Lecture Notes

# Chapter 2: The Judiciary: Institutional Powers and Constraints

## Annotated Chapter Outline

1. Introduction
   1. Congress passed the Child Pornography Prevention Act of 1996.
   2. The law forbade “any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct.”
   3. The prohibition covered a wide range of depictions that do not show actual children but that Congress reasoned could threaten children in other, less direct, ways.
   4. In ***Ashcroft v. Free Speech Coalition (2002)***, the U.S. Supreme Court struck down the law as a violation of the First Amendment.
      1. For two centuries, federal courts have exerted the power to review acts of government to determine their compatibility with the U.S. Constitution.
      2. We take for granted the notion that federal courts may review government actions and strike them down if they violate constitutional mandates.
      3. When courts exert this power, they provoke controversy.
      4. The alleged antidemocratic nature of judicial review is just one of many controversies surrounding the practice.
2. Judicial Review
   1. Despite evidence that the framers intended for federal courts to have the potent authority of judicial review, it is not mentioned in the Constitution.
   2. ***Hylton v. United States (1796)***
      1. Daniel Hylton challenged the constitutionality of a 1793 federal tax on carriages.
      2. According to Hylton, the act violated the constitutional mandate that direct taxes must be apportioned on the basis of population.
      3. By even considering the tax’s validity, the Court assumed it could review an act of Congress.
   3. *Marbury v. Madison*
      1. The Court invoked judicial review for the first time to strike down legislation it deemed incompatible with the Constitution.
      2. By exerting the power of judicial review, Justice Marshall sent the president a clear signal that the Court would be a major player in the American government.
      3. Current justices more than occasionally invoke the logic of Marbury to invalidate laws.
      4. Marbury still prompts debates among scholars and other commentators.
      5. See Table 2.1.
   4. The Court has made frequent use of the power, striking down close to fifteen hundred government acts since 1790.
   5. With respect to federal laws, the historical record shows that the justices rarely strike down important features of landmark legislation.
   6. More often, the justices invalidate less significant federal policy.
   7. We can reach two conclusions about the Court’s use of judicial review.
      1. One is that as “important as judicial review has been, it has not given the Court anything like a dominant position in the national government.”
      2. The other is that the power of judicial review may lie more in the threat of its invocation than its actual use.
3. Constraints on Judicial Power
   1. Article III—or the Court’s interpretation of it—places three major constraints on the ability of federal tribunals to hear and decide cases:
      1. Courts must have authority to hear a case (jurisdiction).
      2. The case must be appropriate for judicial resolution (justiciability).
      3. The appropriate party must bring the case (standing to sue).
   2. Because the Court engages in its own form of self-regulation, these limits can be quite fluid.
   3. Jurisdiction
      1. Article III, Section 2, defines the jurisdiction of U.S. federal courts.
      2. Lower courts have the authority to hear disputes involving particular parties and subject matter.
      3. The U.S. Supreme Court’s jurisdiction is divided into original and appellate.
         1. The former are classes of cases that may originate in the Court.
         2. The latter are those it hears after a lower court.
      4. Chief Justice Marshall informed Congress that it could not alter the original jurisdiction of the Court.
      5. The issue of appellate jurisdiction may be a bit more complex.
         1. Article III explicitly states that for those cases over which the Court does not have original jurisdiction, it “shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.”
      6. *Ex parte McCardle*
         1. The Court examined whether Congress can use its power under the exceptions clause to remove the Court’s appellate jurisdiction over a particular category of cases.
         2. The Court acceded and declined to hear the case.
         3. In 1962, however, Justice Douglas remarked, “There is a serious question whether the *McCardle* case could command a majority view today.”
         4. To this day *McCardle’s* status remains an open question.
   4. Justiciability
      1. According to Article III, the judicial power of the federal courts is restricted to “cases” and “controversies.”
      2. Chief Justice Warren elucidated several types of cases or characteristics of litigation that would render it nonjusticiable.
      3. Advisory Opinions
         1. A few states require judges of the highest court to advise the executive or legislature, when requested to do so, as to their views on the constitutionality of a proposed policy.
            1. Since the time of Chief Justice Jay, however, federal judges in the United States have refused to issue advisory opinions.
            2. They do not render advice in hypothetical suits because if litigation is abstract, there is no real controversy to resolve.
         2. The framers rejected a proposal that would have permitted the other branches of government to request judicial rulings “upon important questions of law, and upon solemn occasions.”
         3. In July 1793, Secretary of State Thomas Jefferson asked the justices if they would be willing to address questions concerning the appropriate role America should play in the ongoing British-French war.
            1. Less than a month later, in a written response sent directly to the president, the justices denied Jefferson’s request.
            2. Scholars still debate the Court’s letter to Washington.
            3. Some agree with the justices’ logic, but others assert that other more institutional concerns were at work.
         4. Justices have found other ways of offering advice.
            1. They have sometimes offered political leaders informal suggestions in private conversations or correspondence.
            2. They also often give advice in an institutional but indirect manner.
            3. More recent chief justices have sent annual reports on the state of the judiciary to Congress.
         5. Judges have occasionally used their opinions to provide advice to decision makers.
            1. *Regents of the University of California v. Bakke (1978).*
      4. Collusive Suits
         1. The Court will not decide cases in which the litigants:
            1. Want the same outcome.
            2. Evince no real adversity between them.
            3. Are merely testing the law.
         2. *Chicago & Grand Trunk Railway. Co. v. Wellman (1892)*
            1. At issue was a Michigan law that set maximum passenger fares for railroad companies.
            2. A lawsuit was filed by a passenger who was refused a ticket at the state-mandated price.
            3. The railroad company, which wanted to charge its previously higher rate, argued that the Constitution gave the state no power to regulate railroad ticket prices.
            4. As the Michigan Supreme Court observed, however, the passenger and the railroad were actually working together, conspiring to create a lawsuit in order to challenge the law.
            5. The U.S. Supreme Court agreed and refused to rule on the validity of the regulation.
         3. *Pollock v. Farmers’ Loan and Trust Co. (1895)*
            1. The Court has not always followed the *Wellman* precedent.
            2. In this case the Court declared the federal income tax unconstitutional.
            3. The litigants in this dispute, a bank and a stockholder in the bank, both wanted the same outcome.
         4. ***Carter v. Carter Coal Co. (1936)***
            1. The Court agreed to resolve a dispute over a major piece of New Deal legislation.
            2. The litigants, a company president and the company, both wanted the same outcome—the legislation to be declared unconstitutional.
         5. The Court might overlook some element of collusion if the suit presents a real controversy or the potential for one.
         6. It may also be that the temptation to set “good” public policy (or strike down “bad” public policy), is sometimes too strong for the justices to follow their own rules.
      5. Mootness
         1. In general, the Court will not decide cases in which the controversy is no longer live by the time it reaches the Court’s doorstep.
         2. ***DeFunis v. Odegaard (1974)***
            1. Rejected for admission to the University of Washington Law School, Marco DeFunis Jr. sued the school, alleging that it had engaged in reverse discrimination because it had denied him a place but accepted statistically less qualified minority students.
            2. In 1971 a trial court found merit in his claim and ordered that the university admit him.
            3. While DeFunis was in his second year of law school, the state supreme court reversed the trial judge’s ruling.
            4. He then appealed to the U.S. Supreme Court.
            5. By that time, DeFunis had registered for his final quarter in school.
            6. In a per curiam opinion, the Court refused to rule on the merits of DeFunis’s claim, asserting that it was moot.
         3. *Roe v. Wade (1973)*
            1. The Court legalized abortions performed during the first two trimesters of pregnancy.
            2. When the Court handed down the decision in 1973, Roe had long since given birth and put her baby up for adoption.
            3. But the justices did not declare this case moot, providing two legal justifications.
            4. First, *Roe* was a class action.
            5. Second, Roe could become pregnant again.
         4. *New York State Rifle & Pistol Association v. City of New York (2020)*
            1. The Court granted certiorari to review a New York City rule that prohibited firearms from being transported to a second home or shooting range outside the city.
            2. The state legislature amended its gun laws and allowed firearms to be taken outside of the city by its residents.
            3. The justices ruled that the case was moot, since the state had provided “the precise relief that petitioners requested.”
      6. Ripeness
         1. Whereas moot cases are brought too late, “unripe” cases are those that are brought too early.
         2. *Trump v. New York (2020)*
            1. This case involved a challenge to an order from the president to the Secretary of Commerce to exclude from the U.S. Census the number of unauthorized aliens in each state.
            2. The census, however, does not collect information on immigration status, and at the time of the President’s order, the census had already been underway for several months.
            3. The Court declined to evaluate whether the president had the authority to impose the order, since it was not clear that Secretary of Commerce could even carry it out.
         3. The ripeness requirement also mandates that a party exhaust all available administrative and lower court remedies before seeking review by the Supreme Court.
      7. Political Questions
         1. The Court recognizes that there is a class of questions the Court will not address because they are better solved by other branches of government, even though they may be constitutional in nature.
         2. ***Baker v. Carr (1962)***
            1. Justice Brennan set out the elements of political questions.
            2. First, the Court will look to the Constitution to see if there is a “textually demonstrable commitment” to another branch of government.
            3. Second, the justices consider whether particular questions should be left to another branch of government as a matter of prudence.
         3. *Nixon v. United States (1993)*
            1. The case involved a federal judge who challenged the method the Senate used to try him, after the House had impeached him.
            2. The Court held that impeachment procedures are not subject to judicial review.
            3. Article I of the Constitution assigns the task of impeachment to Congress.
            4. Judicial intrusion into impeachment proceedings could create confusion.
         4. *Rucho v. Common Cause (2019)*
            1. The justices have sometimes attempted to resolve an issue, only to conclude later that it has evaded the development of clear legal standards.
            2. The Court ruled that the issue of drawing legislative districts for partisan advantage could not be resolved successfully by judges.
   5. Standing to Sue
      1. If the party bringing the litigation is not the appropriate party, the courts will not resolve the dispute.
      2. According to the Court’s interpretation of Article III, standing requires that:
         1. The party must have suffered a concrete injury or be in imminent danger of suffering such a loss.
         2. The injury must be “fairly traceable” to the challenged action of the defendant.
         3. The party must show that a favorable court decision is likely to provide redress.
      3. *Carney v. Adams (2020)*
         1. The Court refused to rule, for instance, on whether the state of Delaware could limit its judgeships to members of a major political party.
         2. The justices decided that a political independent who claimed only that he was “ready and willing” to apply for a judicial vacancy had not suffered an actual injury; instead, he merely presented a more abstract complaint about the law.
      4. In addition to the three constitutionally derived requirements, the Court has articulated several prudential considerations to govern standing.
      5. Among the most prominent are those that limit generalized grievance suits.
   6. Constraints on Judicial Power and the Separation of Powers System
      1. The jurisdiction, justiciability, and standing requirements place considerable constraints are largely self-imposed.
      2. *Ashwander v. Tennessee Valley Authority (1936)*
         1. Justice Brandeis provided a summary of the principles of judicial self-restraint as they pertain to constitutional interpretation.
         2. His goal was to delineate a set of rules to avoid unnecessarily reaching decisions on the constitutionality of laws.
      3. Members of the executive and legislative branches also have expectations concerning the appropriate limits of judicial authority.
      4. If the justices are perceived as exceeding their role by failing to restrain the use of their own powers, a reaction from the political branches may occur.
         1. Congress could pass statutes or propose constitutional amendments to counteract decisions of the Court.
         2. The legislature might also alter the Court’s appellate jurisdiction or fail to provide the Court with its requested levels of funding.
         3. The political branches might react by being slow to implement and enforce Court rulings.
         4. The president and the Senate could use their powers in the judicial selection process to fill Court vacancies with new justices whose views on judicial power are more consistent with their own.
      5. The justices are fully aware that the president and Congress can impose checks, and they may exercise their powers with at least some consideration of how other government actors may respond.