

Thousands have gathered outside the Supreme Court in protest, both in support of and against a new law. A group of school shooting victims lobbied to get a gun control law passed to stop gun violence in schools. Many support the law and believe it will make our country safer. Others say the new law is unconstitutional because it limits private citizens' ability to purchase guns. The case has been brought to the Supreme Court, and it's up to them to decide. *But why is it up to the Supreme Court anyway?*



Let's Talk About Judicial Review

Judicial review is the power of the Supreme Court to decide whether a law, executive order, or other act of government is constitutional or not. It's the ultimate check on the executive and legislative branches of government. Why? Because it allows the Supreme Court to evaluate actions from the president and Congress—and, in some cases, reverse them. Think the President's new executive order violated freedom of speech or that Congress' new law restricted your right to equal protection? You can take it up in federal court. Whenever a citizen can demonstrate that a law or government action violated their rights, they can bring that complaint to the courts. Their complaint is the first step in the process called judicial review.

It's Constitutional, Right?

Wrong. Contrary to what some might think, the power of judicial review is not expressly given in the Constitution. In fact, this power wasn't even established until 1803, almost fifteen years after the states ratified the U.S. Constitution. That was when a Federalist judge named **William Marbury** started the process that would change the way the courts functioned forever.

Step back into 1801. President John Adams, a member of the Federalist party and only the second President of the United States ever, was about to step down and hand over the reins to a Democratic-Republican, Thomas Jefferson.



Source: C-SPAN

William Marbury

Federalist? Democratic-Republican? You might be wondering why all those labels even matter. Federalist and Democratic-Republican were the main political parties people identified with at the time, like Democratic and Republican today. 1801 was the first-ever political party change in the history of our country, so things were a bit tense. Before Adams stepped down, he appointed several federal judges. (Not to be confused with *Federalist*; "federal" here means that they worked for the national government, not the states). All of the judges were from his political party. Adams hoped that the Federalists would be able to control the courts once the Democratic-Republicans took office. But once Jefferson was in office, he and Secretary of State James Madison decided not to send the letters that finalized the judges' appointments.

Then & Now

The power to appoint judges is still a big deal because it's a way for the executive and legislative branches to influence the federal courts, especially the supreme one! Since presidents are responsible for nominating judges, they often choose candidates whose rulings have proven to align with their own political party. And because federal judges serve for life, their rulings impact the country much longer than a president's one or two terms. Of course this doesn't always work out. Sometimes, as with President Obama in 2016, an opposing party in the Senate stops the judicial nomination from being approved. This is one way Congress can influence the judicial branch as well.

Justice Marshall Gets Creative!

One of the to-be-judges was William Marbury. He was livid, and he wanted his job. He took his complaint to the Supreme Court and asked them to issue a **writ of mandamus**, basically, an order from the Court requiring someone to perform a lawful duty, like delivering those appointment letters. The chief justice of the Supreme Court, **John Marshall**, was a Federalist himself, so it seemed pretty obvious that he'd side with Marbury, and he did, *kind of*. But he also gave another judgment; one that would change the way the Court functioned forever.

Justice Marshall agreed that Madison needed to hand over the letters. He just didn't think the Court could force him to do it. Specifically, he didn't believe that the Court should have the power to issue writs of mandamus at all because, get this, it wasn't written in the Constitution!

Article III of the Constitution describes the role, authority, and format of the Supreme Court, and gives Congress the power to create and structure lower federal courts. In 1789, Congress wrote a law that did just that. That law was called the **Judiciary Act of 1789**, and it created the federal court system as you know it today. The act also gave the Supreme Court the power to issue writs, like the one Marbury wanted. This is where Marshall saw a problem. *Where was that power in the Constitution?* Marshall believed that the Judiciary Act of 1789 expanded the Supreme Court's power beyond what was written in the Constitution and the other justices agreed.



What Does That Even Mean?

Essentially Justice Marshall decided two things:

#1 - Marbury was right. Madison should hand over the letters.

#2 - The Court had no constitutional power to force him to do so.

— It is so ordered by the Supreme Court of the United States

Wait, what?! If it sounds confusing, that's because it was. Marshall's decision came at a time when the Court's power was new and kind of uncertain. It would have been dangerous for it to look as though Justice Marshall was taking Marbury's side since they were both in the same political party. So Marshall shifted the case from a political fight between parties to a question of **jurisdiction**, which is the official power to make legal decisions or exercise authority over a person, institution, or territory.

This was the first time that the Supreme Court had ever declared an act of Congress unconstitutional. Marshall ruled that whenever a law (like the Judiciary Act of 1789) was in conflict with the Constitution, the Constitution must be upheld. By ruling that the Court only had the jurisdiction to use powers given to it in the Constitution, the Court actually established another power for itself—the power of judicial review!

Marbury never got his job, but using the Constitution established legal precedent. **Legal precedent** is the practice of relying on the basis of an earlier decision to determine the outcome of future decisions. Judicial review may not be found word-for-word in the Constitution, but the Court's ruling in *Marbury v. Madison* solidified it as a precedent that the Court has used ever since.

What if the Court had issued the writ? Would Marbury have gotten his job?



Maybe—the Court can rule, but it doesn't have much power to enforce its decisions.

The Court doesn't have the authority to make law or enforce its decisions. Those powers belong to other branches. It doesn't happen often, but Supreme Court rulings have been ignored in the past. In *Worcester v. Georgia (1832)*, President Andrew Jackson and the state of Georgia dismissed a decision that said the state couldn't impose its laws in the Cherokee nation. And *Brown v. Board of Education (1954)* which desegregated public schools faced protest for years before President Dwight Eisenhower mobilized the National Guard and Army troops to help nine Black students desegregate Central High School in Little Rock, Arkansas.

Here's Where It Gets a Bit More Complex...

Today, judicial review is one of the most well-known powers of the Court and gives the judicial branch equal standing with the other branches of the government. The Supreme Court can evaluate congressional laws, actions taken by the president, and state laws and actions for constitutionality if they're brought to the Court for review. And because judicial review takes place after a law has been passed or an action has been taken, the Court often has the final say.

Judicial review is usually defined in one of two ways: restraint or activism. **Judicial restraint** is the belief that judges should limit their power over legislation. Rulings should try to determine *how* the law applies instead of overturning it. Because of this, restraint typically requires that judges stand with earlier Court precedent, a principle called **stare decisis**—pronounced stair-ee de-cy-sis—which is Latin for "let the decision stand".



Pioneered in the United States, judicial review now exists in more than thirty countries. State supreme courts also have this power, but the U.S. Supreme Court can review their decisions.

Judicial activism, on the other hand, is the willingness of a judge to overturn laws by declaring them unconstitutional. Although it can be difficult to define, judicial activism typically occurs when political and social forces butt heads against parts of the Constitution or specific laws. In instances of activism, the Court strikes down laws or actions, usually for the purpose of extending the protections of the Constitution. They may also overturn their own decisions—legal precedents—set in previous cases.

Judicial Restraint

Gamble v. United States (2019)

Terrance Gamble argued that under the 5th Amendment the state of Alabama and the federal government couldn't try him for the same crime (a practice called double jeopardy). The Court upheld the precedent that state and federal governments can each try a person for the same crime, and it is not double jeopardy, because each government is its own sovereign—government with the authority to set its own laws and punish those who don't follow them.

Judicial Activism

Obergefell v. Hodges (2015)

In this case, the Supreme Court decided that the 14th Amendment guarantees the right to marry for same-sex couples and required that all states recognize same-sex marriages as equally valid as opposite-sex marriages. This case of **judicial activism** overturned *Baker v. Nelson*, a case that said bans on same-sex marriage were constitutional, and reversed the ruling of the lower court.

Facts of the Case

Dick Heller sued the District of Columbia because he said that the District's law prohibiting the registration of handguns and requiring that users disassemble and unload their firearms unless they were being used for business or legal activities violated his 2nd Amendment right to keep a firearm in his home for protection.

DISTRICT OF
COLUMBIA V.
HELLER
(2008)

#IRL

Although judicial activism can sometimes be unpopular, it has been responsible for the protection of many of the rights we have today. Cases like *Brown v. Board of Education* (1954), which desegregated schools, and *Miranda v. Arizona* (1966), which required police to inform suspects of their legal rights, were considered activist decisions, but it would be hard to imagine our society today without them.

In real life, the Court has reviewed and decided many controversial cases like the one that started our lesson. Before 2008, the Court interpreted the 2nd Amendment based on how it related to a state's need to keep a well-regulated militia. In 2008, in *District of Columbia v. Heller*, the Court ruled in favor of gun lobbyists like the National

Rifle Association (NRA) in saying that the 2nd Amendment *did* protect citizens' right to own a gun. But the Court has also said their decision shouldn't be interpreted to go against reasonable gun laws, like those that prohibit where a person is allowed to carry a gun, say who can own a firearm, or set conditions on how weapons are sold. Still many groups are challenging whether certain state laws violate the 2nd Amendment, and they're asking the Court to review their cases.

You have the right to know about your right to remain silent!

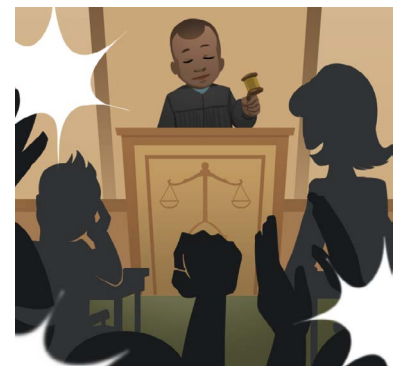
You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?



Before *Miranda v. Arizona*, the rules about what police and interrogators could do were decided by state legislatures. Prior court rulings were in favor of letting states continue to decide those law enforcement rules. But in 1963, the Supreme Court said that all states must protect Americans' constitutional rights by making sure that they're advised of the protections of the 5th and 6th Amendments, which say that you have the right to not answer questions and have an attorney present when you're in police custody. Now, all people taken into police custody are read the Miranda Warning above.

The Final Word

Judicial review allows the Constitution to be a flexible, living document. A nation's constitution could never cover all of the problems that might come up. Do you think America's Founding Fathers could have imagined that someone might bring a gun to a school or that people's private information could be accessed with the swipe of a finger on a digital phone? Whether it's the issue of school shootings or regulation of big tech companies, many of the problems we face today weren't planned for in our Constitution. The power of judicial review allows the Court to determine what the Constitution should mean in modern contexts. Because our world is constantly changing, judicial review ensures that our Constitution and our founding principles are able to evolve with it.



Judicial Review

Name: _____

A. Marbury v. Madison. In your own words, summarize the issue and decision in *Marbury v. Madison* and explain the decisions' significance. Make sure you mention how this case changed our government and the function of the judicial branch.



B. Judicial Balance. How does the power of judicial review serve as a check on the legislative and executive branches? And how do these branches balance the power of the courts? Read about some of the judicial-related powers each branch has, then use the information to help you answer the questions.

Executive	Legislative	Judicial
<ul style="list-style-type: none">• Appoints judges with approval of the Senate	<ul style="list-style-type: none">• Approves presidential appointments to the court• Creates lower courts• Proposes constitutional amendments• Can impeach judges	<ul style="list-style-type: none">• Interprets if laws are constitutional• Interprets constitutionality of executive actions• Serves in Supreme Court for life

<p><i>How does the judicial branch check the power of the executive branch?</i></p>	<p><i>How does the judicial branch check the power of the legislative branch?</i></p>	<p><i>How does the executive branch check the power of the judicial branch?</i></p>	<p><i>How does the legislative branch check the power of the judicial branch?</i></p>
---	---	---	---



***Think:** Is judicial review the be-all and end-all of a decision? Why or why not?

Judicial Review



Name: _____

C. What If...? Judicial review and specifically judicial activism have, in many cases, expanded rights. Read about two landmark cases of judicial review and think about how their rulings helped expand rights for all.



JUDICIAL ACTIVISM	
<p>Brown v. Board of Education (1954)</p> <p>In 1951, Oliver Brown tried to enroll his daughter in their neighborhood school in Topeka, Kansas. But because his school district was segregated, and his daughter was Black, the school turned him away. The Brown family, along with 12 other families, felt this was unfair. They filed a lawsuit against the Topeka Board of Education. The case made it all the way to the Supreme Court. The Court overturned their previous judgment in <i>Plessy v. Ferguson</i> by ruling that racially segregated schools were unequal and violated the Constitution's promise of equal protection.</p>	<p>Gideon v. Wainwright (1963)</p> <p>In Florida, Clarence Earl Gideon was charged with breaking and entering. In court, he asked the judge to assign him a lawyer since he couldn't afford to pay for one. The court denied his request, and Gideon was sentenced to prison. Florida law said that only a person facing the death penalty could have a free, court-appointed lawyer. Gideon wrote a letter to the Supreme Court claiming that his right to equal protection and legal representation was violated. The Court agreed. They ruled that courts must provide lawyers for criminal defendants who cannot afford their own.</p>
What if...	
<p><i>What if the Court had stuck to its precedent?</i></p>	<p><i>What if the Court had upheld Florida's law?</i></p>

D. For or Against? Some people think the Court should never disregard precedent or allow societal influences to affect their decisions. What do you think? Use the chart below to think through some of the pros and cons of judicial activism. (There are arguments on both sides!)

 <div style="border: 1px solid black; padding: 10px; width: fit-content; margin: 0 auto;">PROS</div>	<div style="border: 1px solid black; padding: 10px; width: fit-content; margin: 0 auto;">CONS</div> 
---	---

Judicial Review

Name: _____

E. Interpret the Quote. Read each quote from real-life Supreme Court Justices. Decide whether it appears to support judicial activism or judicial restraint then explain why you feel this way.

1. “We are under a Constitution, but the Constitution is what the judge says it is.”

– Justice Charles Evan Hughes (1930–1941)

This quote reflects activism restraint because _____

2. “I think most judges have a definition of judicial activism, it’s a ruling you don’t like.”

– Justice Sonia Sotomayor (2009–present)

This quote reflects activism restraint because _____

3. “The Constitution is not a panacea [cure] for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven of [safe place for] reform movements.”

– Justice John M. Harlan II (1955–1971)

This quote reflects activism restraint because _____

4. “Today’s Constitution is a realistic document of freedom only because of several corrective amendments. Those amendments speak to a sense of decency and fairness that I and other Blacks cherish.”

– Justice Thurgood Marshall (1967–1991)

This quote reflects activism restraint because _____

5. “The Court today continues its quixotic [unrealistic] quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed.”

– Justice Antonin Scalia (1986–2016)

This quote reflects activism restraint because _____

***Discuss:** What do these quotes reveal about how justices view the Court’s power of judicial review?

Judicial Review

Name: _____

F. Primary Source. Even though judicial review isn't mentioned in the Constitution, the Founders did assume the Court would use this power. Read an excerpt from James Wilson's speech to the Pennsylvania Constitutional Convention on December 1, 1787, and then answer the questions.

I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion, on a former day [24 November], to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. And judges, independent and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity and refuse to the act the sanction of judicial authority.

1. What reason does Wilson give for why the judicial branch would need to restrain the legislature through the use of judicial review?

2. How will the judicial branch decide if a law goes against the Constitution?

3. Why does Wilson believe that the judges will act with intrepidity (fearlessness) in exercising judicial review. In other words, why wouldn't they feel pressured to act or rule in a certain way?

4. Supreme Court justices also serve in their positions for life. It's another check that's used to balance the judicial branch and help them maintain independence or influence from the other branches of government. Why do you think it is important for the justices to be independent?
