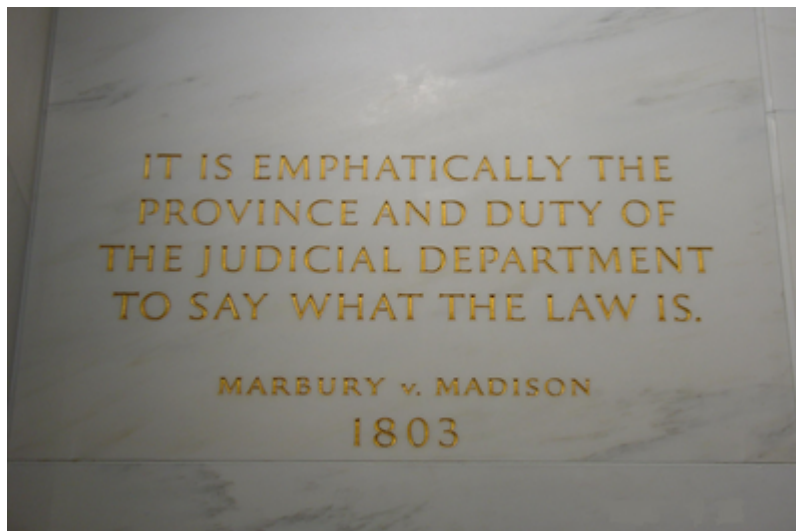


## Marbury v. Madison and the Principle of Judicial Review

### Standard 5.5: *Marbury v. Madison* and the Principle of Judicial Review

*Explain the Principle of Judicial Review established in Marbury v. Madison and explain how cases come before the Supreme Court, how cases are argued, and how the Court issues decisions and dissents.* (Massachusetts Curriculum Framework for History and Social Studies) **[8.T5.5]**



[Plaque on the Wall of the Supreme Court Building](#), by User:NuclearWarfare, Public Domain

### FOCUS QUESTION: How Does the Supreme Court Use the Power of Judicial Review to Interpret the Law?

[John Marshall](#), the fourth Chief Justice of the Supreme Court, was born in Fauquier, Virginia in 1755. His family was poor, and as a youth, he received little formal education. He fought in the American Revolutionary War, then studied law from 1779–80. Following that year of study he set up a law practice. In 1782 he was elected to the Virginia legislature. His rapid rise brought him to the Supreme Court, where he served from 1801 to 1835.



[John Marshall Engraving](#), by Charles-Balthazar-Julien Fevret de Saint-Mémin, 1808, Public Domain

Under his leadership, the ‘[Marshall Court](#)’ shaped the law and government of the United States by testing and defining the powers of the newly adopted U.S. Constitution. He established the principle of [Judicial Review](#) whereby the Court has the final say in deciding whether congressional legislation is constitutional.

### Modules for this Standard Include:

1. [INVESTIGATE: John Marshall and \*Marbury v. Madison\*](#)
2. [UNCOVER: The Trail of Tears, Chief John Ross, and Supreme Court Cases involving Native Americans](#)
3. [ENGAGE: Do Supreme Court Dissents Make a Difference to the Law?](#)
  - MEDIA LITERACY CONNECTIONS: Reading Supreme Court Dissents Aloud

## 1. INVESTIGATE: *Marbury v. Madison* (1803)

John Marshall's [Marbury v. Madison](#) (1803) decision formulated the concept of judicial review, giving the judicial branch the final decision on the constitutionality of laws passed by Congress. In other decisions, including [McCulloch v. Maryland](#), Marshall established his view of the power of the federal government over the states and their legislatures.



## Suggested Learning Activities

- **Design an Infographic or Digital Poster:** What was John Marshall's Impact on the Supreme Court
  - Explore the [resourcesforhistoryteachers](#) wiki page about [John Marshall and Marbury v. Madison](#) Supreme Court case.
  - [John Marshall, Marbury v. Madison, and Judicial Review—How the Court Became Supreme](#)
- **Learn Online**
  - ["Marbury v. Madison: An Introduction to Judicial Review" learning plan](#) has a series of interactive activities, primary source documents, and Jeopardy questions for review.

## Online Resources for John Marshall and *Marbury vs. Madison*

- [Justice in the Classroom](#) is a teaching resource funded by the John Marshall foundation. It offers a free online textbook, lesson plans, instructional videos, and allows you to request a historian or lawyer from the foundation come speak in your class.
- [Marbury vs. Madison: What Was the Case About? | History](#) (video)
- [Marbury v. Madison on PBS](#) from its series on the Supreme Court

## 2. UNCOVER: The Trail of Tears, Chief John Ross, and Supreme Court Cases Involving Native Americans

In the 1830s, the United States was transformed by events centered around three men: **John Marshall**, in his final years as Chief Justice of the Supreme Court; **Andrew Jackson**, the 7th President and **John Ross**, Chief of the Cherokee nation. Their interactions altered the country's physical landscape and redefined its political culture, replacing the Indian lands of the southeastern United States with what would become known as the "Deep South" of white plantations with Black slaves, what journalist Steve Inskeep has called "Jacksonland" (2015).

These transformative events began in 1830 with [Andrew Jackson's policy of Indian Removal](#). As part of the Indian Removal policy, native Tribes had to negotiate treaties with the United States government in which they gave up their homelands and then moved to new territories (examples: [Treaty of Dancing Rabbit Creek](#), 1830; the [Treaty of New Echota](#), 1835).

The Cherokee people protested the policy, notably [John Ross](#). He envisioned nationhood, not displacement and subjugation for his people ([Chief John Ross Protests the Treaty of New Echota](#)).



[Chief John Ross, 1843](#) by Charles Bird King, Public Domain

The [Indian Removal Act](#) went to the Supreme Court led by John Marshall. In a famous case, [Worcester v. Georgia](#) (1832), the Court ruled that the state of Georgia had no jurisdiction over the Cherokees, and therefore could not forcibly remove them from the territory. Read [Marshall's Opinion](#) in *Worcester v. Georgia*.

Andrew Jackson ignored the Court, declaring, "John Marshall has made his decision, now let him enforce it."

Then "in 1838 and 1839, as part of Andrew Jackson's Indian removal policy, the Cherokee nation was forced to give up its lands east of the Mississippi River and to migrate to an area in present-day Oklahoma" ([PBS, 1998, para. 1](#)).



Trail of Tears Map, National Park Service (2005)

[Map on Wikimedia Commons, Public Domain](#)

The Cherokee people called this forced journey the "**Trail of Tears.**" More than **4,000 out of 15,000 of the Cherokees died** from the devastations of hunger, disease, and exhaustion on the forced march. It was one of the darkest moments in United States history. Learn more from the *resourcesforhistoryteachers* wiki page: [The Trail of Tears](#).

In 2009, President Barack Obama signed a [Congress-passed apology for the Trail of Tears](#) entitled in part, "a joint resolution to acknowledge a long history of official depredations and ill-conceived policies by the federal government regarding Indian tribes."

## Suggested Learning Activities

### • Write & Illustrate a People's History

- Create an historically accurate people's history using historical accounts of the Trail of Tears from different sources:
  - a) [What Happened on the Trail of Tears](#), from the National Park Service
  - b) [A Brief History of the Trail of Tears from the Cherokee National Cultural Resource Center](#) (download PDF)
  - c) [Two Accounts of the Trail of Tears: Wahlenauhi and Private John G. Burnett](#), from Digital History
  - d) [The Human Meaning of Removal](#), primary sources from Digital History

### • State Your View

- Were Andrew Jackson's actions in defying the Supreme Court an obstruction of justice?
- Do they constitute an impeachable offense?



## Online Resources for The Trail of Tears and Native American Court Cases

- [Indian Removal Act: Primary Documents in American History](#), Library of Congress
- [Discover the Trail of Tears: A Lightning Lesson from Teaching with Historic Places](#), National Park Service (2018)
- Supreme Court Case: [Cherokee Nation v. State of Georgia](#) (1832)
  - [Marshall's Opinion](#) in Cherokee Nation v. Georgia
- Supreme Court Case: [Fletcher v. Peck \(1810\)](#)
  - [Marshall's Opinion](#) in Fletcher v. Peck
  - [Justice Johnson's Concurring Opinion](#)

### 3. ENGAGE: Do Supreme Court Dissents Make a Difference to the Law?

Courts in the United States operate on the principle of [stare decisis](#) (translated from Latin as "to stand by decided matters"). Judges decide cases based on how such cases were previously decided by earlier judges (Walker, 2016). Those earlier decisions are known as [legal precedents](#). A precedent is a rule or guide that has been established by previous cases.

Legal scholars refer to certain rulings as **super precedents** which are "*constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time*" (quoted from [Constitution Daily](#), October 20, 2020, para. 7).

On notable occasions, however, the Court changes its earlier interpretations in what have become known as **landmark cases**. The 1896 *Plessy v. Ferguson* "separate but equal" decision, for example, was reversed by the *Brown v. Board of Education* decision outlawing racial segregation in schools in 1954. *Brown v. Board of Education* is now considered a super precedent.

Landmark cases can change fundamentally how society operates. In *Gideon v. Wainwright* (1963), the Court held that anyone charged with a crime is entitled to free legal representation, a major change in granting full rights to those accused of a crime. In *Roe v. Wade* (1973) the Court stated that laws that restrict or deny a woman's access to abortion are unconstitutional. The law is never fixed, but rather it is always evolving as attitudes and situations change over time.

Cases before the United States Supreme Court are decided by a majority vote of the justices who author a written opinion explaining their reasons. Sometimes there are concurring opinions as well. The justices who voted in the minority also have the opportunity to explain their votes through what is called a **dissent** or **dissenting opinion**.



[Sign Message for Supreme Court Justice Ruth Bader Ginsburg at a 2018 Women's March in Missoula, Montana](#) by [Montanasuffragettes](#) and licensed [CC BY-SA 4.0](#)

**"I Dissent"** is a powerful statement of politics and law. Dissents establish a counter-narrative to the majority opinion that can, over time, lead the Court and public opinion in new directions. As [Ruth Bader Ginsburg](#) stated:

*"Dissents speak to a future age. It's not simply to say, 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today but for tomorrow."*

There are many historic dissents in Supreme Court history: Benjamin Robbins Curtis in the Dred Scott case; [John Marshall Harlan](#) (known historically as "The Great Dissenter") in *Plessy v. Ferguson* (Harlan wrote: it is wrong to allow the states to "regulate the enjoyment of citizens' civil rights solely on the basis of race"); Oliver Wendell Holmes in *Abrams v. United States*; Robert Jackson in *Korematsu v. United States*; and Harlan Fiske Stone in *Minersville School District v. Gobitis*. All were statements in support of personal freedoms and liberties. Before his death, Justice Antonin Scalia was a frequent dissenter, supporting an originalist interpretation of the Constitution.

In the course of her career on the Court, [Ruth Bader Ginsburg](#) (RBG) authored many notable dissents, including in a gender discrimination case brought by Lilly Ledbetter against the Goodyear Tire & Rubber Company in 1999. A lower court had awarded Ledbetter 3.8 million in back pay and damages, reflecting 19 years in which she worked and earned lower pay than male co-workers. In a 5 to 4 vote, the Supreme Court overturned the lower court decision which occasioned Ginsburg's historic 2007 dissent (listen to the [audio of her dissent](#)).

Justice Ginsburg's ideas helped lead to the passage of the [Lilly Ledbetter Fair Pay Act of 2009](#).

You can learn more about the career of Justice Ginsburg in the picture book, [I Dissent: Ruth Bader Ginsburg Makes Her Mark](#) (Debbie Levy, Simon & Schuster Books for Young Readers, 2016).

## Media Literacy Connections: Reading Supreme Court Dissents Aloud

Each **term** (the time period from the first Monday in October to late June/early July), the United States Supreme Court decides between 70 and 80 cases and there are dissents in 60% of them. A **dissent or dissenting opinion** is a statement by a judge expressing and explaining disagreement with the Court's majority opinion.

Occasionally, but notably, these dissents are read aloud from the bench by a dissenting justice. The impacts of a read aloud can be far-reaching.

The late Justice [Ruth Bader Ginsburg](#) (RBG) produced one of the Court's most dramatic dissent read alouds in the famous gender pay discrimination case, [Ledbetter v. Goodyear Tire & Rubber Company](#) (2007).

In 1999, Lilly Ledbetter sued her employer, Goodyear Tire & Rubber Company on the grounds that she had been receiving lower pay than her male coworkers for 19 years. She won a \$3.8 million settlement in federal court. However, the Supreme Court (by a 5 to 4 vote) reversed that decision, saying Ledbetter's claim had not been made within a 180 day time charging period.

Ginsburg, the only woman justice on the Court at the time, [dissented passionately](#), declaring that the Court "did not comprehend or is indifferent to the insidious way in which women can be victims of pay discrimination."

Two years later, President Obama signed the [Lilly Ledbetter Fair Pay Act of 2009](#) that reversed the Supreme Court's decision. Ginsburg's dissent is credited as providing the political and social momentum needed to enact this major milestone in the quest for equal rights for women.

In this activity, you will listen to Ruth Bader Ginsburg's famous dissent spoken aloud and consider how hearing a dissent spoken directly by a Supreme Court justice might influence people's thinking.

- [Activity: Evaluate the Impact of Spoken Words in Supreme Court Dissents](#)



[Watch on YouTube](#)



## Suggested Learning Activity

- **Write a Dissent**

- Dissent writing illustrates the power of words and the importance of a well-reasoned arguments in presenting one's ideas.
- Individually or in groups, write a dissent to existing school or community policies and practices that affect students and their families.

## Online Resources for Dissents

- [How to Read a U.S. Supreme Court Opinion](#), American Bar Association, November 27, 2018
- [The Power of a Supreme Court Dissent](#), David Cole, *The Washington Post* (October 29, 2015)
- [Looking Back: Famous Supreme Court Dissents](#), from the National Constitution Center
- [John Marshall Harlan's Dissent](#) in *Plessy v. Ferguson* (1896)
- [Oliver Wendell Holmes and the Most Famous Dissent in American History](#), The Atlantic (April 10, 2013)
  - [Abrams v. United States \(1919\), Justice Holmes Dissenting](#)
- [5 Opinions from Justice Antonin Scalia That Are Worth a Read](#), NPR (February 13, 2016)
- [Lilly Ledbetter: RBG's Dissent in Landmark Case Still Gives Me 'Chills'](#)

## Standard 5.5 Conclusion

"The Constitution means what the Supreme Court says it means," said Professor Eric J. Segal (2016) in the [Harvard Law Review Forum \(2016\)](#). **INVESTIGATE** examined the impact of John Marshall, the Chief Justice who established the power of judicial review for the Supreme Court. **UNCOVER** reviewed at the Trail of Tears, a seminal event in First American history when the power of the federal government's President was pitted against Indian tribes and the Supreme Court itself. **ENGAGE** asked how dissenting opinions by Supreme Court justices can make a difference in how the law is understood and applied.



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