Brandon Sydow

Topic #1

“Why Judicial Review?”
In 1989, Shawn Eichman was arrested for burning an American flag in response to foreign and domestic policy. Earlier that year, the Flag Protection Act was formed, making it illegal to desecrate an American flag. It was for this crime that Eichman was arrested and found guilty. He appealed the case, and it was heard by the Supreme Court in May 1990.¹

Judicial activism is “the Court’s willingness to use its powers to make significant changes in public policy.” Conversely, judicial restraint is “the Court’s willingness to limit the use and extent of its power and avoid making significant changes in public policy.” Judicial activism and judicial restraint can each be detected by three different methods.

The first legal method that determines if the court’s action is judicial activism is the court declaring a law or statute unconstitutional. When the court makes the decision not to “uphold” a law that is already in place, the law is deemed unconstitutional, and it is thereby reversed. The court is exercising its power to change public policy, therefore, it is exercising judicial activism. Another legal method for identifying judicial activism is whether a precedent is overturned by the court. If a precedent is changed, then the court no longer accepts the result of a previous case. This is once again an example of the court changing public policy, which indicates the use judicial activism. The final legal method that detects judicial activism is the court focusing on the laws and statutes passed by the legislature, rather than compliance to the Constitution and the ideas it presents. This is a crucial part of judicial activism, because disregarding the text of the Constitution is an action that extends the court’s power. Not only is this action a demonstration of power, but, in the same way as the previous methods, it also shows that the court has the authority to change public policy. However, this method shows that the court can go around the actual text of the Constitution in order to do so. All three of these methods display the court’s power to change public policy, therefore showing the court’s practice of exercising judicial activism.

Conversely, the first legal method used to identify judicial restraint in an action of a court is the court’s decision is to uphold a law or statute. If the court declares a law is constitutional, it will continue to follow the law, and that law remains the rule. Without changing a law, the rules remain the same, and public policy does not change. The second method to determine if an action is judicial restraint is whether the decision is to uphold precedent. If the court decides to respect *stare decisis*, then it is following already-set precedents. It does not change any public policy. The final method to detect judicial restraint in a court’s decision is to determine if the action “[adheres] strictly to the Constitution.” If the decision follows the ideas set forth by the original wording of the Constitution, then the court is not changing any public policies. Contrary to exercising judicial activism, this exemplifies judicial restraint. These three methods are contradictory of those used to identify judicial activism. All three show the courts refraining from tampering with public policy and not demonstrating the court’s ability to extend its power.

The Supreme Court case United States v. Eichman, from 1990, is a real example of the application of these methods. As the result of the case, the Supreme Court determined that the Flag Protection Act was unconstitutional. There are two legal methods that justify the argument that the Supreme Court exercised judicial activism in the decision of this case. The first justification is the court’s decision not to uphold the act that deemed destruction of the American Flag a crime. The first legal method in determining whether an action is judicial activism or restraint is whether a law or statute is upheld or overturned. In this case, the court exercised power by overturning the act. This action directly changed public policy, which shows that the action reflected the idea of judicial activism. The second legal method that demonstrates that the Supreme Court used judicial activism in the case is the decision not to follow precedent. There were many cases of the same nature where individuals broke the rules of the Flag Protection Act. These set a precedent for courts to follow. The Supreme Court’s decision of US v. Eichman reversed these rulings. Changing a precedent is another power of the court which results in a

https://www.oyez.org/cases/1989/89-1433.1
change in public policy. The decision in this case produced these two actions, both of which demonstrated the court exercising judicial activism.

Conversely, the final legal method, unmentioned in the context of judicial activism, supports the counterargument that the ruling of the court in US v. Eichman reflects judicial restraint. This legal method, which consists of following or overlooking the textual ideas of the Constitution, was an outlier in the court’s decision. The court heeded the text of the Constitution, which is not an aspect of judicial activism, but rather of judicial restraint. The Supreme Court did not stray beyond the message of the First Amendment. They did not exercise their own power, nor did they change public policy in this aspect. Therefore, by adhering to the Constitution in this case, this action reflects judicial restraint, rather than judicial activism, as do the previous legal methods.

Sonia Sotomayor is a current Supreme Court Justice, who adheres to precedents and attempts to interpret laws and statutes and, above all, the Constitution, the way they are written and intended. In the case of United States v. Eichman, it is very possible Justice Sotomayor could have been swayed to rule either way. Based solely on the quote provided, it would be accurate to state that Sotomayor’s decisions would reflect judicial restraint to much more of an extent than they would judicial activism. Her philosophy is shown by the quote to be based heavily on the preservation of precedents and the upholding of the law. There are three factors that would determine Justice Sotomayor’s decision in this case, specifically is relation to her philosophy on judicial activism and restraint. The first would be that the case overturns the Flag Protection Act. Whether she would be a supporter of the act or not, her ideology is to abide by existing laws. Voting in favor of Eichman would mean deeming Flag Protection Act unconstitutional. Doing so would contradictory of her intentions as a justice. The second factor that might influence her decision of the case would be that the case breaks precedents set by several case determined before this one. This is on a level of severity much lower than stating that a law is

unconstitutional, however it is still an important argument in predicting how Justice Sotomayor would have ruled in the case. As she stated in the quotation provided, “I believe, that my record... reflects my rigorous commitment to interpreting the Constitution ... and hewing faithfully to precedents established by the Supreme Court.” Sotomayor’s philosophy once again would lean more towards the preservation of the law and precedents. Ruling for Eichman would fail to uphold, not only a law, but the precedents set by similar cases as well, in which the offenders were found guilty. The final, seemingly most important, factor that would influence Sotomayor’s decision would be that ruling in favor of Eichman would be more closely adhering to the Constitution than ruling against him. There was no law that supported the Flag Protection Act. It was unbacked by the Constitution and was debated in the case as infringing on the First Amendment. This would be the deciding factor, as it was the basis of the entire case. The decision came down to whether or not it was better to overturn a law and several precedents that were potentially in contradiction to the First Amendment.

It is reasonable to predict that Justice Sotomayor would have ruled in favor of Eichman. The Flag Protection Act was portrayed in the court as a violation of the First Amendment. It was reasoned that individuals should possess the right to burn a flag in protest as they see fit, as it is seen as freedom of expression. Her ruling would clearly reflect judicial restraint, as her predicted decision would be presumably based on the facts that the Flag Protection Act is not protected or backed by anything in the Constitution. Again, Sotomayor has stated, “I believe, that my record... reflects my rigorous commitment to interpreting the Constitution according to its terms.” She is dedicated to interpreting the Constitution based on its text and the ideas presented by it. The third legal method for identifying judicial restraint is abiding by the wording of the Constitution and the ideas it presents. This would be the factor reflecting judicial restraint for ruling for Eichman that could trump the factors contributing to judicial restraint on the converse side of the decision. Because the factors of judicial activism and restraint were split among both sides of the argument, it is logical that one side would have to take priority in Justice Sotomayor’s

mind. The determining factor can presumably be the most important deciding factor. This just so happens to be the entire basis of the court case. It is the decision of whether or not the Flag Protection Act violates the first Amendment. If the question is answered with yes, then it reflects the concept of judicial restraint.