

The Judiciary and Judicial Review

Objectives:

1. Students will become familiar with the role of the federal courts in American democracy.
2. Students will understand the definition of and basis for judicial review, one of the distinctive features of U.S. constitutional law.
3. Students will explore the controversy between theories of strict construction and expansion and apply to contemporary situations.

Materials needed: Copies of student handouts

Time needed: 2-3 class periods

Grade level: Grades 9-12

Procedure:

1. Instruct students to look at [Article III of the Constitution](#). Have them read the language that gives power to the Judicial Branch of government.
2. Ask the students to read the handout "[Creation and Authority](#)." Discuss the operation and jurisdiction of the court. Explain the requirement of "case and controversy" to the students.

The federal courts will not answer just any question propounded, like whether wrestling coaches should teach psychology. The courts answer legal questions. Moreover, you can't walk into court and ask the judge to answer even important legal questions, unless the answer is necessary to settle a case. Under Article III, the courts sit to hear "cases and controversies." Important legal issues that are not raised by adversaries in an actual legal dispute are not within the judicial purview

Jethro K. Lieberman
The Enduring Constitution

This principle was laid down in 1793 when the Supreme Court refused President Washington's request for advisory opinions on questions dealing with American neutrality arising out of the war between England and France.

3. Explain original jurisdiction and appellate jurisdiction. Original jurisdiction means the Supreme Court has the power to try a case in the first instance. Appellate jurisdiction means the court hears appeals from lower courts, whether state or federal. Congress has the power to limit and regulate the court's ability to hear cases on appeal from lower courts. However, Congress has no power to limit cases of original jurisdiction. Congress cannot increase or decrease the Supreme Court's original jurisdiction. (This is one of the issues in [Marbury v. Madison](#).)
4. The judiciary is the least understood branch of government. The Constitution creates the Supreme Court. It leaves to Congress the task of creating the lower courts and deciding how many judges will sit on the courts.

5. For more than a century, the Supreme Court consisted of the chief justice and eight associate justices. In the early days, the court had one chief justice and five associate judges.
6. The third branch of government was considered the least important and least dangerous by the framers. In fact, they thought it so insignificant that when the federal government moved to Washington in 1800, the capitol architects forgot to design or build special place for it to sit. The Supreme Court got its own building in 1935.
7. The Supreme Court has played an increasingly important role in the development of Constitutional law. This development has also created controversy surrounding the action of the court. Should the court be free to act as it wishes? No, the court's role is to render decisions that are fashioned in some way from the Constitution, they must comply with the Constitution. The controversy has been in what way this is done; what method does the court use to carry out this function of judicial review?

There are two general theories on the appropriate method. The first is strict construction, sometimes called original intent. This theory limits constitutional decisions by looking at the language of the Constitution. The supporters of this theory interpret only the words of the text, they say that the Constitution is what the framers wrote and intended. The second theory is loose construction. This theory states that many provisions of the Constitution have no plain meaning, that a search must be made outside of the language of the Constitution for constitutional values.

8. Ask students which of the methods they prefer. How should the judges read the Constitution, should they try to find out what it meant in 1787 and apply that meaning today, or should they try to take account of changing times, circumstances, and conditions? Ask them to consider the advantages and disadvantages of each. (Some include: original intent is hard to determine, looking outside the Constitutional actually results in a continuing Constitutional Convention, for example the right to privacy although not mentioned in the Constitution has become a constitutionally protected right.)
9. This controversy continues and becomes more public during the appointment of new judges to the Supreme Court. During confirmation hearings they are frequently asked their viewpoints on the issue of original intent versus contemporary construction. Also presidential candidates are asked about the philosophy of their potential judicial nominees. Ask students to think of current issues and examples.
10. In addition to looking at the language of the Constitution, the Supreme Court looks at previous cases (precedents) to guide its decision-making. This practice or policy is called “stare decisis” and it suggests adherence to the court's latest decision on a particular issue. Why or why not is this a good idea? (It is a good idea because it provides stability and predictability. It is a bad idea because society is “stuck” with bad decisions (such as the [Dred Scott v. Sanford](#) and [Plessy v. Ferguson](#) cases) until the court overturns them. Ask students to think of examples in which the Supreme Court has ignored precedents and overruled cases even when its decision is contrary to current public opinion ([Brown v. Board of Education](#)). Ask them to think of other examples. (Possible examples might include illegal search cases and first amendment cases.)
11. Have the students read the handouts “Legal Interpretation—Judicial review” and “[Marbury v. Madison](#)” and “[Dred Scott v. Sandford](#).” Compare the cases. Suggested questions include:
 - A. What were the facts of each case?
 - B. What were the questions that the court needed to answer?

- C. What was the reasoning behind the court's answer? (In [Marbury](#), the court looked to the language of the Constitution in ruling that Congress had violated the Constitution in granting additional original jurisdiction power to the court. Congress, the court said, did not have the power to increase original jurisdiction and therefore the federal statute was unconstitutional. In [Dred Scott](#), the court ruled that the Missouri Compromise of 1820 was unconstitutional because it violated the Fifth Amendment by illegally taking the property of citizens (slaves) when it prohibited slave ownership in new territories. The court declared slaves to be property.
- D. What did the court do to come to this conclusion? (In [Marbury](#), this is the beginning of the development of the concepts of judicial review in American Constitutional law. The court said that the power to decide whether an act is constitutional or not belongs to the judiciary. [Dred Scott](#) was the second time the Supreme Court declared an act of Congress unconstitutional)
12. Ask the students if they agree that a committee of nine people, appointed for life, should decide for all Americans what the Constitution means. Or would they prefer that Congress, which represents all Americans, decide. Or should the issues be brought to the public through a vote. If the general public is left to decide the meaning of the Constitution, will the interests of the minority that are guaranteed in the Bill of Rights be protected?

You might provide the students with the following hypothetical situation:

You are a student at Olsen High School. The students and the teachers are disagreeing on interpretations of school policy. A committee has been established to decide the issue. However, the committee consists of mostly teachers. Will the teachers be fair? Will they protect the interests of the students?

Compare this with the constitutional issues surrounding race. If Congress, which has a white majority, makes decisions, will the interests of the minority (black persons) be protected? If the students belonged to the minority group, will they trust the majority group to be fair?

13. Complete the lesson with a discussion of the Court's isolation in an effort to minimize the impact of public sentiment on the decision-making process. Discuss the value of an independent judiciary. Federal judges are not subject to public scrutiny through the election process as long as they act in good behavior. What are the advantages and disadvantages of this system? What is the system for electing state judges? (In Minnesota, most judges are appointed to their first terms by the governor and must run for reelection every six years after that.)

From [The Constitution: A 200 Year Experiment](#) published by the Minnesota Center for Community Legal Education, 1987.

STUDENT HANDOUT

CREATION AND AUTHORITY

The U.S. Supreme Court is the one court established by name in the Constitution. Article III, section 1 of that Document says, "The judicial power of the United States shall be vested in one supreme Court, and in such inferior [lower] courts as the Congress may from time to time ordain and establish." The judicial power is the power to decide disputes in conformity with the law and by the methods or procedures that are established both by custom and by law. The authority of a court to exercise its judicial power is what is meant by the **jurisdiction** of a court. The federal courts have jurisdiction based both on the nature-of the dispute and the parties to the dispute. The second section of Article III outlines the kinds of cases that the federal courts have the authority to hear.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies between two or more States; between a State and Citizens or another State; -between Citizens of different states; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Although some of this jurisdiction belongs exclusively to the federal courts, much of it is shared with state courts.

Article III also defines the **original jurisdiction** of the Supreme Court. These are the cases that can go directly to the Supreme Court without a lower court first having heard the dispute.

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Supreme Court exercises its appellate jurisdiction far more often than its original jurisdiction. This means that the Court reviews cases that have been heard first in another lower court.

There are **some obvious differences** between courts exercising original and appellate jurisdiction. In a courtroom where a case is first heard there are commonly witnesses who testify and there may be a jury. In an appellate hearing a panel of judges hears the lawyers from both sides argue specific legal points raised by the case. Since the case has already been heard in a lower court, there are no witnesses and no jury is present. The appealed case is argued from the written record of the case and the written briefs (arguments) of the opposing sides.

Notice that the Congress can control the appellate jurisdiction of the Supreme Court. Except for the original jurisdiction of the Supreme Court, no federal court has any authority to hear any case unless Congress has granted it that power. The Congress has had other important powers over the federal courts. Article III says very little about federal judges except that

[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The number of judges who would serve on the Supreme Court and their qualifications were left to future Congresses and Presidents to determine.

You have now read almost all of what the constitution says about the judicial branch of the government. By the brevity of Article III, it is obvious that the authors of the Constitution decided not to be too exact or specific about the powers of the Supreme Court or the organization of the judicial branch as a whole. The federal court system as we know it today has been molded and defined by tradition and custom, by laws of Congress, and by the decisions of the justices who have served on the Supreme Court. Like the other branches, the judiciary has evolved within the limits set forth in the Constitution.

STUDENT HANDOUT

LEGAL INTERPRETATION--JUDICIAL REVIEW

The basic duty of any court is to interpret law. This is true even when the case is a minor one before a lower court. For example, have you or someone you know ever been to a court after receiving a traffic ticket? The lawmakers (legislature) might have set the speed limit at 35 miles per hour on a particular street. The police, who are a part of the executive branch of the local government and charged with enforcing that speed limit, have charged someone with violating that law. It is the duty of the court to hear both sides of the resulting case and apply the appropriate laws. In doing so, the court will have interpreted the law as it applies to the particular facts of that one case. The true facts in the case will have been determined and then matched to the laws governing the situation.

The task of interpreting the law may be relatively simple in the lower courts. However, those cases that go all the way to the United States Supreme Court usually are not simple. They may involve complex laws passed by Congress. Frequently they involve questions about the meaning of our most fundamental law, the U.S. Constitution.

The authority of the Supreme Court to interpret the meaning of the Constitution is not explicitly provided in the Constitution. This authority, called judicial review, is, nonetheless, the most important power exercised by the Supreme Court. Judicial review allows the Court to nullify any governmental action that the Court finds in conflict with the Constitution.

The constitutional phrase which gives the Supreme Court jurisdiction over cases "arising under this Constitution" ([Article III](#), Section 2) and the supremacy clause (This Constitution ... shall be the supreme law of the land" from Article VI) have been used as justifications for the Supreme Court's exercise of judicial review.

Actually, the idea that there was a higher law which could not be altered by the passage of a new legislative act was quite old. The hated Stamp Act had been declared null and void by the royal governor of Massachusetts because the colonists believed it contradicted "the Magna Carta and the natural rights of Englishmen."

When the U.S. Constitution was written, many felt that judicial review was an inherent function of the Supreme Court even though it was not specifically outlined in the Constitution. During the debate over ratification of the new Constitution, Alexander Hamilton explained this view of judicial review in [The Federalist, Number 78](#). 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 the judges as, a 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, and, in case of irreconcilable difference between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

The will of the whole people as expressed in their Constitution was to be preferred over the will of the legislature which might only reflect the temporary will of a part of the people. Hamilton and others believed that the Supreme Court would be the natural arbiter of what was or was not constitutional.

The will of the majority in the first Congress was expressed concerning judicial review of state laws in 1789. The first bill ever introduced in the United States Senate became the famous Judiciary Act of 1789. This Act established federal district courts throughout the country as the first tier of "inferior" courts in the federal court system. The law also said that the Supreme Court would have six judges, one to be called Chief Justice and five Associate Justices. One of the most important parts of the law was the section that granted the Supreme Court the power to review the decisions of the various states' Supreme Courts and to void those that contradicted the federal Constitution, federal law, or treaties. As it was used in the early 1800s against state laws, this type of judicial review was an important force in unifying the country and advancing the cause of nationalism.

Another section of the Judiciary Act of 1789 authorized the Supreme Court to issue **writs of mandamus** as part of the Court's original jurisdiction. This meant someone could go directly to the Supreme Court and ask that Court to issue an order directing some public official to carry out some aspect of his duties. When this section of the law was used by William Marbury some years later, the Court made use of the opportunity to extend its power of judicial review to acts of the Congress.

Student Handout

Marbury v. Madison **5 U.S. 137 (1803)**

Facts

Thomas Jefferson was elected President in 1800. He was the leader of an anti-Federalist party that was called the Republicans. During the period between Jefferson's election and his inauguration, the defeated Federalists did two things that angered incoming Republican officials, they passed the Circuit Act of 1801, which double the number of federal judges, and they filled the new judicial offices with Federalists.

Republicans branded many of the new appointees "midnight judges" because they believed that outgoing President Adams signed the appointments just before midnight of his last day in office. However, some of the appointments were not delivered before Adams left office.

Most of the midnight judges took office. But when President Jefferson discovered that some of the commissions had not been delivered while President Adams was in office, he ordered that his new Secretary of State James Madison not deliver them. One of the undelivered judicial commissions would have made William Marbury a judge in the District of Columbia.

Marbury asked the Supreme Court to force Madison to deliver his commission. He based his petition on a section of the Judiciary Act of 1789 that had given the Supreme Court the power to issue writs of mandamus (judicial orders that required government officers to perform specific acts, such as deliver the commissions). The court issued an order for the Secretary of State to come to court to explain why the commissions were not delivered. Secretary of State Madison ignored the order. Many Republicans were angered that the court would dare to call a high level executive to appear before it.

The court delayed hearing the case until 1803. It was clear that a potentially serious confrontation had developed between the executive and judicial branches. John Marshall, who was the Chief Justice, knew that he must proceed carefully. The courts were the only stronghold of Federalist power. The President and Congress have already indicated a willingness to impeach Federalist judges, and Congress had already passed a law postponing a regular session of the Supreme Court for over a year.

As the political controversy grew, Marshall knew that if he ordered Madison to deliver the commissions there would be problems. The decision would be unpopular and could increase the pressure to attack the court through impeachment. There was also the possibility that the executive branch would simply ignore the order. Even so, to refuse to grant Marbury's request might show the powerlessness of the Court and indicate that the high executive officials were above the law.

Questions before the court?

1. Did Mr. Marbury have a right to his petition?
2. If Mr. Marbury had a right to his office, and if that right had been violated, could the laws of his country help him?
3. Did the Supreme Court have the authority to deal with Mr. Marbury's request?

4. Was the law under which Mr. Marbury appealed, the Judiciary Act of 1789, valid?

The Court's decision

The Chief Justice of the Supreme Court, John Marshall, wrote the court's unanimous opinion. The court decided that Mr. Marbury had a right to his petition because his commission had been signed by the President of the United States, it had been sealed by the Secretary of State, and that the Judiciary Act of 1789 created the judgeship he wanted and gave to him the right to hold the job for five years, regardless of what party was in power. It also ruled that as a citizen, Marbury had the right to claim protection of the law when his rights were violated. Chief Justice Marshall said that the United States is a government of laws and not men and that the government must see to it that the laws protect people whose rights are violated.

However, the court ruled that Marbury's request for a writ of mandamus was based on a part of the Judiciary Act of 1789 that was unconstitutional. Claiming that the Constitution defined and limited the original jurisdiction of the Supreme Court, it was unconstitutional for Congress to alter that jurisdiction by adding to it the power to issue a writ of mandamus.

The chief justice refused to accept a power that had been granted to it by Congress. In doing so he announced that the Court would exercise much greater power, judicial review. Justice Marshall wrote:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two rules conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law; disregarding the Constitution; or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Despite there being no mention of this power in the Constitution, since 1803 our nation has assumed the two chief principles of this case: that when there is a conflict between the Constitution and a federal or state law, the Constitution is supreme; and that it is the job of the Court to interpret the laws of the United State. The courts, particularly the Supreme Court, have become the guardians of the Constitution so that whenever a Congress, President, or state acts contrary to it, the actions are ruled unconstitutional.

Portions of this case study were taken from [The Constitution](#), published by Law in a Changing Society, Dallas, Texas, 1982.

Student Handout

Dred Scott v. Sandford **60 U.S.393 (1857)**

The Facts of the Case

In 1857, a case was heard by the Supreme Court of the United States in which a 58 year-old-man asked for the Supreme Court's help in ending his condition of slavery and granting his full rights as a U.S. citizen.

Dred Scott was a slave owned by a military surgeon. In 1833, Scott's master took him from Missouri to a military post in Illinois. In 1836, they moved again to Fort Snelling in the territory near the city of St. Paul that would later become the state of Minnesota. At Fort Snelling, Scott married Harriet, a slave of another military officer. They had two children. Both slaves then lived with Scott's master. In 1842, the couple was taken back to Missouri. In 1843, Scott's master died and his wife hired out Scott, his wife, and their children to work for other families. In 1846, Scott sued in Missouri court for his and his wife's freedom. It took 11 years for his case to reach the Supreme Court in 1857.

Dred Scott's attorneys argued that since Scott and his wife, Harriet, had been taken to a part of the U.S. where slavery was forbidden, they had lived and married as "free" individuals. They were not just passing through Illinois or Minnesota but had lived in free territory for almost nine years. The Congress of the United States had passed the Missouri Compromise of 1820 saying slaves were not allowed in that part of the country. If slavery was forbidden, they were free, and once free a person could not be made to go back to slavery.

The main opponents of Dred Scott were slave owners who argued that slaves were their property and that the Fifth Amendment to the Constitution protects the right to own property. If Dred Scott were granted his freedom, many slaves would also qualify to be free. This would cause slave owners to lose valuable property worth a lot of money.

The Scotts lost the first trial because they used hearsay evidence. They were granted the right to a second trial in which a jury heard the evidence and decided that the Scott family should be free. Scott's owner did not want to lose her property so she appealed to the Missouri Supreme Court, which in 1852 reversed the lower court. Scott appealed to the federal courts.

The Questions before the Court

1. Can a slave, whose ancestors were imported into this country, and sold as slaves, become a citizen entitled to all the rights, privileges, and immunities guaranteed by the Constitution including the right to sue?
2. Was the Missouri Compromise unconstitutional because it deprived citizens of "life, liberty, or property without due process of law" as required by the Fifth Amendment?

The Court's Answer

In a 7-2 decision, the court ruled against the Scotts. Chief Justice Roger Taney wrote the opinion for the court and explained:

(a) "Negroes" were not considered citizens of the United States at the time the Constitution was adopted. Therefore, they had "no rights which the white man was bound to respect." Neither Dred Scott nor any other African-American including any people who thought they were "free," were actually citizens of the United States. Therefore, African-Americans could not use any United States courts to try and get help for their problems.

(b) The Constitution does protect the right of people to own property. Slaves are actually property and not citizens. All property rights are to be equally protected. Because government cannot take away or restrict owning other property without due process of law, it has no right or power to restrict owning slaves and is legally bound to protect that right. For example, if a slave runs away to any place in the United States the government must help return that property to its owner.

Chief Justice Taney said,

“and an act or Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.”

“The status of slaves who had been taken into free States or territories and who had afterwards returned depended on the law of the State where they resided when they brought suit.”