

Constitutional and Public Law

The American and British Constitutions & Guiding Principles

Principles of Common Law

24 November 2025

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Linkedin:

EVALUATIONS

- Principles of Common Law (Eval. 109798)
- English: <https://www.qmsl.uzh.ch/en/4KNXC>
- German: <https://www.qmsl.uzh.ch/de/4KNXC>

TIME

The Supreme Court

Decisions That Changed America

PRIVACY ■ FREE SPEECH ■ CIVIL RIGHTS ■ ABORTION ■ GUNS
■ SAME-SEX MARRIAGE ■ OBAMACARE



Overview

Ensure Ensure basic knowledge of the Constitution and the role of the courts

Explore Explore the unique role of the Courts in Judicial Review

Examine Examine some historical landmark US Supreme Court cases and decisions

Consider Encourage further analysis of recent cases involving the clash of authority between the President and the federal courts



Public Law

Constitutional Law

- Structure of the state
- Organs of the state
- Fundamental law of the land
- General principles regarding powers of the state and its relations with its citizens
- International relations
- → *State set-up (skeleton)*

Administrative Law

- Sub-category of Constitutional Law
- Specifically organs of the State in motion
- Functions of the State
- Judicial Review (US)
- Exclusively powers and functions of administrative authorities
- → *State in motion (muscles/flesh)*

The UK Constitution

Unwritten vs. uncodified

- *‘If a constitution means a written document, then obviously Great Britain has no constitution. In countries where such a document exists, the word has that meaning. But the document itself merely sets out rules determining the creation and operation of governmental institutions, and obviously Great Britain has such institutions and such rules. The phrase “British constitution” is used to describe those rules.’ (*)*

Sir Ivor Jennings, 1959

- *“The British Constitution, contrary to popular description, is not ‘unwritten’ – a good part of it is written – but it is uncodified.”*

House of Lords Select Committee on the Constitution, 2002

Sources of the UK Constitution

- A substantial part of the UK Constitution is “written” albeit not codified in any one document
- Variety of sources of the UK Constitution:
 - Historical charters: Magna Carta 1215, Bill of Rights 1689
 - Statutory Law – Certain Acts of Parliament (*): Act of Settlement 1701 (Crown succession), Acts of Union 1707 (England and Scotland) and 1800 (Great Britain and Ireland), Parliament Acts 1911 and 1949, British Nationality Act 1981, House of Lords Act 1999, Constitutional Reform Act 2005, Wales Act 2017, etc.
 - Common Law - Seminal judicial decisions: *Entick v Carrington* (1765)(state subject to same laws v trespass as individual); *Jackson v AG* (UKHL, 2005)((there may be limits to Parliamentary sovereignty ob.)
 - Constitutional Principles: rule of law, parliamentary sovereignty, separation of powers
 - Constitutional Conventions: Salisbury Convention, PM is leader of party with majority in HoC, Queen follows PM’s advice, Royal Assent for Bills to become law
 - Do not confuse with “customs”: red briefcase, PM questions on Wednesday (very British)
 - Constitutional writers: Dicey, Bagehot, Blackstone, Mill, Hart, Raz
 - EU Law + European Communities Act 1972 (repealed by “Brexit Act”)
 - European Convention on Human Rights + Human Rights Act 1998

Separation of Powers

Legislative

- UK Parliament
 - House of Commons: elected, majority rules
 - House of Lords: appointed by the King on the advice of the Prime Minister excluding 91 (today) hereditary members

Executive

- The Monarch
- Government
 - Prime Minister: leader of the party with majority of seats in House of Commons
 - PM's Cabinet
- Scottish Government, Welsh Assembly Government, Northern Ireland Executive

Judiciary

- Supreme Court
- Court of Appeal
- High Court: Queen's Bench Division, Chancery Division, Family Division
- Lower Courts: Crown, Magistrates, County, Family

- Checks and balances between all of them to hold them accountable
- Progressive move towards separation of powers: House of Lords used to be highest court in the UK
- The Lord Chancellor used to be the Speaker and a member of the House of Lords, Head of the Judiciary in the country and often judge in the House of Lords acting as highest court, and sat in the Prime Minister's Cabinet.

Sovereignty of Parliament

- Dicey: “Parliament has the right to make and unmake and law whatever.”
- Developed over time to gradually limit the powers of the King (no revolution).
- No person can override or set aside the legislation of Parliament.
- No Parliament can bind future Parliaments.

Challenges

- Shared or limited sovereignty with international law and EU Law
- No Parliament can bind future Parliaments – so the sovereignty of Parliament is not absolute - paradox
- If each generation can make new laws, it limits the power of any generation to entrench their laws.
- Problem with *lex posteriori* in dualistic system.
- Example: in theory, Parliament could make a law that says that “*all babies born on a Tuesday must be put to death.*” But constitutional principles and international human rights obligations prevent that.
- Refer to International Law lecture (17 Nov).

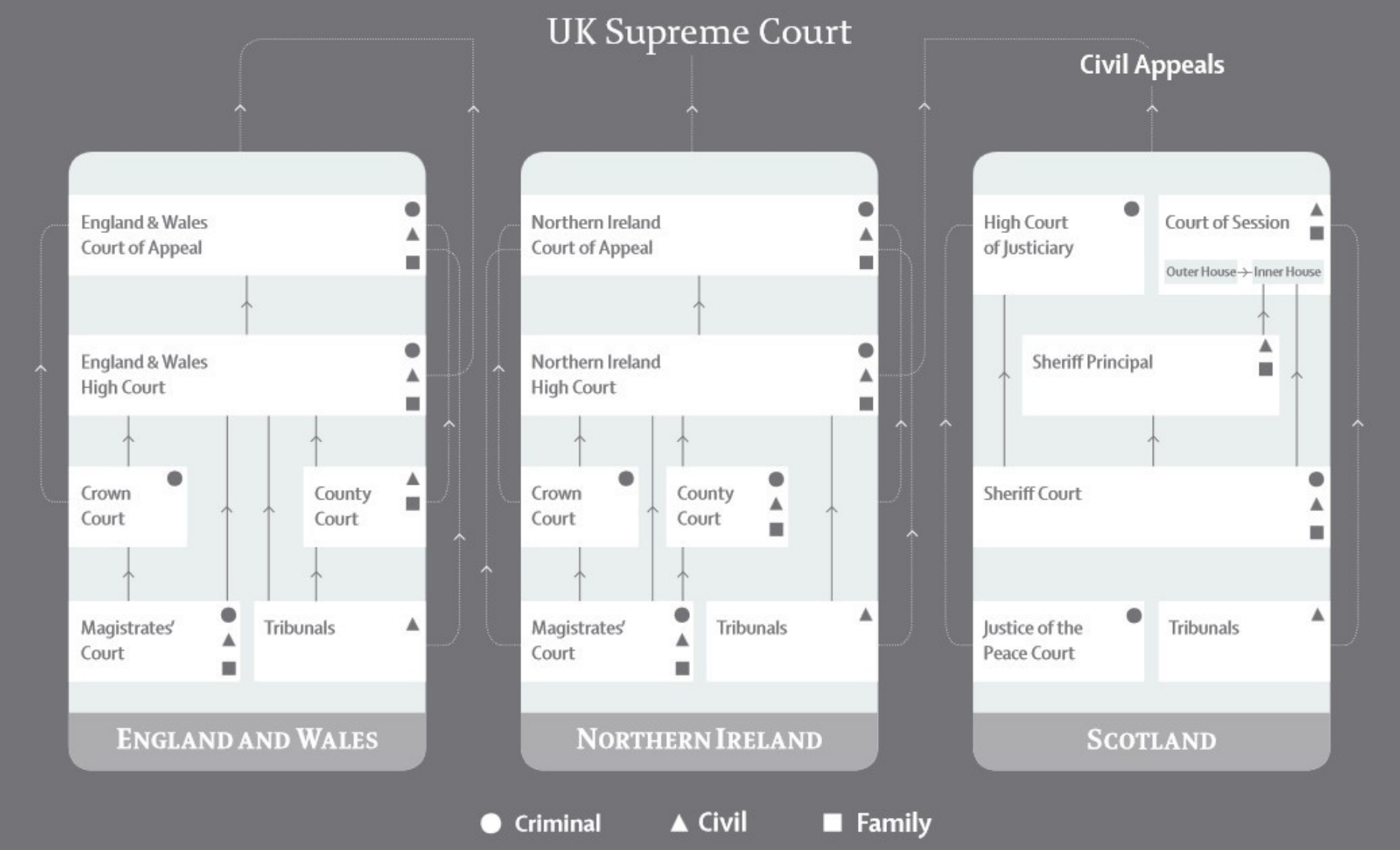
The Royal Prerogative

- Royal Prerogative = body of authorities, privileges and immunities exclusive to the Crown alone as head of the State and of the executive. In theory, in the UK – subject to no restriction.
- By convention, most of these rights are executed by her government, the Prime Minister and his Cabinet, in her stead (eg. Prime Minister goes to international conferences for «heads of state»)
- Current functions that have stayed with the head of state (the Crown):
 - Constitutional:
 - appointment of the Prime Minister (by convention: leader of the party with the majority in the House of Commons)
 - signing Statutes and opening and dissolving Parliament (by convention, always signs Bills, Orders in Council (advice of Privy Council), and acts on the advice of his Prime Minister).
 - Public engagement and ceremonial to the national community
 - Symbolic and representative of their country to the international community

Human Rights

- European Convention on Human Rights, UK signed 1950, ratified 1951, in effect since 1953
 - e.g: Articles 5, 6 and 7 promote crucial requirements of the rule of law: they prohibit arbitrary executive detention, require fair procedures in the determination of criminal charges and civil rights, and prohibit retrospective criminal penalties.
- No national legislation to incorporate and give effect to the Convention until Human Rights Act 1998
- The Act makes it unlawful for UK public authorities to act in a way that contravenes *certain* rights guaranteed in the Convention and gives the individual standing to sue the authority in a UK court.
- S. 3 HRA requires legislation to be given effect in a way that is compatible with the ECHR. If it cannot be interpreted that way, the court will make a “declaration of incompatibility” (s.4 HRA) – rarely used.
- One of the ways to get judicial review from UK courts.
- The legislation is still valid and operative, but the declaration *allows* Parliament to *consider* changing it – without any obligations.
- Parliamentary sovereignty: freedom to leave the Convention. But while still in

Court system in the UK



Statutory Interpretation

- Methods of interpretation
 - Literal Rule (UK) = textual (US) – looking at the actual language of the Statute first. The idea is that if Parliament had wanted to say something, they would have
 - Golden Rule – allows the judges to take the literal meaning of the statute but if the decision will lead to an absurd outcome then the judge will intervene to use their common sense and discretion to make the judgment
 - Mischief Rule – usually used to determine what Parliament meant by creating the Act.
 - Judges can also look at explanatory notes to the statute to try and help their understanding
- The Human Rights Act requires judges to interpret statutes in accordance with the European Convention on Human Rights 1950, otherwise the judge has to issue a declaration of incompatibility. Judges do not like this because of sovereignty of Parliament.

Statutory intervention - issues

- Under UK Law, international conventions and treaties have to be brought home by an Act of Parliament (see previously)
 - Eg. Human Rights Act 1998, European Communities Act 1972
- Problem with lex posteriori that can repeal former Acts of Parliament (see sovereignty of Parliament)
- In 2012, students were taught defamation law (tort) under common law, now they are taught under the Defamation Act 2013 which wiped out most of the pre-existing legal work
- Comment – UK system very careful with Acts of Parliament because they still prefer the adaptable and down to earth approach of cases judged on a case-by-case basis based on reasonableness. And it is much easier to reverse a judgment than to repeal an Act of Parliament.

Statutory intervention in Common Law - examples

1) Negligence

- Under common law – if there was an accident caused by the negligence of one party (usually employer/factory owner), if there was the slightest contributory negligence on the part of the victim/worker, the latter had no claim at all.
- Parliament intervened by statute to regulate that small area of the law
- Contributory Negligence Act 1945 – the Act of Parliament which stipulates that the amount of damages awarded to the victim has to be lowered to reflect the contributory negligence of the victim, but they still have a claim against the tortfeasor.

2) Rights of third parties

- Contract Law (Rights of Third Parties) Act 1999 – Act of Parliament to make sure third parties can claim on a contract they are not a party to if they are named and can benefit from it (modifies privity of contract principle).

US Constitutional (1787)

Article I – Powers of Congress

Article II – Powers of the President

Article III – Role of the federal courts

Bill of Rights (1791) (1st 10 amendments to US Constitution)– Thomas Jefferson main author. 1st amendment. ‘Free exercise’ clause. Establishment clause (state shall not establish a religion). 6th amendment (double jeopardy) 7th amendment (right to a jury trial in civil actions) 10th amendment – retained powers of States (not enumerated in the federal constitution)

3 BRANCHES of GOVERNMENT

 **Constitution**
(provided a separation of powers)



Legislative
(makes laws)



Senate

100 elected senators total;
2 senators per state



House of Representatives

435 elected representatives total;
representatives based on each state's population



Executive
(carries out laws)



President



Vice President



Cabinet

Nominated by the president and must be approved by the Senate (with at least 51 votes)



Judicial
(evaluates laws)



Supreme Court

9 justices nominated by the president and must be approved by the Senate (with at least 51 votes)



Other Federal Courts

CONSTITUTIONAL BALANCE

Let's Review



Constitutional Balance

How do the different branches serve to check on the others? How does each branch balance power with the others? Review some of the powers each branch has, then use the information along with your background knowledge to help you answer the questions.



EXECUTIVE	LEGISLATIVE	JUDICIAL
<ul style="list-style-type: none">• Signs laws• Vetoes laws• Grants pardons• Appoints judges	<ul style="list-style-type: none">• Makes laws• Approves presidential appointments• Proposes constitutional amendments• Impeachments	<ul style="list-style-type: none">• Decides if laws and executive actions are constitutional• Can overturn rulings by other judges



<p>How does the judicial branch check the power of the executive branch?</p>	<p>How does the judicial branch check the power of the legislative branch?</p>	<p>How does the executive branch check the power of the judicial branch?</p>	<p>How does the legislative branch check the power of the judicial branch?</p>
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CONSTITUTIONAL BALANCE

Let's Review



US Supreme Court's Role

Need for uniformity in federal constitution interpretation among the 50 states

'the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void.'

The US Constitution proclaimed itself to be by «We, the people» - rather than Parliamentary supremacy.

THE ROLE OF THE SUPREME COURT

The following quotes are from past Supreme Court Justices. For each one, decide if you agree or disagree with their views.

1. **“We are under a Constitution, but the Constitution is what the judge says it is” (Charles Hughes)**
2. **“The Constitution is not a living organism. It’s a legal document , and it says what it says and doesn’t say what it doesn’t say.” (Antonin Scalia)**
3. **“At the constitutional level where we work, 90 percent of any decision is emotional” (William Douglas)**
4. **“For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court, in reality, substitutes its view of what should be so for the amending process” (John Harlan II)**



THE ROLE OF THE SUPREME COURT

Judicial Activism

- the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent

Judicial Restraint

- a refraining in the judiciary from departure from precedent and the formulation of broad doctrine



What does the Constitution say?





THE ROLE OF THE SUPREME COURT

Article III

- *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.*
- Describes jurisdiction
- Discusses trial by jury
- Defines treason

The US Constitution

Due Process Under the US Constitution

“Due Process” is that the government cannot take away life, liberty, or property from any person without a legal proceeding. However, modern understandings of due process extend further.

Two due process clauses:

- 1) Fifth Amendment due process clause applies to the federal government (against federal govt power) (state constitutions protected against state powers) and
- 2) Fourteenth Amendment due process clause applies to the States. It incorporates nearly all of the rights provided by the Bill of Rights, which consists of the first 10 amendments to the Constitution.

Although the Supreme Court determined that the Due Process Clause does not automatically incorporate every right in the Bill of Rights, most of these rights have been gradually incorporated. In other words, state and local governments must not infringe on that right.

The US Constitution

Due Process Under the US Constitution

Substantive Due Process

More controversial: It stems from Supreme Court decisions finding that due process protects **substantive rights** that go beyond the rights specifically enumerated by the Constitution.

Historically, **substantive due process** formed the basis of decisions striking down state regulations that protected workers. Courts reasoned that these regulations violated the freedom of contract, which was an 'unenumerated right'. However, this line of reasoning ended during the New Deal era (1930s), and economic applications of substantive due process have been widely discredited.

Substantive due process recently has often involved the right to privacy. No explicit right to privacy in US constitution. In *Griswold v. Connecticut (1965)*, the Supreme Court struck down a Connecticut law preventing couples from using contraception. Court ruled that the right to privacy is implied from several provisions in the Bill of Rights. These include **the right to assembly** and **protections against searches and seizures**.

Standards for applying substantive due process remain murky, though. The majority opinion in *Washington v. Glucksberg* indicated that an unenumerated right must be carefully described, closely tied to American history and traditions, and implicit in notions of "ordered liberty." Other Court decisions have departed from that approach in favor of a more fluid, case-specific analysis

The US Constitution

Due Process Under the US Constitution

Procedural Due Process

Involves the procedures that are required before the government can remove ***life, liberty, or property***.

A jury trial is not necessarily required, but the individual must have notice of the proceeding and receive an opportunity to be heard before an impartial tribunal.

The Supreme Court has determined that property rights do not simply involve real estate or tangible items of personal property. Recipients of some government benefits, for example, are entitled to due process before the loss of their right to benefits.

When considering whether due process has been satisfied in these less obvious cases, a court will weigh individual rights against government interests in a balancing test provided by the Supreme Court. Factors to consider include the nature of the right, a comparison of the procedures provided to alternative procedures that could have been used, and the burden imposed on the government in using other procedures.

Origins of Judicial Review

English common law 17th century in *Dr. Bonham's case* (1610), Lord Coke wrote

'the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void.'

The US Constitution proclaimed itself to be by «We, the people» - rather than Parliamentary supremacy.

Judicial review

- The rule of law requires that all government action be legally authorised. *Ultra vs intra vires*
- Suspicious of wide discretionary power → judicial safeguards against abuse
- Issues: review of actions by *public authorities* only, standing to sue
- Separation of powers: review *not* appeal, judiciary may defer matters to political decision-making (new law)
- Grounds for judicial review (*GCHQ* case 1985):
 - Illegality of the action – the law regulates decision-making, even discretion must be *intra vires*
 - Irrationality of the action / unreasonableness – outrageous defiance of logic or accepted moral standards. Judges should be able to tell, otherwise there is something wrong with the system
 - Procedural impropriety – failure to observe basic rules of natural justice, procedural fairness not followed, denial of justice, bias in the decision (ECHR: independent and impartial tribunal)
 - New: s. 6 HRA 1998 – if the action of the public authority violated the ECHR
 - Must engage Convention right, must be interference, interference must be unlawful and disproportionate
- Dealt with in standard courts, no division for administrative courts (French system)
- Judicial Review Procedure in the Civil Procedure Rules (made under Act of Parliament)

MARBURY V. MADISON (1803)

TERMS TO KNOW

- **Writ of Mandamus**
 - 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
- **Stare Decisis**
 - The legal principle of determining points in litigation according to precedent



JUDICIAL REVIEW

No law or action can contradict the U.S. Constitution, which is the supreme law of the land.

The courts can only review a law that is brought before it through a lawsuit.

State courts also have the power to review state laws or actions based upon their state constitutions.



JUDICIAL REVIEW

The idea, fundamental to the US system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary. Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the Constitution.

The text of the Constitution does not contain a specific provision for the power of judicial review. Rather, the power to declare laws unconstitutional has been deemed an implied power, derived from Article III and Article VI of the U.S. Constitution.

Established in the landmark decision of *Marbury v. Madison*

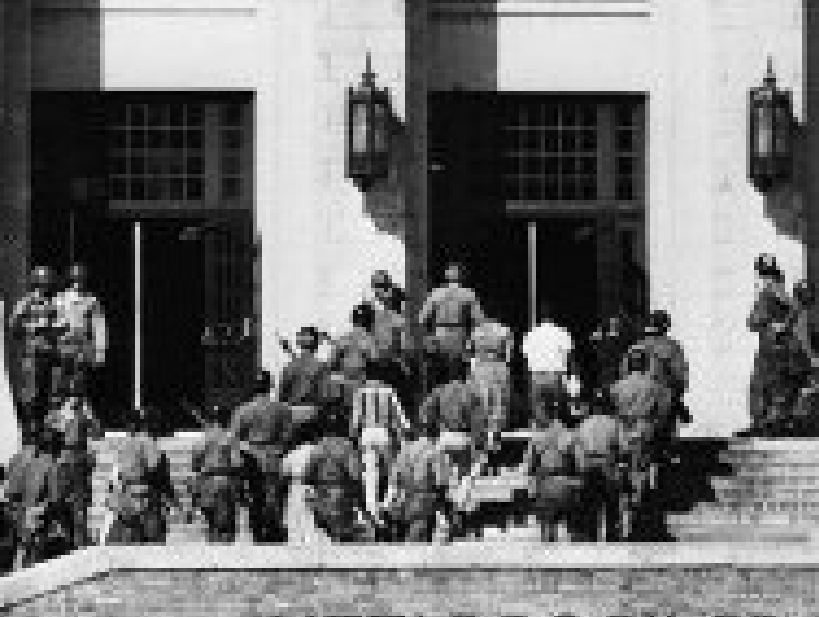


IT IS EMPHATICALLY THE
PROVINCE AND DUTY OF
THE JUDICIAL DEPARTMENT
TO SAY WHAT THE LAW IS.

MARBURY v. MADISON

1803





JUDICIAL REVIEW

- **Expansion**

- 1821 case of *Cohens v. Virginia*, the Supreme Court expanded its power of constitutional review to include the decisions of state criminal courts.
- In *Cooper v. Aaron* in 1958, the Supreme Court expanded the power so that it could deem any action of any branch of a state's government to be unconstitutional



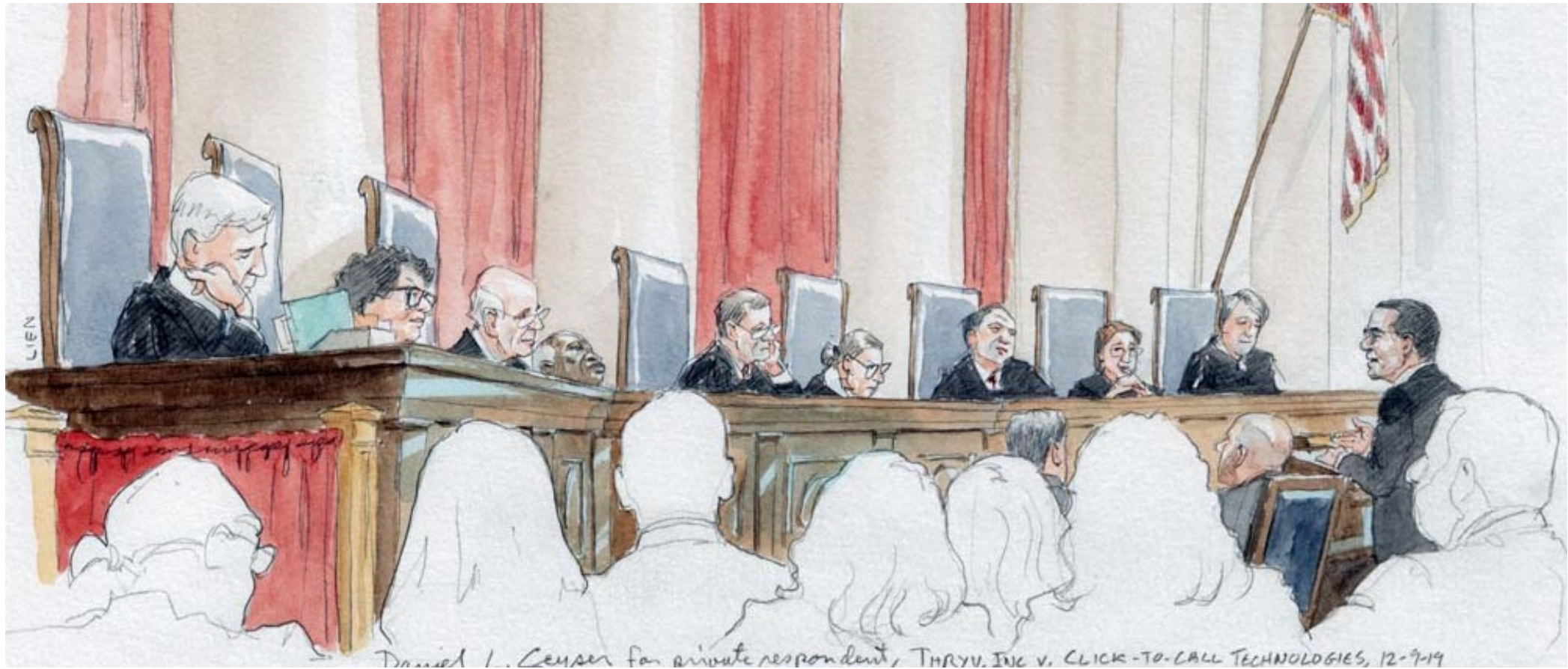


JUDICIAL REVIEW

• Historical Examples

- **Fletcher v. Peck** (1810) – State Land Grants
- **Schenk v. US** (1919) – Espionage Act
- **Brown v. Board** (1954) – Public school segregation laws
- **Engel v. Vitale** (1962) – State law requiring prayer in public school
- **Loving v. Virginia** (1967) & **Obergefell v. Hodges** (2015) – state laws related to limits on marriage
- **Roe v. Wade** (1973) – State anti-abortion laws
- **DC v. Heller** (2008) – D.C. Firearm Codes
- **Citizens United v. Federal Election Commission** (2010) – laws limiting corporate campaign spending
- **Dobbs v Jackson Womens Health** (2022) – no constitutional right to abortion in 1st 6 months (overruled Roe v Wade)





JUDICIAL REVIEW

In the period 1960–2019, the Supreme Court has held 483 laws unconstitutional in whole or in part



Judicial Review- Do I Understand?



Balance of Power between Judicial and Executive Branches – Trump Orders

- Trump Administration executive orders (Mar 2025) sending 250 Central and South American immigrants to a prison in El Salvador.
- US courts issue orders instructing Trump officials to provide them with due process rights (5th Amendment hearing).
- US Judges (Boaesberg and Xinis) declared that Trump officials acted in bad faith by failing to comply with their decrees to require a hearing before deportation.
- Appellate Judge Harvie Wilkinson (Reagan appointee) ordered that the President play a more active role in seeking the release of Maryland man Kilmar Armando Abrego Garcia, who was sent to El Salvador, despite a court order expressly forbidding him from being sent there. See (citation)

- Judge Wilkinson further stated

«Now the branches come too close to grinding irrevocably against one another in a conflict that promises to diminish both.»

«This is a losing proposition all around. The judiciary will lose much from the constant intimations of its ‘illegitimacy’, to which by custom and detachment we can only sparingly reply. The executive will lose much from a public perception of its lawlessness and all of its attendant ‘contagion’.»

- *KILMAR ARMANDO ABREGO GARVIA v. KRISTI NOEM*, No. 25-1404 (8:25-cv-00951-PX), 4th Cir. Apr. 17, 2025 (https://upload.wikimedia.org/wikipedia/commons/0/02/Abrego_Garcia_v._Noem_Fourth_Circuit_Denial_of_Motion_to_Stay_-_April_17_2025.pdf)

LEARNING MORE/STAYING INFORMED

- [#SCOTUS](#)
- [Supreme Court Website](#)
- [SCOTUS BLOG](#)
- [ABA Annual Review of the Supreme Court's Term](#)
- [Civics in Real Life – produced by FJCC](#)





Verfassungsgerichtsbarkeit – Schweiz

Art. 190 der Bundesverfassung (BV)

«Bundesgesetze und Völkerrecht sind für das Bundesgericht und die anderen rechtsanwendenden Behörden massgebend.»

- Schweizer Gerichte müssen ein Bundesgesetz anwenden, selbst wenn sie es für verfassungswidrig halten (Anwendungsgebot); Vermutung der Verfassungskonformität, d.h. die Gerichte legen die Norm verfassungskonform aus
- Kein Prüfungsgebot: Gerichte dürfen die Verfassungsmässigkeit prüfen und die Verfassungswidrigkeit feststellen (oft als *obiter dictum*) → führt aber nicht zur Aufhebung, sondern kann als politisches Signal an das Parlament dienen, eine Gesetzesrevision vorzunehmen
- Abstrakte Normenkontrolle ist nicht möglich. Konkrete Normenkontrolle ist möglich, aber ohne Aufhebungsbefugnis von Bundesgesetzen und Völkerrecht

	Anwendungsgebot	Aufhebung
Bundesgesetze	Ja	Nein
Verordnungen des Bundesrats	Nein	Nein
Kantonales Recht	Nein	Ja

➤ Verfassungsgerichtsbarkeit in der Schweiz?

Ja, aber nicht auf allen Ebenen → **beschränkte Verfassungsgerichtsbarkeit**, d.h. insb. auch keine abstrakte Normenkontrolle (siehe Art. 189 Abs. 4 BV)



Judicial Review - Switzerland

Art. 190 of the Federal Constitution (FC)

“The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.”

- Swiss courts must apply a federal statute, even if they consider it unconstitutional (duty to apply); Presumption of Constitutionality, meaning the courts interpret the norm in a constitutionally compliant way
- No prohibition to of review: courts are allowed to review the constitutionality and declare a statute unconstitutional (often as an *obiter dictum*) → this declaration does not lead to the repeal of the statute, but serves as a political signal to Parliament (Federal Assembly) to undertake a legislative revision
- Abstract judicial review (review independent of a specific case) is not possible. Concrete judicial review (review within a specific pending case) is possible, but without the power to repeal federal statutes and international law

	Duty to apply	Repeal
Federal statutes	yes	no
Verordnungen des Bundesrats	no	no
Kantonales Recht	no	yes

➤ Judicial review in Switzerland?

Yes, but not at all levels → **limited judicial review**, meaning specifically no abstract judicial review of federal statutes (see art. 189 (4) FC)

<https://www.lexology.com/library/detail.aspx?g=eededda70-ebe6-4e3f-a251-3f4b5c646527>

<https://www.parlament.ch/de/%C3%BCber-das-parlament/Seiten/faktenblatt-verfassungsgerichtsbarkeit.aspx>

<https://www.bvger.ch/en/newsroom/media-releases/unlawful-write-off-of-at1-capital-instruments-2385>