

**Table 2-1 Major Controversies over Judicial Review**

Controversy	Supporting Judicial Review	Opposing Judicial Review
<i>Framers' Intent:</i> Did the framers intend the federal courts to exercise judicial review?	The framers knew about judicial review. Evidence shows that the concept was adopted in England in the 1600s. Moreover, between 1776 and 1787, eight of the thirteen colonies incorporated judicial review into their constitutions, and by 1789 various state courts had struck down as unconstitutional eight acts passed by their legislatures.	Even though some states adopted judicial review, their courts rarely exercised the power. When they did, the public outrage that followed provides some indication that the practice was not widely accepted.
	The framers left judicial review out of the Constitution because they did not want to heighten controversy over Article III review, not because they opposed the practice.	The participants at the Constitutional Convention rejected the proposed Council of Revision, which would have enabled Supreme Court justices and the president to veto legislative acts.
	The framers implicitly accepted judicial review. Historians have established that more than half of the delegates to the Constitutional Convention approved of it. In <i>Federalist</i> No. 78, Hamilton argued that one branch of government must safeguard the Constitution and that the courts were best suited for that task.	
<i>Judicial Restraint:</i> Should unelected courts defer to the elected institutions of government?	The government needs an umpire who will act neutrally and fairly in interpreting the constitutional strictures.	Unelected judges should defer to the wishes of elected officials, who represent the best interests of the people and who can be removed from office when they do not.
<i>Democratic Checks:</i> Are there sufficient checks on courts to prevent them from using judicial review in a way repugnant to the best interests of the people?	Acting in different combinations, Congress, the president, and the states can, for example, ratify a constitutional amendment to overturn a decision, change the size of the Court, or remove the Court's appellate jurisdiction.	The problem with these checks, some analysts say, is that they are rarely invoked: only five amendments have overturned Court decisions, the Court's size has not been changed since 1869, and only rarely has Congress removed the Court's appellate jurisdiction.
	Although Congress rarely takes direct action against the Court, the fact that the legislature has weapons to use against the judiciary may influence the justices, who might try to accommodate the wishes of Congress rather than risk the reversal of a ruling. It is the existence of congressional threat—not its actual use—that may affect how the Court rules in a given case, which may explain why the justices rarely strike down congressional acts.	