The Supreme Court and the Attitudinal Model Revisited

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If the fatuousness characteristic of Pollyanna had continued to rose-color anyone's attitude toward the U.S. Supreme Court, the decision in *Bush v. Gore* must have been mind-boggling.[1] More neatly than we might have imagined, the Court's three most conservative justices – William Rehnquist, Antonin Scalia, and Clarence Thomas – overruled the Florida Supreme Court's interpretation of Florida law and declared that Florida's recount violated the equal protection clause. The Court's two other conservatives, less extremely so than their colleagues – Anthony Kennedy and Sandra Day O'Connor – agreed with the equal-protection violation and ruled with the triumvirate that the current recount was illegal and set a deadline (two hours hence!) that made any subsequent recount impossible. Two moderates, David Souter and Stephen Breyer, found equal protection problems with the recount but thought the problems solvable; whereas the Court's most liberal members, Ruth Bader Ginsburg and John Paul Stevens, who usually support equal protection claims, found nothing wrong with the recount. As we declared in 1993, ". . . if a case on the outcome of a presidential election should reach the Supreme Court . . . the Court's decision might well turn on the personal preferences of the justices."[2]

The justices in the majority, who historically have resisted Fourteenth Amendment claims far more than their colleagues, rested their decision

[1] 148 L Ed 2d 388 (2000). Because of the frequency of references to this decision, we avoid further use of its citation. Keep in mind that this reference appears first.

[2] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), p. 70.

on a blithely asserted violation of the equal protection clause. Unbroken precedent had held that such a violation requires purposeful discrimination, but clearly this pattern did not preclude the majority from reaching its preferred outcome. And never mind that this attack on federalism came from the same five justices who by the same identical vote have granted the states and their courts, under the guise of states' rights, immunity from the provisions of a variety of progressive federal laws, for example, disabled persons,[3] violence against women,[4] age discrimination in employment,[5] overtime pay,[6] and gun-free school zones.[7]

While *Bush v. Gore* may appear to be the most egregious example of judicial policy making, we suggest that it is only because of its recency. Our history is replete with similar examples, although perhaps none as shamelessly partisan. One that took less liberty with legal language perhaps, but nonetheless engendered a fierce conflict that has not yet dissipated, is *Roe v. Wade*.[8] Included within the right to privacy – which is nowhere mentioned in the Constitution – and which in turn is imbedded in the due process clauses, is a woman's right to terminate her pregnancy. The majority then proceeded to write a detailed legislative specification of when and under what conditions an abortion was constitutional.

Although we live in a representative democracy, the extent to which either representation or democratic elections have force and effect depends on the will of a majority of the nine unelected, lifetime-serving justices. These justices decide whether abortions should be allowed, death penalties inflicted, same-sex marriage legitimated, and, every century or so, who shall become President.[9] Although the justices conventionally claim for public consumption that they do not make public policy, that they merely interpret the law, the truth conforms to Chief Justice (then Governor) Charles Evans Hughes's declaration, "We

[3] *Board of Trustees v. Garrett*, 148 L Ed 2d 866 (2001).
[4] *United States v. Morrison*, 146 L Ed 2d 658 (2000).
[5] *Kimel v. Florida Board*, 145 L Ed 2d 522 (2000).
[6] *Alden v. Maine*, 144 L Ed 2d 636 (1999).
[7] *United States v. Lopez*, 514 U.S. 549 (1995). [8] 410 U.S. 113 (1973).
[9] In 1876, five justices of the Supreme Court served on a congressional commission to resolve 21 disputed electoral votes. The two Democratic justices on the commission voted to give each disputed vote to the Democrat Tilden, while the three Republican justices voted to give each disputed vote to the Republican Hayes. The congressional members of the commission, split evenly between Democrats and Republicans, similarly voted a straight party line. Thus did the justices of the Supreme Court legitimize what was, at the time, the most fraudulent presidential election in U.S. history.

are under a Constitution, but the Constitution is what the judges say it is."[10]

This chapter focuses on why the Supreme Court, along with other American courts, makes policy. We initially present a set of reasons for judicial policy making. Though these reasons are crucial to our understanding of the institution's importance, they do not tell us anything about the considerations that cause the justices to make the choices that produce the Court's policies. We take up those factors in Chapters 2 and 3, which describe and evaluate three models of Supreme Court decision making: the legal, the attitudinal, and the rational choice. While *Bush v. Gore* undoubtedly serves as a prime example of attitudinal decision making, we cannot generalize from a single case. Thus, we carefully evaluate these models in Chapters 2 and 3 and throughout the book, with our most specific tests presented in Chapters 8 and 9.

WHAT COURTS DO

To explain why justices act as they do, we begin with a specification of what courts themselves do. From the most general and nontechnical standpoint, they resolve disputes. Not all disputes, of course, only those that possess certain characteristics. The party initiating legal action must be a "proper plaintiff," and the court in which the dispute is brought must be a "proper forum," that is, it must have the authority – the jurisdiction – to resolve the dispute. Thus, for example, courts generally, and the federal courts in particular, may resolve only a "case" or "controversy."[11] We detail the specific characteristics that enable a litigant to be a proper plaintiff and those pertaining to the proper forum in Chapter 6.

The process whereby courts resolve disputes produces a decision. This decision, unless overruled by a higher court, is binding on the parties to the dispute. If a higher court does overrule the trial or a lower appellate

[10] Quoted in Craig Ducat and Harold Chase, *Constitutional Interpretation*, 4th ed. (New York: West, 1988), p. 3.

[11] For all practical purposes, the two terms are synonymous. A "case" includes all judicial proceedings, while a "controversy" is a civil matter. As Justice Iredell pointed out in the lead opinion in *Chisholm v. Georgia*, 2 Dallas 419 (1792), at 432: "it cannot be presumed that the general word, 'controversies' was intended to include any proceedings that relate to criminal cases. . . ." Although the Eleventh Amendment nullified the Court's decision in *Chisholm v. Georgia*, Iredell's distinction survives.

court, then its decision replaces the earlier one. A court's decision, binding the litigants, is authoritative in the sense that nonjudicial decision makers, such as legislators or executive officials, cannot alter or nullify it.[12]

Judicial authority, however, is not subverted by the possibility that the legislature may at some point in the future alter the law that the court applied to the case it decided. Examples of congressional overrides abound. As an extreme example, the Civil Rights Act of 1991 overturned six highly charged Supreme Court decisions that were handed down between May 1 and June 15, 1989.[13] Even though a congressional overruling does not subvert judicial authority, the Supreme Court not uncommonly disapproves of Congress's efforts to undo the interpretation it has given to congressional enactments.[14] Thus, for example, a seventh decision handed down during the six-week period mentioned above[15] required Congress "to pass the same statute *three times* to achieve its original goal."[16] And though Congress eventually won this battle, it had less success on another aspect of the same issue that conflicted the *Dellmuth* Court: the authority of Congress to abrogate the states' immunity from being sued in the federal courts. This is the so-called sovereign immunity doctrine, an ancient judge-made rule that rests on the notion that the divinely ordained sovereign (historically, a king or queen) could do no wrong, and therefore could not be sued for the very simple and logical reason that courts exist to right wrongs. *Dellmuth* concerned the Education of the Handicapped Act and the ability of parents of a handicapped child to obtain reimbursement for private school tuition pending the outcome of state administrative proceedings. The Court said the parents could obtain no relief in the federal courts. Notwithstanding this series of cases that Congress overturned, the Court

[12] This assumes, of course, that the court in question had authority to resolve the dispute in the first place. If, e.g., a court were to decide a matter for which a legislative or executive agency has ultimate responsibility, its decision lacks authority.

[13] *Price Waterhouse v. Hopkins*, 490 U.S. 228; *Finley v. United States*, 490 U.S. 545; *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642; *Martin v. Wilks*, 490 U.S. 755; *Lorance v. AT&T Technologies*, 490 U.S. 900; and *Patterson v. McLean Credit Union*, 491 U.S. 164.

For a more general discussion, see William N. Eskridge, Jr., "Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale Law Journal* 331 (1991).

[14] On the other hand, and also not uncommonly, the justices *invite* Congress to alter the Court's interpretation of its legislation. See, e.g., Rehnquist's concurrence, joined by Scalia and Kennedy, in *Ortiz v. Fibreboard Corp.*, 144 L Ed 2d 715 (1999), at 752.

[15] *Dellmuth v. Muth*, 491 U.S. 223 (1989).

[16] Eskridge, *op. cit.*, n. 13, *supra*, p. 410.

did not meekly accede – at least not where sovereign immunity is concerned.[17]

If action by Congress to undo the Court's interpretation of one of its laws does not subvert judicial authority, a fortiori neither does the passage of a constitutional amendment, for example, the Twenty-Sixth Amendment reducing the voting age to eighteen and thereby undoing the decision in *Oregon v. Mitchell*,[18] which held that Congress could not constitutionally lower the voting age in state elections. Furthermore, not only does a constitutional amendment not subvert judicial authority, courts themselves – ultimately, the Supreme Court – have the last word when determining the sanctioning amendment's meaning. Thus, the Court is free to construe any amendment – whether or not it overturns one of its decisions – as it sees fit, even though its construction deviates appreciably from the language or purpose of the amendment.

Consider, for example, the Fourteenth and Sixteenth Amendments. The former clearly overturned the Court's decision in *Scott v. Sandford*[19] and was meant to give blacks legal equality with whites. Scholars disagree about other objectives the amendment may have had, but it does appear that the prohibition of sex discrimination was not among them.[20] Nonetheless, in 1971 the Court held that the equal protection clause of the Fourteenth Amendment encompassed women.[21] As for the Sixteenth Amendment, it substantially, but not completely, reversed the Court's decisions in *Pollock v. Farmers' Loan and Trust Co.*, which declared unconstitutional the income tax that Congress had enacted in 1894.[22] In 1913, the requisite number of states ratified an amendment that authorized Congress to levy a tax on income "from whatever source derived." The language is unequivocal. Yet for the next twenty-six years the

[17] This discord between Court and Congress over sovereign immunity has not abated, but has rather intruded itself into other areas of litigation. Thus, e.g., in *United States v. Nordic Village*, 503 U.S. 30 (1992), the Court ruled that a corporate officer's use of funds purloined from his bankrupt employer to pay his federal taxes could not be recovered by the corporation's bankruptcy trustee, notwithstanding that the relevant federal statute rather clearly waives the sovereign immunity of the United States. In an uncharacteristically strident dissent, Justice Stevens, joined by Justice Blackmun, castigated the majority for its "love affair" with the "thoroughly discredited" doctrine, which the Court itself has noted is a "persistent threat to the impartial administration of justice." 503 U.S. at 42–43.

For a contextual discussion of sovereign immunity, see the section on sovereign immunity in this chapter.

[18] 400 U.S. 112 (1970). [19] 19 Howard 393 (1857).

[20] See *Bradwell v. State*, 16 Wallace 130 (1873). [21] *Reed v. Reed*, 404 U.S. 71 (1971).

[22] 157 U.S. 429 (1895) and 158 U.S. 601 (1895).

Supreme Court ruled that this language *excluded* the salaries of federal judges. Why the exclusion? Because Article III, section 1, of the original Constitution orders that judges' salaries "not be diminished during their continuance in office." Though it is an elementary legal principle that later language erases incompatible earlier language, the justices ruled that any taxation of their salaries, and those of their lower court colleagues, would obviously diminish them.[23] Finally, in 1939, the justices overruled their predecessors and magnanimously and unselfishly allowed themselves to be taxed.[24]

Judges as Policy Makers

The authoritative character of judicial decisions results because judges make policy. This statement may have once appeared heretical – as well as demeaning to judges – because it conflicts with the unsophisticated view that judges are objective, dispassionate, and impartial in their decision making. But the Warren Court's liberal activism, followed not long after by the Rehnquist Court's conservative activism (topped off by *Bush v. Gore*) certainly must have dampened the remaining remnants of such a notion. Actually, even the justices themselves recognize that they make policy, for example, "The majority's analysis . . . is motivated by its policy preferences."[25] Policy making is certainly not a subversive activity. It merely involves choosing among alternative courses of action, where the choice binds the behavior of those subject to the policy maker's authority. Phrased more succinctly, a policy maker authoritatively allocates resources.

Even so, judges are reluctant to admit the obvious. Consider *Gregory v. Ashcroft*,[26] which required the Court to directly answer the question of whether judges make policy. The Age Discrimination in Employment Act exempts appointed state court judges from its ban on mandatory

[23] See *Evans v. Gore*, 253 U.S. 245 (1920), and *Miles v. Graham*, 268 U.S. 501 (1925).

[24] *O'Malley v. Woodrough*, 307 U.S. 277 (1939). The subjection of federal judges "to a general tax . . . merely [recognizes] . . . that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* at 282.

[25] *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), at 27. The statement spanned the Court's ideological spectrum: written by the conservative Justice Thomas, and joined by his fellow conservative, Justice Scalia, as well as two who frequently dissociate themselves from them, Ginsburg and Breyer.

[26] 501 U.S. 452 (1991).

retirement, and the Court construed the relevant language – "appointees . . . 'on a policymaking level' " – to encompass judges. But not without considerable waffling. The majority noted that exemption requires judges only to function on a policy-making level, not that they "actually make policy." And though "[i]t is at least ambiguous whether a state judge is an 'appointee' on the policymaking level," nonetheless "we conclude that the petition[ing judges] fall presumptively under the policymaking exception."[27] Justices White and Stevens, concurring in the result, had no hesitance to call a spade a spade. Using Webster's definition of policy, they concluded by quoting the lower court whose decision the Supreme Court reviewed: "[E]ach judge, as a separate and independent judicial officer, is at the very top of his particular 'policymaking' chain, responding . . . only to a higher appellate court."[28]

Unfortunately, the justices further muddied matters in another case decided on the same day as *Gregory v. Ashcroft*. The issue was the retroactive application of a decision that declared unconstitutional a state statute that discriminatorily taxed liquor produced out of state.[29] The six-member majority required four opinions to state their varied positions, none of which commanded more than three votes.[30] Justice White continued the realistic thrust of his *Ashcroft* opinion by acerbically criticizing the opinion of Justice Scalia, which read:

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course, this mode of action poses difficulties of a . . . practical sort . . . when courts decide to overrule prior precedent.[31] (emphasis in original)

White replied:

[27] *Id.* at 466, 467.

[28] *Id.* at 485. Justice Blackmun, whom Marshall joined, dissented, refusing to accept Webster's definition as authoritative: "I hesitate to classify judges as policymakers. . . . Although some part of a judge's task may be to fill in the interstices of legislative enactments, the *primary* task of a judicial officer is to apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions." At 487, n. 1. The dissent relied on the opinion of Judge Amalya Kearse of the Second Circuit, who flatly asserted, "The performance of traditional judicial functions is not policy making." Linda Greenhouse, "Justices to Hear Retirement Age Case," *New York Times*, November 27, 1990, p. A12. Judge Kearse's opinion, and one from the Eastern District of Virginia, are the only ones that held judges not to be policy makers. The majority of lower courts, holding to the contrary, are listed at 482, note 2.

[29] *Bacchus Imports Ltd v. Dias*, 468 U.S. 263 (1984).

[30] *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

[31] *Id.* at 549.

> . . . even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.[32]

The foregoing evidence, such as it is, suggests that the fairy tale of a discretionless judiciary survives. Post–*Bush v. Gore* polls persistently indicate that the bulk of the public simply will not allow themselves to be confused by the fact of judicial policy making.

Although the typical judicial decision will only authoritatively allocate the limited resources at issue between the parties to a lawsuit, the resources allocated at appellate court levels commonly affect persons other than the litigants. Appellate courts support their decisions with opinions precisely because of their broader impact, so that persons who find themselves in similar situations may be apprized of the fate that may befall them if they engage in actions akin to those of the relevant litigant.

Do note, however, that trial court decisions may also have wide-ranging policy effects. Few cases are appealed; as a result, unappealed decisions become as authoritative as those of a supreme court. Multiparty litigation is becoming increasingly common. A class of thousands of human or legal persons may institute a single lawsuit, the decision in which binds all participants, for example, all taxpayers in the State of California, or all stockholders of General Motors. Organizations frequently sue or are sued as surrogates for their members, for example, the Sierra Club or the Teamsters Union. A lawsuit brought by or against the United States or a state or local government may have very broad and pervasive effects.

Courts make policy only on matters which they have authority to decide, that is, within their jurisdiction. The subjects of the jurisdiction of American courts range from the banal to matters of utmost societal importance. As an eminent Canadian jurist phrases it:

> Reading through an American constitutional law text is like walking through modern human existence in an afternoon. From a woman's control of her own body to the Vietnam war and from desegregation of schools to drunken drivers, it is hard to imagine a facet of American existence that has not been subjected to constitutional scrutiny.[33]

[32] *Id.* at 546.
[33] Bertha Wilson, "The Making of a Constitution," 71 *Judicature* 334 (1988).

In the case of the Supreme Court, its jurisdiction has sufficient breadth to allow it to address novel issues: thus, the right to die and assisted suicide,[34] the internet transmission of patently offensive communications to minors,[35] the propriety of subjecting an incumbent President to civil damages litigation,[36] and the question of whether a city could restrict admission to certain dance halls to persons between fourteen and eighteen years of age.[37] On the other hand, the Court's jurisdiction does not preclude it from considering such trifling matters as the escheat to the tribe of fractional land allotments of deceased Indians. Thus,

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $0.05 in annual rent and two-thirds of whom receive less than $1. . . . The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $0.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $0.000418.[38]

Without dissent, the Court declared the Act of Congress decreeing escheat unconstitutional because it took property without the payment of just compensation. If a more trivial dispute ever produced a declaration of congressional unconstitutionality, we are unaware of it.

Consider also the matter of punitive damages. Since the founding of the Republic, tort – personal injury – law, with its concepts of due care, fault, and liability, has been the province of the states. Moreover, the law of torts is overwhelmingly judge-made (i.e., common-law) rather than legislatively enacted. Notwithstanding, the Supreme Court injected itself into the issue of punitive damages – albeit negatively – in *Browning-Ferris Industries v. Kelco Disposal*,[39] ruling that $6 million in punitive damages on top of a measly $51,000 in compensatory damages did not violate the excessive fines clause of the Eighth Amendment where government neither prosecuted the action nor received any share of the awarded damages. Two justices – Stevens and O'Connor – held to the contrary. Five years later, the justices ruled that Oregon's constitutional provision that denied its courts the authority to review jury verdicts for excessiveness violated the due process clause of the Fourteenth

[34] E.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997).
[35] *Reno v. ACLU*, 521 U.S. 844 (1997).
[36] *Clinton v. Jones*, 520 U.S. 681 (1997).
[37] *Dallas v. Stanglin*, 490 U.S. 19 (1989).
[38] *Hodel v. Irving*, 481 U.S. 704 (1987).
[39] 492 U.S. 257 (1989).

Amendment.[40] Finally, the Court directly addressed the constitutionality of a jury's award. An award of $2 million was granted to the purchaser of a $40,000 – new – car that had been repainted unbeknownst to the purchaser. Over the dissents of Ginsburg, Rehnquist, Scalia, and Thomas, the majority ruled the damages grossly excessive and thus in violation of due process.[41]

The jurisdiction that American courts have derives from the constitution that established them and/or from legislative enactments. Because judges' decisions adjudicate the legality of contested matters, judges of necessity make law. Even so, Americans find it unsettling to admit to judicial policy making because we have surrounded judicial decisions with a panoply of myth, the essence of which avers that judges and their decisions are objective, impartial, and dispassionate. In the language of Chief Justice John Marshall:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature. . . .[42]

Until *Bush v. Gore*, this statement had a thin veneer of plausibility. But since the decision awarding the presidency to Bush, everyone not totally disconnected from reality now recognizes that "Judges make law."[43] Everyone, that is, except judges.

Consider the language of Justice Scalia, whom many deem the most intelligent of today's justices:

> The very framing of the issue that we purport to decide today – whether our decision . . . shall "apply" retroactively – presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of "the judicial Power," US Const, Art III, Sec. 1, cl 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures. . . . To hold a governmental act to be

[40] *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). Justices Ginsburg and Rehnquist dissented.
[41] *BMW v. Gore*, 517 U.S. 559 (1996).
[42] *Osborn v. Bank of the United States*, 9 Wheaton 738 (1824), at 866.
[43] Wilson, *op. cit.*, n. 33, *supra*, p. 334.

unconstitutional is not to announce that we forbid it, but that the *Constitution* forbids it. . . .[44]

Apparently, intelligence does not preclude self-deception. But perhaps we render too harsh a judgment. Scalia may simply believe a bit of "spin" should color an occasional opinion. Even so, Scalia's remarks are puzzling. If it is he and his colleagues in whom the Constitution speaks, and not vice-versa, how could he consistently assert a few paragraphs later in the same opinion that he might not adhere to what "the *Constitution* forbids"? Thus:

> stare decisis – that is to say, a respect for the needs of stability in our legal system – would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law.[45]

Note the use of the phrase "a decision of this Court." Scalia presumably distinguishes between "what the *Constitution* forbids" or commands and the Court's decisions. Some of the latter must contain only matters that a majority of lawmaking justices forbid or command. Scalia has provided no objective criteria for determining in which decisions the Constitution speaks and which merely voice the willful utterances of a biased majority. Perhaps those from which he dissents?

Relatedly, consider the Court's decision in *Printz v. United States*.[46] A better example of judicial doublespeak probably doesn't exist. Over the objections of four justices, the Court's five conservatives declared unconstitutional the highly publicized Brady Handgun Violence Prevention Act, which required local law enforcement authorities to conduct background checks on prospective handgun purchasers. Scalia wrote the Court's opinion. One may sensibly assume that when the Court declares congressional action unconstitutional, it will at least partially rest its decision on the document's language. Virtually always does it do so. Enhancing the probability of such an outcome are the words of the opinion's author who asserted – as quoted above – that to be legitimate such action must be forbidden by the Constitution, and not merely result from judicial fiat. Does the author practice what he preaches? Of course not. One searches the language of *Printz* in vain for reference to the constitutional language on which the opinion rests. Instead, the reader is instructed to fixate on the "structure of the Constitution" in order to divine "a principle" governing the case.[47] And – *voila!* – digging deeply,

[44] *American Trucking Assns. v. Smith*, 497 U.S. 167 (1990), at 291. Emphasis in original.
[45] *Id.* at 204. [46] 521 U.S. 848 (1997). [47] *Id.* at 934.

Scalia unearths what he calls "the very *principle* of separate state sovereignty."[48] We may call it S-cubed, created by a judicial activist piously masquerading as a devoted adherent of the words of the Constitution.

REASONS FOR JUDICIAL POLICY MAKING

Few nations empower its courts to resolve so broad a range of disputes as does the United States. Neither do most nations concede to their courts such authoritative decision making. Furthermore, in making their decisions, their courts do so with a minimum of interference from other governmental bodies or officials. That is not to say that Congress, the presidency, bureaucrats, state governments, or the public at large meekly accept whatever courts decree. Not at all. Sound and fury directed at a particular court – or at courts in general – frequently characterize political discourse. But the sound and fury typically signify nothing more than the alleviation of the frustration of adversely reacting segments of the body politic, as Congress's annual remonstrations about flag burning and school prayer clearly demonstrate.[49]

Why do American judges have such virtually untrammeled policy-making authority? Five interrelated factors provide an answer: fundamental law, distrust of governmental power, federalism, separation of powers, and judicial review. Because they are so closely interconnected, we cannot empirically judge their relative importance. Rather, they appear to function as so many parts of a seamless web.

Fundamental Law

The original English colonizers of New England brought with them the concept of a fundamental law: the idea that all human and governmental action should accord with the word of God or the strictures of nature as the leadership of the particular settlement decreed.[50] These individuals had left Europe because they were unwilling or unable to conform to the teachings of England's established church. Their arrival in America did not produce religious harmony. Much of the settlement of Rhode

[48] *Id.* at 943. [49] Eskridge, *op. cit.*, n. 13, *supra*.
[50] Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), pp. 12–17, 24–27.

Island and Connecticut, for example, resulted from the expulsion of dissenters from Plymouth and Massachusetts Bay.

The overtly religious motivations that inspired the founding of new settlements was reflected in the charters and constitutions that their inhabitants devised. Although the theocratic parochialism of the early colonies, if not of specific towns and villages within each of them, had largely vanished by the beginning of the Revolutionary War, the notion of a fundamental law had not, but instead retained its vitality.[51]

The environment in which the colonists found themselves did not lend itself to the stabilizing influences of the Old World. Religious diversity flourished. Dissenters – with or without a theomanic preacher – merely had to move a few miles west to establish their own kindred community. The process of westward settlement produced marked social and economic turbulence, which continued throughout the nineteenth and into the twentieth century and persists still. The industrial and technological revolutions transformed a society of yeoman farmers and artisans into one of urban employees. Culturally, well before the Revolution, the original English settlers had been supplemented by substantial numbers from The Netherlands, Germany, Scotland, and Ireland, to say nothing of the forcible importation of African slaves. The cultural diversity that resulted became vastly more eclectic with the mass immigration of the latter half of the nineteenth and the early years of the twentieth centuries.

The changes in life style and status that these and associated forces have wrought preclude the establishment of a fixed and stable religious, social, economic, or cultural system. Indeed, Americans generally view change in these areas of human activity to be desirable, considering them synonymous with progress and freedom. Only in the political realm do we view drastic change as undesirable.

This schizoid orientation reflects the reality of American life. No one can function well in an unduly dynamic environment. To a substantial extent, human beings are creatures of habit. Economic misfortune, the unexpected breakup of personal relationships, and the demolition of cherished beliefs produce trauma. Life becomes frightening to those who find events in the saddle riding herd on them. But the political sphere appeared to be an arena amenable to stability. Consciously or otherwise, this was the goal that the Framers set for themselves when they gathered in Philadelphia in the summer of 1787: to transpose the

[51] See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca: Cornell University Press, 1955).

religious notion of a fundamental law into a secular context, to enshrine the Constitution that they intended to create as a secular substitute for Holy Writ.

The fact that the Constitution has lasted longer than that of any other nation evidences the Framers' success. Its long life has added political stability to the distinguishing features of American life. Although a resurrected Framer might be appalled at the size of the governmental system he helped create, he most assuredly would recognize the workings of what he had wrought. Other societies may achieve stability through an established church, to which the citizenry pay at least pro forma obeisance, or through the hierarchical social control that a hereditary caste or group exercises. Alternatively, the economic system may prove unchanging, as in a nonindustrialized society where subsistence farming occupies all but a privileged elite. Or national boundaries may coincide with ethnic or tribal lines, insuring cultural homogeneity. In these environments, the political sphere provides the vehicle for change. Radical regime changes, bloody or otherwise, become commonplace. Not so in the United States. The Constitution and its system of government furnish us with our link to the invariant.

Distrust of Governmental Power

A second reason for judicial policy making inheres in our historic distrust of governmental power, especially that exercised from a central level. Like the concept of fundamental law, this factor also dates from the colonial era. Americans viewed British insistence that they defray the costs of the French and Indian War, which ended in 1763, as inimical to their rights and liberties. Opposition to these policies led to the onset of the Revolutionary War, which coincided with an internal struggle for control of the newly formed governments that the patriots (i.e., the non-Loyalists) established in each of the colonies. This internal struggle roughly pitted the socioeconomic elite, such as it was, against the rural yeomanry and urban artisans. It was continuing apace when the Framers convened in Philadelphia in 1787.

Unsettled economic conditions that persisted beyond the end of the Revolution severely strained the governmental capabilities of both the Continental Congress and the individual states. The Articles of Confederation, which took effect in 1781, made no provision for a chief executive or a federal judiciary; the Continental Congress had no power to levy taxes; nor could it exercise any of its limited powers over individu-

als; amendment of the Articles required unanimous approval of the thirteen state legislatures. A number of states yielded to debtor demands and printed large quantities of paper money that they issued as legal tender, while others enacted stay laws that extended the period of time during which debtors could legally pay their creditors. To protect their own interests, some states imposed tariffs and other trade barriers that inhibited the free flow of interstate commerce. Of the money that Congress requested to defray the costs of the Confederation and the Revolutionary War, the states paid so little that Congress could not meet the interest payments on the national debt.

Support for strengthening the governmental system came from a number of sources: leaders who believed that the power of a single state to prevent change endangered them all, merchants and shipowners concerned about commercial restrictions, frontiersmen threatened by Indian attacks, and veterans and members of the Continental Congress who had developed national loyalties. Of the fifty-five delegates to the Constitutional Convention, thirty-nine had served in Congress; at least thirty were veterans; eight had signed the Declaration of Independence; and all were experienced in the politics of their respective states.

They clearly recognized that any effort to replace the Articles of Confederation with a more capable government required the creation of a system that no single interest or "faction" (to use the word then in vogue) could control or dominate, one that – from the broadest standpoint – neither the "haves" nor the "have nots" could become master of. The governmental capability of the federal level had to be strengthened, whereas that of the states required diminution. The hoped-for result was a system in which neither level would do much governing. The federal government would be empowered to defend the Union, coin money, operate a postal system, regulate interstate commerce, and – needless to say – levy taxes. The states would be saddled with restrictions to prevent them from interfering with the responsibilities given to the federal level, as Article I, section 10, illustrates.

The federal government did not escape similar strictures. Section 9 of Article I, for example, contains eight clauses of "thou shalt nots" that specify things that Congress may not do.

In short, the Framers limited the powers of government in two distinctly different ways. First, they severely limited what government could do. Second, they specified in considerable detail the *way* in which government could exercise the powers that it did possess. Thus, Article III stipulates that persons accused of committing a federal crime, other than

impeachment, be tried by a jury, and Article I, section 7, details the procedure whereby a bill becomes a law. The sum total of these substantive and procedural limitations on the exercise of power paradigmatically evidences the "constitutionalism" of the Constitution.[52]

The resulting system gained the support of the major elements of American society, though not without a sharp and hard-fought struggle. The lower socioeconomic echelons stood to benefit from limited government because they lacked experience in the affairs of state. Some had been deprived of the right to vote or hold public office because of property qualifications. Others, though entitled to vote and hold office, lacked the political seasoning of their more experienced neighbors. Their preference for states' rights and local self-government made them suspicious of what might become a strong and efficient centralized government. If not in their own experience, in that of their ancestors, government had been a vehicle of oppression and tyranny. For the many who lived along the frontier, the utility of a federal government was limited to an occasional band of cavalry to pacify unruly natives.

Nor were the landed gentry and mercantile interests necessarily opposed to a government invulnerable to any group's effective control. They chiefly feared loss of position on the socioeconomic ladder. As long as governmental power was not used against them, they sensibly assumed that they could perpetuate their position in society, given their education and wealth and the status that accompanied it.

Consequently, for self-interested reasons that varied from one group and interest to another, the Jeffersonian ideal that that government is best that governs least quickly became an article of faith for Americans generally. Subsequent developments insured its retention: The lure of the frontier and the opportunities it provided individuals to begin again, the immigrating refugees of the nineteenth and twentieth centuries for whom government was synonymous with tyranny and oppression, the Darwinian thesis of the survival of the fittest, the gospel of wealth, and rugged individualism all paid homage to the concept of limited government.

Federalism

In addition to rigorously circumscribing the powers of government, the Framers divided those that were provided between the national govern-

[52] For a classic treatment of constitutionalism, see Charles H. McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca: Cornell University Press, 1947).

ment and the states. For the most part, certain powers are delegated to the federal government, while others are reserved for the states. Some, however, are shared, such as the power to tax.

The constitutional language that pertains to this geographical division of power sorely lacks precision. As a result, the Supreme Court has confronted a constant stream of litigation that has required the justices to determine the relative power of the federal government vis-à-vis the states. The Court's first major case, *Chisholm v. Georgia*,[53] concerned federal-state relations. Constitutional language tilts resolution of these conflicts in favor of the federal government, for example, the supremacy clause (Article VI, section 2):

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The resolution of federal-state conflicts also tilts in favor of the federal government because the Supreme Court has arrogated to itself the authority to ultimately decide these disputes. It did so early in the nineteenth century, in a pair of landmark decisions, *Martin v. Hunter's Lessee* and *Cohens v. Virginia*.[54]

But do not infer that resolution necessarily advantages Washington at the expense of the states. It does not, as we see below. The tilt results only because a federal entity – the Supreme Court – has the last word. The Court's decisions have caused the degree of centralization/decentralization to vary from one period to another. Indeed, during the late nineteenth and early twentieth centuries when the Court was writing the doctrines of laissez-faire economics into the Constitution, the justices rather even-handedly struck down antibusiness regulations regardless of the governmental level from which they emanated.

Apart from the operation of the justices' personal policy preferences, the limited jurisdiction of the federal courts and the separate constitutional existence of the state judicial systems have enabled the states to resist rather successfully a variety of centralizing tendencies. We address these matters in the next major section of this chapter, "The Federal and State Judicial Systems."

[53] 2 Dallas 419 (1793). [54] 1 Wheaton 304 (1816) and 6 Wheaton 264 (1821).

Separation of Powers

Separation of powers compartmentalizes government into three separate chambers, in the sense that each exercises powers distinct from the others and does so with its own personnel. The effect of this arrangement precludes any branch from compelling action by the other two. Instead, separation of powers institutionalizes conflict, particularly between Congress and President. To prevent one branch from overpowering another, each is provided with certain powers that functionally belong to one of the other branches. These are the so-called checks and balances. Thus, the President constitutionally possesses the legislative power to veto Congress's actions, while the Senate participates in the selection of executive officials through the constitutional requirement of advice and consent. Both check the courts: the President by nominating judges, and Congress by consenting to their selection (Senate only) and determining their number and jurisdiction. The courts, in turn, check the President and Congress through the power of judicial review, which we discuss below.[55]

The Framers were most concerned about the exercise of legislative power. To lessen their fears, they divided Congress into two separate chambers, the Senate and the House of Representatives, with the membership chosen from distinct constituencies (except for those states that have only a single representative) and with a different term of office. They required that a bill pass both houses with identical provisions, down to the last comma, before it could be sent to the President for signature or veto. The judiciary, by contrast, escaped relatively unscathed. The Framers did not view the courts as a threat to the constitutionalism they so carefully crafted.[56] They were more concerned lest the judges

[55] In exercising their power of judicial review, the Supreme Court and the lower federal courts primarily rest their decisions on constitutional provisions other than separation of powers. Once in a great while, however, the basis for decision is the language pertaining to separation of powers. It is used when the court in question views the action taken by the other branch as intruding on the realm of judicial power and responsibility. Thus, e.g., *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), in which the Court voided an effort by Congress forcing the federal courts to retroactively reopen securities fraud cases that the courts had authoritatively resolved. Justice Scalia, reputedly deferential to the "democratic" branches of government, wrote the Court's opinion. Justices Stevens and Ginsburg dissented.

[56] Nonetheless, the courts sometimes get caught up in the crossfire resulting from the adolescent game of chicken that the President and Congress often play. Though it may strain credulity, their failure to resolve how the census in the year 2000 should be conducted

become subservient to either of the other branches. To insure the judiciary's independence, the Framers created a selection process that neither the President nor Congress could control, and provided judges with lifetime tenure and with no reduction in salary. But because both branches are involved – the President nominating candidates and the Senate deciding whether to confirm them or not – this divided responsibility encourages delay, especially when one party controls the Senate and the other the presidency.[57]

Separation of powers enables the Supreme Court to resolve authoritatively such justiciable disputes as pit Congress and the President against one another.[58] A politically charged example concerned the Gramm–Rudman Balanced Budget and Deficit Reduction Act of 1985. Congress assigned one of its own employees, the comptroller general, responsibility for determining the cuts needed to reduce the budget deficit. By a 7-to-2 vote, the Supreme Court declared the provision unconstitutional because a person removable by Congress was given the executive power to estimate, allocate, and order the spending cuts required to satisfy the deficit targeted by the law. The Court ruled that since Congress could remove the comptroller general from office, he was "subservient" to it.[59] The fact that Congress had never done so during the sixty-five years of the office's existence did not sway the majority from their deductively predetermined outcome.

Notwithstanding the publicity that attended this decision, the dispute turned on a trivial technicality. The Court did not void the fallback provision that allows the regular legislative process to effectuate the cuts;

almost forced the courts to shut down on June 15, 1999, because of a congressionally imposed budgetary deadline. The courts became involved because longstanding budget committee procedures fund the courts together with several executive branch departments, including the Department of Commerce, which includes the Census Bureau. Fortuitously, Congress passed an emergency supplemental appropriation which the President signed on May 21 that enabled him to fund the war then going on in Kosovo. Buried within it was a provision to continue funding the federal courts. See Thomas Baker, "Courts as Drive-By Victims," *National Law Journal*, June 21, 1999, p. A22.

[57] Wendy L. Martinek, Mark Kemper, and Steven Van Winkle, "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1997–1998," 62 *Journal of Politics* (2002) [forthcoming].

[58] Many such disputes are "political questions." The plaintiff lacks standing to sue because the Court believes the matter, though within the courts' subject matter jurisdiction, should be resolved by the "political" branches of government themselves. We discuss this matter in the section on standing to sue in Chapter 5.

[59] *Bowsher v. Synar*, 478 U.S. 714 (1986), at 727. The dissenters were White and Blackmun.

neither does the decision preclude Congress from merely repealing the provision that allows it to remove the comptroller, or from bestowing the comptroller's power on an official whom Congress can remove only through impeachment. Either of these options would make the official "executive" rather than "legislative." This arguably is a distinction without a difference.

No technicality marred the decision in *Clinton v. New York City*[60] in which the Court declared unconstitutional the line-item veto. Although Congress consciously gave the President authority to veto single spending items and specific tax breaks, thereby strengthening the presidency in its dealings with Congress, the Court said Congress could not do so, ruling that the President could veto only all of the provisions in a bill, not just some of them.

The creation of the judiciary as an independent coordinate branch of the government has appreciably promoted the policy-making capabilities of federal judges in general, and that of the Supreme Court in particular. Absent functional independence, the judges would likely be viewed – along with other government officials – as mere politicians and bureaucrats. Their efforts to distinguish themselves and their activities as principled, even-handed, and nonpartisan would likely be unsuccessful, with the result that the public would view them as on all fours with the persons of minimal competence and dubious ethics who engage in the dirty business of politics.

Judicial Review

The most striking evidence of judicial independence is a court's exercise of the power of judicial review. Although the power to declare an action of the other branches of government incompatible with the content of the fundamental law is nowhere specified in the Constitution, its exercise comports with the motivations and concerns that led to the drafting and ratification of the document.

First, if the Constitution is to be the fundamental law of the land, some body must be able to decide whether the actions of government conform to it. Such decisions may theoretically be made by Congress and/or the President. After all, they do take the same oath as federal judges to preserve, protect, and defend the Constitution of the United

[60] 141 L Ed 2d 393 (1998).