

## Judicial Independence & Judicial Review

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### Judicial Independence

The judicial component of government is independent in order to insulate its members from punitive or coercive actions by the legislature and executive departments of the government. If the judiciary is independent, then it can make fair decisions that uphold the rule of law, an essential element of any genuine constitutional democracy.

The U.S. Constitution, for example, protects judicial independence in two ways. First, Article III says that federal judges may hold their positions “during good Behavior.” In effect, they have lifetime appointments as long as they satisfy the ethical and legal standards of their judicial office. Secondly, Article III says that the legislative and executive branches may not combine to punish judges by decreasing payments for their services. The constitutions of some democratic countries provide appointments to the judges for a specific period of time, but invariably they protect their independence of action during their terms of office.

Alexander Hamilton, a framer of the U.S. Constitution, offered justification for an independent judiciary in the 78<sup>th</sup> paper of *The Federalist*. He wrote, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” Hamilton claimed that only an independent judicial branch of government would be able to impartially check an excessive exercise of power by the other branches of government. Thus, the judiciary guards the rule of law in a constitutional democracy.

### Judicial Review

Judicial review is the power of an independent judiciary, or courts of law, to determine whether the acts of other components of the government are in accordance with the constitution. Any action that conflicts with the constitution is declared unconstitutional and therefore nullified. Thus, the judicial department of government may check or limit the legislative and executive departments by preventing them from exceeding the limits set by the constitution.

The concept of judicial review was created during the founding of the United States and specifically included in the constitutional governments and some of the 13 original American states, such as Massachusetts, New Hampshire, and New York. Judicial review is not mentioned in the U.S. Constitution but most constitutional experts claim that it is implied in Articles III and VI of the document.

Article III says that the federal judiciary has power to make judgments in all cases pertaining to the Constitution, statutes, and treaties of the United States. Article VI implies that the judicial power of the federal courts of law must be used to protect and defend the supreme authority of the Constitution against acts in government that violate or contradict it. Article VI says,

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.

Furthermore, Article VI states that all officials of the federal and state governments, including all “judicial Officers, both of the United States and of the several States; shall be bound by Oath or Affirmation to support this Constitution.”

In 1788, in the 78<sup>th</sup> paper of *The Federalist*, Alexander Hamilton argued for judicial review by an independent judiciary as a necessary means to void all governmental actions contrary to the Constitution. He maintained that limits placed on the power of the federal legislative and executive branches in order to protect the rights of individuals “can be preserved in practice no other way that through...courts of justice, whose duty it must be to declare all acts contrary to...the Constitution void.” Without this power of judicial review, Hamilton asserted, “all the reservations of particular rights or privileges would amount to nothing.” Hamilton concluded,

No legislative act, therefore, contrary to the Constitution can be valid...[T]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is...a fundamental law. It therefore belongs to [judges] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

John Marshall, chief justice of the United States, applied the ideas about judicial review put forth in *The Federalist* in the 1803 case *Marbury v. Madison*. In this case, the U.S. Supreme Court declared one part of a federal law to be unconstitutional. In so doing, it set a precedent for the Court’s use of judicial review, which became an essential part of constitutional democracy in the United States.

In the 20<sup>th</sup> century, judicial review was incorporated into constitutional democracies around the world. In most of them, however, the power to declare acts of government unconstitutional is called constitutional review-not judicial review-and it works a bit differently than it does in the United States. For example, the U.S. Supreme Court exercises judicial review, as do federal circuit courts of appeal and district courts, which also deal with various other cases that have nothing to do with constitutional issues.

In most other democracies, a special constitutional court, whose sole function is to consider the constitutionality of government actions, exercises constitutional review. Meanwhile, other courts resolve issues that pertain strictly to statutory interpretation, without any involvement of the constitutional court. The constitutional courts of other democracies may provide advisory or binding opinions about the constitutionality of an act separate from the adversarial process in which a real case involving the act at issue is brought to the court by a prosecutor or something filing suit against another party. However, the essence of judicial review, as invented and practice in the United States, is similar to constitutional review used in other democratic countries.

Several constitutional democracies, such as the Netherlands and Great Britain, do not practice judicial review. The rule of law is maintained in these countries through the democratic political process, especially elections, whereby the government is held accountable to the people. However, judicial review or constitutional review seems to be an especially strong means to protect the rights of minorities against the threat of oppression by a tyrannical majority of the people acting through its representatives in the government.