

HOUSE BILL REPORT

HB 2060

As Reported By House Committee On:
Law & Justice

Title: An act relating to restoring the balance of powers between the branches of government as established by the people in the state Constitution.

Brief Description: Restoring the balance of powers between branches of the government.

Sponsors: Representatives Lambert, Chandler, L. Thomas, Benson, Sterk, Carrell, Mulliken, Thompson, D. Schmidt, McDonald, Dunn, Sherstad, Smith, Bush, Buck, McMorris, Boldt, Sheahan, Dyer, Backlund, Koster, Clements, Pennington, Talcott, Delvin, Sump, Mielke, Ballasiotes, Honeyford, Van Luven, Zellinsky, Johnson, Schoesler and D. Sommers.

Brief History:

Committee Activity:

Law & Justice: 3/4/97, 3/5/97 [DPS].

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Sheahan, Chairman; McDonald, Vice Chairman; Sterk, Vice Chairman; Carrell; Lambert; Sherstad and Skinner.

Minority Report: Do not pass. Signed by 1 member: Representative Radcliff.

Staff: Trudes Hutcheson (786-7384).

Background: The United States Constitution establishes the legislative, executive, and judicial branches of government. The Constitution does not explicitly state that the United States Supreme Court may determine the constitutionality of acts of other branches of government. However, in *Marbury v. Madison*, the Court determined that the federal judiciary had the power to review legislative and executive acts and, if necessary, declare such acts unconstitutional. Before *Marbury*, constitutional analysis was dominated by Congress and the President. For example, in 1798 Congress passed the Alien and Sedition Acts, which prohibited citizens from criticizing their own government. When Thomas Jefferson became President in 1801, he declared the Sedition Act a nullity and pardoned every person prosecuted under it.

Marbury has generated numerous debates on the subject of judicial review. Some commentaries argue that the power to interpret the Constitution is solely within the judiciary. Their argument is based on three propositions. First, the Constitution is the supreme law of the land, and Congress may not pass a law contrary to the Constitution. Second, because it is the duty of the judiciary to decide cases in accordance with the law, courts must interpret the Constitution. Third, if courts are to interpret and enforce the Constitution, and the Constitution is superior to any ordinary act of Congress, the Constitution, and not the congressional act, must control.

Other commentaries argue that the Constitution does not grant the courts the power of judicial review. Instead, the right to interpret the constitution should be exercised by all branches of government equally, including the courts. They argue that the courts may determine the constitutionality of certain acts, but that such a determination should be binding only upon the case before the court. Courts would not ignore the Constitution, but would treat the legislative interpretation as definitive, and leave to Congress the task of resolving apparent conflicts between statute and the Constitution. Other countries have adopted this approach in their constitutions and courts. For example, courts in England and France generally do not review the validity of Parliament's acts.

Like the federal judiciary, Washington's supreme court and court of appeals exercise the power of judicial review over the acts of the state legislative and executive branches.

Summary of Substitute Bill: The Legislature finds that the judiciary's interpretation of the state constitution is only one branch of government's interpretation of the constitution and should not be binding upon the legislative or executive branches.

If the state supreme court or the court of appeals determines that a legislative act, or any part of an act, violates the state constitution, the court shall declare its opinion that it considers the act to be void and unenforceable. The court's opinion is the law of the case before it, and extends no further than the facts of the case. The judiciary is also declared to be the proper branch to determine, under the doctrine of *stare decisis*, when a rule in one case should apply to subsequent cases that are substantially similar in facts.

The Legislature, during regular or special session, may vote by a constitutional majority, to affirm the constitutionality of the legislative act and reject the court's opinion.

If the Legislature affirms the constitutionality of the legislative act, that determination is effective immediately. The legislative act is binding from the effective date of the

act, regardless of the court's determination. However, the court's decision of the case remains binding on the parties involved in the case.

The Legislature's determination is subject to a referendum power reserved to the people.

Substitute Bill Compared to Original Bill: The judiciary is declared to be the proper branch to determine, under the doctrine of *stare decisis*, when a rule in one case should apply to subsequent cases that are substantially similar in facts.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: The judiciary's proper role is to decide individual cases. The Constitution should not be whatever the court says it is. All political power is inherent in the people, not just one branch and, therefore, the people should be the final arbiter of the Constitution. The doctrine of judicial review is a court-made rule and is not based on what is in the Constitution. The bill places the courts on equal footing with the other branches of government and allows judicial errors to be corrected. People are frustrated because it is often the courts, rather than the legislature, that make laws.

Testimony Against: Allowing the Legislature to be the sole source of individual liberties is contrary to the principles on which America is based. Without the court's ability to set precedent, there will be no stability or predictability in our laws. Constitutional principles will change whenever the control of the Legislature changes. If the problem is judicial activism in the federal courts, this bill does not address that concern.

Testified: Representative Lambert, prime sponsor; Tom Jipping, Director of Free Congress, Center for Law and Democracy (Washington D.C.--by telephone testimony) (pro); Rhett Dehart, Special Council to Edwin Meese III, Heritage Foundation (Washington D.C.--by telephone testimony) (pro); Herb Titus, Oklahoma Court of Appeals Judge (by telephone testimony) (pro); Russell Hittinger, Research Professor, University of Tulsa Law School (by telephone testimony) (pro); Kurt Mach, citizen (pro); Edsel Hammond, citizen (pro); Fred Jensen, citizen (pro); Dean Isaacson, Judicial Forum (pro); Bob Struble, citizen (pro); John Strait, Washington Defenders Association and Washington Association of Criminal Defense Lawyers (con); Richard Shepard, Northwest Legal Foundation (con); Tom Swayze, citizen (con); Jeanette Burrage, Superior Court Judges Association (con); and Stewart Jay,

University of Washington Professor of Law (con).