

Chapter 1: CONSTITUTIONAL VALUES

Abstract

Separation of powers among the executive, legislative, and judicial branches of government is a fundamental principle of the United States Constitution. Concerned that ambitious officials in one branch would attempt to encroach upon the authority of the others, the Framers established a structure of government designed to prevent that. The exercise of judicial review and expansive constitutional interpretation by the U.S. Supreme Court – powers not *explicitly* granted by the Constitution – have evolved as additional judicial checks on powers claimed by the President, the Congress, and the states. As part of Constitutionally Speaking’s inquiry into the question: “How Does the Constitution Keep Up with the Times?” the materials that follow explore the history of judicial review, approaches to constitutional interpretation, and the practical application of constitutional values such as freedom of speech.

Relevant Constitutionally Speaking Videos

An Assignment Left to the Future

Speakers: David H. Souter, U.S. Supreme Court Justice (Retired)
Adam Liptak, *New York Times* columnist

Duration: 5 min 12 sec

Synopsis: Justice Souter and Mr. Liptak address the role and timing of the U.S. Supreme Court in the practical application of constitutional values. Their discussion touches upon the lack of specificity in constitutional language (i.e., Commerce Clause, freedom of speech, security in people’s houses) and the absence of a template for constitutional interpretation.

A Play of Constitutional Values

Speakers: David H. Souter, U.S. Supreme Court Justice (Retired)
William Chapman, Esq. Shareholder, Orr & Reno

Duration: 8 min 02 sec

Synopsis: Justice Souter and Attorney Chapman discuss the First Amendment, what rights it encompasses in order to give practical value to the general right of freedom of speech (i.e., freedom of association), and its limitations. References are made to the Espionage Act that criminalized anti-war writings and protests during World War I, Justice Holmes’ dissent in the Abrams case, and the tension between the constitutional values of liberty and equality reflected in the *Citizens United* case.

Chapter Outline

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Learning Objectives

Goal Students will be able to examine the U.S. Supreme Court’s power of judicial review and critique the various approaches justices take when interpreting the Constitution. Further, students will understand how the constitutional right to free speech has evolved over time.

Students will understand that...

- The U.S. Supreme Court is the supreme authority over the meaning of the U.S. Constitution and has changed its interpretation of the Constitution over time.
- Supreme Court justices have differing approaches to constitutional interpretation.
- The Court’s decisions have a profound impact on everyday lives of American citizens.
- Changing interpretations of the Constitution allow it to keep up with the times.

Essential Questions

- How was the power of judicial review established?
- What basic approaches to constitutional interpretation have justices of the Supreme Court adopted?
- How can opposing judicial philosophies have an affect on constitutional interpretation?
- How has the interpretation of the First Amendment changed over time?
- What rights are afforded to American citizens under the First Amendment?

Students will know...

- Important terms regarding judicial review, constitutional interpretation, and the First Amendment.
- Key facts about establishing the principle of judicial review and how the Supreme Court has exercised that power over time.
- Key Supreme Court cases on constitutional interpretation and the Bill of Rights.
- Key Supreme Court cases on the First Amendment and free speech.

Students will be able to...

- Recognize, define, and use vocabulary in context.
- Read, comprehend, and analyze the text of the U.S. Constitution.
- Interpret, compare, and evaluate Supreme Court analysis of the Constitution over time.
- Express their learning orally during class discussions and in writing.
- Collaborate successfully with their peers to improve and express their learning.

Relevant U.S. Supreme Court Cases

Each case is followed by a link to the full-text opinion at Cornell University's Legal Information Institute and a case summary at Oyez.org.

<u>Title (year)</u>	<u>Full Text</u>	<u>Summary</u>
<u>Judicial Review</u>		
Marbury v. Madison (1803)*	Full Text	Summary
Cooper v. Aaron (1958)	Full Text	Summary
<u>Constitutional Interpretation</u>		
McCulloch v. Maryland (1819)*	Full Text	Summary
Ex Parte Milligan (1865)	Full Text	Summary
Watkins v. United States (1957)	Full Text	Summary
Roe v. Wade (1973)*	Full Text	Summary
U.S. v. Nixon (1974)*	Full Text	Summary
Cipollone v. Liggett Group (1991)	Full Text	Summary
Planned Parenthood v. Casey (1992)	Full Text	Summary
Clinton v. City of New York (1998)	Full Text	Summary
Roper v. Simmons (2005)	Full Text	Summary
District of Columbia v. Heller (2008)	Full Text	Summary
McDonald v. Chicago (2010)	Full Text	Summary
Affordable Care Act cases (2012)**	Full Text	Summary
<u>First Amendment and Free Speech</u>		
Schenck v. United States (1919)	Full Text	Summary
Debs v. United States (1919)	Full Text	Summary
Abrams v. United States (1919)	Full Text	Summary
Gitlow v. New York (1925)	Full Text	Summary
Chaplinsky v. New Hampshire (1942)	Full Text	Summary
West Virginia v. Barnette (1943)	Full Text	Summary
United States v. O'Brien (1968)	Full Text	Summary
Tinker v. Des Moines (1969)*	Full Text	Summary
Brandenburg v. Ohio (1969)	Full Text	Summary
Cohen v. California (1971)	Full Text	Summary
Miller v. California (1973)	Full Text	Summary
Island Trees School District v. Pico (1982)	Full Text	Summary
Bethel School District v. Fraser (1986)	Full Text	Summary
Hazelwood v. Kuhlmeier (1988)	Full Text	Summary
Texas v. Johnson (1989)	Full Text	Summary
R.A.V. v. St. Paul (1992)	Full Text	Summary
Reno v. ACLU (1997)	Full Text	Summary
Watchtower Bible and Tract Society c. Stratton (2002)	Full Text	Summary

McConnell v. FEC (2003)	Full Text	Summary
Virginia v. Black (2003)	Full Text	Summary
Virginia v. Hicks (2003)	Full Text	Summary
United States v. American Library Association (2003)	Full Text	Summary
Ashcroft v. ACLU (2004)	Full Text	Summary
Morse v. Frederick (2007)	Full Text	Summary
Citizens United v. FEC (2010)	Full Text	Summary

*Teaching materials – including case summaries and excerpts – are available for these cases at [Landmark Supreme Court Cases of the U.S. Supreme Court](#).

**Additional case summaries and excerpts are available for these cases in [Street Law Inc.'s Resource Library](#).

Important Terms

appellate jurisdiction	The power of a court to hear appeals from lower courts. This includes the power to reverse or modify the lower court's decision. In the federal system, the circuit courts have appellate jurisdiction over the cases of district courts and the Supreme Court has appellate jurisdiction over the decision of the circuit courts.
Bill of Rights	The first ten Amendments to the Constitution, setting out individual rights and liberties. Enforced only on the federal government at the time of its adoption, through the legal doctrine of incorporation, most of the Bill of Rights now applies to the states under the Due Process Clause of the Fourteenth Amendment.
civil liberties	Rights granted to citizens under the Constitution (and derived primarily from the First Amendment) to speak freely, think, assemble, organize, worship, or petition without government interference or restraints.
civil rights	Enforceable rights or privileges, which if interfered with by another gives rise to an action for injury.
constitution	The most fundamental law of a country or a state. The term is capitalized only when referring to a specific constitution (e.g. U.S. Constitution, Texas Constitution.)
court	An official tribunal presided over by a judge or judges in which legal issues or claims are heard and determined.
express authority	An agent's power to act on behalf of a principal, explicitly granted by an agreement between the agent and the principal.
federal	Typically used to refer to the U.S. government, its legislative, executive, and judicial branches, and the statutes, rules and regulations enacted by those branches of government.
First Amendment	Protects the right to freedom of religion and freedom of expression from government interference.
implied authority	An agent's power to act on behalf of a principal, intentionally granted by the principal as a result of the principal's conduct, but without express agreement.

Failure to object after prior exercise of such power may give rise to implied authority.

judicial review	The doctrine under which the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch. Judicial review allows the Supreme Court to take an active role in ensuring that laws and executive actions conform with the U.S. Constitution.
jurisdiction	Power of a court to adjudicate cases and issue orders.
original jurisdiction	A court's power to hear and decide a case before any appellate review. A trial court must necessarily have original jurisdiction over the types of cases it hears.
precedent	A case or issue decided by a court that can be used to help answer future legal questions.
<i>stare decisis</i>	Latin for "to stand by things decided." <i>Stare decisis</i> is essentially the doctrine of precedent. Courts cite <i>stare decisis</i> when an issue has previously been brought to the court and a ruling issued. Generally, courts will adhere to the previous ruling, though this is not universally true.
Supremacy Clause	Article VI, Paragraph 2 of the Constitution is commonly referred to as the Supremacy Clause. It establishes that the U.S. Constitution, and federal laws generally, take precedence over state laws and even state constitutions.
supreme court	The highest court in a jurisdiction.
unconstitutional	In opposition to the Constitution. Used to describe a statute, governmental conduct, court decision, or private contract that violates one or more provisions of the Constitution. Can be used in reference to the federal constitution or a state constitution.

Learning Activities & Assessments

Part 1: The Power of “Judicial Review”

The goal of these activities is to understand the meaning of “judicial review” and to determine if the practice finds its basis in the U.S. Constitution.

Step 1: The Role of the U.S. Supreme Court

At the beginning of class have students respond to the following prompt:
What is the role of the U.S. Supreme Court?

To see the collective response of the class, have students write their responses on a random or designated spot on the classroom whiteboard, chalkboard, or chart paper. After everyone has recorded a response, have students walk around and analyze their classmates’ answers. Create a chart to note similarities, differences, and surprises. Have students return to their seats and initiate a class discussion about the results.

Step 2: A Definition of “Judicial Review”

Define, post, and explain the term “judicial review” for students (see Important Terms, page 7). Explain that the U.S. Supreme Court uses this power to review acts of the executive and legislative branches of the federal government and the states. If laws are in conflict with the Constitution, the Supreme Court may invalidate them by declaring them unconstitutional. If necessary, review the structure of the federal judiciary and how a case reaches the Supreme Court. Walk students through how a case made its way to the Court and the outcome of the case (e.g. *Brown v. Board of Education*). Note: Do not use *Marbury v Madison* as your example. This case will be used later in the lesson.

Step 3: What the Constitution Says

Ask students what they believe is the source of the Supreme Court’s power of judicial review. Presumably, students will suggest the power is derived from the U.S. Constitution. Distribute copies of Article III of the Constitution. Have students refer to the text to answer the following questions:

1. Under Article III, what are the roles, responsibilities, and powers of the Supreme Court? Are there any limitations? Explain.
2. Does Article III give the Supreme Court authority to determine if acts of the executive branch, legislative branch, or the states are constitutional? Where? Explain.
3. Does Article III give the Supreme Court the authority to invalidate laws passed by Congress or states if those measures do not comport with the Constitution?
4. In your own words, describe what you understand the role of the Supreme Court to be under Article III of the United States Constitution.

Next, divide students into small groups. Each group should have a facilitator and a timekeeper. Facilitators will lead the discussion by soliciting input from each group member, ensuring no one person dominates the conversation, drawing quieter students into the conversation, and asking clarifying questions to keep the conversation moving. Timekeepers will keep the group informed of how much time discussion remains. (Consider modeling this process for the class.) Once the roles have been established, each group should discuss responses to each question for two to three minutes.

Then, lead the whole class in a discussion. Have students cite text from Article III when addressing each question, and determine as a class if the text cited supports their assertions. Explain to students that despite the lack of explicit language in the Constitution, the U.S. Supreme Court has used the power of judicial review since as early as 1796. Note: You may wish to review with your students the difference between the terms explicit and implicit. Ask students to look at Article III and Article VI, Section II and determine if there is implicit language supporting judicial review. Is it implied by the structure of government that the Supreme Court should have this power?

Part 2: The Establishment of “Judicial Review”

In these activities students will examine *Marbury v. Madison* (1803), the case that established judicial review as a power of the U.S. Supreme Court; compare and contrast conceptions of judicial review; and express and support their positions on the legitimacy of judicial review.

Step 1: Analysis of Marbury v. Madison

Individually or in groups, have students research the background of *Marbury v. Madison*, the landmark 1803 case that established judicial review; the issues the U.S. Supreme Court considered; and the decision the Court rendered. Consider using Street Law’s Case Study strategy, included in the links below.

1. Case Study Strategy

http://www.streetlaw.org/en/landmark/teaching_strategies/case_study

b. Extended Background

http://edsitement.neh.gov/sites/edsitement.neh.gov/files/worksheets/marbury_background.pdf

c. Brief Background

http://www.streetlaw.org/en/Page/272/Background_Summary_Questions

d. Full Text of the Majority Opinion

<http://www.ourdocuments.gov/doc.php?flash=true&doc=19>

e. Excerpts from the Majority Opinion

http://www.streetlaw.org/en/Page/290/Key_Excerpts_from_the_Majority_Opinion

f. Summary of the Decision

http://www.streetlaw.org/en/Page/292/Summary_of_the_Decision

After the case studies have been completed, divide students into small groups to share what they have learned, then reassemble the class for a wider discussion and to check for understanding.

Discussion Questions

- What did the Court hold in *Marbury v. Madison*?
- Why is it such an important case in United States history?
- Did the outcome enhance or erode the system of checks and balances created by the Constitution?

Step 2: Early Debate on the Supreme Court's Role

Have students use primary sources to explore differing opinions about the exercise of judicial review. To begin, set up stations with one document per station and have students fill out a primary source analysis sheet for each. (Use the APPARTS method in APPENDIX A when completing the primary source analysis.) Students can then use the primary source analysis sheets to answer the follow up questions. The documents are as follows:

a. Federalist 78 (1788)

http://www.streetlaw.org/en/Page/280/The_Power_of_the_Judicial_Branch_The_Federalist_Number_78_and_the_AntiFederalist_78

<http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf>

b. Anti-Federalist 78 (1788)

http://www.streetlaw.org/en/Page/280/The_Power_of_the_Judicial_Branch_The_Federalist_Number_78_and_the_AntiFederalist_78

c. Federalist 80 (1788)

<http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf>

d. Virginia & Kentucky Resolutions (1798, 1799)

<http://billofrightsinstitute.org/founding-documents/primary-source-documents/virginia-and-kentucky-resolutions/>

e. Thomas Jefferson to Spencer Roane (1819)

http://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html

Next, have students consider the following questions and discuss their responses as a class, keeping track of significant text from the documents by using an overhead or

projector to point out this language and having students highlight or write down the important passages.

Discussion Questions

- How did Federalists and Anti-Federalists differ in their views about the tenure of justices and the role of the Supreme Court? Did their attitudes toward federal authority and liberty influence these views?
- Is the “check” mentioned in Anti-Federalist 78 a necessary check on the judicial branch or would it strip the Court of a meaningful role in government?
- In writing the Virginia and Kentucky Resolutions, how did Jefferson and Madison propose nullifying unconstitutional federal laws, and where did Jefferson suggest this authority came from? How would this affect the relationship between the federal government and the states? Is this a superior approach to the current process?
- What did Thomas Jefferson mean by the following:

The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape in any form they please.

Step 3: Thinking Critically about Judicial Review

Ask students to write down alternative approaches for determining the constitutionality of laws. Share the ideas as a class and vote on which suggestions are worthy of consideration. Are these approaches problematic? If not already mentioned, share some approaches to judicial review proposed by Thomas Jefferson and other critics of the principle.

As a wrap up exercise, form groups of four to five students and complete a Debate Team Carousel exercise from APPENDIX B, using one or more of the following prompts:

1. Should the Supreme Court have the power of judicial review?
2. Is judicial review undemocratic? Explain.
3. Does judicial review exempt or preclude the other branches from considering the constitutionality of their actions?
4. How would our country be different without judicial review?

Using the Debate Team Carousel directions and template, students should consider the primary sources, analysis sheets, and follow up questions when answering the above prompts. Discuss the responses as a class and create a list of the most compelling arguments.

Learning Extension

First, ask students to read the articles below to deepen their understanding of judicial review and the decision in *Marbury v Madison*.

Grossman, Joel B. “The 200th Anniversary of *Marbury v. Madison*: The Reasons We Should Still Care About the Decision, and The Lingering Questions It Left

Behind.” FindLaw, 24 Feb. 2003. Web. 9 July 2013.
<http://writ.news.findlaw.com/commentary/20030224_grossman.html>.

Rappaport, Mike. "The Constitutional Basis for Judicial Review." Library of Law and Liberty. Liberty Fund Inc., 24 Jan. 2013. Web. 9 July 2013.
<<http://www.libertylawsite.org/2013/01/24/the-constitutional-basis-for-judicial-review/>>.

Then, as homework or using the Debate Team Carousel format in class, have students consider the arguments put forth by Grossman and Rappaport and address the following questions:

1. Should the Judiciary have a monopoly on interpreting the Constitution?
2. Did the Founders expect the Supreme Court to engage in judicial review?
3. Is there a constitutional basis for judicial review?

Alternatively, have students complete a case study, using Street Law’s Case Study case study format.

Short Answer/Essay/Debate Prompts

- Why is judicial review such an important power of the Supreme Court?
- Does the power of judicial review support or undermine the doctrine of checks and balances?
- Should lifetime appointments to the Supreme Court be discontinued in favor of the election of judges subject to recall?
- Why is it important for the Supreme Court to be insulated from politics?
- Is the Supreme Court accountable to the American people?

Summative Assessments

- Consider Supreme Court Justice Antonin Scalia’s 1996 remarks about judicial review (in italics below), and write position papers or participate in a formal class debate on whether judicial review is a power that should be exercised by the Supreme Court even though it is not enumerated in the Constitution.

“The Constitution of the United States nowhere says that the Supreme Court shall be the last word on what the Constitution means. Or that the Supreme Court shall have the authority to disregard statutes enacted by the Congress of the United States on the ground that in its view they do not comport with the Constitution. It doesn’t say that anywhere. We made it up. Now, we made it up very sensibly because what we said was, ‘Look, a Constitution is a law, it’s a sort of super law...and what the law means is the job of the courts.’”

- Create a timeline or diagram that illustrates the debate and evolution of judicial review over time. Include dates, case names where possible, and descriptions of how judicial review changed at each point. Students could complete additional research to add depth to the material covered in class.

Part 3: Approaches to Constitutional Interpretation

In these activities students will analyze the constitutionality of historical and contemporary legal issues; become attuned to constitutional language, both specific and broad; and describe how the Constitution's language and subject matter creates a dichotomy.

Step 1: Discerning Constitutional Meaning

Break students into groups of three to five. Provide each group with one or more of the following scenarios depicting an action taken by the executive branch, the legislative branch, or a state. Ask students to decide if each action is constitutional, and to cite the Article, Section, Clause, or Amendment of the Constitution that supports their conclusion. Students should be prepared to defend their answers and explain how the text supports or prevents each action.

1. After protesters in New York City burn the United States flag, Congress passes a Flag Desecration Act banning any display of contempt directed against the flag.
2. New Hampshire passes the Separate Car Act declaring that all forms of transit carrying passengers must provide separate but equal accommodations for white and nonwhite passengers. Passengers sitting in the wrong shuttle must pay a \$250 fine or face 30 days in jail.
3. Congress passes a law banning the sale of guns to those who have been deemed dangerous to themselves or others, involuntarily committed, found not guilty by reason of insanity, or judged incompetent to stand trial.
4. The state of Texas adopts an amendment to its state constitution recognizing marriage as between one man and one woman. The amendment also states that Texas may not create or recognize any legal status identical or similar to marriage.

Note: Teachers may create other scenarios pertinent to other landmark Supreme Court cases or current events that raise interesting legal questions. Depending on ability levels in the classroom, you may choose more complex cases or use examples from the following links:

Power Grab Game

http://score.rims.k12.ca.us/score_lessons/power_grab_game/

Interpreting the Constitution

<http://www.icivics.org/teachers/lesson-plans/interpreting-constitution-what-does-mean>

After students debate the scenarios in small groups, lead a class discussion. Keep track of the rationales and explanations offered by students on the board or on a projector.

Discussion Questions

- Does the Constitution make clear the legality or illegality of the action taken in each scenario? How so? Explain.

- Did you encounter vague language that made it difficult to determine if each action was constitutional? What was this language?
- How did you determine the meaning of the text?
- Was there disagreement over constitutional meaning? Did the group settle this disagreement or do members still disagree?
- If Supreme Court justices disagree about constitutional meaning, how might that affect the outcome of the case at hand and future cases?

Step 2: How Constitutional Language and Interpretation Intertwine

Show the *Constitutionally Speaking* video *An Assignment Left to the Future*, in which Justice Souter and New York Times columnist Adam Liptak discuss how the Constitution’s structure and language, coupled with contemporary cultural norms, lead to different understandings, interpretations, and applications of our Nation’s founding document. Then, working with partners or in small groups, have students discuss the following questions.

Video Discussion Questions: An Assignment Left to the Future

1. According to Justice Souter, in what way does the United States have two Constitutions? What does he refer to these as and what are the characteristics of each?
2. Justice Souter stated there is “great range of breadth of language” in the Constitution. What did he mean? What is the practical effect of that “breadth?”
3. What does Justice Souter mean by the following statement:
 These general terms, I think, are best understood as kind of a listing or a menu of approved values, the application of which has got to be worked out over time.
4. Does Justice Souter’s understanding expand or restrict the Court’s ability to interpret the language in the Constitution?
5. What assignment did Justice Souter suggest was left to the future? What does this mean and what does it suggest about Justice Souter’s perception of the Constitution?
6. According to Mr. Liptak, how has the Supreme Court helped establish rights not previously recognized? Why have some justices worried that the Court has acted too fast in doing so?
7. Why does Justice Souter believe it is important for the Supreme Court to explain why it makes rights and values work the way they do?

Learning Extension

Break students into small groups and have them review different parts of the Constitution. For example, one or more groups could examine the Bill of Rights while other groups reviewed Article I, Section VIII. Groups could also examine important Amendments and clauses such as the Fourteenth Amendment and the Equal Protection Clause. While examining the Articles and Amendments, students should address the following questions:

1. Is this Article/Section/Clause/Amendment part of the “Structural Constitution” or “Liberty” Constitution? How so? Explain.
2. How does this Article /Amendment/Section/Clause relate to Justice Souter’s remark about the breadth of language within the Constitution?
3. What is the practical value of the Article/Amendment/Section/Clause?
4. Can you argue there are implied powers or rights under this Article/Amendment/Section/Clause?

Step 3: Differing Approaches to Constitutional Interpretation

Have students read “How is the Constitution Interpreted?” an eight-page chapter on constitutional interpretation that is written at an advanced reading level and can be accessed by the link below. Then, working individually or in pairs, have students answer the related discussion questions.

Ritchie, Donald A. Our Constitution. N.p.: Oxford University Press, 2006. 37-44.
 Annenberg Classroom, The Leonore Annenberg Institute for Civics. Web. 9 July 2013.

http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Constitution/COMPLETED_Our%20Constitution.pdf.

Discussion Questions

- What does “judicial activism” mean? How does this term reflect the attitudes some have about the role of the Supreme Court?
- What is “constitutional law” and how does it differ from other forms of law?
- Explain why the municipality of New York City, but not Congress, succeeded in challenging President Clinton’s line item veto.
- How might constitutional interpretations by Congress and the President affect how they carry out their powers?
- Based on the reading and what you know about United States history, government, and politics, explain how political parties have played a role in constitutional interpretation.
- How have the branches of government engaged in constitutional conflict?
- How did President Jackson’s response to the Supreme Court ruling on the Indian Removal Act highlight the conflict between the Court and the other branches of government?
- How did slavery, the Civil War, and Andrew Johnson’s actions as president demonstrate the idea of constitutional conflict?
- How did the Fourteenth Amendment allow for the expansion of congressional and judicial authority?
- How did the Warren Court shift in its outlook and approach to national problems?
- Explain the difference between “originalists” and those who believe in the idea of a “living Constitution.” Which approach do you favor, and why?
- Do different philosophies always mean different conclusions?

Next, lead a class discussion and check for understanding. Survey students about their thoughts on constitutional interpretation. For example, who believes in the concept of a “living Constitution”? Who believes in the “originalist” approach? Conduct a Debate Carousel (see APPENDIX B) or class discussion and create a list of the pros and cons of each approach.

As a supplement, consider using the Annenberg Classroom lesson plan, A Conversation on the Constitution: Judicial Interpretation.

Lesson Guide

<http://www.annenbergclassroom.org/Files/Documents/LessonPlans/LessonPlanConversationsJudicialInterpretation.pdf>

Video

<http://www.annenbergclassroom.org/pages.aspx?name=a-conversation-on-the-constitution-judicial-interpretation&AspxAutoDetectCookieSupport=1>

Step 4: The Death Penalty and Gun Control: Cases in Point

To further illustrate differing approaches to constitutional interpretation, discuss and debate the abolition of the death penalty. Explain to students that in 1791, when the Bill of Rights was adopted, the death penalty was a widely accepted practice. Pose the following question: Would you consider it acceptable for the U.S. Supreme Court to abolish the death if modern society viewed the practice as “cruel and unusual,” or do you think a constitutional amendment should be required to abolish the death penalty?

Alternatively, discuss and debate gun control measures in the United States. Post the text of the Second Amendment for all students to see.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Lead a discussion on the meaning of the text. The Cornell Legal Information Institute has two excellent readings on this topic (links below), outlining the “individual rights” theory and “states’ rights” theory. Discuss these two approaches as a class and conduct a Debate Carousel exercise (see APPENDIX B). Then, have students review *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010). To elicit further discussion and debate, analyze the assault weapons ban proposed in 2013 by Sen. Dianne Feinstein, D-CA. Ask students to consider the constitutionality of such legislation, which failed to win approval in the Senate.

a. Second Amendment

http://www.law.cornell.edu/wex/second_amendment

b. Bearing Arms

http://www.law.cornell.edu/anncon/html/amdt2_user.html#amdt2_hd2

c. Assault Weapons Ban of 2013

<http://thomas.loc.gov/cgi-bin/query/D?c113:2:./temp/~c113gMgtE8>

Learning Extension

Provide students with the facts, issues, and arguments involved in one or more Supreme Court cases that highlight differences in the justices' approaches to interpreting the Constitution. Ask students to complete case studies, utilizing the Street Law Case Study Teaching Strategy referenced below. Then, have groups of seven to nine students decide the outcome of their cases. Those in the majority should write Majority and/or Concurring Opinions, while those in the minority should write Dissenting Opinions. You could modify this activity by assigning a specific interpretation approach to students, with some advancing the "originalist" view and others espousing an "evolutionist" approach. This activity would also be suitable as a Moot Court exercise.

Street Law: Case Study Teaching Strategy

http://www.streetlaw.org/en/landmark/teaching_strategies/case_study

Street Law: Moot Court Teaching Strategy

http://www.streetlaw.org/en/landmark/teaching_strategies/moot_court

Short Answer /Essay/Debate Prompts

- Should the language within the Constitution, and its various Articles and Amendments, narrowly define its meaning and interpretation?
- Should the Constitution be understood to mean what the Founders envisioned when they wrote it? Should its meaning and/or interpretation change over time?
- Is the amendment process an adequate remedy for issues arising under the Constitution as society changes?

Summative Assessments

- Use the activity from the Learning Extension as a summative assessment for this section.
- Write a position paper in support of one of the approaches to Constitutional interpretation.
- Write a position paper in support of a Majority, Concurring, or Dissenting Opinion from one of the cases considered.
- Write a judicial opinion from an originalist or evolutionist perspective based on the facts of a case decided by the Supreme Court or on a fictional case provided by the teacher.

Part 4: The First Amendment and Free Speech

The goal of these activities is to familiarize students with the values the First Amendment seeks to promote, and to consider when and why the government places limitations on the freedom of speech.

Step 1: What the First Amendment Says

Post or project the text of the First Amendment for the class to see.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Ask students to identify the freedoms contained within the First Amendment and keep a list that is visible to all. As a class, narrow the list down to the following five:

Religion
Assembly
Press
Petition
Speech

Tell students they will be focusing on the freedom of speech. Divide the class into small groups to either define free speech or answer the question: What does freedom of speech *mean to me*? Have each group create separate lists of what actions by citizens they believe are protected by the First Amendment's free speech clause, and what actions are not. Bring the students back together and create a class definition of free speech.

Have students return to their groups to consider: Under what circumstances is it acceptable for the government to limit your freedom of speech? Reassemble the class to compare responses. Familiarize your students with the concept of countervailing interests (see Important Terms, page 69), and create a class list of acceptable limits on speech in contemporary society.

Discussion Questions

- Was there any disagreement over how freedom of speech should be defined?
- Is there anything that you consider acceptable that someone else does not, or vice versa? Why do you think those differences exist?
- Do you think that your definition of free speech is the same as your parents? Your grandparents? Why or why not?
- Why do you think people have different perspectives on free speech? What factors may affect how a person views free speech? Where did your opinion come from - in other words, from whom and when did you learn what was considered free speech?

- Why do people disagree about when it is acceptable for the government to limit a person's speech? How has technological advancement made this a more important question today than it has been in the past?

Learning Extension

Ask students to interview several adults and/or students outside of class and ask them for their definition of free speech as well as their response to follow up questions 2-4 above. These responses can add to the students' understanding of the variations of how free speech is defined and the reasons for those variations.

Step 2: The First Amendment in Practical Terms

Introduce the *Constitutionally Speaking* video *A Play of Constitutional Values*, which introduces free speech and its role within the context of the Constitution. Then, working with partners or in small groups, have students answer the related questions below and discuss in small groups or as a class.

Video Discussion Questions: A Play of Constitutional Values

1. How does the right to free association give practical value to the First Amendment?
2. What is the role, or value, of the First Amendment in terms of the Constitution?
3. Do you agree with Justice Souter's assessment that if First Amendment is limited narrowly it is not going to mean very much?
4. In his dissent in *Abrams v. United States* (1919), Justice Oliver Wendell Holmes wrote the following:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.

What does Holmes mean by this and how does it relate to the First Amendment?

5. How might life be different if the First Amendment were absolute?
6. Explain the "play of constitutional values" that Justice Souter mentioned in the *Citizens United* case.

Learning Extension

Justice Souter's comments about *Citizens United* provides both a glimpse into his approach to constitutional interpretation and an opportunity to consider "How does the Constitution keep up with the times?" in terms of the First Amendment. Have students write responses to one or more of the following prompts:

1. How would you define Justice Souter’s approach to constitutional interpretation?
2. Do Americans today interpret the First Amendment differently than citizens did in 1791 when the Bill of Rights was ratified?
3. Has the meaning of the First Amendment changed over time or simply the applicable circumstances and phenomena?
4. Can the exercise of free speech violate the rights of others? How so and at what point?
5. What constitutional values may justify the restriction of free speech? In other words, are there times when other constitutional values “trump” liberty and free speech?
6. How should we go about defining free speech if the Constitution does not?

Step 3: Protected vs. Unprotected Speech

Reiterate to students that because the Constitution does not spell out precisely what freedom of speech *is*, its definition has been shaped by the decisions of the Supreme Court. Review the terms precedent and stare decisis with students (see Important Terms, page 7).

Then, have students form small groups and review different Supreme Court cases defining free speech and determining its limitations. Use Street Law’s Case Study Teaching Strategy, accessible at

http://www.streetlaw.org/en/landmark/teaching_strategies/case_study

Topics to address with students include, but are not limited to:

1. The right to seek information and ideas
2. The right to receive information and ideas
3. The right to impart information and ideas
4. Symbolic speech
5. Conduct
6. Spoken words
7. Written words
8. Obscenity
9. Defamation
10. Fighting words
11. Copyright
12. Expression intended and/or likely to incite lawless activity
13. Threats to national security
14. Expression on school grounds
15. Commercial speech
16. Political speech

Once groups have reviewed their assigned cases, reassign students so that each new group has an expert on each different case. Experts will teach the other members of their groups about their cases so that students can create a list of what constitutes protected and

unprotected speech. Groups might also create a timeline of the cases noting how the interpretation of free speech changed over time and how *stare decisis* and precedent affect development of the law.

Short Answer/Essay/Debate Prompts

- Look back at the lists you created in the Introductory Activity. How do these lists compare to the precedents established in the cases?
- How do the cases reflect the idea of a living Constitution? How do the cases reflect an originalist approach to Constitutional interpretation?
- How has the Court's view on speech changed over time? Did the Court reverse any previous decisions? What may have contributed to this change?
- Was the Court trying to strike a balance between different values in any of these cases? How so? Explain?
- How has the right to free speech conflicted with other liberties guaranteed under the Constitution? Have these conflicts been resolved? Explain
- How has the right to free speech conflicted with the function of government? Have these conflicts been resolved? Explain.

Learning Extension

The Right to Freedom of Speech reading referenced below contains eight pages of background information and is written at an advanced reading level. It is best used to add detail to students' existing knowledge and help them conceptualize changes in free speech protections, apparent in the cases they have already read.

Bodenhamer, David J. *Our Rights*. N.p.: Oxford University Press, 2006. 57-64.
Annenberg Classroom, The Leonore Annenberg Institute for Civics. Web. 9 July 2013.

[http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Rights/Chapter 6 Our Rights.pdf](http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Rights/Chapter%206%20Our%20Rights.pdf)

Discussion Questions

- Why is free speech considered one of our most important rights?
- How did the Supreme Court view freedom of speech prior to the 20th century?
- Explain the test established in *Schenck v. United States*.
- What test was established in *Brandenburg v. Ohio*? Did this deviate from previous decisions of the Court?
- How and why does symbolic speech highlight how contentious the right of free speech remains in our society?
- In your view, how does the First Amendment contribute to our liberty as Americans?
- Why does the U.S. government permit citizens to express offensive opinions and engage in often-bitter conflict over ideas?

Step 4: Political speech: What, Who and Why

First, ask students to brainstorm what political speech is. Consider what constitutes political speech, who might engage in it, and why it is so important. Have students discuss in small groups and report their findings. Post a master list of student responses to the what, who, and why questions, and refer back to it during the lesson.

Next, focus the students' attention on the who aspect. Does the First Amendment apply to everyone? Are there people or groups who may not be protected by the First Amendment?

- Do nonprofit organizations have free speech rights?
- Do businesses / for profit companies have free speech rights?
 - Sole proprietorships
 - Partnerships
 - Corporations?
 - Wal Mart
 - Apple / Mac
- Do unions have free speech rights?
- Can these organizations engage in political speech?
- Can their speech rights be limited in any way?

Adjust the what and who master lists based on student response and input.

Step 5: Limitations Imposed by McCain-Feingold Act

First, pass out summaries of the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act. This law placed new limits on political contributions and campaign advertising, many of which were invalidated by the Supreme Court's 2012 decision in *Citizens' United v. Federal Election Commission*. To help students grasp the implications of the 2002 law and the 2012 decision, explain the difference between "hard" and "soft" money in political campaigns, and define electioneering and other key terms.

Federal Election Commission: Campaign Finance Law Quick Reference for Reporters
http://www.fec.gov/press/bkgnd/bcra_overview.shtml

Library of Congress: Bill Summary & Status
<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:H.R.2356>

Next, have students fold a piece of paper into thirds. Label one column Limits of Individuals, another Limitations on Organizations, and the third Limitations on Money. Working in groups, have students review the legislation, determine how it limited these three categories, and answer the discussion questions.

Discussion Questions

- What would compel lawmakers to adopt the Bipartisan Campaign Reform Act of 2002? What might they have been concerned about?

- Why would nonprofit organizations, businesses, corporations, and unions be interested in the outcome of elections?
- Should the First Amendment protect the free speech rights of corporations and unions?
- Thinking back to the First Amendment case studies, and the list of countervailing interests, is there support for the provisions within the BCRA?
- In your opinion did the BCRA of 2002 violate the First Amendment?

Provide students with a Debate Carousel sheet (see APPENDIX B). Follow the directions and post one of the following prompts on the board or projector:

Special interests have too much influence over government and politics.

Money buys undue influence in our political system.

Is money the equivalent of speech and/or expression?

After students have reviewed their Debate Carousel sheets, conduct a class discussion about the results. Ask students to share the most compelling arguments for and against the prompt and create a master list to refer back to throughout the lesson.

Step 6: Citizens United v. Federal Election Commission (2010)

Hand out the two-page reading from the Bill of Rights Institute lesson on *Citizens United* (pages 4-5 in the link below) to familiarize students with how the United States has gone about limiting the political influence of special interest groups and big business throughout history.

Background Reading

<http://billofrightsinstitute.org/wp-content/uploads/2012/10/Citizens-United-lesson.pdf>

In small groups, have students complete a case study following the Street Law format. Be sure students can describe the facts, understand the issues before the Court, comprehend the arguments, review the Opinions, and evaluate the outcome. Use a full text or summary of the case as well as additional background readings and Opinions. After completing the case study for *Citizens United*, conduct a class discussion to check for understanding.

Learning Extension

To further illuminate the relevant facts, issues, arguments, and outcome of *Citizens United* – as well as reactions to the ruling – have students read the article on the SCOTUS blog and/or the videos and article available on the C-SPAN website.

Summary of Decision

<http://www.scotusblog.com/2012/06/opinion-recap-citizens-united-solidified/>

Explanation of Ruling

<http://www.c-spanvideo.org/clip/3817900>

Reactions to Ruling

<http://www.c-spanclassroomdeliberations.org/issues/money-in-politics>

Short Answer/Essay/Debate Prompts

- How would you characterize the Supreme Court's view of the First Amendment according to the reading?
- What interests or values were Congress and the Supreme Court attempting to uphold through their actions?
- Is there a conflict of constitutional values at play in any of these cases or historical events?
- How might an originalist approach *Citizens United v. FEC*? Someone who believes in a living or evolving Constitution?

Learning Extension

To illustrate the relevance of the First Amendment and free speech in students' lives, review the following landmark cases on the level of constitutional protection afforded to student speech in public schools: *Tinker v. Des Moines*, *Bethel School District v. Fraser*, *Hazelwood v. Kuhlmeier*, and *Morse v. Frederick* (see Relevant Cases, pages 4-5). After reviewing the cases, have students apply their holdings to a lower court case, such as *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), or provide them with a fictional case scenario of your own creation.

Additional Resources

Judicial Review

[A More Perfect Union: The Creation of the U.S. Constitution](#)

[Annenberg Classroom's Best Civics Sites for Teachers](#)

[Articles of Confederation](#)

[Constitution of New Hampshire \(1776\)](#)

[C-SPAN Classroom: *Marbury v. Madison*](#)

[Exploring Constitutional Conflicts: Judicial Review](#)

[Edsitement: How the Court Became Supreme](#)

[iCivics: The Judicial Branch](#)

[iCivics: Supreme Decision Game](#)

[Street Law: Landmark Supreme Court Cases](#)

[Yale Law School: The Federalist Papers](#)

Constitutional Interpretation

[Annenberg Classroom: A Conversation on the Constitution](#)

[iCivics: Interpreting the Constitution: What Does that Mean?](#)

[Our Constitution, an eBook on the U.S. Constitution from Annenberg Classroom](#)

[Teaching the Constitution resources at Annenberg Classroom](#)
[The Court and Constitutional Interpretation](#)

[Your Bill of Rights videos at Time Magazine](#)

[The First Amendment and Free Speech](#)

[Annenberg Classroom: Free Speech: Finding the Limits](#)

[Bill of Rights Institute: *Citizens United v. FEC*](#)

[C-SPAN Classroom: Money in Politics](#)

[First Amendment Center: Free Speech Lesson Plans](#)

[Freedom of Speech: Bill of Rights Institute](#)

[iCivics: You've Got Rights](#)

[National Constitution Center: Respecting Free speech](#)

[Our Constitution, an eBook on the U.S. Constitution from Annenberg Classroom](#)

[Our Rights, an eBook on civil rights from Annenberg Classroom](#)

[The Bill of Rights Institute](#)

[U.S. Courts: What Does Free Speech Mean](#)