On what basis and for what reasons do judges in the United States rule the way they do on the motions, petitions, and judicial policy questions that require their attention? In this chapter, we respond to this query by summarizing the theories and research findings of a large number of judicial scholars who have tried to find out what makes judges tick. (Chapter 13 then examines the special case of decision making on the collegial appellate courts at the state and federal levels.) In this chapter, we examine federal and state jurists as a group because, to a large extent, the variables that influence judicial decision making are the same for judges at both levels. For instance, both types of judges tend to be governed strongly by court precedents, and virtually all judges reflect to some degree their political party affiliation. Where differences between federal and state judges can be anticipated, we take note of this. For example, one would expect public opinion to have less effect on federal judges, who are appointed for life, than it has on those state judges who must regularly stand for reelection.

It is useful to begin with a brief discussion of the decision-making environment in which trial judges and their appellate colleagues operate. Because of the differing purposes and organizational frameworks of trial and appellate courts, judges of each type face particular kinds of pressure and expectations. However, all jurists are subject to two major kinds of influence, as described by noted judicial politics scholars Richard J. Richardson and Kenneth N. Vines: the legal...
Judicial Process in America

subculture and the democratic subculture. 1 In any given case, it is often difficult to determine the relative impact of a specific influence on a judge. Studies have suggested that when judges, especially trial judges, find no significant precedent to guide them—that is, when the legal subculture cupboard is bare—they tend to turn to the democratic subculture, an amalgam of determinants that includes their own political inclinations.

At the base of the federal and state judicial hierarchies are the trial court judges, who preside over the judicial process and corporately make hundreds of millions of decisions each year. Some decisions pertain to legal points and procedures raised by litigants even before a trial begins, such as a motion by a criminal defendant’s lawyer to exclude from trial a piece of illegally obtained evidence. During the trial a judge must rule on scores of motions made by the attorneys in the case—for example, an objection to a particular question asked of a witness or a request to strike contested testimony from the record. Even after a verdict has been rendered, a trial judge may be confronted with demands for decisions—for instance, a litigant’s request to reduce a monetary award made by a civil jury.

Trial judges can and occasionally do take ample time to reflect on the more important decisions and may consult with their staff or other judges about how to handle a particular legal problem. Nevertheless, a significant portion of their decision making must be done on the spur of the moment, without the luxury of lengthy reflection or discussion with staff or colleagues. As one trial judge told us, “We’re where the action is. We often have to ‘shoot from the hip’ and hope you’re doing the right thing. You can’t ruminate forever every time you have

Massachusetts Superior Court Judge E. Susan Garsh hears arguments during the trial of Aaron Hernandez, the former New England Patriots football player who was convicted of murder in 2015. Hernandez subsequently appealed the verdict. But while his case was still pending before the Massachusetts’ Appeals Court, he hanged himself in prison in 2017. Consistent with Massachusetts state law, which says murder convictions are effectively erased after an inmate’s death if their appeals options have not been exhausted, Judge Garsh officially vacated Hernandez’s conviction in 2017.
to make a ruling. We’d be spending months on each case if we ever did that.” (Virtually all of the judges interviewed for this study were promised anonymity.)

Decision making by the appeals courts and the supreme courts is different in several important respects. By the time a case reaches the appellate level, the record and facts have already been established. The jurists’ job is to review dispassionately the transcript of a trial that has already occurred, to search for legal errors that may have been committed by others. Few snap judgments are required. And although the appeals courts and a supreme court may occasionally hear oral arguments by attorneys, they do not examine witnesses, and they are removed from the drama and confrontations of the trial courtroom. Another difference in the decision-making process is that the trial level is largely individualistic, whereas the appellate level is to some degree the product of group deliberation.

Despite the acknowledged differences between trial and appellate judge decision making, all American jurists have many values in common. We examine several studies that have sought to explain why judges think and act as they do, using the legal subculture and the democratic subculture analytic framework. The thrust of these scholarly efforts has differed. Some view judges as akin to judicial computers who take in a volume of facts, law, and legal doctrines and spew out “correct” rulings—determinations that are virtually independent of the judges’ values and characteristics as human beings. Other researchers tend to explain judicial decision making in terms of the personal orientations of the judges. A decision is seen not so much as the product of some unbiased, exacting thought process that judges learn in law school but rather as having been affected by the judge’s life experiences, prejudices, and overall social values. As with most theories of human behavior, each of these approaches has its fair share of the truth, but none provides the whole story.

The Legal Subculture

It is useful in examining the legal subculture as a source of trial judge decision making to focus on a number of specific questions: What are the basic rules, practices, and norms of this subculture? Where do judges learn these principles, and what groups or institutions keep judges from departing from them? How often and under what circumstances do judges respond to stimuli other than those from the traditional legal realm?

The Nature of Legal Reasoning

In the classic movie set at Harvard Law School, The Paper Chase, the formidable Professor Kingsfield promises his budding law students that if they work hard and entrust their mush-filled brains to him, he will instill in them the ability “to think like a lawyer.” How do lawyers and judges think when they deliberate in their professional capacities? One classic answer to this question is that “the
basic pattern of legal reasoning is reasoning by example. It is a three-step process
described by the doctrine of precedent as follows: (1) similarity is seen between
cases; (2) the rule of law inherent in the first case is announced; and (3) the rule
of law is made applicable to the second case. For example, the cases of Lane v.
Wilson and Gomillion v. Lightfoot had similar arguments and factual situations.
In Lane, an African American citizen of Oklahoma, brought suit in federal court,
alleging that he had been deprived of the right to vote. In 1916, the legislature of
that state had passed a law, ostensibly designed to give formerly disenfranchised
Black citizens the right to vote, which required them to register, but the registra-
tion period lasted only twelve days. (White voters were for all practical purposes
exempted from this scheme through the use of a “grandfather clause.”) If Blacks
did not sign up within that short interval, never again would they have the right
to vote. The Oklahoma legislature clearly realized that a twelve-day period was
wholly inadequate for African Americans to mount a voter registration drive and
that the vast majority would not acquire the franchise. The plaintiff in this case
did not get on the registration rolls in 1916. When he was thereafter forbidden
to vote, he brought suit, claiming that the Oklahoma registration scheme was
unconstitutional. The Supreme Court agreed with the plaintiff. In striking down
the statute, it set forth this principle, or rule of law: “The Fifteenth Amendment
nullifies sophisticated as well as simple-minded modes of discrimination.” Two
decades later, another Black citizen, Charles Gomillion, brought suit in the fed-
eral courts, alleging a denial of his right to vote as secured by the Fifteenth
Amendment. Here an Alabama statute altered the Tuskegee city boundaries from
a square to a twenty-eight-sided figure, allegedly removing “all save only four or
five of its 400 Negro voters while not removing a single white voter or resident.”
Although not denying a legislature’s right to alter city boundaries “under normal
circumstances,” the Court saw through the Alabama legislature’s thinly disguised
attempt to deny suffrage to the African American citizens of Tuskegee. Reasoning
that the situation in Gomillion was analogous to that in the Oklahoma case, the
Court used the precedent of Lane v. Wilson to strike down the Alabama law: “It
is difficult to appreciate what stands in the way of adjudging a statute having
this inevitable effect invalid in light of the principles of which this Court must
judge, and uniformly has judged, statutes that, howsoever speciously defined,
obviously discriminate against colored citizens. ‘The Fifteenth Amendment nul-
ifies sophisticated as well as simple-minded modes of discrimination.’ Lane v.
Wilson.” This is one example of the judicial reasoning process—of thinking
like Professor Kingsfield’s lawyer. Two cases are compared because the facts or
principles are similar; a rule of law gleaned from the first case is applied to the
second. This step-by-step process is the essence of proper and traditional legal
reasoning.

Adherence to Precedent

A related value held by trial and appellate judges is a commitment to follow
precedents—decisions rendered on similar subjects by judges in the past. The
sacred doctrine of *stare decisis* (“stand by what has been decided”) is a cardinal principle of the common law tradition. In a national survey of more than 1,000 trial court judges in the United States, the jurists were asked about how important precedent was in their decision making—especially when the precedent was “clear and directly relevant.” Ninety-one percent replied that it was “very important.” By contrast, when these same jurists were asked to rate the importance of their own personal “view of justice in the case,” only 28 percent said that was “very important.”

As for appellate court judges, a 2010 study focused on a random sample of 500 Supreme Court cases, yielding over 10,000 subsequent treatments in the U.S. Courts of Appeals. The authors concluded that “hierarchical control [that is, the appellate courts generally following the decisions of the Supreme Court] appears strong and effective.”

The U.S. Supreme Court, although technically free to depart from its own precedents, does not usually do so, for when “the Court reverses itself or makes new law out of whole cloth—reveals its policy-making role for all to see—the holy rite of judges consulting a higher law loses some of its mysterious power.” Indeed, one study of the Supreme Court found that “in any given decade, the Court overturns less than .002 percent of its previous decisions.” A sophisticated study of this phenomenon published in 2008 further concluded that “legal factors play an important role in Supreme Court decision making.”

Ideally, adherence to past rulings endows the law with predictability and continuity and reduces the dangerous possibility that judges will decide cases on a momentary whim or with an individualistic sense of right and wrong. Not all legal systems have placed such emphasis on *stare decisis*. In early Greek times, for example, the judge-kings decided each case on the basis of what appeared fair and just to them at the moment. When a judge-king resolved a dispute, the judgment was assumed to be the result of direct divine inspiration. The early Greek model is thus the antithesis of the common law tradition. However, strict adherence to past precedent may be something of a legal fiction. Judges can and do distinguish among various precedents in creating new law. This helps to keep the law flexible and reflective of changing societal values and practices. Many scholars have argued that the readiness of common law judges to occasionally discard or ignore precedents that no longer serve the public has contributed to the survival of the common law tradition.

**Constraints on Trial Judge Decision Making**

Another significant element of the legal subculture is found under the heading of what one prominent scholar called the “great maxims of judicial self-restraint.” These maxims derive from a variety of sources—the common law, statutory law, legal tradition—but each serves to limit and channel the decision making of state and federal judges. Because these various principles have already been discussed in detail, we merely reiterate a few of the major themes of judicial self-restraint.

Before a judge will agree to consider a lawsuit, a definite case or controversy at law or in equity must exist between bona fide adversaries under the
Constitution. The case must concern the protection or enforcement of valuable legal rights or the punishment, prevention, or redress of wrongs directly related to the litigants. Allied with this maxim is the principle that U.S. judges may not render advisory opinions—that is, rulings on abstract, hypothetical questions. (This rule is not followed as strictly in many state systems.) Also, all parties to a lawsuit must have standing or a substantial personal interest infringed on by the statute or action in question.

The rules of the game also forbid jurists to hear a case unless all other legal remedies have been exhausted. In addition, the legal culture discourages the judiciary from deciding political questions or matters that ought to be resolved by one of the other branches of government, by another level of government, or by the voters. Judges are also obliged to give the benefit of the doubt to statutes and official actions when their constitutionality is being questioned. A law or an executive action is presumed to be constitutional until proven otherwise. (Some judges adhere to this principle on economic issues but not on matters of civil rights and civil liberties, believing that in these matters the burden of proof is on the government.) In this same realm, judges feel bound by the norm that if a law must be invalidated, they will do so on as narrow a ground as possible or will void only that portion of the statute that is unconstitutional.

Finally, American jurists may not throw out a law or an official action simply because they personally believe it is unfair, stupid, or undemocratic. For a statute or an official deed to be invalidated, it must clearly be unconstitutional. Judges do not always agree about what is a clearly unconstitutional act, but most acknowledge that broad matters of public policy should be determined by the people through their elected representatives—not by the judiciary.

The Impact of the Legal Subculture: An Example

Because the principles that make up the legal subculture—reasoning, precedent, and restraint—tend to be abstract, it is useful to illustrate them with a real-life example. *Evers v. Jackson Municipal Separate School District* was an uncomplicated 1964 school integration case in which a group of African American children and their parents sought to enjoin the “district and its officials from operating a compulsory biracial school system.”

The facts and controlling precedents were clear: (1) Jackson, Mississippi, was overtly maintaining a segregated public school system; (2) the U.S. Supreme Court had ruled a decade earlier, in *Brown v. Board of Education*, that such segregation was unconstitutional; and (3) the U.S. Court of Appeals for the Fifth Circuit, which has jurisdiction over Mississippi, had handed down a string of rulings ordering the integration process to go forward.

The federal trial judge in *Evers*, Sidney Mize, did not like the commands he heard from the legal subculture. Appointed to the federal bench in 1937, Mize was an unabashed segregationist, as his written opinion in this case clearly shows. After discussing a score of alleged physical and mental differences between Blacks and Whites, Mize argued further that...
in the case of Caucasians and Negroes, such differences may be directly confirmed by comparative anatomical and encephalographic measurements of the correlative physical structure of the brain and of the neural and endocrine systems of the body. The evidence was conclusive to the effect that the cranial capacity and brain size of the average Negro is approximately ten per cent less than that of the average white person of similar age and size, and that brain size is correlated with intelligence.\textsuperscript{14}

Judge Mize also argued, “From the evidence I find that separate classes allow greater adaptation to the differing educational traits of Negro and white pupils, and actually result in greater scholastic accomplishments for both.”\textsuperscript{15}

It would seem clear where this decision was headed. But then entered the legal subculture. After fourteen single-spaced printed pages of racially biased argument against the integration of the Jackson schools, Mize yielded to the requirements of legal reasoning, respect for precedent, and judicial self-restraint. Almost sheepishly he concluded his decision with these unexpected words:

Nevertheless, this Court feels that it is bound by what appears to be the obvious holding of the United States Court of Appeals for the Fifth Circuit that if disparities and differences such as that reflected in this record are to constitute a proper basis for the maintenance of separate schools for the white and Negro races it is the function of the United States Supreme Court to make such a decision and no inferior federal court can do so.\textsuperscript{16}

Mize then quietly enjoined the school district and its officials from operating a compulsory biracial school system. The legal subculture tiptoed to victory.

\textbf{Wellsprings of the Legal Subculture}

The institutions that instill and maintain the legal values in the United States are “the law schools, the bar associations, the judicial councils, and other groups that spring from the institutionalization of the ‘bench and the bar.’”\textsuperscript{17} “The purpose of law school,” a scholar wrote, “is to change people; to turn them into novice lawyers; and to instill in them a nascent self-concept as a professional, a commitment to the value of the calling, and a claim to that elusive and esoteric style of reasoning called ‘thinking like a lawyer.’”\textsuperscript{18} The world just does not look the same to someone on whom law school has worked its indoctrinating magic. Facts and relationships in the human arena that formerly went unnoticed suddenly become compelling and controlling to the fledgling advocate. Likewise, other facets of reality that previously had been important in one’s worldview are now dismissed as irrelevant and immaterial.

Besides the teaching that occurs in law school, the values of the legal subculture are maintained by the state and national bar associations and by a variety of professional–social groups whose members are from both bench and bar—for
example, the honorary Order of the Coif. The values and practices of jurists are handed down from one generation to another. Thus the traditions and tenets of the American legal subculture are well tended by powerful support groups. They are rightly accorded ample deference if one is to understand judicial decision making in America.

The Limits of the Legal Subculture

Despite the taut nature of judicial reasoning and the importance of *stare decisis* and judicial self-restraint, the legal subculture does not totally explain the behavior of American jurists. If objective facts and obvious controlling precedents were the only stimuli to which jurists responded, the judicial decision-making process would be largely mechanical, and all judicial outcomes would be predictable. Yet even the legal subculture’s most loyal apologists would concede that judges often distinguish between precedents and that some judges are more inclined than others toward self-restraint.

To understand the thinking of judicial decision makers and the evolution of the law, it is necessary to consider more than law school curricula and the canons of the bar associations. One of the first great minds to realize this was Justice Oliver Wendell Holmes Jr., who over a century ago wrote that

> the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.20

By about the 1920s an entire school of thought had developed that argued that judicial decision making is as much the product of human, extralegal stimuli as it is of some sort of mechanical legal thought process. Adherents of this view, who were known as *judicial realists*, insisted that judges, similar to other human beings, are influenced by the values and attitudes learned in childhood. As one of these realists put it, a judge’s background “may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain facial twitch or cough or gesture may start up memories, painful or pleasant.”21
Since the late 1940s, the study of the personal, extralegal influences on decision making has become more rigorous. Often calling themselves judicial behaviorists, modern-day advocates of the realist approach have improved on it in two ways. First, they have tried to test empirically many of the theories and propositions advanced by the realist school. Second, they have attempted to relate their findings to more scientifically grounded theories of human behavior. Thus, whereas a realist might have asserted that a Democratic judge would probably be more supportive of labor unions than would a Republican jurist, a judicial behavioralist might go a step further by taking a generous random sample of labor union versus management decisions and statistically determining whether Democratic judges are significantly more likely than their GOP counterparts to back the union. It is one thing to intuitively ascribe a cause for human behavior; it is another to subject an assertion to careful empirical analysis.

The Democratic Subculture

The legal subculture has an impact on American jurists. Evidence shows that popular democratic values—manifested in a variety of ways through many different mediums—have an influence as well. Some scholars have argued that the only reason courts have maintained their significant role in the American political system is that they have learned to bend when the democratic winds have blown. That is, judges have tempered rigid legalisms with commonsense popular values and have maintained “extensive linkages with the democratic subculture.”

Very often, legal elites such as bar associations and judicial councils are more noticeable spokesmen for the federal judiciary than are the spokesmen of the democratic subculture. However, representatives of the democratic subculture, such as members of political parties, members of social and economic groups, and local state political elites, can also be observed commenting on controversial questions. In matters like staffing the courts, determining their structure and organization, and fixing federal jurisdiction, democratic representatives have access through Congress and other institutions that are influential in establishing judicial policy. Although Congress provides a main channel to the federal courts, access for democratic values is also obtained through the President, the attorney general, and nonlegal officials who deal with the judiciary. In addition, the location of federal courts throughout the states and regions renders them unusually susceptible to local and regional democratic forces.

In discussing the democratic subculture, we focus on the influences most often observed by students of the American court system—political party identification, localism, public opinion, and the legislative and executive branches of government.
The Influence of Political Party Affiliation

Do the political party affiliations of judges affect the way they decide certain cases? The question is straightforward enough, but the responses are by no means in unanimous agreement. To most attorneys, judges, and court watchers among the general public, the question rings with outright impertinence, and their answer is usually something similar to this: After taking the judicial oath and donning the black robe, a judge is no longer a Republican or a Democrat. Former affiliations are (or at least certainly should be) put aside as the judge enters a realm in which decisions are the product of evidence, sound judicial reasoning, and precedent, as opposed to such a base factor as political identification. Or as noted author Donald Dale Jackson quipped in his perceptive book *Judges*, “Most judges would sooner admit to grand larceny than confess a political interest or motivation.” Indeed, during his 2017 confirmation hearings before the Senate Judiciary Committee, then U.S. Court of Appeals judge and future Supreme Court justice Neil Gorsuch proclaimed “There is no such thing as a Republican judge or Democratic judge. We just have judges.”

The data, however, tell a different story. Despite the cries of indignation from those who contend that the legal subculture explains virtually all judicial decision making, evidence compiled over years of research clearly indicates that judges’ political identification does affect their behavior on the bench. Studies have shown that other personal factors—such as religion, gender, race, prejudicial career, and the level of prestige of their law school education—may also play a role. However, only political party affiliation seems to have any significant and consistent capacity to explain and predict the outcome of judicial decisions.

One prominent student of American politics explained why there may be a cause-and-effect relationship between judges’ party allegiance and their decisional patterns:

If judges are party identifiers before reaching the bench, there would be a basis for believing that they—like legislators—are affected in their issue orientations by party. . . . Furthermore, judges are generally well educated and the vote studies show that the more educated tend to be stronger party identifiers, to cast policy preferences in ideological terms, to have clearer perceptions of issues and of party positions on those issues, to have issue attitudes consistent with the positions of the party with which they identify, and to be more interested and involved in politics. For judges, even more than for the general population, party may therefore be a significant reference group on issues.

Federal District Court Judges Given the relationship between party affiliation and court decision making, the following observation should come as no surprise: as a whole, Democratic trial judges on the U.S. district courts are more liberal than their Republican colleagues. In a study of more than 117,000 published district court decisions reached between 1932 and 2016, Democratic judges took the liberal position 47.1 percent of the time, whereas Republican jurists did so...
in only 38 percent of the cases. Thus, for our eighty-four-year time frame, the Democrats’ ratio of liberal-to-conservative opinions has been 1.45 times greater (more liberal) than the Republican ratio. Although the overall differences cannot be called overwhelming, neither can they be dismissed as inconsequential.

As the data in Table 12.1 suggest, differences between Republican and Democratic judges depend considerably on the type of case. An analysis of partisan voting patterns in twenty-eight separate case categories indicates that differences between judges from the two parties were greatest for cases concerning affirmative action, in which preferential treatment was given to members of racial and ethnic minority groups and to women (referred to negatively by its opponents as “reverse discrimination”); the right to privacy (for example, abortion, gay and lesbian rights); race discrimination; and deviations in sentencing guidelines (in which judges use their discretion to call for upward or downward variations in sentencing guidelines). Partisan differences were very modest.

| Table 12.1 Liberal Decisions of Federal District Court Judges in Order of Magnitude of Partisan Differences for Twenty-Eight Types of Cases, 1932–2016 |
|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Overall         | Democrat        | Republican      | Partisan Difference | Odds Ratio (α) |
| Reverse discrimination | 57             | 69             | 47             | 22             | 2.60           |
| Right to privacy      | 50             | 60             | 41             | 19             | 2.21           |
| Racial discrimination   | 39             | 48             | 30             | 18             | 2.11           |
| Sentencing guidelines deviation | 47             | 56             | 38             | 18             | 2.03           |
| Local economic regulation | 65             | 72             | 59             | 13             | 1.77           |
| Criminal convictions  | 34             | 40             | 28             | 12             | 1.73           |
| Freedom of religion   | 50             | 56             | 43             | 13             | 1.69           |
| Gender equality/ women’s rights | 47             | 53             | 40             | 13             | 1.68           |
| Fourteenth Amendment  | 35             | 40             | 30             | 11             | 1.60           |
| U.S. habeas corpus pleas | 27             | 31             | 22             | 9              | 1.53           |

(Continued)
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Source: Data collected by Robert A. Carp and Kenneth L. Manning.

Notes: NLRB = National Labor Relations Board. The odds ratio (α), also called the cross-product ratio, is a measure of the relationship between two dichotomous variables. Specifically, it is a measure of the relative odds of respondents from each independent variable category being placed in a single dependent variable category.
or virtually nonexistent in cases involving rent control and excess profits, in disputes between union members and their union hierarchy, and in cases where the federal government was regulating labor unions or the employer.

The partisan affiliation of federal district judges was a key variable on whether these jurists upheld or overturned the highly debated Affordable Care Act (aka “Obamacare”). In 2011, a study noted that: “Party affiliation has made the difference so far with health care. The two trial judges who declared the law unconstitutional—Virginia’s Henry Hudson and Florida’s Roger Vinson—are both Republican appointees.

The judges who upheld the law—Norman Moon of Virginia and George Caram Steeh of Michigan—were appointed by Democratic presidents. These facts and figures would be more meaningful if one could enter into the minds of typical Republican and Democratic judges and view the world from their perspectives. Barring that, however, excerpts of interviews with two jurists who are lifelong members of each of the two parties are revealing. Sitting in the same city and on the same day, they discussed a subject that in recent decades has divided Republican and Democratic judges—their philosophy of criminal justice and, more specifically, their views about sentencing convicted felons. The rank-and-file Democrat (appointed by Lyndon B. Johnson) said in part:

Most of the people who appear before me for sentencing come from the poorer classes and have had few of the advantages of life. They’ve had an uphill fight all the way and life has constantly stepped on them. . . . I come from a pretty humble background myself, and I know what it’s like. I think I take all this into consideration when I have to sentence someone, and it inclines me towards handing down lighter sentences, I think.

One hour later, a lifelong Republican (appointed by Richard M. Nixon) addressed the same issue but with a different twist at the end:

When I was first appointed, I was one of those big law-and-order types. You know—just put all those crooks and hippies in jail and all will be right with the world. But I’ve changed a lot. I never realized what poor, pathetic people there are who come before us for sentencing. My God, the terrible childhoods and horrendous backgrounds that some of them come from! Mistreated when they were kids and kicked around by everybody in the world for most of their lives. Society has clearly failed them. As a judge there’s only one thing you can do: send them to prison for as long as the law allows because when they’re in that bad a state there’s nothing anyone can do with them. All you can do is protect society from these poor souls for as long as you can.

Although we would not contend that all Republican and all Democratic trial judges think precisely in those terms, we believe that something of the spirit of partisan differences is captured in these two quotations.
A more recent study reaffirms the importance of partisan, ideological differences among U.S. district court judges, which the author concludes are “modest, but not unsubstantial. During the recent era of independent executive-vetting practices, the likelihood of a conservative decision is approximately 78 to 85 percent for Democratic appointees, and 85 to 90 percent for Republican appointees.” Furthermore, there is at least some evidence that partisan differences may be increasing. Research published in 2017 suggests that the increasing partisan polarization seen in recent decades in Congress may be occurring in the federal district courts as well.

**Federal Appeals Court Judges** As for partisan variations in the voting patterns of U.S. appeals court judges, here, too, evidence shows that their (prior) party affiliation tempers their decision making to some degree. Studies conducted during the 1960s by Sheldon Goldman and others concluded that “on balance, the findings underscore the absence of a sharp ideological party cleavage in the United States but also give support to the contention that the center of gravity of the Democratic party is more ‘liberal’ than that of the Republican party.” This finding has stood the test of time. Most recent work has also found that Democratic judges on the whole tend to be more supportive of the rights of criminal defendants and of those seeking to expand First and Fourteenth Amendment freedoms. And a major 2006 study by a research team headed by Harvard Law professor Cass Sunstein found that the partisanship of federal appeals court judges predicts their decision-making in the aggregate and that “Republican appointees vote very differently from Democratic appointees.”

Another study of voting patterns among appellate court judges was conducted on decisions made en banc—by all or a specified number of the judges in a circuit court of appeals instead of by the usual three-judge panels. This research focused primarily on partisan differences in cases dealing with criminal justice and civil liberties issues. The scholars found that support for criminal appellants by the Democrats was 59 percent, whereas for Republican appointees the figures were significantly lower—around 21 percent. Likewise, Democrats supported civil liberties petitioners approximately 67 percent of the time, whereas Republicans did so only around 35 percent of the time.

**U.S. Supreme Court Justices** Does political party affiliation affect the way members of the U.S. Supreme Court decide their cases? Scholars have found this to be a difficult subject to investigate. There is a common perception that the Supreme Court has usually decided cases in a partisan way, with voting splits often falling exactly along party lines. While this is true in some instances, the overall picture is not nearly that simple. The Supreme Court decides dozens of cases in any given term, and some of those disputes are more politically salient than others. In numerous cases the justices are unanimous in their rulings; in many others, the jurists do not split neatly along party or ideological lines. Consider, for example, the fact that in the 2014–2015 Supreme Court term,
conservative Antonin Scalia (an appointee of Republican president Ronald Reagan) agreed with liberal Ruth Bader Ginsburg (who was selected by Democrat Bill Clinton) in 58 percent of the Court’s decisions that year.\textsuperscript{38} In other words, Justices Scalia and Ginsburg agreed most of the time. To suggest that partisanship is usually the overwhelming motivator of Supreme Court rulings is to ignore basic facts such as this.

Still, researchers have looked past the political spin and have engaged in rigorous, painstaking research on this question, and they have found reliable evidence indicating that partisanship may be a factor in some instances. The research hurdle on this question stems, in part, from the fact that the Court has nine justices, and generalizing about the behavior of groups this small is very challenging. Moreover, the conventional wisdom that party is influential in Supreme Court decision making often takes a very limited-time view of the Court, sometimes applying contemporary political understandings to an institution that has a more than two-century history. Numerous political parties have been represented on the Court over the decades, and the definitions of Federalist, Democrat, Whig, Republican, liberal, and conservative have varied so much over time that generalizations often become problematic. For example, before the 1920s, most mainstream Democrats opposed civil rights for African Americans. Since that era, most champions of the civil rights movement have been Democrats. In the jargon of the trade, the variables are so numerous and the n’s (number of justices) are so small that statistically significant observations are extremely difficult to make.

Despite the methodological problems involved, judicial scholars have sought to explore this subject. In a comprehensive study of the relationship between party affiliation and the liberal–conservative voting patterns of justices in the early part of the twentieth century, one scholar found that between 1903 and 1939, party identification was “clearly a good cue for selecting judicial decision-makers with the proper values.” That is, on matters of support for the economic underdog, Democratic Supreme Court justices were more liberal than their Republican colleagues. Since 1940, the greater liberalism of Democratic Court members has also extended to matters of civil rights and liberties, thereby reaffirming “the concept that judges are not random samples of their group.” But even this scholar concedes, as did those who studied partisan voting by appeals court and trial court judges, that the relationships are weak:

The inability to predict at high rates of probability is not surprising when one considers the assumptions that must be made and the variety of other influences on the Court, such as political and environmental pressures, social change, precedent, reasoned argument, intracourt social influences and idiosyncrasy.\textsuperscript{39}

A major study of partisan voting patterns on the Supreme Court focused on criminal justice cases. Among other things, the researchers concluded, “Democratic control of the Court and the White House, coupled with a high proportion...
of the Court’s docket devoted to criminal issues, results in significantly higher support levels for criminal defendants than under the condition of the Republicans occupying the presidency and a majority of the Supreme Court seats with a relatively low priority placed on criminal justice appeals.” Nonetheless, some scholars urge caution before making a flat-out pronouncement about the relationship between the justices’ backgrounds and their subsequent voting patterns. For example, one prominent researcher has argued that previous studies may be time-bound—that is, during some time periods decisional differences among the justices might be explained by background characteristics, whereas during others background is only a modest predictor of behavior. When one is faced with such conflicting and tentative studies, it is clear that the final chapter of a book on this subject is yet to be written.

More recently, however, there is evidence that the contemporary Supreme Court has tended to exhibit increasingly partisan differences. Those who assert that partisanship is frequently paramount in Supreme Court decision making might point to the epic 2000 case of *Bush v. Gore*, the controversial five-to-four ruling that fell perfectly along party lines and effectively handed the disputed presidential election that year to George W. Bush. At the same time, there is indisputable data that Congress has become more polarized along party and ideological lines in recent years, and it would be logical to speculate that something similar could also be happening on the Supreme Court. A 2011 article by scholars Lawrence Baum and Neal Devins argued that “for the first time in our political lifetimes, each of the four Democratic appointees has a strong tendency to favor liberal outcomes, while the five Republicans typically take conservative positions.” Baum also noted in 2014 that “the [Supreme] Court is now divided along partisan lines in a way that hasn’t been true in the past.” Still, this must be tempered with the understanding that many cases—even highly political ones—do not always reveal consistent partisan trends. Consider that in the landmark 2015 same-sex marriage case of *Obergefell v. Hodges*, a five-vote majority of four Democrats and one Republican ruled in favor of marriage rights for gay couples. In another blockbuster case during that same term, *King v. Burwell*, the Court upheld a key provision of the Affordable Care Act (aka “Obamacare”) in a six-to-three ruling, in which the majority included two Republican appointees along with four Democrats. Had partisanship been the sole predictor of the voting in those two high-profile cases, the rulings—and American history—would have been very different.

Finally, it is interesting to note that while the overall data are somewhat mixed, the American public often seems to believe that partisan politics influences the vote of Supreme Court justices. For example, prior to the Court’s first ruling on the Affordable Care Act in the summer of 2012, a Bloomberg News poll in March of that year revealed that a full 75 percent of the American public thought “the Court’s decision will be based more on politics than on constitutional merit.”

**Partisanship in State Courts** The federal courts are not the only arena in which Republican and Democratic jurists sometimes square off against one another. Partisan voting patterns often occur as well among the men and women who sit...
on the trial and appellate court benches. However, the evidence at the state level is weaker, for three general reasons. First, the state courts have not been studied as extensively and systematically as have the federal courts. This may be because some political scientists have held the (mistaken) view that state judiciaries are less important than their federal counterparts or because many state court decisions are unpublished and therefore much more difficult to obtain and study. Second, partisanship among state jurists is not strongly uniform across the country. In some states, for instance, judicial selection is truly bipartisan (or nonpartisan), and both political parties may support the same candidates. Also, many state judges do not have extensive relationships with a political party. Although they may have partisan identifications, they may not view judicial questions as being reflective of their party's ideology. Finally, the United States has a number of states in which one party dominates and in which the vast majority of judges bear one same party label. For example, it would make little sense to study partisan variations among appellate judges in Texas because they are virtually all now Republicans. Nonetheless, keen levels of partisanship have been documented in some jurisdictions—particularly in states with big cities. One study revealed that the intensity of partisan rhetoric has increased in campaigns for judicial office ever since the Supreme Court ruled in *Republican Party of Minnesota v. White*\(^48\) that free speech rights extend “to candidates for judicial office, allowing them the freedom to announce their views on a variety of political and legal issues.”\(^49\)

In Michigan, partisan voting patterns among the judges have been noteworthy, especially on the state supreme court. Research has shown that on labor-management issues, for example, Democrats on the bench were significantly more likely to support the side of the worker in unemployment compensation cases and in issues dealing with workers' compensation (on-the-job injuries). Democratic judges were also more likely to support criminal defendants seeking a new trial, to favor government efforts to regulate business, and to side with persons who sue business enterprises—all consistent with the voting behavior of Democrats on the federal bench.\(^50\) Another study that focused on Michigan reaffirmed the high level of judicial partisanship in that state.\(^51\) In a study of partisan conflict on a California intermediate court of appeals, significant differences were found between Democrats and Republicans in both criminal and civil cases.\(^52\) Studying issues such as votes in criminal justice cases, labor-management disputes, debtor-creditor disagreements, and consumerism, the author concluded that “as previous research . . . would have predicted, the results are in the expected direction, with Republican panels significantly more likely to reach conservative outcomes than Democratic panels.”\(^53\)

Illinois, Iowa, Maryland, New York, and Pennsylvania are examples of other states where researchers have found meaningful partisan differences between Republican and Democratic judges.\(^54\) Finally, a comprehensive study of state supreme court chief justices in 2005 found that there has been “a significant relationship between citizen ideology and the ideology of the chief justice”—that is to say, the partisan values of a majority of a state's voters is often reflected in corresponding partisan behavior by the state's supreme court chief justice.
Partisan voting behavior of jurists in other nations is not unknown, but it is more difficult to pinpoint for several reasons. First, in virtually all other countries, judges do not run for elective office in an openly partisan manner, as they do in those American states that elect judges. Outside of the United States, there are only two nations that have judicial elections, and then only in limited fashion. Some Swiss cantons elect judges, and appointed justices on the Japanese Supreme Court must sometimes face retention elections, though scholars there say those elections are a formality. Also, in most other nations potential judicial candidates are more likely to eschew active partisan politics before their appointment to the bench. Identifying a judge’s party affiliation and correlating it with a particular substantive voting pattern is therefore more difficult. Nevertheless, many studies suggest that a judge’s background, which is highly correlated with his or her political orientation, does meaningfully affect the jurist’s decisions on the bench. Likewise, other studies have identified the existence of clear ideological voting patterns of appellate court judges on foreign courts, and these ideological values can usually be traced to a political party within that country.

The political party affiliation of the judges and justices can make a difference in the way they decide cases. Of all the background variables studied, it seems to be the most compelling and consistent. But a word of caution is in order. Although evidence of partisan influence on judicial behavior is convincing, it by no means suggests that Democrats always take the liberal position on all issues, whereas Republicans always opt for the conservative side. Rather, it is a matter of tendencies—that is, when the decision is a close call, a Democrat on the bench tends to be more liberal than a Republican judge. When controlling precedents are absent or ambiguous, or when the evidence in the case is about evenly divided, Democrats are more inclined than Republicans to be supportive of civil rights and liberties, to support government regulation that favors the worker or the economic underdog, and to turn a sympathetic ear toward the pleas of criminal defendants.

A wide range of influences are included in the term localism, and we regard it as a broad second category of factors that affect federal and state judicial decision making. A substantial body of literature suggests that federal judges are influenced by the traditions and mores of the region in which their courts are located, or in the case of Supreme Court justices, it varies by the geographic area in which they were reared. For trial and appeals court judges, geographic differences define both the legal and the democratic subcultures as well as the nature of the questions they must decide. Historically, such judges have had strong ties to the state and the circuit in which their courts are situated, and on many issues
judicial decision making reflects the parochial values and attitudes of the region. As two leading students of the subject have noted,

A persistent factor in the molding of lower court organization has been the preservation of state and regional boundaries. The feeling that the judiciary should reflect the local features of the federal system has often been expressed by state officials most explicitly. Mississippi Congressman John Sharp Williams declared that he was "frankly opposed to a perambulatory judiciary, to carpetbagging Nebraska with a Louisianian, certainly to carpetbagging Mississippi or Louisiana with somebody north of Mason and Dixon's line."59

Why should judges in one district or circuit decide cases differently from their colleagues in other localities? Why should a Supreme Court justice make decisions differently from colleagues who hail from other parts of the United States?60 Richardson and Vines put the matter succinctly:

Since both district and appeals judges frequently receive legal training in the state or circuit they serve, the significance of legal education is important. If a federal judge is trained at a state university, he is exposed to and may assimilate state and sectional political viewpoints, especially since state law schools are training grounds for local political elites. . . . Other than education, different local environments provide different reactions to policy issues, such as civil rights or labor relations. Indeed, throughout the history of the lower court judiciary there is evidence that various persons involved in judicial organization and selection have perceived that local, state, or regional factors make a difference and have behaved accordingly.61

Moreover, trial and appellate judges tend to come from the district or state in which their courts are located, and the vast majority were educated in law schools of the state or circuit in which they work. (For example, two-thirds of all district judges in one study were born in the state where their court is located, and 86 percent of all circuit judges attended a law school in their respective circuits.)62 Also, the strong local ties of many judges tend to develop and mature even after their appointment to the bench.63

In identifying with their regional base, judges are similar to other political decision makers. Public attitudes and voting patterns on a wide range of issues vary from one section of America to another.64 As for national political officials, there is evidence that regionalism affects the voting patterns of members of Congress on many important issues—for example, civil rights, conservation, price controls for farmers, and labor legislation.65

Regionalism at the Three Judicial Levels

When President George Washington appointed the first Supreme Court, half of its members were northerners and half were southerners. Washington's
choices were surely more than just a symbolic gesture to give a superficial balance to the Court. Having successfully led a group of squabbling former colonies during the Revolutionary War, Washington understood that the attitudes and mores of his fellow citizens differed widely from one locale to another and that justices would not be immune to these parochial influences. Studies of the early history of the high court reveal that sectionalism did creep into its decision-making patterns—particularly along North–South lines.

For example, a study of Supreme Court voting patterns in the sectional crisis that preceded the Civil War noted that the four justices who were most supportive of southern regional interests were all from the South, whereas jurists from the northern states usually favored the litigants from that region. In the twentieth century, evidence also supported the belief that where the justices came from tempered their decision making to some degree. A fairly dramatic manifestation of this principle is found in President Nixon’s famous “southern strategy.” After the appointment of Warren E. Burger as chief justice in 1969,

pressure had been building on Nixon to name a southerner to the Court. Though he had never publicly promised a southern nominee, Nixon’s intentions were never seriously doubted. Aware that a judge in the South enjoyed a prestige unrivaled in any other section of the country, Nixon advisors believed that he could do southerners no higher favor than to appoint one of their own to the highest court in the land. Even before Nixon assumed office, he had successfully identified with the southern cause. “The one battle most white southerners feel they are fighting is with the Court and Nixon has effectively identified himself with that cause,” wrote election analyst Samuel Lubell. “Only Nixon can change the makeup of the Court to satisfy southern aspirations.”

Nixon then nominated Clement Haynsworth, Jr. of South Carolina, who was rejected by the Senate. Next, he submitted the name of G. Harrold Carswell of Florida, but this nomination met the same fate as Haynsworth’s. An angry Nixon then stated, “As long as the Senate is constituted the way it is today, I will not nominate another southerner.”

Although political leaders and much of the general public believe that a relationship exists between the justices’ regional backgrounds and their judicial decisions, scholars have had difficulty documenting this phenomenon. First, links between the justices’ regional heritage and their subsequent voting behavior are difficult to pinpoint, and they exist at most for probably a few regionally sensitive issues. Also, after Supreme Court justices are appointed and move to Washington, D.C., they may, over time, take on a more national perspective, loosening to a significant degree the attitudes and narrow purview of the regions in which they were reared and educated. For example, in his early days in Alabama, Hugo Black had been a member of the Ku Klux Klan, but after his judicial appointment in 1937, he became one of the most articulate advocates of civil rights ever to sit on the Supreme Court.
Some evidence indicates that regionalism pervades the federal judicial system at the appeals court level as well. One study noted regional differences on such important issues as rights of the consumer, pleas by criminal defendants, petitions by workers and by Blacks, public rights in patent cases, and immigration litigation. The author of this research concluded that "regionalism is an inescapable adjunct of adjudicating appeals in one of the oldest regional operations of federal power in existence." He observed that although the appeals courts may adhere to national standards, such norms are nevertheless "regionally enforced. In the crosswinds of office and constituencies, Courts of Appeals may mediate cultural values—national and local, professional and political—in federal appeals." In a study of regional variations in the voting of court of appeals judges, judicial politics scholar Susan Haire noted, for example, that in search and seizure cases, Haire found that Western judges were more liberal than their counterparts in the East (including the South). But in race-based employment discrimination cases Western judges adopted positions that were more conservative than their colleagues in the East. In studies of federal district judges, East–West differences have never been found to be great. However, significant variations have traditionally existed between judges living in nonsouthern states and those holding court in the South. Between 1932 and 1979, only 39 percent of the southern judges’ decisions were liberal, whereas the figure was nearly 45 percent for jurists in the nonsouthern states. However, the data in Table 12.2 indicate that in the past four decades these differences have declined to only 1.7 percent, although on some specific issues southern jurists may still manifest strongly conservative sentiments. For example, a 1990 study showed that federal district judges in the more conservative South were almost 70 percent more likely to take an anti-abortion stance than their colleagues in the North. This was found to be consistent with the values of the region as measured by public opinion polls and other data. Also recall that in the 2012 and 2016 presidential elections, some of the strongest support for the conservative Republican ticket was in the southern states.

Regional influences on judges’ voting behavior are by no means a uniquely American phenomenon. For example, even in a small country such as Norway, the way judges vote in certain types of cases is often influenced by the regions they come from. One early study found that for violations of the conscientious objector laws, the likelihood of being convicted varied from a low of 3 percent if the judge was located in the Western Military District (Vestlandet) to a high of 54 percent if the jurist was from the Northern District (Nordland).

**Variances in Judicial Behavior among the Circuits** Not only may judicial decision making vary from one region of the country to another, but each of the circuits, according to studies, has its own particular way of administering the law and making decisions. One reason is that circuits tend to follow sectional lines that mark off historical, social, and political differences. Another reason is that the circuit courts of appeals tend to be idiosyncratic, and thus the
standards and guidelines they provide to the trial judges will reflect their own approach. In a study of variations in the behavior of appellate judges from one circuit to another, scholar Susan Haire observed that the “findings . . . strongly suggest judges’ decisional tendencies are shaped by the circuit.” In her analysis, Haire found “meaningful policy differences” in such fields as search-and-seizure cases, obscenity rulings, and employment discrimination lawsuits. Likewise, a study published in 2002 indicates that there were significant circuit-by-circuit variations in the degree to which these entities adhered to Supreme Court precedents. Similarly, the behavior of U.S. trial judges has been observed to vary on a circuit-by-circuit basis. Between 1980 and 2014, for example, in the U.S. Ninth Circuit 49.7 percent of district court judges’ decisions were liberal. (The Ninth Circuit covers many of the western states, including the traditionally liberal states of California, Hawaii, Washington, and Oregon.) Indeed, in February 2005, at a Republican Party dinner, Tom DeLay, then House majority leader, publicly railed against what he termed the “liberal, left-leaning, wacko 9th Circuit over in San Francisco.” At the other end of the scale is the Fourth Circuit (Maryland, North and South Carolina, Virginia, and West Virginia), whose trial jurists rendered liberal decisions only 36.8 percent of the time. Such circuit-by-circuit differences among trial judges are also manifested in variations in sentencing behavior. An article in the Wall Street Journal noted, “Government researchers did find

Table 12.2 Liberal and Conservative Decisions by Non-Southern and Southern Judges in Two Time Periods

<table>
<thead>
<tr>
<th></th>
<th>Nonsoutherners</th>
<th>Southern</th>
<th>Odds ratio ($\alpha$)</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>n</td>
<td>%</td>
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<tr>
<td>1932–1979</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Liberal</td>
<td>44.8</td>
<td>8,749</td>
<td>38.9</td>
</tr>
<tr>
<td>Conservative</td>
<td>55.2</td>
<td>10,760</td>
<td>61.1</td>
</tr>
<tr>
<td>Odds ratio ($\alpha$) = 1.28</td>
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<tr>
<td>1980–2016</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Liberal</td>
<td>42.5</td>
<td>26,140</td>
<td>40.8</td>
</tr>
<tr>
<td>Conservative</td>
<td>57.5</td>
<td>35,423</td>
<td>59.2</td>
</tr>
</tbody>
</table>

Source: Data collected by Robert A. Carp and Kenneth L. Manning.

Note: The odds ratio ($\alpha$), also called the cross-product ratio, is a measure of the relationship between two dichotomous variables. Specifically, it is a measure of the relative odds of respondents from each independent variable category being placed in a single dependent variable category.
wide disparities in sentencing across the country's 12 regional judicial circuits. In drug cases, for example, district judges in San Francisco's Ninth Circuit were 19 times as likely to mete out sentences below the guidelines of the U.S. Sentencing Commission—to make what are called 'downward departures'—as those in the Fourth Circuit, based in Richmond, Va.\textsuperscript{81}

\textbf{Variances in Trial Judge Behavior among the States} At first blush, it may appear strange to argue that U.S. judicial decisions vary significantly from one state to another because the state is not an official level of the federal judicial hierarchy, which advances from district to circuit to nationwide system. Nonetheless, direct and indirect evidence suggest that each state is unique in the way its federal judges administer justice. There are several explanations for this. First, a state, similar to a circuit or a region, is often synonymous with a particular set of policy-relevant values, attitudes, and orientations. One would automatically expect, for instance, that on some issues U.S. trial and appellate judges in Texas would act differently from Massachusetts jurists, not so much because they are from different states but because they are from different political, economic, legal, and cultural milieus. Second, many judges regard their states as meaningful boundaries and behave accordingly. For example, a U.S. trial judge in Louisiana told us, “One thing I frequently discuss with the other judges here is sentencing matters. Judge X has been a big help with this. I wouldn't want to hand down a sentence which is way out of line with what the other judges are doing here in this state for the same crime.”\textsuperscript{82} Another example occurred in the fall of 2002, when all of South Carolina’s active federal trial judges voted “to ban secret legal settlements, stating that such agreements have made the courts complicit in hiding the truth about hazardous products, inept doctors and sexually abusive priests. . . . Mary Squiers, who tracks individual federal courts’ rules for the U.S. Judicial Conference, said only Michigan had a similar rule, which unseals secret settlements after two years.\textsuperscript{83} Third, note the impact on federal judicial behavior of diversity of citizenship cases—suits that constitute almost a quarter of the district courts’ civil business and about one in ten civil appeals to circuit courts. Because the Supreme Court requires the lower courts to apply state instead of federal law in such cases, it behooves U.S. trial judges to keep abreast of and be sensitive to the latest developments in state law. The effect may be the same for circuit judges. For example, when three-judge appellate panels are appointed for diversity of citizenship cases, the tendency is to name circuit judges from states whose law governs. As one scholar observed, “A 'slight local tinge' thus colored diversity opinions as part of a general tendency of members to defer to colleagues most knowledgeable about the subject.”\textsuperscript{84} Quantitative studies of federal trial judges’ voting behavior substantiate the proposition that meaningful differences are evident on a state-by-state basis. Such differences have been increasing since the late 1960s. Also, both circuits that cross North–South boundaries (the Sixth and the Eighth) and the district courts in the border and southern states are markedly more conservative than those in the other states.\textsuperscript{85} This suggests that
local and regional values—as personified by the state—may have a greater influence on trial judge decision making than do those of the circuit as a whole.

**Localism and the Behavior of State Judges** If regional factors leaven the bread of federal judicial decisions, this phenomenon is even more pervasive for state jurists. State judges, even more than their federal counterparts, tend to be local folks—born, bred, educated, and socialized in the locale in which they preside. Whether they have been elected directly by the people or appointed as a result of their political connections with the governor or the local political machine, state judges are likely to mirror the values and attitudes of their environment. A study that compared and contrasted judges and justices in Minneapolis and Pittsburgh, provides a fitting example. The researcher reported that in Minneapolis the state trial judges were elected on a nonpartisan ballot, and in practice the political parties had almost no role in the selection of judges. "The socialization and recruitment of [the] . . . judges reflect this pattern of selection. Most of these judges [like the majority of the local population] have Northern European–Protestant and middle-class backgrounds, and their pre-judicial careers have been predominantly in private legal practice. . . . Such career experiences seem to have stimulated these judges to be interested more in 'society' than in the defendant." Minneapolis's conservative, middle-class environment, from which its judges come, is reflected in the law-and-order, no-nonsense grist of the judicial mill:

This pre-judicial experience, reinforced by their lack of party or policy-oriented experiences and their middle-class backgrounds, seems to have contributed to the legalistic and universalistic character of their decision-making and their eschewal of policy and personal considerations. In their milieu, rules were generally emphasized, especially legal ones, and these rules had been used to maintain and protect societal institutions. Learning to "get around" involved skill in operating in a context of rules. The judges' success seems to have depended more on their objective achievements and skills than on personal relationships.

The environment of the Pittsburgh jurists stood in stark contrast. The highly partisan (Democratic) judges there reflected the working-class, ethnic group–based values of the political machine that put them on the bench. They were likely to have held public office before becoming judges, and as a result, they were much more people-oriented than their counterparts in Minneapolis. They often felt that their own "minority ethnic and lower-income backgrounds and these government and party experiences had developed their general attachment to the problems of the 'underdog' and the 'oppressed.'" The author makes the following conclusion about the impact of the local environment and recruitment process on judicial behavior:
Their political experiences and lack of much legalistic experience apparently contributed to the highly particularistic and nonlegalistic character of their decision-making, their emphasis on policy considerations, and their use of pragmatic criteria. . . . Personal relationships, especially with constituents, were emphasized, and focused on particular and tangible entities. Success depended largely on the ability to operate within personal relationships. It depended on whom one knew, rather than on what one knew. Abstractions such as “the good of society as a whole” seem to have been of little concern.89

Houston, Texas (Harris County), also provides a portrait of a judicial system wherein the judges reflect the values of its community. In a city that prides itself on efficiency and for spending as little as possible on its criminal justice system, one study painted this picture of the “intake” phase of its criminal courts: “Responding to a (frequently bored-sounding) judge who appears to be reading from a script, they [the accused] all plead guilty. The question—‘How do you plead?’—is a rhetorical one, of course. The judge, the prosecutors, the court-appointed lawyers, in fact, everyone in the courthouse knows that these criminal defendants have been offered a Hobson’s choice. That is, no choice at all. Take a guilty plea, or sit in jail until you can have a trial and plead not guilty. When that time rolls around, you’ll have spent more time in the slammer than if you pled guilty. ‘It doesn’t look very good, does it?’ observed Earl Musick, president of the Harris County Criminal Defense Lawyer’s Association.”90

Although social science still needs to develop more systematic empirical evidence for the relationship between the local environment and the output of state courts, these three brief case studies are indicative of the kinds of phenomena we are describing.

The Impact of Public Opinion

If one were to approach a typical federal judge or justice and ask whether public opinion affected the decisions made from the bench, the jurist might respond with a fair measure of indignation. The answer might be something similar to this: ‘Look, as a judge with a lifetime appointment, I’m expected to be free from the pressures of public opinion. That’s part of what we mean when we say that we’re a ‘government of laws—not of men.’ When I decide a case, I look at the law and the facts. I don’t go out into the streets and take some sort of public opinion poll to tell me what to do.”

Yet to some degree and on certain issues, American judges do seem to temper their decision making with public opinion. There are several intuitive reasons for this. First, judges, as human beings, as parents, as consumers, and as residents of the community, are themselves part of public opinion. Putting on a black robe may stimulate a greater concern for responsible, objective decision making, but it does not void a judge’s membership in the human race. As one judicial scholar has noted, “Since judges, both appointed and elected, usually
have been born and reared locally and recruited from a local political system, it seems likely that public opinion would have an effect, especially in issues that are locally visible and controversial. In addition . . . many judges seem to consider themselves independent judicial officials who represent local populations in the courts. Consequently, judges may feel that they ought to take local values into account.”

Even a conservative and strict constructionist such as former Supreme Court chief justice William H. Rehnquist acknowledged this in a revealing statement:

Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs. And, if a judge on coming to the bench were to decide to hermetically seal himself off from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead would be influenced by the state of public opinion at the time he came to the bench.

Indeed, even in an authoritarian country such as China, there is evidence that public opinion may influence some judicial decisions. In April 2012, the Supreme People's Court overturned the death penalty originally handed against a thirty-one-year-old woman who, after becoming rich from a company that sold beauty products, was convicted of financial fraud three years earlier. (Those who protested her conviction and penalty felt the original verdict was based more on that fact that she was a private entrepreneur than because she had done anything illegal.) The editor of Global Times, a populist newspaper, spoke for himself and for the thousands who had protested the original court ruling when he wrote, “This is a victory for Internet public opinion [author's emphasis] in China.”

In June 2003, when the Supreme Court handed down its decision in Lawrence v. Texas that overturned Texas’ antisodomy law, a majority of the Court indicated that it wished to keep in step with world public opinion. The decision had the effect of overturning all the other state laws that criminalized homosexual sex. In Lawrence, Houston police had entered the petitioner’s apartment after responding to a “reported weapons disturbance” (the sound of gun fire) and observed the petitioner and another adult man engaging in a consensual sexual act. The two men were arrested and charged with “deviate, sexual intercourse, namely anal sex, with a member of the same sex (a man).” The applicable state law prohibited two persons of the same sex from engaging in “deviate sexual intercourse.” The Lawrence decision overruled the decision of Bowers v. Hardwick, which had affirmed a similar law in the state of Georgia. In a televised interview on the ABC show This Week, Justices Sandra Day O’Connor and Stephen Breyer recalled that in deciding the case the justices discussed whether the court should take into account the legal opinions of other world courts, such as the European Court of Human Rights. Breyer agreed with [Justice Anthony M.] Kennedy’s view that the foreign courts’ views that gays and lesbians had a right to privacy in their sexual
behavior showed that the U.S. Supreme Court's prior decision to the contrary was not in keeping with Western tradition. . . . “We see this all the time, Justice O'Connor and I, and the others, how the world really—it's trite but it's true—is growing together,” Breyer said.96

The following is another example of judges' keen sensitivity to local public opinion. It was previously noted that the federal district judges in South Carolina unanimously voted to abolish the use of secret settlements in their state. Why? The justification for this decision, as stated by Chief Judge Joseph F. Anderson, Jr., clearly reveals that he and the other trial judges were responding to the public mood: “Here is a rare opportunity for our court to do the right thing and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies.”97

Second, in many instances, public opinion is supposed to be an official factor in the decision-making process. For example, in the implementation of the famous Brown v. Board of Education school desegregation ruling, the Supreme Court refused to set strict national guidelines for how its decision was to be carried out. Instead, individual federal district judges were to implement the high court decision, based on the judges' determination of local moods, conditions, and traditions.98 Likewise, when the Supreme Court ruled that federal courts could hear cases concerning malapportionment of state legislatures, it refused to indicate how its decision was to be carried out. It was, in effect, left to the lower federal courts to implement the ruling in accordance with the way they viewed local needs, conditions, and the state political climate.99 Another example may be found in the obscenity rulings of the Burger Court, in which the justices determined that the courts should use community values and attitudes in determining what materials are obscene.100 Thus, not only is it impossible for judges to rid themselves of the influence of public opinion, but in many important types of cases, they are obliged to consider the attitudes and values of the public. This does not mean that judges go out and take opinion polls whenever they face a tough decision, but public opinion is often one ingredient in the decision-making calculus.

Third, both federal and state judges are aware that ultimately their decisions cannot be carried out unless there is a reasonable degree of public support. As Lawrence Baum has noted, “Justices care about public regard for the Court, because high regard can help the Court in conflicts with the other branches of government and increase people's willingness to carry out its decisions.”101 It has been an open secret for a long time that when the Court is about to hand down a major decision likely to be unpopular among many groups of Americans, the author of the majority opinion takes great pains to word the decision so as to generate popular support for it—or at least to salve the wounds of those potentially offended by it. Examples of high court decisions in which the author is thought to have written as much for the public at large as for the usual narrow audience of lawyers and lower court judges include Marbury v. Madison, in which the Court claimed for itself the right to declare acts of Congress unconstitutional;
Brown v. Board of Education, which called for an end to racial segregation in the public schools; Roe v. Wade, in which the Court upheld a woman’s right to an abortion; and United States v. Nixon—the Watergate case—in which the justices ordered the president of the United States to yield to the authority of the courts.  

The empirical evidence for the impact of public opinion is suggestive but hardly conclusive, in part because relatively few comprehensive studies of the phenomenon have been conducted and the proposition is difficult to prove. While many of the earliest studies of this subject produced conflicting conclusions, more recent and exhaustive investigations have begun to map a real, albeit imperfect, relationship between public opinion and jurists’ decisional patterns.  

A 2010 study found that public opinion may influence decision making on the Supreme Court, but the authors state, “we’re not sure why.” In 1993, two Supreme Court researchers concluded that popular sentiment “exercises important influence on the decisions of the Court even in the absence of changes in the composition of the Court or in the partisan and ideological make-up of Congress and the presidency.” However, they qualified their findings by noting that there was a fairly lengthy interval—three to seven years—between a change in the public mood and a corresponding alteration in justices’ voting behavior. Moreover, these voting changes tended to be concentrated among only a handful of justices.  

A more recent team of researchers to address this matter came up with a set of conclusions that are more emphatic and contain fewer qualifications about the link between public mood changes and Supreme Court decisional patterns. Their analysis “provides partial support for the idea that justices’ preferences shift in response to the same social forces that shape the opinions of the general public.” They further concluded that “even in the absence of membership change . . . public opinion may provide a mechanism by which the preferences of the Court can be aligned with those of the public.”  

Equally interesting and significant, however, are studies indicating that at the lower federal court levels (that is, the appeals and trial courts) no systematic evidence whatever could be found to connect the voting patterns of the judges to public mood—either the national mood or even public opinion shifts in the judges’ own states. These studies suggest that the Supreme Court may be singular and unique, and that its decision-making environment makes the justices particularly susceptible to shifts in the public mood—conditions that do not apply to lower appellate and trial court judges. Further studies will have to resolve this apparent enigma about why lower federal court jurists appear to be immune to shifts in the public mood, while U.S. Supreme Court justices are not. Research is also being done to determine whether shifts in public opinion affect the decision making of federal appeals court judges as well as U.S. trial jurists.

Researchers have also explored this phenomenon at the state level. For example, a study of California state courts found that the severity of sentencing in marijuana cases often changed soon after a popular referendum was held on reducing criminal penalties for personal use of the drug. For example, judges who had given light sentences before the referendum sometimes gave harsher sentences if the local vote was in favor of maintaining criminal penalties.
Conversely, harsh-sentencing jurists sometimes became more lenient when the vote indicated that the public favored reducing the penalties. Given that in a majority of states judges must periodically run for election, they probably are more attuned to public opinion than are federal judges, who have lifetime tenure. One study of elected state supreme court justices found that "to appease their constituencies, justices who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the court majority instead of casting unpopular dissents on politically volatile issues." Likewise, a more recent study involving state supreme court justices' voting behavior in death penalty cases found a clear link between their voting patterns and voter sentiment about capital punishment. The authors noted that "on the highly salient issue of the death penalty, mass opinion and the institution of electing judges systematically influence composition and judge behavior."

The following more down-to-earth example illustrates a state judge's stronger grassroots political awareness and also the greater degree to which elected jurists interact with the local environment. On November 28, 1988, Jack Hampton, a state district court judge in Dallas, Texas, gave a thirty-year prison sentence to a defendant who had been convicted of murdering two gay men. The killer, Richard Bednarski, had testified in court that he and some friends went to a central Dallas park to "pester homosexuals" and ended up killing two of them in what authorities called an execution-style slaying. (Bednarski placed a gun in one victim's mouth and pulled the trigger; he then shot the other man several times.) Because of the heinous and unprovoked nature of the crime and because Hampton was known as a "hanging judge" who usually gave life sentences for murder, the Dallas Times Herald decided to interview the judge about his lighter-than-usual sentence. During the interview Judge Hampton said that the murder victims more or less got what they asked for because they were "queers" who "wouldn't have been killed if they hadn't been cruising the streets picking up teenage boys." Immediately after the interview was published, public protests were staged by human rights groups, local church leaders, and various gay rights organizations. Protest rallies were held, including one attended by five hundred people at the City Hall Plaza, where letters of support were read from Senator Edward M. Kennedy of Massachusetts and Texas State Treasurer Ann Richards. Also, formal complaints were filed with the Texas Commission on Judicial Conduct, calling for Hampton to be disciplined. In reply, this elected judicial official issued a four-paragraph letter to a group of eight Methodist ministers. Judge Hampton said he wished "to apologize" for his "poor choice of words that appeared in a recent newspaper story." He promised that in his court "everyone is entitled to and will receive equal protection."

Was the judge's public apology a response, at least in part, to his perception of public opinion and its possible effect on his bid for reelection? This might be surmised from the judge's later statement, responding to a question about the possible political fallout from the incident: "If it makes anybody mad, they'll forget it by 1990" (when Judge Hampton was up for reelection). This particular incident is not typical of the behavior of state judges, but it demonstrates the degree to which locally elected judicial officials respond to the tides of public
opinion. Very rarely do lifetime judicial appointees, such as federal judges, feel the need to justify their sentencing behavior in interviews with the local press or to issue public apologies when public opinion turns critical of their behavior. For better or worse, public opinion does affect judicial behavior at some level, and this is particularly true when judges must be accountable directly to the electorate.

Finally, a study of state supreme court justices found that jurists who served in states where they were elected to office (as opposed to being appointed) were more responsive to public opinion on the matter of whether or not they disented from the courts’ majority opinions. The study found that “within elective courts, justices respond to elections by pursuing a consensual approach [emphasis added] regardless of their seniority.” Thus, despite the traditional notion of the blindfolded justice weighing only the facts in a case and the relevant law, common sense and statistical evidence support the assertion that jurists do keep their eyes (and ears) open to public opinion.

The Influence of the Legislative and Executive Branches

The executive and legislative branches are the final set of stimuli that the democratic subculture may bring to bear on the behavior of American judges.

Congress and the President Perhaps the most obvious link between the values of the democratic subculture and the output of the federal courts is that the people elect the president and members of the Senate, and the president appoints judges and justices, with the advice and consent of the Senate. The chief executive and certain key senators greatly influence what kinds of men and women will sit on the bench, but even after judges have been appointed, the president and Congress may have an impact on the content and direction of judicial decision making.

First, to a large degree, the jurisdiction of the federal trial and appellate courts is set by the Congress of the United States, which has the authority to determine the types of issues that may become appropriate for judges to resolve. For example, when Congress passed the Civil Rights Act of 1964, Title VII and its subsequent amendments greatly expanded the rights of women to be free from gender discrimination in the workplace. In doing so, Congress in effect expanded the jurisdiction of the federal courts to hear a large number of disputes that previously had been outside the purview of the federal judiciary. And the evidence suggests that the courts have not been idle in expanding the power Congress gave them. Conversely, Congress may restrict the jurisdiction of the federal courts. For example, in fall 2004, many members of Congress feared that the federal courts would strike the words “under God” from the Pledge of Allegiance on the ground that they violated the Establishment Clause of the First Amendment. As a result, the U.S. House of Representatives, by a 247–173 vote, passed a bill that would prevent the federal courts, including the Supreme...
Court, from hearing cases challenging the words “under God” in the pledge.\textsuperscript{118} (The bill died in the Senate and thus did not become law.)\textsuperscript{119} Even if Congress does not pass such legislation, the threat to do so may cause the federal courts to pull in their horns when it comes to deciding cases in ways that are not in accord with the will of the president or Congress. Indeed, a 2009 study found that historically, during time periods when Congress appeared to be hostile to the Supreme Court, the justices exercised greater self-restraint in overturning acts of Congress.\textsuperscript{120}

Second, judicial decision making is likely to be bolder and more effective if it has the active support of at least one other branch of the federal government, and ideally of both of them.\textsuperscript{121} School integration is a case in point. When the federal courts began to order desegregation of the public schools after 1954, they met with considerable opposition—primarily from those parts of the country most affected by the Supreme Court ruling in the \textit{Brown} case. It is doubtful whether the federal courts could have overcome this resistance without the support given them (sometimes reluctantly) by the president and Congress. For example, in 1957, Arkansas governor Orville Faubus sought to obstruct a district judge's order to integrate Little Rock's Central High School. President Dwight D. Eisenhower then mobilized the National Guard, and in effect, he used federal bayonets to implement the judge's ruling. President John F. Kennedy likewise used federal might to support a judge’s decision to admit a Black student to the University of Mississippi in the face of massive local resistance. Congress also gave its support to federal desegregation rulings. For instance, it voted to withhold federal aid to school districts that refused to comply with district court desegregation decisions. Surely, White House and congressional support emboldened the Supreme Court and the lower judiciary to carry on with their efforts to end segregation in the public schools.

Presidential and congressional actions may sometimes lead rather than just implement judicial decision making. One study analyzed the impact on trial judge behavior of the 1937 Supreme Court decisions that permitted much greater government regulation of the economy.\textsuperscript{122} As expected, federal district judges' support for government regulation increased markedly after the Supreme Court gave its official blessing to the government's new powers. However, it was also learned that district court backing for labor and economic regulation had been building before the Supreme Court's decisions. Proregulation decisions by U.S. trial judges increased from 44 percent in 1936 to 67 percent in 1937. The authors attributed this change at least in part to the fact that before 1937, the president and Congress, in response to public opinion, were strongly pushing legislation that favored an expanded federal role in labor and economic regulation.\textsuperscript{123}

Thus, the Supreme Court and the lower courts are not, and cannot be, immune to the will of Congress and the chief executive as they go about their judicial business. Not only does the president, with the advice and consent of the Senate, select all members of the federal judiciary, but to a large degree, Congress also prescribes the jurisdiction of the federal courts and often the qualifications of those who have standing to sue in these tribunals. Moreover, many court decisions cannot be meaningfully implemented without the support of the other two
branches of government—a fact not lost on the judges and justices. Sometimes, too, the courts appear to follow the lead of the president and Congress on various public policy matters. Whatever the circumstances, the legislative and executive branches of government clearly constitute an important source of nonjudicial influence on court behavior. Finally, we note that evidence for the interaction between the judiciary and the legislative and executive branches is not limited to the United States. A study of the European Court of Justice found that "the preferences of member-state governments—whose interests are central to threats of noncompliance and override—have a systematic and substantively important impact on . . . [European Court of Justice] decisions."124

The State Legislature and the Governor  

Just as the legislative and executive branches affect judicial decision making at the national level, their counterparts at the state and local levels also have great influence. In almost half of the jurisdictions, the popularly elected governor (or the state legislature) selects the state judges, and a policy link is likely to exist among the value sets of the voters, the appointing officials, and the judges who render subsequent decisions. For example, when Texas governor Rick Perry met privately with a group of Dallas school officials in 1994, he candidly “predicted . . . that a lawsuit challenging the state school finance law [would] fail because his appointees to the Texas Supreme Court [would not] force changes on the Legislature.”125 As the former president of the Highland Park (Dallas) school board said in response to the governor’s comments, “He didn’t say he had spoken to them [the justices], but I just couldn’t believe it, and a lot of other people couldn’t believe it either. They were stunned that a governor would say something like that.”125 (As it happened, the governor’s prediction was accurate because the state supreme court did not overturn the law in question.)

More specifically, the authors of one study found three major ways in which the political branches affect the role of the state courts.126 First, legislation sponsored by the governor or passed by the legislature regulates the types of claims that can be adjudicated in state courts and also brought to the state appellate courts. For example, class action suits may be easily brought in state judicial tribunals. (Such suits facilitate access to the courts by allowing large numbers of potential litigants with small individual claims to band together, thereby reducing or eliminating entirely the financial costs of seeking redress.) Actions by the legislature determine who may bring such suits and under what circumstances. The evidence suggests that the states vary greatly in this area. Some states make it very easy to initiate such suits, whereas in others access to the courts is very difficult.127

Second, actions by the legislature (which may or may not be part of the governor’s political agenda) determine the authority of the state supreme court to regulate its workload and focus on important cases. For example, it is generally accepted that for most cases litigants should have the right to appeal trial court decisions. In states that have an ample number of intermediate appellate courts, this right to appeal is readily available. However, in states without a sufficient
number of intermediate appeals courts or in states where the supreme court is forced by law to deal with a succession of relatively minor disputes, the chances are slim that litigants will have their cases heard by the supreme court. This fact is significant in terms of the distribution of justice, and it is also important for another reason: in states where the legislature forces the supreme court to overwork on judicial trivia, the court does not have time to devote much attention to cases that raise important policy questions. For instance, after the legislature in North Carolina created intermediate courts of appeals, a study concluded that this action enabled the state high court to assume “a position of true leadership in the legal development of the state.” Thus, actions by the legislature (supported or opposed by the governor) may determine whether the supreme court plays a major or a minor role in policy questions important to the state.

Finally, because a prime function of courts is to enforce existing legal norms, the sorts of issues that state courts address depend to a large degree on the substantive law of the state. For instance, seventeen state constitutions contain “little ERAs” (equal rights amendments); ten states specifically protect the right to privacy; and some states guarantee a right to quality of the environment. Thus, a judge in a state where good air quality is guaranteed will have a much greater opportunity and right to issue an injunction against a polluter than will the judge in a state where such a right is not legally provided. An example of legislatures taking an issue out of the hands of state judges has taken place in the realm of gay and lesbian rights. After the courts began to hand down decisions favoring such rights (for example, Lawrence v. Texas, discussed earlier), numerous state legislatures adopted state constitutional amendments that defined marriage as being between a man and a woman. This in effect precluded judges in those states from handing down a ruling in favor of same-sex marriage that was based on these states’ laws or constitutions. All of these state limits were rendered moot by the Supreme Court’s 2015 ruling in Obergefell v. Hodges, in which the Court announced a federal right for same-sex marriage that trumped state limitations. Still, the point is that state judges often render decisions within the existing constitutional and legal environment of their respective states. Such an environment is largely the product of political decisions made by the governor and the legislature as representatives of the electorate.

In sum, the output of the state courts, similar to that of federal tribunals, is to a significant degree the result of the political values and policy goals of the chief executive and the legislative branch of government.

The Subcultures as Predictors

Scholarly opinion differs on whether judicial decision making is essentially the product of facts, laws, and precedent (the legal subculture model) or whether the various extralegal factors carry more weight (the realist-behavioralist view). In other words, are court decisions better explained by understanding the facts and laws that impinge on a given case, or by knowing which newspaper the judge reads in the morning or how the judge voted in the last election?
The clue to answering the question lies in knowing what kind of case the judge is being asked to decide. The vast majority of federal trial judges’ cases and much appellate judicial business involve routine norm enforcement decisions. In cases in which the law and the controlling precedents are clear, the victor will be the side that is able to marshal better evidence to show that its factual case is stronger. In other words, in the lion’s share of cases, the legal subculture model best explains and predicts judicial decision making. When traditional legal cues are ambiguous or absent, however, judges are obliged to look to the democratic subculture for guidance in their decision making. We think that then-Illinois Senator Barack Obama got pretty close to the truth in a 2005 speech dealing with judicial appointments. Obama argued that 95 percent of court cases are easily settled on the basis of the law and precedent. But in “those 5 percent of hard cases the legal process alone will not lead you to a rule of decision and the critical ingredient is supplied by what is in the judge’s heart.”

When the Legal Evidence Is Contradictory

It is probably fair to say that in a majority of cases, the facts, evidence, and controlling precedents distinctly favor one side. In such instances, the judge is clearly obliged to decide for the party with the stronger case. Not to do so would violate the judge’s legal training and mores; subject a trial or appeals court judge to reversal by a higher court, an event most jurists find embarrassing; and render the Supreme Court vulnerable to the charge that it was making up the law as it went along—an impression not flattering to the high court justices. However, judges often find themselves in situations in which the facts and evidence are about equally compelling on both sides or in which a roughly equal number of precedents sustain a finding for either party. As one U.S. trial judge in Houston told us,

There are days when you want to say to the litigants, “I wish you guys would’ve settled this out of court because I don’t know what to do with you.” If I grant the petition’s request, I can often modify the relief requested [in an attempt to even out the decision], but still one side has got to win and one side has got to lose. I could cite good precedents on either side, and it’s no good worrying about the appeals court because there’s no telling what they would do with it should the judge’s decision be appealed.

The following is an example in which a U.S. trial judge was forced to decide a case by his own lights (that is, using his democratic subculture values) because the cues from the legal subculture were clearly contradictory or nonexistent. Judge Robert E. Coyle, who held court in the Eastern District of California (Fresno), was presented with a case that stemmed from an employment discrimination complaint filed with the Equal Employment Opportunity Commission (EEOC). Alicia Castrejon had been employed by the Tortilleria La Mejor of
Farmersville, California, and claimed in her suit that she had been dismissed from her job because of previous complaints filed with the EEOC against her employer.

The legal issue was whether Castrejon had the right to file a suit in the first place because she was an undocumented immigrant. When Congress passed the Immigration Reform and Control Act of 1986, which prohibits employment of undocumented workers, it did not specify whether immigrants who have applied for amnesty are protected during the period when their applications are being processed. Castrejon had filed for amnesty, but her application had not been acted on at the time she filed her employment discrimination complaint.

The judge looked to the Department of Labor and to the EEOC for some legal guidance on the matter of the interim rights of undocumented residents. Both of these federal agencies maintained that workers are covered by federal labor and antidiscrimination laws even if they are here illegally. But the judge learned that many employers had been interpreting the Immigration Reform and Control Act to mean that illegal immigrants are not protected, and they were able to point to a 1987 ruling by a federal district judge in Alabama. That decision dismissed an undocumented immigrant's claim for minimum wages and overtime pay because, the judge said, that would conflict with the congressional act of 1986. The legal subculture was giving Judge Coyle few cues as to the "right" answer, and the existing cues were contradictory. Furthermore, in deciding this case, the judge had to tap attitudes and values derived from his democratic subculture and to put much of his legal subculture orientation on hold.

After sitting on the case for more than two years, the judge finally issued a ruling that had a significant immediate impact on hundreds of thousands of immigrants. For reasons known fully only to Judge Coyle, he ruled that undocumented workers do have the right to pursue discrimination suits against an employer—regardless of legal residency status. In his decision, the judge acknowledged the seeming incongruity of discouraging illegal immigration, while at the same time allowing undocumented workers to seek legal recourse against discrimination on the job: "We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders."134 In situations such as this, judges have little choice but to turn to their personal value sets to determine how to resolve the cases. Decision making is affected by local attitudes and traditions or by the judge's perception of the public mood or the will of the current Congress or state legislature or administration.

Since the advent of the Burger Court in 1969, a significant number of the Supreme Court's decisions have been regarded as "ideologically imprecise and inconsistent," often sustained by weak five-to-four majorities. This has increased the likelihood that trial and appellate judges will respond to stimuli from the democratic rather than the legal subculture. That is, the potential confusion created by the Court in setting forth ambiguous or contradictory guidelines has meant that judges in the lower federal and state courts—and perhaps even members of the Supreme Court—have been forced to rely on (or have felt free to give vent to) their personal ideas about how the law should read. As
one study concluded, “With the decline of the fact-law congruence after 1968 the . . . [lower courts] became more free to take their decision-making cues from personal-partisan values rather than from guidelines set forth by the Higher Court.” The problem caused by Supreme Court ambiguity is still very much alive in the Roberts Court. For example, in June 2006, “a splintered Supreme Court rolled back coverage of the Clean Water Act, ruling the federal regulators had gone too far in protecting wetlands lying more than 10 miles from navigable waters.” This ambiguous, multipronged ruling prompted the new chief justice, John G. Roberts Jr., to lament in his opinion that “it is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.”

When a Case Concerns New Areas of the Law

Researchers also set aside the legal subculture model and turn to the democratic subculture approach when jurists are asked to resolve new types of policy questions for which statutory law and appellate court guidelines are virtually absent. Since about 1937, most new and uncharted areas of the law (at least at the federal level) have been in the realms of civil liberties and criminal justice rather than in the area of labor and economic regulation. Meanwhile, the federal courts have generally leaned toward self-restraint and deference to the elected branches when it comes to ordering the economic lives of the American people. Moreover, in recent decades, Congress has legislated, often with precision, in the areas of economic regulation and labor relations, and this has further restricted the discretion of judges in these fields. As a result, the noose of the legal subculture has been drawn tightly around the trial judge’s neck, leaving little room for creative decision making or responding to the tug of the heart instead of the clear command of the law. Since the days of the New Deal, the legal subculture, not the democratic subculture, has been the better predictor of trial and appellate judge decision making in labor and economic regulation cases.

Since the 1930s, the opposite trend has been observable for issues of criminal justice and civil rights and liberties:

The “great” and controversial decisions of the Stone, Vinson, Warren, and Burger Courts [as well as the Rehnquist Court] focused primarily on issues of civil liberties and of the rights of criminal defendants, and it is precisely those sorts of issues which evoked the greatest partisan schisms among the justices. Research has shown that . . . [the lower courts] were by no means immune to the debates and divisions which racked the nation’s High Court; they, too, seem to have split along “political” lines more often on criminal justice and on civil rights matters than they did with other sorts of cases.

The ambiguity (or perhaps the constant state of flux) of the law on such matters as the rights of criminal defendants, First Amendment freedoms, and
equal protection of the law has given the federal jurists greater opportunity to respond than they have had in the labor and economic realms, where their freedom of action has been more circumscribed. Put another way, since the 1930s, the democratic subculture model has become increasingly important as a predictor of judicial behavior on issues pertaining to the Bill of Rights.\textsuperscript{140}

A series of interviews with a wide range of district and appellate court judges lends further credence to this notion. In William Kitchin's study, the trial judges were asked about their willingness to "innovate"—that is, to make new law in areas where appellate court or congressional guidelines were ambiguous or nonexistent. After asking why judges create new law through judicial innovation, Kitchin offered one possible explanation: courts innovate because other branches of government ignore certain significant problems that, to individual judges, cry out for attention. Accordingly, the individual district judge innovates in an attempt to fill a legal vacuum. As one judge commented, "The theory is that judges should not be legal innovators, but there are some areas in which they have to innovate because legislatures won't do the job. Race relations is one of these areas. . . ." Other areas identified as needing judicial innovation because of legislative inaction were housing, equal accommodations, and criminal law (especially habeas corpus).\textsuperscript{141} Another study of decisional patterns and variations in U.S. district judges' decision making showed that "the subjects that . . . [the Kitchin study] found to represent the greatest areas of freedom in judicial decision making are the very same subjects that we find to maximize partisan voting differences among the district judges. In situations where judges are more free to take their decision-making cues from sources other than appellate court decisions and statutes, they are more likely to rely on their personal-partisan orientations."\textsuperscript{142}

There may be no other area in the law that is more ambiguous than the legal definition of obscenity, for which there are few appellate court and congressional guidelines, and thus, lower court judges have had to fend for themselves. Prior to 1957, no Supreme Court decisions of note had been handed down on the matter of obscenity. In that year, the nation's high court ruled that obscenity was not protected by the First Amendment and said that it could be defined as material that dealt with sex "in a manner appealing to prurient interest."\textsuperscript{143} Seven years later, the Supreme Court said that hypothetical "national standards" should be used in determining what appealed to the prurient interest of the average person.\textsuperscript{144} However, nine years after that, the Court changed its mind and ruled that "state community standards" could be employed.\textsuperscript{145} But what is obscenity? No one seems to know with any greater certainty today than Justice Potter Stewart did in 1964, when he confessed that he could not intelligibly define obscenity, but "I do know it when I see it."\textsuperscript{146} As U.S. district judge José Gonzalez wrote in 1990, in determining that an album by the controversial Miami-based hip-hop group 2 Live Crew was obscene and thus illegal to sell, "It is an appeal to 'dirty' thoughts and the loins, not to the intellect and mind." (2 Live Crew's attorney defended the album as "art" and said, "Put in its historical context, it is a novel and creative use of sound and lyrics.").\textsuperscript{147} The Eleventh Circuit Court of Appeals later overturned the obscenity conviction.\textsuperscript{148} Given the reluctance or the
inability of Congress and the Supreme Court to define obscenity, America’s trial and appellate judges have little choice but to look to their personal values and perceptions of the local public need to determine what kinds of music, books, films, art, and plays the First Amendment protects in their respective jurisdictions. Today, the legal dispute about defining obscenity has largely become a back-burner issue due to rapidly changing technology and evolving public attitudes with regard to sexual matters. But in some ways, these developments make the legal questions surrounding what is—or is not—obscene potentially even more difficult and ambiguous.

Another lively area of the law that is potentially vexing to federal judges is the subject of sexual harassment. This issue has received much attention recently given disturbing revelations about major media figures such as Harvey Weinstein, Matt Lauer, and others. Ever since Congress added sexual harassment to the list of items prohibited in the workplace by Title VII of the Civil Rights Act of 1964, federal jurists have had a difficult time defining what sexual harassment means. Obvious examples are clear enough (a boss explicitly telling an employee that sexual favors are required for a pay raise), but the legal gray areas have taxed judges’ minds because while an act may be widely deemed inappropriate, it does not mean that it automatically rises to the level of a federal civil rights violation under the law. For example, a U.S. trial judge in Los Angeles was asked to rule that there was sexual harassment in an office because the breasts of female workers were being compared and sexual toys were being given as presents. The judge ruled that, according to his lights, while the office in question had been turned into a “bawdy sorority,” federal law did not provide a “cause of action for embarrassment.” Another example of a federal judge having to resolve an issue never before examined by a court occurred in 2010. The previous year, Quinnipiac University (in Connecticut) had eliminated the women’s volleyball team for budgetary reasons. But the school knew it needed to comply with Title IX of a 1972 federal law that mandated equal opportunities for men and women in education and athletics. So Quinnipiac established a much less expensive “sport” called “competitive cheerleading.” Students did not buy it and brought suit in federal court. So U.S. District Judge Stefan Underhill had to address the novel question, Is cheerleading a sport? Obviously, it would have done him no good to have asked, How would the Founding Fathers have answered this question? Nor did he have any reason to believe that the authors of the 1972 law had pondered this query. With the legal subculture silent in this realm, the jurist was obliged to rely on the democratic subculture to find an answer. So looking into his own heart and mind Judge Underhill ruled: “Competitive cheer [sic] may, sometime in the future, qualify as a sport under Title IX. Today, however, the activity is still too underdeveloped and disorganized to be treated as offering genuine varsity athletics participation opportunities for students.”

Judicial innovation in new legal realms or in the absence of appellate court or legislative guidelines is by no means confined to federal jurists; it is just as significant an occurrence at the state court level. For example, in late 2001, the New Jersey Supreme Court was asked to decide a novel question, Can a man have the frozen embryos he and his ex-wife created implanted in the body of the man’s
new wife? The case involved Mr. “M. B.” and Mrs. “J. B.,” who created seven embryos during the course of their marriage and had them frozen by a company specializing in that activity. (The couple had struggled with infertility and used in vitro fertilization to enable them to have children.) The couple divorced in 1998, but the divorce settlement left open the question of custody of the embryos. Mr. “M. B.” remarried and wished to have the frozen embryos implanted in his new wife, but the first wife objected, stating that she “did not want to become a parent against her will.” The New Jersey Supreme Court ruled that Mr. “M. B.” could retain the embryos or have them destroyed, but he could not have them implanted in his new wife. As one Atlanta attorney who has handled several cases involving disputed embryos said of this case: “There is really no guiding principle nationwide in these cases. There are very few states that have looked at the issue.”151 This case is a vivid reminder that judicial policymaking in new legal realms is by no means the exclusive activity of the federal courts.

The Judge’s Role Conception

In the discussion of which better explains judicial decision making—the rules of the legal subculture or stimuli from the democratic subculture—one additional factor must be considered: how judges conceive of their judicial role. Judicial scholars often talk about three basic decision-making categories regarding whether judges should make law when they decide cases. Lawmakers are those who take a broad view of the judicial role. Often referred to as activists or innovators, these jurists contend that they can and must make law in their decisions because the statutory law and appellate or Supreme Court guidelines are often ambiguous or do not cover all situations, and in addition, legislative intent is frequently impossible to determine. In Kitchin's study of federal district judges, 14 percent were classified in this category, whereas in an investigation of appeals court judges, 15 percent were associated with this role.152 At the other end of the continuum are the law interpreters, who take a narrow, traditional view of the judicial function. Sometimes called strict constructionists, they do not believe that judges should substitute judicial wisdom for the rightful power of the elected branches of government to make policy. They tend to eschew making innovative decisions that may depart from the literal meaning of controlling precedents. In the Kitchin study, 52 percent of the U.S. trial judges were found to be law interpreters, whereas only 26 percent of the appeals court judges were so designated.153 This finding is consistent with the fact that federal district judges are more concerned with routine norm enforcement, whereas the appellate judges’ involvement—and their perception of it—is with broader questions of judicial policy.

Midway between the law interpreters and the lawmakers are judges known as pragmatists or realists, who believe that on occasion they are obliged to make law, but that for most cases, a decision can be made by consulting the controlling law or appellate court precedents. Studies have indicated that a third of federal district judges assume this moderate role, whereas a full 59 percent of their appellate court colleagues do so.154 Comparing federal jurists with state judges,
one scholar has noted, “A slightly greater number of federal than state judges take the pragmatist or realist views, possibly because they have more opportunities to make innovative decisions.”

A study of the importance of judicial roles in thirty-five states reaffirmed the value of such investigations. The researcher concluded, “Regardless of the particular dynamics that are discovered . . . no model of state high court decision making is complete without the essential variable of judicial role.”

Thus, whether judicial decisions are better explained by the legal model or by the democratic model depends not only on the nature of the cases and the state of the controlling law and precedents but also to some degree on how the individual judges evaluate these factors. In virtually every case that comes before them, judges have to determine how much discretion they have and how they wish to exercise it. This is a subjective process, and as one research team put it, “activist judges will find more discretion in a given fact situation than will their more restrained colleagues.”

**SUMMARY**

Federal and state judges make millions of decisions each year, and scholars have sought to explain the thinking behind them. Two schools of thought provide explanations. One theory is based on the rules and procedures of the legal subculture. Judges’ decisions, according to this model, are the product of traditional legal reasoning and adherence to precedent and judicial self-restraint. Another school of thought, the realist-behavioralist approach, holds that judges are influenced in their decision making by such factors as party affiliation, local values and attitudes, public opinion, and pressures from the legislative and executive branches. In the vast majority of cases, the legal subculture model is the more accurate predictor of judicial decision making. However, stimuli from the democratic subculture often become useful in accounting for judges’ decisions (1) when the legal evidence is contradictory or equally compelling on both sides; (2) if the situation concerns new areas of the law and significant precedents are absent; and (3) when judges are inclined to view themselves more as activist lawmakers than as law interpreters.

**FURTHER THOUGHT AND DISCUSSION**

**QUESTIONS**

1. Should a judge’s political party affiliation affect the way he or she makes decisions on the bench? Most Americans would say “no,” although they prefer to elect their judges and sometimes do this on a party basis. Is there an inherent inconsistency in these preferences?

2. Should judges’ decisions reflect public opinion? Most Americans would find that idea offensive. However, no less an authority than former Chief Justice
William H. Rehnquist said it is inevitable and unavoidable that judges reflect public opinion. Sometimes, for example, trial judges are encouraged by the appellate courts to reflect the public mood in their decision making.

3. Judges are much more likely in some situations to hand down decisions that reflect their personal values. What are the circumstances that allow one to predict whether a judge will render a decision “in accordance with the law” or in accordance with his or her personal attitudes?

**SUGGESTED RESOURCES**


NOTES

1. Richard J. Richardson and Kenneth N. Vines, The Politics of Federal Courts (Boston, MA: Little, Brown, 1970). Although Richardson and Vines developed their model primarily for federal courts, we believe that their hypotheses and conclusions are equally true for state judges.


4. Lane, 307 U.S. at 275.

5. Gomillion, 364 U.S. at 342.


14. ibid., 247.

15. ibid., 249.

16. ibid., 255.


27. These figures are based on data collected by Robert A. Carp and Kenneth L. Manning.

28. For a more extensive discussion of the odds ratio and methodology used in this study, see Rowland and Carp, *Politics and Judgment in Federal District Courts*, 180–181.


43. Lawrence Baum and Neal Devins, “Split Definitive: For the First Time in a Century, the Supreme Court Is Divided Solely by Political Party,” Slate.


46. ibid.

47. “Scalia’s Sharp Words Seem Aimed at Obama,” A30.


53. ibid., 953–954.

54. For a good bibliography of the literature on partisan voting patterns among state judges, see ibid., 965–967. See also the literature review in this article: Paul R. Brace and Melinda Gann Hall, “Studying Courts Comparatively: The View from the American States,” Political Research Quarterly 48 (1995): 5–29.


62. ibid., 72.


66. John R. Schmidhauser, “Judicial Behavior and the Sectional Crisis of 1837–1860,” *Journal of Politics* 23 (1961): 615–640. To be more precise, Schmidhauser found that justices’ party affiliations and their geographic orientations were highly interrelated. Because the four justices who were most supportive of southern regional interests were all southern Democrats, and because the two justices with the strongest pronorthern voting patterns were northern Whigs, Schmidhauser concluded that the effects of party and region were virtually inseparable.
67. Leavitt, “Political Party and Class Influences on the Attitudes of Justices of the Supreme Court in the Twentieth Century.”


69. ibid., 123.

70. For a good review of this literature and also for some key empirical findings, see Songer, Sheehan, and Haire, Continuity and Change on the United States Courts of Appeals, 119–125.


75. For a review of the literature in this realm and also for some excellent historical data, see Songer, Sheehan, and Haire, Continuity and Change on the United States Courts of Appeals, 125–128.


80. Based on data collected by Robert A. Carp, Kenneth L. Manning, and Ronald Stidham.


86. This discussion is based on material taken from Martin A. Levin, *Urban Politics and the Criminal Courts* (Chicago, IL: University of Chicago Press, 1977).

87. ibid., 136–142.

88. ibid.

89. ibid., 142–147.


95. 478 U.S. 186 (1986).


97. Liptak, “Judges Seek to Ban Secret Settlements in South Carolina.”


105. Mishler and Sheehan, “The Supreme Court as a Countermajoritarian Institution?” 96.


114 ibid.


117. For example, in 2003, the Supreme Court ruled that in employment discrimination suits authorized by Congress, employees do not need direct evidence of bias to bring a lawsuit against an employer; indirect evidence is sufficient. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).


119. However, many constitutional scholars argue that the right of the federal courts to hear such cases stems directly from Article III of the Constitution, and that therefore Congress could not legally curtail court jurisdiction over these subjects except by initiating an amendment to the Constitution.


127. ibid., 45.


138. However, on matters of local economic regulation, voting differences among judges are still sharp (see Table 12.1). Only at the national level have federal judges tended to refrain from substituting their own views for those of elected officials.


140. At the state level, whether high court ambiguity is thought to be greater on civil rights and liberties issues or in the labor and economic realm varies from one jurisdiction to another. Note the several areas discussed in Chapter 3 of this book, under the heading “Norm Enforcement in the State Courts,” in which state courts have taken the lead in bringing about policymaking innovations.


153. ibid.

154. ibid.

155. Glick, Courts, Politics, and Justice, 335.
