

Marbury v. Madison / The Power of the Judicial Branch

Directions:

1. Read the **Background** section.
 2. Read the essay excerpts from the *Federalist No. 78* and the *Anti-Federalist No. 78–79* and answer the corresponding **Questions to Consider**.
-

Background

When the Constitution was first written, many people supported it. However, there were some people who were opposed to it. The Framers feared that not enough states would ratify it and decided to write a series of persuasive papers to influence people's opinion. They attempted to convince people that the structures and concepts in the Constitution were right for a country seeking to balance power between a national government, state governments, and the people. The series of articles written by Alexander Hamilton, James Madison, and John Jay, appeared in local newspapers under the pseudonym Publius. Later, these articles were compiled and published as a book called *The Federalist Papers*. Others who opposed the Constitution compiled their response in a document called *The Anti-Federalist Papers*. The *Federalist No. 78* and the corresponding *Anti-Federalist No. 78–79* dealt specifically with the judicial branch of government.

Federalist No. 78

WE PROCEED now to an examination of the judiciary department of the proposed government.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR. . . . 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 legislature not only commands the purse, but

prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . 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 incontestably, 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 . . . that . . . the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislative and the Executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

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.

If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. 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 . . . If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative

encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

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 BEHAVIOR as the tenure of their judicial offices . . . The experience of Great Britain affords an illustrious comment on the excellence of the institution.

Questions to Consider

1. What does the author mean by the following passage: “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . [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.”?
2. Examine the following passage: “For there is no liberty, if the power of judging be not separated from the executive and legislative powers.” What does the author mean by this? Which principle of government does this support?
3. According to the author, why are the courts vital to a limited constitution?
4. Why does the author believe that judges have permanent tenure?
5. What is the author’s attitude toward the proposed Supreme Court of the United States?

The Antifederalist No. 78–79

. . . The supreme court under this constitution would be exalted above all other power in the government, and subject to no control

The judges in England, it is true, hold their offices during their good behavior, 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. . . . But the judges under this constitution will control the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress. They are to give the constitution an explanation, and there is no power above them to set aside their judgment . . . there is no power above them that can control their decisions, or correct their errors.

. . . 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 The supreme court then has a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are . . . subject to have their decisions set aside by the house of lords, for error But no such power is in the legislature. The judges are supreme and no law, explanatory of the constitution, will be binding on them.

When great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful checks should be formed to prevent the abuse of it I suppose the supreme judicial ought to be liable to be called to account, for any misconduct, by some body of men, who depend upon the people for their places; and so also should all other great officers in the State, who are not made amenable to some superior officers. . . .

Questions to Consider

1. According to the document, how does the Supreme Court of the United States differ from the highest court in Great Britain?

