The U.S. Supreme Court

The U.S. Supreme Court

US Constitution - ARTICLE III, SECTION. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.


Neil Gorsuch
2017 - 50
Samuel Alito
2006 - 68
Sonia Sotomayor
2009 - 63
Elena Kagan
2010 - 57
Ruth Bader Ginsburg
1993 - 85
Anthony M. Kennedy
1988 - 81
Chief Justice John Roberts
2005 - 63
Clarence Thomas
1991 - 69
Stephen Breyer
1994 - 79

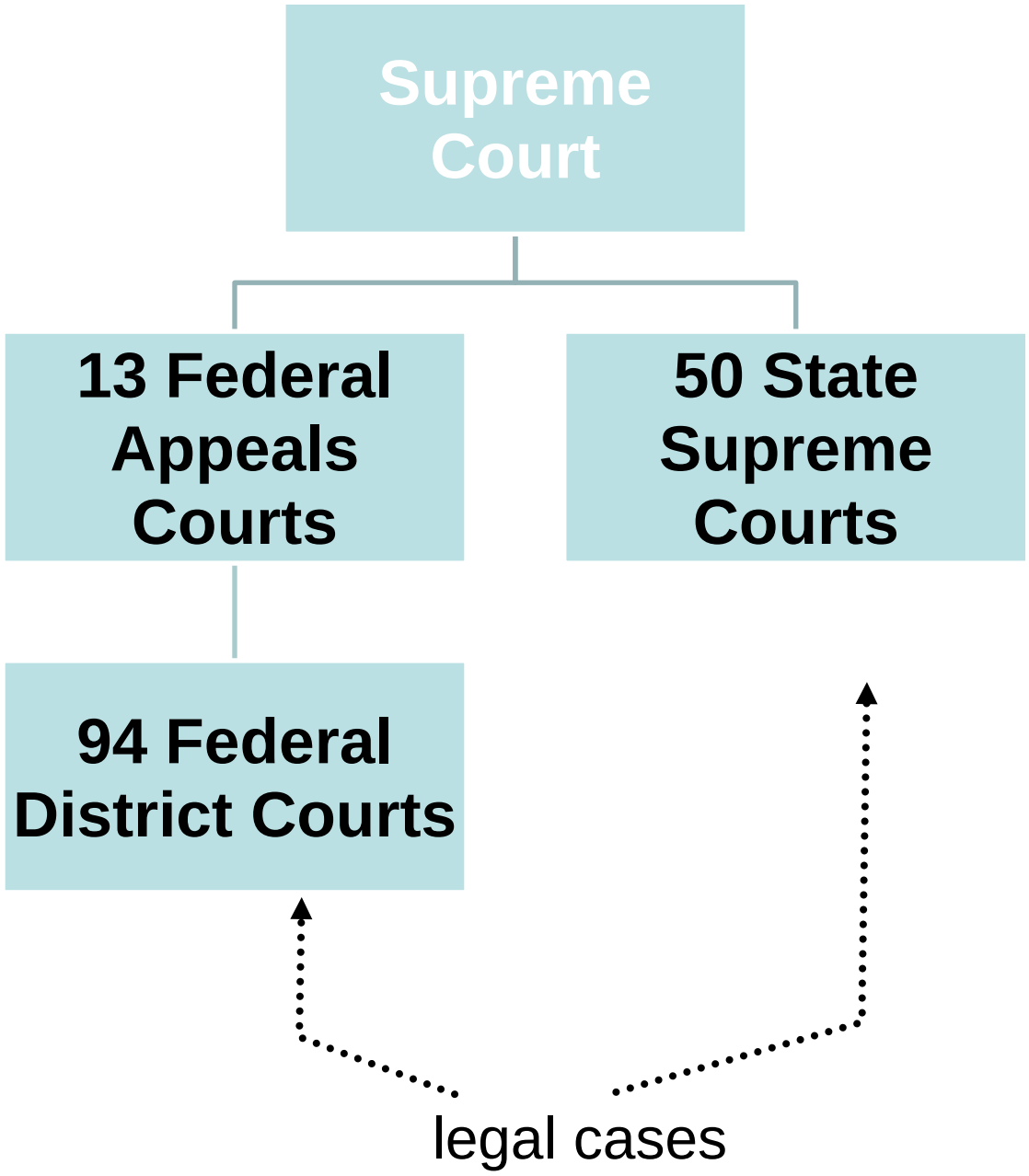
The US Supreme Court

The Federal judiciary

- **Supreme Court** (set up by Constit)
  - Chief Justice & 8 Associate Justices (since 1869)

- **Lower courts** (set up by Congress 1789->)
  - 13 US Courts of Appeal
  - 94 US District Courts

- Each state also has its own system, typically in parallel to the Federal system
  - i.e. state courts, state appeal courts & State Supreme Court.
- Cases involving the Federal govt & constit may be appealed from state supreme courts.


Supreme Court
13 Federal Appeals Courts
50 State Supreme Courts
94 Federal District Courts
legal cases

The US Supreme Court

- **US Constit is fundamental law of USA**
  - all other fed & state laws, plus exec actions, have to conform to it.
  - in system of checks and balances, *who decides* on what is constitutional, and what is unconstit & therefore invalid, is critical.
  - Founding Fathers left this vague in 1787 Constit
  - But Supreme Ct in 1803 Marbury vs Madison case decided it had the authority to interpret and apply the Constit – power of ***judicial review***
  - Judicial review now fully accepted but shows not all key elements of US system are formally codified (other e.g.s?)

The US Supreme Court

Key Powers

- Judicial Review
  - of laws passed by US Congress or by state legislatures (e.g. flag burning)
  - of the exec actions of US Administration or state governors (e.g. treatment of enemy combatants in Guantanamo Bay)
  - can require executive authorities to implement actions (e.g. bussing, affirmative action)

- **Supreme Court decides itself which cases to hear**
  - 4 / 9 Justices have to agree for a case to be placed on the SCOTUS "docket"
  - no rt to have a case heard – 7000-8000 appeals to SCOTUS p.a
  - only takes cases of major constit signif – c75-80 cases heard p.a but only 70 2016-17
  - So c99% of cases appealed to Supreme Ct are rejected

- **Justices serve until death or vol retirement**
  - so can't be pressured by politicians or public opinion = unaccountable?

The US Supreme Court

Supreme Ct & Pres Power

- Jud Review includes power to declare actions of members of exec unconstit
- Key decisions in last 40 years:
  - 1974 – *USA vs Richard Nixon (8-0)* – ruled that Pres Nixon's exec privilege not to hand over tape recordings of all Oval Office conversations only applied to nat security issues. Forced him to hand over "Watergate tapes" implicating him in cover up for 1972 break-in. 16 days later he resigned .
  - 1997 – *Clinton vs Jones* (9-0) – found Pres Clinton had no immunity from prosecution while in office for alleged offences committed before becoming Pres, nor for "unofficial conduct" while Pres.
  - 2004 – *Rasul vs Bush* (6-3) – Ct ruled vs Admin. over its legal policy in War on Terror. "state of war is not a blank cheque for the President". Agreed Pres does have power to detain Al-Qaeda or Taliban members as "enemy combatants", but ruled Guantanamo detainees not beyond fed ct jurisdiction
  - 2006 – *Hamdan vs Rumsfeld* (5-3) – Bush's Military Commissions to try suspects in Guantanamo ruled unconstit. – major limit on Pres power, even in time of war.
  - 2008 – *Boumedien vs Bush* (5-4) – ruled that new legal procedures post-Hamdan were inadequate to ensure detainees received a fair trial.
  - 2014 - *Noel Canning* (9-0) – limiting Presidential power vs Congress re recess apptmts (+ *NLRB vs SW General* 2017)

The US Supreme Court

Checks and Balances on Ct

- **Constitutional checks**
  - No of Justices cd be changed – not happened since 1869 but Roosevelt threatened expansion in 1930s to successfully bring obstructive Ct into line with New Deal.
  - Justices appointed by Pres – chance to infl the nature of the ct LT by appointing justices of partic philosophy – e.g. Gorsuch by Trump 2017 (not always successful – Souter apptd by Bush snr)
  - Justices confirmed by Senate – check on qual & bias in Pres apptmts hearings have become v political 1980s->
    Sent rejected 2 Nixon apptments, + v scholarly & v con Bork in 1987; forced withdrawal of Ginsburg 1987 and Meiers 2005; Obama's nomination of Garland never even voted on 2016
  - Impeachment possible ("during good behaviour") as with other judges and exec members, but never actually happened (Assoc Justice Abe Fortas resigned 1968 to avoid impeachmt process)
  - Constit cd be amended to overturn a judgemt – only done twice – 1795 + 16th Amend 1913 re. Income Tax. Recent attempts to do this have all failed (school prayer, flag burning, term limits, etc.)
  - Supr Ct has no enf mech – Pres can throw weight behind decisions (Brown vs Board 1954), go slow (desegr efforts in late 1950s) or criticise them (Obama 2010 on campaign finance ruling)

The US Supreme Court

Informal checks on judicial power

- judges said to "follow the election returns" – consciously or unconscly take into account national mood, major shifts in public/pol opinion
  - e.g. allowing some limitations on abortion since 1990 *(Planned Parenthood vs Casey 1992)*
  - e.g. 2001-> war on terror – first supp of admin's security agenda, more recently more critical of it?

- Judges cannot initiate cases or issue hypothetical guidance
  - so War Powers Act 1973 regarded as of dubious constitutionality, but remains as never challenged in Ct

- Supr Ct usually hears <100 cases p.a. – limits activism

  (But pressure grps always keen to bring key cases on constit issues to the Ct – e.g.s 1954 Brown vs Board of Education on segregation, gay marriage recently – in hope of wining favourable ruling, so put much $ & expertise into carefully-chosen appeals)

The US Supreme Court

Informal checks on judicial power, cont.

- Supr Ct checks itself
  - justices gen reluctant to overturn prev Supr Ct rulings/precedents without v good reason (e.g. Abortion)
  - but have done so over key issues in the past (e.g. Segregation, exec of minors)
  – so no Supr Ct can forever bind its successors.
    - Recently reversed rulings on execution of 16/17 yrs olds (1989, 2003) and late-term abortions (2000, 2007)

The US Supreme Court

http://www.oyez.org/tour

https://www.youtube.com/watch?v=JxvG71Quin8

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Law or Politics?

Professor Robert McKeever

Law or Politics?

- ***Law*** because:
  - The Court IS a COURT. It hears cases involving legal disputes by contending parties, represented by lawyers
  - The Justices are Judges, not politicians. Appointed for life, not elected for a term.
  - Justices are objective, not partial.

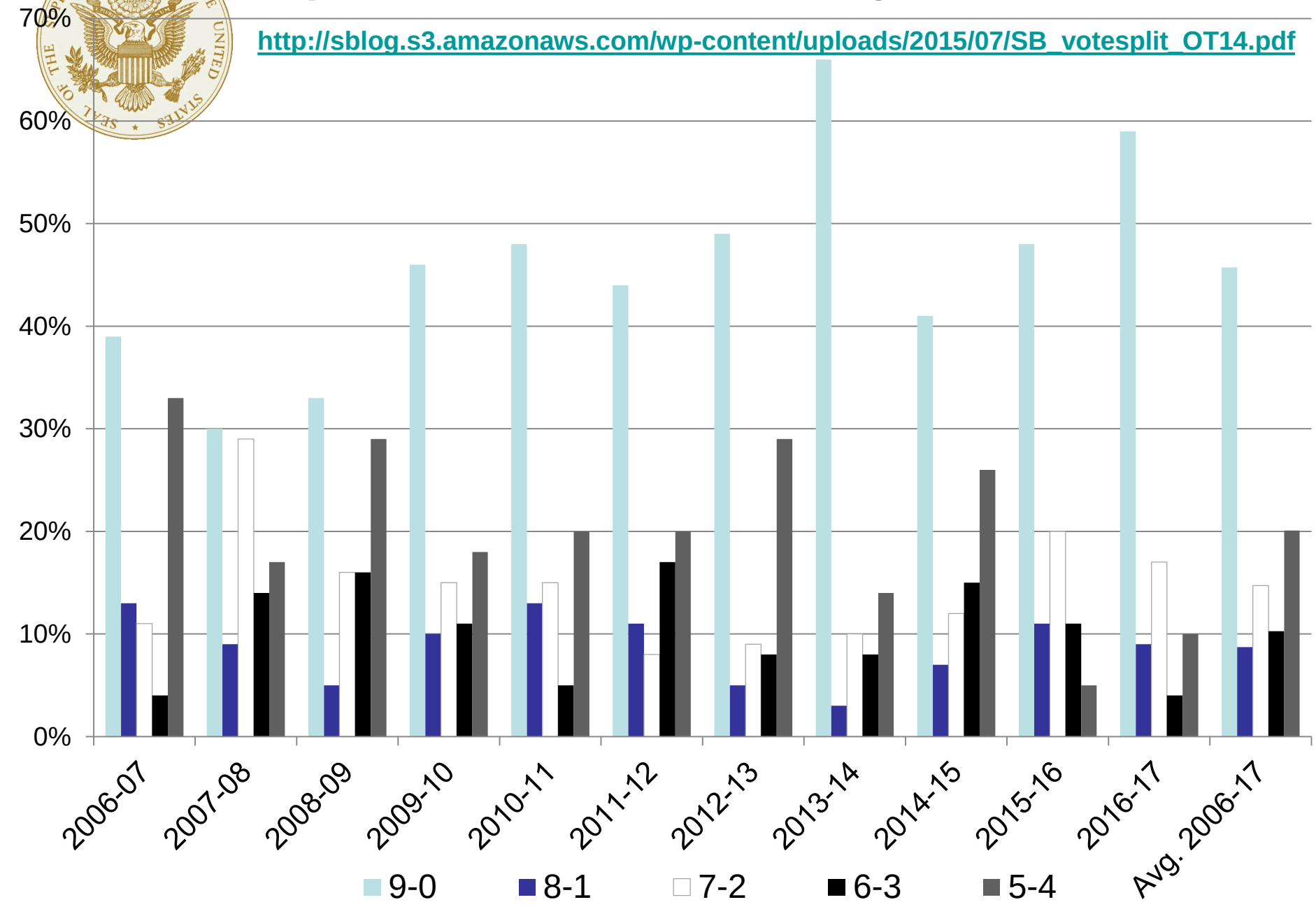
Law or Politics?

Professor Robert McKeever

- ***Politics*** because:
  - Constitutional Language can often only be defined by reference to political, moral, philosophical values: ‘Liberty’, ‘Equal’, ‘Cruel and unusual’, ‘Unreasonable searches and seizures’.
  - Court decisions have great political consequences and make policy.
  - Politicians and Interest Groups treat the Court as if it is political and try to use it for their own political goals. Look at the political struggles over Supreme Court nominations.

Supreme Court Decision margins 2006-2017

http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_votesplit_OT14.pdf



The Obama Agenda

Professor Robert McKeever

1. To shore up the liberal decisions taken by the Court over the past 50 years on issues such as:
   a. The **pro-choice** policy enshrined in *Roe v. Wade* (1973)
   b. The **restricted death penalty** policy, which only allows capital punishment to be imposed on adults (18 and over) and for murder alone: *Roper v Simmons* (2005), *Kennedy v Louisiana* (2008).
   c. The strong **anti-discrimination** policy that grants gays and lesbians 'equal protection of the laws', *Lawrence v. Texas* (2003), *Romer v. Evans* (1996). To extend this where possible – *Perry vs Hollingsworth* (2013), *US vs Windsor* (2013), *Obergefell vs Hodges* (2015)
   d. To **defend existing Executive powers** – e.g. Voting Rights Act in *Shelby County vs Holder* (2012), Recess Appointments in *Noel Canning v NLRB* (2014), Foreign Affairs powers in *Zivotofsky vs Kerry* (2015)
   e. And defend the **Affordable Care Act** - *Nat'l Fed'n Indep. Bus. v Sebelius* (2012), *Sebelius v Hobby Lobby Stores, Inc* (2014), *King vs Burwell* (2015), *Zubik v Burwell* (2016)

The Obama Agenda

Professor Robert McKeever

2. To appoint Supreme Court Justices who will likely support the President's moderate liberal policies on these and other issues.
3. To appoint Supreme Court and other federal judges of a more diverse background.

Did President Obama Succeed with His Judicial Agenda?

Maybe **–** winning the 2012 Presidential Election was key, but:

- Even after the Kagan nomination, the Court had a 5-4 conservative-leaning majority, with Kennedy usually casting the decisive vote.
- Obama needed to replace at least one of Roberts, Scalia, Kennedy, Thomas or Alito to create a liberal majority
- Scalia's sudden death in early 2016 opened up this opportunity, but –
  - Liberals disappointed by Obama nomination of very well qualified moderate Merrick Garland – Chief Justice of DC Appeals Court
  - Senate Republicans refused to hold hearings or votes on Garland
  - & Trump was able to appoint the clearly conservative (and relatively young) Neil Gorsuch instead

The Obama Agenda

Professor Robert McKeever

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- Scalia's sudden death opened up this opportunity, but Senate Republicans refused to hold hearings on Obama's very well qualified and moderate nominee, Merrick Garland, and in April 2017 confirmed very conservative Trump pick Neil Gorsuch instead.

The Trump Agenda?

1. To appoint conservative justices to the Court, initially replacing Scalia with another originalist, but with the hope of replacing at least one of the 3 elderly liberal/swing justices
   - Trump's real preference or a cynical ploy to win social conservative support in the primaries – if they get the kind of justices they want, will they overlook everything else Trump does?
   - Released 2 lists of possible justices on the campaign trail

2. To seek to overturn *Roe vs Wade* –
   - but appears already to have changed his mind about his campaign promise to seek to overturn marriage equality (*Windsor* case).
   - Other conservative causes include more protection for religious belief and practices (e.g. school prayers, rt for business owners to discriminate vs gay people), free speech (e.g on campus) and gun rights

3. To uphold and extend executive power, esp in security, immigration

4. To gain more pro-business decisions?

Judicial Philosophies

Strict constructionist

- construing the Constitution's text literally/narrowly, focuses on intent of Founding Fathers ("originalist") and fixed constit principles.
- tends to stress retention of power by the states – often therefore limits federal government power. Seen as a conservative judicial philosophy.
- e.g.s –

  N.B. Scalia denied he was a strict constructionist, claiming instead to be an *originalist* who relied on the original meaning of the words in the Constitution rather than the intent of the framers who wrote the constitution.

- <u>Criticisms</u>
  - Justice Breyer: Strict Constructionist approach "too legalistic… places too much weight upon language, history, tradition and precedent"
  - Critics also argue framers' intent is impossible to determine + they had varying opinions on the meaning of the Constitution, as did the members of the state conventions who ratified it.

Judicial Philosophies

Loose constructionist

- construing the Constitution's text broadly / liberally – sees Constit as evolving and needing to be interpreted for today in the context of modern society.
- tends to stress broad grants of power to the federal govt. Seen as a liberal judicial philosophy. - e.g.s –

- <u>Criticisms</u>
  - Scalia opposed interpreting Constitution as evolving document, which gives unelected judges too much power. In *A Matter of Interpretation:* "The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is judges who determine those needs and 'find' that changing law."
  - Ronald Bork argues the law is becoming politicized (as demonstrated by his 1987 confirmation hearings), and judges are too often reading their own personal preferences into the Constitution, rather than following the intent of its framers.

Judicial Philosophies

Judicial activism

- philosophy under which judges do not avoid overturning statutes and precedents
- sees Ct as equal partner with Legisl and Exec – not deferential
- judges use their role in interpreting the Constit to promote desirable social ends
- often associated with liberal justices (but cd con justices be active in overturning precedents with which they disagree? -)
- often used as pejorative term by both sides – “legislating from the bench”

- Court seen as activist under Ch Justice Earl Warren (1953-69) and often under Ch Justice Warren Burger (1969-86).
- e.g.s -

Judicial Philosophies

Judicial restraint

- philosophy under which judges avoid overturning statutes and precedents – *stare decisis*
- judges tend to defer to exec & legisl branches (and to states)

- often associated with more conservative justices – but cd make distinction?
- e.g.s -

"You don't approach that question anew as if it had never been decided. For a judge, precedent is a very important thing... We don't go reinvent the wheel every day. [Judges must] start with a heavy, heavy presumption in favor of precedent… [previous cases should be overruled only in] a very few cases".

Justice Gorsuch testimony at Senate confirmation hearing, 2017

[There may be] "colourable arguments both ways [but] these are matters for Congress, not this court, to resolve. … Reasonable people can disagree with how Congress balanced the various social costs and benefits [but judges should not meddle.
The] proper role of the judiciary… to apply, not amend, the work of the people's representatives".

writing in his first majority opinion for the Supreme Court, *Henson v Santander* in June 2017

Judicial Philosophies

A Meaning That Does Not Change *Justice Clarence Thomas*

In a 2001 speech to the American Enterprise Institute, Justice Clarence Thomas argued that upholding the framers' intent is the only judicial philosophy consistent with a written Constitution.

"When interpreting the Constitution and statutes, judges should seek the original understanding of the provision's text, if the meaning of that text is not readily apparent.

This approach works in several ways to reduce judicial discretion and to maintain judicial impartiality. First, by tethering their analysis to the understanding of those who drafted and ratified the text, modern judges are prevented from substituting their own preferences for the Constitution.

Second, it places the authority for creating the legal rules in the hands of the people and their representatives, rather than in the hands of the judiciary. The Constitution means what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean, not what we judges think it should mean.

Third, this approach recognizes the basic principle of a written Constitution. "We the People" adopted a written Constitution precisely because it has a fixed meaning, a meaning that does not change. Otherwise we would have adopted the British approach of an unwritten, evolving constitution. Aside from amendment according to Article V, the Constitution's meaning cannot be updated, or changed, or altered by the Supreme Court, the Congress, or the President."

Judicial Philosophies

The Constitution Made Me Do It *Laurence H. Tribe*

A critic of the framer's intent philosophy, Laurence Tribe of Harvard Law School believes that judicial decisions are inherently political because judges must always make value choices.

"Should the peculiar opinions held...by men who have been dead for two centuries always trump contemporary insights into what the living Constitution means and ought to mean? Should we permit others to rule us from the grave...through hidden beliefs and premises perhaps deliberately left unstated?...

The most serious flaw in both slavish adherence to the constitutional text and the inevitably inconclusive inquiry into the intent of those who wrote it is...that they abdicate responsibility for the choices that constitutional courts necessarily make. The Supreme Court just cannot avoid the painful duty of exercising judgment so as to give concrete meaning to the fluid Constitution, because the constitutional rules and precepts that it is charged with administering lack that certainty which permits anything resembling automatic application. Strict constructionism in all its variants is thus built on [the] myth...that the Supreme Court does not make law, but finds law ready-made by others.... But disclaimers that "the Constitution made me do it" are rarely more persuasive than those that blame the devil."