

Lesson Plan 2

Judicial Review

Procedures:

1. Distribute the student handout—*Defining Judicial Review*, or make it into a transparency, and go through the definition with the students.
2. Distribute the student handout—*The Establishment of Judicial Review*. Have the students read it silently or read aloud as a class. (Most of this material is reprinted from Constitutional Rights Foundation (www.crf-usa.org) *Bill of Rights* online lesson materials. Edits, additions, discussion questions and student handouts are provided by The Missouri Bar.
3. Do the discussion question at the end of the handout.
4. Distribute the student handout—*Consider This...*, or make it into a transparency. Do the discussion questions.
5. Debrief:
 - a. What did you learn? What surprised you?
 - b. What do still need to know?
 - c. How will you use this information?
6. Enrichment: Distribute the student handout—*How do Judges Interpret the Constitution*, or make it into a transparency. Have student research historical cases like *Brown v. Board of Education* or *Roe v. Wade* or *Hazelwood v. Kuhlmeier*, or recent cases such as *Vernonia v. Acton* or *Kelo v. City of New London*, and consider which of the methods of interpreting the Constitution the Court seemed to be leaning toward in those cases. (See *We the People: The Citizen and the Constitution*, Level III, Lesson 21.)

Defining Judicial Review

Judicial review is the power of the judicial branch of a government to decide if acts of the legislative or executive branches violate their constitutions. If a court reaches a decision that the action of the other branch violates the constitution, it then declares the action to be null and void. That means that the law or action is not be obeyed or enforced.

(From *We the People: The Citizen and the Constitution*, Level III, from the Center for Civic Education.)

The Establishment of Judicial Review

The United States Constitution says nothing about the one job the Supreme Court of the United States is most known for today. That is the power to review federal and state laws to determine whether or not they are constitutional. On the other hand, the Missouri Constitution specifically grants the power of judicial review to Missouri Courts:

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity...of a statute or provision of the constitution of this state... (Article V, Section 3.)

Some scholars have argued that the framers assumed that the Supreme Court would have this power without having to spell it out in the Constitution. They cite, for example, Alexander Hamilton in *The Federalist Papers*, a series of articles published to support the ratification of the Constitution. He wrote:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges, as fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

(See *Federalist Paper #78*)

In the 1803 case of *Marbury v. Madison*, John Marshall, the fourth Chief Justice of the Supreme Court of the United States, used judicial review to declare an act of Congress null and void. In that opinion, John Marshall wrote, “The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written.” This was the first time that the judiciary truly asserted its independence and power.

The facts of *Marbury v. Madison* are quite unremarkable in light of the tremendous influence this case has had on the power of the judiciary. In the last hours of his administration, President John Adams had appointed William Marbury as a justice of the peace in the District of Columbia. Unfortunately, Marbury did not receive the appointment papers before Adams left office. The new president, Thomas Jefferson, ordered Secretary of State James Madison not to deliver the appointment to Marbury. Marbury sued to get his appointment, citing the Judiciary Act of 1789. This law had given the Supreme Court the power to order judges and government officials to act.

In his majority opinion in the case, Marshall agreed that Marbury had a right to the appointment. He ruled, however, that the Supreme Court did not have the power to order Madison to deliver the appointment and make it official. The section of the Judiciary Act in question, he determined, gave the Supreme Court a power that it did not have under the Constitution. Since the Constitution was the supreme law of the land, Marshall reasoned, any statute that violated it could not stand and it was the duty of the Supreme Court to

overturn the statute. In giving up the power in the Judiciary Act, Marshall carved out for the court a much greater one—the power of judicial review.

Over the years, the court expanded the power of judicial review to cover not only acts of Congress, but executive and administrative orders as well. In time, it also became the power of the lower federal courts and many state courts as well. In many ways, this power was unique to the American experience. Even England, the origin of so many of our political and legal principles, did not give its judges the power to overrule acts of parliament on constitutional grounds.

Judicial review does have limits. Judges can only review laws or other governmental acts that are challenged in court. And once a ruling is made, judges must rely on the other branches of government to enforce them.

While judicial review expanded the power of the judiciary, it also placed judges in a new role. In deciding whether a governmental act meets constitutional standards, judges had to *interpret* the meaning of the Constitution. Their interpretation, even if based on law and reason, can run contrary to the views of legislators, presidents, or the public. (*See* the handout—Ways to Interpret the Constitution.)

How Judicial Review Has Evolved Through the Years

Ever since the time of John Marshall, the judiciary has been embroiled in political squabbles, some that have threatened its independence. In fact, the famous case of *Marbury v. Madison* itself began when President Adams tried to appoint a loyal Federalist Party man to a judgeship, and the new president Jefferson rejected the appointment favoring judges from his own political viewpoint.

President Andrew Jackson quarreled with Chief Justice Marshall over the court's decision in the case of *Worcester v. Georgia*. Jackson reportedly said, "Well, John Marshall has made his decision, now let him enforce it." Though it is likely that Jackson never really used these words, the statement illustrates one of the real limits on judicial power. It must rely on the other branches of government to enforce its rulings.

Democratic President Franklin Roosevelt, frustrated with Supreme Court actions striking down much of his New Deal legislation, proposed a plan to increase the number of justices so that his appointees would be able to outvote the sitting justices. He also once prepared a radio address to tell the American people why he would not comply with a Supreme Court ruling, but at the last minute the court voted in his favor. Roosevelt's proposed plan to "pack" the Supreme Court set off a firestorm of public criticism, even from his own supporters. Viewed as a naked attack on the independence of the judiciary, no one ever proposed such a strategy again. (Later, the number of Supreme Court Justices was set at nine by federal statute.)

At times the court has also made decisions that have run contrary to the will of Congress. Under the Constitution, Congress has numerous checks that it can use against the

judiciary. First, it has control over funding the federal judiciary's budget. Though it cannot lower judges' salaries during their terms in office, it can reduce staff, lower operating costs, and withhold money for court-ordered actions. Second, Congress can propose new laws or constitutional amendments to override specific court decisions. Third, it can restrict the kinds of cases that can be appealed to the federal courts. In fact, though unlikely, Congress has the power to completely abolish the lower federal courts.

Over the last five decades, America's independent judiciary has done much to shape our history. Through its decisions, the court extended voting rights, abolished laws legalizing racial segregation, recognized the rights of those accused of crime, and expanded the rights of free speech and the press. While many of these decisions became accepted by the vast majority of Americans, others have raised ongoing controversy. Court decisions guaranteeing a woman's right to an abortion, banning prayers and Bible reading in schools, excluding illegally seized evidence in criminal trials, and permitting the burning of the American flag have led to charges that the court has gone too far in interpreting the Constitution.

These decisions have given rise to new calls for limiting the power of the judiciary. In recent years, Congress has passed legislation limiting the discretion federal judges have in determining sentences in criminal trials. Proposals have been made to limit the jurisdiction of federal courts in certain matters. The Senate has also shown its willingness to carefully scrutinize presidential appointments to the Supreme Court and to the lower federal courts under its "advice and consent" power. The trend toward limiting the power of the judiciary can also be seen at the state level.

Some worry that if these trends continue, the delicate balance between the powers of the judiciary and the other branches of government in our system could be undone. Others fear that these trends could compromise judicial independence making judges less likely to make decisions based on law and conscience and more likely to make decisions that serve political ends.

As we have seen, these debates are not new to our history. It is likely that they will continue into the new millennium and beyond.

For Discussion

Do you agree with Hamilton and others that "it only makes sense" in a system of checks and balances that a court can declare acts of the legislative and executive branches null and void? Why or why not?

Consider This...

1. One of the recurring criticisms at both the federal and some state levels is that an unelected body—the Supreme Court—overturns the actions of the legislative and executive branches and, therefore, goes against the majority of the people. Abraham Lincoln believed that there were certain things that the majority should not be able to do—things that violate natural rights, which is the purpose of the Constitution—to protect our natural rights.

React: Should the courts be able to overturn the “will of the majority”? Do you consider this undemocratic? Which is most consistent with how our Founders felt—majority rule or protection of minority rights?

2. In a recent column—Reviewing Judicial Review—George Will was defending judicial review and ended his column with this:

Finally, since Jefferson, no significant politician has flatly opposed judicial review. Even when the Supreme Court was most athwart public opinion—striking down New Deal legislation—voters sharply rebuked President Roosevelt for his plan to “pack” the court by enlarging it. So this is another powerful argument for the compatibility of judicial review with American’s democratic values: the demos—the public—supports it.

React: Do you agree with George Will? Why or why not? Do you think the public supports judicial review? Do you think the “public” is aware of concept of judicial review?

How Do Judges Interpret the Constitution?

Judicial review is not an active power. Both the United States and Missouri Supreme Courts cannot simply declare a law unconstitutional. First there must be a court case where someone can demonstrate harm from the law or action. Second the case must make its way through the lower courts—trial court, sometimes a lower appellate court and then it comes before the higher courts. The four methods of interpretation are:

1. Using the literal meaning of the words of the Constitution. The justices consider only the plain meaning of the words of the Constitution or what they believe they meant at the time the Constitution was written.
2. Using the intentions of those who wrote the Constitution. This is similar to the first method but also calls upon judges to consider what the philosophy of the Framers of the Constitution was.
3. Using basic principles and values in perspective of history. People who favor this method believe judges must consider the ideas about government that the Framers had but also must consider the realities of contemporary society.
4. Using contemporary social values in terms of today's policy needs. This method argues that the justices should use contemporary social values in interpreting the Constitution to fit today's policy needs.

Think about

1. Which of the above methods do you favor?
2. Which of the above methods would you consider “judicial activism” and which “judicial restraint”?