

The Judiciary

Introduction

Antifederalists viewed the federal judiciary as a source of danger to individual liberty and to the independent existence of the states. They were concerned that the judicial power of the United States would compromise the right to trial by jury in civil cases: though the Constitution guaranteed jury trial in criminal cases, it said nothing about civil cases. Even in criminal cases, the Constitution did not guarantee juries of the “vicinage,” but only that trials would take place in the state in which a crime was committed. This might entail a distance of hundreds of miles. And in matters that might come before the Supreme Court, travel of thousands of miles would be involved making the entire system costly, perhaps prohibitively so for those who weren’t wealthy.

The Constitution gave the federal courts appellate jurisdiction not only in matters of law, which was traditional, but also in determining matters of fact that would normally have been decided by a jury in the lower court. Through the appellate jurisdiction, the federal courts could undermine verdicts of local juries and state court systems altogether. This potential threat to the local jury tradition was profoundly disturbing to Antifederalists.

Antifederalists worried that the jurisdiction of the federal courts was too broad, and 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 the state courts. Antifederalists insisted that to prevent this consolidation, state courts should serve as the inferior courts within the federal system. Federalists, suspicious about the objectivity of decisions made at the state level, opposed such an arrangement. Aristides noted that the purpose of the jurisdiction of the federal courts was to “give every assurance . . . of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice.”

As Antifederalists surveyed the Constitution, among the most troublesome features was the high degree of judicial independence accorded to federal judges. The Constitution had no clear statement that judges could be impeached, Antifederalists were wary of the independence of the judicial branch. They fully expected the federal courts to encourage their own aggrandizement of power. As interpreters of the ambiguities in the Constitution, federal courts would accrue more power to themselves as they allowed federal power to expand at state expense. Antifederalist also expressed concerns over the shared responsibility of the executive nomination and the Senate’s confirmation process.

Federalists responded that of the three branches, the judicial branch was the “least dangerous,” because it had only the power of judgment. They denied that jury trials were always necessary or were endangered, either by the silence of the Constitution or by the appellate jurisdiction of the federal courts in matters of fact. They defended the jurisdiction of the federal courts as the only means to provide justice in foreign and interstate cases, and to impose uniform obedience to the Constitution and to federal law. Federalists viewed the courts as the intermediary between the people and the Congress. The courts, through judicial review, would uphold the Constitution against the attempts by Congress to enlarge its power or threaten the rights of individuals. Additionally, since federal judges had terms of “good behavior,” they were shielded from political pressures and as such; the national courts were the protector of the people, not a danger.

Sources

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John Marshall: Speech in the Virginia Convention, 20 June 1788

Roles in Script–11 (L–large role; M–medium role; S–small role)

Moderator

Antifederalist Panelists

- Brutus (L)
- Samuel Bryan (M)
- Centinel (M)
- Federal Farmer (M)
- Luther Martin (M)
- An Old Whig (S)

Federalist Panelists

- Aristides (M)
- John Marshall (M)
- Publius (L)
- Hugh Williamson (S)

Script

Moderator: Good evening and welcome. We have assembled this panel to discuss the proposed Constitution. Specifically, we have asked these individuals to address the judicial branch. Federalists, of course, maintain that the design of the federal courts in the document is not only defensible but also preferable. Antifederalists, on the other hand, have many concerns about the courts and urge Americans to reject the Constitution because of these and other deficiencies. Welcome gentlemen.

All Panelists: Hello. Good Evening. It's a pleasure to be here, etc.

Moderator: Let's begin with Brutus who has written extensively on this issue. As we begin, let's focus on one specific issue. In a word, what is your objection to the authority or, in legal terms, the jurisdiction of the national courts in this proposed Constitution?

Brutus: 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.

Moderator: And what is the problem with this?

Brutus: [Well, the problem] is, that in all the civil causes enumerated, the supreme court shall have authority to re-examine the whole merits of . . . case[s], both with respect to the facts and the law which may arise under it, without the intervention of a jury.

Samuel Bryan: The judicial powers . . . are also so various and extensive, that by legal ingenuity they may be extended to every case, and thus absorb the state judiciaries, and when we consider the decisive influence that a general judiciary would have over the civil polity of the several states . . . this power . . . would effect a consolidation of the states under one government.

Moderator: I see you have honed in on the appellate jurisdiction right away. I suppose we should back track a bit and ask if there are any objections to the cases that the federal courts can hear as a part of their original jurisdiction?

Federal Farmer: I do not . . . see the need . . . of opening a new scene of expensive law suits—of <allowing>¹ foreigners, and citizens of different states, to drag each other many hundred miles into the federal courts. It is true, those courts may be so organized . . . as to make the obtaining of justice in them tolerably easy, . . . But this benefit is by no means secured by the constitution.

Centinel: [Certainly.] This . . . is a very <mean>² jurisdiction, implying an improper distrust of the impartiality and justice of the <courts>³ of the states. It will include all legal debates between foreigners in Britain, or elsewhere, and the people of this country.

Moderator: But isn't there a need for a truly national court system?

Publius: [Absolutely.] The <basic>⁴ necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes,

arising upon the same laws, is a <multi-headed monster>⁵ in government, from which nothing but contradiction and confusion can proceed.

Hugh Williamson: And the <cases>⁶ . . . to be submitted to the Supreme Judiciary, or to the Inferior Courts, are those which naturally arise from the constitutional laws of Congress. [If you think about it, these courts will enhance our national reputation]. Foreigners, with whom we have treaties, will trust our citizens on the faith of this engagement. And the citizens of different States will do the same.

Federal Farmer: [Mr. Williamson, we have thought about it. The question is essentially this: Is it] proper . . . to humble a state, as to bring it to answer to an individual in a court of law? The states are now subject to no such actions; and this new jurisdiction will subject the states and many defendants to actions, and processes, which were not <considered by>⁷ the parties [when they entered into contracts.]

Moderator: So, is it your view that states and state courts should be sovereign and national courts have no jurisdiction over them?

Federal Farmer: [Yes.]

Moderator: And I take it that Federalists disagree?

Aristides: [Yes.] The purpose of extending . . . the jurisdiction of the federal judiciary, is to give every assurance to the general government, of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice. Without this . . . the federal government might frequently be obstructed.

Publius: [Additionally,] the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. . . . [This national] <court system,>⁸ which, having no local attachments, will . . . be impartial between the different states and their citizens.

Aristides: [And as a practical matter,] let not the officers of state courts be overmuch alarmed! . . . In the course of ten years, not one action, that I know of, in [my state of] Maryland, has concerned either another state, or an ambassador, consul, or other minister.

Moderator: But in regards to the future, I am assuming that Antifederalists see all sorts of problems?

Centinel: To manage the various and extensive judicial authority . . . there will be one or more inferior courts immediately requisite in each state; and laws and regulations must be forthwith provided to direct the judges—here is a wide door for inconvenience to enter.

Brutus: [And, I will go one further.] I will venture to predict . . . that if [this Constitution] is adopted without amendments . . . the same gentlemen who have employed their talents and abilities with such success to influence the public mind to adopt this plan, will employ the same to persuade the people, that it will be for their good to abolish the state governments as useless and burdensome.

Samuel Bryan: The consequence of this establishment will be an absolute confirmation of the power of aristocratical influence in the courts of justice; for the common people will not be able to contend or struggle against it.

Publius: [Since we are speculating about the future, even] the most discerning cannot foresee how <widespread the>⁹ local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes. [While on the other hand all can see] . . . that courts constituted <by>¹¹ the states, would be improper <courts for>¹² the union.

John Marshall: [I would ask,] are not the Judges of the Federal Court chosen with as much wisdom, as the Judges of the State Governments? . . . If so, shall we not conclude, that they will decide with equal impartiality and <honesty>?¹³ If there be as much wisdom and knowledge in the [whole] United States, as in a particular State, shall we conclude that that wisdom and knowledge will not be equally exercised in the selection of the Judges?

Moderator: Let's move to another related topic. As I understand it, Antifederalists have objections regarding the geographic implications when considering the appellate jurisdiction in the proposed Constitution. Federal Farmer, you have written on this subject. Could you explain?

Federal Farmer: [Certainly.] I think it one of the greatest benefits in a good government, that each citizen should find a court of justice within a reasonable distance, perhaps, within a day's travel of his home; so that, without great inconveniences and enormous expences, he may have the advantages of his witnesses and jury—it would be <unlikely>¹⁴ to derive these advantages from [this] judiciary. . . . Inferior courts might be properly placed in the different counties, and districts of the union, the appellate jurisdiction would be intolerable and expensive.

Moderator: Can you give us an example of how this might be a problem? Centinel?

Centinel: [Certainly. Let's use Pennsylvania as an example.] An inhabitant of Pennsylvania residing at Pittsburgh, finds the goods of his debtor, who resides in Virginia, <has a legitimate claim>¹⁵ but no <court order>¹⁶ can be had to authorise <federal marshalls,>¹⁷ to seize the property . . . nearer than 200 miles.

Moderator: Is this probable?

Samuel Bryan: [I think it is very probable.] The intolerable delay, the enormous expences and infinite vexation to which the people of this country will be exposed from the <mountain of>¹⁸ proceedings of the courts . . . a man may be drawn from the utmost boundaries of this extensive country to the seat of the supreme court of the nation to contend, perhaps with a wealthy and powerful adversary.

Luther Martin: [Additionally,] Should any question arise between a foreign <diplomat>¹⁹ and any of the citizens of the United States, however remote from the seat of empire . . . in the first instance [the case is] to be heard in the supreme court, however inconvenient to the parties, and however trifling the subject of dispute.

Moderator: So I take it that you also have concerns about the single Supreme Court as outlined in the Constitution?

Federal Farmer: [Even more so.] The one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it—and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court.

Moderator: Mr. Williamson, you have some thoughts on this?

Hugh Williamson: We are told that justice will be delayed, and the poor will be drawn away by the rich to a distant Court. The authors of this remark have not fully considered the question, else they must have <remembered>²⁰ that the poor of this country have little to do with [the kinds of issues that are of national concern.] They do not consider that . . . appeals . . . [in these courts] will never be permitted [by Congress] for trifling sums, or under <insignificant situations>,²¹ unless we can suppose that the national Legislature shall be composed of knaves and fools.

Publius: I am . . . sure . . . 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.

Moderator: And how does this address Antifederalist concerns?

Publius: [Essentially,] 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.

Moderator: And, I presume you also believe that because these courts can potentially be created by Congress, it assures the liberties of the people are safe.

Publius: [Absolutely.] The power of constituting inferior courts is evidently calculated to <avoid>²² the necessity of having recourse to the supreme court. . . . 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.

Luther Martin: [Even if a person was successful in the lower courts] . . . an appeal lies to the supreme court, in which case the citizen must at once give up his cause, or he must attend to it at the distance of perhaps more than a thousand miles from the place of his residence, and must take measures to procure before that court . . . all the evidence necessary to support his action, which even if ultimately prosperous must be attended with a loss of time, a neglect of business, and an expence which will be greater than the original grievance. [Isn't it obvious that geography is a problem here?]

John Marshall: Will a man on the Eastern Shore [of Virginia], be sent to be tried in Kentucky; or a man from Kentucky be brought to the Eastern Shore to have his trial? A Government by doing this, would destroy itself. I am convinced, the trial by jury will be regulated in the manner most advantageous to the community.

Moderator: Another concern Antifederalists have about the proposed judiciary is jury trials; specifically, the lack of provisions in the Constitution protecting the right to a jury trial in civil cases. Aristides, this seems to be a major omission in the proposed Constitution.

Aristides: The institution of the trial by jury has been sanctified by the experience of ages. It has been recognised by the constitution of every state in the union. It is deemed the birthright of Americans; and it is imagined, that liberty cannot subsist without it.

Moderator: Yes, but you have not addressed my question about the lack of protection for jury trials in civil cases.

Aristides: Is there not a great variety of cases, in which this trial is taken away in each of the states? Are there not many more cases, where it is denied in England? For the [Philadelphia] convention to <determine all the types of cases in which the right would and wouldn't operate>²³ was impracticable. On this subject, a future congress is to decide; and I see no foundation under Heaven for the opinion, that congress will despise the known prejudices and inclination of their countrymen.

An Old Whig: [We fear Congress, too.] As to the trial by jury, the question may be decided in a few words. Any future Congress sitting under the authority of the proposed new constitution, may . . . enact that there shall be no more trial by jury, in any of the United States; except in the trial of crimes; and this "SUPREME LAW" will at once annul the trial by jury, in all other cases.

Aristides: But again, I would remind everyone that] the proposed <Constitution>²⁴ expressly adopts it, for the decision of all criminal accusations . . . and is silent with respect to the determination of facts in civil causes.

Moderator: And I think therein lays an additional problem for Antifederalists. I think they fear that the right to jury trials in criminal cases is undermined by the appellate jurisdiction to determine facts in the federal courts. Is this the case?

Luther Martin: [Bingo.] Since . . . [the Constitution] expressly declares the supreme court shall have appellate jurisdiction both as to law and fact. Should . . . a jury [in a criminal case] be adopted [and reach a decision] in the inferior court . . . on an appeal [the Supreme Court could issue a] determination . . . as if [there] had never been [a trial] by a jury.

Samuel Bryan: We abhor the idea of losing the <ultimate>²⁵ privilege of trial by jury, with the loss of which . . . in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that trial by jury and the liberty of the people went out together.

Centinel: [Look, an authority no less than Blackstone once said that] this right of juries is founded on this: "That if the power of judging were entirely trusted with the magistrates, or any select body of men . . . their decisions, in spite of their own natural integrity, would have a bias towards those of their own rank and dignity. This therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the <intrusions>²⁶ of the more powerful and wealthy citizens."

Brutus: I believe it is a new and unusual thing to allow appeals in criminal matters. . . . 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 <state,>²⁷ and their verdict is final. . . .

Moderator: This almost seems like this could be double jeopardy; being tried twice for the same crime.

Brutus: [Exactly.] But by this system, a man may . . . have been acquitted by ever so respectable a jury of his <state;>²⁸ and still the officer of the government who prosecutes, may appeal to the supreme court.

John Marshall: [I know in my state, Patrick Henry made the argument that this right] . . . was secure in England. What makes it secure there?—Is it their Constitution?—What part of their Constitution is there, that the Parliament cannot change?—As the preservation of this right is in the hands of Parliament, and it has ever been held sacred by them, will the Government of America be less honest than that of Great-Britain?

Aristides: [Let's face it. It is possible to overestimate the purity of juries.] A jury, whose legal qualifications are only property and ripe age, may more probably, <be susceptible to biases and excessive pressures.>²⁹ [And again,] . . . congress is to make such regulations and exceptions, as upon mature deliberation, it shall think proper.

Federal Farmer: [I would conclude by saying we are overlooking an important practical consideration.] The trial by jury is . . . the wisest and most fit means of [the people] protecting themselves in the community. Their situation, as jurors . . . enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other. I am very sorry that even a few of our countrymen should consider jurors and representatives in a different point of view, as ignorant, troublesome bodies, which ought not to have any share in the concerns of government.

Moderator: Another issue that divides this panel is the question of independence of federal judges. Am I correct in saying that Federalists are content with the good behavior provision in Article III and Antifederalists have concerns? Am I correct in assuming Antifederalists want some sort of legislative review of judicial decisions?

Brutus: [Yes. Judges] are . . . totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many <incorrect decisions>.³⁰

Moderator: But isn't it a good thing for judges to have some degree of independence? As I recall the English system had this feature.

Brutus: 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.

Moderator: So what specifically is the problem here?

Brutus: 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.

Moderator: But, isn't this difference in the American system warranted? I presume you would suggest that we do not want to replicate the mistakes of the English system.

Brutus: [True, but] 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 set aside their judgment.

Publius: Which is <like>³¹ . . . most . . . of the state constitutions.

Brutus: [Let me finish.] 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.

Publius: [This] objection . . . disorders their imaginations and judgments.

Brutus: [Do I have to challenge you to a duel to shut you up?]

Moderator: Publius you'll have your chance. Let Brutus finish.

Brutus: [Thank you.] The <decisions>³² 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.

Moderator: Publius, you obviously have a rebuttal to this.

Publius: [Finally!] Whoever attentively considers the different departments of power must perceive . . . 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.

Moderator: I am not sure I follow.

Publius: The executive . . . 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 . . . 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 <enforcement>³³ of its judgments.

Brutus: There is no power provided in the constitution, that can correct their errors[!]

Publius: 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 <required>³⁴ to enable it to defend itself against their attacks.

Brutus: From this court there is no appeal[!]

Moderator: Brutus, I must ask you to allow Publius to continue.

Brutus: [This constitution has] made the judges independent, in the fullest sense of the word. There is no power above them, to controul any of their decisions[!]

Moderator: Brutus, again, let Publius speak.

Publius: If . . . the courts of justice are to be considered as the <foundations>³⁵ of a limited constitution against legislative <intrusions,>³⁶ 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.

Brutus: I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers.

Aristides: Away then with your trumpery of fictions! [Don't] accuse . . . the illustrious members of the convention of having in their contemplation such sophistry, pettifogging and <trickery!>³⁷

Moderator: Gentlemen. Gentlemen. Can we tone it down? Let's try to keep this civil. These types of attacks should not get in the way of our discussions.

Brutus: [OK, but again I would point out that] the supreme court . . . [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 [decisions.] . . . The judges are supreme—and no law, explanatory of the constitution, will be binding on them.

John Marshall: [But let's remember a critical point here.] What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood . . . or availing yourselves of force? . . . To what <sector>³⁸ will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection.

Moderator: At this point I would like us to consider the related issue of what many label “judicial review.” As I understand it both sides are generally in agreement that this power is implicit within the powers assigned to the courts in this Constitution. If this is the case, what then separates Federalists and Antifederalists on the issue?

Brutus: If . . . 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.

Publius: 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 . . . to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and <unique job>³⁹ of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law.

Brutus: [But,] under this system [the national courts] have . . . power which is above the legislative [branch], and which indeed transcends any power before given to a judicial by any free government under heaven.

Publius: No legislative act . . . contrary to the constitution can be valid. To deny this would be to affirm . . . that the servant is above his master; that the representatives of the people are superior to the people themselves.

Brutus: [But again,] the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort.

Publius: [Consider this.] There is no liberty, if the power of judging be not separated from the legislative and executive powers. And . . . 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.

Brutus: [The danger is that these courts] will <interpret>⁴⁰ every article of the constitution, that may . . . come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court.

Moderator: But Brutus, it seems that you are elevating the legislature above the judiciary?

Publius: [That's exactly my point;] that 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 <constitution,>⁴¹ rather than the <legislature.>⁴² They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Moderator: And Brutus, I presume you would suggest an even worse scenario?

Brutus: [Absolutely, mark my words.] The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner . . . I mean, an entire subversion of the legislative, executive and judicial powers of the individual states.

Moderator: I see that we have come to the end of our time. It would be good for both sides to give us a summary of their views. Let's start with the Federalists.

Hugh Williamson: Questions that are of a national concern . . . are to be referred to the national Judiciary, but they have not anything to do with a single case either civil or criminal, which respects the private and particular concerns of a State or its citizens.

Aristides: I can . . . with confidence, maintain, that, as there is no express clause, or necessary implication, to oust the jurisdiction of state courts.

John Marshall: [In my state, Virginia just] look at the dockets. You will find them crowded with suits. . . . If some of these suits be carried to other Courts, will it be wrong?

Publius: 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 <similar>⁴³ to most . . . of the state constitutions.

John Marshall: Are not the Judges of the Federal Court chosen with as much wisdom, as the Judges of the State Governments? Are they not equally, if not more independent?

Publius: 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. [This is] indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

Moderator: And let's conclude with several Antifederalists?

Samuel Bryan: The lengthy proceedings [will be] . . . such that few men of moderate fortune can endure the expence . . . the poor man must therefore submit to the wealthy. Length of purse will too often prevail against right and justice.

Federal Farmer: All those numerous actions, now brought in the state courts between our citizens and foreigners, between citizens of different states, by state governments against foreigners, and by state governments against citizens of other states, may also be brought in the federal courts; and an appeal will lay in them from the state courts, or federal inferior courts, to the supreme judicial court of the union.

Centinel: There will be . . . inferior courts . . . in each state; and laws and regulations . . . provided to direct the judges—here is a wide door for inconvenience to enter. The state courts of justice, like the barony and hundred courts of England, will be eclipsed and gradually fall into disuse.

An Old Whig: Judges may sit in the United States, as they did in some instances before the war, without a jury to condemn people's property and extract money from their pockets, to be put into the pockets of the judges themselves who condemn them.

Brutus: Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the . . . judicial [branch.] . . . In this situation . . . neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees . . . [and] 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.

Moderator: Well, we have come to the end of our time together. I hope we have been able to frame the critical issues that surround the national courts as proposed in the Constitution. I would like to again thank our panelists. Gentlemen, it has been a pleasure.

All Panelists: Thank you. It's been a pleasure. Good to be here. Thanks for having me. etc.

Endnotes

- ¹suffering
- ²invidious
- ³tribunals
- ⁴mere
- ⁵the question
- ⁶hydra
- ⁷objects
- ⁸in the contemplation of
- ⁹tribunal
- ¹⁰far the prevalency of a
- ¹¹like those of some of
- ¹²improper channels of the judicial authority of
- ¹³candour
- ¹⁴impracticable
- ¹⁵within the reach of his attachment
- ¹⁶writ
- ¹⁷the marshal, sheriff, or other officer of Congress
- ¹⁸voluminous
- ¹⁹consul
- ²⁰recollected
- ²¹trivial pretences
- ²²obviate
- ²³ascertain in what cases it shall prevail, and in what others it may be expedient to prefer other modes
- ²⁴plan
- ²⁵transcendant
- ²⁶encroachments
- ²⁷country
- ²⁸country
- ²⁹incur the imputation of weakness, partiality, or undue influence
- ³⁰erroneous adjudications
- ³¹conformable
- ³²adjudications
- ³³efficacy
- ³⁴requisite
- ³⁵bulwarks
- ³⁶encroachments
- ³⁷chicane
- ³⁸quarter
- ³⁹peculiar province
- ⁴⁰give the sense of
- ⁴¹latter
- ⁴²former
- ⁴³conformable

Pedagogical Materials

T-Chart for Notes–The Judiciary

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Questions–The Judiciary

1. To what extent, do you find Antifederalists speculations about the jurisdiction of the federal courts convincing? Do Federalists have reasonable rebuttals to these concerns?
2. Do you agree with Antifederalist argument that judicial independence is the same as judicial supremacy? If not, why not?
3. Do you agree with Federalist arguments that judicial review is an essential feature in a constitutional government?
4. In your opinion, is the rule of law undermined by the practice of judicial review?
5. To what extent were Antifederalist concerns over the jurisdiction of the national courts rooted in their fears about states losing powers?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 6, Federal Farmer and Hugh Williamson have very different views about the accessibility of federal courts for the common man.

On page 11, Brutus and Publius have very different views on the independence of the Judiciary.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important portions in the script. Characters in the story could include Publius, Brutus, and Centinel.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from Brutus' view of the Judicial Branch might be:

Brutus future was full of dark taint
Distant justice would cause us to faint
They're too independent
Their decisions resplendent
Mark my words we shall see no restraint