

Judicial Review, why is it so controversial?

What is Judicial Review?

It is the power to declare what the constitution means and whether the actions of the government officials violate the Constitution

U.S. History students first learnt about Judicial Review when examining the Supreme Court case of *Marbury v. Madison* which took place in 1803. It all began with the election of 1800, won by Thomas Jefferson. Before he took office, the federalists and president John Adams made forty-two “midnight appointments” in an attempt to deter Jefferson’s political powers. One of these was the appointment of John Marshall as chief justice. All of Adams’s appointments were confirmed but not all the commissions were delivered to the recipients under the instructions of Thomas Jefferson

William Marbury had been appointed as a justice of the peace by Adams but his commission was one of those halted by Jefferson. Marbury invoked Section 13 of the Judiciary Act of 1789, giving the Supreme Court original jurisdiction over cases in which parties required a writ of mandamus* which was an order to compel James Madison (Jefferson’s Secretary of State) to deliver his commission.

Three questions were raised in the Supreme Court

1. Was Marbury entitled to his commission?
2. If he had a right to the commission, did the laws of the United States afford him a remedy?
3. If the laws of the United States afforded a remedy, was a writ of mandamus from the U.S. Supreme Court the appropriate remedy?

Answers from the Supreme Court

Question 1 – YES

Question 2 – YES

Question 3 – NO

Chief Justice John Marshall claimed that Congress lacked authority to give the Supreme Court original jurisdiction because the *Constitution* is the only source of the Court’s original jurisdiction. Therefore, Section 13 of the Judiciary Act of 1789 was unconstitutional.

Marshall knew that if the Supreme Court issued a writ of mandamus Jefferson would have ignored the Court’s decision. This would have meant that the Supreme Court would no longer have any authority in court matters. Marshall cleverly declared the act unconstitutional in order to protect future cases and the powers of the Supreme Court.

* A writ of mandamus is a directive from the Supreme Court compelling government officers to perform a particular act or acts

Marbury v. Madison was the first test of the Supreme Court's jurisdiction but why?

The *Constitution* does not mention the power of judicial review. However, both Federalists and Anti-Federalists assumed that the Supreme Court would exercise judicial review. According to the *Constitution*, Article III only gives an outline of a national judiciary. Congress was given the job to create and clarify the role of the Supreme Court, which it did in the **Judiciary Act of 1789**.

The act created the following:-

- A Supreme Court consisting of a chief justice and five associate justices
- Thirteen federal districts (trial) courts and judgeships
- Three federal circuit (appellate) courts, staffed by two Supreme Court justices and a district court judge, who traveled throughout the country hearing appeals
- Defined the jurisdiction (power) of the lower federal courts
- Defined the jurisdiction (power) of the Supreme Court
- Power and original jurisdiction to the Supreme Court over cases in which parties requested a writ of mandamus

The Supreme Court justices have the final say about the meaning of the *Constitution*. According to Chief Justice John Marshall, Judicial Review rests on the following premises:

- The people exercised their sovereign power when they adopted the *Constitution*. The *Constitution* is a superior, paramount law that cannot be changed by ordinary means
- Particular acts of Congress, the executive, and the states reflect temporary, fleeting views of what the law is
- Acts of Congress, the executive, and the states that conflict with the fundamental law of the *Constitution* are not entitled to enforcement and must be disregarded
- Judges are in the best position to declare what the *Constitution* means. By striking down laws and acts that conflict with the *Constitution*, they preserve the nation's fundamental law and the true will of the people

Judicial Review was neither immediately nor universally accepted. Anti-Federalists feared that the Supreme Court would use its powers to eliminate the power of state courts. President Andrew Jackson argued against the existence of the Supreme Court and threatened not to enforce their decisions with which he disagreed, especially the removal of Native Americans from Georgia.

Not all judges accepted the doctrine of Judicial Review. In 1825, the case of *Eakin v. Raub* was heard in the Pennsylvania State Court. It was decided that the state supreme court had the power to review legislative acts and, if the acts were contrary to the state constitution, to declare such acts void. Arguments against judicial review were stated during this case by Justice John B. Gibson who stated:

- Legislatures are the repository (safe-keeping) of the people's sovereignty, and the exercise of judicial review is an act of sovereignty, which should reside with the legislatures or the people
- Judicial review could lead to political turmoil if the other branches of government, or the states, refuse to acquiesce (comply) to the Court's interpretation of the *Constitution*
- Judicial review makes the judiciary equal or even superior to the legislature, even though judges are not elected
- All officers of the government take an oath to support the *Constitution* and therefore all must consider the constitutionality of their actions
- The judiciary is not infallible (perfect). Judges' errors in interpreting the *Constitution* cannot be corrected at the ballot box, only by constitutional amendment

Today, judicial review is accepted in the United States with only a few special exceptions. However there are still questions relative to the opinions of both Chief Justices Marshall and Gibson.

1. Which, if any, of Gibson's arguments against judicial review remain relevant today?
2. Should the executive and legislative branches, as well as the judiciary, possess the power to declare what the *Constitution* means? Why or why not?
3. In what circumstances, if any, should the national judiciary have the power to declare state laws unconstitutional?

Source: *We the People, the Citizen and the Constitution*