Introduction

Supreme Court Policy Making

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 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

[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.

[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.

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. Multi-party 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).

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 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,

[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.
[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.

[illegible] 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 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

[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.

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

2

Models of Decision Making

The Legal Model

In the next two chapters, we present three distinct models of Supreme Court decision making: the legal model, the attitudinal model, and the rational choice model. While we apply these models throughout the text, we present the clearest tests of them in Chapters 7 and 8, which cover the decision on the merits.

ABOUT MODELS

Before discussing these models, it may be useful to discuss what a model is and why it is used. We start with the premise that the real world is extraordinarily complex. While natural phenomena may often reduce perfectly to formulae such as $E = mc^2$, the causes of human behavior are typically much more complex and intermeshed. For example, why did the Court find for Roe and not Wade in its 1973 decision striking abortion laws?[1] We readily imagine that we could write an entire book on why the justices did so. Following that, we could write a similar book about *Brown v. Board of Education*,[2] *Marbury v. Madison*,[3] or any number of similarly important cases. We expect that we would learn a lot in researching and writing such a book, and that readers might learn a bit in reading it.

This approach to learning, the case study approach, involves learning as much as possible about as little as possible. While one can profit from this sort of immersion in detail, several shortcomings result as well. First, the complexity of human behavior could occasion years of studying a particular decision and still not result in full comprehension. Given that individuals rarely understand their own decisions, it is immeasurably more difficult to fully understand the decisions of others. Second, we quickly forget the facts we learn about a single decision, as students who cram for exams readily know. Third, the causes of one particular case may not be generalizable to the rest of judicial politics. The litigation strategy of the NAACP Legal Defense Fund may have been crucial in *Brown v. Board of Education*. Is that generally the case? Marshall's decision in *Marbury v. Madison* may have been influenced by fears of political repercussions.[4] Do such considerations frequently concern the Court? The simple yet accurate answer is that while the detailed study of a single event may provide a useful description of events, it does not and cannot explain action independent of that event with any degree of confidence.

As an alternative to case studies, the modeling approach also recognizes the complexity of the world around us; nevertheless it postulates that attempting to learn everything about one thing may not be the best approach to knowledge. Instead, whether quantitatively or qualitatively, modelers attempt to examine the most explanatory aspects of a wider range of behavior.[5] Learning the most important factors that affect thousands of decisions might be far more beneficial than learning all there is to know about a single decision.

This is where models come in. A model is a simplified representation of reality; it does not constitute reality itself. Models purposefully ignore certain aspects of reality and focus instead on a select and often related set of crucial factors. Such simplifications provide a useful handle for understanding the real world that reliance on more exhaustive and descriptive approaches does not. For instance, journalistic accounts of presidential elections discuss thousands of factors that might have influenced the final results. Consider, instead, a retrospective voting model where voters evaluate the performance of the incumbent party and vote accordingly. While this could be tested in a variety of ways, imagine that 80 percent of the variance in post–World War II presidential elections

[1] *Roe v. Wade*, 410 U.S. 113 (1973). [2] 347 U.S. 484 (1954).
[3] 1 Cranch 137 (1803).

[4] Jack Knight and Lee Epstein. "On the Struggle for Judicial Supremacy," 30 *Law and Society Review* 87 (1996).
[5] For a critique of the ability of models to explain judicial behavior, see Michael McCann, "Causal versus Constitutive Explanations (or, On the Difficulty of Being So Positive . . .)," 21 *Law and Social Inquiry* 457 (1996).

can be explained by changes in real disposable income during the incumbent's regime. If so, then this simple retrospective model gives us an extraordinarily useful tool for explaining and understanding not just one but a series of presidential elections.

From the viewpoint of a social scientist, a successful model achieves two often contradictory goals: It explains the behavior in question, and it does so parsimoniously. A model that does not validly and reliably explain and predict the behavior in question obviously has little value. But an unduly complex model that explains behavior may be almost as worthless, for it fails to give us the handle on reality that models provide. Unfortunately, the goals of explanation and parsimony are often contradictory, for the more complex one's model, the more behavior one can "explain." For instance, a justice's vote in a particular equal protection case may result from an encounter the justice had with a member of the group in question earlier in the day. A vote in another case might depend on a different random event. We could potentially expand the "explanatory" power of a model by including these idiosyncratic factors, but the resulting complexity would effectively make the model useless. Useful models ignore idiosyncratic factors and highlight instead variables that explain a high percentage of the behavior in question.[6]

Because models simplify reality, we cannot judge them as true or false, for, strictly speaking, all models are false in that they purposefully exclude idiosyncratic and trivial factors that may marginally influence the behavior in question. Rather, we judge models by whether they are useful in helping us understand that behavior. Internal consistency, coherence, explanatory ability, and parsimony are all hallmarks of a good model. Ultimately, though, model evaluation is a comparative exercise. Because no model explains everything, the crucial question becomes whether it does a better job than its competitors in meeting these criteria.

Requisite to a model's explanatory ability is that it must be *falsifiable* or testable. That is, the model must be able to state a priori the potential conditions that, if observed, would refute the model. For example, if a judicial rational choice model did not state the goals of judges in advance, then almost any systematic behavior would comport with the model, for some goal would almost always be consistent with the behavior being studied. Or if precedents exist on both sides of a case, a legal model based on precedent so long as the judges followed one precedent or another would not be falsifiable. To complete the picture, an attitudinal model that measures the justices' attitudes by their voting behavior and then explains their votes by their attitudes would similarly be unfalsifiable. In these situations, it is nearly impossible to imagine evidence that would refute the model. As a result, the evidence gathered would not constitute a test of the model, for a test requires the possibility of failure. Of course, a mere a priori statement of conditions that would refute the model does not end the matter. With regard to attitudes, for example, a rigorous definition that strongly portends falsifiability is essential, one, moreover, that is tested by a measure that makes failure highly probable statistically.

Legal scholars[7] and Supreme Court justices often fail to comprehend falsifiability. In *Daubert v. Merrell Dow*[8] Justice Blackmun accurately wrote for the Court:

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge . . . will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." . . . See also C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed., 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").[9]

Not bad. But then Justice Rehnquist, whose intellectual gifts are praised by even his staunchest critics, replied: "I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be, too."[10]

Whether federal judges understand this or not, the point is rather simple. If no potential conditions exist by which a model can be wrong, then empirical evidence is irrelevant to the model's validity. Since scientific evidence requires empirical support, the model is of no scientific value. And if *almost* no potential conditions exist that would falsify a

[6] Though models typically aim at uncovering the most important aspects of decisions or behavior, some models may purposefully highlight one aspect of a decision in full knowledge that other aspects may be as or more important.

[7] See, esp., the Law and Courts listserv, Digest 179, June 7, 1997, and Digest 180, June 8, 1997, questioning the need and desirability of falsifiable models. http://www.Lawcourts-l@usc.edu.

[8] 509 U.S. 579 (1993). [9] *Id.* at 593. [10] *Id.* at 600.

almost all potentially observable behavior is consistent with the model, the model is falsifiable, but trivially so. The more potential behavior that is inconsistent with a model, and the more plausible that behavior is, the more leverage that model provides.

As a necessary criterion for the validity of a model, falsifiability will take on special significance when we discuss the legal model, as we do next.

THE LEGAL MODEL

The legal model ranges from the mechanical jurisprudence in vogue through the early twentieth century[11] to the more sophisticated variants that we mention below. What typically connects these variants together is the belief that, in one form or another,[12] the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent.[13] To various degrees, jurists, legal scholars, and political scientists propound variants of the legal model.

Of course, judges still subscribe to the legal model, at least for public consumption. In addition to the comments of Justices Marshall and Scalia, as quoted in Chapter 1, we add those of Judge Harry Edwards of the D.C. Court of Appeals, who asserts that "it is law – and not the personal politics of individual judges – that controls judicial decision making in most cases resolved by the court of appeals."[14] According to Judge Wald of the same court, "there is little time or inclination to infuse the decision making process with personal ideology."[15]

Nonjurists also mouth such notions.[16] Consider, for example, the writings of Ronald Dworkin, arguably this generation's preeminent legal theorist. In *Taking Rights Seriously*, Dworkin disputes the notion that judges freely exercise discretion. While recognizing that precedent only inclines judges toward certain conclusions, rather than commands them, he nevertheless disputes the notion that judges "pick and choose amongst the principles and policies that make up [this] doctrine,"[17] or that judges apply "extra-legal" principles (e.g., no man shall profit from his own wrong) "according to his own lights."[18]

Precedent plays an important role in *Taking Rights Seriously*, and that role becomes paramount in hard cases, those where no preexisting rule of law exists.[19] Dworkin argues that legal positivists err in claiming that judges legislate new rights in such cases, and again denies that they exercise discretion. "It remains the judge's duty, even in hard cases, to *discover* what the rights of the parties are, not to invent new rights retrospectively."[20]

When a new case falls clearly within the scope of a previous decision, the earlier case has an "enactment force" that binds judges. But even when novel circumstances appear, earlier decisions exert a "gravitational force" on judges.[21] This is not mechanical jurisprudence, as judges may disagree as to what the gravitational force is. Yet to Dworkin, judges must *find* the *correct* answer. And though his theory of precedent requires a judge's answer to "reflect his own intellectual and philosophical

[11] Essentially, mechanical jurisprudence posits the existence of a single correct answer to legal questions that judges are to find. According to one legal authority, "*most* contemporary scholars no longer adhere to the strict determinate formalist model." Frank Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance," 92 *Northwestern University Law Review* 251 (1997) at 255. Emphasis added.

Modern legal scholars who argue that law is determinate include: Richard S. Markovits, *Matters of Principle: Legitimate Legal Argument and Constitutional Interpretation* (New York: New York University Press, 1998), who claims "internally-correct answers to all legal questions" (p. 1); Kent Greenawalt, *Law and Objectivity* (New York: Oxford University Press, 1992), who argues that "any extreme thesis that the law is always or usually indeterminate is untenable" (p. 11); and, arguably, Ronald Dworkin, whose work we discuss in detail below.

[12] To postpositive legalists, the only required influence of law is a subjective influence that resides within the justice's own mind. See, e.g., Steven J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992). Needless to say, this internal program is essentially nonfalsifiable (in the postpositive vision of the world, this is not a vice) and provides almost no leverage as to which decisions judges will actually make. We discuss this further in the final chapter.

[13] In addition to text, intent, and precedent, *The Supreme Court and the Attitudinal Model* included balancing as well. On further reflection, balancing strikes us as a standard of review akin to the Preferred Freedoms Doctrine (see Chapter 4) rather than a component of the legal model.

[14] Harry T. Edwards, "Public Misperceptions Concerning the 'Politics' of Judging: Dispelling Some Myths About the D.C. Circuit," 56 *University of Colorado Law Review* 619 (1985) at 620.

[15] Patricia M. Wald, "A Response to Tiller and Cross," 99 *Columbia Law Review* 235 (1999) at 237. Both Edwards and Wald, though, assert that nonlegal factors have a substantially greater impact on Supreme Court decisions than those of the Courts of Appeals.

[16] This section derives in part from Harold J. Spaeth and Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (New York: Cambridge University Press, 1999), pp. 8–15.

[17] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1988), p. 38.

[18] *Id.* at 39. [19] *Id.* at 110–15. [20] *Id.* at 81, emphasis added. [21] *Id.* at 111.

convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his."[22]

We do not wish to misrepresent Dworkin's position. He does not adhere to a purely legalistic perspective. While the requirement of finding a fit between past cases to the current one will "eliminate interpretations that some judges would otherwise prefer, so that the brute facts of legal history will in this way limit the role any judge's personal concoctions can play in his decisions," "different judges will set this threshold differently."[23] Nor is he oblivious to institutional factors. Higher courts generally deviate from strict precedent, the *obligation* to follow past decisions, but nevertheless are subject to the gravitational pull of weak precedent.[24] Overall, though, the notions that the judge's job is to find correct answers to hard legal questions, and that precedents guide this search, indicate that stare decisis plays a vital role in judicial decision making.

Support for the legal model, though to a lesser degree, survives not just in the precedential world of Ronald Dworkin, but in the writings on text and intent that appear in the eclectic world of modern legal scholars. While we do not review these scholars' works in detail, we note the following.

Bruce Ackerman's *We the People* argues that the Supreme Court's role in American history has been to provide a synthesis between constitutional transformations (such as that following the Civil War) and past practices (e.g., the Founders' Constitution). Thus, to Ackerman, the notorious *Lochner* decision[25] represents not conservative justices reaching conservative results, but justices "exercising a preservationist function, trying to develop a comprehensive synthesis of the meaning of the Founding and Reconstruction out of the available legal materials."[26]

[22] *Id.* at 118. This quote concerns Dworkin's mythical judge Hercules, but Dworkin applies the technique to human judges as well (p. 130). One might argue that we are turning a normative argument into an empirical one. In our defense, Dworkin frequently mixes and matches what he thinks judges actually do with what he thinks they ought to do. For example, "judges are agreed that earlier decisions have gravitational force" (1978, p. 112), and "judges characteristically feel an obligation to give what I call 'gravitational force' to past decisions" (Dworkin 1986, p. viii) are empirical statements, not normative ones.

[23] Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1988), p. 255.

[24] *Id.* at 401. [25] *Lochner v. New York*, 198 U.S. 45 (1905).

[26] Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991), p. 101.

Similarly, to Howard Gillman, a postpositive scholar,[27] the *Lochner* Court "was, to a large extent, giving voice to the founders' conception of appropriate and inappropriate policymaking."[28]

Among more modern justices, Hugo Black, of course, is the exemplar of "originalist" jurisprudence: "In interpreting the Constitution [Black] followed the plain meaning of the words and the intent of the framers";[29] "Hugo Black, with a 'near religious fervor' for most of his tenure on the Court, fought and argued to base his and the Court's constitutional interpretation on the literal text itself. . . . Always at war against judicial roaming in the murky 'natural law' ether of substantive rights . . . Black tried to interpret constitutional phrases in accordance with the intent of the Framers and the history of the clause or amendment."[30] More subtly, Leslie Goldstein argues that Black "utilized a moderately textualist jurisprudence . . . guided primarily by the wording of the constitutional text and its structure."[31]

So too for the Court's most conservative justices. Davis states that Rehnquist's behavior on the Court cannot be explained by his conservative ideology. Rather, she claims, Rehnquist is a legal positivist, one who believes that "lawmaking is a prerogative of legislators rather than judges. . . . In an attempt to adhere to the law as an empirical fact, a positivist jurist limits his or her interpretation of the Constitution to the meaning of the words or the text or intent of its authors."[32] "The school of thought of which Chief Justice Rehnquist is the most prominent adherent would deny for the most part the validity of any tradition except that already frozen in the founding events."[33] Without accepting Scalia's words at face value, David Schultz and Christopher Smith note that "Scalia's uniqueness stems from his notable role as the Court's most consistent, forceful advocate of constitutional interpretation according to the original meaning intended by the

[27] See n. 12, *supra*.

[28] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* (Durham: Duke University Press, 1993), p. 20.

[29] Sue Davis, *Justice Rehnquist and the Constitution* (Princeton, N.J.: Princeton University Press, 1989), pp. 23–24.

[30] Howard Ball and Phillip J. Cooper, *Of Power and Right* (New York: Oxford University Press, 1992), pp. 318–19.

[31] Leslie Goldstein, *In Defense of the Text* (Savage, Md.: Rowman and Littlefield, 1991), p. 41.

[32] Davis, *op. cit.*, n. 29, *supra*, p. 24.

[33] H. Jefferson Powell, "Symposium: The Republican Civic Tradition: Reviving Republicanism," 97 *Yale Law Journal* 1703 (1998), at 1703–4.

framers."[34] According to Smith, "Thomas seeks to base his opinions on the original intent of the Framers of the Constitution, Bill of Rights, and subsequent constitutional amendments. His opinions are replete with references to the primacy of the Framers' intentions. He treats these intentions as the compelling directives that dictate the outcomes and reasoning in cases."[35]

More generally, Herman Pritchett, who assertively "blazed a trail"[36] that behavioral judicial scholars have followed for fifty years, retreated from his assumption that the justices' votes are "motivated by their own preferences"[37]:

> [P]olitical scientists, who have done so much to put the "political" in "political jurisprudence" need to emphasize that it is still "jurisprudence." It is judging in a political context, but it is still judging; and judging is still different from legislating or administering. Judges make choices, but they are not the "free" choices of congressmen. . . . There is room for much interpretation in the texts of constitutions, statutes, and ordinances, but the judicial function is still interpretation and not independent policy making. It is just as false to argue that judges freely exercise their discretion as to contend they have no policy functions at all. Any accurate analysis of judicial behavior must have as a major purpose a full clarification of the unique limiting conditions under which judicial policy making proceeds.[38]

Prominent rational choice theorists, who typically conceive of justices as primarily interested in policy outcomes (see Chapter 3), clearly hold open the possibility that judges have legal considerations as goals, and not just constraints.[39] Other economic-minded scholars argue, like Dworkin, that the goal of judges is to find the "correct" answer to legal questions.[40]

Finally, modern political theorists argue that Supreme Court decision making can best be understood as a *constitutive* process, by which "members of the Supreme Court believe that they are required to act in accordance with particular institutional and legal expectations and responsibilities."[41] Thus, "justices must be principled in their decision-making process."[42]

> At the core of a constitutive approach to Supreme Court decision making are the following six major premises: First, the Court does not follow elections or politics, but views itself as autonomous from direct and indirect political pressure. Second, justices do not follow personal policy wants. Third, respect for precedent and principled decision making are central to Supreme Court decision-making. . . .[43]

And so on.

In contrast, we argue that the legal model and its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process. We begin with an analysis of plain meaning.

Plain Meaning

Plain meaning applies not only to the language of statutes and constitutions, but also to the words of judicially formulated rules. It simply holds that judges rest their decisions in significant part on the plain meaning of the pertinent language.[44] So if Article I, section 10, of the Constitution declares that no state shall pass any law impairing the obligation of contract, then the Court should consistently strike laws that do so.

[34] David A. Schultz and Christopher E. Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Lanham, Md.: Rowman and Littlefield, 1996), p. 80.

[35] Christopher E. Smith, "Clarence Thomas: A Distinctive Justice," 28 *Seton Hall Law Review* 1 (1997), p. 9.

[36] Glendon Schubert, *Judicial Decision Making* (New York: Free Press of Glencoe, 1963), p. v.

[37] C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948), p. xii.

[38] C. Herman Pritchett, "The Development of Judicial Research," in Joel Grossman and Joseph Tanenhaus, eds., *Frontiers of Judicial Research* (New York: Wiley, 1969), p. 42. In the aftermath of *Bush v. Gore*, any limitation on "independent policy making," free "exercise of . . . discretion," and "unique limiting conditions" would seem no more substantial than phlogiston. For what it may be worth, Justice Stevens, joined by Brennan and Marshall, identify Pritchett as an "historian" in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), at 646, n. 1.

[39] John Ferejohn and Barry Weingast, "A Positive Theory of Statutory Interpretation," 12 *International Review of Law and Economics* 263 (1992), and Lewis Kornhauser, "Modeling Collegial Courts II: Legal Doctrine," 8 *Journal of Law, Economics, and Organization* 441 (1992).

[40] Lewis Kornhauser, "Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System," 68 *Southern California Law Review* 1605 (1995).

[41] Ronald Kahn, "Interpretive Norms and Supreme Court Decision Making: The Rehnquist Court on Privacy and Religion," in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999), p. 175.

[42] *Id.* at 176.

[43] *Id.* at 177–78. Needless to say, the decision in *Bush v. Gore* could not have happened in such a world.

[44] Note that no correlation need exist between plain meaning and intelligibility. Not infrequently, even the Court so admits. Thus, "It may be well to acknowledge at the outset that it is quite impossible to make complete sense of the provision at issue here." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995), at 185–86.

Alternatively, courts should not judicially create rights that the Constitution does not explicitly contain.

For several reasons, construction through plain meaning possesses a chameleonic quality that spans the color spectrum. First, English as a language lacks precision. Virtually all words have a multiplicity of meanings, as the most nodding acquaintance with a dictionary will attest. Meanings, moreover, may directly conflict. For example, the common legal word "sanction" means to reward as well as to punish. The penumbral quality of a given word, especially in combination with others, insures wide-ranging discretion by those charged with construing the overall meaning of the pertinent set of words. Second, legislators and framers of constitutional language typically fail to define their terms: legislators because of the need to effect a compromise, framers because of their inability to anticipate the future. Third, one statutory or constitutional provision or court rule may conflict with another. And while some language may be clearer than others, the meaning of words under construction in the types of cases heard by the Supreme Court, as we see below, is likely to be particularly opaque. Fourth, identical words in the same or different statutes need not have the same meaning.[45]

A commonly used example of plain meaning pertains to the operative language of the Mann Act, a classic bit of congressional morals legislation.[46]

> . . . any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral purpose . . . shall be deemed guilty of a felony.[47]

[45] Justice Blackmun, writing also for Brennan and Marshall, provides several examples in *Sullivan v. Stroop*, 496 U.S. 478 (1990), at 489–90.

[46] We trust that the irony of Congress's concern with morals legislation is not lost on the reader.

The Court, of course, also legislates morality – e.g., *Barnes v. Glen Theater*, 501 U.S. 560 (1991), which permits state and local governments to outlaw nude dancing – and, according to many, also immorality – c.f., *United States v. Playboy Entertainment Group*, 146 L Ed 2d 865 (2000), declaring unconstitutional the Communications Decency Act of 1996 that restricted sexually explicit cable TV programs to late-night hours.

[47] 18 *United States Code Annotated* 398, section 2. The Court held the statute constitutional as an appropriate exercise of Congress's power to regulate interstate commerce in *Hoke v. United States*, 227 U.S. 308 (1913).

The first case concerned three men who transported their mistresses across a state line. By a vote of 5 to 3, the Court affirmed their convictions on the basis that the phrase "immoral purpose" included persuading a woman to become a "concubine and mistress," even though the venture was nonremunerative.[48] The second case involved a madam and her husband who took two of their employees with them on a vacation to Yellowstone National Park, crossing state lines on the way. The employees did not work until after they returned from vacation. By a 5-to-4 vote, the Court reversed the employers' convictions, ruling that there was no immoral purpose inasmuch as the purpose of the trip "was to provide innocent recreation and a holiday" for their employees.[49] The final case pertained to a group of polygamous Mormons who had transported their several wives across state lines. Justice Douglas, speaking for himself and four of his colleagues, ruled, "The establishment or maintenance of polygamous households is a notorious example of promiscuity." Justice Murphy demurred: "etymologically, the words 'polygyny' and 'polygamy' are quite distinct from 'prostitution' 'debauchery' and words of that ilk."[50] Presumably, the crucial consideration for Douglas, who was married four times, is that plural wives are permissible so long as a man has them consecutively, rather than concurrently.

At the constitutional level, an oft-cited example of plain meaning concerns the creative use that the Marshall and Taney Courts made of the word "citizens," as it is used with reference to the diversity jurisdiction of the federal courts. To avoid subjecting fledgling American business enterprise to the potentially harsh mercies of out-of-state courts, Marshall ruled that a corporation was a "citizen" notwithstanding that no dictionary defined it as such. Marshall reasoned that inasmuch as corporations are artificial entities created by law, one should look to the human reality behind the legal facade, the stockholders.[51] And if they were all domiciled in a state different from that of the other party to the litigation, diversity existed.[52]

Marshall's creative solution worked well as long as American business remained localistic. But once a corporation's stockholders no longer

[48] *Caminetti v. United States*, 242 U.S. 470 (1917), at 483.

[49] *Mortensen v. United States*, 322 U.S. 369 (1944), at 375.

[50] *Cleveland v. United States*, 329 U.S. 14 (1946), at 19, 26.

[51] *Bank of the United States v. Deveaux*, 5 Cranch 84 (1810). For the details of diversity jurisdiction, see Chapter 6.

[52] *Strawbridge v. Curtis*, 3 Cranch 267 (1806).

resided in a single state, the corporation lost its access to the federal courts unless – this time compatibly with lexicographic plain meaning – diversity was complete, that is, no party on one side of the dispute held citizenship in the same state as a party on the other side of the dispute. In 1845, the Taney Court, not noted for its support of either business or federal power, rescued business from the specter of localistic tyranny. Observing that *Deveaux* and *Strawbridge* had "never been satisfactory to the bar," and that Marshall himself had "repeatedly expressed regret that those decisions had been made," the Court ruled the words of the Constitution did not prohibit Congress from giving "the courts jurisdiction between citizens in many other forms than that in which it has been conferred."[53] Hence, for purposes of federal jurisdiction, a corporation was a citizen of the state of its incorporation. The result:

> the most remarkable fiction in American law. A conclusive and irrebuttable presumption . . . that all stockholders of a corporation were citizens of the state in which the corporation was chartered. By operation of this fiction, every one of the shareholders of General Motors Corporation is a citizen of Delaware despite the fact that there are more shareholders than there are Delawareans.[54]

One need not retreat to cases of ancient vintage to document the deficiencies of plain meaning as an explanation of the Court's decisions. Three from a four-month period of 1990 nicely suffice. The question in the first case was the meaning of the words "adjustment" and "recovery" with regard to the Social Security Act's old age benefits. The majority defined the terms to the recipient's detriment; the dissenters conversely. The majority supported its construction by defining the words as they are defined in another section of the statute. The majority said this approach is "reasonable, if not necessary," while confessing that its definition is not "an inevitable interpretation of the statute, but it is assuredly a permissible one."[55]

[53] *Louisville, Cincinnati and Charleston Railroad Co. v. Letson*, 2 Howard 497 (1845), at 555, 554. To shore up its creative use of "citizens," the Court peremptorily asserted that its decision "will be admitted by all to be coincident with the policy of the Constitution." *Id.* at 556. Note also that the Court's reliance on plain meaning enabled it to severely constrict the applicability of Marshall's decisions in *Deveaux* and *Strawbridge*, thereby illustrating the ability of one application of the plain meaning model to undo another.

[54] John P. Frank, *Justice Daniel Dissenting* (Cambridge: Harvard University Press, 1964), p. 219.

[55] *Sullivan v. Everhart*, 494 U.S. 83 (1990), at 92, 93.

The dissenters, in an opinion of equal length, asserted that the majority's construction is "inconsistent with both common sense and the plain terms of the statute" and supplemented their linguistic analysis by concluding that the majority's interpretation "defeat[s] clear congressional intent." The dissent does admit, albeit grudgingly, "that students of language could justify" the majority's result if intent were ignored.[56]

The second case, decided by the same voting alignment as the first (Rehnquist, White, O'Connor, Scalia, and Kennedy vs. Brennan, Marshall, Blackmun, and White), presented the question of whether a "child's insurance benefits" under one provision of the Social Security Act constituted "child support" under another title of the same act. The majority turned not to Webster but to Black's Law Dictionary to determine the "common usage" of child support. The dissenters did the opposite. The majority, however, ruled the common usage of child support "to have become a term of art," and "any attempt to break down the term into its constituent words is not apt to illuminate its meaning."[57]

Whether the supplementation of plain meaning with "term of art" warrants segmenting this version of the legal model into two distinct subtypes will apparently need to await future legalistic developments and usage. But be this as it may, the dissenters again supplemented their focus on "ordinary English usage" with reference to its purpose.[58]

The third case not only illustrates an additional shortcoming of plain meaning, it also demonstrates the inutility of the major alternative model to plain meaning: legislative intent.[59] The case turned on the meaning of the phrase "noncurriculum related student group," as used in a federal statute that requires public schools to give student religious groups equal access to school facilities that other extracurricular groups have. The majority held that the statute did not violate the establishment clause of the First Amendment, but that a high school's refusal to allow students to form a Christian club did violate the law.

The prevailing opinion observed that not only did the act fail to define "noncurriculum related student group," even the law's sponsors did not know what it meant.[60] Given the inadequacy of both plain meaning and intent to resolve the problem, the majority simply rested its judgment on

[56] *Id.* at 96, 103, 106. [57] *Sullivan v. Stroop*, 496 U.S. 478 (1990), at 483.

[58] *Id.* at 496, 486.

[59] *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

[60] *Id.* at 237, 243. The dissenting opinion also agreed with this assertion. At 281.

another deficiency of plain meaning:

> The Court relies heavily on the dictionary's definition of "curriculum." . . . That word, of course, is not the Act's; moreover the word "noncurriculum" is not in the dictionary. Neither Webster nor Congress has authorized us to assume that "noncurriculum" is a precise antonym of the word "curriculum." "Nonplus," for example, does not mean "minus" and it would be incorrect to assume that a "nonentity" is not an "entity" at all.[61]

As a final example, we cite the Court's own words in an important First Amendment freedom case to further falsify plain meaning as a reliable guide to why the Court decides a case the way it does. The Court begins by quoting itself to the effect that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." This unequivocal language is followed by citations to seven cases that arose in seven different contexts, in addition to the one that the Court was quoting. Immediately thereafter, the following language appears:

> This statement, read literally . . . would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached.[62]

In short, plain meaning does not explain the Court's decisions because the justices plainly do not necessarily mean what they say. Nor do they provide criteria that inform analysts when they intend to act as snolly-

[61] *Id.* at 291.

[62] *Young v. American Mini Theatres*, 427 U.S. 50 (1976), at 65. But the justices are willing to quarrel with one another. Thus, in an otherwise unexceptional case, *Conroy v. Aniskoff*, 507 U.S. 511 (1993), Justice Scalia chided the majority for not adhering to the statutory language "which is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it." At 528. The majority, through Justice Stevens, feigned disbelief that Scalia would "conclude that we have a duty to enforce the statute as written even if fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result." At 518, n. 12. Note also that Scalia believes that even a "wretchedly drafted statute" should be applied "as written." *United States v. Granderson*, 511 U.S. 39 (1994), at 60.

gosters or pseudologists. Indeed, they go further still and indicate that plain meaning sometimes ought not be used at all:

> We have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty.[63]

Akin to equivocation about the First Amendment is the longstanding rule that the Constitution's absolute prohibition on laws impairing the obligation of contract is not to be read literally. Rather, the Court will uphold such laws, so long as they are reasonable. "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of contract."[64]

Rights not explicitly found in the Constitution, such as travel and privacy, are currently upheld with the strictest scrutiny.[65] This is not to say that the justices decided these cases incorrectly. We only note that if the Court can regularly read rights out of the Constitution that it explicitly contains while simultaneously reading into the Constitution rights that it does not explicitly embrace, then the plain meaning rule fails as an explanation of what the Court has done. Indeed, not only has no one systematically demonstrated that plain meaning influences the decisions of Supreme Court justices, no proponent has even suggested a falsifiable test for this component of the legal model. Such a demonstration, of course, need not mean that a justice or justices follow plain meaning in every case. Rather, falsifiability simply requires, for example, that some method of determining plain meaning in some cases be established a priori;[66] corroboration of the model might require, for example, that, ceteris paribus, justices must systematically react positively in some meaningful degree to such arguments. Of this, we have no evidence.

[63] *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), at 779. The author of *Blatchford*? Justice Scalia, the Rehnquist Court's self-proclaimed literalist.

[64] *El Paso v. Simmons*, 379 U.S. 497 (1965), at 515.

[65] *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[66] This, of course, seems to require that plain meaning itself be meaningfully definable. That, unfortunately, is often not the case. Consider the following situation: Two statutes with "virtually identical language" nonetheless had "vastly different meanings." Why? Because, according to Justice Thomas's concurrence, a statute's plain meaning in this case at least "depends upon . . . [its] policy objectives and legislative history." *Fogarty v. Fantasy Inc.*, 510 U.S. 517 (1994), at 522, 535, 538.

Legislative and Framers' intent refers to construing statutes and the Constitution according to the preferences of those who originally drafted and supported them. The sole substantive difference between these two types of intent is that the former pertains to the interpretation of statutes, while the latter construes constitutional provisions. As guides to the justices' decisions, neither improves upon plain meaning. Indeed, as we saw above, and as we further observe below, these two versions not infrequently support an opposite result in cases before the Court. Inasmuch as the Court provides no empirically supportable basis for choosing meaning over intent, or vice-versa, a justice's choice of one in preference to the other necessarily rests on considerations other than the model itself.[67]

The Normative View

The belief that the text of the Constitution or the intent of the Framers should bind Supreme Court justices is known as interpretivism or originalism. According to John Hart Ely, interpretivism is the "insistence that the work of the political branches is to be invalidated only in accordance with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution."[68] Thus, an interpretivist would support the constitutionality of the death penalty, despite the Eighth Amendment's ban on cruel and unusual punishment, because the Fifth Amendment explicitly permits capital punishment.[69] Similarly, interpretivists might argue that the Sixth Amendment's trial by jury means a unanimous jury of twelve citizens, because that's what the word "jury" meant in 1791.[70]

While Supreme Court justices generally deny that their own opinions go beyond a fair-minded interpretation of the text of the Constitution or the intent of the Framers, elementary common sense establishes the opposite. In 1905, the Supreme Court declared that New York did not have the right to limit the hours bakers could work. The case, *Lochner v. New York*,[71] rested on a right to contract that the Court found implicit in the Fourteenth Amendment's due process clause. Of course, the amendment says nothing about the right to contract. Moreover, the liberty guaranteed by the amendment is certainly not absolute. For these reasons, among others, *Lochner* received heavy criticism, and thirty-two years later the Court overruled it.[72]

In 1965, the Court overturned a Connecticut law that prohibited anyone in the state, married or otherwise, from using contraceptives.[73] The Court's majority opinion, written by Justice Douglas, created a general right to privacy. The decision did not rest on any specific constitutional clause, but instead on the "penumbras and emanations" of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Like the right to contract, the right to privacy can nowhere be found in the Constitution. Neither, for that matter, can the right to marry or bear children.

The arguments for and against interpretation of the Constitution bound to the intent of the Framers have dominated legalistic critiques of the Supreme Court in past years. This partially results because the Court struck down antiabortion laws in forty-six of the fifty states in *Roe v. Wade*[74] and nearly overruled this decision in *Webster v. Reproductive Services*.[75] The *Roe* opinion, like those in *Lochner* and *Griswold*, has only imperceptible ties to the text of the Constitution or the intent of the Framers.

Additionally, interpretivism was seized upon as an issue by Reagan's Attorney General, Edwin Meese. According to Meese, the Court must follow a "Jurisprudence of Original Intention. . . . Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning

[67] The Court, however, does typically "begin with the text." *Gollust v. Mendell*, 501 U.S. 115 (1991), at 121. Also see *Demarest v. Manspeaker*, 498 U.S. 184 (1991): "In deciding a question of statutory construction, we begin of course with the language of the statute." At 187. And if, in the majority's "view, the plain language . . . disposes of the question before us," intent will not be assessed (*Toibb v. Radloff*, 501 U.S. 157 (1991), at 160); with some exceptions, of course: "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag v. Commissioner*, 501 U.S. 868 (1991), at 873. This language also appears in *Demarest v. Manspeaker*, at 190.

[68] *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), p. 2.

[69] The Fifth Amendment explicitly or implicitly condones the death penalty in three separate phrases. (1) "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ," (2) "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ," (3) "nor be deprived of life, liberty or property without due process of law. . . ."

The second clause above presumably suggests to interpretivists that not only is capital punishment acceptable, but dismemberment is as well.

[70] Raoul Berger, *Death Penalties* (Cambridge, Mass.: Harvard University Press, 1982).

[71] 198 U.S. 45. [72] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[73] *Griswold v. Connecticut*, 381 U.S. 479. [74] 410 U.S. 113 (1973).

[75] 492 U.S. 490 (1989).

was less concerned about original intent than he was the creation of a conservative jurisprudence. He attacked the application of the Bill of Rights to the states, noting that those rights originally limited only the national government. His tale of wrongful incorporation jumps from *Barron v. Baltimore*,[77] in which Chief Justice Marshall accurately asserted that the Framers did not intend the Bill of Rights to apply to the states, to *Gitlow v. New York*,[78] which first incorporated a noneconomic provision of the Bill of Rights, without mentioning the intervening ratification of the Fourteenth Amendment, whose first section was thought by at least some of its proponents to overrule *Barron*.[79] Relatedly, one might also wonder why Meese opposed federal and state affirmative action programs. He contested the former on constitutional grounds even though no constitutional provision explicitly requires the national government to provide equal protection, and he opposed state affirmative action although no proponent of the Fourteenth Amendment ever stated that the amendment could be used to protect white Americans.[80]

An interpretivist almost as harsh as Meese, but with more scholarly credentials, is Raoul Berger.[81] Berger's best-known book, *Government by Judiciary*,[82] argues that the framers of the Fourteenth Amendment did not intend to incorporate the Bill of Rights, protect voting rights, or desegregate public schools. He quotes Representative James Wilson (R-Iowa) that "civil rights . . . do not mean that all citizens shall sit on juries, or that their children shall attend the same schools." Berger then declares that "Wilson's statement is proof positive that segregation was excluded from the scope" of the Fourteenth Amendment, as if a single statement by a single congressman could be proof of anything.[83]

[76] Edwin Meese, Speech before American Bar Association, reprinted in *The Great Debate* (Washington D.C.: Federalist Society, 1986), p. 9. Like judges, politicians prevaricate. As we noted in Chapter 1, diversity jurisdiction, hardly a minute matter, lacks any reference in any report of the Constitutional Convention.

[77] 7 Peters 243 (1833). [78] 268 U.S. 652 (1925).

[79] *Adamson v. California*, 332 U.S. 46 (1947), at 71–72. Justice Black attached a lengthy appendix to his dissenting opinion that supports full incorporation. At 92–123.

The first case to incorporate a provision of the Bill of Rights into the Constitution was *Chicago, Burlington and Quincy R. Co. v. Chicago*, 166 U.S. 266 (1897), which requires government to pay owners just compensation for taking their property.

[80] Meese, *op. cit.*, n. 76, *supra*, pp. 7–8.

[81] But see Bruce Ackerman's devastating critique of Berger's misuse of historical documents: *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991), pp. 334–36.

[82] (Cambridge, Mass.: Harvard University Press, 1977). [83] *Id.* pp. 119–20, 120.

Former Supreme Court nominee Robert Bork provides the best normative defense of interpretivism. According to Bork, interpretivism solves the Madisonian problem of protecting minority rights without interfering with democratic rule.

One essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Some see the model as containing an inherent, perhaps an insoluble, dilemma. Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities, by the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own values, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.[84]

From these premises Bork argues that the Court must "stick close to the text and history (of the Constitution), and their fair implications and not construct new rights."[85] His reading of the text and history of the Constitution leads him to conclude that the *Griswold* decision is unprincipled, that state courts can enforce racially discriminatory contracts despite the equal protection clause,[86] and that the First Amendment provides no protection whatsoever for scientific, literary, or artistic expression.[87] These views had much to do with the Senate's refusal to confirm Bork to the Supreme Court in 1987.

[84] Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1 (1971), 3.

[85] *Id.* at 8. [86] See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[87] Bork, *op. cit.*, n. 84, *supra*, pp. 27–30.

use of interpretivism by right-wing politicians and legal scholars, it is not necessarily a conservative doctrine. The Supreme Court justice who most consistently argued for interpretation bound to the text and history of the Constitution was Hugo Black, a most forceful advocate for freedom of communication and the incorporation of the Bill of Rights as binding on the states. He defended the former through the plain meaning of the First Amendment and the latter through his reading of the intent of the framers of the Fourteenth Amendment.[88] To Black, reading rights out of the Constitution posed a far greater danger to American freedoms than reading rights into it.

Additional arguments for the interpretivist position – as noted by legal historian Raoul Berger – are found in the writings of James Madison and Thomas Jefferson. According to Madison, "if the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government."[89] According to Jefferson, "our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction."[90]

Finally, interpretivists question the alternatives to interpretivism. They argue that if the Constitution does not authoritatively guide the Court's decisions, the policy preferences of the judicial majority will control. Where is the legitimacy of a rule by nine unelected people who do nothing more than decide cases based on their own values?

Alternatively, Justice William Brennan claims:

> A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation – if there is such a thing as the nature of interpretation – commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.[91]

An obvious case to criticize on these grounds is *Olmstead v. United States*, in which Chief Justice Taft declared that the Fourth Amendment's protection against unreasonable searches and seizures did not extend to wiretaps on telephone wires because such activity was not within "the meaning of the 4th Amendment."[92] Similarly, Justice Black argued in a later wiretapping case that the Court's duty is "to carry out as nearly as possible the original intent of the Framers."[93] Did the Framers intend to prohibit wiretapping? Obviously not, so to Black and other interpretivists, the Constitution leaves such activity outside the purview of searches and seizures.

Though in an entirely different case, Brennan responded that such questions ought not be decided by divining the intent of the Framers. "A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared."[94] If wiretapping of one's home in search of evidence without probable cause and a warrant threatens the type of personal privacy protected by the Fourth Amendment, then the amendment should forbid wiretapping.

Finally, it is not clear that the Framers intended that their intent be binding. Virtually every constitutional clause lacks definition. What are the Eighth Amendment's cruel and unusual punishments, or the Fourteenth Amendment's due process and equal protection? No doubt many of the framers of these amendments had certain "conceptions" of what the language meant. But according to constitutional theorist Ronald Dworkin, the "concepts" of due process, equal protection, and cruel and unusual punishments are written into the Constitution, not their conception:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any conception of fairness I might have had in mind.[95]

More devastating to the interpretivist cause is the position of James Madison. "As a guide to expounding and applying the provisions of the

[88] On freedom of speech, see *Barenblatt v. United States*, 360 U.S. 109 (1959). On the incorporation of the Bill of Rights, see *Adamson v. California*, 332 U.S. 46 (1947).
[89] Berger, *op. cit.*, n. 82, *supra*, p. 364. [90] Id. [91] *Id.* at 15.
[92] 277 U.S. 438 (1928), at 466. [93] *Berger v. New York*, 388 U.S. 41 (1967), at 87.
[94] *Abington Township v. Schempp*, 374 U.S. 203 (1963), at 236.
[95] *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), p. 134.

have no authoritative character."[96] "Thus the dilemma: If one believes the 'intent' of the framers is binding, one must not consider that form of intent as binding."[97]

The Empirical Reality

Whatever the merits of the normative arguments for or against intent, its application to the real world is a separate matter. Because many of those who ought to know better believe that intent really explains the justices' behavior, it behooves us to demonstrate the falsity of such belief, as well as its fatuousness, by reference not only to the justices' words but to the writings of commentators as well. And indeed, as we show below, choice based on group intent may be inconsistent and illogical.

The first question that needs answering is whether the concept of the "intent of the framers" is at all meaningful.[98]

Needless to say, the Constitution's framers never conceived of most issues the Court faces today, from affirmative action to workers' compensation. Moreover, even for issues familiar to them, the notion of group intent may be meaningless. To wit: It is well established, via mathematical proof, that every method of social or collective choice – every arrangement whereby individual choices are pooled to arrive at a collective decision – violates at least one principle required for reasonable and fair democratic decision making.[99]

[96] James Madison, *Letters and Other Writings of James Madison* (Philadelphia: Lippincott, 1865), III, 228. See also H. Jefferson Powell, "The Original Understanding of Original Intent," 98 *Harvard Law Review* 885 (1985); and Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* (Ithaca, N.Y.: Cornell University Press, 1999), all of which come to the same conclusion.

[97] Walter Murphy, James Fleming, and William Harris II, *American Constitutional Interpretation* (New York: Foundation Press, 1986), p. 305.

[98] We thank Thomas H. Hammond of Michigan State University for his help in this section of the book.

[99] Kenneth Arrow, *Social Choice and Individual Values*, 2nd ed. (New Haven: Yale University Press, 1963); William H. Riker, *Liberalism Against Populism* (San Francisco: W. H. Freeman, 1982), ch. 5; Frank H. Easterbrook, "Ways of Criticizing the Court," 95 *Harvard Law Review* 802 (1982).

These desirable principles can be summarized in six seemingly innocuous rules: (1) Individuals are free to order their preferences as they see fit. (2) A winning choice may not be a loser, and vice versa; i.e., if the voters prefer A to B and B to C, A must defeat C. (3) An outcome may not be imposed regardless of whether the citizenry approves of it or not. (4) If unanimity prevails for one option over another, the less preferred option cannot win. (5) Identical preference patterns may not produce different results. (6) No individual may function as a dictator. For a fuller statement of these conditions, see Riker, *Liberalism Against Populism*, pp. 116–19, and Easterbrook, "Ways of Criticizing the Court," pp. 823–31.

TABLE 2.1. *Hypothetical Choices of Three Legislators among Three Alternatives*

	Legislator		
	1	2	3
First choice	A	C	B
Second choice	B	A	C
Third choice	C	B	A

To achieve a meaningful choice, the preferences of the decision makers must conform to decision rules that reflect the actors' sense of reasonableness. In American society, this tends to mean majority rule (or at least plurality rule, with the winner being the choice that garners more votes than any other option). Equal weight is accorded the vote of each participant, that is, one person, one vote. Further, among a range of choices – for example, A, B, C – each decision maker must be free to order them preferentially as he or she sees fit. Any system that precludes a person from choosing a particular preference order is dictatorial, and hence morally unacceptable, unfair, and undemocratic. In exercising such choice, an option that no one chooses may not be imposed. Conversely, if everybody prefers A to B, then B may not become the social choice.

However, majority rule under these minimal conditions can produce cyclical judgments. Consider, for example, a panel of three legislators (or framers) with the preferences shown in Table 2.1. Legislator 1 prefers alternative A to alternative B, and also prefers alternative B to alternative C. Legislator 2 prefers alternative C to A, and A to B. Legislator 3 prefers alternative B to C, and C to A.

Assume legislators make their decisions by majority rule. Alternative A loses because legislators 2 and 3 together prefer C. Alternative B loses because legislators 1 and 2 together prefer A. And to make matters complete, alternative C loses because legislators 1 and 3 together prefer B. The result is a social preference cycle among the three alternatives: alternative A defeats alternative B, alternative B defeats alternative C, but alternative C defeats alternative A. Because Congress (or the Framers)

legislative preferences, and therefore intent, may well be intransitive.

This cycling need not necessarily occur. If legislator 3 prefers B to A, and C least of all, alternative A will win because it defeats both B and C. In this case, legislators 1 and 2 prefer A to B, and legislators 1 and 3 prefer A to C. C now becomes the least preferred option because 1 and 3 prefer B to C. But nothing prevents cycling from occurring, and as the size of the group increases from three members to, say, fifty-five (the number who attended the Constitutional Convention), the likelihood of cyclical preferences increases dramatically.[101] Cycling is always a potential problem, not just for legislatures, but for courts as well.[102]

Organizations can create rules that can limit the likelihood of cyclical results, for example, by arbitrarily keeping items off the agenda.[103] But this in no way limits the intransitivity of preferences. And if preferences are intransitive, the notion of group intent becomes illusory at best.

But even if preferences are not intransitive, group intent remains problematic. After all, who were the Framers? All fifty-five of the delegates who showed up at one time or another in Philadelphia during the summer of 1787? Some came and went.[104] Only thirty-nine signed the final document. Some probably had not read it. Assuredly, they were not all of a single mind. Apart from the delegates who refused to sign, should not the delegates to the various state conventions that were called to ratify the Constitution also be counted as Framers? Unfortunately, commentators exclude these persons from consideration.

The intent of framers of constitutional amendments also lacks specification. For example, while Radical Republican Senator Charles Sumner (R-Mass.) insisted that "separate education deprived blacks of their Fourteenth Amendment rights,"[105] Lyman Trumbull (R-Ill.) viewed equal protection as covering only what were then considered civil rights: "the right to go and come; the right to enforce contracts; the right to convey his property; the right to buy property – those general rights that belong to mankind everywhere."[106] "So, two of the leading figures of the Thirty-ninth Congress fundamentally differed about what the Amendment they had enacted meant."[107]

This leads to our second question: If group intent is problematic, whose intent do we examine?

According to Berger, the most important source is the draftsman, the person who wrote the bill, amendment, or clause.[108] Yet Berger himself frequently disregards or disparages the latitudinal interpretations of the Fourteenth Amendment by section 1 coauthor John Bingham (R-Ohio) in favor of more limited constructions by less consequential Republican proponents of the bill. Alternatively, McNollgast argues that the intent of the pivotal coalition member, the one with the ability to make or break the deal, should matter most.[109] More often than not, these differences give any justice worthy of his or her robes the ability to find some framer who supports his or her positon.

But supposing we could determine whose intent mattered most, even the notion of individual intent can be problematic. Justice Scalia wrote precisely in a leading case that considered the constitutionality of a state statute:

leg. intent problems

> The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may

[100] Kenneth A. Shepsle, "Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron," 12 *International Review of Law and Economics* 239, 244 (1992).

[101] See Peter Ordeshook, *Game Theory and Political Theory* (New York: Cambridge University Press, 1986); cf. Bradford Jones, Benjamin Radcliff, Charles Taber, and Richard Timpone, "Condorcet Winners and the Paradox of Voting: Probability Calculations for Weak Preference Orders," 89 *American Political Science Review* 137 (1995), who demonstrate nonmonotonic likelihoods with weak preference structures.

[102] Professor, now Judge, Easterbrook provides a realistic example. See "Ways of Criticizing the Court," 95 *Harvard Law Review* 802 (1982), at 815–16. Extensive cycling would mean that the Court's decisions would have little relationship to the preferences of its justices. The Court, though, has various means that severely limit the actuality of cycling. See Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* (Ann Arbor: University of Michigan Press, 2000).

[103] Kenneth A. Shepsle and Barry R. Weingast, "Structure-Induced Equilibrium and Legislative Choice," 37 *Public Choice* 503 (1981).

[104] Yates, e.g., whose notes "are next in importance" to Madison's. His notes cease with July 5, thereby omitting the crucial last two and a half months of the Convention. Max Farrand, ed., *The Records of the Federal Convention of 1789*, rev. ed. (New Haven: Yale University Press, 1966), I, xv, xiv.

[105] Judith Baer, *Equality under the Constitution* (Ithaca: Cornell University Press, 1983), p. 96.

[106] *Id.* [107] *Id.* at 97. [108] Berger, *op. cit.*, n. 82, *supra*, p. 365.

[109] McNollgast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," 80 *Georgetown Law Journal* 705 (1992).

[illegible] for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and entirely unmotivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Putting that problem aside, however, where ought we to look for the individual legislator's purpose? We cannot . . . assume that every member present . . . agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. . . . Can we assume . . . that they all agree with the motivation expressed in the staff-prepared committee reports . . . [or] post-enactment floor statements? Or post-enactment testimony from legislators, obtained expressly for the lawsuit? . . . media reports on . . . legislative bargaining? All these sources, of course, are eminently manipulable.

. . . If a state senate approves a bill by a vote of 26 to 25, and only one intended solely to advance religion, is the law unconstitutional? What if 13 of 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it – on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree[?][110]

Despite all of these problems, let us assume for argument's sake that legislative intent does exist. The next question becomes: Can we find it?

Obviously, any assessment of intent must depend on the record that the authors of the language left. This record varies as between constitutional and statutory language, as well as from one constitutional provision or statute to another. In the case of the original Constitution, we have only a "carelessly kept" journal; plus Madison's notes, which he edited in 1819, thirty-two years after the events he reports; and a smattering of scattered notes from eight of the delegates to the Constitutional Convention.[111] None of these documents identifies the Framers' intentions in even the most rudimentary fashion.

Apart from their fragmentary character, even official records meant to convey intent may falsify and mislead. The Congressional Record is a prime case in point. Until 1978, members of Congress were free to add to, subtract from, edit, and insert remarks they never uttered on the floor of the House or the Senate, notwithstanding the law that requires the Record to be "substantially a verbatim report of the proceedings of Congress."[112]

The upshot? Partisans on both sides of most every major constitutional issue have been able to support their contentions by equally plausible references to the Framers' intent. And given that the records pertaining to congressional legislation are much more voluminous than those of constitutional provisions, our observation applies to acts of Congress a fortiori. Grist for this mill includes the debates that preceded passage of the legislation; majority and minority committee reports; the statements and views of sponsors of the legislation; testimony and comments of individual legislators, government officials, and interested private entities given at committee and subcommittee hearings; and previous court decisions interpreting the statute.

According to former Senator John C. Danforth (R-Mo.), for example: "Any judge who tries to make legislative history out of the free-for-all that takes place on the floor of the Senate is on very dangerous ground."[113] Lower federal court judges do not disagree. According to Alex Kozinski of the Ninth Circuit Court of Appeals: "Legislative history can be cited to support almost any proposition, and frequently is."[114]

[110] *Edwards v. Aguillard*, 482 U.S. 578 (1987), at 636–38. Also see parallel language by Justice Stevens in *Rogers v. Lodge*, 458 U.S. 613 (1982), at 642–43.

The other justices essentially disagree with Scalia's anti-intent position because "common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), at 611, n. 4.

[111] Max Farrand, ed., *The Records of the Federal Convention of 1789*, rev. ed. (New Haven: Yale University Press, 1966), I, xiii. The eight delegates, in addition to Madison, were Robert Yates, Rufus King, James McHenry, William Pierce, William Paterson, Alexander Hamilton, Charles Pinckney, and George Mason.

[112] Marjorie Hunter, "Case of the Missing Bullets," *New York Times*, May 15, 1985, p. 24. This change presumably decreased the likelihood that 112 pages of events could appear on a day when the Senate had met for only eight seconds, and the House not at all. *Id.* For other examples of how Congress doctors its official records, see Harold J. Spaeth, *Supreme Court Policy Making* (San Francisco: W. H. Freeman, 1979), p. 72, and the references cited therein.

[113] Robert Pear, "With Rights Act Comes Fight to Clarify Congress's Intent," *New York Times*, November 18, 1991, p. A1.

[114] *Id.* An additional quotation from this same article explains why legislative history covers the waterfront of intent: " 'I would like to add some legislative history at the end of my remarks,' Representative Henry J. Hyde, Republican of Illinois, said as he casually dropped a 9,000-word interpretive memorandum into the Congressional Record."

former Supreme Court Justice William Brennan summarized these problems well:

> There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary problems. All too often, sources of potential enlightenment such as the records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant – that of the drafters, the congressional disputants, or the ratifiers in the states? – or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of our sources, our distance of two centuries cannot but work as a prism refracting all we perceive. One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to "original intention" – and proposing nullification of interpretations that fail this quick litmus test – must inevitably come from persons who have no familiarity with the historical record.[115]

More succinctly, the deficiencies of interpretivism have led one critic so far as to assert that "the case for constitutional interpretation bound strictly to text and history is only slightly stronger than the case for the proposition that we inhabit a flat earth."[116]

The use to which intent may be put is perhaps best illustrated by cases in which the Court molds intent to create conflicts with plain meaning. We begin with the first major affirmative action case, *Regents of the University of California v. Bakke*. Four justices ruled that the quota system established by the medical school of the University of California at Davis violated the plain words of Title VI of the Civil Rights Act of 1964, which says, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program

[115] William Brennan, "Speech at Georgetown University," reprinted in *The Great Debate* (Washington, D.C.: Federalist Society, 1986), pp. 14–15.
[116] Lief Carter, *Contemporary Constitutional Lawmaking* (New York: Pergamon Press, 1985), p. 41.

or activity receiving federal financial assistance." They cited the rule that a constitutional issue should be avoided if a case can fairly be decided on statutory grounds[117] and concluded that the "ban on exclusion is crystal clear. Race cannot be the basis for excluding anyone from participation in a federally funded program." Four other justices held these words not to mean what they said because Title VI was enacted "to induce voluntary compliance with the requirement of nondiscriminatory treatment." That being so, "It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies." Justice Powell split the difference, ruling that race could be one of a number of factors governing admission to the medical school, but it could not be the only factor.[118]

In the next affirmative action case that the Court addressed, *Steelworkers v. Weber*, the liberals were able to create a majority opinion that positioned meaning and intent adversely to one another. At issue was the meaning of Title VII of the same 1964 Civil Rights Act that *Bakke* concerned,[119] which makes it unlawful for an employer "to discriminate . . . because of . . . race." Over the objections of the two dissenters – Rehnquist and Burger – who said that the employers' quota system was plainly illegal, the five-member majority ruled the system legal because, citing an 1892 decision,

> It is a "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[120]

Within the spirit? We leave such answers to mystics. But within the intention of its makers? Not if we abide by the specific statements of the bill's chief sponsors, as Rehnquist demonstrates in his legally compelling dissent. Nevertheless, the majority brushed this aside, arguing that it "would be ironic indeed if a law triggered by . . . concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish . . . racial segregation."[121]

The message is clear: If all else fails, simply dust off this language and apply it to destroy both plain meaning of laws and specific statements

[117] The rule cited here is, of course, directly antithetical to Marshall's decision in *Marbury v. Madison*, discussed in Chapter 1.
[118] 438 U.S. 265 (1978), at 412, 418, 336, 319–20.
[119] *Bakke* concerned Title VI.
[120] 443 U.S. 193 (1979), at 199–200, 201.
[121] *Id.* at 204.

of intent.[122] Though its use has been sporadic, by no means does this maxim have applicability only to affirmative action cases. Four years prior to *Steelworkers v. Weber*, the Court used it to deny a union's request for a jury when it was tried for criminal contempt even though the pertinent statute said that the accused shall enjoy a jury trial in "all cases of contempt."[123]

By no means does the Court always find it necessary to use the maxim when it wishes to rationalize policy on the basis of intent rather than plain meaning. It is able to do so very nicely without even a passing reference to it. As an example, consider *Maryland v. Craig* where the majority said that the confrontation clause of the Sixth Amendment does not mean what it says because the purpose of the clause is to ensure that evidence admitted against the accused is reliable and subject to "rigorous adversarial testing."[124] The four dissenters focused on the obvious:

> Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' "[125]

Note should also be made that the Court has at its disposal additional rules of its own creation that allow it to disregard both plain meaning and intent, without replacing either of them with another variant of the legal model. Chief among such devices are the Ashwander Rules that Justice Brandeis formulated in a case of the same name. One such rule reads as follows:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[126]

It conveniently enables the Court to concurrently disregard plain meaning and intent in order to concoct an alternative interpretation of

[122] The majority's view of intent contradicts not only the plain meaning of the act but the dissenters' view of intent as well. Rehnquist makes a compelling case, buttressed by numerous quotes from floor leader Hubert Humphrey (D-Minn.), that the intent of the framers of Title VII was to abolish *all* race-preferential treatment.

[123] *Muniz v. Hoffman*, 422 U.S. 454 (1975), at 457. [124] 497 U.S. 836 (1990), at 857.

[125] *Id.* at 862.

[126] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), at 348. Though the Ashwander Rules were formulated in a dissenting opinion, that has not precluded their use by judges at all levels of the judicial hierarchy to rationalize their decisions.

statutory language of which the majority approves. Two examples will suffice: In *Webster v. Reproductive Services*[127] the Supreme Court construed a Missouri statute limiting abortion rights. One section requires doctors to perform such tests "as are necessary to make a finding" of viability on fetuses over twenty weeks of gestational age. As fetuses at twenty weeks have no lung capacity and thus lack viability, the statute, according to the lower court, required superfluous tests and thus imposed "unnecessary and significant health risks for both the mother and the fetus."[128] To interpret the statute in a way that would avoid constitutional difficulties, the plurality simply said that the statute did not absolutely require the mandated tests.

A second example involves a key provision of the Bankruptcy Reform Act of 1978, which makes certain household goods and personal possessions automatically exempt from the blanket liens that finance companies standardly obtain as security for consumer loans. On the basis of such liens, the creditor company would seize the property of debtors who filed for bankruptcy. To avoid deciding whether the retroactive application of the provision would take creditors' property without due process of law, the Court unanimously rewrote the language, notwithstanding congressional intent, to deny protection to consumers who incurred their debts prior to the statute's enactment.[129]

Given the variety of reasons that legislative intent may not exist, and the problems of finding it in those cases where it does exist, perhaps we ought to discard completely judicial efforts to fathom intent. If legislative preferences are meaningless as social choices, interpretivism as a guide to judicial decision becomes unintelligible. So also strictures that courts and judges should exercise judicial restraint, a subject we discuss in Chapter 10.

Like plain meaning, not only has no one systematically demonstrated that legislative or framers' intent influences the decisions of Supreme Court justices, no proponent of intent has even suggested a falsifiable test for this component of the legal model.

[127] 492 U.S. 490 (1989). [128] 851 F2d 1071, at 1075.

[129] *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). A variation of the quoted Ashwander Rule was used to sustain the constitutionality of a statute conditioning minors' access to abortion: "Where fairly possible courts should construe a statute to avoid a danger of unconstitutionality." *Ohio v. Akron Reproductive Health Center*, 497 U.S. 502 (1990), at 514. Unlike the Ashwander Rules, which were formulated in an opinion to which only the author – Brandeis – subscribed, this one had the support of a second justice, Burger, in addition to its author, Powell. *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983), at 493.

Precedent, or stare decisis, quite simply means adherence to what has been decided. Today's decisions are linked with those handed down yesterday. The law thereby develops a quality of connectedness, an appearance of stability. But no more than plain meaning and intent does precedent restrict the justices' discretion in the types of cases that come before the Court; nor does its use explain any better why the justices decided a particular case in favor of one party rather than the other.

Unlike plain meaning and the variations on intent, judges use precedent as an ostensible explanation for virtually every decision they make. Though it may appear in isolation from other aspects of the legal model, it much more often buttresses the meaning or the intent that the Court ascribes to the statute or the constitutional provision at issue. That is, the justices will support their judgment that a legal or constitutional provision means this rather than that by citing a number of previous decisions. As a result, the frequency accorded precedent far surpasses that accorded any other aspect of the legal model.

Precedent parallels meaning and intent in its application to both statutory construction and constitutional interpretation. As the justices unanimously explained:

> Adherence to precedent is, in the usual case, a cardinal and guiding principal of adjudication, and "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."[130]

But in cases concerning constitutional interpretation, the Court is more openly willing to reexamine its precedents because the Constitution is rarely amended and also – according to Chief Justice Taney – to ensure that the reasoning on which such decisions depend remains cogent.[131] Justice Scalia recently restated the justification for the individual justice to discount constitutional precedents:

> With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible . . . I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors have put on it." Douglas, Stare Decisis, 49 Colum L Rev 735, 736 (1949).[132]

Although precedent is typically presented as an obligatory norm, except that constitutional issues are always open – theoretically – for reconsideration, the justices have rarely acceded to those of which they disapprove.[133] Justice Stevens – in dissent, of course – provides a candid rationale for nonadherence to precedents of which a justice disapproves:

> Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. *Stare decisis*, furthermore, has less force in the area of constitutional law. . . . Finally, by its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law. The kind of judicial activism manifested in cases like *Seminole Tribe, Alden v. Maine* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.[134]

Though precedent, like plain meaning and intent, looks backward, it does not appreciably restrict judicial discretion, for a number of reasons. First, and most basic, precedents lie on both sides of most every controversy, at least at the appellate level. If losing litigants at trial did not have authority to support their contentions, no basis for appeal would exist. Even judges themselves recognize this fact. Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit said: "Precedent is certainly real and we learn to live with it. But if precedent clearly governed, a case would never get as far as the Court of Appeals: the parties would settle."[135]

That view was echoed by Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit, in Chicago.

[130] *California v. Federal Energy Regulatory Commission*, 495 U.S. 490 (1990), at 499.
[131] *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), at 628; *Passenger Cases*, 7 Howard 283 (1849), at 470. Three recent Courts adhere to this stricture, deviating but little from one another, as Table 2.2, below, shows. They overturned constitutional decisions approximately twice as often as they did nonconstitutional ones.
[132] *South Carolina v. Gathers*, 490 U.S. 805 (1989), at 835.
[133] See Spaeth and Segal, *op. cit.*, n. 16, *supra*.
[134] *Kimel v. Florida Board of Regents*, 145 L Ed 2d 522 (2000), at 551–52.
[135] Linda Greenhouse, "Precedent for Lower Courts: Tyrant or Teacher," *New York Times*, January 29, 1988, p. 12.

expensive, why are parties willing to take their cases up?" he asked. "It's because precedent doesn't govern. Precedent covers the major premise. But the mind-set of the judge governs the minor premise."[136]

As further evidence that precedents exist to support the contentions of both parties, merely consult any appellate court case containing a dissenting opinion. This, as well as the majority opinion, will likely contain a substantial number of references to previously decided cases. Reference to these cases will undoubtedly show that those cited by the majority support its decision, while those specified by the dissent bolster its contrary judgment. The same can be said for cases without dissent, as any reading of the litigants' briefs will demonstrate.

As an example, consider the first two campaign spending cases that the Rehnquist Court decided. In the first case, by a 5-to-4 vote, the justices declared unconstitutional a provision of the Federal Election Campaign Act as applied to a nonprofit corporation formed for "pro-life" purposes.[137] Not only did the corporation not need to set up a political action committee through which its funds must be filtered, it also has a First Amendment right to spend its own money directly. The majority as well as the dissenters located an abundance of precedents to support their respective contentions. The second case held that government not only could prohibit nonprofit corporations from contributing money directly to political candidates, but it also could forbid them from spending their own money on behalf of candidates. Because the three conservatives who held that the restrictions violated the First Amendment – Kennedy, O'Connor, and Scalia – were able simply to cite the precedents used in the preceding case, plus that decision itself, as authority for their position, it might superficially appear that the majority would not fare as well precedent-wise. Not so. The Court has taken a very dim view of censorship, which is what the statute at issue decreed, authorizing it only with respect to the military, prisoners, and minor children. Moreover, the Court has consistently stated that political speech is entitled to special protection. Indeed, Justice Marshall, in his opinion of the Court, admitted as much:

> Certainly, the use of funds to support a political candidate is "speech"; independent campaign expenditures constitute "political expression 'at the core of our electoral process and of the First Amendment freedoms.'"[138]

[136] *Id.*

[137] *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

[138] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), at 657.

Nevertheless, Marshall had no difficulty finding seven cases to support the law's constitutionality, including several citations to the majority opinion in *Massachusetts Citizens for Life* itself![139]

A second issue may be briefly adumbrated to further illustrate precedent's ability to serve contradictory masters simultaneously: the conditioning of government action in such a way that it inhibits the free exercise of religion. On the one hand, government may not deny individuals benefits (e.g., unemployment compensation for refusing to work on the Sabbath). But on the other, government may deny welfare benefits to an individual who refuses, for religious reasons, to show a social security number, or to construct a road that defiles government land that had traditionally been used by an Indian tribe for religious purposes.[140]

Not uncommonly, the majority itself will note the existence of alternative lines of precedent. The Court's landmark decision in *Griswold v. Connecticut* provides a most instructive example.[141] Not only did the majority identify alternative sets of precedents, it did so in a decision that shattered legal precedent by establishing a new right to privacy based substantially on a heretofore unused provision of the Constitution: the Ninth Amendment.[142] In ruling unconstitutional a law that criminalized a married couple's use of birth control, the Court rejected a discredited line of largely overruled cases.[143] Instead, the majority candidly recognized the lack of textual authority for its holding:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.[144]

[139] *Id.* at 658–66.

[140] *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Hobbie v. Florida Unemployment Appeals Commission*, 480 U.S. 136 (1987), versus *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988). Also see *Employment Division, Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), upholding the denial of unemployment benefits to persons who used peyote for religious purposes.

[141] 381 U.S. 479 (1965).

[142] It is especially instructive to note that the Court's precedent-shattering decision did *not* require it to formally overrule any precedent. It shattered precedent by creation, not destruction.

[143] I.e., "Overtones of some arguments suggest that Lochner v. New York, 198 U.S. 45, should be our guide." 381 U.S. at 481–82.

[144] *Id.* at 482.

The Court then proceeded to cite twelve cases to document the quoted language, which cases also became the authority for the right that its decision created.

As a more recent, but equally innovative, example of precedent's ability to use past decisions to create new and innovative law, consider *Cruzon v. Director, Missouri Department of Health*, in which the Court created a constitutional right to die.[145] To document the principle underlying the decision – "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" – and thereby sustain the Court's ruling, Chief Justice Rehnquist cited five cases as precedent: one pertaining to compulsory vaccination, another to search and seizure, a third to forcible medication of prisoners, and the final pair to mandatory behavior modification and the confinement of children.[146]

A second reason why precedent does not restrict judicial discretion is because it consists of two components: the court's decision and the material facts that the court took into account in arriving at its decision. Because the facts in two appellate cases invariably differ, and the degree of factual similarity and dissimilarity between any two given cases involves an intensely personal and subjective judgment, judges may pick and choose among precedents to find those that accord with their policy preferences, while simultaneously asserting that these are also the ones that best accord with the facts of the case at hand.

Third, jurists disagree over what constitutes a precedent. One school accepts the previously mentioned considerations: decision, plus material facts. The other ascertains the ratio decidendi, the underlying principle on which the case was decided. Defining the ratio decidendi in an intersubjectively transmissible fashion seems all but impossible; it does appear, however, to turn on a fairly basic principle, one typically more global than the rule of law that the court cites as authority for its decision.

Two cases involving the inheritance rights of illegitimate children provide an instructive example of this approach to precedent. The cases not only came from the same state, Louisiana, each was decided incompatibly with the other, thereby providing courts and judges with authority to rule in favor of or against the children depending on the decision maker's subjective preferences. The first case held that the five illegitimate children of a woman could sue for damages because of her wrongful death due to negligent medical treatment. Starting "from the premise that illegitimate children are not 'nonpersons' " (an obvious statement if there ever was one!) the Court ruled the statute prohibiting such actions unconstitutional because "[t]he rights asserted here involve the intimate, familial relationship between a child and his own mother."[147] The second case, decided three years later, saw the three dissenters from the first case join with Nixon's first two appointees, Burger and Blackmun, to rule that Louisiana could constitutionally prohibit acknowledged illegitimate offspring from sharing their father's estate equally with his legitimate children. "Levy did not say . . . that a State can never treat an illegitimate child differently from legitimate offspring." The law has a rational basis: "promoting family life and of directing the disposition of property left within the State."[148] As a consequence, the Court has a perfectly good precedent on both sides of the matter: if it wishes to rule in favor of illegitimates, *Levy* and its progeny nicely suffice;[149] if it does not, *Labine* is preferable.[150]

Clearly then, precedent as a component of the legal model provides virtually no guide to the justices' decisions. All that one can say is that precedent is a matter of good form, rather than a limit on the operation of judicial policy preferences. A court should lard its opinions with precedents, but doing so will not inhibit the exercise of discretion. And even if the court should confront a situation with but a single line of precedents – perhaps because it has decided only one case in point – it has devices that enable it to deviate from what has been decided, and to do so, moreover, compatibly with good legal form.

There are four such devices – obiter dicta, distinguishing a precedent, limiting (or extending) a precedent in principle, and overruling a precedent. The first two technically do not alter the scope of the precedent involved; the latter two do.

AVOIDING PRECEDENT

Obiter Dicta

Obiter dicta, or simply dicta, indicate that specified portions of the opinion in a previously decided case consist of surplus language. As such,

[145] 497 U.S. 261 (1990). [146] *Id.* at 278–80.

[147] *Levy v. Louisiana*, 391 U.S. 68 (1968), at 70, 71.
[148] *Labine v. Vincent*, 401 U.S. 532 (1971), at 536.
[149] See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); and *Trimble v. Gordon*, 430 U.S. 762 (1977).
[150] See *Mathews v. Lucas*, 427 U.S. 495 (1976); *Norton v. Mathews*, 427 U.S. 524 (1976); *Fiallo v. Bell*, 430 U.S. 787 (1976); and *Lalli v. Lalli*, 439 U.S. 259 (1978).

case at bar. An oft-cited example concerns the power of the President to remove federal officials from office. Congress had authorized the President to remove postmasters short of their four-year term of office only with the advice and consent of the Senate. In 1920, Woodrow Wilson removed the Portland, Oregon, postmaster without Senate approval. In a lengthy opinion, William Howard Taft, the only person to occupy the White House and a seat on the Supreme Court, ruled that the President could remove any and all executive officials at will.[151] With the establishment of executive agencies during the early New Deal whose officials exercised quasilegislative and quasijudicial power, the question of presidential removal arose again. The Court thereupon declared *Myers* applicable only to those executive officials who exercised purely executive power. Congress could restrict the President's removal power of all other federal officials.[152]

Distinguishing a Precedent

The other method of avoiding adherence to precedent without formally altering the precedent in question distinguishes the precedent. Its use merely requires the court to assert that the facts of the case before it sufficiently differ from the situational aspects of the precedent. The cases concerning the inheritance rights of illegitimates illustrate the matter well, particularly *Lalli v. Lalli*, where the plurality took especial pains to distinguish the situation therein from *Trimble v. Gordon*, which had been decided eighteen months earlier.[153] *Lalli* concerned a New York law that bars illegitimates from inheriting their fathers' estates unless the intestate father had gone to court and received judicial recognition of his paternity within two years of the child's birth. The *Trimble* majority had declared unconstitutional an Illinois law that allowed illegitimates to inherit only from intestate mothers, not fathers. The *Lalli* plurality stated that the New York law "is different in important respects" from the Illinois statute because "even a judicial determination of paternity was insufficient to permit inheritance" in Illinois, while "the marital status of the parents is irrelevant" to New York. "A related difference" pertains to their respective purposes. The Illinois law was "a means of encouraging legitimate family relationships," while "no such justification" supports the New York law. Its purpose, instead, "is to provide for the just and orderly disposition of property at death."[154]

[151] *Myers v. United States*, 272 U.S. 52 (1926).
[152] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).
[153] 439 U.S. 259 (1978), and 430 U.S. 762 (1977).

Limiting a Precedent in Principle

The first and less drastic of the two methods of formally altering precedent limits them in principle. A classic example concerns the matter of taxpayers' suits. Initially, the Court flatly prohibited them as a means of challenging the purpose for which federal funds were spent. Given that there are millions of federal taxpayers, their individual interests are minute and indeterminable. Any individual taxpayer therefore suffers only an indirect injury at best. Access to the federal courts, however, requires direct and substantial injury.[155] Forty-five years later, the Court qualified this policy by carving out an exception to the flat ban. If the taxpayer challenged Congress's expenditure on the basis that it exceeded some specific constitutional limitation on Congress's power to tax and spend money (in this case, the establishment clause of the First Amendment), then the taxpayer has standing to sue.[156]

A woman's right to an abortion provides a second example. In *Roe v. Wade*,[157] the Court held that during the first trimester of pregnancy a woman had an untrammeled right to an abortion. Subsequent decisions have qualified the holding in *Roe*, however, to read that women have a right to an abortion without undue governmental interference.[158]

Overruling Precedent

The other way in which a court may formally alter precedent is to overrule it. Because of the other means available to manipulate precedent, none of which shatters the appearance of consistency and predictability of judicial decision making to the extent that overruling does, it rarely occurs. On the other hand, when the Court does overrule precedent, it tends to say so in a rather straightforward fashion. Thus, we may determine the frequency of overruling. As Table 2.2 shows, the Supreme Court has overruled its own precedents only 128 times between the 1953 and 2000 terms. By comparison, it has declared more than four times as many laws unconstitutional during this same period.

[154] 439 U.S. at 266, 267, 268. [155] *Frothingham v. Mellon*, 262 U.S. 447 (1923).
[156] *Flast v. Cohen*, 392 U.S. 83 (1968). [157] 410 U.S. 113 (1973).
[158] *Maher v. Roe*, 432 U.S. 464 (1977); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

TABLE 2.2. *Precedents Overruled, 1953–2000 Terms*

Court	N	Constitutional	Nonconstitutional	Percent constitutional	Overrulings per term
Warren	43	29.0	14.0	67.4	2.7
Burger	46	29.5	16.5	64.1	2.6
Rehnquist	39	26.0	13.0	66.7	2.6
TOTALS	128	84.5	43.5	66.0	2.7

Even so, when the Court decides to overrule itself, it not uncommonly will do so – *mirabile dictu* – on the basis of precedent itself. In 1961, for example, the Court ruled that no person could be convicted on the basis of evidence secured from an unreasonable search or seizure, thereby overruling a 1949 decision that allowed state officials to use such evidence.[159] The Court noted that it had just prohibited the states from using the fruits of a coerced confession and cited that decision[160] as its authority to overrule *Wolf*: "Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.[?]"[161]

A more recent example concerns a choice of law question: the extent to which state rather than federal law governs a state's title to riverbeds within its boundaries. In 1973, the Court ruled that such controversies must be resolved on the basis of federal law.[162] Four years later, the Court overruled itself: "Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter."[163]

Finally, one should not assume that when a court does adhere to precedent no policy change can occur. Not uncommonly adherence to precedent will not only alter the Court's policy, but also expand the scope of the precedent to which the Court is adhering. A recent example concerns the direct purchaser rule, which limits those who may bring an action for the violation of the antitrust laws. The Court had held that only direct purchasers suffer a redressible injury, not their customers, who are indirect purchasers.[164] The rationale for the rule was problems of proof and apportionment of damages. But the Court applied the rule even where state law required the direct purchaser – here a public utility that had purchased gas from a producer and the pipeline that transported it – to pass its costs on to its ratepayers, and to which the rule's rationale accordingly did not apply. As the dissent observed:

> . . . I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a pass-through to consumers of an illegal overcharge that would measure the extent of their damage.[165]

While precedent seems no more likely to explain the Supreme Court's decisions than plain meaning or intent, we have developed systematic tests for its operationalization, which we present in Chapter 7. To the extent that the doctrine of stare decisis is falsifiable, it also turns out to be false.

We conclude the section on the legal model with the following comment from Judge Richard Posner:

> There is a tremendous amount of sheer hypocrisy in judicial opinion writing. Judges have a terrible anxiety about being thought to base their opinions on guesses, on their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it extremely phony.[166]

We now leave what Posner states to be the phony world of precedent and history, and examine what we believe to be the real world of attitudes and values.

[159] *Wolf v. Colorado*, 338 U.S. 25 (1949). [160] *Rogers V. Richmond*, 365 U.S. 534 (1961).
[161] *Mapp v. Ohio*, 367 U.S. 643 (1961), at 656.
[162] *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).
[163] *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), at 382.
[164] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
[165] *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990), at 225.
[166] Linda Greenhouse, "In His Opinion," *New York Times*, September 26, 1999, p. A13.