WELCOME!

Presenter Information

Purpose
*Increasing public awareness of how the government and courts work
*An informed public is the best defense of the rule of law and a fair and impartial judiciary.

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Is That Constitutional?

The U.S. Supreme Court and Judicial Review

Images linked for citations
OBJECTIVES

Ensure
Ensure basic knowledge of how the government works

Explore
Explore the unique role of the Supreme Court

Examine
Examine some historical landmark Supreme Court cases and decisions

Encourage
Encourage further analysis of the role and decisions of the Supreme Court

Presenter Notes/Background Knowledge:
Important to emphasize that typical average citizens, unless they have had an encounter with the law, often don’t understand just how important the role of the judicial branch is, and especially how much the 9 justices on the Supreme Court impact their daily life.

Images linked for citations
Presenter Notes/Background Knowledge:
The U.S. Constitution is comprised of seven articles, each of which concerns a power of government. The first three articles deal with the three branches of government in the order that the Founders intended would reflect the amount of power that each branch would have under the new system. The legislative power, being the most powerful, is listed first, while the executive power is listed second. The judiciary power is listed third (the power of the courts to overturn laws was not established until Marbury v. Madison in 1803, and is not found in the U.S. Constitution). It was the Founders’ intention that the courts would not be powerful.

Legislature
~The U.S. Congress was created as a bicameral, or two-house, legislature.
~The House of Representatives provides for representation based on the population in each state. Each state is guaranteed a minimum of one Representative regardless of size. The U.S. Senate is comprised of two Senators per state
~Terms are two years for House members; six years for Senators. There are no term limits for Congress members
~The powers of Congress includes making laws (legislating), the power to tax, declare war, raise and support armies, and regulate commerce, & a few other powers

Executive
~The president and vice-president are selected through an elaborate mechanism called the
Electoral College which grants each state the same number of votes as it has seats in Congress.

~The president has five constitutional powers including serving as Commander-in-Chief of the armed forces and chief executive. The president also has the power to nominate persons for high office such as Cabinet secretaries, ambassadors, Supreme Court justices, and other offices, and negotiate treaties. Finally, the president has the power to pardon.

Judicial

~The judiciary branch is outlined in Article III, the shortest of the first three articles. Similar to Articles I and II, Article III begins with an identification of the judicial power (the Supreme Court, and all inferior courts) along with the term of office (life with good behavior) in Section 1. Section 2 outlines the role of the office that includes the circumstances in which the Supreme Court is the court of “original jurisdiction” (the first place that the case is heard); otherwise, the Supreme Court is the highest appeals court in the United States. Section 3 defines treason.

Images linked for citations
CONSTITUTIONAL BALANCE
Let’s Review

Presenter Notes/Background Knowledge:
~The founding fathers were deeply concerned about government abusing its power. It was reasoned that when a government abused its power, it deprived the citizens of their liberty. As liberty was a fundamental God given right, assurances had to be put in place to protect the people from government abusing its power.
~Heavy influence from John Locke & Baron de Montesquieu
~Separation of Powers: the structure of the federal government, according to the U.S. Constitution, that sets up three branches with their own distinct powers and responsibilities
~Checks & Balances: a principle of the federal government, according to the U.S. Constitution, that allows each branch of government to limit the power of the other branches

*See presenter answer key for the worksheet activity
**THE ROLE OF THE SUPREME COURT**

*Agree or Disagree?*

**Presenter Notes/Background Knowledge:**
Now that you have reviewed and everyone has a basic understanding of the three branches, their structure, function, and roles, you are going to look more specifically at the judicial branch and the Supreme Court. The role of the Supreme Court within the structure of our government can be interesting and also controversial at times.

Let’s get the opinions of the audience, even if they have no background knowledge yet

*Images linked for citations*
1. “We are under a Constitution, but the Constitution is what the judge says it is” (Charles Hughes)
2. “The Constitution is not a living organism. It’s a legal document, and it says what it says and doesn’t say what it doesn’t say.” (Antonin Scalia)
3. “At the constitutional level where we work, 90 percent of any decision is emotional” (William Douglas)
   “For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court, in reality, substitutes its view of what should be so for the amending process” (John Harlan II)

**Presenter Notes/Background Knowledge:**
The quotes are all from former Supreme Court Justices
All of the quotes shed light on varying opinions related to what the role of the Supreme Court should be
Charles Hughes – Appointed by Taft & served 1910-1916; appointed again by Hoover & served 1930-1941
Antonin Scalia – Appointed by Reagan & served 1986 - 2016
William Douglas – Appointed by FDR & served 1939-1975
John Harlan II – Appointed by Eisenhower & served 1955-1971

*Images linked for citations*
THE ROLE OF THE SUPREME COURT

Judicial Activism
- the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent

Judicial Restraint
- a refraining in the judiciary from departure from precedent and the formulation of broad doctrine

What does the Constitution say?

Presenter Notes/Background Knowledge:
- These varying opinions (both by the Justices and your audience) represent a division in how people view the role of the court: Activism or Restraint
- Judicial restraint: belief that judges should limit power over legislation; they should try to determine how the law applies instead of potentially overturning it; value and emphasize prior court decisions
- Judicial activism: willingness of judges to overturn laws; usually comes up when changing political or social norms contradict laws or past decisions or aren’t accounted for in the Constitution

Opinions are great….but What Does the Constitution Say?

Images linked for citations
Article III

- The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
- Describes jurisdiction
- Discusses trial by jury
- Defines treason

Presenter Notes/Background Knowledge:
As the audience can see by reading the exact Constitutional language, the document itself is very vague in terms of the role and function of the Supreme Court....especially regarding the role we know it plays today. So if the power to review laws and other acts of government and decide whether they are constitutional or not isn’t a power expressly given in the Constitution-how did the Court gain that power?

Images linked for citations
Presenter Notes/Background Knowledge:
(from Oyez)

**Facts of the Case:** Thomas Jefferson defeated John Adams in the 1800 presidential election. Before Jefferson took office on March 4, 1801, Adams and Congress passed the Judiciary Act of 1801, which created new courts, added judges, and gave the president more control over appointment of judges. The Act was essentially an attempt by Adams and his party to frustrate his successor, as he used the act to appoint 16 new circuit judges and 42 new justices of the peace. The appointees were approved by the Senate, but they would not be valid until their commissions were delivered by the Secretary of State. William Marbury had been appointed Justice of the Peace in the District of Columbia, but his commission was not delivered. Marbury petitioned the Supreme Court to compel the new Secretary of State, James Madison, to deliver the documents. Marbury, joined by three other similarly situated appointees, petitioned for a writ of mandamus compelling the delivery of the commissions.

**Questions**
1. Do the plaintiffs have a right to receive their commissions?
2. Can they sue for their commissions in court?
3. Does the Supreme Court have the authority to order the delivery of their commissions?
Conclusion
The Court found that Madison’s refusal to deliver the commission was illegal, but did not order Madison to hand over Marbury’s commission via writ of mandamus. Instead, the Court held that the provision of the Judiciary Act of 1789 enabling Marbury to bring his claim to the Supreme Court was itself unconstitutional, since it purported to extend the Court’s original jurisdiction beyond that which Article III, Section 2, established.

Marshall expanded that a writ of mandamus was the proper way to seek a remedy, but concluded the Court could not issue it. Marshall reasoned that the Judiciary Act of 1789 conflicted with the Constitution. Congress did not have power to modify the Constitution through regular legislation because Supremacy Clause places the Constitution before the laws.

In so holding, Marshall established the principle of judicial review, i.e., the power to declare a law unconstitutional.
The idea, fundamental to the US system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary. Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the Constitution.

The text of the Constitution does not contain a specific provision for the power of judicial review. Rather, the power to declare laws unconstitutional has been deemed an implied power, derived from Article III and Article VI of the U.S. Constitution.

Established in the landmark decision of Marbury v. Madison.

**Presenter Notes/Background Knowledge:**
Judicial review is the ultimate check on the executive and legislative branches as it allows the Supreme Court to evaluate actions of the other two branches, and sometimes even reverse them.

This power was given to the Supreme Court 15 years after the ratification of the Constitution.

Although...it is mentioned in primary sources (indicating conversations as well) prior to the writing & ratification of the Constitution (ex. Federalist 78).

It was also brought up at the Constitutional Convention. Only 11 of the 55 delegates to the Constitutional Convention, according to Madison's notes, expressed an opinion on the desirability of judicial review. Of those that did so, nine generally supported the idea and two opposed. One delegate, James Wilson, argued that the courts should have the even broader power to strike down any unjust federal or state legislation. It may also be worth noting that over half of the thirteen original states gave their own judges some power of judicial review.
JUDICIAL REVIEW

No law or action can contradict the U.S. Constitution, which is the supreme law of the land.

The court can only review a law that is brought before it through a lawsuit.

State courts also have the power to review state laws or actions based upon their state constitutions.

Presenter Notes/Background Knowledge: Parties who are not satisfied with the decision of a lower court must petition the U.S. Supreme Court to hear their case. The primary means to petition the court for review is to ask it to grant a writ of certiorari. This is a request that the Supreme Court order a lower court to send up the record of the case for review. The Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value. In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year. Typically, the Court hears cases that have been decided in either an appropriate U.S. Court of Appeals or the highest Court in a given state (if the state court decided a Constitutional issue).

The Supreme Court has its own set of rules. According to these rules, four of the nine Justices must vote to accept a case.
Judicial Review - Do I Understand?

Presenter Notes/Background Knowledge:

*See presenter answer key for quiz activity

Images linked for citations
JUDICIAL REVIEW

- Expansion
  - 1821 case of *Cohens v. Virginia*, the Supreme Court expanded its power of constitutional review to include the decisions of state criminal courts.
  - In *Cooper v. Aaron* in 1958, the Supreme Court expanded the power so that it could deem any action of any branch of a state’s government to be unconstitutional.

Presenter Notes/Background Knowledge:

**Cohens v. Virginia** *(from Oyez)*

**Facts:** An act of Congress authorized the operation of a lottery in the District of Columbia. The Cohen brothers proceeded to sell D.C. lottery tickets in the state of Virginia, violating state law. State authorities tried and convicted the Cohens, and then declared themselves to be the final arbiters of disputes between the states and the national government.

**Question:** Did the Supreme Court have the power under the Constitution to review the Virginia Supreme Court’s ruling?

**Conclusion:** In a unanimous decision, the Court held that the Supreme Court had jurisdiction to review state criminal proceedings. Chief Justice Marshall wrote that the Court was bound to hear all cases that involved constitutional questions, and that this jurisdiction was not dependent on the identity of the parties in the cases. Marshall argued that state laws and constitutions, when repugnant to the Constitution and federal laws, were "absolutely void." After establishing the Court’s jurisdiction, Marshall declared the lottery ordinance a local matter and concluded that the Virginia court was correct to fine the Cohens brothers for violating Virginia law.

**Cooper v. Aaron** *(from Oyez)*

**Facts:** The Governor and the Legislature of Arkansas openly resisted the Supreme Court’s
decision in *Brown v. Board of Education*. On February 20, 1958, five months after the integration crisis involving the Little Rock Nine, members of the school board (along with the Superintendent of Schools) filed suit in the United States District Court for the Eastern District of Arkansas, urging suspension of its plan of desegregation. The relief the plaintiffs requested was for the African American children to be returned to segregated schools and for the implementation of the desegregation plan to be postponed for two and a half years. The district court granted the school board's request, but the United States Court of Appeals for the Eighth Circuit reversed.

**Question:** Were Arkansas officials bound by federal court orders mandating desegregation?  
**Conclusion:** In a signed, unanimous per curiam opinion, the Court held that the Arkansas officials were bound by federal court orders that rested on the Supreme Court's decision in *Brown v. Board of Education*. While the Court noted that the school board had acted in good faith, that most of the problems stemmed from the official opposition of the Arkansas state government to racial integration in both word and deed, it was constitutionally impermissible under the Equal Protection Clause to maintain law and order by depriving the black students of their equal rights under the law. More importantly, the Court held that since the Supremacy Clause of Article VI made the U.S. Constitution the supreme law of the land, and *Marbury v. Madison* made the Supreme Court the final interpreter of the Constitution, the precedent set forth in *Brown v. Board of Education* was the supreme law of the land and was therefore binding on all the states, regardless of any state laws contradicting it. The Court therefore rejected the contention that the Arkansas legislature and Governor were not bound by the *Brown* decision.

*Images linked for citations*
JUDICIAL REVIEW

- Historical Examples
  - *Fletcher v. Peck* (1810) – State Land Grants
  - *Schenk v. US* (1919) – Espionage Act

Presenter Notes/Background Knowledge:
When it comes to some very important topics to your audience members, things that effect their every day and personal lives, there is a good chance that while that impact was started by a presidential executive order or a piece of legislation passed either at the state or federal level, the final decision was made by the Supreme Court. And whether they like the decision or not, it still has an impact. Topics ranging from:

~What makes a contract you enter legal & binding
~Why you can’t just yell “Fire” for no reason in a crowded theater and think it is protected by “free speech”
~Why our public schools are not separated by race
~Why women can choose to have abortions
~Why your student/child isn’t required to say a prayer or believe in particular religious views while attending public school
~Why couples of the same-sex can get legally married
~Why you can choose to individually own a handgun and store it inside your home

*Images linked for citations*
In the period 1960–2019, the Supreme Court has held 483 laws unconstitutional in whole or in part.

**Presenter Notes/Background Knowledge:**
It is important for the audience to understand that yes, sometimes judicial review and judicial activism are necessary and we probably can’t imagine our lives today without those decisions (i.e. Brown v. Board of Education or Miranda v. Arizona).

BUT….most of the time, we see by looking at how many cases the Supreme Court chooses to hear each session (Slide 13) or the statistic on this slide (source has not updated past 2019) that the Supreme Court airs frequently on judicial restraint and respects the decisions of lower courts, as well as the powers of the other two branches of government.

Out of ALL the actions of federal & state executives, and ALL the legislation passed at the federal and state levels each year, in “modern history” the Supreme Court finds only an average of 8 unconstitutional each year.

Source of statistic: [https://constitution.congress.gov/resources/unconstitutional-laws/](https://constitution.congress.gov/resources/unconstitutional-laws/)

*Images linked for citations*
Let’s Give Judicial Review A Try!

Presenter Notes/Background Knowledge:
All necessary background information is contained within the document

Case Conclusion: The jury-unanimity rule announced in Ramos v. Louisiana does not apply retroactively on federal collateral review. Justice Brett Kavanaugh authored the majority opinion of the Court.

A decision announcing a new rule of criminal procedure ordinarily does not apply retroactively on federal collateral (habeas) review. Applying constitutional rules retroactively undermines the principle of finality, which is “critical to the operation of our criminal justice system.” However, two questions are relevant to the consideration whether a rule may be applied retroactively: (1) whether it is a new rule or applies a settled rule, and (2) whether it is a “watershed” procedural rule. New rules, as opposed to application of settled rules, ordinarily do not apply retroactively unless they are “watershed.” The “watershed” exception is “extremely narrow” and applies only when the new rule “alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” In fact, the only time the Court has recognized a new rule as being watershed was in Gideon v. Wainwright, 372 U.S. 335 (1963), which established the right to counsel. First, the Ramos rule is new because it was not dictated by precedent existing at the time the defendant’s conviction became final. Second, Ramos presents none of the considerations for a watershed rule. The situation in Ramos does not support a different
outcome from (1) other jury-unanimity cases that the Court did not apply retroactively, (2) other cases decided based on original meaning that the Court did not apply retroactively, and (3) other cases involving race discrimination that the Court did not apply retroactively. As a new rule of criminal procedure, the jury-unanimity rule announced in Ramos does not apply retroactively on federal collateral review.

Justice Clarence Thomas authored a concurring opinion, which Justice Neil Gorsuch joined. Justice Thomas noted that the Court could alternatively have resolved the case by applying the statutory text of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which, in his view, leaves no room for a court to grant relief under the present facts. Justice Gorsuch also filed his own separate concurring opinion, which Justice Thomas joined, arguing that the Court’s decision correctly eliminated the “watershed” exception that was never really an exception at all.

Justice Elena Kagan filed a dissenting opinion, which Justice Stephen Breyer and Sonia Sotomayor joined. Justice Kagan criticized the majority for not only misapplying the “watershed” exception in this case but also for going further and eliminating the exception altogether, preventing any procedural rule from ever benefiting a defendant on habeas review.
How Does This Relate To Me?

**Presenter Notes/Background Knowledge:**
~This is an excellent time to draw a connection with your audience in terms of what they learned today, and an important responsibility they have as citizens which is voting
~How often do we as voters research the judges we are voting for on our ballots?
~How often when voting for Presidents, do we consider that they may end up appointing a Supreme Court justice?
~How often when voting for Senators do we consider that they may be part of a Supreme Court confirmation process?

*Images linked for citations*
Judicial review allows the Constitution to be a flexible document. The Founding Fathers in writing the document may not have been able to account for all the issues and problems that may come up. Could they have imagined we as a nation would face issues like school shootings? Or that information would be available in the digital ways it is now? Judicial review allows our Constitution and founding principles to evolve and be applied to our constantly changing world.

There are also lots of ways to stay up to date with what the Supreme Court is deciding. By law, the U.S. Supreme Court’s term begins on the first Monday in October and goes through the Sunday before the first Monday in October of the following year. The Court is, typically, in recess from late June/early July until the first Monday in October. The Court hears oral arguments in cases from October through April. From October through December, arguments are heard during the first two weeks of each month. From January through April, arguments are heard on the last two weeks of each month. During each two-week session, oral arguments are heard on Mondays, Tuesdays, and Wednesdays only (unless the Court directs otherwise).

Follow the cases by listening live to oral arguments, follow #SCOTUS on Twitter (posts about the Supreme Court, not run by the Court), SCOTUS Blog, or the Civics in Real Life – produced by FJCC.
Docket Series produced by the Florida Joint Center for Citizenship.
After the Supreme Court session is over, you can also see summaries of the decisions put out by the ABA

Also-Justice Breyer will be retiring from the Court so make sure to pay attention/watch who President Biden nominates and the Senate confirmation hearings!

*Images linked for citations*
Presenter Notes/Background Knowledge:
The Lou Frey Institute promotes the development of enlightened, responsible, and actively engaged citizens.
The Institute works to accomplish its mission:
• Through civic education programs that encourage thoughtful debate and discussion about current policy issues;
• Through experiential learning programs that encourage the development of civic and political skills;
• By working to help strengthen the civic education capacity of Florida’s K-12 education system; and
• Through research, policy analysis, and advocacy
THANK YOU!!