



CONSOURCE

The Constitutional Sources Project

CONSTITUTIONAL CONVENTION SIMULATION

SHOULD JUDGES JUDGE LAWS?

TIME AND GRADE LEVEL

One 45 or 50 minute class period in a **Grade 9-12** US history, civics, or government course.

PURPOSE AND CRITICAL ENGAGEMENT QUESTIONS

History is the chronicle of choices made by actors/agents/protagonists in specific contexts. This simulation places students at the Constitutional Convention and asks them to engage with a problematic question: Who should have the final say in deciding whether a law or executive action is constitutional? Students will explore this in theoretical, practical, and political contexts. If one branch has the final say, does that negate the separation of powers? But if no branch has the final say, how are inter-branch disputes to be settled? If unelected justices of the Supreme Court can nullify legislative and executive measures, does that fly in the face of popular sovereignty? On the other hand, if constitutional interpretation is left to “the people,” how might that work, and might that lead to political turmoil? By wrestling with such questions, students will gain some insight into why the framers did not explicitly give the Supreme Court the authority to determine constitutionality, even though many expected the Court to exercise that authority. They will also understand why judicial review, although settled law at this point, remains so controversial.

LESSON OBJECTIVES

*Students will be able to define what we call judicial review, or what the founding generation called judicial nullification.

*Students will be able to define what scholars now call “popular constitutionalism,” an alternative to judicial review in the Early Republic.

*Students will be able to explain the theoretical problems of judicial review: giving one branch the power to nullify acts of the other two branches, and the absence of popular accountability.

*Students will be able to explain the political price of judicial review: giving unelected judges the power to overturn acts of elected officials.

*Students will be able to explain the practical advantages of judicial review: providing for an organized way to settle constitutional disputes.

*Students will be able to suggest reasons why the framers of the Constitution did not explicitly provide for judicial review, although many expected the judicial branch to determine constitutionality.

*Students will be able to explicate the historical evolution of judicial review in the Early Republic.

OVERVIEW OF THE LESSON

Prefatory homework:

Handout A: Should Judges Judge Laws?

In class:

1. Homework review: 5-10 minutes
2. Student deliberations: 15 minutes
3. Presentation of the historical outcome: The Constitution's silence. 5 minutes
4. Class discussion: Why didn't the framers specify who has the final say in determining constitutionality? 10 minutes
5. Postscript: Popular constitutionalism in the Early Republic and precedents for judicial review: 10 minutes.

Summary Homework / Extended Activities

MATERIALS

Background Handouts:

- A. Should Judges Judge Laws?

Classroom Handouts

- B. The Constitution's Silence
- C. Popular Constitutionalism in the Early Republic and Precedents for Judicial Review
- D. Activist Judges (optional)
- E. Competing Standards of Constitutional Interpretation (optional)
- F. Vocabulary List

Teacher Resources

- T-A. Homework answers for "Should Judges Judge Laws?"
- T-B. Infrastructure for the Constitutional Convention Simulation
- T-C. Convention Timeline

Links

**Madison's Notes of Debates* from [June 4](#), [July 21](#), [August 15](#)

[The Federalist No. 49](#)

[The Federalist No. 78](#)

PREFATORY HOMEWORK

Distribute Handout A, “**Should Judges Judge Laws?**” Go over the instructions on that sheet. Tell students that this is not rocket science, but they should categorize the arguments as best they can. The idea is to explore the possibilities and the basic arguments for each.

CLASS ACTIVITIES: 45-50 MINUTES

1. HOMEWORK REVIEW: 5-10 minutes

Share answers. Again, this is for students to understand the possibilities that were on the table at the Convention.

2. STUDENT DELIBERATIONS: 15 MINUTES

Students break into their discussion and debate (D & D) groups to engage with the issues: Should judges judge laws before they are finalized, as part of a Council of Revision? After they are finalized? Both? Neither? If they judge laws at all, should they base their judgment only on constitutional grounds, or should they consider what is good public policy?

At the end of this discussion, students meet in their state delegations to vote on the Council of Revision. The votes are tallied in the student convention.

3. PRESENTATION OF THE HISTORICAL OUTCOME: THE CONSTITUTION'S SILENCE. 5 minutes

Student read Handout B, “**The Constitution's Silence**,” or teacher presents that material. Key points to emphasize: The Convention rejected the Council of Revision, but it never specifically determined whether the Supreme Court had the authority to declare a law unconstitutional. Students will realize this by looking through Article III, Section 2, and noting the absence of any *explicit* authority. Open to question, however, is whether this passage in Article III, Section 2, Clause 1, gives the Supreme Court an *implicit* authority to rule on the constitutionality of laws and executive actions: “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.” Even if so, the question remains: Why didn't the framers make such an important provision explicit?

4. CLASS DISCUSSION: WHY DIDN'T THE FRAMERS SPECIFY WHO HAS THE FINAL SAY IN DETERMINING CONSTITUTIONALITY? 10 minutes

Students discuss: Does the passage cited above (from Article III, Section 2, Clause 1) amount for the Supreme Court the *implicit* authority to declare laws or executive actions unconstitutional? If you were at the Convention, would you try to clarify whether judges could nullify a law? If you are in favor of judicial nullification (judicial review), how would you word that in the Constitution? Do you think giving the power of nullification to “unelected judges” might jeopardize ratification? If you are against judicial nullification, what would you add to the Constitution that clarifies how to resolve constitutional disputes?

The idea here is not to generate a definitive answer but to demonstrate the conundrum faced by the framers. By experiencing the difficulties, political as well as theoretical, students might get some idea of why the framers did not explicitly specify who has the final say in determining constitutionality.

5. POSTSCRIPT: POPULAR CONSTITUTIONALISM IN THE EARLY REPUBLIC AND PRECEDENTS FOR JUDICIAL REVIEW: 10 minutes

Distribute Handout C, “**Popular Constitutionalism in the Early Republic and Precedents for Judicial Review.**” Teacher presents a broad summary but students should have the full handout for reference. The class should end with students confronting the questions posed in question 1 below, in “Summary Homework / Extended Activities.”

SUMMARY HOMEWORK / EXTENDED ACTIVITIES

1. Consult Handout C, “**Popular Constitutionalism in the Early Republic and Precedents for Judicial Review,**” and then respond to this question: If you were alive in the 1790s, how would you approach the problem of constitutional interpretation? If you think the people should have the final say, respond to these two questions:

- a) How, exactly, can the people’s will be determined?
- b) Legislatures often act in the moment, responding to popular pressure. How can minorities be protected against over-zealous majorities in such cases?

If you think Supreme Court should have the final say, how would you answer critics who argue:

- a) The Constitution did not specifically grant that authority to the Court.
- b) Unelected judges should not overturn decisions of the people’s representatives.

Do you have an alternate solution? If so, state it. Then imagine the arguments against your idea, and respond to those arguments.

2. Read Handout D, “**Activist Judges.**” Then take any Supreme Court case for which the Court has been accused of being “activist.” Comment of whether you think the Court was unduly “activist” in that case, or whether it acted in accordance with the accepted practice of judicial review.

3. The framers took care to remove judges from political influence. Because federal judges are not elected, they should be free from popular pressure. But has that worked out? Historically, some judges, once they were on the Court, did not follow the “party line” of the president who appointed them. Recently, however, justices have stayed very true to the parties that placed them on the Court.

a. Research Earl Warren, appointed to be Chief Justice by Republican president Dwight Eisenhower, and his record on the Court.

b. Research the *Bush v. Gore*, which decided the election of 2000. Note that conservative justices, who generally sided with state authority, decided that the federal government had the right to intervene in the Florida election, while liberal justices, who generally sided with federal authority, argued that the election should be determined by the judicial processes of the state of Florida.

4. Read Handout E, “**Competing Standards of Constitutional Interpretation.**”

a. Weigh in on this debate. If you have a preference, be sure to respond to the critics of that view. If you can think of another method, or prefer some variant of the ones listed, or some combination, go for it!

b. Discuss the standards of interpretation used in competing opinions in any Supreme Court case that was not unanimous.

c. Write your own opinion, as if you were a Supreme Court justice, of a case, either past or pending. As you do, note what standard of interpretation you are applying.

d. Research *Citizens United v. FEC*. Note the opinions of justices Alito, Scalia, and Thomas, who consider themselves originalists. Do you think the framers of the Constitution (original intent) would approve or disapprove of restrictions on spending to influence elections? How do you think the people who ratified the Constitution (original meaning) would treat the influx of money into politics? How did the Court’s originalists address these questions?

Handout A: Should Judges Judge Laws?

The legislative branch *makes* laws. The executive branch *executes* laws. But does anybody judge *those* laws? Should that be the the job of the judicial branch? Or should judges only judge *people* charged with breaking the laws?

The question of whether judges should pass judgment over laws perplexed the framers of the Constitution. Who, if anybody, should determine whether the document they created was being violated?

Before 1776, Americans had not looked fondly upon the superior court judges in each colony, who were appointed by the Crown and beholden to it. Judges were directly influenced by a king or his appointed colonial governors.

Revolutionaries changed that when they wrote new state constitutions. State legislatures busily passed laws that covered any and every circumstance that might arise. In this new order, judges were to follow these precise new codes and not exercise individual discretion. A judge should be “a mere machine,” Thomas Jefferson pronounced in 1776.

By the 1780s, however, some people began to worry that the legislatures were going too far in their law making. In particular, upper class people feared that legislatures, influenced by debtors and poor folks, would pass laws for debtor relief and issue paper money. Who, then, would prevent “legislative tyranny”?

There were competing ideas on that score, but one possible solution was for judges to step in and impose certain limits on the legislatures, based on written state constitutions. “Here is the limit of your authority, and hither, shall you go, but no further,” Judge George Wythe instructed the Virginia legislature in 1782. The state’s Attorney General, Edmund Randolph, initially opposed Wythe’s view but then came to agree with him. “Every law against the constitution may be declared void,” he said. in August of 1787, North Carolina’s James Iredell wrote to one of his state’s delegates at the Constitutional Convention: “The exercise of [judicial] power is unavoidable, the Constitution not being a mere imaginary thing, about which ten thousand different opinions may be formed.”¹

This view, called *judicial review* today but known at the time as *judicial nullification*, was not universally shared. Why should unelected judges overrule the elected members of legislatures? For many, that was an insult to popular sovereignty. There was a much better way to check a tyrannical legislature: the people could throw the bums out at the next election.

The framers on the Constitution did not state specifically whether judges possessed the authority to nullify laws, but they did grapple with the role judges should play, or not play, in the legislative process. According to the eighth resolution of the Virginia Plan, “a convenient number of the National Judiciary” would combine with the executive to form a “Council of Revision,” which could veto acts of Congress. This way, judges could

modify or even nullify a law *before* it took effect, rather than waiting until *afterwards*, when a case involving the law came before the court.

Delegates differed on whether judges should be able to judge laws before they are passed, after they are passed, or never. They also differed on the criteria judges should use. Some believed they must base their decisions only on the constitutionality of a law; others believed that judges could evaluate whether the law was good policy.

Below are excerpts from the relevant debates. In class, you will be engaging in these debates. For now, as you read through each passage, note in the margin the speaker's position. More than one letter might apply.

- A. Judges, with the president, should be able to nullify or revise a law *before* it is finalized.
- B. Judges should be able to nullify a law *after* it has passed, when they are trying normal cases.
- C. Judges should never be able to nullify a law.
- D. Judges should be able to nullify a law because it is poor public policy.
- E. Judges should be able to nullify a law if it violates the Constitution.
- F. No opinion stated about constitutionality, but judges should not judge a law by its policy.

JUNE 4:

Mr. GERRY [Elbridge Gerry, Massachusetts] doubts whether the Judiciary ought to form a part of it [the Council of Revision]. ... They will have a sufficient check ... by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation [approval]. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures.

Mr. KING [Rufus King, Massachusetts]. Judges ought to be able to expound [understand and explain] the law as it should come before them [in an actual case], free from the bias of having participated in its formation.

JULY 21:

Mr. WILSON [James Wilson, Pennsylvania]. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough.

Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature.

Mr. ELSEWORTH [Oliver Ellsworth, Connecticut] approved heartily of the motion. The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess.

Mr. GHORUM [Nathaniel Gorham, Massachusetts] did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.

Mr. L. MARTIN [Luther Martin, Maryland]. A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.

Col. MASON [George Mason, Virginia]. In their expository capacity of Judges ... they could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.

Mr. RUTLIDGE [John Rutledge, South Carolina] thought the Judges of all men the most unfit to be concerned in the revisionary Council. The Judges ought never to give their opinion on a law till it comes before them.

AUGUST 15:

Mr. MERCER [John Francis Mercer, Maryland]. He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.

Mr. DICKENSON [John Dickinson, Delaware] was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute.

¹ Iredell to Richard Dobbs Spaight, August 26, 1787. Griffith John McRee, *Life and Correspondence of James Iredell*, 2:174.

Handout B. The Constitution's Silence

Article I, Section 8, of the Constitution lists the powers of Congress. The powers of the President are specified in Article II, Sections 2 and 3. Here is Article III, Section 2, of the original Constitution, which specifies the powers of the national judiciary, headed by the Supreme Court. Does any passage within this section grant the Supreme Court the *explicit* authority to nullify a law? Does any passage grant the Supreme Court an *implicit* authority to nullify a law?

“1. 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 to which the United States shall be a party; to controversies between two or more states, between a state and Citizens of 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.

“2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a 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.

“3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”

Now consult the passages from Madison's *Notes of Debates* in Handout A, “**Should Judges Judge Laws?**” Does it appear that Elbridge Gerry, James Wilson, Luther Martin, George Mason, and John Rutledge expected judges to rule on the constitutionality of laws? Then why didn't any of these delegates move to state that *explicitly* in the Constitution? Why didn't the Constitution clearly *specify* who would decide whether an act of Congress or an executive order was in accordance with the Constitution?

Handout C. Popular Constitutionalism in the Early Republic and Precedents for Judicial Review

With the Constitution silent on who should determine the constitutionality of laws, Americans at the time developed two competing views.

Some said that the *courts*, in their daily business, must interpret statutes, and that would include whether a particular law violated the Constitution. Alexander Hamilton held this view. Writing as “Publius” in [*The Federalist #78*](#), he wrote:

“If it be said that the legislative body are themselves the constitutional judges of their own powers, ... it may be answered, that ... it is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. 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. If there should happen to be an irreconcilable variance between the two, ... the Constitution ought to be preferred to the statute.”

Others said that no branch of government had the right to encroach on the work of another branch. Only the *people* could override an act of an overzealous branch of the federal government. Scholars now call this view “popular constitutionalism.” James Madison, also writing as “Publius” in [*The Federalist #49*](#), wrote:

“The several departments [branches of government] being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commissions, can alone declare its true meaning, and enforce its observance?”

Although some scholars argue that “popular constitutionalism” prevailed in the 1790s, Alexander Hamilton and other Federalists were simultaneously laying the groundwork for judicial review.

In 1794 Congress laid a tax of \$8 on each carriage a person owned. Opponents of the tax complained that this was a “direct” tax, so according to Article I, Section 9, Clause 4 of the Constitution, the tax would have to be proportioned by population among the states. Since the number of carriages varied widely state-to-state, a direct tax on carriages would be unworkable.

Supporters of the carriage tax argued that it was not “direct”; they maintained it was permitted by Article I, Section 8, Clause 1, which granted Congress broad powers of

taxation. Secretary of the Treasury Hamilton, who sponsored the bill, wanted the Supreme Court to weigh in. Hamilton and his allies contrived with Daniel Hylton, a Federalist from Virginia who happened to own one carriage, to challenge the tax in court.

There was a problem, however. Hylton's case could only reach the high court if \$2,000 was at stake, and the tax per carriage was only \$8, plus another \$8 penalty if the tax wasn't paid on time. Here's how they got around that. Hylton claimed to own 125 carriages rather than only one, and at \$16 per carriage (tax plus penalty), his would be liable for \$2,000—the threshold to reach the Supreme Court. Then, off the books, the Treasury Department agreed that he if he lost the case—as both Hamilton and Hylton hoped—he would pay only \$16.

The Supreme Court declared unanimously that the tax was not “direct” and therefore perfectly within the bounds of the Constitution. *Hylton v. United States* was double victory for Federalists. The carriage tax would stand, and beyond that, for the first time, the Supreme Court formally upheld a law *on constitutional grounds*. That was stage 1 of judicial review.

Stage 2 came later, in 1803. After Federalist John Adams was defeated by Republican Thomas Jefferson in the election of 1800-1801 (see ConSource lesson “Political Parties and Presidential Electors: The Election of 1800”), the Federalist-dominated Congress passed the Judiciary Act of 1801, which overhauled the judicial system and created many new judgeships. Then, immediately before leaving office, Adams appointed numerous Federalist judges to the newly created positions. Through an administrative oversight, however, a handful of these judges had yet to receive their official commissions when Jefferson assumed the presidency—and the Jefferson administration refused to deliver these commissions.

Demanding their commissions, four prospective justices of the peace, including William Marbury, took James Madison, Jefferson's Secretary of State, to court. The case, *Marbury v. Madison*, was problematic for the all-Federalist Supreme Court, headed by Chief Justice John Marshall. The Federalist justices of the peace had been duly appointed according to the Judiciary Act of 1801, but if Marshall and the Court ordered Madison to deliver the commissions, Jefferson would likely tell Madison to *disobey* that order, thereby setting up a constitutional showdown that Jefferson and the Republicans, at the height of their popularity, would win. At that time, the nation had not yet established the tradition of *judicial review*—the notion that the Supreme Court always had the final say on constitutionality.

Marshall and his fellow Federalists on the Supreme Court conceded the battle in order to win a greater war. Unexpectedly, they ruled in favor of Madison and the Republicans, their political adversaries. The Marbury and the other Federalist justices of the peace did not receive their commissions. Their Court's reasoning, however, made history. In order to bring their case before the Supreme Court, Marbury and his fellow plaintiffs had cited an earlier law, the Judiciary Act of 1789—but *that* law, the Marshall Court declared was unconstitutional! Although the Supreme Court had *evaluated* the constitutionality of a

federal law in *Hylton v. United States*, this was the first time it *negated* a law on the grounds that it violated the Constitution.

Our history texts treat Marshall's decision in *Marbury v. Madison* as establishing judicial review, but at that moment, the matter was not so cut-and-dry. Although Marshall headed the court for another third of a century, he never again overturned federal law. President Jefferson, meanwhile, refused to accept Marshall's pronouncement. He did not directly challenge the decision, which ruled in the administration's favor by dismissing Marbury's case, but privately he fumed. To Abigail Adams, eighteen months after the Court's decision, he wrote, "The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature & executive also, in their spheres, would make the judiciary a despotic branch."¹ A key word here is "would" – for Jefferson, the matter was by no means settled. The notion that the judiciary could interfere with an action of the executive department seemed a clear violation of the basic principle of independent branches, which he had long espoused and the Constitution, he thought, had incorporated. The president, duly elected, clearly should have the final say in executive matters, not appointees from a different branch of government, while Congress itself should decide whether proposed legislation was constitutional. Each branch, Jefferson believed, must determine its own responsibility to the Constitution, subject only to the will of the people.

Over time, Marshall's precedent has prevailed. Today, if the Supreme Court declares a law or executive action unconstitutional, many Americans might grumble, but that is the final word—unless, years later, the Supreme Court overturns its prior decision. Whether or not the framers intended this, judicial review has become a fundamental tenet of government in the United States.

¹ Jefferson to Abigail Adams, September 11, 1804:
<http://founders.archives.gov/documents/Jefferson/99-01-02-0348>

Handout D: Activist Judges

If the Supreme Court declares a law unconstitutional, people who disagree with that verdict cry “foul!” and argue that judges, who are not elected, should not undo the work of the people’s representatives. They complain about so-called “activist judges” who overturn laws and impose their own wills. But such complaints are often one-sided. If you are a staunch supporter of the right to bear arms, and your town decides to *permit* the carrying of guns in public, you don’t want some activist judge to interfere. On the other hand, you *will* want the courts to interfere if your town *outlaws* the carrying of guns in public, which you think violates your constitutional rights.

What defines an activist judge? There are three possible meanings. A judge could be overturning:

- (1) A lower court ruling
- (2) A law or executive order
- (3) An established precedent

The first is not really “activism” because appeal courts, including the Supreme Court, are *supposed* to review lower court rulings.

The second can sometimes be judicial activism, but it might also be necessary. If the Court nullifies a local ordinance that forbids German Americans from writing letters to the newspaper, it can hardly be criticized for being *unduly* activist. The Court is ruling according to a commonly accepted view of the First Amendment.

The third meaning—overturning precedent—is true judicial activism. When a court overturns precedent, it is ruling against the collective historical wisdom of the judicial profession. Sometimes it might be called for, since times do change. By the mid-twentieth century it was clear that the 1896 “separate but equal” ruling in *Plessey v. Ferguson* made no sense. Separate schools for black and white children were inherently equal, and that precedent was overturned. That was judicial activism, but most people today would argue that it was a wise decision.

(Adapted from Ray Raphael, *The Complete Idiot’s Guide to the Founding Fathers and the Birth of Our Nation*, 138.)

Handout E: Competing Standards of Constitutional Interpretation

What standard should judges use when they interpret the Constitution? How should they read and understand that document? The framers did not offer a blueprint for this, and the question has given rise to vigorous debate. There are various schools of thought, but each has its problems.

(A) Some believe judges must adhere to a standard called “**original intent**” (also known as originalism; original intent of the framers). They should review not only the Constitution but all reports of what was said at the Constitutional Convention and any record these men left in their lifetimes, whether published works, letters, or other papers. They should consult Founding Fathers who did not appear at the Convention as well.

But is the original intent of the framers really that clear? Through the course of the Convention, they contradicted each other, promoting sectional interests and disagreeing on many matters. How can we determine the original intent of a body of men who were not of one mind?

Proponents of original intent consult the voluminous writings of the framers. The most frequently cited writings are *The Federalist* essays, mostly penned by James Madison and Alexander Hamilton—but what these men said *after* the framing of the Constitution does not always mesh with their thoughts in 1787. At the Constitutional Convention, Hamilton wanted the president to resemble a king as closely as possible; in *The Federalist* #69, he assured readers that there was a “total dissimilitude” between the American president and the British king. At the Convention, Madison wanted to vest the federal government with the power to nullify state laws for any reason (not only if a state law was unconstitutional); years later, when drafting the Virginia Resolutions, he held that if a federal law was unjust, a state could “interpose” between that law and the people, making the law unenforceable.¹

The framers themselves did not think their intentions should be consulted. At the Constitutional Convention, absolute secrecy on proceedings was the rule. Notes and records were private, and delegates were forbidden to speak of what went on. Why? Think politics for a moment. Then as now, horse-trading was common, and delegates engaged in the practice, perhaps out of sheer necessity. Practically speaking, with dozens of delegates weighing in, how else could they produce a comprehensive set of structures and rules? Understandably, delegates didn’t want a blow-by-blow account of all this to get out. Years later, Madison himself weighed in *against* “original intent”:

“As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, & as a source perhaps of some lights on the Science of Govt. the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or

intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses.”²

(B) Madison’s statement suggests another method of interpretation: “**original meaning**,” a cousin to original intent. People who adhere to this standard see the Constitution as a binding contract between framers and those who agreed to the deal back in 1788, when the Constitution was ratified. Striving to uphold that contract, judges try to figure out how each and every one of its terms was understood by the people of those times. That way, they can hold the document fixed and absolute. The Constitution, said Thomas Jefferson, should not be treated as a “mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please.”³

But do we really want to remain fixed in time? Much has changed since 1788, over two centuries past. What can Founding Era Americans tell us about the constitutionality of regulating the Internet? Or establishing no-fly zones? Or placing limits on biological engineering?

Consider an “original meaning” interpretation of the Eighth Amendment, which prohibits “cruel and unusual punishment.” Whether cruel or not, public lashing and branding of hands were common punishments for minor offenses in 1791, when that amendment was ratified. Since it was not unusual back then, branding a hand for petty theft should be constitutional—if we go by “original meaning,” that is. But no judge today would uphold hand branding or public lashing for shoplifting. Our values have changed and the Constitution along with them, at least in some areas.

Further, to determine the “original meaning” of terms that anchor the Constitution and the Bill of Rights—“general welfare,” “necessary and proper,” “regulate Commerce,” “Republican Form of Government,” “freedom of speech,” “well regulated Militia,” “excessive bail,” “unreasonable searches and seizures,” and so on—we need to consult numerous sources from the late 18th Century: dictionaries, newspapers, letters, journals of the Continental Congress, the Confederation Congresses, the first few federal congresses under the Constitution, and state legislatures. Two dozen volumes (and more in the works) of the *Documentary History of the Ratification of the Constitution* are certainly relevant, as are more than 200 published volumes (so far) of papers of Washington, Adams, Jefferson, Madison, Franklin, and Hamilton. From these sources judges can find evidence to support a wide array of pre-conceived conclusions. The pursuit of “original meaning” does not always involve passive *discovery*, where the answer simply awaits us in the texts; more often, it is a determined act of *construction*, building an argument on behalf of a preferred interpretation. The greater the number and variety of sources to choose from, the easier it is to find material to fashion an argument.

(C) Instead of remaining mired in the past, some say, we should treat our founding document as a “**living Constitution**,” one that evolves with the times. Judges must interpret the Constitution in a way that reflects historical transformations. We must stay true to its core values, they say, but the application of those values will naturally change.

Back then, slavery was widespread, married women could not own property, and only men with property could vote. Those practices do not reflect our values today. On the other hand, “We, the people” still want to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity,” and the Constitution provides a structure that has helped further those ends for more than two centuries.

That’s too general, the proponents of “original intent” and “original meaning” complain. Vague pronouncements cannot provide adequate guideposts. Unless the Constitution remains anchored in the Founding moment, it will drift.

Neither original intent nor original meaning provide that anchor, the living constitutionalists respond. Originalist judges do not comb historical materials objectively, instead, they mine the evidence to support preconceived conclusions.

And so the debate continues. Actual judicial opinions reflect all three standards. Living constitutionalists buttress their arguments with quotations from the founders when they can, while originalists address current realities and apply their chosen standard (whether intent or meaning) only selectively.

¹ For the changing pronouncements of Hamilton and Madison, see Ray Raphael, *Constitutional Myths: What We Get Wrong and How to Get It Right*, 80-102; 113-123.

² Madison to Thomas Richie, September 15, 1821: <http://press-pubs.uchicago.edu/founders/documents/v1ch2s28.html>

³ Jefferson to Spencer Roane, September 9, 1819: http://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html

Should Judges Judge Laws Handout F: Vocabulary List

1. Appellate Jurisdiction: higher court has the power to review a lower court's decision.
2. Constitutional: consistent with, sanctioned by, or permissible according to a constitution.
3. Implicit: implied, though not plainly expressed.
4. Judicial activism: decisions suspected of being based on personal or political considerations rather than on existing law
5. Laudable: deserving praise and commendation.
6. Nullify: to render or declare legally void or inoperative
7. Original Jurisdiction: power to hear a case for the first time when a higher court has the power to review a lower court's decision.
8. Sectional (sectionalism): a tendency to be more concerned with the interests of your particular group or region than with the problems and interests of the larger group, country, etc.
9. Unconstitutional: not in accordance with a constitution.
10. Voluminous: occupying or containing much space; large in volume, in particular.

T-A: Homework Answers for “Should Judges Judge Laws?”

As you read through each passage, note in the margin the speaker’s position. More than one letter might apply.

- A. Judges, with the president, should be able to nullify or revise a law *before* it is finalized.
- B. Judges should be able to nullify a law *after* it has passed, when they are trying normal cases.
- C. Judges should never be able to nullify a law.
- D. Judges should be able to nullify a law because it is poor public policy.
- E. Judges should be able to nullify a law if it violates the Constitution.
- F. No opinion stated about constitutionality, but judges should not judge a law by its policy.

JUNE 4:

Mr. GERRY [Elbridge Gerry, Massachusetts] doubts whether the Judiciary ought to form a part of it [the Council of Revision]. ... They will have a sufficient check ... by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation [approval]. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures. **B and E**

Mr. KING [Rufus King, Massachusetts]. Judges ought to be able to expound [understand and explain] the law as it should come before them [in an actual case], free from the bias of having participated in its formation. **B**

JULY 21:

Mr. WILSON: “It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature. **A and D**

Mr. ELSEWORTH [Oliver Ellsworth, Connecticut] approved heartily of the motion. The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. **A and D**

Mr. GHORUM [Nathaniel Gorham, Massachusetts] did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. **F**

Mr. L. MARTIN [Luther Martin, Maryland]. A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. **B and E**

Col. MASON [George Mason, Virginia]. In their expository capacity of Judges ... they could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences. **A, B, D, and E**

Mr. RUTLIDGE [John Rutledge, South Carolina] thought the Judges of all men the most unfit to be concerned in the revisionary Council. The Judges ought never to give their opinion on a law till it comes before them. **B**

AUGUST 15:

Mr. MERCER [John Francis Mercer, Maryland]. He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable. **C**

Mr. DICKENSON [John Dickinson, Delaware] was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute. **C**

T-B. INFRASTRUCTURE FOR THE CONSTITUTIONAL CONVENTION SIMULATION

These eight lessons can be used individually or as a unit. In either case, here are basic rules of operation:

Assign each student to a state delegation that participated in the 1787 Federal Convention in Philadelphia. (Alternately, you could allow students to choose their states or have a lottery, but this will add an extra step.) Please note that delegates from Rhode Island did not attend.

The numbers in each state delegation will vary by class size. For classes with 24 or more students, there should be two or more in each delegation. (Add delegates in rough proportion to size of states. For instance, in a class of 25, Virginia will have three, the other states two each.) If fewer than 24, you can combine states of similar size and regional interests so each group has more than one delegate. Possible state combinations, in order of preference: DE and NJ (small and free), GA and NC (small/medium and slave), NH and CT (small and free), MA and NY (large/medium and free), VA and MD (large/medium and slave). To facilitate classroom management, students should sit with their fellow state delegates.

Breakout groups, called “**discussion and debate**” (**D & D**) **groups**, will be composed of several state delegations from *diverse* regions: lower South, upper South, mid-Atlantic, New England. These should be small enough to allow each student to participate—the size of each, and therefore the number of state delegations in each, will vary by class size and teacher preference. Again, to facilitate movement, state delegations in each D & D group will sit proximate to each other. For small classes, teachers might choose to conduct all deliberations with the full class—for historical authenticity, you can call this the “**committee of the whole**.”

Each time students meet in their D & D groups, they should be reminded that these are for deliberations only. The groups do not have to come to any agreement. Students will not yet be casting their votes.

Inform students that all votes will be by state delegations—one vote for each state delegation, just as it was at the Federal Convention of 1787. When students do meet with their delegation to determine its vote, they are not to discuss the issue at length—they’ve already done that in their D & D groups. They simply vote and report the state’s preference to the committee of the whole. If delegates of any state are evenly divided on an issue, they report “divided” as their state’s vote.

If you are teaching the full unit, you might want a secretary (it can be the teacher) to keep track of class decisions. You should also stress the importance of retaining all handouts. In extended

activities, students will be asked to compare their personal choices, class decisions, and historical decisions of the actual Convention and project how alternate outcomes might have altered the course of history.

If the units are used in a unit, here is the suggested order:

- 1. Reform or Revolution?** (one-day and two-day options)
- 2. Composition of Congress** (one-day and two-day options)
- 3. Creating an Executive** (one-day and two-day options)
- 4. Should Judges Judge Laws?** (one-day lesson)
- 5. Fine Tuning the Balance of Powers** (one-day and two-day options)
- 6. Slavery at the Constitutional Convention** (two-day lesson)
- 7. Amendments and Ratification** (one-day and two-day options)
- 8. To Sign or Not To Sign**
 - Option A: The Historical Constitution** (one-day lesson)
 - Option B: The Student-Generated Constitution** (one-day lesson)

Throughout these lessons, students need to understand key features of the Articles of Confederation:

*The United States under the Articles was a “confederacy” of sovereign states.

*There was only one branch, Congress, where each state had one vote. There were no separate executive and judicial branches.

*Congress was not a “government” as we view it today. It engaged only with states, not citizens. It passed no laws bearing directly on citizens and had no enforcement powers.

*Congress had no powers of taxation. It raised money by requisitioning the states, but it lacked the authority to force states to pay.

*Amendments required unanimous approval of the states.

These are highlighted in the first lesson and will be brought into play in the appropriate lessons.

Premise for engagement:

History is the chronicle of choices made by actors/agents/protagonists in specific contexts. Students understand choices – they make them all the time. These lessons involve students by placing them in the shoes of historical people and asking: “What might you do in such instances?”

For these exercises to be historical (more than affirmations of individual whims), we need to provide context: what was the issue, the problem to be solved? What were the existing

realities/constraints that limited possibilities? With those in mind, what were the available options? For each option, how did people view the possibilities for a desired outcome? What were the potential dangers? When studying battles, we see how generals evaluate troop strengths, positioning, logistics, morale, and so on. In fact, all historical actors do this—not just leading political figures, but ordinary people and collective bodies. In Revolutionary times, people often made decisions in groups, both indoors (town meetings, caucuses, conventions, congresses) and “out-of-doors,” as they said at the times, informal gatherings that protested authority or enforced popular will. The Federal Convention of 1787, known today as the Constitutional Convention, provides a perfect example of historical actors making consequential decisions in a group context. When coupled with a study of ratification of the Constitution, it shows the interrelation between political decisions made “in chambers,” as they said at the time, with politics “out-of-doors.”

Basic structure for choice-centered lessons, including but not limited to these Constitutional Convention simulations:

(Some lessons include two or even three of the cycles outlined here; others have only a single round. For complex simulations with multiple rounds, more than one class period might be appropriate, at teacher discretion.)

1. *Formulate the problem*, the issue at hand. Define the players: who will be making the choices, deciding which path to take? Provide *context*, including any *constraints* that would limit their actions, with documents when possible. Without context, we will be operating in our world, not theirs.
2. Outline and discuss the *available options*, including possible outcomes of each – that, after all, is what the participants had to do. This is sometimes done as a class, sometimes in breakout groups of two or more students. The size and composition of breakout groups is left to teacher discretion.
 - 2A. After breakout groups, in some lessons, the class will reconvene to share, compare, and evaluate what they came up with. When, historically, the decision was up to a body (a congress or convention), the class will always reconvene as that body—but if no group decision was involved, once students have discussed options in groups, they can continue to the next step.
3. Individuals or bodies make and reveal their choices.
4. Presentation of the *historical outcome*: the choice actually made by the player(s) – use documents when possible.

5. Discuss with full class the *consequences* that did in fact ensue from that choice, including *further* issues raised by the outcome. Sometimes those issues, in turn, provide the “catch” for a subsequent lesson.

To summarize: the opening for each lesson—the catch—is the crossroad, the choice to be made. Then, in turn, come the *context and constraints, discussion of options, decision making, presentation of historical outcomes, and analysis of those outcomes*, including where they might lead next. In these lessons, students actually *engage* in the historical process. **By exercising individual and group decision-making skills within political contexts, they prepare for civic life. When the time comes for them to make history, they will be well rehearsed in making reasoned choices.**

T-C. TIMELINE FOR THE FEDERAL CONVENTION OF 1787

September 11-14, 1786: Twelve delegates from 5 states, meeting at Annapolis, call for a larger convention the following year.

February 21, 1787: Congress endorses the Annapolis Convention's call for a convention, slated to meet in Philadelphia on May 14.

May 14: Delegates from only Pennsylvania and Virginia are present in Philadelphia. This did not constitute a quorum according to the standards of the Continental Congress.

May 25: With 29 delegates from 9 states present, the Convention begins. George Washington is chosen to preside.

May 29: Rule of secrecy adopted. Edmund Randolph presents the Virginia Plan.

May 30: Delegates start debating the Virginia Plan. The Delaware delegation threatens "to retire from the Convention" if all states do not have an equal vote in Congress. Convention resolves: "A *national* government ought to be established consisting of a *supreme* legislative, executive & judiciary."

June 2: Convention stipulates that the executive "be chosen by the national legislature for the term of seven years." This is rescinded on July 19 but reaffirmed on July 26.

June 4: Convention decides on a single executive, 7 states to 3.

June 15: William Paterson introduces the New Jersey Plan, which proposes only to amend the Articles of Confederation and maintains Congress as a unicameral body, each state having one vote.

June 18: Hamilton proposes that the chief executive and senators serve for life, with the executive having absolute veto power over all legislation. He receives no support.

June 19: Virginia Plan, as amended, defeats New Jersey Plan, 7-3 with one divided.

July 12: Convention finalizes the compromise on representation in the House: each slave counts as three-fifths of a person. Vote: 6-2-2.

July 16: Convention finalizes the "Great Compromise": proportional representation in the House; equal representation of states in the Senate; all money bills originate in the House. Vote: 5-4-1.

July 23: Convention resolves to send its proposed plan to Congress, with a recommendation that it be sent to "assemblies chosen by the people" in each state for ratification. Vote: 9-1.

July 24: Convention appoints a five-member committee "to report a Constitution conformable to the Resolutions passed by the Convention." (Committee of Detail.)

July 27-August 5: Convention recesses. Committee of Detail prepares the first full draft of the Constitution.

[August 6](#): Committee of Detail submits its report, which enumerates the powers of each branch. Debate on this draft commences.

[August 21](#), [22](#), [23](#), and [24](#): Convention debates whether Congress can prohibit the importation of slaves.

[August 24](#): Popular election of the president is defeated a final time. Vote: 9-2.

[August 25](#): Convention decides there can be no ban on slave importation until 1808. Vote: 7-4.

[August 30](#): Convention decides that ratification by nine states will suffice to place the Constitution into effect. Vote: 8-3.

[August 31](#): Convention appoints an eleven-member committee (one from each state delegation) to consider “such parts of the Constitution as have been postponed, and such parts of Reports as have not been acted on.” (Committee on Remaining Matters.)

[September 4](#): Committee of Remaining Matters issues its report, reversing key provisions that had already been decided: special electors, not Congress choose the president; the president, not the Senate, has treaty-making and appointive powers; a newly created vice-president presides over the Senate.

[September 8](#): Convention approves the Committee of Remaining Matters report with only minor revisions. Convention appoints a five-member committee “to revise the stile of and arrange the articles which had been agreed to by the House.” (Committee of Style.)

[September 12](#): Committee of Style submits its almost-final draft of the Constitution. George Mason and Elbridge Gerry propose “a Committee to prepare a Bill of Rights.” The motion fails, 0-10.

[September 15](#): The Convention approves the Constitution, with all states present voting in favor.

[September 17](#): 39 of the 42 members present sign the Constitution. Congress sends it to Congress.

September 28: Congress sends the Constitution to the state legislatures with instructions to call conventions to consider ratification, as stipulated by the Federal Convention.