PART I

INTRODUCTION

1

Judicial Policy Making

December 12, 2000, 10:00 P.M.

Without any fanfare at all, the Supreme Court's public information officer released the decision. The case, one of dozens filed regarding the events of November 4, began when the Gore campaign filed suit in a Florida circuit (trial) court, contesting the officially certified results of Florida's presidential election tally.

That official certification, made by Secretary of State Katherine Harris on November 26, had itself been the subject of innumerable suits, including one over Palm Beach County's infamous "butterfly" ballot, which led thousands of Gore supporters to vote mistakenly for the right-wing third-party candidate Pat Buchanan; a few other suits contesting the thousands of undercounted votes resulting from dimpled, pregnant, and hanging chads on the antiquated IBM punch cards; and, most notably, Harris's decision to use her seemingly discretionary authority not to accept recounted votes past Florida's one-week statutory deadline.[1] That decision had been overturned by the Florida Supreme Court, which extended the recount deadline to November 26. Eventually, the U.S. Supreme Court remanded (sent back) that decision to the Florida Supreme Court for further clarification, but before the recount could be completed even the Florida Supreme Court's deadline had passed, and Harris, who cochaired Bush's Florida campaign, certified Bush the winner.

The Gore campaign contested the results of the certification under the provision of Florida law that allowed judicial review of the certification if the election results include "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[2]

[1] Harris's competence to supervise and apply Florida election law was further exemplified by her failure to comply with the requirement that she resign before becoming a congressional candidate. Media publication belatedly forced her to quit as secretary of state so that she might make her run for Congress.

[2] §102.168 of the Florida Code.

The circuit court judge, N. Sanders Saul, ruled against Gore on December 4, incredibly claiming that Gore had not demonstrated a "reasonable probability" that the results of this closest of all national elections would be different with a recount. Four days later, the Florida Supreme Court reversed by a 4–3 vote, claiming that the recount must go forward under the "intent of the voter" standard that had been well established under Florida law.

The very next day, the U.S. Supreme Court issued an injunction preventing further recounts while it reviewed the issues. On December 12, as we will discuss in greater detail later, the Court majority ruled (1) that the intent of the voter standard, which was to be implemented by a different canvassing board in each county, violated the equal protection clause of the Fourteenth Amendment; (2) that the deadline for recounting votes was midnight on December 12; and (3) that therefore no recount would be afforded Vice President Gore.[3] George W. Bush would become the forty-third president of the United States.

We live in a democracy, but within that democracy we give judges broad discretion to determine, for instance, whether abortions should be allowed, death penalties inflicted, homosexuality criminally punished, and, every century or so, who should be president.[4] All judges make policy; at the top of the judicial policy-making pyramid rests the United States Supreme Court.

POLICY MAKING

We begin by defining judicial policy making as simply a choice among alternative courses of action, which choice binds those subject to the policymaker's authority. Phrased more succinctly: A policymaker authoritatively allocates resources. So, if you find yourself suing someone in a court of law over a contested piece of property and the court rules in your favor, you win and the opposing party loses. Short of an appeal to a higher court, the court's decision ends the matter. This, then, becomes a final judgment and thus a policy.

But why should a court's decision end the matter? Why not some other governmental or private authority? Before we answer, let us back up a bit. All nations have their set of cherished beliefs that serve to guide and justify the actions of its citizenry. The fact that some or all of these beliefs do not correspond with reality tends not to affect the public's adherence to them. Among the most ancient of these from Americans' standpoint is the belief that judges decide their cases dispassionately, impartially, and objectively.

Admittedly, politically aware persons realize the inaccuracy of the preceding statement, citing reports of judicial misconduct both on and off the bench, the

[3] *Bush v. Gore*, 531 U.S. 98 (2000).

[4] In 1876, five justices of the Supreme Court served on a congressional commission to resolve twenty-one disputed electoral votes. The two Democratic justices on the commission voted to give each disputed vote to the Democrat Tilden, and 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 the most fraudulent presidential election in U.S. history.

corrupting influence of money, and the partisanship manifest in many judicial decisions, for example, *Bush v. Gore*. Nonetheless, we tend to accept courts' decisions unquestioningly; again, *Bush v. Gore* provides an excellent example. Rare are the situations in which a judicial decision produces organized opposition: Same-sex marriage and proabortion decisions come to mind, as do those in the 1950s, 1960s, and 1970s dealing with Southern public school desegregation.

Now it is indisputable that public acceptance of judges' decisions does not result from the courts' coercive capabilities. They have none. Government has two coercive resources: the power of the purse (taxation) and the power of the sword (fines, imprisonment, and the death penalty). Courts exercise neither. When a court addresses any matter that pertains to either purse or sword, it depends on nonjudicial officials to apply and enforce its decision. Legislative bodies possess the former; the executive branch the latter. This being the case, why do Congress or state legislatures and presidents or governors not simply ignore a court decision with which they disagree?

Complicating the answer is the fact that though our courts lack coercive capability, they are nonetheless the most authoritative of our governmental decision-making bodies, not Congress and not the president. Their word, literally, is law – no ifs, ands, or buts about it. On the surface, this appears to be a contradiction in terms: How can a governmental body, incapable of forcing anybody to do anything, be more authoritative than the president or Congress?

Adding to the implausibility of the foregoing statement is a further fact: American courts possess a range of decision-making authority far broader than that provided the courts of other nations. What other countries regard as decisions that only the legislature or the executive may make, we vest in the courts.

Five interrelated factors provide the answer to this very strange scenario: fundamental law, distrust of governmental action and those who engage in it (politicians), federalism, separation of powers, and judicial review. We cannot say that any one of these is more or less important than the others. Rather, they appear to form one rather seamless web.

Fundamental Law

Fundamental U.S. law dates from the arrival of the English colonists at the beginning of the seventeenth century. Those settling in New England were refugees from religious persecution. Though we now view them as heroic, stalwart individuals, their religious beliefs were extreme, bordering on fanaticism. They viewed themselves as righteous God-fearing people; all others were sinful reprobates, egregious sinners, beyond the pale of God's redemption. They introduced with them the notion that all human and governmental action should conform to the word of God or the strictures of nature as their leaders decreed.[5]

[5] See Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), pp. 12–17, 24–27.

Just as they were unable to get along with their neighbors in England, so also did they lack the ability to accommodate religious disagreements among their brethren. Dissenters were expelled from Plymouth and Massachusetts Bay. Moving west, like-minded refugees founded their own settlements in Rhode Island and Connecticut.

The overtly religious motivations that inspired the founding of new settlements were reflected in charters, constitutions, and the statutes that the settlers wrote. And although the theocratic parochialism – manifested by an established church in various colonies or, alternatively, a single nonconformist church serving all residents in the local village or town – of the early colonies and individual towns and villages within them had lost much of its steam by the beginning of the Revolutionary War, the notion of a fundamental law had not.

The persistence of the notion of a fundamental law stems from the circumstances of life during the colonial period, circumstances that continue to be manifest, though in altered form, today. Not only did the original English colonists find themselves in a highly dynamic environment; so also did the millions of immigrants who arrived later. The stabilizing influences of the Old World did not exist: No longer was there a common religion, or culture, or stratified social system, or static economic system. In their place, dynamic diversity flourished. The religiously disaffected merely had to pull up stakes and move a few miles west to establish a community of like-minded believers. New sects and denominations have continued to arise. Today, the United States has more religious denominations than the countries of the rest of the world combined.

The movement of the frontier ever westward produced marked social and economic turbulence that persisted into the twentieth century. And though we no longer have a geographic frontier, social and economic change continues apace led by science and the technological applications that flow from it. Consider only the recent changes in communication, transportation, medicine, industrial and agricultural production, and chemical and biological warfare.

Cultural uniformity did not last long either. Waves of immigrants began to arrive even before the Revolutionary War, to say nothing of the forcible importation of thousands upon thousands of African slaves. Cultural diversity continues apace, so much so that black, Hispanic, and Asian peoples outnumber those of European ancestry in much of the country.

We like to think of our nation as either socially middle class or striving to achieve that status. This perception, however, overlooks the fact of changes in lifestyle that constantly occur and affect – for better or for worse – the economic well-being and the social and cultural status of millions of people. To mention but a few: single-sex civil unions/marriages (first legalized in Vermont), divorce almost as commonplace as marriage, the steadily increasing number of women in occupations and professions that a generation ago were virtually the exclusive province of men, the ever-increasing life expectancy of both men and women, and a two-way communications revolution that makes information on any given subject as obtainable as the manipulation of a mouse and, conversely,

puts us in touch with millions of people around the world with a few strokes on a keyboard.

The upshot is an environment in which social, cultural, economic, and religious change is the order of the day. And indeed, we view marked – even drastic – change in these areas of life as desirable, associating them with progress and freedom. Where, then, do we look for stability? Individuals cannot function effectively in a world of constant change. Life becomes frightening if events are beyond individual or human control. The answer: the political order, governed and established by fundamental law.[6]

Consciously or otherwise, the objective of the Constitution's Framers when they met in Philadelphia in the summer of 1787 was to transform the religious notion of fundamental law into a secular context. How so? By enshrining the Constitution that they intended to create as a secular substitute for Holy Writ.

They succeeded beyond their wildest dreams. Our Constitution is the world's oldest and shows no signs of suffering from old age. If a Framer rose from the dead, he would recognize his handiwork, appalled perhaps by its size, but not otherwise. The Constitution's longevity has established political stability as a distinctive feature of American life. With but few exceptions, other societies do not share this characteristic. For most of the world, politics is the vehicle of major societal change. Radical regime changes, bloody or otherwise, are the order of the day. What is dynamic in American life is fixed and stable elsewhere: an established religion to which virtually all pay at least lip service; a relatively rigid class or caste system, determined by birth, not achievements; an economic system in which individuals tend to be locked – willy-nilly – into a hereditary occupation (e.g., Daddy is a peasant; you will be one also); and a cultural environment in which all speak the same language and share a common ethnic or tribal background.

Distrust of Governmental Power

In a society wedded to a fundamental law somebody has to interpret its provisions authoritatively. Language, at least English, is woefully imprecise. What is *reasonable* in, for example, *reasonable cause*? It and its opposite, *unreasonable*, are lawyers' and judges' favorite words. What constitutes *due* process? *Ordered* liberty? Consider further that the Constitution's Framers, for political reasons, deliberately left its provisions undefined; the only exception is treason.[7] For

[6] For a treatment of fundamental law, see Edward A. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 *Harvard Law Review* 149, 290 (1928).

[7] According to James Wilson, a delegate to both the Constitutional Convention and the convention in Pennsylvania convened to ratify the Constitution, definitions of treason varied from one government to another. And he asserted "that a very great part of their tyranny over the people has arisen from the extension of the definition of treason." Hence, we have a specific constitutional definition that could not be easily altered. Max Farrand, ed., III *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), p. 163.

reasons that follow, American society bestowed the task of interpreting the fundamental law on the courts.

As colonists subject to imperial British mandates, Americans did not take kindly to many of the motherland's edicts, especially after the French and Indian War that ended in 1763. British efforts to tax the colonists for the cost of the war were viewed as inimical to their rights and liberties. Colonial opposition grew over the next decade and led to the onset of the Revolutionary War. Concomitantly with the outbreak of hostilities occurred a domestic struggle within each of the colonies for control of the newly formed state governments. This struggle broadly pitted the socioeconomic elite – such as it was – against small farmers, backwoods dwellers, and urban artisans.

This internal struggle persisted after the end of hostilities in 1783. Unsettled economic conditions severely strained the governmental capabilities of both the state governments and the Continental Congress that the Articles of Confederation of 1781 established. The latter made no provision for a chief executive or a judiciary; it had no power to levy taxes; nor did its limited power extend to individual conduct; and it was amendable only by unanimous consent of all states. Governmentally, it was akin to an international organization, such as the United Nations, rather than a sovereign state.

Governmental power, as a result, rested with the individual states, which were largely free to do their own thing – whatever it might be. To protect their own interests, some states imposed taxes and other trade barriers on incoming goods from other states. A number yielded to the demands of debtors and printed large amounts of paper money that they decreed to be legal tender. Stay laws extended the period of time debtors could pay their creditors. States refused to pay their proportionate share of the costs of the Continental Congress and the Revolutionary War, with the result that not even interest payments on the national debt could be made.

Efforts to strengthen the governmental system arose from a number of sources: political figures who argued that the ability of a single state to block change endangered all the states, merchants and other commercial interests concerned about state-imposed trade restrictions, pioneers along the frontier fearful of Indian attacks, and veterans and members of the Continental Congress whose loyalties extended beyond a single state's boundaries.

The fifty-five delegates who gathered for the Constitutional Convention quickly concluded that the Articles of Confederation were beyond salvaging, and, instead of constructing proposals for reform, they decided to create an entirely new governmental system. They astutely realized that though their personal interests were those of the social and economic elite, a new government had to be one that no special interest or "faction" could control. Neither the haves nor the have nots should be capable of domination. Although the national level needed strengthening, and the power of the states reduction, the Framers envisioned a system in which neither level would do much governing.

Accordingly, the national government would assume responsibility for military affairs – foreign and domestic; it would coin money, establish a postal

system, regulate interstate commerce, and impose taxes, within specified limits, of course. The states were forbidden to interfere with the tasks accorded the federal government. Article I, Section 10, of the proposed Constitution prohibits states from engaging in economic activities preferably left to the federal government or those that only a single national level could effectively perform, such as, making treaties, coining money, enacting bills of attainder or ex post facto laws, abridging contracts, taxing goods imported into or exported from a state, and maintaining an army or a navy.

Correspondingly, the federal government may not suspend the writ of habeas corpus except for national emergencies; no direct taxes can be imposed except in proportion to the census;[8] bills of attainder and ex post facto laws are banned; no taxes can be levied on exports, nor preference given to ports of one state over another; and all expenditures have to be legally appropriated and authorized.

In short, the Framers cleverly limited the power of the federal government in two distinct ways: (1) They placed certain activities off limits. These were the matters that government could not consider. Constitutionally speaking, they were actions that the Framers deemed beyond the sphere of governmental competence, for instance, determining what is religiously true or false. (2) The powers bestowed on the federal government could only be exercised in accordance with certain prespecified procedures; for example, a person accused of crime could only be convicted by the unanimous vote of a jury of twelve persons drawn from the area where the trial was held; for a bill to become a law, it had to be passed word for word by both houses of Congress and submitted to the president for his approval. If he vetoed it, it could become law only if each of the houses favored it by a two-thirds vote. The sum of these substantive and procedural limitations on the exercise of federal governmental power is known as *constitutionalism*.[9]

We parenthetically note that though the Framers meant for the Constitution to apply primarily to the federal government and not to those of the states and their subdivisions, the drafters of the various state constitutions also imposed limits on the substantive activity and procedures of government, thus ensuring that the popular notion "that that government is best that governs least" was realized in fact.

Why did the politically active portion of the population accept the severe limits that the Constitution imposed on the exercise of governmental power? (Note that women, blacks, Native Americans, and landless males had no vote and, hence, could not participate in the political process.) Although the supporters of the Constitution had to wage a hard-fought struggle to obtain its ratification, they eventually won out because both supporters and opponents realized that half a loaf was better than none. Opponents primarily composed

[8] Constitutional limits on direct (income) taxes were overturned by the Sixteenth Amendment.

[9] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002), pp. 18–21. Charles H. McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca, NY: Cornell University Press, 1947).

the lower socioeconomic segments of society: debtors, small yeomen farmers, urban artisans, and those residing along the frontier. They lacked experience in affairs of state and were deeply suspicious of strong centralized government. If not for them personally, certainly for their ancestors, government had been a tool of oppression. Those along the frontier had little need of government except for an occasional military foray to pacify unruly natives.

Arrayed against them were the landed gentry, merchants, other commercial interests, and the better educated. Far better organized and politically astute, they were concerned with retaining their position atop the socioeconomic ladder. As long as the power of government was not used against them, they sensibly realized that they could maintain their position in society, given their wealth, education, and social status.

Consequently, a rigorously limited system of government was not antithetical to the self-interest of either of these factions. Subsequent developments perpetuated attachment to limited government: The influence of the frontier throughout the nineteenth century, the millions of immigrants for whom government represented tyranny and oppression, notions of the survival of the fittest, the gospel of wealth, and rugged individualism blended to support distrust of governmental action and the Jeffersonian concept of limited government.[10]

Federalism

Federalism is simply and straightforwardly defined as the geographical division of governmental power between the central and local units. The fundamental law specifies this division by indicating which actions are the province of the central government and which belong to the states. In our system, federalism also enumerates the actions that neither the federal government nor the states may perform. On the other hand, both levels may engage in certain common activities, such as taxation.

The pertinent constitutional language, however, as is the case throughout the Constitution, does not specify who may do what with any precision. The only guidance is the supremacy clause of Article VI:

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

Though this language may appear to give the upper hand to the federal government, such is not the case. The Constitution does not say who should resolve federal–state conflicts, and though, as we shall see, the Supreme Court took it upon itself to resolve these controversies, that course has not always resulted

[10] Segal and Spaeth, *The Supreme Court*, pp. 14–20. Max Lerner, *America as a Civilization* (New York: Simon & Schuster, 1957), pp. 353–464.

in the expansion of federal power, and decidedly not since the inception of the Rehnquist Court in 1987.

As a consequence, the Supreme Court has confronted a steady stream of litigation throughout its history that has required the justices to draw an ever shifting line between federal and state power.

Separation of Powers

Whereas federalism divides governmental power geographically, separation of powers does so functionally. Congress legislates, the president performs the executive function, and the courts adjudicate resulting conflicts. This tripartite division ensures the independence of each from the others. Each branch has its own personnel who serve terms of office different in length from those of the others and who – in the case of Congress and the president – are chosen by different constituencies.

The effect of this division prevents any branch from compelling action by either of the other two. Consequently, conflict is institutionalized, most especially between Congress and president. To ensure that separation persists, and that no branch dominates the others, the Framers gave each a few powers that functionally belong to one of the others. Thus, the president possesses the legislative power to veto congressional legislation, and the upper house of the legislature (the Senate) participates in the selection of officials who help the president "take Care that the Laws be faithfully executed." Both branches check the federal courts, the president by nominating judges and the Senate by consenting to their selection. The courts in turn check Congress and the president by their power of judicial review, the final distinguishing feature of our constitutional system.

But before we consider judicial review, we should note that the Framers were most concerned that Congress might overwhelm the other two branches. At the time the Constitution was written and adopted, public participation in government was largely untried and the Framers, representative of the economic and social elite, were concerned that those at the lower end economically and socially might gain too much political power, given their numerical superiority. The Framers and those they represented were much more comfortable with and experienced in conducting governmental affairs without involvement by the bulk of the population. Indeed, the fact that a number of the state governments were in the hands of the lower strata of society gave them real reason for concern. Actions benefiting the average person at the expense of the well-to-do had been enacted by several of the states. The suffrage was broadened to include property-poor males; cheap paper money was issued to enable debts to be paid relatively painlessly; and stay laws lengthened the time in which debts could legally be paid.

To lessen their fear of legislative dominance, and to effect a compromise between large and small states, the Framers divided Congress into two houses: the Senate and the House of Representatives. Senators served six-year terms, with