



Judicial Review

In the United States, political authority is divided among the legislative, executive, and judicial branches of government. The federal and state constitutions assign the branches their individual and shared powers. In this arrangement, the legislature makes the laws and provides funding for government operations; the executive enforces the laws and exercises powers delegated to the executive by law; and the courts adjudicate legal disputes and determine the constitutionality of governmental actions if these actions are challenged in a lawsuit. The power of a court to determine constitutionality of governmental actions is called the power of judicial review.

THE THEORY AND PRACTICE OF JUDICIAL REVIEW

The federal Constitution and state constitutions assign the judicial power to the courts. American courts are unique among courts throughout the world in that they possess the power of judicial review. While the power of judicial review is inherent in this grant of judicial power, taken to an extreme, at least in theory, the exercise of judicial review can lead to judicial supremacy. After all, if the court can determine the legality of legislative actions, as well as actions of the president and governors and federal and state administrative agencies, then the court can effectively set limits on all government action. In a representative democracy, in which the legislature is the

policymaking body, judicial supremacy is a problem.

For this reason, courts set limits on judicial review. They will not review the legality of governmental actions unless there is an actual case at hand. In other words, a party with legal standing must commence a lawsuit to challenge the actions. In this way, courts do not sit as a supreme legislature, dictating which laws are constitutional and which are unconstitutional. Courts also seek to resolve legal disputes on non-constitutional grounds to avoid turning every dispute into a constitutional case. Finally, courts presume that all laws are constitutional, and the burden on finding laws unconstitutional is placed on the party challenging the laws. These mechanisms temper the power of judicial review.

THE ORIGIN OF JUDICIAL REVIEW

Although the power of judicial review is not explicitly mentioned in the federal Constitution, the Founding Fathers believed that this power resided in the grant of the judicial power to the courts. In Federalist No. 78, the authoritative account of the judiciary under the Constitution, Alexander Hamilton wrote that the “interpretation of the laws is the proper and peculiar province of the courts.” If the Constitution conflicts with the statutes, “the constitution ought

to be preferred to the statute.” For Hamilton, the Constitution was “fundamental law” and trumped all legislative enactments.

In 1803 the Supreme Court affirmed the power of the courts to void unconstitutional laws. In *Marbury v. Madison*, Chief Justice

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—Chief Justice Marshall,
Marbury v. Madison (1803)

John Marshall wrote that “a legislative act contrary to the constitution is not law.” And, he added, “It is emphatically the province and duty of the judicial department to say what the law is.” His conception of judicial review echoes Hamilton’s ideas. The courts have the power to overturn laws that conflict with the Constitution. The power of judicial review is a key and inherent feature of the larger judicial power.

Wisconsin played a role in the development of judicial review in the United States. By the 1850s, all states had incorporated some form of judicial review. The Wisconsin Supreme Court took a very expansive view of judicial review, asserting its authority to declare acts of Congress unconstitutional. In *Ableman v. Booth* (1858), however, a case involving the federal fugitive slave law, the United States Su-

preme Court rejected this assertion, but declared its own powers: “If it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void.”

JUDICIAL REVIEW IN WISCONSIN: NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE LAWSUITS

Wisconsin courts have rarely struck down legislative acts. As in most states, the legislature is the preeminent policymaking body and courts are rightly cautious in substituting their public policy preferences, even if expressed in terms of constitutional necessity, for those of the legislature. But sometimes courts overturn laws on constitutional grounds and these occasions allow us to observe judicial review in action. Consider the case of *Ferdon v. Wisconsin Patients Comp. Fund* (2005), in which the Wisconsin Supreme Court, in a 4–3 decision, ruled unconstitutional a law limiting noneconomic damages in medical malpractice lawsuits.

A medical malpractice lawsuit is one in which an injured party seeks relief for injuries the party has allegedly suffered as a result of negligent medical care. Among the damages a party may seek are those for the cost of medical care for the injury, lost future earnings as a result of the injury, and noneconomic damages resulting from the injury. Noneconomic damages include pain and suffering, loss of companionship, and even mental distress. The legislature capped noneconomic damages at \$350,000. In *Ferdon*, at issue was whether this cap violated the equal protection guarantees of the Wisconsin Constitution.

In equal protection cases not involving fundamental rights, courts will uphold the constitutionality of a law if there is any “rational basis” for the law. This test is not found in the constitution, but is instead one that the court has created in exercising its power of judicial review. The equal protection issue centered on the different treatment of people who had noneconomic damages greater than the cap and those whose noneconomic damages were less than or equal to the cap. The latter could receive full noneconomic damages, while the former could receive only up to \$350,000 for these damages.

In *Ferdon* the court identified the legislature’s objectives in enacting the law, and what the court inferred was the rationale for limiting noneconomic damages. The court looked at selected studies on health care costs, medical malpractice premiums, and the delivery of health care and concluded that the caps had no effect on reducing health care costs, lowering medical malpractice premiums, or improving the delivery of health care. The court then ruled that the caps did not have a rational basis and were therefore unconstitutional. Indeed, the court held that to do otherwise would “amount to applying a judicial rubber stamp to an unconstitutional statute.”

The dissenting justices in *Ferdon* strongly disagreed, claiming the court had engaged in a selective reading of empirical studies, and that “instead of attempting to locate a rationale to support the caps, the majority searches for studies to discredit them.” They argued that there was a rational basis for the caps and that the plaintiff had simply not met the burden of proving the caps unconstitutional

beyond a reasonable doubt. According to the minority, the court had adopted a new rational basis test that in practice gave courts the power “to invalidate legislation that does not suit the majority’s fancy.”

Ferdon is an exception in Wisconsin jurisprudence, as courts will usually affirm the constitutionality of most laws. Yet, when a court strikes down legislative enactments and is divided, as in *Ferdon*, then the court’s use of judicial review is controversial and the court faces the criticism that it is actually substituting its public policy preferences for those of the legislature. Judicial review works best when the court is united. A divided court makes it easier for some to claim that the court is engaged in policymaking when it exercises its power of judicial review and overturns legislation.

CONCLUSION

Judicial review is a key feature of the separation of powers doctrine, as it has developed in the United States. Yet, there is a tension between judicial review and representative democracy, a tension captured well by Abraham Lincoln in his First Inaugural Address: “If the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court...the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”

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Governing Wisconsin: "Judicial Review"

Study Questions

1	List some ways that courts limit their own consideration of constitutional issues.	
2	Does the concept of judicial review strengthen or weaken the concept of separation of powers? How?	
3	How could the doctrine of judicial review lead to tyranny by the courts or tyranny in general? Is this a realistic possibility?	
4	Why would courts wish to limit their review of constitutional questions and decide cases on other grounds?	
5	If courts could not declare statutes unconstitutional under the doctrine of judicial review, how could unconstitutional statutes get corrected?	
6	As a judge in the <i>Ferdon</i> case, how would you have ruled? Does a statute that sets a maximum for noneconomic damages violate the equal protection clause?	

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Study Questions in the Cognitive Domain

1	List some ways that courts limit their own consideration of constitutional issues.	(1) Courts decide questions only related to an actual case or controversy. (2) The courts will attempt to resolve all questions on non-constitutional grounds. (3) The courts adopt a presumption that all statutes are constitutional and require proof to the contrary.	Cognition
2	Does the concept of judicial review strengthen or weaken the concept of separation of powers? How?	Judicial review gives the courts more authority over the executive and legislative branches of government. Given that the judiciary is generally regarded as the weakest branch of government, judicial review tends to better balance the powers and improve their separation.	Comprehension
3	How could the doctrine of judicial review lead to tyranny by the courts or tyranny in general? Is this a realistic possibility?	A faction of judges could stop the enforcement of any law by ruling it unconstitutional.	Application
4	Why would courts wish to limit their review of constitutional questions and decide cases on other grounds?	The constitution changes slowly, so the courts do not wish to limit their range of decision by committing to a particular interpretation of the constitution.	Analysis
5	If courts could not declare statutes unconstitutional under the doctrine of judicial review, how could unconstitutional statutes get corrected?	The courts could more clearly state that certain statutes should be amended. The governor could be more judicious in using the veto. The legislature could perform a constitutional review of its acts. If the government did not correct the error, the people could force a change at the ballot box. The press could highlight these issues.	Synthesis
6	As a judge in the <i>Ferdon</i> case, how would you have ruled? Does a statute that sets a maximum for noneconomic damages violate the equal protection clause?	Students may argue that the legislature did or did not have a rational basis for setting a maximum that courts can award for noneconomic damages.	Evaluation