

Are Supreme Court justices politicians in disguise? (60)

The United States Supreme Court is argued to make both political and judicial decisions even though it is a judicial body. A Judicial Decision is a decision based on the law. Whether that law is right or wrong is of no concern to the judiciary because that is a political decision. A political decision is such that should the death penalty should be given for murder, whereas the judicial decision would have been whether the person was guilty of that crime.

To some extent the inevitable answer is yes, the main reason being is judicial review. In the United Kingdom the powers of judicial review only extend to ultra vires, the power to say that the government has exceeded its powers given to it by law; what it cannot do is say the law is invalid. In the United States the Supreme Court can declare laws to be unconstitutional. This is because of the power as introduced by Chief Justice Marshall in Marbury Vs Madison. Therefore it can strike down laws made by congress and also executive actions if it so chooses. The Supreme Court is the guardian of the constitution and, as such if it decides which laws are constitutional or not. This means it must have some political element since it is so to speak making law rather than just ruling on it (such as in Roe Vs Wade 1973). This however is not necessarily a negative thing. Because the Supreme Court is a form of "Higher law" then it must have someone to rule on whether or not congressional law breaks the constitutional law. The founding fathers were well aware of this and it would seem that Alexander Hamilton at least knew that this would have to be the role of the Supreme Court. They left it out of the constitution because it is controversial (with the judiciary overruling democratically made law). However as the Supreme Court seem to be the best candidates for this, it is not necessarily negative and may be the way things 'have' to be. However where the political aspect of the Supreme Court becomes negative is when it is used to overrule the founding fathers or to interpret the constitution according to what we think now.

Under Chief Justice Warren, the Supreme Court went under a highly controversial period. These liberal courts took it upon themselves to 'update' the constitution to make it a living document relevant to our times. Roe v. Wade (1973) is a prime example where the Supreme court used the implied right to privacy that the court said was not written into the constitution but that, they claimed, the founding fathers had implied in writing the constitution. Justice Harry Blackmun, the author of the majority opinion, stated that the Constitution does not explicitly mention a right to privacy but, "in varying contexts the Court or individual justices have, indeed, found at least the roots of that right." The right to an abortion was then considered an extension of this privacy right. As Blackmun stated, "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." This decision made it unconstitutional for any state to restrict abortion in most circumstances. In doing so the Supreme Court was essentially making law and decided that abortion was legal in America.

This can also be seen in the case of Griswold v. Connecticut in 1965. The Supreme Court struck down this Connecticut law, holding that the Constitution actually created substantive rights which were so "fundamental to the principles of liberty" that they could not be restricted by government. The Constitution does not mention contraception or privacy, but the Court declared that the other

rights in the Constitution contained a "penumbra" of implied rights, and the general right to privacy was determined to be one of these rights. The statute prohibiting use of contraceptives was then voided as an infringement of the right of marital privacy

Arguably the more activist a court, the more political it is, and as many liberal courts have been activist courts it can be said the more liberal a court is the more political it gets. A non-activist conservative court is arguably less likely to make political decisions since it does not believe in a living constitution and does not interpret as loosely as does a liberal court. Therefore whether or not a supreme court can be deemed political pretty much depends on the type of court that it is. Therefore with many arguments stating that the court at the moment may be considered conservative may mean it is less political. However sometimes a conservative court can be activist, such as the Supreme Court in the 1930s that struck down FDR's new deal legislation because they were pro-business. Another more recent example is seen in *Bush v. Gore* in which the Supreme Court ruled that the 2000 Florida recount should not go ahead. After *Bush v. Gore*, the concern was that the Court had not only overreached itself but undermined its authority by not speaking with one voice. The 5-4 split decision suggested that *Bush v. Gore* was a political, not a judicial, decision. In a sense, the justices had no choice to make it. When the contest between Bush and Gore proved too close to call, the contestants resorted to a series of lawsuits in an effort to settle the matter. These suits proceeded simultaneously in the state court system and in federal court. The cases largely concerned the matter and manner of counting and recounting votes in the pivotal state of Florida. There were charges of voter intimidation, ballot rigging and something had to be done.

There are however aspects of a court that encourage it to be un-political in its business. Firstly there is the security of tenure, which means that the supreme court do not have to make popular decisions based on the fact that they have to get elected next term and are not accountable to the citizens, just to the constitution. This security of tenure came from article 3 of the constitution where "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour".

In a modern liberal democracy such as that of the USA, all politicians by definition are publically elected. The Supreme Court justices however are not elected, and they have to go through the process of appointment by the president, ABA, Senate judiciary committee and the Senate. This would also lead the Supreme Court to argue that they do not have a mandate to input personal opinions. The appointment process also brings the argument that the Supreme Court is not politicians in disguise. The president has to nominate a judge that will pass through the ABA, Senate judiciary committee and also the floor of the Senate. This therefore shows there is a series of checks and balances that mean the president must pick the correct candidate and not just the candidate that shares his views politically. Harriet Miers is a prime example of this where it is said Bush nominated her because of strong family ties and loyalty. However she did not complete the nomination process due to a number of conservative and liberal critics.

Supreme Court justices are apolitical in the fact that they also have a lack of enforcement and have to wait for the executive branch to help enforce their decisions. This can be seen in the example in Little Rock in Arkansas. After the decision in *Brown v. Board of Education of Topeka*, the Supreme Court declared all laws establishing segregated schools to be unconstitutional, and it called for the desegregation of all schools throughout the nation. Governor Orval Faubus deployed the Arkansas

National Guard to support the segregationists that were trying to physically block the Little Rock nine. Eisenhower attempted to de-escalate the situation and summoned the Governor to meet him. The President warned the governor not to interfere with the Supreme Court's ruling, but in the end had to enforce the supreme court ruling by sending federal troops to assist the little rock nine.

In conclusion, the Supreme Court justices should be seen as politicians in disguise to a certain extent as the decisions they make usually have some political standing. However these decisions may also be circumstantial, such as the Bush V. Gore decision, so the political aspect of the court is part of the evolution of the Supreme Court and was not meant to be there. The extent to which a Supreme Court justice can be seen as a politician is defined by whether or not they are a loose constructionist or in an activist court which usually go hand in hand. This is because they do not just stick to the constitution, but they also interpret the constitution in the context of the modern era thus making a political decision.