Creation of the Federal Courts

Inquire: Expansion of the Constitutional Power of the Federal Courts

Overview

Article III of the Constitution sets up the third branch of the government — the judiciary. It is the shortest, least specific, and least descriptive article. It sets up only one court — the Supreme Court — and leaves everything else, and every other court, up to Congress.

However, in one of the most amazing twists of fate, brought on by the brilliance of one man, Chief Justice John Marshall, the federal courts have become at least the equals of the executive and legislative branches and, perhaps, even more powerful.

How did this come about? Follow the story of Chief Justice Marshall and a case entitled *Marbury v. Madison* as we uncover the truth in this story of incredible change.

Big Question: What was *Marbury v. Madison* and how did it change the power of the federal courts?

Watch: Courts as a Last Resort

While the U.S. Supreme Court and state supreme courts exert power over many when reviewing laws or declaring acts of other branches unconstitutional, they become particularly important when an individual or group comes before them believing someone has been wronged. A citizen or group that feels mistreated can approach a variety of institutional venues for assistance in changing policy or seeking support. Organizing protests, garnering special interest group support, and changing laws through the legislative and executive branches are all possible, but an individual is most likely to find the courts especially well-suited to analyzing the particulars of his or her case.

The adversarial judicial system comes from the common law tradition: in a court case, it is one party versus the other, and it is up to an impartial person or group, such as the judge or jury, to determine which party prevails. The federal court system is most often called upon when a case touches on constitutional rights. For example, when Samantha Elauf, a Muslim woman, was denied a job working for the clothing retailer Abercrombie & Fitch because the headscarf she wore as religious practice violated the company’s dress code, the Supreme Court ruled that her First Amendment rights had been violated, making it possible for her to sue the store for monetary damage.

Elauf had applied for an Abercrombie sales job in Oklahoma in 2008. Her interviewer recommended her based on her qualifications, but she was not given the job because the clothing retailer wanted to avoid
accommodating her religious practice of wearing a headscarf, or hijab. In doing so, the Court ruled, Abercrombie violated Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, and requires them to accommodate religious practices.

Such decisions illustrate how the expansion of individual rights and liberties for particular persons or groups over the years have come about largely as a result of court rulings made for individuals on a case-by-case basis.

Whether it is school segregation in Brown v. Board (1954), same-sex marriage in Obergefell v. Hodges (2015), a baker’s right to have his religious beliefs considered in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission (2018), or Ms. Elauf’s headscarf, it is the federal courts who protect the individual rights of people, regardless of political ideology.

Read: The Federal Courts Go from an Afterthought to Real Power

Overview

Under the Articles of Confederation, there was no national judiciary. The U.S. Constitution changed that, but Article III, which addresses the judicial power of the United States, is the shortest and least detailed of the three articles that created the branches of government. It calls for the creation of “one supreme Court” and establishes the Court’s jurisdiction — its authority to hear cases and make decisions about them — and the types of cases the Court may hear.

Just like the president is referred to as POTUS (President of the United States), the Supreme Court is often referred to as SCOTUS (Supreme Court of the United States).

The Original Court

The Constitution distinguishes between matters of original jurisdiction and appellate jurisdiction. Under original jurisdiction, a case is heard for the first time, whereas under appellate jurisdiction, the Court hears a case on appeal from a lower court and may change the lower court’s decision. The Constitution also limits the Supreme Court’s original jurisdiction to the rare cases of disputes between states, or between the United States and foreign ambassadors or ministers. So, for the most part, the Supreme Court is an appeals court, operating under appellate jurisdiction and hearing appeals from the lower courts. The rest of the judicial system’s development and the creation of the lower courts were left in the hands of Congress.

To add further explanation to Article III, Alexander Hamilton wrote details about the federal judiciary in Federalist #78. In explaining the importance of an independent judiciary, separate from the other branches of government, he said “interpretation” was a key role of the courts as they seek to protect people from unjust laws. But, he also believed “the judiciary department” would “always be the least dangerous” branch because “with no influence over either the sword or the purse,” it had “neither force nor will, but merely judgment.” The courts would only make decisions, not take action. With no control over how those decisions would be implemented and no power to enforce their choices, the courts could exercise only judgment, and their power would begin and end there. Hamilton would no doubt be surprised by what the judiciary has become today: a key component of the nation’s constitutional democracy, the chief interpreter of the Constitution, and the equal of the other two branches, though still checked and balanced by them.
The first U.S. Congress’ first session laid the framework for today’s federal judicial system, established in the Judiciary Act of 1789. Although legislative changes over the years have altered it, the basic structure of the judicial branch remains as it was set early on. At the lowest level are the district courts, where federal cases are tried, witnesses testify, and evidence and arguments are presented. A losing party who is unhappy with a district court decision may appeal to the circuit courts, or U.S. courts of appeals, where the decision of the lower court is reviewed. Still further, an appeal to the U.S. Supreme Court is possible, but of the thousands of petitions for appeal, the Supreme Court will typically hear fewer than 100 a year.

Gaining Power

However, it took years for the Court to be recognized as a “co-equal” branch with the president and Congress. Its first case of any significance, *Chisholm v. Georgia* (1793), was almost immediately overturned by the 11th Amendment (passed by Congress in 1794 and ratified by the states in 1795). It was an early hint that Congress had the power to change the jurisdiction of the courts as it saw fit, and stood ready to use it.

In this atmosphere of perceived weakness, the first chief justice, John Jay, an author of the *Federalist Papers* and appointed by President George Washington, resigned his post to become governor of New York and later declined President John Adams’ offer of a subsequent term.

In fact, the Court might have remained in a state of what Hamilton called “natural feebleness,” if not for the man who filled the vacancy Jay had refused — the fourth chief justice, John Marshall. Often credited with defining the modern court, clarifying its power, and strengthening its role, Marshall served in the chief justice position for 34 years. One landmark case during his tenure changed the course of the judicial branch’s history.

In 1803, the Supreme Court declared for itself the power of judicial review, a power to which Hamilton had referred but which is not expressly mentioned in the Constitution. Judicial review is the power of the courts, as part of the system of checks and balances, to look at actions taken by the states and other branches of government, and determine whether they are constitutional. If the courts find an action to be unconstitutional, it becomes null and void. Judicial review was established in the Supreme Court case *Marbury v. Madison* when, for the first time, the Court declared an act of Congress to be unconstitutional.

Wielding this power is a role Marshall defined as the “very essence of judicial duty,” and it continues today as one of the most significant aspects of judicial power. Judicial review lies at the core of the court’s ability to check the other branches of government — and the states.

Since *Marbury*, the power of judicial review has continually expanded. The Court has not only ruled actions of Congress and the president to be unconstitutional, but has also extended its power to include the review of state and local actions. The power of judicial review is not confined to the Supreme Court; it is also exercised by the lower federal courts and even the state courts. At the federal or state level, any legislative or executive action inconsistent with the U.S. Constitution or a state constitution can be subject to judicial review.
Reflect: Which Branch?

Poll
The executive branch executes the law, is the Commander-in-Chief, has significant influence over legislation with the veto power, and appoints all the Supreme Court Justices. The legislative branch makes all the laws, controls the budget, and confirms the Supreme Court Justices. The judicial branch has judicial review.

Which branch has the most power, in your opinion?
- Executive
- Legislative
- Judicial

Expand: In Marbury v. Madison, it’s Marshall for the Win!

Overview
"An act of the legislature repugnant to the Constitution is void — it is emphatically the province of the judicial department to say what the law is." John Marshall, Marbury v. Madison (1803)

The Constitution painstakingly defines the structure and functions of the legislative (Congressional) branch of the government. It clearly, although less thoroughly, addresses the responsibilities and powers of the president. But, it treats the judicial branch almost as an afterthought.

Article III specifically creates only one court — the Supreme Court — which allows judges to serve for life and to receive compensation, broadly outlines original and appellate jurisdiction, and outlines the trial procedure for, and limitations of, congressional power against those accused of treason. But, that's all.

Marshall Marshals the Court
The framers of the Constitution were clearly more interested in their experiment with legislative government than in the creation of a judicial system. Had it not been for John Marshall, the third chief justice of the Supreme Court, the judicial branch might well have developed into a weak, ineffective check on the legislature and the presidency.

But, Marshall changed everything by interpreting a power "implied" by Article III. Judicial review, or the power of the courts to overturn a law, was the vehicle he used to create the most powerful judicial branch in the history of the world.

Marbury v. Madison (1803): Power of Judicial Review
The power of judicial review may be traced to the famous 1803 court case of Marbury v. Madison. The election of 1800 gave the presidency to an opposing political party for the first time. Fearing that the newly elected Thomas Jefferson, a Democratic Republican, would undo his policies, Federalist president John Adams sought to "pack" the courts with Federalist judges. He worked feverishly on the judicial appointments until the very end of his presidency. When he left office, several of the orders were left on the secretary of state's desk, waiting to be delivered.
The new secretary of state, James Madison, saw what Adams was up to and refused to carry out the commissions. William Marbury, a Federalist whose commission was not delivered, sued Madison and demanded that the Supreme Court force Madison to act. Marbury’s demand was based on the **writ** of mandamus, a power given to the Court by the Judiciary Act of 1789 to command actions by officials of the executive branch.

Chief Justice Marshall faced a huge dilemma. What if he commanded Madison to deliver the commissions and the secretary of state ignored his command? What could Marshall do to enforce the decision? The Court had no army, nor any other means to back up the command. If Marshall did nothing, the quarrel could spill over to Congress and tear the new country apart before it even got off the ground.

A writ is a written court order requiring a party to perform or cease to perform a given act. Marshall’s decision was to declare the writ of mandamus unconstitutional, claiming that Congress had passed a law “repugnant to the Constitution.” He declared that Article III did not grant the judicial branch the power of the writ of mandamus, and so the Supreme Court was unable to order Madison to act. On the surface, Jefferson and Madison should have been happy — they won, right? Only a disgruntled prospective justice, Marbury, was left to protest. Except, maybe only Marshall was happy with the result.

**The Supreme Court Gets the Final Word**

Few seemed to understand the grand implications of what Marshall had done; he had essentially created the power of judicial review. But, Jefferson and Madison understood, and they realized the strong Federalists had established the precedent allowing only the federal courts to interpret the Constitution. Marshall and the federal courts have had the final word in settling virtually every major issue that would challenge the government during American history. Jefferson and Madison accepted the decision because it gave them the result they wanted, but they knew they did not win in the long run. The case was **Marbury v. Madison**, but the real winner was Chief Justice John Marshall and the federal judges.

Today, the judicial branch not only provides strong checks and balances to the executive and legislative branches, it possesses a tremendous amount of policy-making power in its own right. This power rests more on the precedent of judicial review, set by Marshall in 1803, than on the provisions of the Constitution.

**Lesson Toolbox**

**Additional Resources and Readings**

**Judicial Review: Crash Course Government and Politics #21**
- A video discussing Marbury v. Madison and how the court granted itself the power of judicial review
- [https://www.youtube.com/watch?v=mWYFwl93uCM](https://www.youtube.com/watch?v=mWYFwl93uCM)

**Page of History: The Evolution of Federal Court**
- A video discussing the evolution of the federal courts
- [https://www.youtube.com/watch?v=8_R6m5xHE9Y](https://www.youtube.com/watch?v=8_R6m5xHE9Y)

**John Marshall: The Most Important Judicial Figure in American History (2001)**
- A video talking about John Marshall and his legacy
- [https://www.youtube.com/watch?v=q4DcThqiz8Y](https://www.youtube.com/watch?v=q4DcThqiz8Y)
Lesson Glossary

**original jurisdiction**: the power of a court to hear a case for the first time

**appellate jurisdiction**: the power of a court to hear a case on appeal from a lower court, and possibly change the lower court’s decision

**judicial review**: the power of the courts to review actions taken by states and other branches of government, and to rule on whether those actions are constitutional

**Marbury v. Madison**: the 1803 Supreme Court case that established the courts’ power of judicial review, and the first time the Supreme Court ruled an act of Congress to be unconstitutional

**writ**: a written court order requiring a party to perform or cease to perform a given act

Check Your Knowledge

1. If it were not for John Marshall, the Supreme Court might have remained in a state of what Alexander Hamilton called “natural feebleness.”
   - A. True
   - B. False

2. Original jurisdiction is the power of a court to hear a case on appeal from a lower court, and possibly change the lower court’s decision.
   - A. True
   - B. False

3. The power of judicial review is given only to the Supreme Court.
   - A. True
   - B. False

Answer Key:

Citations

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