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External Strategies

In 1989, the Court issued an opinion in *Webster v. Reproductive Health Services*, which upheld most of the provisions of a Missouri law imposing increased regulations on abortion. The much-anticipated decision had been viewed as the death knell for the *Roe* case. Since 1973, four new justices had joined the Court, and three of them were considered to be unsympathetic to *Roe*. That change tipped the expected *Roe* supporters on the Court from seven to four, robbing *Roe* supporters of the majority they had enjoyed.

However, as chief justice and a friend of Sandra Day O'Connor, William Rehnquist suspected that O'Connor's vote was not solid. When the justices met in their conference to discuss *Webster*, Rehnquist spoke first and advocated a position with which he did not fully agree – that the Court should modify the *Roe* standard rather than overturn the decision.[1] This was not easy for Rehnquist. He had been one of the two justices voting against the majority in *Roe* in 1973. Personally, he strongly advocated overturning *Roe*. But he also knew that without O'Connor in agreement, there would be no majority for at least eroding *Roe*. Rehnquist hoped O'Connor would agree with Rehnquist on most of the provisions of the Missouri statute, even if she was unwilling to go further with him to overturn *Roe*. Rehnquist's attempt to compromise on a core principle indicated his willingness to engage in strategic behavior to achieve his broader objective.

Rehnquist's act was hardly novel among Supreme Court justices. This story demonstrates the dilemmas underlying the motivations that drive Supreme Court justices. Are they primarily focused on expressing their views in opinions, or are they seeking to woo other justices to form a majority around some measure of their views, if not their full expression? What is their primary motivation in their interactions with each other as well as with those beyond the Court?

MODELS OF JUDICIAL MOTIVATIONS AND BEHAVIOR

The question of why justices would "go public" really is one about motivations of justices. In terms of judicial motivations, scholars of the U.S. Supreme Court have focused primarily on the act of voting. Because voting is the most common act by justices, as well as the most public act in which they engage, it makes sense that their individual decisions on cases would dominate the study of judicial reasons for their actions. The predominant model in that study has been the social-psychological or attitudinal approach. The key premise of this model is that justices' votes in conference reflect their own attitudes.[2] C. Herman Pritchett posited this model with the thesis that personal attitudes adequately explain how a justice approaches individual decisions regarding granting writ or deciding a case.[3] Whether a justice joins the majority, writes a concurrence, or issues a dissenting opinion is determined by the individual justice's personal interpretation of the U.S. Constitution, statutes, and previous Court decisions.

At first glance, the attitudinal model seems to fit neatly the situation of U.S. Supreme Court justices. Because they appear to answer to no constituency, are highly unlikely to be removed for any opinion they write, and are equal to each other justice in terms of voting, they can act as solitary players lacking incentives to do anything but express their own personal preferences in their opinions. In fact, one might suggest that other political players, particularly the public, expect them to engage in just such behavior.

Yet historical analysis of the justices' papers, as well as occasional glimpses of individual justices' public behavior in switching sides on issues, sometimes over a relatively short period of time, suggests that the attitudinal model may not be as exhaustive an explanation as one might think. For example, in 1940, the Court declared that a state could coerce children of Jehovah's Witnesses to recite the Pledge of Allegiance. Three years later, in the wake of extensive public criticism from scholars and newspaper editorial boards, the Court majority switched dramatically in the opposite direction.[4] Did the justices who switched sides view the Constitution differently in that short time frame, or were they influenced by outside pressures?

History shows us that the Court often shifts direction when personnel change. Most famously, justices appointed by President Franklin D. Roosevelt in the late 1930s and early 1940s replaced predecessors who opposed the constitutionality of New Deal programs, thus resulting in an end to the judicial debate about the constitutionality of New Deal programs. The effect of personnel change also has been in evidence more recently. In 2003, the Court, by 5 – 4, upheld bans on corporate campaign spending. Seven years later, again

by a vote of 5 to 4, the Court reversed itself after Sandra Day O'Connor, who supported the ban, was replaced by Samuel Alito, who opposed it. Similarly, the Court overturned a partial birth abortion ban and then upheld it three years later. Again, the switch was from O'Connor to Alito.[5]

Justices also genuinely change their minds over time or when they are faced with arguments from the other justices. As an example of the former, Justice John Paul Stevens transformed from an advocate of the death penalty early in his Court tenure to a vocal critic by the end.[6] As for the latter, Justice Robert Jackson once admitted, "I myself have changed my opinion after reading the opinions of the other members of this Court. . . . I sometimes wind up not voting the way I voted in conference because the reasons of the majority didn't satisfy me."[7]

These changes would support the attitudinal model; that is, justices change their minds, and therefore their votes, over time. But other evidence suggests that, at least at times, attitudes may be secondary to other motivations by justices. In 1954, Stanley Reed agreed to join the Court's opinion in *Brown v. Board of Education*, thus making the decision unanimous, explaining to his colleagues that "Well, if you are all going to vote that way, I'm not going to stand out."[8] Similarly, in 1968, Justice Hugo Black changed his mind on a case involving union voting rules to avoid dissenting alone.[9] Black dissented on the case in conference but, like Reed, was uncomfortable in his role as the sole dissenter on the case. He wrote a note to Justice William O. Douglas, informing him that "I am still of the opinion that a union like this one needs rules to prevent indiscriminate candidacies for offices where the incumbent has such heavy duties. . . . " Yet Black admitted that "[s]ince this is so surely a matter of judgment, however, I am not willing to dissent alone. Consequently I acquiesce provided all the others go along."[10] Black's personal attitudes regarding the issue became of less importance than his desire not to be publicly voting alone.

Perhaps a more frequent example is when an opinion writer is willing to compromise his or her personal preferences in order to win over, or maintain, the support of other justices who constitute a potential coalition. A nineteenth-century justice wrote to his colleague that he could not agree with one section of his colleague's majority opinion and "that I fear, unless it can be a good deal tempered, I shall have to deliver a separate opinion on the lines of the enclosed memorandum." The justice even added that he knew that, without his support, the majority opinion would become a minority one. The opinion writer compromised and incorporated the language necessary to hold his wavering colleague.[11] Explaining this practice, Antonin Scalia related that the writer of a majority opinion has to "craft it in a way that as many people as

possible will jump on, which means accepting some suggestions – stylistic and otherwise – that really you don't think. . . . are best, but nonetheless, in order to get everybody on board, you take them."[12] Justice Tom Clark described his own approach: "If one was assigned to write, he might go around and talk, as I did, to the doubtful justice, who was on the fence, asking 'Now, what do you think? How should this be written?' And you'd try to get him to come along with you."[13]

In accordance with the attitudinal approach, a justice could abandon strategy and write whatever he or she wanted. In 1994, Antonin Scalia was assigned the Court's opinion in *Holder v. Hall*. However, Scalia reached far beyond what the majority had agreed on when he used the majority opinion to criticize the 1965 Voting Rights Act. As a result, he lost the opinion assignment and ended up joining a concurrence by Thomas. Taking the attitudinal approach may be personally satisfying, but there can be a cost in terms of shaping the Court's decisions.[14]

The flip side of that relationship occurs when a justice who agrees with the position of an opinion chooses to join it, if there is some tweaking by the author, rather than express his or her own personal preferences separately. For example, one justice wrote to another, attaching a summary of his views on an opinion being written by the latter, and urged his colleague to incorporate his views into the latter's opinion. In return, the first justice promised that he would forego writing on his own and join the second justice's opinion. He added: "If you feel that you could agree with me, I think you would find no difficulty in making some changes in your opinion which would make it unnecessary for me to say anything."[15] Similarly, when he disagreed with the majority, Louis Brandeis would write a memorandum to the other justices explaining that he had not decided whether to dissent but was willing to negotiate with the majority for his support. That tactic sometimes led to the other justices compromising with Brandeis to obtain his vote. At other times, Brandeis ended up writing a dissent.[16]

Another example is the assignment of cases. The chief justice, or a senior associate justice when the chief justice is in the minority, often assigns a case to the justice in the majority who is the shakiest member of the narrow majority coalition to keep that individual from defecting to the minority and reversing the direction of the Court.[17] John Paul Stevens admitted that he assigned opinions to the weakest member of the minority because "it might be wiser to let that person write the opinion." For instance, Stevens assigned the *Lawrence v. Texas* decision to Anthony Kennedy to keep Kennedy in the majority.[18] According to the attitudinal model, the assigning justice would seek an opinion that matches his or her personal attitudes. Yet that is not the practice when the goal is to hold together a majority.

Some scholars, then, have questioned whether the attitudinal model best explains judicial decision making. Lee Epstein and Jack Knight argue that a judicial strategy approach is more prominent today.[19] Lawrence Baum has argued that many times justices do express their personal attitudes in decisions, but at other times they seem to act in strategic ways that may not reflect their personal preferences, but allow them to accomplish their desired outcomes.[20] Baum refers to another, competing model in the analysis of judicial behavior: the strategic model.

The strategic model posits that the justices employ strategies in their case acceptance, voting, and opinion writing that will produce a policy outcome that most closely matches their own.[21] Unlike the attitudinal model, the strategic model carries a rational choice perspective that describes the justices as rational actors operating within a political context they attempt to navigate and manipulate. According to Epstein and Knight, justices are "strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act."[22]

The strategic model is not an exhaustive explanation of judicial voting. In many cases, justices do not act in a strategic manner; they simply express their personal preferences and leave it at that. Rather, the model suggests that justices can engage in this behavior and sometimes do. Indeed, they use certain tactics, such as bargaining, personal friendship, and sanctions on other justices, to achieve their own policy preferences through opinions.[23]

JUSTICES AS STRATEGIC EXTERNAL ACTORS

Whether or not the strategic model is supplemental to the attitudinal model in judicial voting, its explanatory value may be more powerful when applied to areas of behavior other than voting. This would include the justices' relationship with constituents beyond the Court, such as the presidency and Congress.[24] But it would also apply to the Court's relationship with the public.

Admittedly, there are those who contend that the attitudinal model still prevails, even in the realm of the Court's interaction with public opinion. Brenner and Whitmeyer argue that the strategic model does not extend to the Court's relationship with the public and offer examples in which justices could not have been acting strategically because of the nature of some of their decisions. These include high-profile cases when the justices opposed public opinion on issues such as school desegregation, school prayer, and the rights of the accused.[25]

Brenner and Whitmeyer are referring to an historical debate regarding whether the Court is fundamentally majoritarian or counter-majoritarian.

On one hand, scholars have pointed to the Court's opinions that have been reflective of public opinion.[26] Robert McCloskey concluded that "the Court has seldom lagged far behind or forged far ahead of America."[27] Indeed, it is not difficult to find examples of the Court mirroring public will. The Court's shift on the New Deal in the late 1930s often is cited.[28] However, many similar examples are available: Decisions regarding the legality of opposition to World War I, Japanese internment during World War II, and the death penalty all closely matched public opinion at the time. Even a controversial case like *Brown v. Board of Education* may be an example of majoritarianism, as the case actually leaned toward the view of the majority of the public at the time.[29] The *Planned Parenthood v. Casey* decision is another example. The Court's decision hewed closely to extant public opinion on abortion, which tended to a middle ground on the issue rather than agreement with either the pro-choice or pro-life camps. Indeed, the opinion of the three justices in the plurality even acknowledged that they were responding to the public's acceptance of the *Roe* decision.[30]

Scholars have pointed out the Court's willingness to issue specific counter-majoritarian decisions and pursue counter-majoritarian trends, at least temporarily.[31] Moreover, the perception left by critics of the Court is of an institution increasingly driven by counter-majoritarian tendencies. From Franklin Roosevelt in the 1930s to Richard Nixon in the 1960s to George W. Bush in the 2000s, presidents have used their "bully pulpits" to label the Court as heedless of public opinion and anxious to employ judicial activism to further the justices' own policy ends.

Yet another view is that although the Court does differ from public opinion at times (and in doing so attempts to shape that opinion), it is still calibrating its actions in terms of its perception of the will of the public. This attitude is suggested in a letter one justice wrote about how the justices navigate public opinion. Justice Wiley Rutledge told a correspondent: "We here cannot allow our judgment to be swayed by the anticipated unpopularity of our views, but this does not mean either that we can be unconscious of that probability. . . ."[32] Barry Friedman argues that the justices participate in and even stimulate an ongoing public debate about the interpretation of the Constitution. Rather than being aloof from the public, they are regularly gauging public sentiment to ensure that they do not stray far from it even as they attempt at times to lead it.[33] This approach conforms at least partly to the strategic approach, because it allows that the justices may strike out in terms of decisions that move beyond public opinion, but also recognizes they do not do so naively.

One explanation for judicial concern about public opinion is the need to build diffuse support among the public, which then translates into acceptance

of and compliance with individual decisions, particularly when they are counter-majoritarian.[34] The solution would seem to be simple enough: The justices could issue only majoritarian decisions. However, the solution is not so simple, because the link between individual decisions and diffuse support for the Court is debatable.[35] On the one hand, confidence in the Supreme Court fell after abortion and flag burning cases in 1989. On the other hand, despite broad public dissatisfaction with the *Bush v. Gore* decision, that case did not damage public support for the institution.[36]

Rather, building diffuse support would seem to rest on broader factors than whether the public is in agreement with any individual decision. The key to creating diffuse support rests not only in what the Court does but also in how it frames and then communicates what it does. The object of such communication is the general public. Gregory A. Caldeira and James L. Gibson suggest that when the justices "anchor their decisions in legal, not political, values and symbols," the public responds with diffuse support.[37]

Clearly, those symbols are not communicated casually, but by design. They cannot be left to chance, because too many other factors would combine to undermine some merely inadvertent communication of diffuse support-building values and symbols. These countervailing forces include publicly stated opposition to individual decisions of the Court by affected parties (including not only the parties to the case but also various interest groups); politically driven criticisms of the Court's general direction by Congress, presidents, or interest groups; general public misunderstanding of the Court decisions due to inaccurate press coverage; or even lack of knowledge by the public of Court opinions as a consequence of the relatively low level of press attention paid to Court actions.

The need for a strategy of public relations stems from the constitutional status as well as the historical experience of the Court. The Court lacks the enforcement mechanism that would allow it to carry out its own decisions regardless of the reaction of other political institutions or the public. Therefore, the Court relies on public deference to achieve general compliance with its decisions. However, as mentioned earlier, the Court lacks direct linkages to the public, as is present for presidents and members of Congress. Those linkages would facilitate public relations and therefore enhance public deference and compliance.

The absence of such linkages is a two-edged sword in the sense that the distance from the public enhances the mystique of the Court. If familiarity breeds contempt, then that aloofness may produce deference. In contrast, if other players seek to shape the Court's image, the Court has no automatic mechanism for rebuttal. If the justices attempted to engage in the traditional

methods of public rebuttal (e.g., press conferences, interviews, photo opportunities), the public would consider such actions unseemly, and the justices' efforts could be counterproductive to the aim of enhancing public deference.

For example, recent presidents have used the State of the Union address to criticize the Court directly or indirectly. In 2004 and 2005, President George W. Bush decried "activist judges" whom he charged were shaping public policy against the public's will. In 2010, President Barack Obama criticized a specific decision – *Citizen's United v. F.E.C.* – that significantly altered the role of corporate money in electoral campaigns. While the justices who were present sat impassively during the Bush addresses, Samuel Alito shook his head and mouthed "not true" after Obama's remark. A debate ensued about whether Alito had acted appropriately. The justice gave no subsequent explanation of his action, even though he was specifically asked by the press to do so.[38]

Therefore, the Court may be affected by public opinion when that opinion is shaped by others. This includes presidents, Congress, and interest groups, among others. However, at the same time, the Court is at a severe disadvantage in responding to others' image-making efforts regarding the Court. The justices are constrained by the Court's own norms (partly driven by that same public opinion) in their attempts to shape the public's opinion of their institution, as well as of themselves as members of that institution.

Historical examples suggest the justices do act to remake negative public opinion to save the institution's power and that failure to do so can have long-term consequences for the Court's role. In the early 1800s, in the midst of bitter attacks by Jeffersonian Republicans, as well as the problem of current justices involving themselves in partisan politics, Chief Justice John Marshall attempted to recast the public image of the Court from that of a divided, partisan body to a united, nonpolitical institution.[39] Again in the 1850s, abolitionists portrayed the Court as a pro-slavery institution dominated by Southern interests to undermine its legitimacy as a policy maker on the issue of slavery. This time there was no John Marshall present to save the Court. The result was a general lack of public acceptance for the Dred Scott case and a seeming willingness on the part of the public to allow the post–Civil War Congress to weaken the Court's power over Reconstruction.[40] Conversely, the Court acted in its own defense eighty years later when President Franklin Roosevelt sought to mold an image of the Court as a group of policy makers rather than neutral adjudicators of law to build public support for his eventual Court-packing plan. The justices took action to save the Court through a public defense of their institution as well as an eventual acceptance of Roosevelt's economic views.[41]

In each case, the image of the Court was tarnished – sometimes briefly and sometimes over a lengthy period of time – by the efforts to paint it as possessing certain negative characteristics. The 1850s and 1860s Court suffered powerful attacks from other national political players who accused the justices of overt bias in their decision making on the slavery issue. That Court was one of the weakest in history and ultimately produced a long period where deference to the Court was suspended. The New Deal–era Court was forced to fight back with both public statements asserting its efficiency and a change in voting patterns that more closely reflected the public's will. The danger to the Court of the creation of a public image diminishing the Court is real. The justices must engage in their own public relations strategies to prevent others from setting that image for them, an image that likely will not conform to their own desired one.

As discussed earlier, whether individual decisions shape long-term public opinion about the Court is questionable. Given the uncertainty of scholars, the justices cannot expect that their decisions will not affect public opinion of the institution. Hence, strategic external relations would appear necessary if it is the case that public opinion can be shaped by the justices, either through written opinions or via other means.

A variant of the strategy model then would posit that the justices engage not only in strategic internal negotiations with each other but also in external strategic behavior – that is, public relations – to achieve certain desired objectives such as institutional support for the Court. In this approach, the justices are external strategic actors who view the public as an important constituency and seek the public's diffuse support for the institution. They act strategically to preserve the institution from external threats.

As indicated previously, these strategic public relations acts do not exist in a vacuum. The justices are aware that the Court at any time may come under attack by various groups in society or even from other political players, such as the Congress or the presidency, who seek to use the Court for their own purposes. Such moves regarding the Court have been frequent in the Court's history as various players find political gain in taking on the justices. The Jefferson Republicans sought to undermine the Court in the early 1800s. Both pro- and antislavery forces assailed the Court in the pre–Civil War period. The Radical Republicans in the immediate aftermath of the war continued the assault. New Deal advocates joined in during the 1930s. More recently, both liberals and conservatives have criticized the Court in the past quarter century when decisions moved in directions they have opposed.

How do the justices engage in public relations in the face of external threats? The most obvious means is through written opinions. One example is the

policy of public unanimity that John Marshall, as chief justice, enacted to shield the justices from attacks by Jefferson Republicans. Again in 1974, the justices were directly threatened with noncompliance by President Richard Nixon, who claimed he would abide by a split decision regarding the Watergate tapes. Joined by three Nixon appointees, the Court responded with a unanimous opinion opposing Nixon's position.[42]

The justices believe that their written opinions can affect how the public responds, not only to the Court's own policy resolution in the case at hand but also to the Court itself. They are sensitive to the effects their decisions have on public opinion and their own institution's role, as well as to the imperatives of "selling" their actions to a sometimes skeptical public. One example was the Court's handling of the segregation cases in the mid-1950s. In 1955, Justice Felix Frankfurter reminded his colleagues of their position when he admonished that "how we do what we do in the Segregation cases may be as important as what we do."[43]

Another means for response has occurred outside the realm of judicial opinions. This has included public letters, testimony to Congress, and speeches. An example of the use of public letters was the effort by Charles Evans Hughes, chief justice during the New Deal era when Roosevelt's Court-packing plan potentially undermined the independence of the Court. With the intent of shaping debate about the Court-packing plan, Hughes issued a public letter to Senator Burton K. Wheeler, Senate Judiciary Committee chair, refuting Roosevelt's claims about the Court.[44] An example of the role of congressional testimony is the regular appearance by select justices before Congress to discuss the judiciary's budget. Occasionally, the justices have used this forum to express institutional needs that could be met through legislation. The use of speeches is demonstrated by the examples discussed in the preface – that is, public addresses by Ruth Bader Ginsburg and Sandra Day O'Connor designed to blunt congressional Republican criticism of the Court.

The small size of the Court enhances the ability of the justices to engage in joint actions to preserve the institution in the face of some external menace. The advantage of small size is maintained by a norm of secrecy, the violation of which would expand the number of players involved in the Court's inner workings. As Brenner and Whitmeyer note, secrecy "lessens criticism of . . . Court actions, lessens the ability of outsiders to work the Court strategically, and garners the Court more mystery and respect."[45] This norm is usually maintained even in the face of competing individual-oriented goals.

The justices' public relations strategy is not wholly institutional. Justices may possess individual goals that are not necessarily shared by their colleagues. Even if others also possess those goals, justices still pursue them largely in a