

Unit III, District Question #3- June 2014

What are the major arguments for and against judicial review?

- *Alexander Hamilton claimed in Federalist #78 that “the interpretation of the law is the proper and peculiar province of the courts.” Do you agree or disagree? Why?*
- *What are the advantages and disadvantages of an appointed, life-tenured branch of government overturning laws passed by a democratically elected body of government?*

P1. Judicial review is America’s novel contribution to political theory and to the practice of constitutional government. The concept was first introduced to the Founders while the colonies were still under British rule, when the Privy Council, the kings’ advisors, held the power to veto laws passed by colonial legislatures. The idea of judicial review was also discussed at Philadelphia and during the ratifications debates that followed. However, judicial review is not specifically mentioned in the constitution.

P2. Judicial review is the power of courts to declare laws and acts of government unconstitutional. Its anchor can be found in the Supremacy Clause of Article VI of the Constitution. We all know the story of the way the Supreme Court got this power. It certainly wasn’t through any provision in the Constitution itself. Chief Justice John Marshall in the 1803 decision in *Marbury v. Madison* made a statement that fundamentally changed the separation of powers doctrine from what it might have been to one in which the judiciary gained the right to have the final say in cases and controversies: “It is emphatically the duty and province of the judicial department to say what the law is.” When the Constitution and a law conflict, “the court must determine which of these conflicting rules governs the case. This is the very essence of the judiciary duty.”

P3. In *Federalist 78*, Alexander Hamilton seemed to suggest a broad power of judicial review when he claimed that the duty of the courts “must be to declare all acts contrary to the manifest tenor of the Constitution void.” Hamilton also claimed in the same paper that “the interpretation of the laws is the proper and peculiar province of the courts.”

P4. We agree with Hamilton’s statement. Each of the three branches of government enjoys a primacy within a particular area of government. This is one of the bedrock principles of separation of powers. The judiciary’s power is the power to interpret the law. It is common sense that someone has to determine what the Constitution means. This is particularly important with a constitution that was drafted in terms as broad and vague as those of ours. Who is to determine the meaning of undefined clauses such as “Due Process” or “Free Speech?”

P5. Moreover, one of the most important functions of the Constitution is the protection of individual rights. Constitutional law protects the rights of the individual against the decisions and

acts of government. The most effective protection for the rights of the majority is through the ballot box.

P6. On the other hand, when protecting the rights of those in the minority, the power properly belongs to the courts. Hamilton described the judiciary as a bulwark against majoritarian abuses. Because judges are safe from political pressures that representatives may endure, they are able to rule on issues in the way that they see just, not in a way that will best please the public. For example, in the landmark 1954 case, *Brown v. Board of Education*, the court decided that racial segregation was a violation of the equal protection clause of the Fourteenth Amendment, thus outlawing segregation. This ruling did not exactly match public opinion at the time, but the justices were more willing to rule how they did simply because they wouldn't have to answer to scrutiny from the public.

P7. Many critics ask if this power is consistent with the principle of limited representative government. They argue that a decision by a judge who is appointed bypasses the democratic will of the people. These critics feel that the elected branches of government were intended to reflect the wishes of the people, and they point out that decisions such *Roe v. Wade* and *Kelo v. New London* demonstrate judicial arrogance and a lack of judicial restraint.

P8. Additionally, some critics argue that the court isn't as impartial and removed from politics as they should be. They view decisions, such as the one in *Bush v. Gore (2000)*, as politically charged because it was decided five to four, right down political lines. That is, the five justices who voted with the majority were appointed by Republican presidents, and the remaining four that didn't vote with the majority were appointed by Democratic presidents.

P9. On the other hand, one can argue that judicial review is a necessary check on the legislative and executive branches, whose members' actions may be swayed by their desire to be reelected. James Madison warned that the "tyranny of the majority" was as much to be feared as a tyranny of the minority. And we, the people, do elect Presidents and Senators who appoint and confirm judges respectively. In addition, the constitutional impeachment process allows Congress to remove judges who are found guilty of "high crimes and misdemeanors."

P10. In conclusion, the watchdog of our Constitution is our independent judiciary. If our courts did not have the power of judicial review, if our judges were even more subject to political pressures than they are today, the complex system designed by the framers to ensure a more perfect union would be threatened.

P11. Thank you for your time. We are now eager to answer your questions.

P1

- Be able to understand the Privy Council.
 - What was the Privy Council?
 - How did the Privy Council help establish the modern principles of judicial review?
 - Why didn't the Framers include the principle of judicial review in the written Constitution?

P2

- What is judicial review and how the Supreme Court implement review?
 - What was the court case that established the principle in American society?
 - What were the details of the case?

P3

- Read: **Alexander Hamilton's Federalist 78**
 - What point was Hamilton attempting to get across with this essay?
 - Why do you think his points weren't specifically mentioned in our Constitution?

P4

- Judicial review gives the Supreme Court an edge in our government. Before judicial review, the judiciary branch may have been our weakest.
- Read: **James Madison's Federalist 47**
 - This paper talks about the fear of too large a government that's vested in one branch. What did Madison propose to address the people's fear of a strong executive?

P5 and P6

- How, using specific examples, is the Constitution an actant for protecting the citizens from governmental harm?
- What rights give the governed an advantage over the government in our society?
- What role does the Judiciary play in protecting individual's rights?
- How is the Judiciary separated from politics and public attention?
 - What are the advantages of this when dealing with the courts?
 - Define the justice's tenure "during good behavior?" What did the Framers mean with good behavior?

P7 and P8

- What are some arguments against the power of Judiciary?
- How could Judicial review be seen as undemocratic?
- **COURT CASE: Kelo v. New London (2005)**
 - What are the details of the case? What did the court rule?
 - How can the ruling be seen as an expression of judicial arrogance?
- **COURT CASE: Brown v. Board of Education (1954)**
 - What were the details of this case?
 - What was the constitutional provision in question?

P9

- Read: **James Madison's Federalist 10**
 - Assess Madison's arguments about majority-minority relationships and their passions. Also look at his ideas about factions and what we needed to prevent them from becoming too powerful.
- How does the impeachment power act as a check on the Judiciary as well as the executive?

P10

- It should be part of your knowledge to know all of the amendments of the Constitution. Memorize and understand each amendment's significance. All amendments are significant because of the difficulty of their ratification.
- How have amendments helped better our union? Use specific amendments and accurate historical context to answer this question.
- Do you agree with Lincoln's statement? In short, do you prefer the convention mode of amending? If not, what method do you prefer and for what reason? Do you prefer amending the constitution in order for better representation of the people or for pure democracy where the people decide? Explain your reasoning.