What is Judicial Review?

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- Do the federal courts have the legal authority to overturn federal law?
- Can the only unelected branch of the federal government rule over the elected branches?
- What are the consequences of "constitutional law" overruling the Constitution itself?

If you spend any significant time discussing court opinions, you've encountered the concept of "Judicial Review". What is judicial review, where does it come from, and is it used today the way it was originally defined? These are the questions every American should have a basic understanding of if they wish to live free. So that's what we're going to look at in this article.

When it comes to understanding a term, the best place to start is with a dictionary definition:

A court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles.

The power of courts of law to review the actions of the executive and legislative branches is called judicial review. Though judicial review is usually associated with the U.S. Supreme Court, which has ultimate judicial authority, it is a power possessed by most federal and state courts of law in the United States. The concept is an American invention. Prior to

the early 1800s, no country in the world gave its judicial branch such authority.

Judicial Review – The Free Legal Dictionary

For a contemporary understanding of judicial review, this is an accurate definition. Is that the original understanding of judicial review though? Is that what our framers intended when they drafted the Constitution? What does the Constitution say?

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Constitution, Article III, Section 1

So what is this judicial power the Constitution is talking about? The closest definition I can find from Noah Webster is:

That branch of government which is concerned in the trial and determination of controversies between parties, and of criminal prosecutions; the system of courts of justice in a government.

JUDI'CIARY – Webster's 1828 Dictionary

So where does this idea the federal courts have the authority to invalidate acts of Congress or the President come from? What happened in the early 1800s to bring this power into existence? The answer is the case Marbury v. Madison.

Marbury v Madison

When John Adams lost his bid for re-election in 1800, he, along with other federalists in Congress, attempted to pack the courts by passing the Judiciary Act of 1801 and appointing 16 new circuit judges and 42 new justices of the peace. While these appointments were approved by the Senate, their commissions were not delivered before the Jefferson administration was inaugurated. James Madison, Jefferson's

Secretary of State, refused to deliver the commissions. William Marbury, one of the new Justices of the Peace, petitioned the Supreme Court to compel Mr. Madison to deliver his commission via a writ of mandamus.

A (writ of) mandamus is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion.

Wex Legal Dictionary

Does the court have the legal authority to issue such a writ?

It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

Marbury v. Madison Opinion

You see, lawyers playing games with words is nothing new. The Constitution clearly states that:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Constitution, Article III, Section 2, Clause 2

So the Constitution delegates original jurisdiction to the Supreme Court in this case, since it involves a public

minister, Secretary of State James Madison. Did you notice the twist? Congress can make exceptions for the question of jurisdiction, and set regulations for the process of the court, but does that mean it can grant to the court a power not delegated by the Constitution?

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

Marbury v. Madison Opinion

This is an important question, and what drove the court to the question of judicial review. The Tenth Amendment to the Constitution is quite clear:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment X

So if the Constitution does not grant to the courts the general power to issue writs of mandamus against another branch of the government and it's not included as part of their jurisdiction, then Congress cannot give to the court a power not delegated to it by the Constitution of the United States.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

Marbury v. Madison Opinion

That brings us back to the question of judicial review.

Judicial Review

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. …

If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury v. Madison Opinion

Notice the definition of judicial review used by Chief Justice Marshall. It's not a question of invalidating a law, but determining, in the context of a specific case, whether laws are in conflict with one another. And if one of those laws happen to be the Constitution of the United States, then it must win.

Compare this with how courts use judicial review today.

A court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles.

Judicial Review – The Free Legal Dictionary

See the difference? Chief Justice Marshall made the point that in a case where both a legislative and constitutional law apply, the Constitution must govern the case. Yet today, that has morphed into courts invalidating laws they believe violate the Constitution. This is not a question of applying the law to a case before the court, but of the nullification of laws created by the representatives of the people. Chief Justice Marshall went on.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed

to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Marbury v. Madison Opinion

Yes, an act repugnant to the Constitution is void and invalid. Yes, the court claims that the rule must be discharged, but do you see the Chief Justice claiming that the courts can invalidate a law with a simple opinion, much less order other courts and departments to follow their opinion? Yet for as long as I have been following their decisions, courts have used this language to not only overturn laws of the United States, but to place their opinions above the law.

Modern Judicial Review

The most blatant example of this violation of judicial review I can think is the question of "levels of scrutiny".

In U.S. constitutional law, when a court finds that a law infringes a fundamental constitutional right, it may apply the strict scrutiny standard to nevertheless hold the law or policy constitutionally valid if the government can demonstrate in court that the law or regulation is necessary to achieve a "compelling state interest". The government must also demonstrate that the law is "narrowly tailored" to achieve the compelling purpose, and uses the "least restrictive means" to achieve the purpose. Failure to show these conditions may result in a judge striking down a law as unconstitutional.

The standard is the highest and most stringent standard of judicial review and is part of the levels of judicial scrutiny that courts use to determine whether a constitutional right or principle should give way to the government's interest against observance of the principle. The lesser standards are rational

basis review and exacting or intermediate scrutiny. These standards are applied to statutes and government action at all levels of government within the United States.

Strict scrutiny – The Free Legal Dictionary

Do you see the inversion here? According to Article VI, Clause 2 of the Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

Yet today, using the concepts of judicial review and "constitutional law", courts claim that they can overrule the Constitution if, in their opinion, the government has a good enough reason. Compare that to the origins of judicial review in the Marbury v Madison opinion and you'll see the courts have not only claimed to rule over the representative branches of government, but have placed their opinion, and those of their predecessors, above the supreme law of the land. Why has this abomination of the republican form of government, not to mention the idea of self-government, been allowed to continue? Because those in the federal government, state governments, and yes, We the People, are generally ignorant about the Constitution. We have all simply sat back while this oligarchy has been allowed to take over our republic. When was the last time you demanded that your representative in the House impeach a justice for such bad behavior? We should not use impeachment against every judge who issues an opinion we disagree with; that is not what I'm saying. I'm not talking about disagreements about the law, but the fundamental usurpation of the Constitution and the violation of the

judges' oaths to support the Constitution. That borders on the level of a coup d'etat against the rightful law and government of this nation. So how can that be considered "good behavior"?

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,

U.S. Constitution, Article III, Section 1

Conclusion

I hope this explanation of judicial review, along with the abuses thereof, have opened your eyes to the tyranny of the oligarchs in black robes that currently rule over our country. I do not think it is an exaggeration to state that what the courts have done is usurp the Constitution, the supreme law of the land, and replace it with a government of their own design. Isn't it about time those we employ to represent us do their job to oversee the judicial branch? There is a reason why the only non-elected branch of the federal government was not given any power.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. … The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Alexander Hamilton – Federalist Papers #78

Isn't it time We the People, through our elected representatives, restore the courts to their rightful place in

our government? Shouldn’t we remove the force and will the courts have stolen from us, and return them to a body of mere judgment? Unless We the People stand up to the long train of abuses the federal courts have committed against us and throw off such despotism, we condemn our children to live as subjects of an oligarchy rather than a free and secure people in a constitutional republic.

But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

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