

Judicial Review

(In conjunction with the Judicial Track of the Checks and Balances Project)

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Description: This lesson plan will reinforce the concept of judicial review discussed in third judicial telecast.

Objectives:

1. To reinforce the concepts discussed in the telecast on judicial review.
2. To demonstrate how judicial review is an important function of the courts in a governmental system founded on the principles of separation of powers and checks and balances..

Suggested grade levels: 9-12

Materials needed: Handouts for and access to either a writing board or a flip chart.

Procedures:

1. Distribute the student handout—*The Establishment of Judicial Review*. Have the students read it silently or read aloud as a class. This article provides additional background on judicial review as well as repeating some of the more important information covered earlier. (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.
2. Do the discussion question at the end of the handout.
3. Distribute the student handout—*Consider This...*, or make it into a transparency. Do the discussion questions.
4. Debrief:
 - a. What did you learn? What surprised you?
 - b. What do still need to know?
 - c. How will you use this information?
5. 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 also *We the People: The Citizen and the Constitution*, Level III, Lesson 21.)

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.

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

1. 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?
2. Do you think judicial review is consistent with the principle of representative democracy? Why or why not?

Student Handout

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?