CHAPTER

THE COURTS—JURISDICTION AND JUDICIAL REVIEW

Outline

I. The Creation of the Courts in the Constitution
   A. Article III, sec. 1
   B. Of the three branches, this is the branch of the federal government with the least detail
      1. One Supreme Court
         a. Current Court
         b. History of the Court
            (1) While the Constitutional Framers created this court, the number of justices was left to Congress
            (2) Original number was six initially—Judiciary Act of 1789
            (3) Number changed to five
            (4) FDR and the New Deal
         c. How justices are chosen
            (1) Appointed for life
               (a) Why life appointments are a positive thing
               (b) The pitfalls of life appointments
               (c) Impeachment for removal
            (2) The confirmation process
         d. Power of the Court
            (1) Original jurisdiction
               (a) Article II, sec. 2
               (b) “[I]n all Cases affecting Ambassadors, other public Ministers and Consuls, and in those in which a State shall be a Party”
            (2) Appellate jurisdiction
               (a) General rules of justiciability:
                  i. The case must not require the giving of an advisory opinion
                     a) Case or controversy requirement—Article II, sec. 2—all federal courts only have jurisdiction over cases and controversy
                     b) Cannot answer hypothetical questions or give advisory opinions
                     c) Declaratory judgments sometimes allowed
                        1) A judicial decision in which the court is not requested to award damages or an injunction, but is instead requested to state what the legal effect would be of proposed conduct by one or both of the parties
                        2) Requirements: still must have a concrete controversy
                  ii. The plaintiff must have standing
                     a) Plaintiff must have a significant stake in the controversy
                     b) Must have an injury in fact
                     c) Who is kept out?
                        1) Non-individualized harm—plaintiff’s harm is the same suffered by a large number of other citizens
                        2) Examples: taxpayer suits—generally a taxpayer may not bring a suit to keep the government from using tax dollars in a certain
way—exception: taxpayer has standing to sue to overturn a federal tax or spending program that violates the Establishment Clause.

3) Third-party rights—individuals not injured, but third parties are

d) Three requirements for standing:

1) Injury in fact—includes economic and noneconomic harm; can be imminent harm and also show the injury would be remedied by a favorable court decision.

2) Individuated harm.

3) Causation—action that plaintiff is complaining about must be the cause in fact of his injury; two subrequirements:

   i) Plaintiff has to show that the challenged action was a “but for” cause of injury (would not have occurred unless the defendant’s action took place), and

   ii) Plaintiff must show that a favorable decision in the suit would probably redress that individual’s injury.

iii. The case must not be moot:

   a) Case may not be heard if the issue is moot—it raised a live controversy at the time the complaint was filed, but events occurring after the filing have deprived the litigant of an ongoing stake in the controversy.

   b) Exceptions:

      1) Capable of repetition, yet evading review—a different person will be injured in the same way in the future (example, pregnancy).

      2) Voluntary cessation by defendant—defendant voluntarily ceases conduct plaintiff complained of.

      3) Collateral consequences—case will not be moot even if it mostly decided if there are still collateral consequences that might be adverse to defendant; attack the constitutionality of defendant’s conviction.

iv. The case must be ripe for decision:

   a) Case is not ripe if it has not yet become sufficiently concrete to be adjudicated.

   b) Not necessary for the litigant to have suffered harm; it is enough that there is a reasonable probability of specific harm.

v. The case must not involve a nonjusticiable political question:

   a) Court will decline to hear a case on political questions grounds only if it thinks that the doctrine of separation of powers require this, or if it thinks that deciding the case would be unwise as a policy matter; two factors involved:

      1) Commitment to another branch—case presents an issue that has been committed by the Constitution to another branch of the federal government.

      2) Lack of standards—the fact that there are no manageable standards by which a court could resolve the issue.

   b) How the Court decides what cases to hear:

      1) Petition for Writ of Certiorari.

      2) Outlines why case is ripe, whether issues are moot, etc.

      3) The rule of four—vote by four or more justices to hear case.

      4) Issuance of Writ.

   c) Congressional control of federal court jurisdiction:

      1) Limits in Article II.

      2) *Ex Parte McCord*, 74 U.S. 506 (1869):

         i) Challenge in habeas corpus to parts of the Reconstruction Acts.

         ii) During interim, Congress repealed portions of the Act and Congress claimed to have deprived the Supreme Court of
opportunity to decide this case and any other habeas corpus cases on appeal

(iii) Court's holding: upheld Congress' action to restrict the Court's jurisdiction to hear habeas decisions on appeal

(iv) This congressional action did not deprive the Supreme Court from hearing cases involving an original petition for habeas corpus

(v) Also noteworthy that the congressional action was neutral in that it operated in a manner that did not allow either the government or private party to appeal

3) Limits on congressional power—not unlimited


(i) Challenge to congressional statute that did not allow for compensation to those who lost property during the Civil War if they had supported the confederacy

(ii) Had the opposite effect of a previous statute and presidential pardon

(iii) Court struck down the congressional statute, saying it was a violation of separation of powers

(iv) Congressional limitations on jurisdiction must be neutral and not merely an attempt to limit jurisdiction

5) Modern congressional control on federal jurisdiction

(i) Congressional act that leaves the state court option open can restrict the jurisdiction of the Supreme Court and other federal courts

(ii) If Congress acts to curtail all jurisdiction in all courts, this would be unconstitutional

e. The ways the Court makes decisions

(1) Legally relevant approach

(a) *Stare decisis*

(b) Doctrine of original intent

(c) Literalism

(d) Meaning of the words

(e) Logical reasoning

(f) Balancing approach

(2) Attitudinal approach

(a) Also called extra-legal approach

(b) Preference-based approach

(3) Strategic approach

(a) Combination of legally relevant and attitudinal approaches

(b) Judicial decisions made in societal context

f. Types of opinions handed down by the Court

(1) Majority

(a) *Stare decisis*

(b) Applicability of rules

(2) Per curiam

(3) Concurring

(4) Dissenting

2. Other inferior courts as determined by the Congress

a. United States Circuit Court of Appeals

(1) The 13 circuits (chart)

(2) The panels of judges

(3) Majority vote

b. United States District Court

(1) Court of general jurisdiction

(a) Criminal cases

(b) Civil cases
i. Federal questions—example is 1983 action
ii. Diversity of citizenship

(2) Locations within the United States (chart)

II. Judicial Review
A. The power of the Court
B. *Marbury v. Madison*, 1 Cranch. 137 (1803):
   1. Final say in interpreting the constitution
   2. First time the Court used the concept of judicial review
   3. Review case background
      a. History—the political struggle between the lame-duck president and the incoming president (and their parties)
         (1) Adams signed appointments, but didn’t deliver them
         (2) Jefferson refused to honor the appointments
         (3) Marbury and other appointees brought suit directly to U.S. Supreme Court
            (a) Wanted writ of mandamus to compel delivery of appointments
            (b) Was writ appropriate? No
               i. Judiciary Act authorized it
               ii. Conflict between Article III, sec. 2 and the Judiciary Act
      b. Several other issues decided, but only the issue of judicial review is significant today
         (1) The Supremacy Clause
         (2) Conflict between a congressional act and the Constitution creates a situation where the Court has the authority and the duty to declare the statute unconstitutional and to refuse to enforce it
         (3) The Constitution trumps a congressional act
         (4) The Court, not the legislature, has the power to interpret and say what the law is or is not
         (5) This case spoke to congressional acts and the Constitution
   1. The review of judicial privilege
   2. The extension of executive privilege
   3. General doctrine of executive privilege did not apply in this case
      a. Court decides when privilege exists
      b. Did recognize the privilege in Article II
      c. Privilege is qualified
      d. Balance the need for security against other societal needs, such as the need to develop evidence for a criminal trial in this case
      e. Trial court was ordered to look at the documents in camera to determine what was relevant and admissible
   4. Impact of *Nixon* case:
      a. Executive privilege outweighed by the needs of the criminal justice system
      b. Criminal defendants—due process demands that defendant have access to privileged information; even more compelling than if the prosecution needs info
      c. Civil cases—no real answer from this case
      d. State secrets—case made it clear that sensitive information or national security is on a higher footing than a general claim of confidentiality, as Nixon claimed in this case
      e. Does not answer the question of whether the qualified executive privilege will outweigh or be outweighed by congressional inquiries
D. Review of state court decisions:
   1. Review of state court decisions is an appellate power, not original jurisdiction
   2. Supreme Court’s appellate power over state courts limited by the original Judiciary Act
      a. Only hears federal questions
      b. No review of state law issues
      c. Court may not review state court decisions that merely adjudicate questions of state law
   (1) Virginia statute conflicted with a federal treaty
   (2) Virginia argued that it was the state court's job to determine whether the state action violated the federal Constitution
   (3) Supreme Court rejected Virginia's view
   (4) Held: Court could review the constitutionality of a decision by a state's highest court
      (a) Rejected Virginia's sovereignty argument—federal Constitution cut back on state sovereignty in many ways and state courts were no exception
      (b) Uniformity—the need for uniformity in decisions affecting the nation was more important

(5) *Cohens v. Virginia*, 6 Wheat. 264 (1821):
   (a) Supreme Court's right to review state criminal cases for constitutionality was upheld

(6) More recent challenge—desegregation
   (a) *Cooper v. Aaron*, 358 U.S. 1 (1958):
      (b) Court reiterated that it has the power to determine constitutionality of action by the state legislature and executive and judicial officers

III. Three Standards of Review
   A. Three standards reappear throughout the discussion of constitutional law
   B. Mere rationality—easiest of the standards to satisfy
      1. Uphold the government action if
         a. First, the government is pursuing a legitimate government objective, i.e.:
            (1) Health
            (2) Safety
            (3) Welfare
         b. Second, minimally rational relation between the means chosen by the government and the state objective
            (1) Easy to satisfy
            (2) Only if government has acted in an arbitrary and capricious manner will this link be found to be nonexistent
      2. When this will be used:
         a. Dormant Commerce Clause
            (1) Determine whether a state regulation that affects interstate commerce violates this clause
            (2) State regulation has to pursue a legitimate state end, and
            (3) Be rationally related to that end
         b. Substantive due process
            (1) So long as no fundamental right is affected, the test for determining whether government act violates substantive due process is mere rationality
            (2) Most economic regulations will be tested by mere rationality
         c. Equal protection
            (1) Mere rationality used here so long as
               (a) No suspect or quasi-suspect classification is being used
               (b) No fundamental right is being impaired
               (c) Most economic regulations/classifications based on alienage and rights that are not fundamental (food, housing, and public education)
         d. Contracts Clause—use mere rationality
   C. Middle-level review
      1. The government objective has to be important
         a. This is halfway between
            (1) Legitimate (mere rationality) and
            (2) Compelling (strict scrutiny)
      2. The means chosen by the government must be substantially related to this important government interest
      3. When this is used:
         a. Equal protection/semi-suspect, such as gender and legitimacy
b. Contracts Clause  
c. Free expression/noncontent-based regulations  
   (1) Time, place, and manner regulations  
   (2) Not based on message being given  

D. Strict scrutiny  
1. Hardest of the three to meet  
2. Two requirements:  
   a. Objective being pursued by the government must be compelling  
   b. The means chosen by the government must be necessary to achieve that  
      compelling goal  
      (1) There must be a tight fit between the compelling interest and the means  
          chosen to achieve that end  
      (2) In reality, this means that there is no less restrictive alternative available to  
          achieve the same compelling goal  
3. When this will be used:  
   a. Substantive due process/fundamental rights  
   b. Equal protection review  
      (1) Relates to suspect classification (race, religion, etc.  
      (2) Or fundamental rights (voting, access to courts, travel to other states)  
   c. Freedom of expression  
      (1) Content-based regulations—strict scrutiny  
      (2) Freedom of association  
   d. Freedom of religion/Free Exercise Clause  

IV. Summary  

Key Terms and Definitions  

amicus curiae: (Latin) “Friend of the court.” A person allowed to give argument or appear in a lawsuit (usually to file a brief, but sometimes to take an active part) who is not a party to the lawsuit.  

appellate jurisdiction: The power and authority of a higher court to take up cases that have already been in a lower court and the power to make decisions about these cases. The process is called appellate review. Also, a trial court may have appellate jurisdiction over cases from an administrative agency.  

balancing approach: A doctrine in constitutional law that says a court should balance constitutional rights such as free speech against the right of the government to control conduct it calls harmful. The court should decide for the side with more important needs in each individual situation. The doctrine says that no rights are absolute; Any judicial decision-making principle that “balances rights or responsibilities.”  

cases and controversies: Real (not hypothetical or faked) disputes that turn into lawsuits. The U.S. Constitution gives the federal courts the power to decide certain “cases and controversies.”  

certiorari: (Latin) “To make sure.” A request for certiorari (or “cert.” for short) is like an appeal, but one which the higher court is not required to take for decision. It is literally a writ from the higher court asking the lower court for the record of the case.  

concuring opinion: Opinion in which a judge agrees with the result reached in an opinion by another judge in the same case but not necessarily with the reasoning that the other judge used to reach the conclusion.  

declaratory judgment: A judicial opinion that states the rights of the parties or answers a legal question without awarding any damages or ordering that anything be done. A person may ask a court for a declaratory judgment only if there is a real, not theoretical, problem that involves real legal consequences.  

dissenting opinion: A judge’s formal disagreement (in writing) with the decision of the majority of the judges in a lawsuit.  

diversity of citizenship: The situation that occurs when persons on one side of a case in federal court come from a different state than persons on the other side.
**federal question:** A legal issue directly involving the U.S. Constitution, statutes, or treaties. Federal courts have jurisdiction in cases involving a federal question.

**habeas corpus:** (Latin) “You have the body.” A judicial order to someone holding a person to bring that person to court. It is most often used to get a person out of unlawful imprisonment by forcing the captor and the person being held to come to court for a decision on the legality of the imprisonment or other holding (such as keeping a child when someone else claims custody).

**judicial review:** A court’s power to declare a statute unconstitutional and to interpret laws; . . . A higher court’s examination of a lower court’s decision.

**justiciable:** Proper to be decided by a particular court. For example, a “justiciable” controversy is a real, rather than hypothetical, dispute. Federal courts may handle only cases that present a justiciable controversy.

**majority opinion:** Written when over half of the judges in a case agree about both the result and the reasoning used to reach that result.

**moot:** Moot has several conflicting and overlapping definitions, including: No longer important or no longer needing a decision because already decided . . .; Abstract. Not a real case involving a real dispute.

**opinion:** A judge’s statement of the decision he or she has reached in a case.

**original jurisdiction:** The power of a court to take a case, try it, and decide it (as opposed to appellate jurisdiction, the power of a court to hear and decide an appeal).

**per curiam:** “By the court” Describes an opinion backed by all the judges in a particular court and usually with no one judge’s name on it.

**ratio decidendi:** (Latin) “Reason for decision.” The rationale for a judge’s holding; the basic ideas a judge uses to come to a decision in a case.

**rational basis test:** The principle that a court should not second-guess a legislature (or an administrative agency) about the wisdom of a law (or an administrative decision) if the law (or decision) has some rational basis.

**ripe:** A case is ripe for selection and decision by the U.S. Supreme Court if the legal issues involved are clear enough and well enough evolved and presented so that a clear decision can come out of the case. Any court or agency that has the power to turn down cases may use ripeness as a way of deciding whether to take the case. Ripeness also includes the idea that the case involves a real controversy, not merely potential harm.

**rule of four:** The principle that if at least four of the nine U.S. Supreme Court justices vote to take a case, the court will hear the case. The Court uses the rule of four for cases that reach the Court by certiorari.

**standing:** A person’s right to bring (start) or join a lawsuit because he or she is directly affected by the issues raised. This is called “standing to sue.”

**stare decisis:** (Latin) “Let the decision stand.” The rule that when a court has decided a case by applying a legal principle to a set of facts, the court should stick by the principle and apply it to all later cases with clearly similar facts unless there is a strong reason not to, and that courts below must apply the principle in similar cases. This rule helps promote fairness and reliability in judicial decision making.

**strict scrutiny:** The principle that a state law (or administrative agency regulation) that affects fundamental individual rights is valid only if it accomplishes important state objectives in the least restrictive way possible.

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**Review Questions**

1. What is the significance of the Court’s decision in *Marbury v. Madison* and what is the impact of this decision in today’s justice system?
2. What defines the power of the U.S. Supreme Court, and how does this power fit with the separation of powers in the federal system?

3. Why is it significant to understand how the Court makes its decisions?

4. What theories explain how the Court makes its decisions? How do these theories conflict and how do they seem to work together?

5. Why is it important that those justices who either disagree with the majority opinion or who reached the decision for a different reason than the majority write dissenting or concurring opinions?

Internet Connections

1. For more information about the U.S. Supreme Court, go to the Court’s Web page at http://www.supremecourtus.gov and read “A Brief Overview of the Supreme Court.”

2. For more information on the Constitution, go to http://www.yale.edu/lawweb/avalon/avalon.htm and access the Avalon Project at Yale Law School. You will find documents regarding the law, history of the law, and diplomacy.

3. To read more about the federal judicial system, access the Federal Judicial Center’s Web site at http://www.fjc.gov. Two documents on that site of particular interest are “Creating the Federal Judicial System” and “Origin of the Elements of Federal Court Governance.”