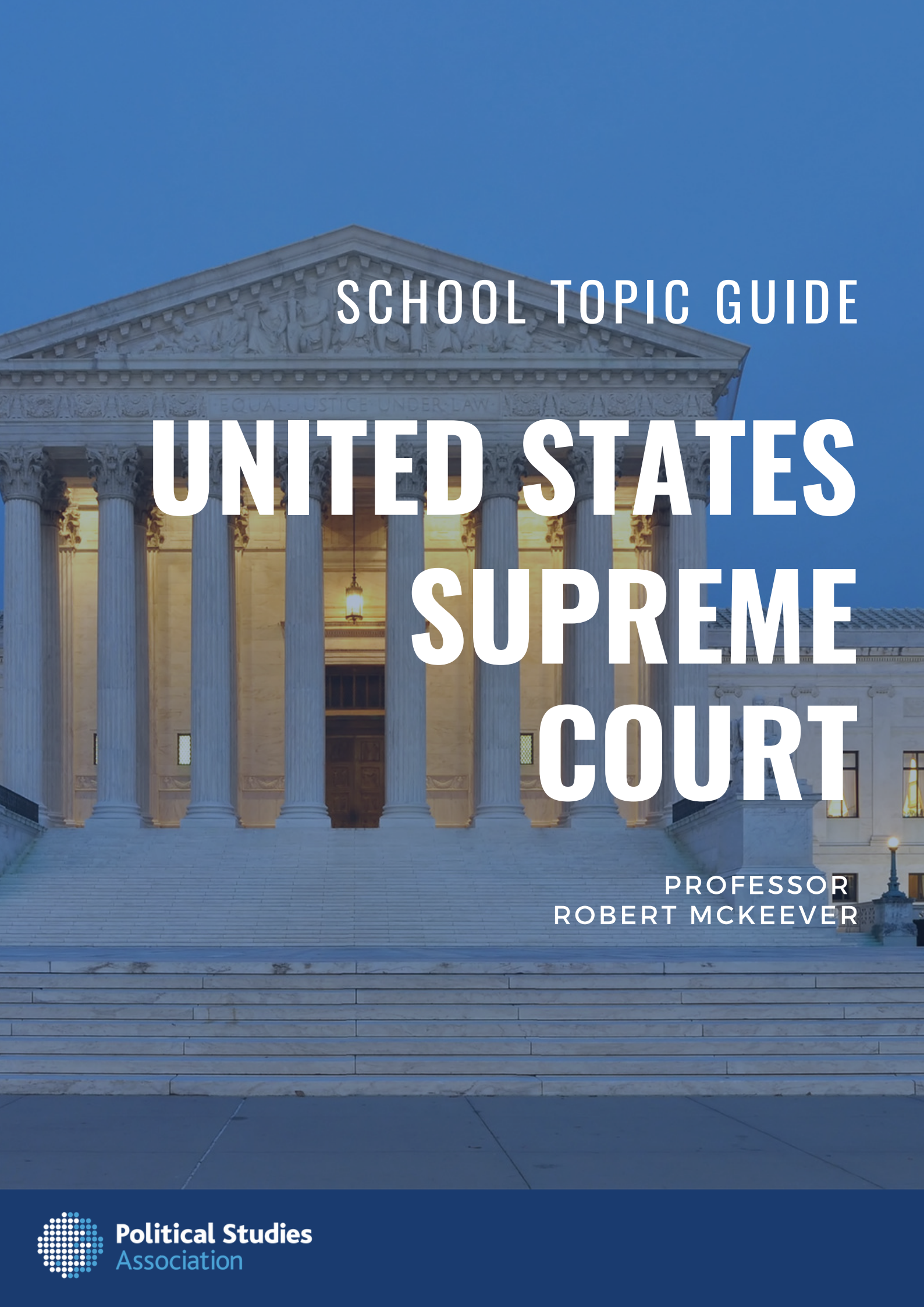

SCHOOL TOPIC GUIDE

UNITED STATES SUPREME COURT

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Political Studies Association

CONTENTS

The United States Supreme Court (2019)

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He is a leading scholar of the United States Constitution. For many years he has participated in the Congress to Campus Programme that brings together UK Sixth Form Students, former members of the US Congress and British academics. He has written many books and articles on American politics including Politics USA (3rd edition, 2012), with Philip Davies. He also wrote Raw Judicial Power: The Supreme Court and American Society (1995) and The United States Supreme Court: A political and legal analysis (2nd edition, 2016).

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Topic Guide Aims

This guide is pitched for A-level teachers looking to keep up with modern developments, and/or to provide material to more advanced students who may be able to go beyond the basics and either grasp more difficult concepts or read further in the topic. This guide consolidates some of the literature's key themes into core and advanced topics as well as providing up to date case studies.

1. Classic Studies: mechanical jurisprudence and interpretivism

An overview to show the classical way in which students are encouraged to explore judicial review in the United States and the process by which the nine Justices of the Supreme Court determine whether or not laws violate one or more clauses of the United States Constitution.

2. Contemporary Studies: behaviouralism, non-interpretivism and new-institutionalism

An overview of the debate in contemporary studies of how judicial review is not purely a matter of neutral textual interpretation.

3. Case Studies:

i) National Federation of Independent Business v. Sebelius (2012). A look at the case which arose from the passage of the Patient Protection and Affordable Care Act in 2010, usually shortened to ACA or 'Obamacare'.

ii) Procedural and Substantive Due Process: Same-sex Marriage. A look at the controversial decision in Obergefell v. Hodges (2015) in which the Supreme Court voted 5-4 to declare a constitutional right to same-sex marriage.

iii) Trump v. Hawaii, the 'Muslim ban' case.

The Classic Studies

Mechanical jurisprudence & interpretivism

Judicial review in the United States is the process by which the nine Justices of the Supreme Court determine whether or not laws violate one or more clauses of the United States Constitution. If a majority of the Justices decide that a law is unconstitutional, then that law is null and void. Because judicial review can result in nullifying major legislation, it is inevitably controversial. Rather than the effect of judicial review being fiercely debated, however, it is the process by which the Justices reach their decision that has divided scholars of the court.

Justices of the US Supreme Court 2018-19 Term

Justice	Appointing President	Senate Confirmation
John Roberts*	George W. Bush 2005	78-22
Clarence Thomas	George H. Bush 1991	52-48
Ruth Bader Ginsburg	Bill Clinton 1993	96-3
Stephen Breyer	Bill Clinton 1994	87-9
Samuel Alito	George W. Bush 2006	58-42
Sonia Sotomayor	Barack Obama 2009	68-31
Elena Kagan	Barack Obama 2010	63-37
Neil Gorsuch	Donald Trump 2017	54-45
Brett Kavanaugh	Donald Trump 2019	50-48

*Chief Justice

When Alexander Hamilton defended judicial review in the Federalist no.78, he argued that the judiciary possesses 'neither Force nor Will, but merely judgment'. And 'judgment' involved the traditional concept of textual interpretation. Hamilton continued: 'The interpretation of laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two...the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents'.

This traditional account of judicial review as a neutral exercise in textual interpretation came to be known as 'mechanical jurisprudence'. It dominated the understanding of judicial review for the first one hundred-and-fifty years of the United States and still holds sway in many law schools today, though there is widespread agreement that 'interpretation' is far less mechanica than originally thought.

Above all, virtually every Justice of the Supreme Court to this day claims to engage in a genuine act of interpretation that does not involve their own political or policy preferences. When they apply the Constitution, they rely on their ‘judgment’, not their ‘Will’.

Supreme Court Justices insist upon this, even in the most controversial of cases. In the 1930's, the Supreme Court caused outrage by declaring unconstitutional many of President Franklin D. Roosevelt's New Deal statutes. In one of the most important cases, US v Butler (1936), Justice Owen Roberts sought to reassure the Nation that their decisions involved no political disagreement with the New Deal:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch has only one duty - to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy.

In the twentieth century, it was increasingly recognised that the Justices were neither automatons nor bound to approach constitutional interpretation in the same manner. The main fault-line that developed was between those committed to the doctrine of 'original intent' and those who believed in a 'living Constitution'. The former argue that when Justices interpret a constitutional clause, they must define it as it was understood or intended by those who wrote it. Take, for example, a challenge to a State death penalty statute as a violation of the Eighth Amendment's ban on 'cruel and unusual punishment': proponents of original intent would point to the fact that the Fifth Amendment's requirement for a Grand Jury indictment in 'capital cases' makes clear that the death penalty was not regarded by the authors of the Bill of Rights as unacceptably cruel.

Those who subscribe to the 'living Constitution' do not feel bound by historic definitions of the words they are required to interpret. Key terms such as 'liberty' and 'equal protection of the laws' evolve as society changes. Certainly what were deemed acceptable punishments in the late-eighteenth century are generally viewed as hideously cruel in the twenty-first. As the great liberal Justice William Brennan (1956-90) put it:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Originalists condemn the 'living Constitution' as inviting far too much judicial activism, allowing the Justices to impose their own ideologies and preferences upon the people and their elected representatives. The administration of President Ronald Reagan made a concerted effort to re-establish originalism as the Court's interpretive approach. Attorney General Edwin Meese led the charge for the administration in a speech before the Federalist Society in 1985:

In the main, jurisprudence that seeks to be faithful to our Constitution - a Jurisprudence of Original Intention, as I have called it - is not difficult to describe. Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

It is important to stress that Meese is not arguing that modern Americans must live according to the practices of the past. Rather, that the role of applying concepts like 'liberty' or 'equal protection of the laws' to the contemporary world belongs to the people's elected representatives, and not to an unelected judiciary interpreting a 'living Constitution'. Originalism seeks to constrain judicial power and prevent 'judicial legislation'.

In spite of the sharp differences between Meese and Brennan, however, both are advocating an interpretivist approach to judicial review. The text of the Constitution is at the core of their interpretations and that is why in their written Opinions in cases, they explain in great detail how that text logically results in the decisions that they make.

Accordingly, the Hamiltonian description of judicial review remains valid: Supreme Court Justices exercise judgement, not will. And differences between them stem from differing interpretations of the constitutional text, not differing political, moral or policy predilections.

Students could debate the advantages and disadvantages of original intent and meaning as a means of interpreting the Constitution.

Advanced students could examine Chief Justice Warren's Opinion for the Court in Brown v. Board of Education (1954). Written in accessible language, this Opinion explains why the Court now believes that its decision in Plessy v. Ferguson (1896) should be overturned. In Plessy, an 8-1 majority of the Justices ruled that the Equal Protection clause of the 14th Amendment permitted segregation by race in public schools under the 'separate but equal' doctrine.

ORIGINALISM SEEKS TO CONSTRAIN JUDICIAL POWER AND PREVENT 'JUDICIAL LEGISLATION'.

Contemporary Studies

behaviouralism, non-interpretivism and new-institutionalism

There have long been those who believed that judicial review was not purely a matter of neutral textual interpretation. In 1901, the satirist Finley Peter Dunne had his Irish cartoon comic character Mr Dooley say, 'No matter whether the Constitution follows th' flag, th' Supreme Court follows th' election returns'. The insinuation that the Court's decisions were influenced by political pressures was given further credence in 1937. Following FDR's crushing re-election victory the previous year, he produced what became known as his 'Court-packing plan'; a proposal to put additional Justices on the Court who would vote for the constitutionality of the New Deal. The plan came to nothing, but soon the Court started to uphold socio-economic legislation that it had previously struck down. This became known as 'the switch-in-time-that-saved-nine'.

The suspicion that the Court sometimes acted from political motivations was, however, transformed by the appearance of the behaviouralist school of Supreme Court scholars in the 1960's. Its leading light, Glendon Schubert (Judicial Policy-Making, 1965), employed social science methods to analyse the Justices' decisional behaviour. By classifying Court decisions as ideological choices and tracking its members votes over time, Schubert found that Justices behaved consistently as, say, liberals or conservatives. He therefore concluded that 'The Justices themselves are goal oriented and their basic goals are the same as those that motivate other political actors'. In other words, Justices of the Supreme Court are politicians disguised in judges' robes.

IN OTHER WORDS, JUSTICES OF THE SUPREME COURT ARE POLITICIANS DISGUISED IN JUDGES' ROBES

Building on the behaviouralists' work, Jeffrey Segal and Harold Spaeth (The Supreme Court and the Attitudinal Model Revisited, 2002) developed 'the attitudinal model' of Supreme Court decision-making. Using rich and varied databases, they not merely critiqued the interpetivist, or 'Legal model' as they termed it, but produced what many scholars regard as the definitive account of how Justices make decisions that are rooted in their attitudes, that is to say, their ideological preferences. Behaviouralism and the attitudinal model form the paradigm of Supreme Court decision-making among political scientists today. Moreover, it has to be said that other political actors, such as Presidents and members of Congress, also treat the Court as if it is essentially a political body, whose Justices votes are predictable by their ideology. That is why Presidents now go to considerable lengths to ensure their nominees to the Court are reliable conservatives or liberals. It also explains why confirmation votes in the Senate have become far more partisan than they were throughout most of the twentieth century. *Moreover, polling data shows that the general public increasingly views the Court as making its decision on a predominantly political basis.*

Quinnipiac University Poll: April 26-29, 2019. N = 1,044 registered voters nationwide. Margin of error ± 3.5

"Do you think that Supreme Court justices are too influenced by politics, or don't you think so?"

Are too influenced	Don't think so	Unsure/No answer
59%	35%	6%

"Do you think that the process of confirming Supreme Court justices is too political, or don't you think so?"

Is too political	Don't think so	Unsure/No answer
81%	15%	4%

One of the reasons why Segal and Spaeth are confident that Justices actually do decide cases on the basis of their sincere personal preferences is because, they argue, there are no constraints on such decision-making They are appointed for life and therefore cannot be disciplined by other political actors. Furthermore, they have reached the pinnacle of their profession and have no aspirations for further advancement that might cause them to moderate their behaviour.

Students could debate whether it is possible for the Justices to remain politically neutral when called upon to define terms such as ‘liberty’, ‘equal protection of the laws’ or ‘cruel and unusual punishment’.
Advanced students could research and explore different concepts of liberty and equality as applied to women at different points in American history. A staring point might be Justice Bradley's Opinion in Bradwell v. Illinois (1873) explaining why women's nature meant they had no right to practice Law.

This view of an unconstrained Court has been challenged by a number of scholars who argue that the Justices have other interests than case outcomes that affect their behaviour. In 1999 Clayton and Gillman edited a collection of essays on the Court introducing 'new institutionalist' approaches to understanding the Court. As the term suggests, this approach emphasises the fact that Justices have regard to the protection of the power and prestige of their institution. There are, for example, norms of legal culture which includes offering a convincing constitutional rationale for their decisions. Justices are also aware that their authoritydepends in significant measure on the Court being viewed as, if not totally apolitical, then at least above the daily fray of partisan politics. While the new institutionalism does not claim that personal preferences play no part in Justices' decisions, they do argue that these preferences are significantly tempered by other interests that the Court has.

Finally, another important critique of the attitudinal model appeared in 2011, in the form of Bailey and Maltzman's The Constrained Court: Law, Politics, and the Decisions Justices Make. Using sophisticated methodological tools that had previously not been available, Bailey and Maltzman strengthen some the key arguments advanced by the new institutionalism. In particular they show that Justices do have to make strategic choices stemming from the political environment they inhabit - most obviously, tempering their case outcomes to accommodate the views and likely responses of President and Congress.

To summarise these contemporary theoretical debates, there are three broad schools of thought on the decision-making of Supreme Court Justices when they exercise judicial review. The interpretivist, or legal, model holds that Justices make a good-faith attempt to interpret the Constitution. They may disagree on the correct method of interpretation to be used, but textual analysis, not personal preference, is the touchstone for their decision-making. The behaviouralist or attitudinal model holds that the Justices decide on the basis of their political, ideological and policy preferences, with the inevitable corollary that all the constitutional textual analysis contained in Supreme Court Opinions is only so much window dressing. Finally, the new institutionalist approach holds that legal, political and strategic factors influence the Court's decisions. The Justices personal preferences are certainly important but they are tempered by other considerations that the Court would ignore at its peril.

Let us now look at two important case studies of Supreme Court decision-making, involving two of the most controversial subjects of recent years: the Affordable Care Act (or 'Obamacare') and same-sex marriage. We can apply each of the three theoretical approaches discussed above and try to determine which provides the best explanation of the Court's decisions.

JUSTICES DO HAVE TO MAKE STRATEGIC CHOICES STEMMING FROM THE POLITICAL ENVIRONMENT THEY INHABIT

Case Study

National Federation of Independent Business v. Sebelius (2012)

This case arose from the passage of the Patient Protection and Affordable Care Act in 2010, usually shortened to ACA or 'Obamacare'. The new health-care law was the culmination of some fifty years of campaigning by mostly Democrat politicians whose ultimate aim was to provide universal coverage for all Americans, including those too poor to purchase private health insurance. It was heavily criticised and opposed by Republican politicians, however, and not a single one of them voted for the law in either the Senate or the House of Representatives. The American public was more or less evenly divided on the subject.

Having failed to stop the passage of the bill in Congress, opponents turned to a familiar tactic: challenging the constitutionality of the ACA in the federal courts and, ultimately, in the United States Supreme Court. The political tensions involved in the case were heightened by the fact that the Court would announce its decision in June, 2012 - in the throes of that year's presidential election. The most important attack on the statute involved its so-called 'individual mandate'. This was a penalty levied on those who failed to purchase or otherwise acquire health insurance. (The penalty did not apply to certain categories of people, such as those deemed too poor).

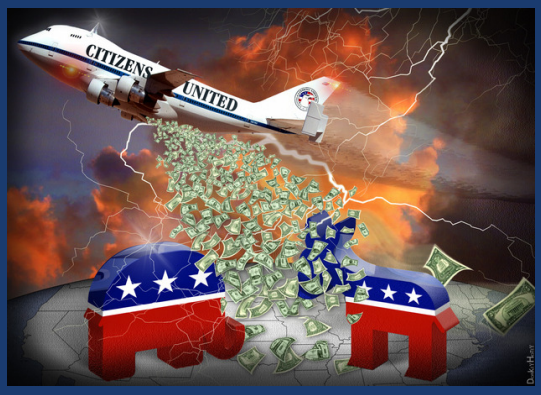
The Government argued that it possessed two distinct powers under the Constitution that legitimated the enactment of the individual mandate; first, the Commerce clause and second, the Taxation clause. In the final vote, four conservative Justices argued that neither clause authorised Congress to enact the mandate. Four liberal Justices, on the other hand, held that both clauses endorsed it. That left Chief Justice John Roberts, a conservative appointed by President George W. Bush, with the casting vote. He argued that while the mandate was not constitutional under the Commerce clause, it was under the Taxation clause.

"ALL THREE THEORIES OF JUDICIAL DECISION-MAKING HAVE SOMETHING TO OFFER TO AN EXPLANATION OF THE OUTCOME OF NFIB V. SEBELIUS"

All three theories of judicial decision-making have something to offer to an explanation of the outcome of NFIB v. Sebelius, but the attitudinal model runs into trouble with Chief Justice Roberts' vote and Opinion.

Interpretivism can plausibly account for all the votes and Opinions in the decision. The four conservative dissenters - Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito - are at their most convincing when attacking the Taxation clause as the basis for the individual mandate's constitutionality. Most obviously, the legislation refers to it as imposing a penalty and never refers to it as a tax. Logically too, the mandate looks much more like a penalty than a tax. After all, a tax is imposed on all eligible citizens regardless of their actions and is levied for the purpose of supporting the general government. A penalty, on the other hand, is imposed on someone who has transgressed a particular law and its purpose is to deter inappropriate behaviour. Nevertheless, as is often the case, the argument that the Taxation clause could support the constitutionality of the mandate was not entirely without merit. Most obviously, the penalty would be collected by the Internal Revenue Service (IRS), who main function was to collect federal taxes. Moreover anyone required to pay the penalty would do so as part of their annual tax return. It's possible therefore that when interpreting the Taxation clause in this case, four of the Justices were persuaded by one set of arguments, while four were persuaded by the opposing set.

However, the four liberal Justices - Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan - would seem to have the better of the argument on the Commerce clause. The Commerce clause had undergone considerable reinterpretation since 1787, when the Constitution was written. In the unchanged words of that document, Congress was given to power 'To regulate Commerce ...among the several States...' This so-called interstate commerce power clearly excluded any Congressional power to regulate intrastate commerce, that is, commerce within any single State.



THE COMMERCE CLAUSE HAD UNDERGONE CONSIDERABLE REINTERPRETATION SINCE 1787, WHEN THE CONSTITUTION WAS WRITTEN

As the national economy developed, especially as a result of industrialisation, the clear distinction between intrastate and interstate commerce began to blur. Were goods manufactured in one State, perhaps with imported materials, and then sold in other States, part of intrastate or interstate commerce? For many years, the Court tried to find concepts that would demarcate what Congress could and could not regulate, separating manufacture from commerce, for example. Eventually, under the pressure of the New Deal, it conceded defeat and effectively gave up trying to police Congressional use of the Commerce clause, (Wickard v. Filburn, 1942). In the civil rights era, it even allowed Congress to use the Commerce clause to tackle non-economic activity, like racial discrimination. Although a more conservative Court led by Chief Justice William Rehnquist (1986-2005) refused to allow Congress to reach criminal law through the Commerce clause (US v. Lopez, 1995), it reiterated, rather than challenged, the prevailing interpretivist orthodoxy that Congress was empowered to regulate any activity that had a 'substantial effect' on interstate commerce.

Health care insurance is a vast national business. However, according to Justice Ginsburg's Opinion in NFIB, some fifty million Americans had no insurance. Since hospitals and doctors were nevertheless required to provide urgent medical care to the uninsured, the cost to the rest of Americans was estimated at $100 billion each year. Clearly the failure to purchase health insurance had a substantial effect on the business and Congress was entitled to regulate that according to some seventy years of Supreme Court interpretation.

In the face of the strength of this argument, the Court's five most conservative members returned to the old practice of making fine distinctions in the interpretation of the Commerce clause. They drew a distinction between action and inaction and classified the refusal to purchase health care insurance as inaction. They then concluded that Congress could regulate action, but not inaction. Congress could not force people to buy any product if they didn't wish to.

There has been a growing chorus in conservative legal, academic and political circles in recent decades to rein in Congress's use of the Commerce power and the five conservative Justices in NFIB clearly endorsed that view. They were concerned what else Congress might try to do if they could oblige people to engage in commerce. Such a concern gave rise to the oft-cited 'broccoli analogy': if Congress could oblige people to buy health care insurance, could they also force them to buy broccoli because it's good for their health?

IF CONGRESS COULD OBLIGE PEOPLE TO BUY HEALTH CARE INSURANCE, COULD THEY ALSO FORCE THEM TO BUY BROCCOLI BECAUSE IT'S GOOD FOR THEIR HEALTH?

Students could discuss whether the distinction between 'action' and 'inaction' is a meaningful one in this context. They could also discuss whether the broccoli analogy is an appropriate one.

Advanced students could undertake a critique of one of the Opinions in NFIB v. Sebelius.

At this point, an advocate of the attitudinal model might point out that the liberal Justices have a strained argument on the Taxation clause and the conservatives are strained on the Commerce clause. Their analysis would be that these unconvincing arguments result from the fact that the Justices are all simply constructing their interpretations to allow them to reach their preferred conclusion: the conservatives oppose the ACA, while the liberals support it - just as liberals and conservatives had done in Congress. However, the behaviouralist analysis runs into difficulty in explaining Chief Justice Roberts' controversial decision to join the liberal Justices in upholding the ACA under the Taxation clause. According to the attitudinal model, Roberts' vote to condemn the law under the Commerce clause should mean that he opposes it on political grounds. What could therefore be his motive for then rescuing the ACA under the Taxation clause? Once we dismiss the behaviouralist explain as making no sense, we are left with two possibilities. First, the interpretivist account that when looking at the two possible constitutional grounds for upholding the law, one was persuasive but the other wasn't. Second, that more than the fate of the ACA was stake for Roberts. New institutionalist analysis would suggest that while the Chief Justice was certainly part of that conservative movement that wanted to narrow the scope of the Commerce clause, he was also concerned about the impact of a decision striking down the ACA in the middle of a presidential election. The ACA was regarded by the Obama administration as perhaps its greatest first term achievement: Republicans regarded it as an abomination and made opposition to it a major plank of their presidential and congressional election campaigns. If five unelected Republican Justices declared it null and void, there was a real danger that their decision would be seen by many as motivated by partisan politics. The Court's authority rests in part upon respect for it as a champion of constitutional values, not the values of one political faction or another. Roberts may well have decided, therefore, that leaving the fate of the ACA to the national electorate would avoid the risk of considerable institutional damage to the Court. Therefore on balance, the new institutionalist (or 'constrained Court') theories seem better to explain the outcome in NFIB v. Sebelius, than the interpretivist or attitudinal approaches.

Students could role play the Justices of the Supreme Court, explain on constitutional grounds why they would either uphold the ACA or strike it down.

Case Study

Due Process: Same-sex Marriage

In Obergefell v. Hodges (2015), the Supreme Court voted 5-4 to declare a constitutional right to same-sex marriage. Given the issue involved, the decision was bound to be controversial. What really provoked passionate dissent both on and off the Court, however, was the majority Justices' finding that this right was protected by the Due Process clause of the Fourteenth Amendment to the Constitution. To understand this outrage, we need to look at the transformation of that clause from a procedural protection to a substantive source of rights. Then we ask which theory of Supreme Court decision-making - interpretivist, behavioural/attitudinal or new institutionalist - best explains the decision in Obergefell.

The Fifth Amendment declares that 'No person shall be... deprived of life, liberty or property, without due process of law'. The Fourteenth Amendment contains a similarly worded protection against State governments. These were quite obviously intended as procedural safeguards against arbitrary actions by government, since clearly people could be deprived of life, liberty and property provided due process was observed. Due process in this sense included the elements of what we otherwise call 'a fair hearing' or 'a fair trial'.

However, the Supreme Court from time to time read substantive rights into the clause, even if the term 'substantive due process' didn't gain currency until well into the twentieth century. The modern version of substantive due process began with the case of Griswold v. Connecticut (1965). In that case the Court ruled that the clause contained a 'right to privacy' that government could not invade. In this case, the privacy-liberty concept was used to strike down a State law banning the use of contraceptives. Much more controversially, the Court ruled in Roe v. Wade (1973) that the 'privacy-liberty' concept included the right of a woman to terminate a pregnancy by abortion.

Neither privacy nor abortion are mentioned anywhere in the Constitution. For critics of Griswold and Roe, the question was: what is the source of these values, given that they are not mentioned in the Constitution?

Students could discuss whether, as some have said, 'substantive due process' is an oxymoron and no substantive rights should ever be read into the Due process clause.

Advanced students could read Justice Thomas's dissent in Obergefell and discuss his view that 'In the American legal tradition, liberty has long been understood as individual freedom from government action, not as a right to a particular government entitlement'.

Behaviouralists would argue that the source of the values in substantive due process cases is very obvious - the Justices' own preferences. And they need look no further than the dissenting Justices' arguments in Obergefell. Chief Justice Roberts and Justices Scalia, Thomas and Alito each filed a dissent in which they excoriated Justice Kennedy's majority Opinion for the Court.

Kennedy had rested his defence of a constitutional right to same-sex marriage on the fact that choosing to marry was one of those intimate acts of autonomy - like contraceptive use and abortion - that was protected by the Due Process clause. Moreover, he wrote, 'Same-sex couples have the same right as opposite-sex couples to enjoy intimate association...' and cited recent cases in which the Court had upheld the rights of same-sex individuals and couples.

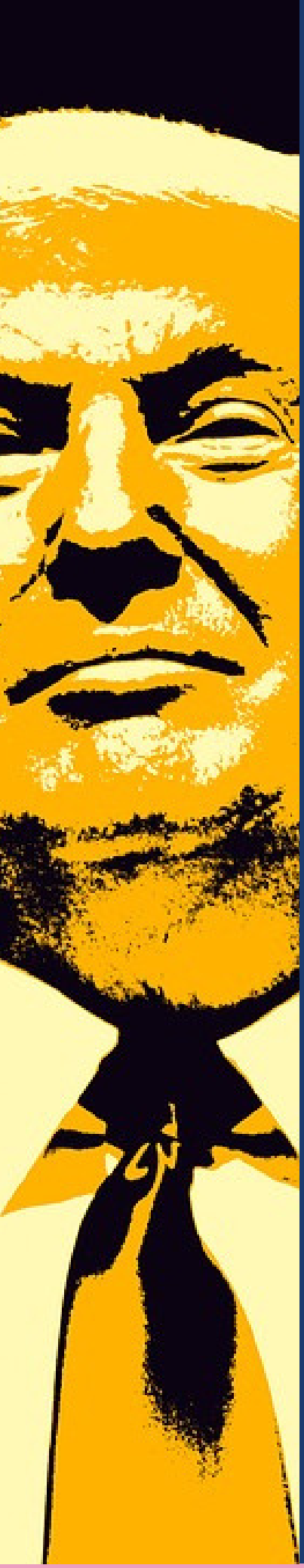
IN HIS DISSENT, CHIEF JUSTICE ROBERTS ACKNOWLEDGED THAT PROPONENTS OF SAME-SEX MARRIAGE HAD STRONG ARGUMENTS

In his dissent, Chief Justice Roberts acknowledged that proponents of same-sex marriage had strong arguments. While that entitled them to try to persuade State legislatures to change their definition of marriage, it did not entitle the Supreme Court to order State legislatures to make that change. He wrote '...our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition'. As if echoing the attitudinal model, he added 'Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law'.

Roberts and the other dissenters argued that they had taken an interpretivist approach to the issue and found that the Constitution left this issue to each State to decide for itself. But behaviouralists hold that the same explanation applies equally to the majority Justices and the dissenters: the majority Justices sincerely believe that same-sex marriage is good policy, while the dissenters think it a bad one. In other words, the Obergefell decision is a classic liberal-conservative divide. It should be noted here that while Justice Kennedy might generally be considered conservative, on the issue of gay rights he has been consistently liberal.

Students might debate the circumstances under which the Court might legitimately make a decision on an issue on which the Constitution appears to be silent.

What of the new institutionalist theory as applied to Obergefell? Certainly the majority Justices did not feel constrained by the inevitable outcry from opponents of same-sex marriage, nor by the powerful argument that the Constitution left this issue to be decided by the States for themselves. However, the Court would know that while it would come under attack from powerful political quarters, it would have strong support from President Obama and most of the Democratic Party. Furthermore it had been attacked before on issues of gay rights, yet public opinion in recent years had seen a rapid increase in support for an end to discrimination on grounds of sexual orientation. From an institutional perspective, therefore, the Court could have some confidence in both its duty and its power to apply core constitutional values to contemporary social issues.



Case Study

Trump V. Hawaii (2018)

This case arose from one of the most controversial policies of Donald Trump's 2016 election campaign and his presidency: his so-called 'Muslim ban'. Almost from the outset of his presidential campaign, Trump sought to gain support from the many Americans who were fearful of Muslims. This fear was, of course, rooted in the terrorist attacks on the World Trade Centre in New York in September, 2001. On December 7, 2015, candidate Trump called for 'a total and complete shutdown of Muslims entering the United States'. In March, 2016, he proclaimed 'Muslims hate us...We can't allow people coming into this country who have this hatred of the United States...and of people who are not Muslim'. As the campaign progressed, Trump's rhetoric on the issue changed and became expressed in terms of preventing terrorism and the need to strengthen the country's immigration procedures. In June 2016, he said that he would stop 'importing radical Islamic terrorism to the West through a failed immigration system'.

Once in the White House, President Trump moved quickly. On January 27, 2017, he issued an Executive Order (EO-1) entitled 'Protecting the Nation from Foreign Terrorist Entry Into the United States'. This required the Secretary of Homeland Security to conduct a review into the information provided by foreign governments on their citizens who wished to enter the United States. While the review was taking place, the US banned the nationals of seven countries from entry to the United States – Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.

However, a federal District Court ordered a temporary block on the enforcement of EO-1 and that decision was upheld by the Court of Appeals. The response of the White House was to issue a new Executive Order (EO-2) which restricted entry of the nationals of those same countries with exception of Somalia. However, there were new vetting procedures allowing for individual exceptions to be made. The six countries affected were selected, it was said, because they had been State sponsors of terrorism. Once again, federal courts halted enforcement, although the Supreme Court allowed the suspension of entry, except as it applied to those who had a credible claim of a bona fide relationship with an individual or business in the United States.

On completion of the review, President Trump issued a third Executive Order, entitled 'Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists'. The government review had identified the minimum information that the US required from foreign governments whose citizens wanted entry to America as immigrants and found that eight countries failed to provide this: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela and Yemen. Individual exceptions were permitted.

Once again, the Executive Order was challenged in the federal courts, one of the parties being the State of Hawaii. It argued that the University of Hawaii would be damaged by the entry restrictions, because they recruited both students and staff from the affected countries.

Eventually, the case came before the US Supreme Court in Trump v. Hawaii. The Court decided by a vote of 5-4 that the Executive Order was constitutional. The five Justices who voted to uphold it were all appointed by Republican Presidents and the four who deemed it unconstitutional were all appointed by Democratic Presidents. Immediately then there is the suspicion that the behaviouralist analysis of the Court is correct, since the Justices appear to have divided along partisan and ideological lines. However that would be based upon the assumption that all five majority Justices either supported the entry restrictions as good policy and/or they wished to support a Republican President. Given the history of the Executive Order and the nature of this particular Republican President, that cannot be taken for granted.

Moreover, there are other plausible explanations, involving both interpretivist and institutionalist aspects. First, the Constitution gives the President very broad discretion when it comes to national security. He is, after all, Commander-in-Chief of the armed forces and is responsible for relations with other countries. Congress has recognised this by giving the President great freedom in matters of immigration policy. The Immigration and Nationality Act of 1952 states that: 'Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such periods as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens, any restrictions he may deem to be appropriate'.

On its face, therefore, President Trump's Executive Order falls squarely within that generous delegation of power by the Congress. Furthermore, the Supreme Court has shown great deference to both Congress and the President in matters of foreign policy and national security. As Chief Justice Roberts said in his Opinion for the Court, 'Judicial inquiry into the national-security realm raises concerns for the separation of powers by intruding on the President's responsibilities in the area of foreign affairs...(W)hen it comes to collecting evidence and drawing inferences on questions of national security, the lack of competence on the part of the courts is marked'.

The four dissenting Justices did not seriously dispute that normally the President is given wide discretion in national security matters or that the Court usually adopts a deferential posture vis-à-vis the elected branches of government. Nevertheless, they are unwilling to defer to a President whose past statements raise doubts about the true motive behind his Executive Order. As Justice Sotomayor argues in her dissent, there are grounds for seeing the Order as nothing less than the 'Muslim ban' in disguise. If indeed the Order is based on dislike or animus towards Muslims, then it falls foul of the First Amendment to the Constitution which forbids any 'Establishment of Religion'. Advantaging or disadvantaging any particular religion would without doubt violate the Amendment.

The strongest dissent came from Justice Sotomayor, supported by Justice Ginsburg. Sotomayor pointed out that President Trump had justified the need for a review of immigration in a statement that read: 'Donald J. trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on'. She also pointed out that, referring to the 'Muslim ban', he had said to advisor, 'Put a commission together. Show me the right way to do it legally'.

After citing many other anti-Muslim statements by the President, she said 'the narrow question here is whether a reasonable observer...would conclude that the primary purpose of the Proclamation is to disfavour Islam and its adherents by excluding them from the country. The answer is unquestionably yes'.

Justice Breyer's dissenting Opinion, supported by Justice Kagan, was more cautious. However, he too questioned the real intent of the Proclamation as the record indicated that few individual exemptions had been granted.

The Court in Trump v. Hawaii was faced with a choice; either to accept that the language used in the Proclamation did not target a particular religion or to go behind that language and identify a different purpose to the official assertion. In analysing the Court's decision, it is possible that behaviouralist, interpretivist and institutionalist theories all have something to contribute.

Students might debate the circumstances under which the Court might legitimately make a decision on an issue on which the Constitution appears to be silent.

Advanced students could discuss whether the differing institutional capacities and responsibilities of the three branches of the Federal Government necessitates great deference to the President in matters such as immigration and national security.

Summary

There is considerable disagreement among scholars about how we should understand the United States Supreme Court and the nature of its decision making. Of course, that debate cannot be resolved merely by reference to two cases, albeit major ones. I hope, however, that this discussion has indicted the interplay between politics and law in the role of the court in American government and provided an enhanced appreciation of the controversies that surround it. Most of all, I hope it has conveyed the wisdom of the great constitutional scholar, Philip B. Kurland, who wrote over forty years ago: "It should be clear, even to the blindest partisan, that the Court has never been either purely judicial or purely legislative in its work."