

## Chapter 5 – The Courts and The Question Of Ultimate Power In A Nation

What is the final authority in the United States?

What powers does the Constitution grant the judiciary?

How have courts gained additional power?

### A. Ultimate Power: Who will have it?

--This is the most basic issue regarding any system of government

--Answers often given: A monarchy, dictators, a prime minister or a president, even anarchy,

--The United States answered: not a person, but a document (the Constitution).

--The Constitutional system bears significant similarities to the system of government in ancient Israel found in the Bible. For instance, all the governmental officials in Israel were to be subject to an external law:

Moses required that the king would “write for himself in a book a copy of this law” (Deut. 17:18), and that “he shall read in it all the days of his life, that he may learn to fear the Lord his God by keeping all the words of this law and these statutes, and doing them” (v. 19). (see also 2 Sam. 11:1-27;12:1-15).

--A separation of powers was developed to restrict too much power from falling to one person or group:

- One group makes the laws (Congress; the state and local legislatures and boards)

- Another group interprets and applies the laws and decides if the laws are consistent with the Constitution (the courts)

--Judges interpret and apply the Constitution and the laws, but they do not make laws

--They certainly do not change the Constitution

--As the U.S. Constitution was originally set up, judges had absolutely no role in making any new laws, nor did they have any role whatsoever in the difficult process of amending the Constitution.

--Benefits of the Constitutional system

- (1) Separation of powers
- (2) Accountability for those who make laws
- (3) Rule of law
- (4) Protection from fundamental change
- (5) Protection from a hasty majority

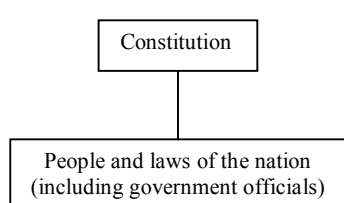


Figure 5.1: GOVERNMENT UNDER A CONSTITUTION AS THE HIGHEST AUTHORITY

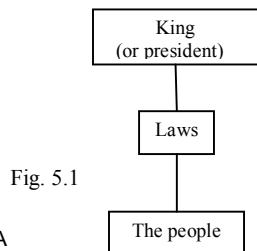


Figure 5.2: GOVERNMENT UNDER A KING AS THE HIGHEST AUTHORITY

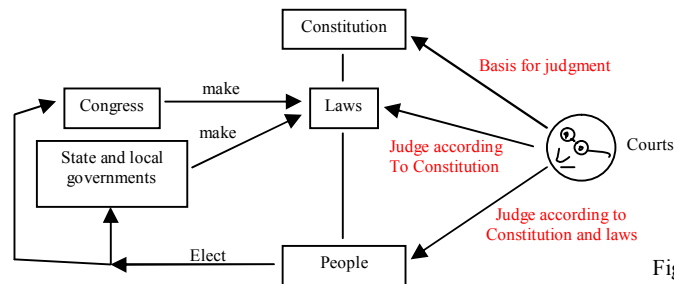


Figure 5.3: MAKING LAWS SEPARATED FROM INTERPRETING AND APPLYING LAWS IN THE UNITED STATES

### B. According to the Bible, what should judges do?

1. The essential role of judges is to judge according to a law external to themselves

In a dispute they shall take their stand to judge; they shall judge it according to My ordinances. (Ezek. 44:24, NASB).

God is going to strike you, you whitewashed wall! Are you sitting to judge me according to the law, and yet *contrary to the law* you order me to be struck? (Acts 23:3).

And you, Ezra, according to the wisdom of your God that is in your hand, appoint magistrates and judges who may judge all the people in the province Beyond the River, *all such as know the laws of your God*. And those who do not know them, you shall teach. Whoever will not obey the law of your God and the law of the king, let judgment be strictly executed on him . . . (Ezra 7:25-26).

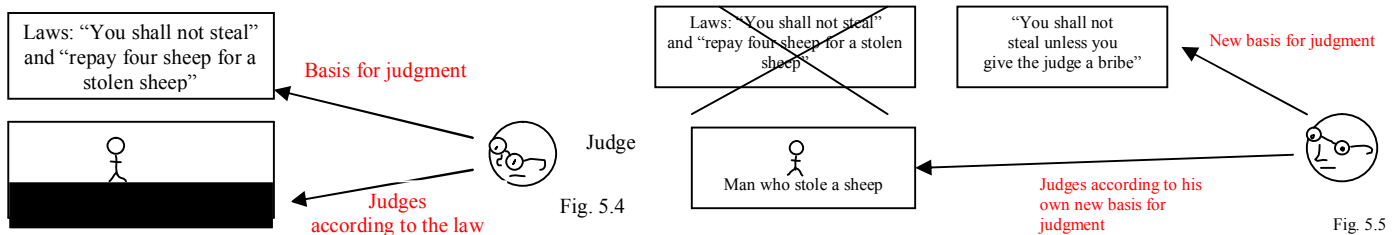
“Blessed be the Lord, the God of our fathers, who put such a thing as this into the heart of the king, to beautify the house of the Lord that is in Jerusalem” (Ezra 7:27).

2. Judges are not to show partiality or take bribes, for this would be using some other basis for judgment than the established law

“You shall appoint judges and officers in all your towns that the Lord your God is giving you, according to your tribes, and they shall judge the people with righteous judgment. You shall not pervert justice. You shall not show partiality, and you shall not accept a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice, and only justice, you shall follow, that you may live and inherit the land that the Lord your God is giving you (Deut. 16:18-20).

Example: “You shall not steal” (Ex. 20:15)

Specific law about stealing & restitution: If a man steals an ox or a sheep, and kills it or sells it, he shall repay five oxen for an ox, and four sheep for a sheep (Ex. 22:1).



Nor shall you be partial to a poor man in his lawsuit (Ex. 23:3).

You shall not pervert the justice due to the poor in his lawsuit (Ex. 23:6, prohibiting favoritism to those who are wealthy or powerful).

And you shall take no bribe, for a bribe blinds the clear-sighted and subverts the cause of those who are in the right (Ex. 23:8).

You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor (Lev. 19:15).

And I charged your judges at that time, “Hear the cases between your brothers, and judge righteously between a man and his brother or the alien who is with him. You shall not be partial in judgment. You shall hear the small and the great alike. You shall not be intimidated by anyone, for the judgment is God’s.” (Deut. 1:16-17).

He appointed judges in the land in all the fortified cities of Judah, city by city, and said to the judges, “Consider what you do, for you judge not for man but for the Lord. He is with you in giving judgment. Now then, let the fear of the Lord be upon you. Be careful what you do, for there is no injustice with the Lord our God, or partiality or taking bribes” (2 Chron. 19:5-7).

"How long will you judge unjustly and show partiality to the wicked? . . . Give justice to the weak and the fatherless; maintain the right of the afflicted and the destitute. Rescue the weak and the needy; deliver them from the hand of the wicked." (Psalm 82:2-4)

To impose a fine on a righteous man is not good, nor to strike the noble for their uprightness (Prov. 17:26).

3. Conclusion: Judges were to evaluate and judge cases fairly according to an established standard of law external to themselves. They were not to change the law or to use any other basis for judgment than the law that was clearly established, a law that was external to themselves.

## C. What has actually happened in the United States?

### 1. The gradual discovery that the Supreme Court could have unlimited power

--If a case came to the Supreme Court and the Constitution did not say something that the Supreme Court justices wanted it to say, or thought it should say, they could "discover" new principles in the Constitution, and no one would have power to overrule them. They could simply create a new law (i.e. *Roe v. Wade*)

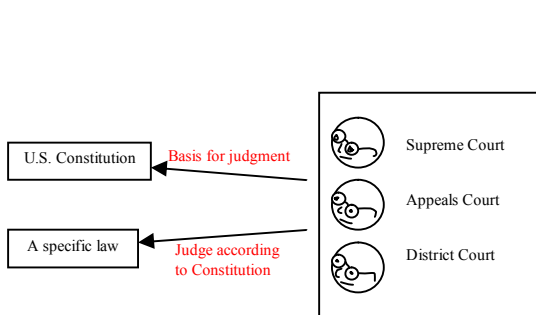


Fig. 5.6

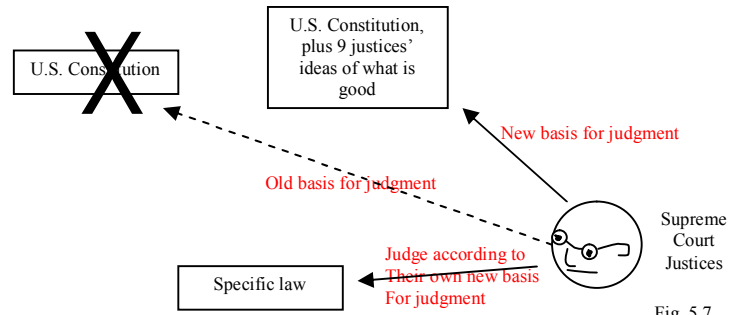


Fig. 5.7

### 2. The Supreme Court thus became the most powerful group in the nation

--Other examples of the courts using "raw judicial power"

- a. Supreme Court changes regarding freedom of religion (*Lemon v. Kurtzman*)
- b. Taking private property for private development (*Kelo v. City of New London*)
- c. Four votes to change laws regarding acceptance of homosexual conduct (*Boy Scouts of America et al. v. Dale*)
- d. State laws regarding same-sex marriage (*Goodridge v. Department of Public Health; Varnum v. Brien*)
- e. Laws giving special legal rights to homosexuals (*Romer v. Evans, 1996*)
- f. Other cases, including capital punishment (*Furman v. Georgia, 1972; Kennedy v. Louisiana, 2008*)
- g. But what if citizens want to change these Supreme Court decisions?

--The simple fact is that the citizens of the United States have *absolutely no power* to overcome these rulings.

### 3. Liberal politicians uphold this process of judges making new laws

### 4. The rise of originalism in constitutional interpretation

--At the time of *Roe v. Wade* in 1973, only William Rehnquist was an advocate of originalism. Currently four justices clearly hold to originalism: Roberts, Scalia, Thomas, and Alito.

**D. This is the most important issue facing the nation today** (because it affects the entire structure of how we are governed, and it decides who will have ultimate power in the nation)

### 1. Democrats and Republicans differ strongly over this issue

--Areas that have been pushed constantly leftward by Supreme Court decisions and by decisions of state supreme courts:

- (1) Abortion
- (2) Homosexuality and homosexual marriage
- (3) Removal of religion from public events and public places
- (4) The legitimacy of religious convictions as reasons to influence public actions
- (5) As a result of (3) and (4), the removal from public schools of any teaching of accountability to God for one's actions, or of any absolute moral standards, resulting in widespread moral erosion
- (6) The undermining of personal sexual morality through the nullification of all of the most mild restraints on pornography
- (7) Promoting the use of international law to interpret the U.S. Constitution, and thereby undermining American sovereignty.

2. The current status of the Supreme Court

--Almost evenly balanced between liberal "activist" justices and conservative "originalist" justices:

Usually liberal:

John Paul Stevens  
Sonia Sotomayor  
Ruth Bader Ginsburg  
Stephen Breyer

"Swing" vote; often sides

with "originalist" justices:  
Anthony Kennedy

Consistently rule

according to original

meaning of Constitution:

Antonio Scalia  
Clarence Thomas  
John Roberts  
Samuel Alito

3. Relevant biblical principles that apply to the issue of the Supreme Court

(1) Romans 13 tells us, "Let every person be subject to the governing authorities" (Rom. 13:1).

(2) The biblical argument that it is wise to have a separation of powers in human government argues strongly against the concentration of so much power in the hands of only one small group.

(3) The principle that people should be accountable for their actions implies that it is wrong for those who judge the laws to be the exact same people who actually make the laws.

(4) Anti-Christian results from the current activist judiciary are contrary to biblical principles. (i.e. results in such areas as the exclusion of God from the public square, the prevalence of pornography, the erosion of moral standards in many other areas of life, the prohibition against teaching in public schools that God even exists and that he created the world, the unrestricted right to abortion, the increasing rights given to homosexual conduct, etc)

4. Individual votes for Democrats or Republicans will decide the future of the nation on this issue

--Every vote for every candidate at the state and national level will tend to perpetuate either a liberal, activist system of judges or a conservative, originalist system of judges.

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