

THE FEDERALIST #78

1. Appointments.

First. As to the mode of appointing the judges: this is the same with that of appointing the officers of the union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

2. Elements of and reasons for Judicial Independence.

Second. As to the **tenure** by which the judges are to hold their places: This chiefly concerns **their duration in office**; the provisions for **their support**; the **precautions for their responsibility**.

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 conformable to the most approved of the state constitutions . . .

3. Supreme Court's authority depends not on force, but on judgment.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, 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...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 efficacy of its judgments.

Note: In *Marbury*, C.J. Marshall knew that Pres. Jefferson would not enforce a judgment against Sec. Madison.

4. The weakest branch and the consequences of that.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power;* [quotes Montesquieu to same effect] that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter:



Hamilton defends the power of judicial review by framing the judiciary as the weakest of the three branches - it has neither force nor will, but only mere judgment. I wonder if he would still defend that assessment of the judicial branch if he knew the current place of the Supreme Court of the United States in American culture.

It is striking from today's vantage point that a Founding Father was more concerned with a runaway legislature than a runaway judiciary.

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5. What if the judiciary is dependent on another branch -- despite nominal separation.

I mean, so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”† And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

6.Limited constitution with restraints on the legislature requires judicial independence.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no ex post facto laws, and the like.

7. Claim that the courts will be superior to the legislative branch.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

8. The Constitution is superior--delegates only certain powers to the legislative branch.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

Question: If true, why does the Court often say that acts of Congress have a presumption of constitutionality?

9. The claim: legislative power conclusively determines constitutionality of its acts.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents.

10. The Constitution as representing the intention of the people.

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, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

11.C.J. Marshall in *Marbury* plagiarizing from Federalist #78.

Marshall: “It is emphatically the province and duty of the judicial department to say what the law is.”

Federalist #78: “The interpretation of the laws is the proper and peculiar province of the courts.”

12. The structure of the argument in *Marbury*.

The issue: Is Marbury entitled to his judicial appointment even though his commission was not delivered?

- (1) Does Marbury have a right? Yes
- (2) Is there a remedy? Yes, a mandamus.
- (3) Can this Court grant the remedy? No. It lacks the jurisdiction because the provision in the Judiciary Act violates the Article III language regarding the Supreme Court.

Note. Pres. Jefferson contended that Marshall have only said the Court lacked jurisdiction.

Question” What was the significance of mandamus?

13. The judiciary not superior to the legislative; the people are superior to both.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Note: Justice Holmes: judges make law.

Justice Story for the Marshall Court: judicial opinions are not law.

Lincoln: final court judgments control the parties, but precedent is not necessarily binding.

14. With contradictory laws, following the later-in-time is only a rule of construction.

This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression..... it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing.

16. Claim: the courts may substitute their own will to that of the legislature.

This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

Note: McCulloch and Gibbons.

17. Permanent tenure justification: blocking legislative violations of the Constitution.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices[.]

18. Judicial independence protects the rights of individuals.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

19. Constitution binds all until changed, but difficult for judges to resist majority.

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually: and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

21. Temporary appointments of judges would be fatal.

That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

22. Only few will have the learning and integrity to deal with the growing body of law.

It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.

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24. Claim: interpreting the Constitution should rest, like England, in the legislature.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect:

“The authority of the supreme court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the state constitutions in general. The parliament of Great Britain, and the legislatures of the several states, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States, will be uncontrolable and remediless.”

25.False reasoning re “the spirit of the constitution.”

This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan, which directly empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect, than may be claimed by the courts of every state. I admit, however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution;



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1. Hamilton seems to be arguing that the Supreme Court will not have unlimited power in its interpretations of the Constitution nor federal laws. It seems to me that we have seen the Supreme Court ignore this, and instead do what 5 Justices decide they want to do to enact social change. (Obergefell, Roe, Engle, etc.)
2. Hamilton argues that because the courts cannot “support its usurpations by force” it is relatively weak compared to the other branches; However, because (a) the courts are necessary to implement the other branches, (b) the other branches are bound by the courts’ rulings, and (c) the Supreme Court feels comfortable doing whatever it likes, the courts have upset the balance of the separation of powers.

26. Members of legislatures generally not fit as judges.

The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information; so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and of equity.

27. Distinction between judgments and future legislation to change a precedent.

It is not true, in the second place, that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British nor the state constitutions, authorizes the revisal of a judicial sentence by a legislative act. A legislature, without exceeding its province, cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies, in all its consequences, exactly in the same manner and extent, to the state governments, as to the national government, now under consideration.

30. Is this statement still true? What about Dred Scott? Lincoln's response.

Particular misconstructions and contraventions of the will of the legislature, may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force.

31.Impeachment as a complete security.

And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. **This is alone a complete security.** There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the senate a court for the trial of impeachments.

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35. Complaint: no bill of rights.

The most considerable of the remaining objections is, that the plan of the convention contains **no bill of rights**. Among other answers given to this, it has been upon different occasions remarked, that the constitutions of **several of the states are in a similar predicament.**

To the first I answer, **that the constitution offered by the convention contains, as well as the constitution of this state, a number of such provisions.**

37. Rights included.

Independent of those which relate to the structure of the government, we find the following: [limitations on impeachment; difficulty of suspending habeas corpus; No bill of attainder or ex post facto law; No title of nobility; Emolument clause; Criminal jury trial; Limitations on punishment of treasons].

38.State constitutions reference to common law not protected from legislative change.

To the second, that is, to the pretended establishment of the common and statute law by the constitution, I answer, that they are expressly made subject “to such alterations and provisions as the legislature shall from time to time make concerning the same.” They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law, and to remove doubts which might have been occasioned by the revolution. This consequently can be considered as no part of a declaration of rights; which under our constitutions must be intended to limit the power of the government itself.

39. Historically, bills of rights are stipulations between king and his subjects.

It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favour of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the Barons, sword in hand, from king John... Here, in strictness, the people surrender nothing; and as they retain every thing, they have no need of particular reservations. [Publius quotes the preamble]

40. Detailed list of rights inappropriate, and dangerous, for a limited constitution.

But a minute detail of particular rights, is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns....

I go further, and affirm, that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous.

They would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

41. Definitional problems; need support of freedom of press needs public opinion.

On the subject of the liberty of the press, as much has been said, I cannot forbear adding a remark or two:...What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.* And here, after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.

Note: social media censorship. Judge Silberman's recent dissent.



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Hamilton's comment that a bill of rights is "not only unnecessary in the proposed Constitution, but would even be dangerous" appears now to be even more relevant than may have been understood then. Not only did the addition of a bill of rights imply that the federal government now had increased authority over the areas mentioned in the bill of rights, but today every single right mentioned in the Bill of Rights is subject to limiting regulation (free speech is regulated in certain scenarios, free exercise is restricted in certain scenarios, the right to carry firearms is limited in certain scenarios, etc.). It seems as though the inclusion of a right in the bill of rights functionally resulted in a direct invitation for the federal government to restrict or hamper the right.

Related to the previous point, it seems counterintuitive that the opponents of the Constitution would seek to include a bill of rights and simultaneously protest that the federal government would be too far away from the people to be adequately accountable and controlled. If the opponents were truly concerned about these rights and an unaccountable government, then they would have more logically sought to establish bills of rights at their more-local state level and simply sought to forbid the government from interfering with such state determinations.

The other primary point Hamilton seems to address is the funding of the government: here it seems clear that the Founders never intended to have "professional" politicians perpetually serving in Congress (much less career bureaucrats spending their entire lives paid by the administrative state). It seems Hamilton believed that having such a professional political class was dangerous, as they would become disconnected from their home communities and would seek to stay in power by any means necessary. I would posit that his fear was completely justified.

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42. The structural Constitution as a bill of rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights, in Great Britain, form its constitution, and conversely the constitution of each state is its bill of rights. In like manner the proposed constitution, if adopted, will be the bill of rights of the union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the state constitutions.

43.Pre-17th amendment, the states executives and legislators were to alert the people.

The executive and legislative bodies of each state will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behaviour of those who represent their constituents in the national councils,

44. The principals department of the new government like those of the Confederation.

It is evident that the principal departments of the administration under the present government, are the same which will be required under the new. There are now a secretary at war, a secretary for foreign affairs, a secretary for domestic affairs, a board of treasury consisting of three persons, a treasurer, assistants, clerks, &c. These offices are indispensable under any system, and will suffice under the new, as well as the old.

45. Federalist #85

[Publius quotes Hume]“to balance a large state or society (says he) whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work: **EXPERIENCE** must guide their labour: **TIME** must bring it to perfection: and the **FEELING OF** inconveniences must correct the mistakes which they inevitably fall into, in their first trials and experiments.”

New Program: Argumentation

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