

Section 13, Judiciary Act of 1789

And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and *writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.*

U.S. Constitution, Article III, Section 1

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. . . .

Intent & History:

- March 4, 1789, ratified; September 24, 1789, the Act passed.
The argument for review of the Act for its Constitutionality assumes that the very people who drafted and ratified the Constitution then did the opposite just a few months later. That is an unstable foundation for such a sweeping power.
- Not France – its Constitution of 1789 says: “The tribunals cannot interfere in the exercise of legislative power, nor suspend the execution of the laws, nor encroach upon the administrative functions, nor cite before them the administrators on account of their functions.”
- Not England. See *City of London v. Wood*, 12 Mod. 669 (1700) (“An Act of Parliament can do no wrong, though it may do several things that look pretty odd.”)

Text:

- “Judicial review”? It is nowhere to be seen, you would expect something this sweeping to at least be mentioned.
- “Oath? Every official takes an oath to support the Constitution.
- “Arising under”?
 - (1) That just means you can hear the case; it doesn’t set up what the controlling law is (i.e., Congress’s interpretation, or the people’s)
 - (2) And, there can be plenty of cases arising under the Constitution, such as violations of the 4th Amendment by the police, or the 7th Amendment by a court, that have nothing to do with Congress.
- The “supremacy clause” is just a list of supreme laws, not an ordering.
- Written? Magna Charta is written.

Structure:

- Abuse?
 - o Voters check abuses by Congress. There is no corresponding check on judges other than impeachment, which is the “last-ditch” tool for all senior government positions.
 - o And that is a real issue, as Luther Martin of Maryland said during a state convention: “It is necessary that the supreme judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the legislature.”
- Ways to do judicial review:
 - o If you really like judicial review, you could have a purely procedural review rather than one that second-guesses the substance
 - o Or you could defer to Congress when the text of the Constitution is ambiguous.
 - o Or require a unanimous vote.
- Congress could of course do something silly, but so can the courts.
You could imagine a ban on aliens, or a seizure of a vital industry.
- At the Philadelphia Convention, John Dickinson of Delaware warns of the justiciary of Arragon. There would go these United States.