Concept Formation Lesson: Judicial Activism

Overview/Background Knowledge:
During the Philadelphia Convention, the founding fathers decided to create a system where power was divided among three separate branches. Moreover, each branch would keep the others in check by using specific powers granted in the Constitution allowing for balance and oversight. Several years after the Constitution’s adoption, the judicial branch gained considerable power by claiming the authority to engage in judicial review, the idea that courts could review and nullify actions by the legislative or executive branch. In Marbury v. Madison (1803), the Supreme Court ruled that the Judiciary Act of 1789 was unconstitutional, thereby solidifying the court’s power of judicial review. Over two hundred years later, the courts’ use of judicial review represents their greatest check on the other branches.

While judicial review has defined the judiciary’s role in the system of checks and balances, some people claim that the court misuses this power. They argue that the most heinous instances of misuse occur when judges strike a law or create a new policy based on personal opinion. The critics argue that to support the court decision, the judges interpret the Constitution too broadly. As these arguments become more prevalent, it becomes increasingly important to understand the concept to which they all refer: judicial activism.

This concept formation lesson, which was designed for a twelfth grade U.S. government class, seeks to teach students about judicial activism. During the lesson, students will not know the name of the concept (i.e. judicial activism). Instead, they will first read several examples of judicial activism, answering questions about the examples and coming up with differences and similarities. From these questions and lists, they will discover the concept’s critical attributes, enabling them to construct a definition. After labeling the concept, the true name of the concept will be revealed. Finally, students will use their definition and new understanding of the concept to decide if other instances qualify as examples of judicial activism.

Grade Level/Class:
This lesson is designed for a twelfth grade VA and U.S. Government class, incorporating important learning objectives from the VA and U.S. Government Standards of Learning. This lesson is best taught during a unit on the judicial branch after students acquire a basic understanding of what powers the Constitution grants the courts and how judicial review developed out of the decision in Marbury v. Madison (1803). With that framework in place, students will be able to construct an understanding of judicial activism, analyzing examples and discovering the critical attributes of the concept.

Length:
The lesson will run approximately twenty to thirty minutes. If necessary, one could shorten or lengthen the lesson by manipulating the amount of time students have to work in groups.

Rationale:
It is essential for students to have a clear understanding of the many broad concepts related to the judicial branch. Sadly, students often have a skewed version of the concepts based on misrepresentations from various sources. Few concepts are as misunderstood as judicial activism. People often throw around the politically charged term every time they disagree with a
court’s decision, regardless whether judicial activism has occurred. As the political climate polarizes and the courts come under heavier scrutiny, the term becomes increasingly prevalent among politicians and commentators. Therefore, it is essential that students gain a clear understanding of what judicial activism is and what it is not.

Concept formation lessons are best used to teach broad, abstract ideas that can be easily misunderstood. In this case, the use of a concept formation model is particularly appropriate because it enables students to break down the concept and construct a proper definition of judicial activism. By looking at examples of judicial activism, students discover its critical attributes. This discovery, in turn, gives students the tools needed to identify judicial activism in the future. While concept formation lessons can be used at earlier grade levels, the complexity of judicial activism and the political controversy it entails require the level of cognitive development present in older students.

Objectives:

- Students will be able to collaborate to analyze historical examples of judicial activism. (GOVT 10.d) (NCSS Thematic Strands II, V)
- Students will understand how the judiciary influences public policy through judicial review, describing how court decisions affected public policy. (GOVT 7.a, 7.b, 10.b, 10.e) (NCSS Thematic Strands V, VI)
- Upon completion of the lesson, each student will be able to define judicial activism based on its critical attributes and apply this definition to identify instances of it. (GOVT 10.d) (NCSS Thematic Strands V)

Assessment:

Based on my learning objectives, particularly the last one, my students need to demonstrate that they can apply their understanding of judicial activism in order to identify the concept in other examples. For this reason, I will assess my students through a homework worksheet that requires students to identify whether or not each example presented is an instance of judicial activism. Furthermore, students will have to explain each answer, using their understanding of the critical attributes of judicial activism to justify their decisions. The homework worksheet can be found on pages three and four. The worksheet answer key can be found on page five.

While this homework assignment will be the primary method of assessment, I will also listen carefully to student discussions during the lesson. Quality discussions will be those that remain focused on the lesson and that attempt to construct a clear definition of judicial activism. By listening to student responses during small group work and large group discussion, I will get a sense of each student’s understanding of the concept. This information will be useful when constructing future lessons on broad concepts, showing me the additional types of help my students need in order to grasp abstract ideas.

To make my expectations clear, students will know from the beginning of the lesson that they will have a worksheet to be completed as homework. After I have graded each student’s homework, I will return it and go over each answer in class, discussing questions that students missed. If a student is unable to accomplish the worksheet adequately, I will know that I will need to work with that student to improve his or her understanding of judicial activism.
Identifying Judicial Activism

For each of the following examples, identify whether the scenario represents an instance of judicial activism. After identifying, explain your answer, using your understanding of the critical attributes of judicial activism to justify your decision. Each correct identification is worth one point and each correct explanation is worth two points.

1. In 1973, the Supreme Court overturned state laws prohibiting abortion. It ruled that these laws were unconstitutional because they violated the right to privacy implicit in the 1st and 4th amendments, the Due Process Clause in the 14th amendment, and the 9th amendment. Proponents of the decision believed the ruling reflected positive changes in society’s respect for the rights of women. Opponents believed the ruling reflected the opinions of a few individual Supreme Court justices. The decision was 7-2.

Judicial activism?  Yes_____  No_______
Explain:

2. In 1910, the Supreme Court upheld the right of a New Hampshire citizen to refuse the quartering of troops in their home. The Supreme Court justified its decision by referring to the explicit language in the 3rd amendment which states that “no soldier shall, in time of peace be quartered in any house without the consent of the owner.” The decision was 8-1.

Judicial activism?  Yes_____  No_______
Explain:

3. In 1990, the Supreme Court overturned a Hawaiian state law permitting the coining of a Hawaiian currency by a Hawaiian state agency. The Supreme Court based its decision on Article I, Section 8, which permits Congress the exclusive right to coin money. Many legal analyzers predicted the outcome of the case, saying that there was no logical reason for Hawaii to have their own money and that it was curious that any state would attempt to make their own money when few people in society supported such a law. The decision was 9-0.

Judicial activism?  Yes_____  No_______
Explain:
4. The Supreme Court overturned parts of federal law that prohibited unions, corporations and not-for-profit organizations from broadcasting electioneering communications within 60 days of a general election or 30 days. The Supreme Court ruled that those parts of the law were unconstitutional because it violated the broad Free Speech Clause of 1st Amendment. Supporters of the decision said that the ruling protected a group’s freedom to express its opinions before an election. Opponents argued that the decision reflected the opinions of the conservative justices on the Court. The decision was 5-4.
Judicial activism?  Yes____  No_______
Explain:

5. In an 1836 case between Virginia and Maryland over water rights, the Supreme Court ruled in favor of Virginia. The Supreme Court had jurisdiction over the case because it involved a legal dispute between two states. Virginians celebrated the decision while Marylanders decried it. In deciding the case, the majority of justices found that territorial maps drawn in the mid 1700s supported Virginia’s claim to the waters. In contrast, the dissenting justices argued that the territorial maps were not reliable sources and that the waters should belong to Maryland. The decision was 5-2 (there were only seven Supreme Court justices in 1836).
Judicial activism?  Yes____  No_______
Explain:
Identifying Judicial Activism—Key

1. Abortion laws overturned
Judicial activism? Yes  No
Explain:
Displays all three critical attributes: Decision overturned old policies/create new policies, decision based on personal views or changing societal views, decision justified through broad interpretation of Constitution

2. Quartering of troops
Judicial activism? Yes  No
Explain:
Displays none of the critical attributes: Decision did not overturn old policies/create new policies, decision was not based on personal views or changing societal views, decision was not justified through broad interpretation of Constitution

3. Coining Hawaiian money
Judicial activism? Yes  No
Explain:
While the decision overturned a law, the decision was not based on personal views or changing societal views and was not justified through a broad interpretation of Constitution

4. Free speech in elections case
Judicial activism? Yes  No
Explain:
Displays all three critical attributes: Decision overturned old policies/create new policies, decision based on personal views or changing societal views, decision justified through a broad interpretation of Constitution

5. Water rights
Judicial activism? Yes  No
Explain:
While the decision was based, in part, on the personal views of justices, the decision did not overturn old policies/create new policies and was not justified through a broad interpretation of Constitution/law.
Content and Instructional Strategies:

I. The Concept Definition

Judicial activism is defined in different ways by many sources; however, an appropriate definition based on its critical attributes can be constructed easily. The critical attributes of judicial activism include: decisions that overturn old precedents and/or create new policies, decisions based on personal views or changing societal views, and decisions that are justified using a broad interpretation of the Constitution. Therefore, one can define judicial activism as a term referring to Court decisions based on the judges’ personal views or the changing views of society that overturn old rules or create new policies through a broad interpretation of the Constitution. It is important to note that judicial activism does not necessarily represent liberal or conservative decisions. Additionally, judicial activism is not limited to the Supreme Court and is not limited to the overturning of federal laws. These ideas represent mistaken ideas of judicial activism and one must take care to ensure that students do not fall into such misunderstandings.

II. Hook

The lesson will begin with an interview of Vice President Joe Biden on President Obama’s chastisement of the Supreme Court during his 2010 State of the Union. This hook will introduce students to a contemporary situation in which many people argued the Supreme Court engaged in judicial activism. The interview does a good job at presenting students with a situation that will force them to dig into understanding the concept without identifying or defining it. In particular, the interview brings up ideas relating to overturning long-standing precedents and engaging in broad Constitutional interpretation, two of the critical attributes of judicial activism. The interview can be found at http://www.youtube.com/watch?v=dZ4iT7nowAk&feature=related. Following the video clip, I will inform the students that Vice President Biden hinted around an important concept and that it will be there task to discover the concept at the end of the lesson. I will explain to them that they will analyze several examples before passing out the concept example sheet to each student.

III. Data-Retrieval Chart and Example Analysis

I will ask students to use the example sheet to fill out the data retrieval chart. The students will accomplish this task individually. The example sheet and data retrieval chart are located on pages seven and eight, respectively. The information in the examples is clear and structured in a way that students will identify the information related to the critical attributes successfully. Additionally, the questions located at the top of each column will assist students in identifying and extracting vital information for identifying the concept’s critical attributes.

The cases chosen as examples represent a wide range of various instances of judicial activism. The cases occur over a long period, address different issues, occur in different courts, are justified in different ways, and result in conservative and liberal rulings. These examples are appropriate for a twelfth grade government class. Some of the examples presented, such as *Brown v. Board of Education*, allow students to access prior knowledge, helping them analyze the case. Other examples involve contemporary cases, exposing students to important information about current events.
Examples for Data Chart

Use the following examples to fill out the chart on the next page.

The Supreme Court overturned state laws permitting racial segregation of schools, thereby overturning the precedent of “separate but equal” in *Plessy v. Ferguson* (1896). The Supreme Court ruled that the laws were unconstitutional because they violated the broad Equal Protection Clause of the 14th amendment. Supporters of the decision championed the ruling, saying that it reflected the progress of society in securing equal rights for minorities. Those people in society who disagreed with the decision met the ruling with hostility, arguing that their communities wanted segregation and the Supreme Court had overstepped its bounds. The Court’s decision was unanimous, 9-0.

The California State Supreme Court overturned a ballot initiative that amended the CA State Constitution to prohibit recognition of same-sex marriages. The judge ruled that the proposition violated the broad Due Process Clause and the Equal Protection Clause of the 14th amendment. Proponents of same-sex marriage celebrated the decision as a crucial step in society’s acceptance of equal rights for homosexual couples. Opponents of the ruling claimed that it was unfair that the beliefs of one judge could overturn the voter-approved state constitutional amendment and vowed to overturn the decision.

The Supreme Court overturned a New York law that limited the number of hours that a baker could work each day to ten, and limited the number of hours that a baker could work each week to sixty. The Supreme Court ruled that the law was unconstitutional because a “liberty of contract” was implicit in the 14th amendment. Business leaders supported the decision, believing it would protect them against many other labor laws. Labor activists decried the ruling as a blow to organized labor. The decision was 5-4.

The Supreme Court overturned a ban on hand guns in Washington D.C. The Supreme Court ruled that the law was unconstitutional because it violated the 2nd amendment. Supporters of the decision celebrated the ruling as a major step in securing individual gun rights. Gun control advocates contended that the second amendment did not protect the right to individual gun ownership and that the judges were wrong to interpret the amendment in such a wide fashion. They feared that the judges’ decision would lead to the overturning of many more gun control laws. The decision was 5-4.
Data Retrieval Chart

Please fill out the chart using the examples from the previous page.

<table>
<thead>
<tr>
<th>Case Study</th>
<th>What was the case about?</th>
<th>What was the outcome of the case?</th>
<th>How was the decision justified?</th>
<th>How did society view the judges’ decision?</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Lochner v. New York (1905)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
IV. Defining and Labeling the Concept

Once the students start finishing the data retrieval chart, I will instruct them to get into groups of two or three so that they can compare their charts, adding information if necessary. Then, the groups will use their charts to identify and list all the differences. We will then spend a few minutes as a class discussing the various differences each group was able to identify. As the students list the differences, I will write their ideas on the board, asking clarifying questions to get accurate descriptions of differences if necessary. I will then ask students to spend three to five minutes in their groups identifying all the similarities between the examples. Afterwards, we will discuss the similarities the groups identify. Just as before, I will write their ideas on the board, asking clarifying questions to get accurate descriptions of differences if necessary.

At this point, I will ask students what they think the three or four critical attributes of the concept are. The whole class will discuss their ideas about the critical attributes. If the students are having difficulty, I will explain that they should look at the list of similarities and see which ones appear essential or which ones could be grouped together to make an overarching critical attribute. After determining three critical attributes (similar to the actual critical attributes of the concept), we will construct a concept definition as a class based on the attributes. Finally, I will ask students to write down on their paper individually what they think the concept could be. I will then ask four or five of the students to share their answers. Finally, at this point, I will unveil the term “judicial activism.” After reiterating the critical attributes and the definition of judicial activism, I will ask for questions and wrap up the lesson.

V. Classifying

The last step in the concept lesson formation is to assess each student’s ability to classify the concept following the lesson. As discussed in the “assessment” section, I will accomplish this task through the “Identifying Judicial Activism” homework worksheet. This worksheet asks students to read another example, decide whether it represents a case of judicial activism, and justify their decision using the concept’s definition and critical attributes. To assist students in the classification process, the examples given on the worksheet are all written like the examples we went over in class. These examples are appropriate for the grade level and class, addressing two real Supreme Court cases and three fictitious cases (when going over the homework, I will make sure to let the students know which cases are real and which ones are made up). For more details on the assignment and the answers, please see the copies of the worksheet and answer key on pages three to five.

Another way to assess students’ abilities to apply their newly formed concept using its critical attributes is by asking students to create or find an example. While there are plenty of examples students could select from, many students do not have adequate background knowledge in important cases (historical or contemporary). For this reason, I will not require students to do this task; however, I will mention that they can bring in examples they find and that they should be able to assess a case of judicial activism in the future. A final way to assess students’ abilities to classify judicial activism is by having them correct a non-example to make it an example. While I have opted to avoid this task in this lesson, it might be an interesting item to include on a chapter test. In this way, students will have to draw on their knowledge of the concept in order to change the non-example accurately.
Resources:

The needed materials for this lesson include the handouts, the homework worksheets, and a board to write down student-generated responses. Additionally, the hook requires technology allowing a video clip on a computer to be displayed on a screen. Such technology is available in my cooperating teacher’s classroom.

Differentiation:

It is important that I differentiate this lesson for different types of learners, challenging and supporting them. One of the first ways to differentiate the lesson is in how students interact during the lesson. Some students learn effectively by themselves while others learn best with the help of classmates. At some points during this lesson, students will work individually, in small groups, and in discussion with the whole class. In this way, students will be able to both work independently and assist each other as they identify differences, identify similarities, identify critical attributes, define judicial activism, and label the concept. The small groups also help students gain the confidence needed to participate in discussion—a person normally less likely to talk during discussion might be happy to report out what they discussed as a pair or small group. To challenge students to participate, I can call on a particular member of each small group, asking them for their feedback. This will push shyer students to step outside their comfort zone in a supportive environment.

Students with different levels of intellectual ability have different needs. I can ask guiding questions that help the students combine similar answers in order to come up with three or four broad critical attributes. Additionally, asking low-risk questions with simpler answers gives students of lower ability levels the opportunities to participate in class discussion. In the data retrieval chart, I differentiated by asking questions representing a range of difficulty. While all the answers to the questions can be found in the examples, some of the questions allow for more detailed analysis and thorough discussion than other questions. For example, the first two questions, “what was the case about?” and “what was the outcome of the case?” are straightforward inquiries involving little analysis. However, the latter questions can be opened up for a higher level of study and discussion. This differentiation will enable students of lower intellectual abilities to participate while also challenging students of higher intellectual abilities.

The nature of the examples also provides opportunity for differentiation. By providing a variety of examples (representing different issues, different times, etc.), I allow students of diverse interests to use their differing abilities to understand judicial activism. By including contemporary examples, I provide a great opportunity for students of all intellectual abilities to become involved in a discussion about current societal issues. This opportunity is particularly strong for students in gifted education, who might combine the examples with their outside information to acquire a deeper understanding of contemporary issues and judicial activism.

Adaptations:

It is also important that I am able to adapt the lesson to take into account students with IEPs and 504 plans. Some students are required to have additional time on assignments. For this reason, the identifying judicial activism worksheet is not a classroom assignment. Instead, students have ample time to work on the worksheet at home. Allowing students to complete the assignment at home also ensures that they can use a word processor if necessary. Some students require additional class notes to help them as they complete their assignments. Since the lesson is not lecture-based, I cannot simply provide lecture notes to students; however, I can do several
things to assist students seeking effective notes. First, I can write the identified critical attributes of the concept clearly, even using different colored dry erase markers to emphasize their significance in constructing a proper understanding of the concept. I can also write out the concept definition based on these critical attributes and stress that students need to be able to explain its meaning. The data retrieval chart also acts as class notes and students can add to their chart throughout class in order to have an accurate understanding of the concept. I could alter the data retrieval chart, making a visual map that will make it easier for students to organize the information they pull from the examples. At the end of the lesson, I can review and reiterate the main points of the concept, helping students who struggle to see the big picture while participating in the lesson. If a student still needed class notes, I could give that student a short set of class notes based on the discussion we had in class. Such a set of notes could only be given after the class discussion so that the student does not already know the concept and its critical attributes. A final way I could adapt this lesson is in how I present the examples. Rather than a narrative form, I could provide the examples in a more straightforward, bullet-point form, which would help students access the necessary information.

**Reflection:**

Many possible issues could arise during the implementation of this lesson. My primary concern is that students will be unable to draw out the correct critical attributes during the example analysis. If this issue becomes evident, I can ask the students questions based on their lists of similarities in order to guide them in the right direction. These questions could be as simple as, “Why could this similarity be important?” I might also ask them to look at a particular example again in order to draw out an important point that reflects the concept’s critical attributes. Through positive encouragement, I will ensure that my students are confident that they can analyze the examples and come up with an accurate understanding of the concept.

Due to the group work involved in the lesson, classroom management might become an issue. To maintain control of the classroom environment, I can do a few things. First, I can use proximity control and use gentle reminders to keep the students focused and relatively quiet. I can also prepare students for lesson transitions by announcing when we are about to switch to a new part of the lesson. I will also make transitions smoother by giving clear, explicit directions. When students are working independently, some might finish before others. By observing the pace of the class, I can make sure to wrap up that part of the lesson once a large portion of the class is finished so that the finished students do not start misbehaving. I can encourage students to share their answers with each other once they get into small groups so that each student is exposed to every example. During class discussion, I will call on members from each group, thereby preventing students from talking over each other. If the class starts to get out of hand, I can remind them to pay attention to whoever is talking. If groups are refusing to do work or just goofing off, I can quickly rearrange groups, putting the members of the trouble group with different people.

Students should have a good understanding of concepts such as judicial review from previous lessons. Students should also already have an understanding how certain amendments, such as the second amendment and the fourteenth amendment allow for interpretations of varying breadths. However, if some students do not have an adequate base knowledge, they will be less likely to be able to pull out some of the critical attributes. To preempt this issue, I can take a few minutes at the beginning to review what they already know about judicial review. When students bring up particular amendments when discussing the similarities and differences
of the examples, I can use that opportunity to ask questions about the amendments so everyone has the background knowledge necessary to identify the critical attributes of judicial activism.