

The Judiciary Act of 1789

Time and Grade Level

Two 50 minute class periods in a Grade 9-12 US history, government or civics classroom

Purpose of the Lesson

The purpose of this lesson is to teach students about the significance of the Judiciary Act of 1789 in establishing a federal judiciary, and the power of judicial review as outlined by the landmark U.S. Supreme Court Case, *Marbury v. Madison* (1803). By the conclusion of this lesson, students will understand the key provisions of the Judiciary Act of 1789 and the structure of the federal judiciary, as well as the power of judicial review.

Critical Engagement Questions & Lesson Objectives

1. What are the key features of the Judiciary Act of 1789, and why are they significant?
 - **Objective:** Students will be able to analyze and explain the structure of the federal judicial system as created by the Judiciary Act of 1789. They will be able to articulate the reasoning for the structure of the judiciary, as well as how the statute relates to the U.S. Constitution.
2. What is the concept of judicial review, and where did it originate?
 - **Objective:** Students will be able to define judicial review, articulate the arguments for and against it, and explain the case *Marbury v. Madison*.

Standards

[Common Core Standards: English Language Arts Standards-History/Social Studies- Grade 9-10](#)

CCSS.ELA-Literacy.RH.9-10.1 Cite specific textual evidence to support analysis of primary and secondary sources, attending to such features as the date and origin of the information.

CCSS.ELA-Literacy.RH.9-10.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.

CCSS.ELA-Literacy.RH.9-10.9 Compare and contrast treatments of the same topic in several primary and secondary sources.

[Common Core Standards: English Language Arts Standards-History/Social Studies-Grade 11-12](#)

CCSS.ELA-Literacy.RH.11-12.1 Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.



CCSS.ELA-Literacy.RH.11-12.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.5 Analyze in detail how a complex primary source is structured, including how key sentences, paragraphs, and larger portions of the text contribute to the whole.

[C3 Standards: Suggested k-12 Pathway for College, Career, and Civic Readiness Dimension 2, Civic and Political Institutions, Perspectives, & Causation and Argumentation](#)

D2.Civ.4.9-12. Explain how the U.S. Constitution establishes a system of government that has powers, responsibilities, and limits that have changed over time and that are still contested

D2.His.6.9-12. Analyze the ways in which the perspectives of those writing history shaped the history that they produced.

Overview of the Lesson

Day One
<ol style="list-style-type: none">1. Homework: Read “The Judiciary Act of 1789 – the Basics” worksheet, and selected provisions of the U.S. Constitution (Appendices A and B).2. Teacher Lesson: Review the Judiciary Act of 1789 and discuss the tensions and motivations the drafters faced in creating the federal judiciary.3. Activity: Assign students to small groups to complete “The Judiciary Act of 1789 and the Constitution” activity (Appendix B).
Day Two
<ol style="list-style-type: none">1. Homework: Read “Marbury v. Madison” worksheet (Appendix C) and excerpts from <i>Federalist No. 78</i> and <i>Brutus XV</i> (Appendix D)2. Teacher Lesson: Review the facts and outcome of <i>Marbury v. Madison</i>3. Activity: Assign students to small groups to complete the Federalist 78 and Brutus XV comparison activity (Appendix E)

Materials

1. ConSource materials:
 - a. [The Federalist No. 78 \(June 14, 1788\)](#)
 - b. [Brutus XV \(March 20, 1788\)](#)
2. The Judiciary Act of 1789 (available [here](#))
3. Printed copies of the worksheets included in Appendices A through E



Student Warm-Up for the Lesson

Prior to the start of the lesson, students should be assigned the following reading:

Day One: “The Judiciary Act of 1789 – the Basics” worksheet, and selected provisions of the U.S. Constitution (Appendices A and B).

Day Two: “Marbury v. Madison” worksheet (Appendix D)
Judicial Powers excerpted reading (Appendix E)

Teacher Warm-Up for the Lesson

KEY VOCABULARY

Admiralty: cases involving ships, the sea, or other navigable waters (also known as maritime)

Alien: a person who is not a citizen; a person who is a citizen of another country or nation

Appeal: a legal process in which a losing party asks a higher court to reverse a lower court’s decision

Civil cases: a law suit that involves private parties; the harm is against an individual, group of individuals, or organization

Criminal cases: a law suit that involves a crime; one party is the government; the harm is against society

Inferior courts: federal courts that are beneath the Supreme Court. Congress has the constitutional authority to establish these lower courts, and first did so in the Judiciary Act of 1789 when it established District Courts and Circuit Courts (which still exist today!)

“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. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”

-- Article III, Section 1, U.S. Constitution

Judicial Review: the power of the judiciary to overturn acts of legislation that are inconsistent with the U.S. Constitution

Jurisdiction: the authority of a court to hear a particular case

- Subject-matter jurisdiction: the court’s authority to hear a case dealing with a specific subject matter



- Original jurisdiction: the authority of the court to be the first to hear a case
- Appellate jurisdiction: the court's authority to hear an appeal of a case

Tort: a wrongful act that causes civil legal harm (not criminal)

Writ of Mandamus: a court order directing a person or agency to do or not do something

OVERVIEW OF THE TOPIC¹

At the time of the Constitutional Convention, delegates were deeply divided over the creation of federal courts, and what authority those courts would have. The categories of cases that the federal courts would be able to hear (known as “federal subject-matter jurisdiction”) could determine the extent of power of the federal courts, and implicates the federalism concern of allocation of power between state and federal governments. One plan for the new Constitution, the Virginia Plan, suggested a far more expansive federal judiciary than any other plan. Some key aspects to the Virginia Plan’s treatment of the federal judiciary include: broad subject-matter jurisdiction, a supreme court, and a wide-ranging framework of inferior courts.

This broad judiciary plan was met with resistance from some delegates, such as John Rutledge of South Carolina and Roger Sherman of Connecticut, who argued against federal encroachment on the power of state courts. As a compromise between those who wanted a powerful judiciary, and those who wanted to preserve the authority of state courts, a motion was passed to give the legislature the power to establish inferior courts. This compromise gave flexibility to the system, by giving the new Congress the discretion of whether to establish these lower federal courts. In deciding subject-matter jurisdiction, the Convention ultimately gave the Supreme Court original jurisdiction (the power to hear the case first) over cases involving foreign diplomats and cases in which a state is a party, and appellate jurisdiction (the power to hear an appeal of a case) in other cases, including, for example cases involving federal law, admiralty cases, and cases involving diversity of citizenship and aliens. Also important, the Constitution did not limit the Supreme Court’s ability to review state court decisions.

By 1789 the Constitution was ratified, and the new federal government was ready to govern. One of the first legislative actions commenced when the Senate created a Grand Committee consisting of one Senator from each state to draft a bill to design the federal judiciary. One of the major concerns on the mind of those drafting the new bill was national security. Coming out of the weak Articles of Confederation, the drafters wanted to ensure the federal judiciary had power over prize cases (an outdated type of admiralty case), law suits involving federal revenue laws, and cases involving federal crimes.

Admiralty jurisdiction was a critical issue in the creation of the federal judiciary. At the time, admiralty cases were frequent and critical to trade and national security. Thus, there was not much controversy over the idea that the federal courts should have jurisdiction over admiralty cases, and due to their frequency, it became clear that having only a single Supreme Court was not an option. This helped immensely in the fight for the establishment of federal trial

¹ Works cited: Judiciary Act, Sept. 24, 1789, 1 Stat. 73; Casto, William R. The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth. Columbia, SC: University of South Carolina, 1995.

courts. However, the non-admiralty subject-matter jurisdiction to be given to federal trial courts raised debate.

One of the biggest problems in drafting the new bill was interpreting the Constitution's clause that granted jurisdiction for cases "arising under" federal law. The difficulty was this: even if a case dealt primarily with state law, any question, no matter how small, that invoked a federal law could be construed as "arising under" federal law. This gave teeth to the fear that federal courts would swallow up the state courts. Oliver Ellsworth, the chair of the drafting committee, chose not to furnish the federal trial courts with general jurisdiction over cases arising under federal law, thereby ignoring the arising under clause altogether in the new bill. Rather, Ellsworth carved out specific areas of subject-matter jurisdiction that clearly arose under federal law, such as alien tort cases, revenue collection cases including seizure of property, and criminal cases.

The bill split the federal trial courts into two categories: district courts, and circuit courts. District courts would primarily hear admiralty cases, and also minor crimes where the punishment did not exceed "thirty stripes" of whipping, a fine of more than one hundred dollars, or imprisonment of more than six months. In practice, these limits made it such that most crimes were heard by the circuit courts. Circuit courts were also given jurisdiction over civil cases in which an alien is a party, or a citizen of one state sues a citizen of another state.

The Judiciary Act created thirteen district courts, comprised of one federal district judge who resided in that district. The circuit courts, however, were comprised of three judges: the resident district judge, and two Supreme Court justices, who would "ride circuit." This arrangement lent the authority of the Supreme Court to circuit court cases and made the Supreme Court justices accessible to litigants without involving expensive and time-consuming travel.

Ultimately, the Judiciary Act of 1789 passed through Congress with relative ease, garnering a Senate vote of 14 to 6, and a House of Representatives vote of 37 to 16. To this day, the federal judiciary is set up in a manner that maintains many of the key features established by the Judiciary Act of 1789.

However, the Judiciary Act of 1789 did not survive in its entirety, nor did it wholly escape controversy. In fact, the Act played a key role in one of the most critical moments of American legal history. In 1800 President John Adams commissioned William Marbury as a Justice of the Peace for the District of Columbia. However, the commission was not delivered before Adams left the White House. When the next president, Thomas Jefferson, entered the White House, he refused to have the commission delivered to Mr. Marbury. It was his Secretary of State, James Madison, who was legally tasked with the delivery of such commissions. So when Mr. Marbury decided to sue for the non-delivery, he brought the case against James Madison—*Marbury v. Madison*. Marbury sued in the Supreme Court for a writ of mandamus, which would effectively require Madison to deliver the commission.

It is important to understand the political context in which this case arose. At the time, there was a bitter divide between the nation's two political parties: the Federalists and the Republicans. John Adams, of the Federalist Party, was not re-elected to the presidency in 1800, but rather Thomas Jefferson of the Republican Party was voted into office in a long drawn out election that was ultimately settled by the House of Representatives. Before giving up power, the Federalist Party pushed through the Judiciary Act of 1801, creating several new judicial offices. The intention was to put as many Federalists into judicial roles as possible before handing over power to the Republicans (remember that constitutionally federal judges retain office during good behavior, which is usually for life).

One of these new judicial roles was the position given to William Marbury. Further complicating the case is the fact that John Marshall was the Secretary of State under John Adams, and was tasked with the delivery of the commissions. It was his failure to deliver Marbury's commission that led to the legal action in *Marbury v. Madison*. Yet, Marshall was appointed Chief Justice of the Supreme Court at the end of Adams' presidency. Thus, he was the Chief Justice at the time *Marbury v. Madison* was heard.

In his opinion, Chief Justice Marshall found that William Marbury had a legal right to his commission as Justice of the Peace, but that there was no remedy because the provision of the Judiciary Act of 1789 (Section 13) that allowed for the writ of mandamus was unconstitutional. Marshall pointed out that the Constitution explicitly granted the Supreme Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," and reserved appellate jurisdiction for all other cases. Marshall reasoned that because Section 13 of the Judiciary Act of 1789 granted the Supreme Court original jurisdiction over writs of mandamus, it was contrary to the Constitution and could not be upheld.

This decision was the Court's first exercise of judicial review and represents an important historical step in establishing and maintaining judicial independence. However, it is important to remember the political context in which the case was decided, and that the outcome of the case was able to achieve a sort of balance in acknowledging the Federalist party claim to Marbury's right to office, while ultimately making the Republicans happy by withholding the commission on procedural grounds.

RESOURCES FOR BACKGROUND ON THE TOPIC

Primary Source Documents (ConSource):

- ConSource Documents related to the establishment of the judiciary:
 - [James Madison's Notes of the Constitutional Convention \(June 5, 1787\)](#)
 - [James Madison's Notes of the Constitutional Convention \(June 13, 1787\)](#)
 - [The Federalist No. 78 \(June 14, 1788\)](#)
 - [Brutus XV \(March 20, 1788\)](#)
 - [The Virginia Plan \(1787\)](#)
 - [The New Jersey Plan \(1787\)](#)
 - [The Pinckney Plan \(1787\)](#)
 - [The Hamilton Plan \(1787\)](#)
 - To see all ConSource documents relating to:
 - [The Judicial Power clause](#)
 - [The Supreme Court clause](#)
 - [The Inferior Courts clause](#)
 - [The Good Behavior clause](#)
 - [The Judicial Compensation clause](#)

Activity

Activity	Description
Day One Judiciary Act of 1789 and the U.S. Constitution Activity	Split the students into pairs or small groups, and give them 20 minutes to complete the Judiciary Act of 1789 and the U.S. Constitution activity worksheet.
Class Discussion of Activity	Have the class use the remainder of class time for discussion of the comparisons between the Judiciary Act of 1789 provisions and the Constitution excerpts. In particular, focus on how the Judiciary Act of 1789 follows from the framework set in the Constitution, and emphasize the fact that many of the same men who debated the Constitution also drafted and voted the Judiciary Act into law, and how their knowledge of the Constitutional debates may have informed their decisions.
Day Two Comparison of <i>Federalist No. 78</i> and <i>Brutus XV</i>	Split the students into small groups and give them 15 minutes to answer questions on <i>Federalist No. 78</i> and <i>Brutus XV</i> .
Class Discussion of Activity	Reconvene the class and use the remainder of class time to discuss the students' answers to the questions. If there is time, split the class in half, and have one side argue the Federalist perspective, and the other side argue the Anti-Federalist (Brutus') perspective.

Homework

Day One: Have students read “The Judiciary Act of 1789 – the Basics” worksheet, and selected provisions of the Judiciary Act of 1789 and the U.S. Constitution (Find in Appendix A and B)

Day Two: Have students read “Marbury v. Madison” worksheet, and excerpts from *Federalist No. 78* and *Brutus XV*. (Find in Appendix D)



The Act Established federal courts including:

Supreme Court	District Courts	Circuit Courts
One Supreme Court	Thirteen Districts	Three Circuits
6 Justices (1 Chief Justice, and 5 Associate Justices)	Each District Court has 1 judge	Consists of any 2 justices of the Supreme Court and 1 District Judge (this is called "riding circuit")
Holds 2 sessions per year	Holds 4 sessions per year	Holds 2 sessions per year

NOTE: The Supreme Court is the only court created by the Constitution. All other courts throughout American history have been created by acts of legislation, including the first – the Judiciary Act of 1789.

So what cases can the courts hear under this Act?

- **Supreme Court**
 - The only court that can hear cases between two states, between a state and the United States, and law suits against ambassadors and diplomats (this means anyone who represents his or her government in a foreign country)
 - Can hear appeals from cases that were originally heard in the federal circuit courts, and some cases heard by the state courts (an appeal is when a second court hears the same case over again to look for mistakes the first court might have made)
 - For example: The Supreme Court can hear appeals from cases heard by the highest court of the state when those cases involve questions of the constitutionality of state or federal laws
- **District Court**
 - The first court to hear cases involving crimes that took place within the district or on the high seas where the punishment is one of the following: whipping of "thirty stripes" or less, a fine of \$100 or less, or imprisonment for six months or less
 - The first court to hear civil cases, for example, admiralty and maritime ("civil" cases are those law suits that do not involve crimes)
 - May also hear civil cases where the United States is plaintiff and the amount in controversy exceeds \$100
- **Circuit Court**
 - The first court to hear civil cases where the matter of dispute exceeds \$500, and the United States is plaintiff, or an alien (someone who is not a U.S. citizen) is a party, or the suit is between citizens of different states
 - May also hear the same criminal cases as the district courts over crimes they may hear, and crimes not included in district courts' jurisdiction
 - May hear appeals of cases originally heard in district court



The Act grants federal court judges powers including, for example:

- Issue writs of *habeas corpus* (document requiring a person who is under arrest to appear in court), and other necessary writs as the judge finds necessary to keep order in the court
- Require the parties to a trial to submit written evidence (such as documents, letters, books, etc.)
- Administer oaths or affirmations (these are promises to tell the truth)
- Punish contempt of court by fine or imprisonment (contempt is when someone does not cooperate with court orders)



- Arrest criminal offenders by the rules in the state where the crime was committed, and imprison the offender until trial

1. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
---Article I, Section 9
2. 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. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
---Article III, Section 1
3. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
---Article III, Section 2
4. 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.
---Article III, Section 2
5. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.
---Article III, Section 2
6. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
---Article III, Section 3
7. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.
---Article IV, Section 2
8. 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, anything in the Constitution or laws of any State to the contrary notwithstanding.
---Article VI

INSTRUCTIONS: For the Judiciary Act of 1789 excerpts below, identify which provisions of the Constitution from your reading are most closely related to, and briefly describe why (more than one provision may apply).

Judiciary Act of 1789:

Sec. 1. *Be it enacted*, That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear the same date on the same day, according to their respective ages.

Sec. 3. That there be a court called a District Court in each of the aforementioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a District Judge, and shall hold annually four sessions, . . .

Sec. 4. That the beforementioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit. . . . [T]hat there shall be held annually in each district of said circuits two courts which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court and the district judge of such districts, any two of whom shall constitute a quorum. *Provided*, That no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision. . . .

Sec. 9. That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding



thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States. . . . And the trial of issues in fact, in the district courts, in all cases except civil causes of admiralty and maritime jurisdiction, shall be by jury. . . .

Sec 11. That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. . . . And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided. . . .

Sec. 13. That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states in the cases hereinafter specially provided for and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principle and usages of law, to any courts appointed, or persons holding office under the authority of the United States. . . .

Sec 14. That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Sec 33. That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence.

Sec 34. And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.



Basic facts: At the end of his presidency, John Adams made several last minute federal appointments, including the appointment of William Marbury as a Justice of the Peace. These appointments were required to be hand delivered, but because they were last minute, John Adams was not able to deliver them all before he left office. Thomas Jefferson, the incoming President, refused to recognize the remaining appointments that had yet to be delivered (including William Marbury's), so his Secretary of State (James Madison) did not deliver Marbury's commission to him. Marbury then sued Madison for failing to deliver the commission, which Marbury argued he was required to do under the Judiciary Act of 1789.

Outcome: Chief Justice John Marshall wrote the opinion on the case, which decided that part of the Judiciary Act of 1789 was unconstitutional because it granted jurisdiction contrary to that which was allowed in Article III of the U.S. Constitution. Because the law was "repugnant" to the Constitution, the court could not uphold it. This concept is known as judicial review, which is not expressly in the Constitution. Thus, the Judiciary Act of 1789 was the first piece of legislation to be partially overturned on the basis of judicial review.

Federalist No. 78

Alexander Hamilton, James Madison, and John Jay wrote several persuasive essays under the pseudonym “Publius” in support of the new Constitution. Those essays have come to be known as “The Federalist Papers.” Below are excerpts from Federalist No. 78, which tackled the subject of the federal judiciary.

We proceed now to an examination of the judiciary department of the proposed government. In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed: The only questions which have been raised being relative to the manner of constituting it, and to its extent. [...]

As to the tenure by which the judges are to hold their places: This chiefly concerns their duration in office; the provisions for their support; and the precautions for their responsibility. According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behaviour, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state. [...]

The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws. 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 executive not only dispenses the honors, but holds the sword of the community. The legislative not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. 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. This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. [...]

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder,

no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable. There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. [...]

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. [...]

Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behaviour as the tenure of their judicial offices in point of duration; and that so far from being blameable on this account, their plan would have been inexcuseably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

Brutus XV

A number of articles were also written and published in opposition to the new constitution. Several such articles were written under the pseudonym "Brutus." The excerpts below consider the role of a federal judiciary.

I said in my last number, that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. [...]

The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union.-I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with

their constitution. They consider themselves bound to decide according to the existing laws of the land, and never undertake to controul them by adjudging that they are inconsistent with the constitution- much less are they vested with the power of giving an equitable construction to the constitution. [...]

The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven. [...]

There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. [...]

I have said that the judges under this system will be independent in the strict sense of the word: To prove this I will shew-That there is no power above them that can controul their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.

1st. There is no power above them that can correct their errors or controul their decisions- The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits.-In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

2d. They cannot be removed from office or suffer a dimunition of their salaries, for any error in judgement or want of capacity. [...]

3d. The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and obvious meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. [...]

I have, in the course of my observation on this constitution, affirmed and endeavored to shew, that it was calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national. [...]

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accomodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take

place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them. [...]

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature. A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but with a high hand and an outstretched arm.

Considering the Powers of the Judiciary

1. *Federalist No. 78* states, “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution.” Do you agree? Why or why not?
2. *Federalist No. 78* assumes that the federal judiciary should have the power of judicial review because of the Supremacy Clause of the Constitution (which states that the Constitution “shall be the supreme law of the land”). Are you persuaded? What about the concern raised in *Brutus XV* that “this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions”? Why do you think the framers failed to explicitly mention judicial review in the Constitution?
3. Should judges hold tenure during good behavior? Are you more persuaded by *Federalist No. 78* or *Brutus XV*? Should the legislature be able to review the court’s decisions, like Brutus wants? Why or why not? How can the legislature effectively overrule or undo a Supreme Court decision?
4. Consider *Marbury v. Madison*. Did the court act independently? Did it exert power over the legislature? Should Congress have been able to overturn the decision?

Below are some examples of possible answers.

Considering the Powers of the Judiciary

1. *Federalist No. 78* states, “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution.” Do you agree? Why or why not?

Yes. As Publius points out in *Federalist No. 78*, the decisions of the judiciary are only as good as the enforcement of the executive branch. *Federalist No. 78* points out that the executive has the power of the sword and the legislative branch has the power of the purse, both of which are superior powers to the judicial review that the judicial branch exercises.

OR

No. As Brutus XV warns, there is no check on the judicial branch’s ability to exercise judicial review. These are men and women who are appointed during good behavior, which usually equates to lifetime tenure. There is nothing holding these judges accountable, and therefore it is most dangerous to the political rights of the constitution.

2. *Federalist No. 78* assumes that the federal judiciary should have the power of judicial review, as a logical outgrowth of the supremacy of the Constitution over congressional legislation. Are you persuaded? What about the concern raised in *Brutus XV* that “this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions”? Why do you think the framers failed to explicitly mention judicial review in the Constitution?

Yes. The Constitution is the supreme law of the land, and therefore must take precedence over congressional acts of legislation. Someone has to interpret the constitution, and it makes more sense to have the judicial branch make that interpretation because it is separate and independent; allowing the legislative branch to determine the constitutionality of its own acts is problematic because members of Congress are elected to two- and six-year terms, and thus are under political pressure to legislate with the whim of the majority rather than to uphold the Constitution.

OR

No. The legislative branch is better suited to determine the constitutionality of its own acts of legislation. As Brutus XV points out, the judiciary is not accountable to the people, and therefore is not trustworthy to uphold the Constitution. The people

are the very source of sovereignty under the Constitution, and thus the branch closest to the people should have the responsibility of upholding that document.

3. Should judges hold tenure during good behavior? Are you more persuaded by *Federalist No. 78* or *Brutus XV*? Should the legislature be able to review the court's decisions, like Brutus wants? Why or why not? How can the legislature effectively overrule or undo a Supreme Court decision?

Yes, judges should hold tenure during good behavior. This is the only way to keep judges truly independent from the sway of politics. The concept of the rule of law requires an independent judiciary, who can interpret the law without fear of political retribution. For this same reason, the legislature should not be able to review the court's decisions. If Congress could overturn a judicial decision, the Court would hesitate to interpret the law in any way that Congress might not like, for fear that it would undermine their authority. Politics should not influence the court of law.

OR

No, judges should not hold tenure during good behavior. The idea of judges as neutral arbiters above the sway of politics is impossible. Judges are human, and often have political careers before entering the judiciary. They do not simply shed their biases at the bench. They should be held accountable for their decisions, like Brutus insists. The legislative branch should be able to review their decisions.

4. Consider *Marbury v. Madison*. Did the court act independently? Did it exert power over the legislature? Should Congress have been able to overturn the decision?

Yes, the court acted independently in *Marbury v. Madison* by determining that Congress acted outside its constitutional scope of authority in Section 13 of the Judiciary Act of 1789. The Court only exerted power over the legislature insofar as it did not allow the unconstitutional legislation to stand. However, it did not impede any rightful power of Congress, so arguably the Court did not exert power over the legislature. Similarly, Congress should not have been able to overturn the decision because the Court acted within its scope of authority in determining the unconstitutionality of the legislation.

OR

No, the court did not act independently. *Marbury v. Madison* is a prime example of how politics enters the court even with a supposedly independent judiciary. Firstly, Chief Justice Marshall was the reason the case came before the court in the first place, by not delivering the commission when he was still Secretary of State. The fact that he decided the fate of the case is suspect. Secondly, the court was afraid of the Republican Party, and therefore found a crafty way to keep Marbury from getting the commission. Congress didn't need the power to overturn the decision,



because with the authority to change the structure of the federal courts through legislation, it could and did scare the Court into deciding in a way that was favorable to those in power.