01 2015

Document of the Month

Center *for the* Study *of the* American Constitution

No. 13: The Federalist and Antifederalist Debate Over the Judiciary

For Antifederalists the system of government under the proposed Constitution was fundamentally defective in its design. They viewed the federal judiciary as a source of danger to individual liberty, the state judiciaries, and the future existence of the states themselves. Antifederalists criticized the jurisdiction of federal judges over law and equity in every case involving the Constitution. These two jurisdictions had traditionally been separated. Under the Constitution, if a federal judge could not find a law under which to make a ruling in a case, he could use equity to broaden the court's jurisdiction.

Because the Constitution specifically guaranteed jury trials in criminal cases but said nothing about civil cases, Antifederalists predicted that the right to jury trials in civil cases would not be preserved. They also suggested that in criminal cases the appellate authority of federal courts to re-examine both the facts and the law of the case jeopardized jury decisions. Without protection against double jeopardy, defendants found innocent by juries could be re-tried on appeal and, upon a re-examination of the facts, found guilty. The Constitution did not guarantee trials of the vicinage (local trials, with local juries) in either civil or criminal cases. This meant that individuals might need to travel hundreds of miles to federal courts or over a thousand miles in cases coming before the Supreme Court. These distances would increase costs, which would be particularly disadvantageous to litigants who were not wealthy.

Additionally, Antifederalists worried that the jurisdiction of federal courts was too broad. As federal power grew, which they believed was inevitable, more cases would be taken to federal courts rather than state courts, thus reducing the importance of state judiciaries. Since federal judges would be the interpreters of the ambiguities of the Constitution, the federal courts under the supremacy clause would be likely to accrue more power at the expense of the states. To help guard against the transfer of jurisdiction from the states to the federal judiciary, Antifederalists argued that the state courts should serve as inferior federal courts. This would also reduce the cost of the federal judiciary and, at the same time, bring the courts closer to the people. Antifederalists also condemned the federal courts' jurisdiction in cases involving a state and an inhabitant of another state. This ran counter to the tradition of sovereign immunity, which meant that states could not be sued without their own consent. Federalists responded that the clause only meant that states, using federal courts, could sue inhabitants of other states.

Federalists denied that jury trials in civil cases were always necessary, arguing that the states themselves did not agree on what types of civil cases should have jury trials. State courts often did not have jury trials in admiralty cases, probate, and family matters. Congress should be left to determine the extent of jury trials in civil cases. In addition, Federalists suggested that the appellate jurisdiction of federal courts in matters of fact and law would not be dangerous: if inferior court jury decisions were reversed, the cases would be remanded to the inferior court for re-trial. Federalists defended the jurisdiction of federal courts as the only means to provide justice in foreign and interstate cases and to impose uniform obedience to the Constitution and federal law.

In addition to jurisdictional concerns, another pressing issue in the ratification debate was the nature of judicial independence. Most people agreed that judges should have lifetime tenure (that is, service during good behavior) and that judges' salaries ought to be guaranteed. "Brutus," however, led Antifederalists in denouncing the complete independence of the federal judiciary. Federal judges

"independent of the people, of the legislature, and of every power under heaven . . . will generally soon feel themselves independent of heaven itself." Antifederalists argued that there needed to be some kind of legislative review process to overturn faulty judicial decisions. They pointed to various precedents—the law lords in England, legislative councils serving as courts of last resort in colonial charters and in some new state constitutions (i.e., the Revolutionary-era constitutions), and the New York court of errors and impeachment, which was made up of the lieutenant governor, the chancellor, the three justices of the state supreme court and all of the state senators. This court—a legislative court, in essence—had the power to try impeachments and to review and overturn faulty judicial decisions.

Relatively little debate took place over judicial review. Both Federalists and Antifederalists acknowledged the federal courts' legitimate authority in using the supremacy clause to strike down state laws deemed to violate the federal Constitution. Some debate did occur over the federal courts' power to declare federal laws unconstitutional. In *The Federalist* 78, "Publius" suggested that judicial review was advantageous since the courts would be "an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority." The Constitution, Federalists asserted, was the supreme law; laws passed by Congress were always inferior to the Constitution. "Publius" maintained that "the interpretation of the law is the proper and peculiar province of the courts." "Publius" concluded that this was "an essential safeguard against the effects of occasional ill humours in the society." But Antifederalists worried that, if carried too far, the courts would assert their dominance over the other two branches of the federal government. Federalists argued that judicial review did not make the judiciary superior to Congress and the president; it made the will of the people, as expressed in the Constitution, superior to all.■

Antifederalist Documents

Brutus XIII on Treaty Interpretation *New York Journal,* 21 February 1788

. . . The next paragraph extends its authority, to all cases, in law and equity, arising under the laws of the United States. This power, as I understand it, is a proper one. The proper province of the judicial power, in any government, is, as I conceive, to declare what is the law of the land. . . .

The next paragraph which gives a power to decide in law and equity, on all cases arising under treaties, is unintelligible to me. I can readily comprehend what is meant by deciding a case under a treaty. For as treaties will be the law of the land, every person who have rights or privileges secured by treaty, will have aid of the courts of law, in recovering them. But I do not understand, what is meant by equity arising under a treaty. I presume every right which can be claimed under a treaty, must be claimed by virtue of some article or clause contained in it, which gives the right in plain and obvious words; or at least, I conceive, that the rules for explaining treaties, are so well ascertained, that there is no need of having recourse to an equitable construction. If under this power, the courts are to explain treaties, according to what they conceive are their spirit, which is nothing less than a power to give them whatever extension they may judge proper, it is a dangerous and improper power. The cases affecting ambassadors, public ministers, and consuls—of admiralty and maritime jurisdiction; controversies to which the United States are a party, and controversies between states, it is proper should be under the cognizance of the courts of the union, because none but the general government, can, or ought to pass laws on their subjects. . . .

Brutus XIII on the Abolition of State Governments *New York Journal,* 21 February 1788

. . . I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in its exercise, prove most pernicious and destructive.

It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.

The states are now subject to no such actions. All contracts entered into by individuals with states, were made upon the faith and credit of the states, and the individu-

als never had in contemplation any compulsory mode of obliging the government to fulfil its engagements.

The evil consequences that will flow from the exercise of this power, will best appear by tracing it in its operation. The constitution does not direct the mode in which an individual shall commence a suit against a state or the manner in which the judgement of the court shall be carried into execution, but it gives the legislature full power to pass all laws which shall be proper and necessary for the purpose. And they certainly must make provision for these purposes, or otherwise the power of the judicial will be nugatory. For, to what purpose will the power of a judicial be, if they have no mode, in which they can call the parties before them? Or of what use will it be, to call the parties to answer, if after they have given judgment, there is no authority to execute the judgment? We must, therefore, conclude, that the legislature will pass laws which will be effectual in this head. An individual of one state will then have a legal remedy against a state for any demand he may have against a state to which he does not belong. Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering. It is easy to see, that when this once happens, the notes of the state will pass rapidly from the hands of citizens of the state to those of other states. . . .

Brutus XIV on Appeals
New York Journal, 28 February 1788

The appellate jurisdiction granted to the supreme court . . . has justly been considered as one of the most objectionable parts of the constitution: under this power, appeals may be had from the inferior courts to the supreme, in every case to which the judicial power extends, except in the few instances in which the supreme court will have original jurisdiction.

By this article [Article III Section 2], appeals will lie to the supreme court, in all criminal as well as civil causes. . . . If then this section extends the power of the judicial, to criminal cases, it allows appeals in such cases. If the power of the judicial is not extended to criminal matters by this section, I ask, by what part of this system does it appear, that they have any cognizance of them?

I believe it is a new and unusual thing to allow appeals in criminal matters. It is contrary to the sense of our laws, and dangerous to the lives and liberties of the citizen. As our law now stands, a person charged with a crime has a right to a fair and impartial trial by a jury of his country, and their verdict is final. If he is acquitted no other court can call upon him to answer for the same crime. But by this system, a man may have had ever so fair a trial, have been acquitted by ever so respectable a jury of his country; and still the officer of the government who prosecutes, may appeal to the supreme court. The whole matter may have a second hearing. By this means, persons who may have disobliged those who execute the general government, may be subjected to intolerable oppression. They may be kept in long and ruinous confinement, and exposed to heavy and insupportable charges, to procure the attendence of witnesses, and provide the means of their defence, at a great distance from their places of residence.

I can scarcely believe there can be a considerate citizen of the United States, that will approve of this appellate jurisdiction, as extending to criminal cases, if they will give themselves time for reflection. . . .

Brutus XV on the Judiciary in England
New York Journal, 20 March 1788

. . . I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe, the courts of law are put upon the most prudent establishment, they are on a very different footing.

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 giv[ing] an *equitable* construction to the constitution.

The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul 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 sit aside their judgment. 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 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. Before I proceed to illustrate the truth of these assertions, I beg liberty to make one remark—Though in my opinion the judges ought to hold their offices during good behaviour, yet I think it is clear, that the reasons in favour of this establishment of the judges in England, do by no means apply to this country.

. . While the judges held their places at the will and pleasure of the king, on whom they depended not only for their offices, but also for their salaries, they were subject to every undue influence. If the crown wished to carry a favorite point, to accomplish which the aid of the courts of law was necessary, the pleasure of the king would be signified to the judges. And it required the spirit of a martyr, for the judges to determine contrary to the king's will. . . . When they obtained the appointment of the judges, during good behaviour, they got from the crown a concession, which deprived it of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people. But these reasons do not apply to this country, we have no hereditary monarch; those who appoint the judges do not hold their offices for life, nor do they descend to their children. The same arguments, therefore, which will conclude in favor of the tenor of the judge's offices for good behaviour, lose a considerable part of their weight when applied to the state and condition of America. . . .

Brutus XV on the Judiciary's Independence
New York Journal, 20 March 1788

I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible. But I say, this system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering the judges independent; which, in the British constitution, means no more than that they hold their places during good behaviour, and have fixed salaries, they have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. . . .

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.

It is expressly declared by the constitution,—"That they shall at stated times receive a compensation for their services which shall not be diminished during their continuance in office."

The only clause in the constitution which provides for the removal of the judges from offices, is that which declares, that "the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.". . . Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*. A man

may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges commited the error from wicked and corrupt motives.

3d. The power of this court is in many cases superior to that of the legislature. . . . this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] 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 legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority which vested the legislature with their powers, vested the judicial with theirs—both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial.—The supreme court then have 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 not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgement of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme—and no law, explanatory of the constitution, will be binding on them. . . .

Federalist Documents

Publius: *The Federalist* 78 on the Judiciary as the Weakest Branch of Government
New York, 28 May 1788

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. . . .

Publius: *The Federalist* 78 on Judicial Independence Versus Judicial Supremacy
New York, 28 May 1788

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. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, 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 irreconcileable variance between the two, that which has the superior obligation and validity ought of course to be prefered; or in other words, the constitution ought to be prefered to the statute, the intention of the people to the intention of their agents. . . .

Publius: *The Federalist* 78 on the Supremacy of the People
New York, 28 May 1788

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. . . .

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.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which . . . have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . .

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. . . .

Publius: *The Federalist* 78 on Judges' Tenure
New York, 28 May 1788

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniencies necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And mak-

ing the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quiting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

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.

Publius: *The Federalist* 80 on Federal Review
New York, 28 May 1788

The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union than that which has been just examined. . . .

A method of terminating territorial disputes between the states, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together. But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the states. And though the proposed constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which produced them will assume new shapes that could not be foreseen, nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the states, are proper objects of federal superintendence and control.

It may be esteemed the basis of the union, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded. . . .

The reasonableness of the agency of the national courts in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens. . . .

Publius: *The Federalist* 81 on Creating Inferior Federal Courts
New York, 28 May 1788

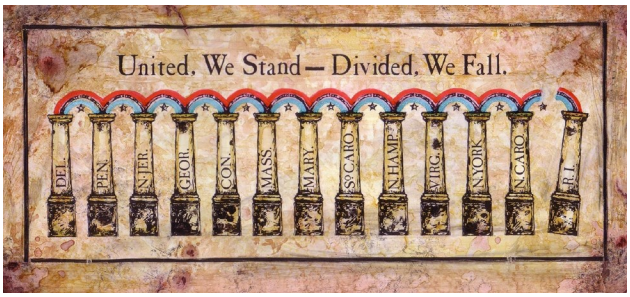
The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the supreme court, in every case of federal cognizance. It is intended to enable the national government to institute or *authorise* in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts? . . . But ought not a more direct and explicit provision to have been made in favour of the state courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. . . .

I am not sure but that it will be found highly expedient and useful to divide the United States into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state. The judges of these courts, with the aid of the state judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch; and appeals may be safely circumscribed within a very narrow compass. This plan appears to me at present the most eligible of any that could be adopted, and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed constitution. . . .■

Discussion Questions for a Socratic Seminar

- To what extent do you agree with the argument made by "Brutus" that judicial independence is the same as judicial supremacy?
- To what extent does "Publius" open himself to criticism when he argues in *The Federalist* 78 that judicial review is an essential feature in a constitutional government?
- In your opinion, is the rule of law undermined by the practice of judicial review?
- In your view, is the use of British precedents by "Brutus" persuasive when he makes his arguments regarding judicial independence? In your opinion, does "Publius" successfully rebut these concerns?
- In your opinion, are the jurisdiction issues raised by "Brutus" an overreaction? If so, what might be some of the reasons for his concerns?
- To what extent are these arguments about the judiciary connected to modern debates about judicial activism and judicial restraint?



Teaching Tools

I. Comparing and Evaluating the Federalist and Antifederalist Arguments Over the Judiciary

1. Divide the class in half. One half (Antifederalists) will read the selections from "Brutus," and the other half (Federalists) will read the selections from "Publius."
2. In the first part of the lesson, each half of the class should be divided into groups of 3-5 students. Each of these smaller groups should read its assigned selections, discussing and summarizing the arguments of its author using the T-chart below.

Arguments of "Brutus"	Arguments of "Publius"
* ___	* ___
* ___	* ___
* ___	* ___
* ___	* ___

3. After each group has read and discussed its selections, all groups should meet together—Antifederalists with other Antifederalist groups and Federalists with other Federalist groups—to reach a consensus on the four best arguments by their author.
4. Each half of the class should then select a student (or students) to present the arguments made by its author.
5. During the presentation, the opposition should evaluate the strength of each argument. As students present "Brutus," the Federalists will listen and evaluate the arguments using the T-chart. Likewise, as students present "Publius," the Antifederalists will listen and evaluate the arguments using the T-chart.

Each side can use the score bar to rate the effectiveness of the opposition's arguments. Evaluators can use a 1-10 scale to rate arguments.

6. When all of the arguments have been presented, have the Federalists and the Antifederalists meet together to reach a consensus on the two best arguments from the opposition.
7. Once the Federalists and the Antifederalists have had an opportunity to discuss and rank the arguments of their opposition, have a spokesperson report the findings of each to the class.
8. After each side has reported its assessment, the teacher can lead a discussion using the following questions:
    - Ask the Federalists, "What would you say is the strongest argument made by the Antifederalists?"
    - Ask the Antifederalists, "What would you say is the strongest argument made by the Federalists?"
    - Is the opposition's ranking of your arguments consistent with your own ranking of them? Why or why not?

II. How Much Independence is Too Much Independence?: Comparing the Arguments of "Brutus" and "Publius"

1. Divide the class into groups of 3–5 students. Half of the groups should read "Brutus" XV (Antifederalist); the other half should read "Publius," *The Federalist* 78 (Federalist). As students read their documents, they should summarize and record their author's arguments using the chart below.

The Danger of Judicial Independence	The Safety of Judicial Independence
Antifederalist, Brutus XV	Federalist, *The Federalist* 78

2. After each group has had an opportunity to read and list its author's arguments, have a representative from each group report its findings to the class. The groups representing the opposing perspective should pay particular attention to the opposition's summary points. They will be asked to find and use arguments in their own piece as rebuttals to the opposition's points.
3. After groups from each side, Antifederalist and Federalists, have reported their findings, give all groups an opportunity to evaluate the opposition's summary points. Groups should then select the best excerpts from their author to use as an effective rebuttal.
4. Then have one side begin with a summary statement. For example:

   (The Charge) The Antifederalist group could start with:
   Brutus charges "The power of this court is in many cases superior to that of the legislature."

   (The Rebuttal) The Federalist side might respond:
   Publius says "the power of the people is superior to both . . . where the will of the legislature . . . 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."
5. Reverse the sequence in the next round: Federalists make an accusation from their text and Antifederalists select their rebuttal statement. Teachers may select a panel of judges to score the rebuttals in each round and keep a running score to determine the winner. The chart below would be useful for judges.

The Charge	The Rebuttal
1. F/AF	F/AF
2. F/AF	F/AF
3. F/AF	F/AF
4. F/AF	F/AF

6. Conclude the lesson by leading a discussion using the following questions:
   - In your opinion, did "Brutus" overstate the case that the judiciary would be too independent?
   - In your estimation, did "Publius" successfully rebut the arguments of "Brutus"?

- In your view, is judicial independence the same as judicial supremacy?
- Do you agree with Federalist arguments that judicial review is an essential feature in a constitutional government?
- In your opinion, is the rule of law undermined by the practice of judicial review?

III. What Does Jurisdictional Creep Look Like?: Creating a Political Cartoon from the Arguments of "Brutus" XV

1. A key idea in "Brutus" XV is that the federal courts will take power from the state courts.
2. Have students read "Brutus" XV. You may want to lead a discussion using the following questions:
   - How does "Brutus" believe the Constitution will reduce the power or eliminate the importance of state courts?
   - Do you think his observations are reasonable?
   - What factors might inform the author's views about governmental power?
3. Important ideas for students to understand in "Brutus" are:
   - The author's use of a slippery slope form of argumentation.
   - The author's inference that the state courts will be eliminated by a subtle and slow process.
4. Divide the class into groups of 3-5 students and ask them to brainstorm images that would illustrate these two ideas.
5. After each group has had sufficient time to brainstorm have the groups share their ideas with the class. Some suggestions might include:
   - a constricting snake swallowing its prey.
   - an avalanche that begins slowly and speeds up as it descends.
   - a fishing net being reeled in slowly.
   - a lion sneaking up on its prey at a water hole.
6. After the groups have shared their ideas, assign students with artistic abilities to create a political cartoon illustrating the arguments of "Brutus" XV. You may want to have students look at political cartoons at www.cagle.com to get some ideas.

Vocabulary

"Brutus" XIII on Treaty Interpretation

1. *province:* area or sphere
2. *ascertained:* determined
3. *recourse:* alternative
4. *equitable:* honest or reasonable
5. *consuls:* diplomats
6. *cognizance:* awareness; grasp

"Brutus" XIII on the Abolition of State Governments

1. *pernicious:* evil or wicked
2. *in contemplation:* in mind
3. *compulsory:* mandatory
4. *obliging:* forcing or requiring
5. *commence:* begin
6. *nugatory:* trivial or insignificant
7. *remedy:* solution

"Brutus" XIV on Appeals

1. *acquitted:* found innocent
2. *disobliged:* inconvenienced
3. *ruinous:* devastating or disastrous

"Brutus" XV on the Judiciary in England

1. *prudent:* wise
2. *footing:* foundation
3. *adjudging:* ruling or declaring
4. *rendering:* making
5. *tribunal:* court
6. *pleasure:* satisfaction or liking
7. *undue:* unreasonable
8. *martyr:* a person willing to die for a principle
9. *concession:* the act of giving up one's prerogative
10. *prerogative:* privilege
11. *hereditary:* inherited
12. *tenor:* tendency

"Brutus" XV on the Judiciary's Independence

1. *jurisprudence:* judicial practice
2. *adjudications:* decisions
3. *want of capacity:* lack of ability or skill
4. *dimunition (i.e., diminution):* reduction
5. *manifest:* illustrate
6. *subordinate:* inferior
7. *vested:* assigned

Publius: *The Federalist* 78 on the Judiciary as the Weakest Branch of Government

1. *capacity:* role
2. *dispenses:* distributes
3. *efficacy:* effectiveness

Publius: *The Federalist* 78 on Judicial Independence Versus Judicial Supremacy

1. *tenor:* meaning
2. *constituents:* clients or voters
3. *irreconcilable:* opposing
4. *variance:* difference

Publius: *The Federalist* 78 on the Supremacy of the People

1. *tenure:* term
2. *requisite: required*

3. *conjunctures:* combinations of events
4. *disseminate:* spread or circulate
5. *innovations:* changes; alterations
6. *ill humours:* poisonous situations
7. *mitigating:* limiting; lessening
8. *severity:* harshness
9. *iniquitous:* wicked
10. *meditate:* intend

Publius: *The Federalist* 78 on Judges' Tenure

1. *commission: assignment of* authority
2. *complaisance:* a tendency to agree with
3. *hazard:* risk
4. *disposition:* tendency
5. *deducible:* to reach a conclusion
6. *propriety:* correctness
7. *voluminous:* large
8. *stations:* positions or places
9. *depravity:* tendency toward wrongdoing
10. *requisite:* required
11. *lucrative:* profitable
12. *score:* account

Publius: *The Federalist* 80 on Federal Review

1. *terminating:* ending
2. *animosities:* hostilities
3. *conjectured:* speculated
4. *fraudulent:* dishonest
5. *warrantable:* justifiable
6. *apprehend:* imagine; suspect or expect
7. *inviolable:* firm or unbreakable
8. *evasion:* avoidance
9. *subterfuge:* tricks or deceptions
10. *attachments:* connections
11. *inauspicious:* unfavorable

Publius: *The Federalist* 81 on Creating Inferior Federal Courts

1. *obviate:* remove
2. *cognizance:* awareness; oversight
3. *prevalency:* widespread presence
4. *expedient:* beneficial
5. *institute:* create or start
6. *circumscribed:* confined
7. *narrow compass:* limited area