

Study Outline

Chapter 14: The Judiciary

I. Introduction

- A. Only in the United States do judges play so large a role in policy-making.
 - 1. Judicial review: right to rule on laws and executive acts on basis of constitutionality; chief judicial weapon in system of checks and balances
 - 2. In Great Britain, Parliament is supreme
 - 3. In other countries, judicial review means little
 - Exceptions: Australia, Canada, West Germany, India, and a few others
- B. Debate is over how the Constitution should be interpreted
 - 1. Strict constructionist (interpretivist) approach: judges are bound by the wording of the Constitution
 - 2. Activist (legislative) approach: judges should look to the underlying principles of the Constitution
 - 3. Not a matter of liberal versus conservative
 - a. A judge can be both conservative and activist, or vice versa
 - b. Today most activists tend to be liberal, most strict constructionists conservative

II. The development of the federal courts

- A. Founders' view
 - 1. Most Founders probably expected judicial review but not its large role in policy making
 - 2. Traditional view: judges find and apply existing law
 - 3. Activist judges would later respond that judges make law
 - 4. Traditional view made it easy for Founders to justify judicial review
 - 5. Hamilton: courts least dangerous branch
 - 6. But federal judiciary evolved toward judicial activism
- B. National supremacy and slavery: 1789-1861
 - 1. *McCulloch v. Maryland*: federal law declared supreme over state law
 - 2. Interstate commerce clause is placed under the authority of federal law; conflicting state law void
 - 3. *Dred Scott v. Sandford*: Negroes were not and could not become free citizens of the United States; a direct cause of the Civil War
- C. Government and the economy: Civil War to 1936
 - 1. Dominant issue of the period: whether the economy could be regulated by state and federal governments
 - 2. Private property held to be protected by the Fourteenth Amendment
 - 3. States seek to protect local businesses and employees from the predatory activities of national monopolies; judicial activism
 - 4. The Supreme Court determines what is "reasonable" regulation
 - 5. The Court interprets the Fourteenth and Fifteenth Amendments narrowly as applied to blacks
- D. Government and political liberty: 1936 to the present
 - 1. Court establishes tradition of deferring to the legislature in economic cases
 - 2. Court shifts attention to personal liberties and becomes active in defining rights
- E. The revival of state sovereignty
 - 1. Supreme Court rules that states have right to resist some forms of federal action
 - 2. Hint at some real limits to the supremacy of the federal government

III. The structure of the federal courts

- A. Two kinds of federal courts
 - 1. Constitutional courts
 - a. Created under Article III
 - b. Judges serve during good behavior
 - c. Salaries not reduced while in office
 - d. Examples: District Courts (ninety-four), Courts of Appeals (twelve)
 - 2. Legislative courts
 - a. Created by Congress for specialized purposes
 - b. Judges have fixed terms
 - c. No salary protection

- B. Selecting judges
 - 1. Party background some effect on judicial behavior but ideology does not determine behavior
 - 2. Senatorial courtesy: judges for U.S. district courts must be approved by that state's senators
 - 3. The litmus test
 - a. Presidential successes in selecting compatible judges
 - b. Concern this may downplay professional qualifications
 - c. Greatest effect on Supreme Court
- IV. The jurisdiction of the federal courts
 - A. Dual court system
 - 1. One state, one federal
 - 2. Federal cases listed in Article III and the Eleventh Amendment of the Constitution
 - a. Federal question cases: involving U.S. matters
 - b. Diversity cases: involving citizens of different states
 - c. All others are left to state courts
 - 3. Some cases can be tried in either court
 - a. Example: if both federal and state laws have been broken (dual sovereignty)
 - b. Justified: each government has right to enact laws, and neither can block prosecution out of sympathy for the accused
 - 4. State cases sometimes can be appealed to Supreme Court
 - 5. Exclusive federal jurisdiction over federal criminal laws, appeals from federal regulatory agencies, bankruptcy, and controversies between two states
 - B. Route to the Supreme Court
 - 1. Most federal cases begin in U.S. district courts, are straightforward, and do not lead to new public policy.
 - 2. The Supreme Court picks the cases it wants to hear on appeal
 - a. Uses writ of certiorari ("cert")
 - b. Requires agreement of four justices to hear case
 - c. Usually deals with significant federal or constitutional question
 - 1. Conflicting decisions by circuit courts
 - 2. State court decisions involving the Constitution
 - d. Only 3 to 4 percent of appeals are granted certiorari
 - e. Others are left to lower courts; this results in a diversity of constitutional interpretation
- V. Getting to court
 - A. Deterrents
 - 1. The Court rejects 95 percent of applications for certiorari
 - 2. Costs of appeal are high
 - a. But these can be lowered by
 - 1. In forma pauperis: plaintiff heard as pauper, with costs paid by the government
 - 2. Payment by interest groups who have something to gain (American Civil Liberties Union)
 - b. Each party must pay its own way except for cases in which it is decided
 - 1. That losing defendant will pay (fee shifting)
 - 2. Section 1983 suits
 - 3. Standing: guidelines
 - a. Must be controversy between adversaries
 - b. Personal harm must be demonstrated
 - c. Being taxpayer not entitlement for suit
 - d. Sovereign immunity
 - B. Class action suits
 - 1. Brought on behalf of all similarly situated
 - 2. Financial incentives to bring suit
 - 3. Need to notify all members of the class since 1974 to limit such suits
- VI. The Supreme Court in action
 - A. Oral arguments by lawyers after briefs submitted
 - 1. Questions by justices cut down to thirty minutes
 - 2. Role of solicitor general
 - 3. Amicus curiae briefs

- 4. Many sources of influence on justices, such as law journals
 - B. Conference procedures
 - 1. Role of chief justice: speaking first, voting last
 - 2. Selection of opinion writer: concurring and dissenting opinions
 - C. Strategic retirements from the U.S. Supreme Court
 - 1. There has been a sharp increase in the rate of retirements (contra deaths)
 - 2. Early duties were physically onerous, adverse to one's health
 - 3. More recently, retirements occur when justices and presidents share party identification
- VII. The power of the federal courts
- A. The power to make policy
 - 1. By interpretation
 - 2. By extending reach of existing law
 - 3. By designing remedies
 - B. Measures of power
 - 1. Number of laws declared unconstitutional (more than 120)
 - 2. Number of prior cases overturned; not following stare decisis
 - 3. Deference to the legislative branch (political questions)
 - 4. Kinds of remedies imposed; judges go beyond what justice requires
 - 5. Basis for sweeping orders from either the Constitution or the interpretation of federal laws
 - C. Views of judicial activism
 - 1. Supporters
 - a. Courts should correct injustices
 - b. Courts are last resort
 - 2. Critics
 - a. Judges lack expertise
 - b. Courts not accountable; judges not elected
 - 3. Various reasons for activism
 - a. Too many lawyers; but real cause adversary culture
 - b. Easier to get standing in courts
 - D. Legislation and courts
 - 1. Laws and the Constitution are filled with vague language
 - a. Ambiguity gives courts opportunities to design remedies
 - b. Courts can interpret language in different ways
 - 2. Federal government is increasingly on the defensive in court cases; laws induce litigation
 - 3. The attitudes of federal judges affect their decisions
- VIII. Checks on judicial power
- A. Judges are not immune to politics or public opinion
 - 1. Effects will vary from case to case
 - 2. Decisions can be ignored
 - a. Examples: school prayer, segregated schools
 - b. Usually if register is not highly visible
 - B. Congress and the courts
 - 1. Confirmation and impeachment proceedings alter the composition of the courts
 - 2. Changing the number of judges
 - 3. Revising legislation declared unconstitutional
 - 4. Altering jurisdiction of the courts and restricting remedies
 - 5. Constitutional amendment
 - C. Public opinion and the courts
 - 1. Defying public opinion, especially elite opinion, frontally is dangerous
 - 2. Opinion in realigning eras may energize court
 - 3. Public confidence in court since 1966 has varied
 - 4. Change caused by changes of personnel and what government is doing
 - D. Reasons for increased activism
 - 1. Growth of government
 - 2. Activist ethos of judges