be that the justices bend to the will of the people because the Court requires public support to remain an efficacious branch of government. Or it could be that “the people” include the justices. The justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinions of other members of the public. In 1921 Justice Benjamin Cardozo wrote, “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by.”

**Partisan Politics.** Public opinion may not be the only political factor that allegedly influences the justices. As Jonathan Casper wrote, we cannot overestimate “the importance of the political context in which the Court does its work.” In his view, the statement that the Court follows the election returns “recognizes that the choices the Court makes are related to developments in the broader political system.” In other words, the political environment has an effect on Court behavior. In fact, many assert that the Court is responsive to the influence of partisan politics, both internally and externally.

On the inner workings of the Court, social scientists long have argued that political creatures inhabit the Court, that justices are not simply neutral arbiters of the law. Since 1789, the beginning of constitutional government in the United States, those who have ascended to the bench have come from the political institutions of government or, at the very least, have affiliated with particular political parties. Judicial scholars recognize that justices bring with them the philosophies of those partisan attachments. Just as the members of the present Court tend to reflect the views of the Republican Party or the Democratic Party, so too did the justices who came from the ranks of the Federalists and Jeffersonians. As one might expect, justices who affiliate with the Democratic Party tend to be more liberal in their decision making than those who are Republicans. Some commentators say that Bush v. Gore (2000), in which the Supreme Court issued a ruling that virtually ensured that George W. Bush would become president, provides an example (see chapter 4). In that case, five of the Court’s seven Republican appointees “voted” for Bush, while its two Democrats “voted” for Gore.

Political pressures from the outside also can affect the Court. Although the justices have no electoral connection or mandate of responsiveness, the other institutions of government have some influence on judicial behavior, and, naturally, the direction of that influence reflects the partisan composition of those branches. The Court has always had a complex relationship with the president, a relationship that provides the president with several possible ways to influence judicial decisions. The president has some direct links with the Court, including (1) the power to nominate justices and shape the Court; (2) personal relationships with sitting justices, such as Franklin Roosevelt’s with James Byrnes, Lyndon Johnson’s with Abe Fortas, and Richard Nixon’s with Warren Burger; and (3) the notion that the president, having been elected within the previous four years, may carry a popular mandate, reflecting citizens’ preferences, which would affect the environment within which the Court operates.

A less direct source of influence is the executive branch, which operates under the president’s command. The bureaucracy can assist the Court in implementing its policies, or it can hinder the Court by refusing to do so, a fact of which the justices are well aware. As a judicial body, the Supreme Court cannot implement or execute its own decisions. It often must depend on the executive branch to give its decisions legitimacy through action. The Court, therefore, may act strategically, anticipate the wishes of the executive branch, and respond accordingly to avoid a confrontation that could threaten its legitimacy. Marbury v. Madison (1803), in which the Court enunciated the doctrine of judicial review, is the classic example (see chapter 2 for an excerpt). Some scholars suggest that the justices knew that, if they ruled a certain way, the Thomas Jefferson administration would not carry out the Court’s orders. Because the Court believed that such a failure would threaten the legitimacy of judicial institutions, it crafted its opinion in a way that would not force the administration to take any action, but instead would send a message about its displeasure with the administration’s politics.

Another indirect source of presidential influence is the office of the U.S. solicitor general. In addition to the SG’s success as a petitioning party, the office can

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have an equally pronounced effect at the merits stage. In fact, data indicate that whether acting as an amicus curiae or as a party to a suit, the SG’s office is generally able to convince the justices to adopt the position advocated by the SG.72

Presidential influence is also demonstrated in the kinds of arguments an SG brings into the Court. That is, SGs representing Democratic administrations tend to present more liberal arguments; those from the ranks of the Republican Party, more conservative arguments. The transition from George H. W. Bush’s administration to Bill Clinton’s provides an interesting illustration. Bush’s SG had filed amicus curiae briefs—many of which took a conservative position—in a number of cases heard by the Court during the 1993–1994 term. Drew S. Days III, Clinton’s first SG, rewrote at least four of those briefs to reflect the new administration’s liberal posture. In one case, Days argued that the Civil Rights Act of 1991 should be applied retroactively, whereas the Bush administration had suggested that it should not be. In another, Days claimed trial attorneys could not systematically dismiss prospective jurors on the basis of sex; his predecessor had argued that such challenges were constitutional.

Congress, too—or so some argue—can influence Supreme Court decision making. Like the president, the legislature has many powers over the Court that the justices cannot ignore.73 Some of these resemble presidential powers—the Senate’s role in confirmation proceedings, the implementation of judicial decisions—but there are others. Congress can restrict the Court’s jurisdiction to hear cases, enact legislation, or propose constitutional amendments to recast Court decisions, and hold judicial salaries constant. To forestall a congressional attack, the Court might accede to legislators’ wishes. Often-cited instances include the Court’s willingness to defer to the Radical Republican Congress after the Civil War and to approve New Deal legislation after Roosevelt proposed his Court-packing plan in 1937. Some argue that these examples represent anomalies, not the rule. The Court, they say, has no reason to respond strategically to Congress because it is so rare that the legislature threatens, much less takes action against, the judiciary. Indeed, Congress has only infrequently removed the Supreme Court’s jurisdiction to hear particular kinds of cases. The best-known example occurred just after the Civil War, and the most recent was in pursuance of the war on terrorism (see chapter 2 for more details). You should keep this argument in mind as you read the cases that pit the Court against Congress and the president.

72. See Epstein et al., *Supreme Court Compendium*, Tables 7-15 and 7-16.


74. See Epstein et al., *Supreme Court Compendium*, Table 7-22.
A companion volume to Constitutional Law for a Changing America: Rights, Liberties and Justice, this volume analyzes institutional authority, including the separation of powers; nation state relations; commerce and tax law; and economic liberties. Photographs of litigants, exhibits from the cases, and descriptions of events that led to suits animate the text. This new editi.