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CHOOSING BETWEEN NORMATIVE AND DESCRIPTIVE VERSIONS OF THE JUDICIAL ROLE

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I. INTRODUCTION

Beginning a talk on writing, author Peter DeVries wondered why he had been invited. Why, he asked, do people keep asking cows to discuss milk? One might have the same doubts about judges' views of their craft. However, several recent Supreme Court cases contain interesting and explicit holdings regarding the nature of the judicial role.

Every case implicitly raises questions about the role of judges in a democracy, and judges frequently offer comments on that role—usually well-worn platitudes about the limited and apolitical nature of the judicial task. In several cases from the 1990 Term, however, the Court was forced to answer the question "What is a judge?," much more directly. In *Gregory v. Ashcroft*,¹ the Court had to decide whether judges are "policymakers" outside the coverage of the Age Discrimination in Employment Act (ADEA). *Chisom v. Roemer*² presented the question of whether judges are "representatives," the elections for which are within the coverage of the Voting Rights Act. The Court answered in the affirmative in both cases, although not without a good deal of hedging. These results seem at odds with the standard view of judges' governmental functions. After all, "representative policymakers" are supposed to be in the other two branches of government. Two other decisions from the 1990 Term, *Payne v. Tennessee*³

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1. 111 S. Ct. 2395 (1991).

2. 111 S. Ct. 2354 (1991).

3. 111 S. Ct. 2597 (1991).

and *James B. Beam Distilling Co. v. Georgia*⁴ (*Jim Beam*), while not raising the question of the judge's role so starkly, also brought the Court strikingly close to a legislative model of judicial decisionmaking by discounting the weight of precedent and, more or less, endorsing prospective decisions.

In each of these cases, the Court struggled between a normative, idealized view of judges as apolitical dispute-resolvers, and a descriptive, post-realist recognition that in practice the judiciary exercises significant policymaking functions. The Court has frequently endorsed the idealized view with fervor in recent years. Yet a majority of Justices rejected this view in each of these cases, although it exerted a considerable tug. The Court's inability to adhere to the terms of its own theory calls the theory itself into question. If judges are "policymakers" and "representatives" who can change the law freely and prospectively like a legislature, then how can they be dispute resolvers who, lacking a constituency, decide questions of law rather than policy? One answer is that they cannot; either the theory or the decisions are wrong. A second is that the theory is purely normative, and in these cases the Court was adhering to a descriptive vision of what judges do. This Article explores whether it was correct to do so.

II. COURTS IN A REPRESENTATIVE DEMOCRACY

The most familiar model of how courts should operate in a representative democracy—the "official version"—is that they leave policymaking to the legislature and the executive. Governmental decisions as to what is expedient, useful, efficient, moral, or wealth-producing are made not by judges but by the people's representatives. Courts exist to resolve disputes.⁵ Their decisions rest on the law rather than on personal preferences or public pres-

4. 111 S. Ct. 2439 (1991).

5. For a standard exposition of this position, see generally the lectures by former Senator Sam Ervin in SAM J. ERVIN, JR. & RAMSEY CLARK, *ROLE OF THE SUPREME COURT: POLICYMAKER OR ADJUDICATOR* (1970). A more recent and scholarly statement of essentially the same idea is MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 3-28 (1991). Professor Redish sees the core constraint on judicial authority as being "the Representational principle":

The Representational principle posits that, within constitutionally established boundaries, the representative branches of government may make policy decisions, free from judicial power to ignore or overrule them simply on grounds of social, political, or moral disagreement. This principle flows from the fundamental values underlying democratic systems in general and the American system in particular: the right of the populace to have basic policy choices made by representatives whom it has chosen and whom it may replace if, on balance, their policy choices do not coincide with the wishes of a majority of the electorate.

Id. at 4.

sure, on "judgment" rather than on "will."⁶ Put anachronistically, courts find the law while legislatures make the law. The differing roles of judge and legislator are captured in the fact that "ideology [is] the most exalted motive that most theories attribute to legislators [but] the basest motive generally attributed to judges, and the one that virtually all theories of judicial decisionmaking strive to eliminate."⁷ In a representative democracy, policy decisions are legitimated only by popular delegation or consent.

In recent years, the Supreme Court has shown renewed enthusiasm for this model. For example, Erwin Chemerinsky has detailed the Court's "majoritarian paradigm" for constitutional decisions, under which the Court sees its essential mission as getting out of the way of legislative majorities.⁸ This view of the judiciary is also central to the Court's calls for deference to administrative agencies' elaborations of ambiguous statutes. The Court states that fleshing out vague, standardless enactments involves questions of policy, not law, and therefore is best done by a part of the government with at least a measure of democratic accountability—officials who, unlike judges, have a constituency.⁹ Judges should not decide cases on the basis of their "personal policy preferences," whereas it is "entirely appropriate" for the executive branch to do so because the Chief Executive is "directly accountable to the people."¹⁰ In short, the Court has a tidy political theory in which election, representation, and policymaking are linked; judges are apolitical law-appliers wholly outside that constellation.

This model of judicial decisionmaking is open to two obvious criticisms. The first is that the model is empirically false. Although judges *say* their hands are tied by external, neutral norms, the fact is that they merely apply

6. THE FEDERALIST NO. 78, at 399 (Alexander Hamilton) (Max Beloff ed., 1987); *see also* *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.) ("Courts are the mere instruments of the law, and can will nothing.").

7. Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 56-57 (1991).

8. Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989). A belief in aggressive judicial enforcement of countermajoritarian constitutional provisions is not necessarily inconsistent with the conviction that policy should be made in the political branches. Policymaking must still occur within constitutional limits, either broad or narrow. For the current Court, however, narrow readings of individual rights and doubts about a policymaking judiciary are linked by their common normative foundation: Majoritarian agreement is the necessary and sufficient condition of governmental authority.

9. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865-66 (1984); *see generally* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985) (endorsing *Chevron* in light of political theory that requires policy decisions to be made by electorally accountable officials).

10. *Chevron*, 467 U.S. at 865.

their own policy preferences. The secret has been out for some time,¹¹ and the cases I will discuss provide handy illustrations. For example, one striking aspect of these cases is that the Court's liberal old guard suddenly discovered judicial humility. Only recently, one distinguishing characteristic of the liberal wing seemed to be that it was *not* constantly urging that judges avoid imposing their own values.¹² That is not what it looks like in these opinions. In *Gregory v. Ashcroft*,¹³ Justices Marshall and Blackmun, alone among the nine, paint a picture of judges humbly resolving disputes according to external standards, and not making policy.¹⁴ They were again united against the rest of the Court in *Payne v. Tennessee*,¹⁵ invoking precedent and stare decisis and warning of the dangers of judges mistaking their personal predilections for the law.¹⁶ Finally, in *James B. Beam Distilling Co. v. Georgia*,¹⁷ Justices Marshall and Blackmun were joined by Justice Scalia, of all people, in insisting, against the other six members of the Court, that judges find law rather than make it, that they thus lack the power to change the law, and that Article III forbids prospective decisions because that is not how the common law operated in the eighteenth century.¹⁸

These opinions are the liberal minority's desperate attempts to erect doctrinal barriers to the dismantling of the Warren (and Burger) Court edifice. In decrying the majority's decisionmaking as resting on policy rather than principle, and in offering this new-found and extraordinarily conservative vision of the judicial role instead, Justices Marshall and Blackmun provide a pretty good indication that judicial reasoning *is* result-oriented and that doctrine—in this case doctrine about the judicial function—is driven by considerations of policy.¹⁹

11. The jurisprudential debate triggered by the Realists' attack on the concept of rules-bound judicial decisionmaking is lucidly set out in Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 235-44 (1990).

12. See Chemerinsky, *supra* note 8, at 51 n.28.

13. 111 S. Ct. 2395 (1991).

14. *Id.* at 2415 (Blackmun, J., joined by Marshall, J., dissenting).

15. 111 S. Ct. 2597 (1991).

16. *Id.* at 2619-25 (Marshall, J., joined by Blackmun, J., dissenting). Justice Stevens also filed a dissent, which Justice Blackmun joined. *Id.* at 2625.

17. 111 S. Ct. 2439 (1991).

18. *Id.* at 2449-50 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment).

19. In making these comments about Justices Marshall and Blackmun, I do not mean in any way to suggest that the same could not be said of the other Justices. See, e.g., Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373 (1992) (arguing powerfully that the reasoning, treatment of precedent, and results in the Court's search and seizure decisions can be explained only by a policy that the government should always win); see also *infra* note 54.

This familiar criticism is important but incomplete. The realist account of judicial decisionmaking does not directly contradict the "official" version, since the former is descriptive, the latter prescriptive. It is not inconsistent (or uncommon) to say that judges do make law but they should not, or should to the least extent possible, or should in the manner which least impinges on legislative authority. Indeed, that is what *Chevron* says.²⁰ My aim is not to criticize the Court's normative vision as descriptively inaccurate. Rather, I will develop the idea that these two versions of the judicial role, although in tension, coexist in the Court's own theory of the judicial role. The question becomes when and why it chooses to look to one or the other.

The second evident line of attack on the Court's model of an apolitical judiciary is that it is mistaken on the merits; judges *should* pursue a relatively active, policy-based agenda.²¹ If this criticism is correct, then the tension between the real and the ideal dissolves.²² This too is not my argument. For present purposes, I accept the Court's ideal as an ideal, but also deem it unachievable in practice.

20. Although it involves the Court's normative, apolitical vision of the courts, the *Chevron* opinion is essentially functionalist rather than formalist. The formalist view would be that judges interpret statutes, saying "what the law is." *Chevron* says that, in practice, adherence to that formal arrangement conflicts with the underlying constitutional structure, which places policymaking in the hands of accountable actors. Recognizing that judges are forced by standardless legislation to make policy, it shifts what is technically a judicial function to another policymaking branch in order to preserve the underlying balance. Indeed, this mix of a functionalist approach with a strong normative view is what makes *Chevron*, for all its flaws, such a strong opinion.

21. A prominent strand of current scholarship does seem, in the words of one harsh critic, to treat courts as no different than legislatures. See John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 834-42 (1991). For a provocatively explicit example, see Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1 (1978).

22. Quite similar questions, shifted a few degrees toward politics, arise with regard to the role of the Solicitor General (SG). Traditionally, the SG is seen as having obligations to the Court and to "the law" that are at least as strong as his duties to the President. Although the SG's pursuit of a relatively active, policy-based agenda in recent administrations has come under attack, see, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987), it can also be argued that the SG's essential duty is to advance the legal positions and jurisprudential beliefs of the President. If that is the normative model, then there is no tension with the reality of a "politicized" SG's office (except to the extent that the SG is insufficiently dedicated to the President's views). See generally John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992).

III. JUDGES AS POLICYMAKERS

Modeled directly after Title VII,²³ the Age Discrimination in Employment Act (ADEA) forbids employers to discriminate on the basis of age, such as by imposing mandatory retirement.²⁴ The Act covers state employees, but not one "elected to public office . . . or an appointee on the policymaking level."²⁵ *Gregory v. Ashcroft*²⁶ upheld Missouri's requirement that appointed state judges retire at age seventy on the ground that judges are not covered by the ADEA.

A. *The Gregory Opinions*

As this issue worked its way through the lower courts, the principal area of dispute was whether judges are exempt from the ADEA because they are policymakers.²⁷ However, Justice O'Connor's majority opinion placed this issue somewhat in the background. She began with a lengthy discourse on federalism and the Tenth Amendment, emphasizing that the states must retain the authority to determine the qualifications of their most important officials. She did not conclude that the Tenth Amendment forbids federal intrusion on the states' methods of selecting and retaining judges, although one cannot avoid the sense that Justice O'Connor and many of those who joined her would be happy to so hold.²⁸ Rather, she

23. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-56 (codified as amended at 42 U.S.C. §§ 2000e to 2000e17 (1988)). For discussion of Title VII's role as the model for the ADEA, see *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

24. 29 U.S.C. § 623(a) (1988).

25. 29 U.S.C. § 630(f) (1988).

26. 111 S. Ct. 2395 (1991).

27. See *EEOC v. Vermont*, 904 F.2d 794, 800 (2d Cir. 1990) (holding that exception does not apply because "courts are called upon primarily to fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy"); *Gregory v. Ashcroft*, 898 F.2d 598, 601-02 (8th Cir. 1990) (holding that exception does apply because "judges must exercise the same sort of discretion in decisionmaking . . . that is required of 'appointee[s] on the policymaking level' in the executive and legislative branches"), *aff'd*, 111 S. Ct. 2395 (1991); *EEOC v. Massachusetts*, 858 F.2d 52, 55 (1st Cir. 1988) (holding that exception does apply because "'policymaking' is indisputably a part of the function of judging"). Read narrowly, these statements are not contradictory. Judges *are* "called upon"—by history, separation of powers, and received understandings—to act as the Second Circuit says, but in attempting to do so they also "indisputably" end up exercising policymaking discretion, as the First and Eighth Circuits say.

28. Indeed, they have said as much. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (predicting that constitutional immunity for state employees from federal regulation "will, I am confident, in time again command the support of a majority of this Court"); *id.* at 589 (O'Connor, J., dissenting). The State of Missouri urged the Court to use this case to overrule *Garcia*. Brief for Respondents at 35-37, *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

relied on federalism principles to impose a "plain statement" rule.²⁹ Congress cannot forbid mandatory retirement for state judges except with an utter clarity missing from the ADEA. This approach allowed the Court to avoid deciding whether judges are actually "on the policymaking level."³⁰ The opinion simply summarizes the contentions of the parties, giving a good deal more attention to the State's position than the petitioners' position, and finds that "[i]t is at least ambiguous whether a state judge is an 'appointee on the policymaking level.'"³¹ Under the plain statement rule, that ambiguity precludes application of the ADEA to judges.³²

Justice White, joined by Justice Stevens, concurred in the judgment but rejected the plain statement rule.³³ Addressing the statutory issue without a federalist thumb on the scales, he concluded that the Act exempts state judges. Judges—certainly common law judges—are inescapably policymakers; at the very least, they are "on the policymaking level." A few shreds of Title VII legislative history also suggested that Congress adopted this provision out of concern that the definition of employee not reach high ranking officials, including judges.³⁴

Justice Blackmun, joined by Justice Marshall, agreed with Justice White about the plain statement rule, but disagreed about the meaning of the statute. He argued that judges are not policymakers; their primary task is to resolve disputes by "apply[ing] rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions."³⁵ Justice Blackmun also offered his own reading of the legislative history and, as if to reinforce the point that policymaking authority lies outside the judicial branch, invoked a different sort of plain statement rule: Judges should accept plausible agency interpretations of ambiguous statutes.³⁶

29. "This plain statement rule is nothing more than an acknowledgement that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 111 S. Ct. at 2401.

30. *Id.* at 2398.

31. *Id.* at 2404.

32. Writing for seven Justices, Justice O'Connor made short work of the petitioners' equal protection argument. *Id.* at 2406-08.

33. Justice White argued that federalism requires at most a plain statement that the statute as a whole applies to state governments, a statement Congress indisputably made in the ADEA. Congress cannot be required to make a separate "plain statement" in each specific provision. *Id.* at 2409-11 (White, J., concurring in the judgment). He also found any plain statement approach out of place when Congress acts pursuant to Section 5 of the Fourteenth Amendment. *Id.* at 2411-12.

34. *Id.* at 2412-14.

35. *Id.* at 2415 n.1 (Blackmun, J., dissenting).

36. *Id.* at 2415-18 (Blackmun, J., dissenting).

There is a certain irony in seeing Justices White and Blackmun have this dispute about judicial policymaking given their opinions in *Roe v. Wade*.³⁷ Whatever one's view of the merits of that decision, it is hard to think of a clearer example of the Supreme Court's role as policymaker.³⁸ Justice Blackmun's *Roe* opinion was a frank "policy" sort of opinion; it had no real basis in the constitutional text or the Court's precedents and drew "legislative" types of lines. That was precisely Justice White's complaint in dissent.³⁹ Now, two decades later, Justice White stresses the important policymaking function of the judiciary and Justice Blackmun—the diffident, shy person's judge—protests that judges merely resolve disputes and are not charged with doing what he did in *Roe v. Wade*, namely, "fashion[ing] broad policies establishing the rights and duties of citizens."⁴⁰ Of course, in *Roe*, Justice Blackmun said that the Court's task was "to resolve the issue by constitutional measurement, free of emotion and of predilection."⁴¹ This was one of the cases, however, in which such a disclaimer

37. 410 U.S. 113 (1973).

38. See generally DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 23-61 (2d ed. 1990) (recounting story of *Roe* as part of description of Court as a "superlegislature").

39. *Roe*, 410 U.S. at 222 (White, J., dissenting) (decision "an improvident and extravagant exercise" of "raw judicial power" with "scarcely any reason or authority"). Justice White's rhetoric implies a particular vision of the judicial role. Judges should go no further than reason and authority take them; they should not (unlike a legislature) be exercising raw power. This is the usual rhetoric of the losing side. It resurfaced with eerie similarity in Justice Blackmun's dissent in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), which all but overruled *Roe*. Sounding just like Justice White a decade and a half before, Justice Blackmun described the majority opinion as one in which "[b]ald assertion masquerades as reasoning. The object, quite clearly, is not to persuade, but to prevail." *Webster*, 492 U.S. at 546 (Blackmun, J., dissenting). He went on: "This it-is-so-because-we-say-so jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place." *Id.* at 552. Two years later it was Justice Marshall's turn: "Power, not reason, is the new currency of this Court's decisionmaking." *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., concurring in part, dissenting in part). Each dissent implies an almost Blackstonian understanding of the judicial task as involving the application of precedent and pure reason, in contrast to the legislature's pursuit of preference and power. See also *infra* note 128 and accompanying text.

40. *Gregory*, 111 S. Ct. at 2415 n.1 (Blackmun, J., dissenting). In fact Justice White generally has not shied away from the reality of the Supreme Court as policymaker, even when objecting to the policy it is making. Dissenting in *Miranda*, for example, he observed that the majority was making

new law and new public policy in much the same way that [the Court] has in the course of interpreting other great clauses of the Constitution. This is what the Court . . . must do and will continue to do unless there is some fundamental change in the constitutional distribution of governmental powers.

Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting).

41. *Roe*, 410 U.S. at 116.

merely "signal[s] that the court is about to impose a value choice so controversial that denial is easier than explanation."⁴²

B. Accepting Judicial Policymaking

Only a court would consider whether judges are "on the policymaking level" a difficult question. At the very least, the *Gregory* plaintiffs' common-law functions involve policymaking.⁴³ It has been some time since anyone seriously subscribed to the notion that the common law is a pre-existing denizen of "some Aladdin's Cave" to which mortals gain access when appointment to the judiciary gives them "knowledge of the magic words Open Sesame."⁴⁴ Common law is made by judges alone. Therefore, the subversive view of the judicial function—that judges make policy—has become the official version.⁴⁵ Consider the revolution in products liability law over the last generation. These decisions rest on explicit policy considerations—who has superior information, inequality of bargaining power,

42. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1204 (1987). On the invocation of objectivity as a pure honorific to bolster an otherwise subjective argument, see Jeanne L. Schroeder, *Subject: Object*, 47 U. MIAMI L. REV. 1 (1992).

43. "Policymaking" is not defined by the statute. I take it to mean deciding on a particular course of action based on considerations of utility to, or the values of, the community as a whole. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82 (1979) ("Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole.").

Justice White's definition was a good deal broader: "'Policy' is defined as 'a definite course or method of action selected . . . from among alternatives and in the light of given conditions to guide and usually determine present and future decisions.'" *Gregory*, 111 S. Ct. at 2412 (White, J., concurring) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1754 (1976)). Judges do make policy in this sense, but so do game wardens, or the maintenance employees who decide where to order cleaning supplies, neither of whom a court is likely to find exempt from ADEA protection. See *EEOC v. Wyoming*, 460 U.S. 226 (1983). The dictionary definition misses what must be critical features of policymaking in this setting, namely, that policy reflects an evaluation of the benefit of a given course of action to the community as a whole or a significant portion thereof and that it be made on behalf of or directly affect the community.

44. Lord Reid, *The Judge as Lawmaker*, 12 J. SOC. PUB. TEACHERS L. (New Series) 22 (1972), quoted in Roger Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 535-36 n.7 (1977).

45. Daniel Farber & Philip Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 876 (1991); see also PHILIP L. DUBOIS, *FROM BALLOT TO BENCH* 23-27 (1980). For a rather stunning description of judges as policymakers, see generally RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* (1988). Judge Neely, who sits on the Supreme Court of West Virginia, views judges as wholly political actors, noting, for example, that "[t]he major difference between courts and other political institutions . . . is that it is not usually smart to try to bribe appointed judges." *Id.* at 14.

the role of insurers, and so on.⁴⁶ Critics have responded in the same terms. They do not contend that the courts have exceeded their proper institutional role. They simply argue that the doctrinal innovations either pursue the wrong policy or will not achieve the policy results for which they aim.⁴⁷ Once the fiction of "found" common law is abandoned, the tension between the normative and descriptive models abates—courts are, and should be, policymakers.⁴⁸ It is not surprising, then, that in arguing that judges are policymakers, Justice White focuses solely on common-law courts. That focus permits him to avoid choosing between the normative and the descriptive, as might be necessary in considering judges as interpreters of the Constitution or statutes.

The fact that the *Gregory* plaintiffs were common-law judges makes one wonder how there could be any hesitation about whether they fell within the statutory exception. Perhaps part of the explanation is that the federal judges deciding these cases have quite a different docket. In federal cases, the view that judges should not make policy is much more substantial. A statutory or constitutional provision is almost always at issue. While interpretation may still lead to judicial policymaking in practice, at least an identifiable nonjudicial lawmaker exists. In contrast to the common-law setting, the notion that judges simply implement the policy decisions made by others is at least plausible. Perhaps the Court's failure to focus on the plaintiffs' common-law functions arose from a sense that in practice common-law decisionmaking is not so very different from statutory and constitutional decisionmaking. By most accounts federal judges also function as

46. See generally James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570 (1991). Henderson's data, reflecting 2,500 judicial products liability opinions, show courts explicitly relying on policy in "only" 15% of the cases. *Id.* at 1612. Fifteen percent is, I would say, a pretty high number for a system handling many routine cases and purporting to be based on precedent rather than starting from first principles in each case.

47. See, e.g., Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

48. There remains the objection, and it can be powerful, that although judges say they are pursuing sound public policy, in fact they are merely imposing their own prejudices. Alternatively, the critical observer might conclude that the judge is pursuing public policy, but views of what constitutes good policy are inescapably a function of race, class, background, and psychology. It is an overgeneralization, but one could say that the first of these distinguishable positions (law is not found, it reflects public policy) is that of Holmes, the second that of the realists, and the third that of the critical legal scholars. Strangely, under these latter views, unlike under the Court's conception, the normative model supports the result in *Gregory*, the descriptive undercuts it.

policymakers.⁴⁹ If so, then the Court's failure to focus on the common-law role of the Missouri courts suggests a lack of confidence in its normative view of the *federal* judicial role because of its descriptive weakness.

In fact, Justice O'Connor *did* say that state judges are policymakers, she just was unwilling to do so in the part of her opinion that actually involved that question. Her Tenth Amendment discourse relied heavily on a line of equal protection cases in which the Court had backed away from its initial, confident announcement that aliens are a suspect class⁵⁰ and established a "political function" exception to strict scrutiny. These cases lowered the standard of review for citizenship requirements for "elective or important nonelective executive, legislative, and *judicial* positions [whose operations] go to the heart of representative government."⁵¹ Specifically, mere rationality review applies if the position to which the citizenship requirement is attached is "policy-making"; hence, strict scrutiny applies to a citizenship requirement for notaries public but not to one for probation officers.⁵² In borrowing from the political function cases to apply a Tenth Amendment-based plain statement rule for federal regulation of judges, Justice O'Connor thus decided the case without acknowledging that she did so. She concluded that judges are the kind of officials to which a state could attach a citizenship requirement because of their "political function."⁵³ They are therefore policymakers.⁵⁴

49. On the role of policy in constitutional decisionmaking, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Fallon, *supra* note 42, at 1243-46. For relatively bold calls for judicial policymaking in statutory cases, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990). The respondents in *Gregory*, displaying either strategic advocacy or the deep sincerity of their conviction that judges are policymakers, even when interpreting a statute, devoted a section of their brief to the proposition that exempting judges from the ADEA "is consistent with sound principles of public policy." Brief for Respondents at 29-30, *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

50. *Graham v. Richardson*, 403 U.S. 365 (1971).

51. *Sugarman v. Douglass*, 413 U.S. 634, 647 (1973) (emphasis added); *accord Bernal v. Fainter*, 467 U.S. 216, 221 (1984); *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-41 (1982).

52. *Bernal*, 467 U.S. at 227; *Cabell*, 454 U.S. at 439-40.

53. Although none directly involved judges, the cases on which she relies also took this view of the judiciary. See, e.g., *Sugarman*, 413 U.S. at 647; *id.* at 661 (Rehnquist, J., dissenting) (stating that "policymaking for a political community" involves "judges"). The author of *Sugarman* was Justice Blackmun, whose view of the centrality of judges to the functioning of representative government in that opinion seems inconsistent with his description of the judicial role in his dissent in *Gregory*.

54. Justice O'Connor's reliance on the Tenth Amendment might show judges (or at least these five Justices) to be policymakers in a second way as well. This view of federalism, it has been argued, has no foundation in the text, structure, or history of the Constitution, but simply reflects the Justices' "own conception of proper public policy." Dean Alfange, Jr., *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 S. CT.

One striking aspect of *Gregory*, then, is how subversive the idea of the policymaking judge remains. Only two Justices actually stated that judges make policy, and even they soft-pedalled by (1) noting that the statute required only that judges be "on the policymaking level," not that they actually be policymakers,⁵⁵ (2) focusing solely on judges' common-law functions, and (3) using a dictionary definition of "policy" that was so uselessly broad as to make the description of judges as policymakers uncontroversial.⁵⁶ Five Justices skirted the issue, even though they implicitly endorsed precisely this view of courts elsewhere, and two flat-out denied that policy was part of judicial decisionmaking.

This reluctance stems from the fact that the view of judges as policymakers conflicts with the present Court's highly majoritarian and deferential description of its own role. Unelected judges are not accountable to the public and policy choices may legitimately be made only by the people's representatives.⁵⁷ Against the background of its statements that what distinguishes courts is that they lack an electoral constituency and, therefore, do not make political decisions, it would have been quite awkward for the Court to suddenly announce that judges *do* make policy. Perhaps because questions of the Court's own legitimacy revolve almost entirely around con-

REV. 215, 216. It is also tempting to characterize the votes on the merits in *Gregory*, which conveniently align with the Justices' individual enthusiasm, of lack thereof, for civil rights legislation in general, as based on policy considerations.

Throughout (or almost throughout) this article, I avoid that common and easy critique, focusing instead on the Court's explicit statements about the judicial role. The two issues come together with an irony too stunning to resist, however, in Solicitor General Robert Bork's argument in *National League of Cities*. Arguing for the constitutionality of applying federal minimum wage and maximum hour standards to state employees, Bork conceded that federal regulation of the salaries of certain "policymaking" officials might exceed Congress's power. He also said that state judges might be immune from federal regulation, provoking the following exchange:

Q: But judges [do] not make policy generally.

MR. BORK: There is a school of thought centered in the Yale Law School, Mr. Justice Rehnquist, that suggest[s] that they do occasionally. But I was trying to prevent it in this case. [Laughter.]

Q: Touche.

Transcript of Reargument at 63, *National League of Cities v. Usery*, 426 U.S. 833 (1976); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (overruling *National League of Cities*) ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes.").

55. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2413 (1991) (White, J., concurring). The majority took the same tack. *Id.* at 2404.

56. See *supra* note 43.

57. See *supra* notes 5-10 and accompanying text; see generally DWORKIN, *supra* note 43, at 84-85; JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

stitutional decisionmaking, the Court failed to see that concerns over judicial policymaking are, if not inconsequential, at least greatly attenuated outside that arena.⁵⁸ The Court hewed closely to the image of judges as expositors rather than creators of the law, or at least as closely as it could without actually affirming it.

In contrast, the public function cases on which Justice O'Connor relied are explicit in determining the level of scrutiny in light of the actual rather than theoretical role of the official.⁵⁹ This is the sensible approach to take in assessing the constitutionality of a state statute. Indeed, Justice O'Connor took precisely that approach in evaluating the constitutionality of Missouri's mandatory retirement law.⁶⁰ It is clearly rational for a state legislature to view the world as it really is rather than as it is supposed to be. In addition, absent some actual indication to the contrary, it should be assumed that the legislature was concerned with the actual functioning of state officials. What counts in interpreting the ADEA, or any statute, is how judges function in the real world. Given the general consensus both on and off the Court that judges do make policy, the Court should not have shied away from this reality in interpreting the statute. The opinion would have been far stronger had it acknowledged directly rather than only implicitly that in the real world judges are policymakers. The descriptive rather than the normative model should control in interpreting a statute or assessing its constitutionality.

58. In theory, the legislature's power to reverse nonconstitutional judicial decisions eliminates concern over judicial overreaching. The legislature may be deemed to have handed the policymaking function to the courts, or at least to have accepted the courts' assumption of that function. In practice, of course, legislative correction is not so straightforward. Nonetheless, legislative silence at least in part reflects "either lack of political interest or some vague sense that the problems are being adequately handled by the courts." Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1005 (1977); see also ELY, *supra* note 57, at 4. Furthermore, precisely because the legislature lacks the time and energy to resolve every question, judicial refusal to make policy determinations is not necessarily a favor to the legislature, which may have sought the very judicial elaboration the court now refuses to provide. Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1679-80 & n.80 (1991). Duncan Kennedy describes "standards," as opposed to "rules," as just such a policymaking delegation to the judiciary. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 677 (1990) (noting conscious congressional delegations to courts).

59. E.g., *Bernal v. Fainter*, 467 U.S. 216 (1984).

60. The Court relied on judges' "general lack of accountability" to justify mandatory retirement for them but not other, more easily removed, officials. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2407 (1991). It noted that in theory the judges are accountable, because they are subject to periodic recall elections. Yet recall elections are not a meaningful check because the judges do not operate in the public eye and usually run unopposed. Furthermore, impeachment is impractical. In concluding that judges are not accountable, the Court thus focused on the practical rather than theoretical relationship between the judges and their ostensible constituents. *Id.*

IV. JUDGES AS REPRESENTATIVES

In *Chisom v. Roemer*, the Court had to decide whether elected judges are "representative." If judges are policymakers, and/or if they rank among the states' most important officials, whose selection must be left entirely to the citizens of the states, then it would be peculiar if they, at least those who are elected, were *not* the people's representatives.⁶¹ In light of the Court's view of election as the necessary and sufficient condition of accountability, representation, and legitimate policymaking, *Chisom v. Roemer* should have been an easy case. Yet, as in *Gregory*, the Court would not surrender its model of an apolitical judiciary so easily.

Section 2(a) of the Voting Rights Act⁶² outlaws any voting standard, practice, or procedure that denies the right to vote in any election on account of race. Under section 1(b), a violation of section 2(a) is established if the members of a class of citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁶³ Section 2(b) thus establishes a "results test" for section 2(a) violations, overruling *Mobile v. Bolden*,⁶⁴ which had required a showing of discriminatory purpose to establish a violation of the Act. The question in *Chisom v. Roemer* was whether section 2(b) applies to elections for judges. The State argued that section 2(b) applies only when a class is unable "to elect *representatives* of their choice,"⁶⁵ and judges are not "representatives."⁶⁶

Against the background of the Court's recent model of the judicial role, *Chisom* forced the Court to navigate between the Scylla of abandoning its view of judges as independent and apolitical and the Charybdis of abandoning its belief in a straightforward linkage of election with accountability and legitimate policymaking. When the issue of elected judges had briefly

61. The standard justification for electing judges is that "judges make policy [and] . . . like other policymakers, they should be accountable to the people in a representative political system." David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 772, 778.

62. 42 U.S.C. § 1973(a) (1988).

63. 42 U.S.C. § 1973(b) (1988).

64. 446 U.S. 55 (1980).

65. 42 U.S.C. § 1973(b) (1988) (emphasis added).

66. Until the Fifth Circuit's en banc ruling reviewed in *Chisom*, the lower courts had consistently held that section 2(b) did apply to judicial elections. See *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988); *Ewing v. Monroe County Mississippi*, 740 F. Supp. 417 (N.D. Miss. 1990); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988).

surfaced once before, the first view had triumphed.⁶⁷ This time it was the belief in popular electoral control that prevailed. In an opinion by Justice Stevens, the Court held that section 2(b) does apply to judicial elections. Reasoning circularly, it read "representatives" to refer to "the winners of representative, popular elections,"⁶⁸ a reading confirmed by the fact that the judges had to be residents of, and were elected by voters from, particular geographic districts.⁶⁹ Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, dissented. He argued that the ordinary meaning of "representatives" does not include judges, who do not act *on behalf* of the people in the way that legislators or executive officials do.⁷⁰ Although Justices Stevens and Scalia were both unhappy with the idea of popular influence on the judiciary, Justice Stevens saw it as an inevitable reality in a system of elected judges, whereas Justice Scalia insisted that a judge, elected or appointed, "represents the Law—which often requires him to rule against the People."⁷¹

A. Judges and Popular Opinion

For purposes of deciding the statutory issue, the Court could have begun and ended with the fact that these judges are elected.⁷² The Act's essential protection, as its title indicates, is of the right to vote. Section 2(a) reaches *all* elections and there is no obvious reason why section 2(b), which

67. This was in a summary affirmance of a district court ruling that the one-person-one-vote principle does not apply in judicial elections. The district court had reasoned that judges "serve" the people rather than "represent" them and, therefore, a rule designed to ensure the integrity of representative government does not apply to judicial elections. *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972). The case fell within the Court's mandatory appellate jurisdiction. Over three dissents, the Court affirmed without briefing, argument, or opinion. 409 U.S. 1095 (1973). *Wells* is typical of the lower courts' treatment of this issue. See generally Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1199-1202 (1989). For these courts, judges "are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964); accord *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972); *New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y. 1967). This logic is pure *Chevron*. There Justice Stevens wrote: "Courts must, in some cases, reconcile competing political interests, but not on the basis of the judge's personal policy preferences. . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865-66 (1984).

68. *Chisom v. Roemer*, 111 S. Ct. 2354, 2366 (1991).

69. *Id.*

70. *Id.* at 2372 (Scalia, J., dissenting).

71. *Id.*

72. See *LULAC v. Clements*, 914 F.2d 620, 657 (5th Cir. 1990) (en banc) (Johnson, J., dissenting); *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987).

merely explains how a violation of section 2(a) is established, should be any less extensive. It is not an oversimplification to say that if there is an election for public office, the Voting Rights Act applies.⁷³ Reduced to its essence, this is what Justice Stevens said. Specifically, however, he treated the reference to "representatives" as a limitation on the elections section 2(b) reaches. He then concluded that judges fall within that subset of all elected officials, primarily because they are elected. The flaw in this reasoning is that if "representatives" is a term of limitation, then election alone cannot make an official a representative; the premise is that there are elections for officials who are not representatives.

Even apart from the particular wording of this provision, the mere fact that judges are elected cannot in itself make them representatives.⁷⁴ That label depends not on whether judges are elected, but on what they are elected to do. To be representatives, judges must act on behalf of or be responsive to the public. Citing himself as authority,⁷⁵ Justice Stevens explains why they meet this test: To win elections, judges must be sensitive to the popular will, which means reaching substantive results that will meet with popular approval.⁷⁶ Thus, elected judges will follow majority (or vocal minority) policy preferences, making law rather than finding it. This is the obvious move for the author of *Chevron*, reaffirming the equation of election, responsiveness, and representation.

At least in theory, however, an elected judiciary need not consist of unconstrained law-makers. The electorate might believe that judges should ignore popular sentiment regarding specific legal or policy issues. If so, judges who make policy, even in the name of the people, would then go down to defeat at the polls.⁷⁷ Indeed, the fact that the public's elected rep-

73. The "vote" that the Act protects is defined to "include all action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, . . . casting a ballot, and having such ballot counted properly . . . with respect to candidates for public . . . office." 42 U.S.C. § 1973(l)(c)(1) (1988) (emphasis added). This comprehensive definition makes it clear that no election of a government official is excluded from the Act's coverage.

74. HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 116 (1967). As Justice Scalia retorted, with his usual sarcasm and more than his usual effectiveness, by that definition "the fan-elected members of the baseball All-Star teams are 'representatives.'" *Chisom*, 111 S. Ct. at 2372 (Scalia, J., dissenting).

75. *Chisom*, 111 S. Ct. at 2367 n.29 (citing John Paul Stevens, *The Office of an Office*, 55 CHL. BAR REC. 276, 280, 281 (1974)).

76. *Id.* at 2367. The same general idea emerges in Justice Stevens's dissents in *Baldwin v. Alabama*, 472 U.S. 372, 397-98 (1985), and *Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (1984) (expressing concern that an elected judge will be unable to ignore jury's recommendation of death sentence, especially since jury is the voice of the community).

77. J. Roland Pennock has pointed out that even if the representative is an agent, bound to support what a majority of her constituency desires, "[d]esires, of course, need not be self-regarding; they may relate to the realization of ideals." J. Roland Pennock, *Political Representation: An*

representative in the White House has found it politically expedient to promise that his judicial nominees will find law rather than make it⁷⁸ suggests that the public might vote directly for judicial candidates who made the same promise.⁷⁹ It is not inconceivable that the majority would see it as in its interest if the legislature made policy and judges were neutral servants of the law, especially since, as the majority, it controls the legislative policymakers.

Justice Stevens also mentions in passing that Louisiana judges are selected from separate geographical districts. The implication is that geographic division reflects, or creates, conflicting interests and invites judges to identify with those of their particular constituencies. This belief has an impressive pedigree. For one, it underlies diversity jurisdiction,⁸⁰ which reflects the assumption that state judges will favor and protect the interests of their fellow citizens. In other words, they are representatives. Any tribalism tendency to favor fellow citizens is significantly enhanced if the judge is elected, since one litigant may vote for her and the other cannot vote against her.⁸¹ Nonetheless, hailing from separate districts does not necessarily mean that judges will or should pursue only that narrow interest. First, the geographic diversity resulting from this requirement can be seen as merely an assurance that the courts are "representative" in the sense of being typical, just as Presidents avoid having too many Supreme Court Justices from any one state, or seek a Cabinet that "looks like America." Second, a longstanding thread of political theory, one that is especially appropriate as applied to judges, holds that an official owes a duty of representation not toward the home district but to the entire state or nation.⁸²

Overview, in NOMOS X: REPRESENTATION 3, 12 n.19 (J. Roland Pennock & John W. Chapman eds., 1968). This account of a non-policymaking elected judiciary would be an example.

78. In announcing his nomination of Justice Souter, for example, President Bush promised that the nominee "is committed to interpreting, not making the law." *Comments by President on His Choice of Justice*, N.Y. TIMES, July 24, 1990, at A18 (transcript of press conference). In the ensuing question and answer period, he reiterated six separate times that the nominee would "interpret the Constitution" rather than "legislate from the bench." *Id.* The President was following a long tradition. See generally HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 14 (2d ed. 1985) (recounting President Nixon's similar assurances on nominating Chief Justice Burger).

79. The point is significantly undercut by the fact that the President is appointing judges with life tenure.

80. See U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . ."); 28 U.S.C. § 1332 (1988).

81. Judge Neely states that local plaintiffs, who can vote in state judicial elections, enjoy an advantage over out of state defendants, who "can't even be relied upon to send a campaign contribution." NEELY, *supra* note 45, at 62.

82. Edmund Burke, *Speech to the Electors of Bristol*, in LEGISLATIVE POLITICS, U.S.A. 11 (Theodore J. Lowi ed., 2d ed. 1965); see also Pennock, *supra* note 77, at 12-13.

In short, it is easy to construct a model of an elected judiciary that does not consist of "representatives" as understood by Justice Stevens. Given Justice Stevens's dismay over popular influence on the judiciary,⁸³ the model should appeal to him. Yet, like the majority in *Gregory*, *Chisom* ultimately looked not to a theoretical model, but to a perceived practical reality. The extent to which elected judges do in fact respond to popular pressure is unclear. Judicial elections are notoriously ineffective tools for popular control given the lack of any real debate between opposing candidates (if not the lack of opposing candidates themselves), the generally small and uninformed electorate, and the frequency with which judges in an elective scheme are in fact appointed to fill vacancies.⁸⁴ Furthermore, judges' terms tend to be sufficiently long, and recall elections sufficiently irrelevant, to render judges practically unaccountable once in office. The *Gregory* Court made just this point.⁸⁵ Nonetheless, there is some support, both intuitive and empirical, for Justice Stevens's view of the world.⁸⁶ More importantly, the question for the Court was not the empirical one of whether elected judges do in fact heed popular sentiment, but the legal one of whether Congress thought they would do so. With regard to that question, the Court was clearly correct. Without a lengthy review of the Act and its history, the key point is that it would have been a mistake to read the Act as premised on a purely theoretical version of how courts operate. In deciding whether the statute applied, it was proper to look to reality, for that is what Congress does.

Blinking at reality is a central weakness of Justice Scalia's dissenting opinion. While Justice Stevens focuses on the link between elections and

83. *Chisom v. Roemer*, 111 S. Ct. 2354, 2366-67 (1991).

84. See generally *DuBois*, *supra* note 45, at 32-34 (describing these criticisms).

85. Hence the reference in *Gregory* to judges' "general lack of accountability." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2407 (1991); see also *supra* note 60. The plaintiff judges in *Gregory* were appointed (elected officials are expressly exempted from the ADEA's coverage) but subject to recall elections. Rather than seeing recall elections as a tool of popular control, the Court stressed that the elections came only every twelve years (six for some) and were usually meaningless because judges operate out of the public eye. *Gregory*, 111 S. Ct. at 2407. Thus, while willing to say that judges are policymakers the Court did not portray them as representatives in the sense of being subject to popular control.

86. For confirmation from an elected state-court judge, see *Neely*, *supra* note 45, at 1-4. See also *DuBois*, *supra* note 45 (concluding that as an empirical matter, partisan elections best ensure judicial accountability); Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 315-16 (1985) (discussing popular pressure on elected judges to be "tough on crime"); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1358-59 & n.251 (concluding that state court judges have been reluctant to enforce constitutional debt limitations in part because they are subject to the same political pressures that cause legislators to ignore such limitations in the first place).

accountability, Justice Scalia latches on to a different aspect of the *Chevron* model, namely the idea of an apolitical judiciary. For Justice Scalia, neither an elected judge nor an appointed one is a popular representative: "[T]he judge represents the Law—which often requires him to rule against the People."⁸⁷ But his argument is not that elections do not actually have an effect on judicial independence. He seems uninterested in whether they do; it is enough that they are not supposed to. To complete the circle, he accuses the majority of violating this vision of the judicial function, wielding the Voting Rights Act "as they please."⁸⁸ To Justice Scalia, the majority's approach is anti-democratic in two ways. First, it involves "judicial interference in democratic elections."⁸⁹ Second, this free-form, policy-driven approach to statutory construction undercuts Congress's ability to execute the popular will because it leaves Congress uncertain as to how its statutes will be read.⁹⁰ Judges *are* representatives, but their constituency is the elected branches of government from which they take instructions,⁹¹ or, more broadly, "the Law."⁹²

The difference between the majority and the dissent at the abstract level is minute. They share a theoretical commitment to an independent judiciary. Despite its holding, the majority stresses that "ideally public opinion should be irrelevant to the judge's role,"⁹³ and it plainly disapproves of electing judges. The majority is unable to rely on "the ideal character of the judicial office," however, given "the real world of electoral politics."⁹⁴ In contrast, the dissent looks to the ideal. Here again, as in *Gregory*, the ma-

87. *Chisom v. Roemer*, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting).

88. *Id.* at 2369 (Scalia, J., dissenting).

89. *Id.* at 2375 (Scalia, J., dissenting). This is a strange choice of words given Scalia's view of the merits. What makes these elections "democratic" if they are not for the purpose of selecting "representatives"?

90. This is a recurrent theme of Justice Scalia's. See *United States v. Taylor*, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring in part); Eskridge, *supra* note 58, at 677. It is unlikely that his approach to statutory interpretation would do for democracy all he claims. See generally Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175 (1992). *Chisom* is itself one of many examples where Justice Scalia has hampered rather than enhanced Congress's effectuation of the popular will.

91. Hence Larry Kramer's observation that "I cannot imagine Justice Scalia serving on a common-law court. For the considerations of justice and policy that are central to common-law adjudication—and that surely ought to remain a part of other forms of adjudication—are anathema to Justice Scalia's vision of judging." Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1798 (1991).

92. *Chisom*, 111 S. Ct. at 2372 (Scalia, J., dissenting). The "Law" with a capital "L" is clearly something external, found rather than made.

93. *Id.* at 2366-67.

94. *Id.* at 2367.

jority's approach is correct because it is more likely to be consistent with Congress. Justice Scalia devotes much of his statutory discussion to the need to focus on the ordinary meaning of the term representatives. One can grant him his point, but it does not resolve the case. The hard question is whether we look to judges as they are or as they are supposed to be. The former fits within the "ordinary meaning" of the term, the latter does not. Justice Scalia does not indicate why Congress would have directed the statute at an idealized, purely hypothetical judiciary.

Finally, the majority and the dissent might be reconciled to some degree in a model of the representative as trustee, exercising independent judgment, rather than as a delegate adhering to a popular mandate. Such was the original conception of elected federal officers.⁹⁵ Developing such a model is precisely the goal of almost all efforts to explain away the counter-majoritarian difficulty of judicial review, of advocates of "dynamic" statutory interpretation,⁹⁶ and of those scholars who prescribe a role for the courts in correcting government's anti-democratic aspects.⁹⁷ The trustee model is not limited to elected judges. Just as elected officials are not necessarily representatives, so representatives need not necessarily be elected. Indeed, given Justice Stevens's positions in *Gregory* (that appointed judges clearly are policymakers) and *Chevron* (that policy should be made by officials who are accountable to the public), one would expect him to be reassured, not bothered, by the claim that judges have representative obligations. Some notion of the judge as trustee is necessary to reconcile these diverging tendencies.⁹⁸ Within the judicial system, the jury is a rele-

95. See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY* 24-26 (1989); THE FEDERALIST No. 71, at 366 (Alexander Hamilton) (Max Beloff ed., 1987) (noting representative's duty to pursue the people's "interests" over their "inclinations"); *id.*, No. 10, at 82 (James Madison) (placing the advantage of representative over direct democracy in the former's tendency to "refine and enlarge the public views"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-48 (1985).

96. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1523-33 (1987).

97. E.g., SUNSTEIN, *supra* note 49.

98. Had Justice Brennan still been on the Court for *Chisom*, he surely would have been in the majority and might well have assigned the case to himself. One wonders whether he would have developed the idea of representative judges as trustees. He implicitly offered such a view in a 1984 lecture. In interpreting the Constitution, he stated, the Justices "speak for their community," for "it is, in a very real sense, the community's interpretation that is sought." Thus, judges are representatives. On the other hand, in the same speech he acknowledged that most of his fellow-citizens disagreed with his view that capital punishment is per se unconstitutional. Thus, judges are not delegates, bound by a popular mandate. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Speech (Oct. 12, 1985), in *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 4, 13 (1985); see also William J. Brennan, Jr., *Lecture* (Sept. 17, 1987), in *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 23 (1988) (arguing

vant though imperfect model of unelected representatives. The Court, quite properly, views the jury as the public's representative.⁹⁹ Yet jurors are unelected and unaccountable. They do not seek reappointment (indeed, for a time service disqualifies); there is no popular review of their verdict, and any effort to sway a jury in light of expected public reaction to a verdict is forbidden.

B. Symbolism and Representativeness

"Representation" has two meanings in addition to the political one just discussed. First, it can be purely symbolic, the way the flag represents certain values and institutions. Second, it can refer to typicality, as in the case of a "representative" subgroup so like the larger group from which it is drawn that its views and preferences will correspond with those of the larger group. These aspects of representation merit a slight detour because they took center stage with the nomination of Clarence Thomas and because they underscore the general acceptance of the descriptive model of the judicial function.

Justice Thomas's central, although not only, qualifications for appointment to the Supreme Court were his skin color and his biography. Some saw these as valuable because of the perspective they give him on legal issues.¹⁰⁰ For the White House, however, the point was not who Clarence Thomas represents but what he represents. As President Bush stated in announcing the nomination, "Judge Thomas's life is a model for all Americans, and he's earned the right to sit on this nation's highest court."¹⁰¹ It was as a "model," a symbol, that Judge Thomas had most distinguished himself and "earned" a place on the Supreme Court. Comparison with the previous year's packaging of Justice Souter drives the point home. The President defended Justice Souter in the usual Republican manner, by con-

that "reliance on formal rules alone," untouched by passion, cannot satisfy the courts' constitutional obligations to "our ultimate sovereign—the people.").

99. See, e.g., *Glasser v. United States*, 315 U.S. 60, 85 (1942) (describing representative jury as part of "our basic concepts of a democratic society and a representative government"). Indeed, a few months before deciding *Chisom*, the Court wrote:

Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people. . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Powers v. Ohio, 111 S. Ct. 1364, 1369 (1992) (citations omitted) (striking down prosecutor's use of race-based preemptory challenges).

100. See, e.g., Maya Angelou, *I Dare to Hope*, N.Y. TIMES, Aug. 25, 1991, § 4, at 15; Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15.

101. *The Supreme Court: Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14.

stantly returning to the theme that Souter would find the law rather than make it.¹⁰² Justice Souter's key credential was that he would *not* be a representative policymaker in the political sense, and the mechanical task for which he was qualified was one as to which "representativeness" was irrelevant.¹⁰³ This rhetoric was completely in the background in the case of Justice Thomas, obscured by his looming symbolic presence. Of course, as so many have pointed out, Justice Thomas's nomination symbolizes not only hard work and upward mobility, but also the triumph of the civil rights laws, affirmative action, and, arguably, a quota system for Supreme Court appointments.

The Thomas nomination was also a response to the complaint that the judiciary is not adequately "representative" of society as a whole. Advocates of a more representative bench¹⁰⁴ often fail to identify precisely the value of such diversity. Three overlapping justifications are implicit. First, the bench, like any profession, should be open to all regardless of race or gender. This justification is concerned with the benefit to those who become judges, not the public at large. It is only coincidentally about representativeness. Second, a "representative" judiciary (or Congress or school board) has symbolic value. Those subject to the commands of a governing body will have more confidence in and respect for that body if it includes a member or members who are "like" them.¹⁰⁵ Third, representativeness will affect substantive outcomes; that is the basic realist critique and the assumption, or hope, underlying much reluctant support for the Thomas

102. See *Comments by President on His Choice of Justice*, N.Y. TIMES, July 24, 1990, at A18 (transcript of press conference); see also *supra* note 78.

103. As a symbol, Justice Souter had little to offer under the Republican value system. True, he was fond of his mother, but in a solitary "confirmed bachelor" this was as much a liability as an asset. Nor could he be said to "represent" some portion of a diverse citizenry. See Edith Adame, *How Could a Hermit from New Hampshire Possibly Understand Multicultural America*, L.A. DAILY J., Aug. 29, 1990, at 6. His reclusiveness was sold as an aspect of sound, unrepresentative judicial temperament.

104. E.g., Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U. L. REV. 494, 512-14 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

105. Recalling the Carter administration's efforts to add women and minorities to the bench, former Attorney General Griffin Bell stated that "[a]ffirmative action was designed *solely* to give the American public more confidence in the federal courts." *WHOM DO JUDGES REPRESENT?* 5 (1981) (Am. Enterprise Inst. F. 53) (emphasis added). Similarly, the New York State Governor's Task Force on Judicial Diversity—establishment of which was prompted by the *Chisom* decision—seeks to add minorities and women to the bench because "[w]e want to be sure that in both appearance and reality everyone can see that the bench is above and not tainted by discrimination. Right now, the numbers don't lead to that kind of confidence." Gary Spencer, *Judicial Election Reforms Urged*, N.Y. L. J., Feb. 13, 1992, at 1, 2 (quoting Evan A. Davis, chair of the Task Force). This argument blends the first and second justifications.

nomination. These latter two justifications are linked. It is because decisions are affected by the decisionmaker's background and group membership that "representativeness" has symbolic value. Public confidence in governing bodies hinges much more on their representativeness than does public confidence in, say, the space program. Thus, the reason "representativeness" matters with regard to judges is that they *do* act on behalf of the public and they do so through the elaboration of norms that are not wholly objective. It is not a pun to link judges as "representatives," as in *Chisom*, and the "representativeness" of the judiciary. It is because they are the first that the second matters. That is also why plaintiffs bring cases like *Chisom* and one reason why the Voting Rights Act should apply to judicial elections. One striking aspect of the *Chisom* opinion is that it never even hints at this. The whole point of the litigation, which was brought by a class of 135,000 African-American registered voters, was to put more minorities on the bench. The proverbial Martian would have a hard time gleaning this from the Court's opinion. The opinion is written within the parameters of the usual normative view of judging, under which factors such as the race of the judge do not matter.

Although the criteria of representativeness change, it has *always* been accepted that the judiciary should be representative. Supreme Court appointments, for example, have always reflected a balance of religion, geography, and background. Variety per se is not the inherent value, for there is an implicit or explicit understanding as to which features should be diverse and which consistent. Hence the general scorn for Senator Hruska's argument that G. Harrold Carswell should sit on the Court because "there are a lot of mediocre judges and people and lawyers" and "[t]hey are entitled to a little representation, aren't they?"¹⁰⁶ Identifying the varieties of background and experience that are valuable in the judiciary reveals a good deal about what we think judges do. The further afield one gets from legal expe-

106. ABRAHAM, *supra* note 78, at 16-17. Hruska's full defense was: "Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance. We can't have all Brandises, Cardozos, and Frankfurters, and stuff like that there." *Id.* Perhaps unintentionally, Hruska's comment announced disdain for how the idea of a "representative" Court had functioned in the past. Carswell was nominated to replace Abe Fortas, who was the last holder of the Court's "Jewish seat." In historical context, the most notable fact about Carswell, other than his mediocrity, was that he was not Jewish. Hruska's list of non-mediocre Justices is astonishing in that it consists, in its entirety, of the three best-known of the Court's five Jewish Justices. Thus, Hruska was saying, almost literally, that if Jews are to have representation, so should the mediocre; indeed he was in a sense arguing for eliminating the Jewish seat in favor of the mediocre seat. This gives a different flavor to the observation that "we can't have all"—or any—"Brandises, Cardozos, and Frankfurters, and stuff like that."

rience, the more it seems that judges make rather than find the law.¹⁰⁷ But *whatever* qualities should be represented, the very fact of any argument for variety of background indicates an understanding that the law is not found in a Blackstonian sense but is inescapably fluid and in a process of judicial creation. Arguments about judicial representativeness rest on the realist conclusion that judges are representatives.

C. *Mandatory Retirement and Representativeness*

This brings us back to the opinions in *Chisom* and *Gregory*. A standard justification for mandatory retirement of judges has been that it opens up positions for women and minorities, thus enabling states to make their judiciaries more representative. This is hardly a timeless justification. It may hold at this particular historical moment, when the bench is still predominantly male and white, but there is some movement to appoint women and minorities. However, once the new appointees are on the bench, mandatory retirement will prevent them from staying there, and there is no guarantee as to who their replacements will be.¹⁰⁸ Furthermore, requiring judges to step down at seventy will hardly make or break a shift to a more diverse

107. A recent debate over the appointment process for Supreme Court Justices illustrates exactly this point. David Strauss and Cass Sunstein have proposed that the Senate play a much more central role than has recently been the case, giving no deference to the President's selection and insisting on a real, *pre-nomination* advice function. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992). Part of their project is to produce a Court that comprises justices of diverse jurisprudential views. *Id.* at 1510-12. The call for intellectual diversity of course assumes that the judge's task is to some degree discretionary and requiring "judgment."

John McGinnis has forcefully responded to Strauss and Sunstein. John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEXAS L. REV. 633 (1993). For McGinnis, the President has a constitutional obligation to propose nominees who share the President's jurisprudential views; if this leads to an intellectually homogenous Court, that is if anything a strength.

It may be the highest commendation for a legislature that it represents the diverse views of the citizenry and thereby serves as a vehicle for democratic compromise. Under the traditional view that the law is distinct from politics, it is hardly the highest commendation, however, that a court is representative. Indeed, in a structure with constitutional judicial review, one of the essential tasks of the Court is to enforce constitutional provisions against the will of a representative legislature.

Id. at 651 (footnote omitted).

Whether Strauss and Sunstein or McGinnis correctly reads the Appointments Clause is not relevant for present purposes. The point is only that these divergent views on diversity within the Court reflect quite different views about what it is judges do.

108. This point has a parallel in debates over *stare decisis*, in which the same built-in tension appears. To those seeking doctrinal change, "retiring" old precedents may be appealing. Yet this disregard for precedent will ultimately undermine the very changes it permits. See David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1715-16 (1991).

judiciary. The average male life span is not much more than seventy and many judges voluntarily retire before or around seventy. Nonetheless, lower courts upholding the legality of mandatory retirement for judges have often referred to this justification.¹⁰⁹ The courts have also invoked a second, related notion of representativeness. Mandatory retirement is said to ensure that the judiciary will not become fossilized; the resulting turnover will give us "judges who command respect because they share experiences and understandings similar to those of the majority of adult citizens."¹¹⁰

The goals of diversity and currency are conspicuously absent from the *Gregory* Court's discussion of the statute's rationality under the Equal Protection Clause. Given the opportunity to develop an idea of a judiciary that is representative and in tune with the times, the Court carefully avoids it. This is not surprising, for the idea that mandatory retirement will prevent an anachronistic judiciary reinforces the idea of judges as policymakers. It is because judges are policymakers that they need to be in touch. It is because the law is not external, constant, and found that those who have been on the bench the longest are not necessarily the best equipped to judge. Similarly, the *Chisom* Court at no point indicates that a more representative set of judicial representatives might be valuable; if anything, its hostility to elected judges implies the opposite.¹¹¹

109. *E.g.*, *EEOC v. Massachusetts*, 858 F.2d 52, 58 (1st Cir. 1988); *Apkin v. Treasurer and Receiver Gen.*, 517 N.E.2d 141, 146 (Mass. 1988).

110. *Apkin*, 517 N.E.2d at 146 (1988); *see also* *O'Neil v. Baine*, 568 S.W.2d 761, 767 (Mo. 1978) (en banc).

111. One other case from the 1990 Term required the Court to decide what defines a "court." *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991), was a challenge to appointments of special trial judges by the Chief Judge of the Tax Court. All nine Justices agreed that special trial judges are "inferior officers" for purposes of the Appointments Clause. *Id.* at 2641. Thus, they can be appointed only by the President with the Senate's advice and consent, the President alone, "the Courts of Law, or the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. The first two categories obviously did not apply. Five Justices found that the Tax Court is a "court of law" and four upheld the arrangement on the ground that the Chief Judge head a "department."

Justice Blackmun's majority opinion has a familiar ring: What makes the Tax Court a court? "It is neither advocate nor rulemaker. As an adjudicatory body, it construes statutes . . . and regulations It does not make political decisions." *Freytag*, 111 S. Ct. at 2645. Thus, Justice Blackmun measures the Tax Court by the standard normative vision of courts. The case was easy because there was no need to confront the competing descriptive version. The concurring Justices disagreed not over the nature of courts but over the meaning of the Appointments Clause. Justice Scalia acknowledged that the Tax Court was a court. However, he argued that, like the Supreme Court of Rhode Island, for example, it was not one of "the Courts of Law" referred to by the Appointments Clause.

V. JUDICIAL LEGISLATION

The Justices' normative model of *courts* is not applicable to all adjudicators. Administrative agencies regularly make policy through adjudication.¹¹² Presumably, the Court would say that this is appropriate because, as *Chevron* explained, agencies enjoy the legitimacy that comes from (indirect) electoral accountability. Policymaking via agency adjudication has certain characteristics that are not part of the conventional picture of judicial decisionmaking. Three stand out: Frequent shifts of policy, decisions that are often prospective, and a docket that reflects the perceived need for action. Not coincidentally, these characteristics are even more prominent in the archetypal representative policymaker, the legislature. In contrast, under the conventional view courts are bound by *stare decisis*, their decisions are retroactive, and they merely resolve those disputes that happen to come to them.

In this Part, I discuss these aspects of the mechanics of judicial decisionmaking. If *Chisom* and *Gregory* suggest, although ambivalently, a view of courts as representative policymakers with regard to the inputs or bases of their decisions, *Payne v. Tennessee*¹¹³ and *James B. Beam Distilling Co. v. Georgia*¹¹⁴ suggest such a view with regard to these mechanics. We again see the tug of the normative model, its ultimate rejection, and formalist objections to the outcome.

A. *Stare Decisis*

In theory, courts respect their own precedents. The doctrine of *stare decisis* tends to be honored, however, primarily in the breach. The gap between theory and practice was evident in *Payne*. Overruling *Booth v. Maryland*¹¹⁵ and *South Carolina v. Gathers*,¹¹⁶ four and two years old respectively, *Payne* held that the Constitution permits the prosecution in a capital case to introduce evidence of the impact of the crime on the victim's survivors.

As I have discussed, *Gregory's* Tenth Amendment rhapsody had unacknowledged implications for the issue on the merits in that case¹¹⁷ and in *Chisom*.¹¹⁸ It also holds a lesson with regard to the weight of precedent, an

112. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

113. 111 S. Ct. 2597 (1991).

114. 111 S. Ct. 2439 (1991).

115. 482 U.S. 496 (1987).

116. 490 U.S. 805 (1989).

117. See *supra* notes 50-54 and accompanying text.

118. See *supra* text accompanying note 61.

issue confronting the Court in *Payne*. That lesson comes from the Court's pendular treatment of the Tenth Amendment in the past. In *Maryland v. Wirtz*,¹¹⁹ the Court upheld congressional regulation of state employees; eight years later, in *National League of Cities v. Usery*,¹²⁰ it reversed itself and held that the Tenth Amendment forbids Congress to interfere with the states' performance of traditional governmental functions; nine years after that, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹²¹ it reversed itself over dissents promising that *National League of Cities* would rise again.¹²² Read against this background, Justice O'Connor's Tenth Amendment discussion in *Gregory* was not so much necessary for the decision of the case as it was an announcement that the foretold overruling of *Garcia* is imminent.¹²³ That, in turn, indicates that the claims of stare decisis are weak—which this sequence of decisions had already quite amply demonstrated.

The view of precedent implicit in *Gregory* is explicit in *Payne*. Confronted with recent and dispositive precedents, Chief Justice Rehnquist's opinion for the Court offers the standard view that precedent is less binding in constitutional cases than in statutory cases and the more controversial claim that it is less important in "cases such as the present one involving procedural and evidentiary rules" than in cases "involving property and contract rights, where reliance interests are involved."¹²⁴ Since *Booth* and *Gathers* were 5-4 decisions, over "spirited dissents," which had proven difficult to apply, this watered-down stare decisis did not stand in the way of overruling them.¹²⁵ Concurring, Justice Scalia quoted some of Justice Marshall's older statements about the non-binding nature of precedent and argued, as is implicit in any overruling decision involving a constitutional issue, that the overruled cases were the real aberrations and that *Payne* was a return to settled principles.¹²⁶ Of the Justices in the majority, Justice Souter seemed to feel the pull of precedent most strongly. However, he con-

119. 392 U.S. 183 (1968).

120. 426 U.S. 833 (1976).

121. 469 U.S. 528 (1985).

122. *Id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

123. In what many thought would be the vehicle for doing so, however, the Court further invigorated the Tenth Amendment but stopped shy of overruling *Garcia*, at least explicitly. See *New York v. United States*, 112 S. Ct. 2408 (1992).

124. *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991).

125. *Id.* at 2610-11.

126. *Id.* at 2613-14 (Scalia, J., concurring).

cluded that the necessary "special justification" for overruling was present because *Booth* and *Gathers* had proved unworkable in practice.¹²⁷

Justice Marshall's dissent, his final opinion as a Supreme Court Justice, is a thunderous, perhaps bombastic, defense of stare decisis. From its striking, though overstated, opening soundbite—"Power, not reason, is the new currency of this Court's decisionmaking"¹²⁸—the dissent, which was joined by Justice Blackmun and more or less endorsed by Justice Stevens,¹²⁹ is a rhetorically unrestrained attack on the majority's methodology. Justice Marshall argued that stare decisis serves important purposes in promoting reliance, encouraging compliance by the public and by other courts, and in protecting the politically unpopular. Repeatedly stating that nothing had changed since *Booth* and *Gathers* other than the Court's personnel, he stressed that adherence to precedent demonstrates that the Court is constrained by law and not merely following its own predilections.¹³⁰

1. *Payne*, Stare Decisis, and Law Finding

Many Justices have identified a link between stare decisis and constraints on judicial policymaking. Consider Justice Powell:

Perhaps the most important and familiar argument for *stare decisis* is one of public legitimacy. The respect given the Court by the public, and by the other branches of government, rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the judicial power prescribed by the Constitution. An important aspect of this is the respect the Court shows for its own previous opinion.¹³¹

127. *Id.* at 2614-19 (Souter, J., concurring). The "special justification" standard from *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), is invoked by Justice Marshall as well. *Payne*, 111 S. Ct. at 2621-22 (Marshall, J., dissenting).

128. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting). The criticism is familiar. See *supra* note 39; see also Guido Calabresi, *Tom Emerson: The Scholar as Hero*, 101 YALE L.J. 315, 316 (1991) (bemoaning "a Supreme Court that, in its eagerness to execute those whom it deems guilty, cares little for precedent, logic, or human decency") (emphasis in original).

129. *Payne*, 111 S. Ct. at 2625 (Stevens, J., dissenting).

130. *Id.* at 2618, 2623-24 (Marshall, J., dissenting); see also *Solario v. United States*, 483 U.S. 435, 466 (1987) (Marshall, J., dissenting).

131. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 44 RECORD ASS'N BAR 813, 819 (1989); see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2814-15 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (noting that "[t]he Court's power lies in its legitimacy, a product of substance and perception" that could fade if too "frequent overriding . . . overtax[ed] the country's belief in the Court's good faith" and was "taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term"); *Vazquez v. Hillery*, 474 U.S. 254, 265 (1986) (stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals"); *Florida Dep't of Health*

To be sure, this may merely be one part myth and two parts public relations. Justices making this point invariably express concern not with how the Court actually decides cases but with how it is popularly perceived to do so, which may indicate that they deem the perception accurate (at least descriptively) but dangerous.¹³² Moreover, a law-finding judge would appropriately overrule precedent on the ground that the prior court had improperly *made* law. Indeed, that is the standard formulation.¹³³ The primary guardians of the guardians, after all, are their successors. Any substantive theory of proper decisionmaking must allow for overruling, for the very existence of the theory means that some decisions may be wrong. If the substantive theory is that judges should not impose their own policy preferences, then overruling a decision in which a prior court did so is consistent with the overall approach.

Nonetheless, a link does exist between policymaking and freedom from precedent. The link can be seen in the way judges treat flip-flopping agency "interpretations" of statutes. Traditionally, such shifts by the agency undermined the deference accorded by a court.¹³⁴ This approach only makes sense if the agency is finding the law embedded in the statute. If there is nothing to find, and the agency's "interpretations" are simply policy decisions with no "right" answer under the statute, however, then there is no reason to be suspicious about a change; to the contrary, it may reflect just the responsiveness we value in agencies.¹³⁵ Ignoring precedent is also a typical and appropriate characteristic of legislatures. Adherence to precedent impedes responsiveness, which is precisely why such adherence is a good thing for courts and a bad thing for legislatures. Rejection of precedent may frequently reflect responsiveness or, in the words of the *Casey* joint

& Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 151-55 (1981) (Stevens, J., concurring); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970) (Harlan, J.); *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (Frankfurter, J., dissenting); ARTHUR GOLDBERG, *EQUAL JUSTICE: THE WARREN COURT ERA OF THE SUPREME COURT* 75-76 (1971); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2, 5 (1983).

132. See RONALD DWORKIN, *LAW'S EMPIRE* 152-55 (1986) (discussing "as-if rights" and pragmatist's "noble lie" that decisions rest on statute or precedent); cf. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949) (rejecting argument that public confidence in the Court depends on perception of doctrinal stability and arguing that frank overruling will breed understanding "[a]nd confidence based on understanding is more enduring than confidence based on awe").

133. EDWARD J. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 7-8 (1949).

134. *E.g.*, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

135. *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1125-26 (1987).

opinion, "political pressure."¹³⁶ For a judge who sees her role as promulgating correct social policy, precedent is a hindrance.¹³⁷ The notion that the overruling court is simply "finding" the true law where it had been all along is likely to be merely a "magnificent disguise,"¹³⁸ and will quickly ring hollow if too often invoked. If judges do find law, one obvious place to look is in their own past decisions.¹³⁹ Overall, then, the more freely courts overrule their own precedents the more they are just making it up.¹⁴⁰

The majority and concurring opinions in *Payne* are conspicuously silent about the link between stare decisis and law-finding. The Court discusses only the other prominent justification for stare decisis, namely, protection of settled expectations.¹⁴¹ The Court looks at stare decisis exactly as a legislature does, deeming itself free to change as long as doing so is not too disruptive. Only the dissent argues that the law exists independent of the current preferences of a majority of the Justices, objecting to the majority's disregard for "the law of the land."¹⁴² Justice Scalia virtually comes right out and rejects this line of argument as empty formalism.¹⁴³ The Court's casual dismissal of the claims of precedent implicitly rejects the ideal for the real, and suggests that the court is more policymaker than lawfinder.¹⁴⁴

136. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2815 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

137. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 741 n.108 (1988) ("stare decisis is undercut by law teachers and their deep-rooted belief that lawyers are social engineers").

138. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1378-79 (1990).

139. Stevens, *supra* note 131, at 5. Thus Justice Scalia has explicitly equated overruling with lawmaking, observing that disincentives to overruling are important "checks upon judicial law making." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991).

140. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 70-71 (1991); Monaghan, *supra* note 137, at 753 (arguing that adherence to precedent will minimize "the existing cynicism that constitutional law is nothing more than politics carried on in a different forum").

141. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

142. *Id.* at 2621, 2623 (Marshall, J., dissenting).

143. *Id.* at 2613 (Scalia, J., concurring) ("[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes.") (emphasis in original).

144. The Court's treatment of stare decisis shows that the Court is a policymaker in a second sense as well. Stare decisis has always been deemed "a principle of policy." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Indeed, an amicus brief in *Gregory* pointed to the courts' balancing of competing considerations in deciding whether to overrule as proof that judges are policymakers and therefore exempt from the ADEA. *Payne* is typical in that it implicitly denies any constitutional limit on overruling and weighs, balances, and argues about consequences.

Policy concerns are, by definition, prominent here. Stare decisis has no meaning if it merely requires a court to follow precedent unless it disagrees with it. A prior decision's inaccuracy cannot alone justify overruling. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172

Ironically, the Court relies on precedent to show that it has the authority to abandon precedent.¹⁴⁵ It does so precisely to show that it is operating as courts are supposed to and not just making things up as it goes along. Other judges have overruled decisions in the past; we are adhering to the law of stare decisis which we find in our own precedent. The Court nods toward the normative ideal of consistency, even while destroying that ideal in its ruling on the merits. By its opinion-writing style, the Court confirms that stare decisis preserves the appearance or reality of judges doing something other than merely following their own predilections. Yet one is not convinced. The majority does not appear to be constrained by precedent. For every decision that respects a prior ruling there is a decision that ignores one. The contrast between the majority opinion and Justice Souter's concurring opinion is that Justice Souter at least gives the impression of honestly grappling with the Court's precedent about precedent. There is, in short, no coherent doctrine of stare decisis to be drawn from prior cases. The prior cases thus become not a requirement but an excuse. This is, of course, hardly the only body of law for which this is true. It is a common observation, and only a slight exaggeration, that given the maturity of our legal system, the number of courts, and the existence of computerized data bases, a precedent can always be found.

Payne identifies the Court as a representative policymaker in two other ways that merit brief mention. First, the decision resulted from a series of appointments by Republican Presidents. The predecessors of Justices Kennedy and Souter had been in the *Booth* and *Gathers* majorities. At the theoretical level, doctrinal transformation through changes in personnel is justifiable only if the Justices are supposed to "represent" the popular will as implemented through Presidential appointment. All three *Chisom* dissenters, who denied that judges represent the people, were in the majority in *Payne*, in which they did just that. Chief Justice Rehnquist has described the appointment process as a mechanism for "indirect infusions of the pop-

(1989); Maurice Kelman, *The Forked Path of Dissent*, 1985 S. CT. REV. 227, 231-32. Under the principle of stare decisis, the Court will allow its legal errors to stand unless *policy* considerations—the "special justification" of impracticality or unworkability—require abandoning them. Stare decisis is thus exactly the opposite of the usual conception of judicial decisionmaking, under which courts are bound to follow the law, even if it is inconvenient or silly. Instead, courts *ignore* the law, unless doing so is inconvenient or silly. The legal mandate is soft, the policy considerations hard.

The doctrine of stare decisis is in this sense at odds with the Court's conception of a non-policymaking judiciary. In this setting, however, the Court is making policy only for itself. That does not make it a policymaker in its governmental capacity. See *supra* note 43.

145. *Payne*, 111 S. Ct. at 2609-10; *id.* at 2617-19 (Souter, J., concurring).

ular will."¹⁴⁶ The recent history of the judicial nomination and confirmation process only confirms this view. Qualification for the judiciary is evaluated almost solely in terms of the political desirability of the nominee's anticipated votes.¹⁴⁷ In *Payne*, the Court rose, or fell, to these expectations. Indeed, some commentators have expressed concern that treating judges as mere politicians in robes, both during confirmation battles and once on the bench, will be a self-fulfilling prophecy.¹⁴⁸ *Payne* was one of several cases from the 1990 Term in which the new Justices might be said to be delivering the goods, as promised.¹⁴⁹

The second way in which *Payne* reveals the Court as a representative policymaker is that the opinions give a strong sense that the Justices in the majority felt they were not only setting matters right when they had been askew, but also that they were reconciling constitutional doctrine with popular sentiment.¹⁵⁰ This reconciliation is easily overstated, because Eighth

146. William H. Rehnquist, *Presidential Appointments to the Supreme Court*, 2 CONST. COMM. 319, 320, 330 (1985). This article is reprinted essentially unchanged as chapter 10 of WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS HOW IT IS* (1987). Justice Scalia too seemed to endorse this theory of public influence on the judiciary when lamenting the Court's failure to give it its full effect in *Gathers*. See *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

147. Ely, *supra* note 21, at 842-54.

148. See, e.g., Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838-39, 854-55. On one account of the history of Supreme Court nominations, highly politicized, ideologically based confirmation battles have had the effect of making the Court, in perception and reality, a more political institution. Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 84-87 (1983).

149. See generally Green, *supra* note 19.

150. Justice Rehnquist observed that theories of sentencing "have varied with the times," that the "pendulum has swung back" toward more determinate sentencing, and that "in recent years . . . consideration of the harm caused by the crime has been an important factor in the exercise of" judicial discretion in sentencing. *Payne v. Tennessee*, 111 S. Ct. 2597, 2605-06 (1991). Justice O'Connor pointed out that "there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family Just the opposite is true." *Id.* at 2612 (O'Connor, J., concurring). Justice Scalia argued that "*Booth's* stunning *ipse dixit* . . . conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victim rights' movement." *Id.* at 2613 (Scalia, J., concurring). To be fair, Justice Scalia's invocation of the "public sense of justice," read in context, is not a full-fledged endorsement of that as the standard by which prior constitutional decisions are to be evaluated. The phrase is borrowed from an opinion by Justice Marshall which in turn quoted a law review article. See *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959)).

The "nationwide 'victim rights' movement," to which Justice Scalia referred, figured prominently in one of the rare judicial elections of real salience: The 1986 retention election in which California Supreme Court Chief Justice Bird and Associate Justices Grodin and Reynoso were defeated. JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* 178-79 (1989). This is probably the political force with the greatest potential to

Amendment cases always involve some reference to popular standards as a measure of what is "cruel and unusual."¹⁵¹ Yet the usual rhetoric can make its way into Eighth Amendment decisions,¹⁵² and is missing here. Indeed, Justice Stevens's dissenting accusation was that the majority was acting too much like elected representatives, caving in to the "hydraulic pressure" of public opinion.¹⁵³

2. Stare Decisis and Leaving Policymaking to Others

Although a weak rule of stare decisis is inconsistent with the understanding of how judges theoretically operate, it may, at least in settings such as *Payne*, owe a good deal to the Court's theory of leaving policymaking to others. To the extent that this is true, *Payne* does not contradict the Court's normative vision.

Stare decisis is usually understood to be weightier in statutory than in constitutional cases because in the former the Court need not correct itself; Congress will correct the Court's errors and congressional inaction indicates that the decision is correct. The *Payne* opinion repeats this observation, with the customary cite to Justice Brandeis.¹⁵⁴ This approach also corresponds with the deferential ideal; the Court yields to Congress's primary role. If this principle is valid,¹⁵⁵ it might not only distinguish statutory from constitutional precedents, but may distinguish between

affect judicial decisionmaking. See Allen, *supra* note 86. It is at least plausible to argue that in California in 1986, the retention election served its supposed function of ensuring judicial accountability. *Payne* implies a vision of appointed federal judges as responsive, notwithstanding the absence of the mechanism of accountability.

151. *E.g.*, *Ford v. Wainwright*, 477 U.S. 399 (1986).

152. See, *e.g.*, *Stanford v. Kentucky*, 492 U.S. 361, 378-80 (1989) (plurality opinion) (to hold capital punishment of juveniles unconstitutional would be to follow "our personal preferences" and "replace judges of the law with a committee of philosopher-kings").

153. *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)). Justice Stevens's citation of Holmes's *Northern Securities* dissent is loaded. That dissent is one of the standard examples of a Justice disappointing the President who appointed him. ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 686 (2d ed. 1990). It was the opinion that prompted Theodore Roosevelt to complain that he could carve a judge with more backbone out of a banana. *Id.* Stevens's reference implicitly accuses the more recent appointees of being too dependable.

154. *Payne*, 111 S. Ct. at 2610 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

155. It may not be. It is routinely objected that congressional silence means nothing because it has many causes other than agreement. See, *e.g.*, Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 682 (1987). That is only an argument against making statutory precedents absolutely binding, however. As long as statutory change is easier than constitutional amendment, statutory precedents deserve relatively greater weight. In any event, there are other arguments besides implicit congressional endorse-

constitutional precedents. As Professor Monaghan has pointed out, constitutional decisions that reject rights-based arguments *can* be "overruled" by statute.¹⁵⁶ After *Payne*, Tennessee's legislature is free to forbid introduction of victim impact evidence; its prosecutors are free to forgo its use. Thus, the Court's decision can be ignored in a way that it could not have been had it come out the other way. If the distinction is important, then decisions that limit legislative authority (usually by expanding individual rights) will always be subject to judicial revision; those that defer to legislative authority will carry greater force. Such a modification to the usual rule supports the Court's result in *Payne* and suggests that *Payne* itself, unlike the decisions it overruled, should have the weight of a statutory precedent. If there is error in *Payne*, state legislatures are free to correct it by outlawing the introduction of victim-impact statement evidence in capital cases.

Such a distinction between the precedential weight of different types of constitutional decisions is lurking in Justice Scalia's opinion. In an extraordinary, though confusing statement, he asserts that "to the extent [stare decisis] rests upon anything more than administrative convenience, [it] is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts."¹⁵⁷ In part, this is just more of Justice Scalia the arch-traditionalist, to whom nothing is more vexing than rocking the boat.¹⁵⁸ But this is also Justice Scalia the advocate of judicial restraint, deferring to the legislative process. That is, the justification for respecting settled practices is that they are the expressions of a democratic society. This may be the first time that Justice Scalia has offered a theoretical justification for the central position of tradition: It is a democratic and majoritarian product. This idea helps reconcile Justice Scalia's claimed devotion to tradition with his willingness to overrule. His willingness to overrule always arises in settings where legislatures would then be free to "overrule" the Court in turn.¹⁵⁹

Apart from the empirical dubiousness of the proposition that traditions are in their nature democratic, the core flaw of this approach is that it over-

ment for strict stare decisis in statutory cases. Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

156. Monaghan, *supra* note 137, at 742 & n.112.

157. *Payne*, 111 S. Ct. at 2613-14 (Scalia, J., concurring).

158. See generally Strauss, *supra* note 108.

159. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 531 (1989) (Scalia, J., concurring) (arguing for overruling *Roe v. Wade*, 410 U.S. 113 (1973)); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring) (arguing that the Court should abandon the notion of dormant commerce clause limits on state authority).

looks the Court's function as the protector of political minorities. Of course, a legislature *could* overrule *Payne*, but it is highly unlikely that one will. Legislatures tend not to enact statutes aimed at protecting a despised minority of political outsiders from the venomous anger of an outraged majority.¹⁶⁰ In a very real sense, *Payne* is thus not subject to legislative reversal. The reason for this immunity, however, is that the decision allows the political process have its way. Therefore, it is probably consistent with actual majority sentiment in the country, and will directly harm only a small minority of the population.

The claim that respect for stare decisis is consistent with a view of judges as finders of the law is thus oversimplified. The Rehnquist majority could have its cake and eat it too, because the substantive doctrine it pursues is one of accepting the decisions of legislative majorities. *Payne* could reflect a theory of weak stare decisis that denies that judges make law or policy in that it gives weight only to the precedents that the legislature can overrule. Such a theory would be a mistake, and would come at the expense of the basic function of the courts to protect against majoritarian tyranny. Nonetheless it is internally coherent.

B. *Setting a Policy Agenda*

A legislature sets its own agenda, pursuing (or, according to some critics, avoiding) the most pressing issues—so does the Supreme Court. The docket is discretionary, sufficiently crowded and varied to allow the Court to take on almost any issue it wishes, and filled according to which issues, not which cases, require resolution.¹⁶¹

Payne illustrates the legislative aspect of the Court in its most extreme and active form. Although the decision may have been virtuous, it was hardly passive.¹⁶² On the term's opening day, the Court granted certiorari in *Ohio v. Huertas*,¹⁶³ which raised the victim-impact evidence issue. However, it ultimately dismissed *Huertas* as improvidently granted.¹⁶⁴ Undeterred, it promptly granted certiorari in *Payne v. Tennessee*.¹⁶⁵ By now,

160. See *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) (noting certain popular approval for majority's decision).

161. See SUP. CT. R. 10.1.

162. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* ch. 4 (1962).

163. 111 S. Ct. 39 (1991) (granting certiorari).

164. *Ohio v. Huertas*, 111 S. Ct. 805 (1991). The Court initially denied respondent's motion to dismiss on the ground that the decision below rested on an independent and adequate state ground. 111 S. Ct. 383 (1990). After argument, that ground apparently proved too conspicuous to be ignored.

165. 111 S. Ct. 1031 (1991); 111 S. Ct. 1407 (1991).

however, the last argument day was only a little more than two months off. The normal briefing schedule would force the case into the next term. With no time to lose, the Court issued its order on a Friday, rather than waiting until the following Tuesday, as is customary, and established an expedited briefing schedule so that the case would be heard during the 1990 Term.¹⁶⁶ It also specifically requested the parties to address the question whether to overrule *Booth* and *Gathers*, a question that the petition, for obvious reasons, had not raised.¹⁶⁷ On February 19 the Court amended its order, limiting the grant to the second of the three questions raised by the petition.¹⁶⁸ The limited grant would force a decision on admissibility of the victim impact statement and avoid any possibility that the Court or some of its members would be sidetracked from the matter at hand. At this point, then, "no knowledgeable observer could doubt that the days of [*Booth* and *Gathers*] were numbered."¹⁶⁹ The Court was, to quote one commentator, "hell-bent to allow victim impact testimony."¹⁷⁰ So much for the theory that the Court's policymaking opportunities are limited by the need to wait for cases to come to it. The history of *Payne* belies the image of the Court as merely resolving disputes. Here the Court was acting with a sense of its norm-elaborating function as keen as anything that, say, Owen Fiss could ever have conceived.¹⁷¹

166. 59 U.S.L.W. 3558 (Feb. 15, 1991) (No. 90-5721). The petitioner was given 31 days to file its brief; the respondent's brief was due 21 days later. The case was heard on the term's last day of argument.

167. This procedure provoked the three Justices who ultimately dissented on the merits to take the unusual step of dissenting from the grant of certiorari. In a brief opinion by Justice Stevens, the dissenters argued that requiring briefing on the overruling question, which neither party had suggested, was "both unwise and unnecessary," and that the decisions below rested alternatively on the ground that any *Booth* violation was harmless beyond a reasonable doubt. *Payne*, 111 S. Ct. at 1031 (Stevens, J., joined by Marshall and Blackmun, JJ., dissenting from grant of certiorari).

168. 111 S. Ct. 1407 (1991).

169. Vivian Berger, *Payne and Suffering—A Personal Reflection and A Victim-Centered Critique*, 20 FLORIDA STATE U. L. REV. 21, 41-42 (1992). Berger vividly describes the Court's aggressiveness in seeking out the case: "Four weeks [after dismissing *Huertas* as improvidently granted], the Court again agreed to hear a capital case raising issues under *Booth* and *Gathers*. Indeed, the Court reached out to do so. Fishing in the certiorari pool, the justices hooked a petition from hell." *Id.* at 40.

170. Tony Mauro, *Justices Just Say No: High Court Hell-bent to Allow Victim-Impact Testimony*, MANHATTAN LAW., Apr. 1991, at 14.

171. Fiss, among many others, has argued that the courts generally, and the Supreme Court deciding constitutional cases in particular, serve a more important function in elaborating norms than in deciding individual disputes. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281-92 (1990).

C. Prospectivity

The tension between theory and practice recurred in *James B. Beam Distilling Co. v. Georgia*, in which the Court held that its decision in *Bacchus Imports, Ltd. v. Dias*¹⁷² applied retroactively.¹⁷³ Three Justices, finding selective prospectivity unfair, concluded that because the Court had applied *Bacchus* to the parties in that case, the decision must be retroactive across the board.¹⁷⁴ Three argued that Article III requires *all* judicial decisions to be retroactive.¹⁷⁵ Three would have applied *Bacchus* prospectively only.¹⁷⁶

Judicial decisions are usually retroactive. That is inherent in a legal system that relies on precedent and on extrajudicial sources of law. When retroactive application of a new rule has struck the Court as too disruptive or unfair, however, it has simply applied it prospectively. The Court has always treated retroactivity, like *stare decisis*, as a question of "policy" rather than "law." Although the formulations for criminal and civil cases have varied in their particulars, both involve an explicit balancing of the real world pros and cons of retroactive application, free of constitutional constraint.¹⁷⁷ Retroactivity doctrine is not much altered by *Jim Beam*. Four Justices endorsed the standard precedent, *Chevron Oil*.¹⁷⁸ Justice Souter, joined by Justice Stevens, expressed some reservations about prospective decisionmaking but went no further than rejecting selective prospectivity on general principles of fairness. The provocative position

172. 468 U.S. 263 (1984) (striking down state alcohol sales tax that exempted liqueur made from indigenous shrub as unconstitutional discrimination against interstate commerce).

173. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2445-46 (1991).

174. *Id.* at 2445-46 (Souter, J., joined by Stevens, J.); *id.* at 2448 (White, J., concurring).

175. *Id.* at 2449-50 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring); *id.* at 2450-51 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring).

176. *Id.* at 2451-56 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting).

177. In deciding whether to apply a new rule retroactively in a civil case, the Court will "look [] to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation" and "weigh the inequity imposed by retroactive application." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971).

Until fairly recently the Court took a similar approach in criminal procedure cases. *See, e.g., Stovall v. Denno*, 388 U.S. 293, 297 (1967). It now applies new rules retroactively to all cases pending on direct review, *Griffith v. Kentucky*, 479 U.S. 314 (1987), but not to habeas cases, *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288 (1989). Although these decisions reject the case-by-case approach, their reasoning reflects the same understanding of the inquiry as being one of pure policy and the weighing of competing factors. This is, indeed, a telling criticism of *Teague* and *Penry*, since technically they are interpretations of the federal habeas statute.

178. *Jim Beam*, 111 S. Ct. at 2449 (White, J., concurring); *id.* at 2452 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); *see supra* note 177.

was taken by Justices Marshall, Blackmun, and Scalia, who argued that Article III forbids prospectivity.

The dispute between the Marshall group and the rest of the Court is, on two levels, quite literally a debate about whether judges are policymakers. First, they disagree as to whether their decisions should be, like a legislature's, prospective, and second they disagree as to whether the answer to that question lies in "law" or "policy." With regard to the first, as Justice Souter stated, retroactivity "reflect[s] the declaratory theory of the law according to which the courts are understood only to find the law, not to make it."¹⁷⁹ Retroactivity asserts that the law predates the decision; if that is so, then the Justices cannot be making it up. In accepting prospective rulings, six Justices reject this formal, theoretical model of decisionmaking.

The same dynamic surfaces in the Justices' discussion of the links between stare decisis and prospectivity. Arguing for prospectivity, and sounding like a committed functionalist, Justice O'Connor asserts that not applying a law-changing decision retroactively shows respect for stare decisis because it respects settled expectations just as stare decisis is supposed to.¹⁸⁰ As she had stated the term before: "Prospective overruling allows courts to respect the principle of stare decisis even when they are impelled to change the law in light of new understanding."¹⁸¹ This is the narrow understanding that stare decisis does no more than preserve stability and reliance.¹⁸² Five Justices—Souter, with Stevens, and the odd bedfellows of

179. *Jim Beam*, 111 S. Ct. at 2443. The link is also acknowledged by Justices White, *id.* at 2449 (White, J., concurring), and Scalia. Indeed, Justice Scalia noted that while he was "not so naive . . . as to be unaware that judges in a real sense 'make law,' . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it." *Id.* at 2451 (emphasis in original). For Justice Scalia, this is a retreat from a more anachronistically literal view of judges finding law. See *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 200 (1990) (Scalia, J., concurring). The shift is from denying any inconsistency between the normative and the descriptive to acknowledging the inconsistency but insisting that what counts is the theory, not the practice.

180. *Jim Beam*, 111 S. Ct. at 2452.

181. *American Trucking Ass'n, Inc.*, 496 U.S. at 197 (O'Connor, J.). Justice O'Connor's use of the term "impel" is odd. One might say that the stimulus that "impels" is internal, whereas that which "compels" is external. "Impel" suggests a conception of the judicial role as making rather than finding law, of looking inward rather than outward. Something of the same attitude surfaces in her opinion in *Jim Beam*, which refers, almost cavalierly, to "the Court decid[ing] . . . to change the law," and notes that "when the Court changes its mind, the law changes with it." *Jim Beam*, 111 S. Ct. at 2451 (O'Connor, J., dissenting). The phrasing has a strikingly legislative ring.

182. Prospective overruling and stare decisis share a more abstract link. A prospective decision assumes a system of precedent; unlike a retroactive decision, it is meaningful precisely and only because future courts will adhere to it. On the forward-looking aspects of precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2815 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (describing stare

Marshall, Blackmun, and Scalia—make the opposite argument: The availability of prospective decisions undercuts stare decisis, inviting overruling by reducing its consequences. They assume that overruling is a bad thing, but do not say why. If it is only because it disrupts reliance interests, then Justice O'Connor is correct that prospective overruling goes far toward eliminating those concerns. These Justices imply that stare decisis has some other value. That value would seem to be the belief that it keeps judges from imposing their own policies.

With regard to how the Court should approach the question of prospectivity, one set of Justices contends that it is a pure policy question left to the Court; the other that it is a legal question determined by a binding external source, the Constitution. Without discussing the merits,¹⁸³ I will make a few comments about the effort to constitutionalize retroactivity.

First, the argument from Article III is to some extent required by the fact that the dissenters' approach would mean overruling a long line of cases. Overruling always requires returning to some truer, more fundamental understanding. Of course, this is another example—not that one was needed—that the invocation of the “true” law is likely to be fictional.¹⁸⁴

Second, the appeal to the Constitution is substantively significant because it implies a view of judges as having their hands tied, and by a bright-line rule whose application involves no policy considerations, discretion, or judgment. Some have suggested that Justice Scalia, at least, resorts to the fiction of a law-finding judiciary simply to escape hard problems.¹⁸⁵ Although there may be something to this analysis, it is incomplete. Justice Scalia does not latch on to just any available fiction to avoid hard questions, he adopts one that illustrates his normative view of how courts should operate. The choice is thus not simply between the real and the fictional, in which case it is hard to justify hiding from reality, but between the descriptive and the normative, in which case there may be some value in insisting on the latter because it will actually affect how judges make decisions.

decisis as involving a “promise of constancy” by which “the Court implicitly undertakes to remain steadfast”).

183. The argument that Article III requires retroactive decisionmaking is convincingly refuted in Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1797-1806 (1991).

184. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2624 n.3 (1991) (Marshall, J., dissenting); Posner, *supra* note 138, at 1378-79.

185. Kramer, *supra* note 90, at 1797. Professor Kramer suggests that Justice Scalia adopts the utter fiction of judges finding law, “something he *must* know to be false,” in order to avoid the “quagmire” of balancing relevant interests in retroactivity cases. *Id.* (emphasis in original). This is part of an overall “tendency to simplify complicated questions.” *Id.*

Third, the most curious part of the argument for constitutionally mandated retroactivity is the claim that it will discourage overruling. Since overruling is not itself constitutionally forbidden, it is strange to say that a safeguard against it is a constitutional requirement. One might justify a judge-made rule as protection against an unconstitutional practice. The exclusionary rule is an example. It is peculiar to justify a purported constitutional requirement as protection for a judge-made rule. In any event, this is a policy argument, one that deems overruling basically bad and implicitly balances its harms with the burdens and unfairness of retroactive decision-making. This group of Justices would read it into the Constitution, but it is, like *stare decisis* itself, merely a "principle of policy." Finally, this argument indicates a peculiar distrust of judges. The notion is that judges lack the self-discipline to adhere to a general admonition to respect precedent, but can be reigned in by penalizing transgressions. Justice Scalia has always made it clear that he trusts no judges other than himself—as for example in his uninhibited calls for overruling precedent but apparent confidence that his own decisions will bind those who follow. As for Justices Marshall and Blackmun, it is probably fair to say that they do not trust certain judges—most obviously, their colleagues on the Court. They both consider overruling an evil, and *Payne* and *Jim Beam* are of a piece.

VI. CONCLUSION

The Supreme Court frequently endorses a model of the judicial role in which judges are mere dispute-resolvers, implementing the policy choices made by the majoritarian instruments of government. The Court has involved this model to justify its decisions about individual rights, statutory construction, federalism, and separation of powers. Yet when put directly to the test, the model collapses. Although reluctantly, the Court has acknowledged that judges are policymakers and representatives, and has claimed for itself legislative-type authority to reverse field and rule prospectively. This inability to sustain the model under direct scrutiny suggests that the model is flawed. This is not to say that a judge is a legislator. But the choice is not between seeing judges as politicians in robes on the one hand and mere referees on the other. The Court could pursue a more complex vision of the role of judges in democratic government, one in which judges, as public trustees, do have some responsibility for policy development.

Notwithstanding this tension, these decisions do not *disprove* the validity of the Court's underlying model. The Court might conclude that judges should always aim for apolitical neutrality, although they will always fall short. Normative and descriptive models compete rather than conflict. In

each of these cases, the Court had to choose one or the other and opted for the descriptive. The majorities were shifting. Within them, the two most consistent Justices were White, who was concerned only with how courts actually function, and Scalia, who was concerned only with how they are supposed to (with the possible exception of his position in *Payne*). It is no coincidence that these two are, respectively, the Court's leading functionalist and its leading formalist in separation of powers cases.

Was the Court right to fall back on the descriptive version of the judicial function in each of these cases? All in all, the answer is yes. *Chisom* and *Gregory* were both statutory cases. The precise question was therefore not whether judges are representatives or policymakers in some general or theoretical sense, but whether Congress considered them as such. Thus, in *Chisom*, Justice Scalia was at least asking the right question, although he gave the wrong answer. If the statute gives no indication of whether the normative or descriptive model ought to apply, the default rule should be the latter. Congress should be presumed to legislate with regard to the world as it is, not as it should be.

In a second setting, assessing the constitutionality of legislation about judges, the normative view is equally out of place. The Court has had no trouble taking the descriptive approach in examining state laws. This approach has been slightly more controversial with regard to the federal judiciary, but in essence its functional approach amounts to a focus on the real rather than the ideal.

The hardest question comes in cases like *Payne* and *Jim Beam*, which involve *self-imposed* restraints. Here the argument for pursuit of the normative vision is strongest, for the Court should strive to achieve the noblest role it has defined for itself. Yet it is here where the Court has most readily ignored its own normative vision.

