

Against Judicial Supremacy: The Founders and the Limits on the Courts

Report [Courts](#)

Against Judicial Supremacy: The Founders and the Limits on the Courts

January 25, 2019 About an hour read

Carson Holloway

Visiting Scholar, 2014-15 Visiting Fellow in American Political Thought

Summary

Americans' contemporary understanding of judicial power is inconsistent with the argument put forward by Hamilton and Madison in *The Federalist*. Although *The Federalist* affirms the power of judicial review—and hence the role of the judiciary as a check on the other branches—it does not present this as the first or most important function of the courts. Moreover, *The Federalist* does not support the vast implications of judicial review as including a power to decide the great moral issues of the times and to adjust the Constitution to trends in public opinion. Finally, *The Federalist* lends no aid to the belief that the Supreme Court is the ultimate interpreter of constitutional meaning, unanswerable for its interpretations to any authority but itself.

Key Takeaways

The Federalist's understanding of the judicial power is significantly more circumscribed than is understood by many Americans today.

This original account of judicial power is more consistent with republican self-government and the sovereignty of the American people.

Congress may rightly discipline the judiciary by impeaching and removing from office judges who abuse the judicial power.

[Twitter](#) [Facebook](#) [Link](#) [Checkmark](#) Copied [Print](#)

Select a Section 1/0

▶ Toggle open close

Americans are inclined to have a very exalted conception of the judiciary's role in our nation's political life. Most of us think that the first task of the courts is to act as a check on the other branches of the federal government. This understanding tends to identify the federal courts with their power of judicial review, i.e., their authority to declare void acts of the other branches that are contrary to the Constitution. Today, if one asks an ordinary citizen what is the job of the nation's courts, he or she is likely to answer with something along these lines.

In addition, many Americans understand the power of judicial review as including a vast responsibility to decide what is right or just for the country on the big questions of domestic policy. On this view, the exercise of judicial review requires the courts to seek the moral meaning of the Constitution or to inquire into the spirit of justice that informs our fundamental law. For those who hold this view, it is not surprising, but rather to be expected, that the Supreme Court would finally settle for the nation our debates about issues like abortion and same-sex marriage.

Some Americans—proponents of the “living Constitution”—even expect the courts to use the power of judicial review to keep the Constitution in tune with contemporary moral opinions. For them, the meaning of the Constitution is not static but changing—and indeed, changing for the better. In this view, society progresses toward ever higher standards of public enlightenment and justice, and it is the duty of the courts—and particularly of the Supreme Court—to make sure that the Constitution keeps pace with this social progress.

Finally, most Americans believe that the Supreme Court's judgments on the momentous questions entrusted to it are final—that they cannot, except in the case of formal amendments to the Constitution, be revisited by any authority other than the Court itself. That is, most Americans today believe in judicial supremacy. They think that the Supreme Court is supreme not only over all other American courts, but also over the other branches of the federal government. On this view, the constitutional judgments of the Supreme Court are binding on the presidency and the Congress, which are required by respect for the Court and for the rule of law itself to submit to the Court's interpretation of our fundamental law.

Although the courts have always held a key place in our constitutional system, this very lofty conception of their authority has largely arisen over the past several decades. The rise of this view can be traced in part to the influence of modern liberalism, which has used the courts as instruments of social and political change and has accordingly had to bolster the authority of the judiciary. Many of the Left's recent causes—such as the liberalization of abortion law, race-conscious programs of affirmative action, and same-sex marriage, to take just three examples—are highly controversial and probably could not have succeeded on a national scale if their proponents had relied solely on appeals to the ballot box. At the very least, these policies could not have advanced as far and as quickly as they did if they had been left to the voters and their elected representatives.

Since many of these policies are not clearly required by the text of the Constitution—or, in the case of

affirmative action, may even be in tension with it—the Left has had to argue for a more free-wheeling kind of judicial review. Hence the Left’s defense of moralized readings of the text, not merely to enforce clear constitutional provisions, but to vindicate what it holds to be fundamental values, as well as interpretations intended to keep the Constitution “living,” or in tune with what the Left believes to be the prevailing norms of the day. And, since many of the Left’s causes have been so controversial, it has had to foster an exalted conception of the Court’s authority, lest citizens and their elected leaders push back, trying to reverse through political action the gains won through litigation.

To some extent, this lofty view of the Court’s authority has been encouraged by justices of the Supreme Court themselves. In *Planned Parenthood v. Casey*, Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter declined to overrule *Roe v. Wade* (1973), claiming that such a move would undermine the public legitimacy of the Court by making it seem to bend to public pressure. This would be dangerous, they contended, because the Court’s legitimacy is essential to the nation’s understanding of itself as a law-abiding nation and a constitutional republic. Americans’ “belief in themselves” as a “people who aspire to live according to the rule of law,” these justices contended, is “not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”REF

And, since many of the Left’s causes have been so controversial, it has had to foster an exalted conception of the Court’s authority, lest citizens and their elected leaders push back, trying to reverse through political action the gains won through litigation.

Many Americans have probably accepted this grand vision of the Court’s authority out of respect and gratitude for the key role the Court played in the civil rights movement. Most Americans today agree that the legal revolution in race relations—the destruction of segregation—had to take place if America were to call itself a just nation according to its own professed standards of justice. Yet most Americans can also easily see that this revolution might have been delayed a generation, or perhaps indefinitely, without the intervention of the courts. And it was in the context of enforcing desegregation that the Supreme Court expressed with great force its claim to an authority to decide for the whole country, including all other public authorities, the meaning of the Constitution. In *Cooper v. Aaron*, a case involving the implementation of *Brown v. Board of Education* (1954), the Court asserted the “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution” and that therefore other public authorities could not decline to follow its directives without making “war against the Constitution.”REF

Nevertheless, this expansive modern understanding of the judicial power is inconsistent with the argument put forward in the single most authoritative commentary on the Constitution to emerge from the founding, *The Federalist*. Although *The Federalist* affirms the power of judicial review, and hence the role of the judiciary as a check on the other branches, it does not present this as the first or most important function of the courts. Moreover, *The Federalist* does not support the vast implications of judicial review as it is often understood today—as including a power to decide the great moral issues

of our time and to keep the Constitution in tune with contemporary values.

Finally, *The Federalist* lends no aid to the modern view of judicial supremacy, the belief that the Supreme Court is the ultimate interpreter of the meaning of the Constitution, unanswerable for its interpretations to any authority but itself. On the contrary, *The Federalist* points instead to the older view, sometimes called “departmentalism,” that each of the branches of the federal government—legislative, executive, and judicial—is co-ordinate and co-equal with the others, and that each therefore has an equal power to interpret the Constitution authoritatively in the execution of its own powers.

The First Purpose of the Judicial Power

The foundation of the federal judiciary is laid in Article III of the Constitution, which provides for “one supreme Court,” as well as for “such inferior Courts” as Congress may choose to erect. In its core statement of the authority of these courts, Article III provides that 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,” as well as to other cases of interest to the country as a whole.^{REF}

Article III does not even mention the power of judicial review—and therefore offers no support to the idea that the first or most important job of the courts is to check the other branches of government. On the contrary, the language of Article III instead emphasizes the role of the courts in assisting the other branches in carrying into effect the authoritative acts of the government.

This, after all, is what ordinarily happens when courts exert their “power” in “cases” that are brought before them. Such cases involve the judicial scrutiny of the actions of individuals to determine whether they conform to the pre-existing, authoritatively established rules of the country—that is, as Article III indicates, the laws and treaties of the United States, as well as the Constitution itself. When courts find that individuals have fallen afoul of such rules, they then exert their power to remedy or punish the wrong, thus vindicating the law in the present case and encouraging obedience to it in future ones. Simply put, the first job of the courts is not to resist the other branches of the government but to assist them and is not to strike down laws but to carry them into effect in particular cases.

This understanding of the primary task of the federal courts is affirmed by *The Federalist*. Although this work, as we will see, contemplates the exercise of judicial review, it first emphasizes the role of the courts in assisting the other branches of the government in enforcing the law. Writing in the 15th and 16th *Federalist* essays, Alexander Hamilton explained how the federal courts were essential to establishing the genuine power of the government over its own citizens, a power necessary for the government to exist in reality and not just in theory.

The Constitution was designed to replace the Articles of Confederation. According to Hamilton, the “great and radical vice” in the Articles was “the principle of legislation for states or governments,” which prevented the federal government from enacting laws that could be directly enforced on

individual citizens.REF This principle, Hamilton held, rendered the federal government under the Articles effectively impotent. The Confederation Congress issued decisions that were supposed to bind the state governments and then relied on the state governments to execute them. In most cases, however, these directives were ignored or imperfectly observed because state officials, out of love of their own power or excessive attachment to local interests, declined to carry them out. The country, then, needed, and the Constitution was designed to provide, a federal power to act directly on individuals—a federal government with authority to execute its own resolutions by forcing, if necessary, the compliance of individuals.

According to Hamilton, the federal courts were essential to this power. A federal government truly capable of governing would have to be able to “carry its agency to the persons of the citizens” and be “empowered to employ the arm of the ordinary magistrate to execute its own resolutions.” This, in turn, required that the “majesty of the national authority” be “manifested through the medium of the courts of justice,” through whom the government could secure the obedience of “individuals” by addressing “itself immediately” to their “hopes and fears.”REF

James Madison had made the same point at the Constitutional Convention, where he had contended that the federal government needed to have its own courts to see to the enforcement of its own laws. “An effective judiciary establishment commensurate to the legislative authority was essential,” he said. “A government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.”REF

Americans often think that the main aim of the Constitution is to limit the power of the federal government. But that is only half of the story. As Hamilton reminds us, the first aim of the Framers in drafting the Constitution was to empower the national government, to give it the authority necessary to perform its functions.

On this view, the first purpose—in the sense of the most ordinary task—of the federal courts is not to check the power of the federal government but instead to act as an arm of its power. This misconception of the first job of the federal courts is related to—indeed is another version of—a more general misconception about the first purpose of the Constitution itself. Americans often think that the main aim of the Constitution is to limit the power of the federal government. But that is only half of the story. As Hamilton reminds us, the first aim of the Framers in drafting the Constitution was to empower the national government, to give it the authority necessary to perform its functions. The limits to its powers are important, but not more important than the powers themselves—just as judicial review is important, but not more important than the courts’ ordinary duty to put the laws into practice by applying them to individuals in particular cases.

Judicial Review

Although judicial review is not the primary or most important function of the judiciary, it is certainly a legitimate power. Although not expressly granted by the Constitution, it is undoubtedly a result of

reasonable implication. This was understood and affirmed at the time of the Founding.

One of the leading Anti-Federalist writers, Robert Yates, writing as “Brutus” in the *New York Journal*, deduced the power of judicial review from the language of Article III of the Constitution. The relevant passage provides, again, that 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.” In interpreting this passage, Yates noted that “cases arising under the Constitution must be” understood as a distinct category “from those arising under the laws.” Otherwise, “the two clauses” would “mean exactly the same thing,” which Yates properly rejected as an implausible reading of the text. Such “cases arising under the Constitution,” moreover, “must include such as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it.” The Constitution, then, expressly authorizes the judiciary to hear cases arising under the Constitution. And such a power inevitably implies an authority to inquire into the meaning of the Constitution. Accordingly, Yates concluded that Article III “vests” the courts “with a power to resolve all questions that may arise” in “any case on the construction of the Constitution either in law or equity.”^{REF} In addition, Yates continued, the power to interpret the meaning of the Constitution in cases necessarily implies a power to refuse to carry out the unconstitutional acts of the other branches of the federal government. After all, the courts “cannot...execute a law, which, in their judgment, opposes the Constitution,” since we cannot “suppose they can make a superior law give way to an inferior.”^{REF}

Writing in *The Federalist* as a defender of the Constitution, Alexander Hamilton drew the same conclusion. The power of judicial review, he suggested, was inseparable from a limited constitution such as the Convention had proposed. Such a constitution, Hamilton explained, “contains certain specified exceptions to the legislative authority,” such as the prohibitions on “bills of attainder...ex post facto laws, and the like.” Such constitutional limitations on the power of the government, however, could be “preserved in practice in no other way than through the medium of the courts of justice,” which have a “duty” to declare “void” all acts contrary to the Constitution. Without such an authority in the courts, he concluded, “all the reservations of particular rights or privileges” in the Constitution “would amount to nothing.”^{REF}

Like Yates, Hamilton also emphasized that the power of judicial review arose from the judges’ obligation to treat the Constitution as a superior law. The “interpretation of the law is the proper and peculiar province of the courts,” who must regard the Constitution “as a fundamental law.” Accordingly, it belongs to the courts to ascertain the meaning of the Constitution and of every other law in cases that require such inquiry. And when it finds a conflict between the two, a court must give preference to the Constitution because it is the fundamental law, of higher obligation than any statute. Courts, after all, must “regulate their decisions by the fundamental law, rather than those which are not fundamental.”^{REF}

The power of judicial review, then, is no usurpation or invention. Both the leading critics and

defenders of the Constitution agreed that this power is reasonably implied by both the theory of the Constitution and the actual words of its relevant provisions. Beyond that point, however, the agreement broke down. Yates and Hamilton differed about how to understand the scope of the judicial power. That disagreement, moreover, is instructive for us today, because it undermines rather than supports the lofty pretensions of the contemporary judiciary. Yates anticipated something like the modern imperial court—and he presented it as an object of dread. In response, Hamilton contended that such a judiciary would be inconsistent with the Constitution, properly understood.

Yates anticipated something like the modern imperial court—and he presented it as an object of dread. In response, Hamilton contended that such a judiciary would be inconsistent with the Constitution, properly understood.

Judicial Supremacy: The Anti-Federalist Warning

Robert Yates foresaw the possibility—and warned against the danger—of a Supreme Court with the vast discretion and outsize role often attributed to the Court by many contemporary Americans. Yates feared an expansive version of judicial review that would empower the Court not just to interpret the Constitution but to determine its meaning on the basis of the judges' own opinions about the spirit of justice. Moreover, he contended that the Court would become the highest authority in the government, since the other branches would be absolutely obligated to obey the Court's decisions and would themselves have no power by which to restrain, correct, or discipline the judges.

According to Yates, Article III of the Constitution authorizes the courts to determine the meaning of the Constitution as law, that is, to “give” it “a legal construction, or to explain it according to the rules laid down for construing a law.” In other words, the Constitution authorizes courts to interpret the words or the text of its various provisions. This power necessarily involves some judicial discretion because the “rules” of legal construction “give a certain latitude of explanation.”^{REF} Here, then, Yates sees an opening for the emergence of a Court with the freedom to decide important questions and impose its decisions on the country.

For Yates, however, the real danger lay in the combination of the power of judicial review with the courts' authority to pursue not only a legal but an equitable interpretation of the Constitution.

According to an ancient tradition of Anglo-American law, doing justice in certain cases may require a judge to turn to the principles of “equity,” that is, to look beyond the words of the law and to consider its more fundamental intention, or its animating spirit. Article III seems to acknowledge that tradition by authorizing the courts to hear cases arising “in law and equity.” According to Yates, this power to decide cases according to principles of equity empowers judges “to explain the Constitution according to the reasoning spirit of it, without being confined to the words or letter.”^{REF} Here Yates foresees the possibility of a vast power of judicial review, unfettered from the text, permitting judges to decide great national questions according to their opinion of the Constitution's larger meaning or spirit.

Because of this power, Yates warned, the judges “will give the sense of every article of the Constitution that may from time to time come before them. And in their decisions they will not confine

themselves to any fixed or established rules but will determine according to what appears to them the reason or spirit of the Constitution.”REF

Moreover, Yates warned, this unfettered constitutional discretion would vastly expand the power of the Supreme Court. Judges, after all, would be personally “interested in using” their “latitude of interpretation.” “Every body of men invested with office,” Yates observed, “are tenacious of power.” Moreover, this love of power would “influence” judges “to extend their power, and increase their rights,” with the result that the courts will tend to “give such a meaning to the Constitution in all cases where it can possibly be done, as will enlarge the sphere of their authority.”REF The end result of all this would be a Supreme Court with power to rule the country in the most important matters according to its own will—to not only exceed its authority but to usurp others’ authority. “This power,” Yates said, “will enable” the justices of the Supreme Court “to mould the government into almost any shape they please.”REF

Yates further contended that the Supreme Court would not only be supreme over all other courts, but that it would, in fact, be the supreme power in the government to be created by the Constitution. This supremacy, Yates contended, would follow from the Court’s power of settling for all other political actors the authoritative meaning of the Constitution. The Supreme Court, he observed, “has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the Constitution.”REF The courts are thus “vested with the supreme and uncontrollable power, to determine in all cases that come before them, what the Constitution means.”REF

This authority would render the Supreme Court effectively superior to the other branches of the federal government. The “courts of law,” Yates contended, “are not only to decide upon the Constitution and laws made in pursuance of it, but by officers subordinate to them to execute all their decisions.”REF Thus, Yates presented the federal executive as subordinate to the courts and bound to do their bidding.

According to Yates’s interpretation, the legislature would become likewise subordinate to the courts. The Supreme Court would determine the meaning of the Constitution, and “the legislature” could not “set aside a judgment of the court, because” only the latter is “authorized by the Constitution to decide in the last resort.”REF Under the Constitution, Yates claimed, judges will “control the legislature, for the Supreme Court” is “authorized in the last resort, to determine what is the extent of the powers of the Congress.” The judges “are to give the Constitution an explanation, and there is no power above them” to set aside “their judgment.”REF

Yates illustrated Congress’s subordination to the Supreme Court by comparing the system proposed by the Constitution to that then prevailing in the mother country. In England, Parliament had the power to correct what it regarded as the legal errors of the courts. To be sure, Parliament could not set aside the judgment of a court in a particular case. Nevertheless, in cases in which the courts “gave an explanation of the law or the constitution of the country, contrary to the sense of the Parliament,” the

latter had “authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions.”^{REF} In other words, although Parliament could not change the outcome of a case or the decision the court reached for the parties whose dispute it heard, it could, by subsequent legislation, prevent the erroneous legal reasoning of a court from becoming the established rule for the country. “But,” Yates observed, “no such power is in the legislature” created by the Constitution of the United States. Here the “judges are supreme—and no law, explanatory of the Constitution, will be binding on them.”^{REF}

Finally, Yates warned that the courts would dominate the government not only because of the expansive nature of their power, but also because there was no authority in the government that could hold them accountable for the exercise of that power. Here Yates’s argument rested on a narrow understanding of the grounds on which Congress might properly impeach and remove a judge from office. According to Yates, the “only cause for which” judges “can be displaced” are “conviction of treason, bribery, and high crimes and misdemeanors.”^{REF} Accordingly, he contended, judges could not be removed for mere improper exercises of the judicial power, but only for acts that could be shown to arise from “wicked and corrupt motives.”^{REF} On this view, judges could usurp the powers of the other branches and get away with it, so long as their decisions could not be attributed to criminal corruption, such as being bribed to issue a particular ruling.

For Yates, these three causes—the expansive character of judicial review, the subordination of the other branches to the courts, and the powerlessness of the former to correct or discipline the latter—would conspire to produce a judiciary with a regal and even god-like authority. “There is,” he warned, “no power above” the courts, “to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”^{REF}

One might contend that Yates has proven to be a stunningly accurate prophet regarding the ultimate development of the judicial power under the Constitution. Contemporary critics of the imperial judiciary can claim that our courts have become exactly what Yates feared.

One might contend that Yates has proven to be a stunningly accurate prophet regarding the ultimate development of the judicial power under the Constitution. Contemporary critics of the imperial judiciary can claim that our courts have become exactly what Yates feared. They exercise an expansive power of judicial review that has permitted them to impose on the country novel interpretations of the Constitution, thus remolding the government at will. And the other branches of the federal government, the presidency and the Congress, have revealed their subordination to the judicial power by their regular and seemingly willing submission to the courts’ sometimes revolutionary rulings.

None of this, however, can establish the constitutional legitimacy of the imperial judiciary. After all, Yates brought these possibilities to light in order to warn against them, not to endorse them. Moreover,

his warning called forth from Alexander Hamilton, writing in *The Federalist*, a principled statement of the proper limits of the judicial power under the new Constitution. Hamilton famously contended that Anti-Federalist fears of the federal judiciary were overblown because the judiciary is by its nature the “least dangerous branch” of the federal government and the “weakest of the three departments of power.”^{REF} As we will see, for Hamilton, a judiciary of the character that Yates feared and that we arguably have now—one supreme over the other branches and able through judicial review to reinvent the meaning of the Constitution—could only come into being in opposition to the true meaning of the Constitution.

The Federalist Response: The Judicial Power Properly Understood and Properly Limited

Although Hamilton agreed with Yates that the federal courts would exercise a power of judicial review, he understood that power to be much more limited in its scope. Where Yates thought it would permit judges to do practically anything they wanted, Hamilton insisted that it would properly be used in a spirit of restraint. Where Yates viewed the Constitution as an invitation to judges to strike down laws, Hamilton rather emphasized that the Constitution imposed a duty on judges to do so only in cases of evident necessity.

This idea appears repeatedly in Hamilton’s canonical account of the judicial power in *The Federalist*. In *Federalist No. 78*, Hamilton held that it was the “duty” of the courts to “declare all acts contrary to the manifest tenor of the Constitution void.” This formulation necessarily implies a spirit of restraint, that courts will not exercise judicial review in a freewheeling manner on the basis of creative legal reasoning but only when the act of the legislature is in violation of the plain meaning of the Constitution. Similarly, later in the same paper, Hamilton indicated that the power to strike down a law would be exercised only when there is “irreconcilable variance” between the law and the Constitution.^{REF} Again, this way of describing the power indicates the spirit of moderation and restraint with which it is to be exercised. After all, the search for “irreconcilable variance” implies a sympathetic attempt on the part of the Court to reconcile the law with the Constitution, if possible. Similarly, in *Federalist No. 81* Hamilton indicates that judicial review will be applied only when there is an “evident opposition” between the law and the Constitution.

Moreover, Hamilton took pains to reassure his readers that, contrary to Yates’s fears, the purpose of the federal courts’ equity jurisdiction was not to authorize judges to exercise an open-ended power of judicial review based on vague notions of the “reasoning spirit” of the Constitution.

We may illustrate *The Federalist*’s teaching here by means of modern examples. Hamilton’s conception of judicial review can easily justify the constitutional rulings of the Supreme Court in the area of civil rights in the 1950s and 1960s. Laws forcing the segregation of Americans by race were, after all, rather obviously in opposition to the 14th Amendment’s provision requiring the “equal protection of the laws.” A proper application of judicial review could not, however, lead to an outcome such as the Court embraced in *Roe v. Wade*. There, the justices were not compelled to strike down a state abortion law on the basis of any “evident opposition” to the Constitution—which, indeed, is

silent on the question of abortion. Instead, they creatively devised a path to doing so based on supposed “emanations” from “penumbras” of selected constitutional provisions.

Moreover, Hamilton took pains to reassure his readers that, contrary to Yates’s fears, the purpose of the federal courts’ equity jurisdiction was not to authorize judges to exercise an open-ended power of judicial review based on vague notions of the “reasoning spirit” of the Constitution. On the contrary, Hamilton contended that the equity jurisdiction had more mundane purposes. According to Federalist No. 80, federal courts were given an equity jurisdiction not so much to aid in constitutional construction, but in order to be able to “do justice” in disputes between individuals.REF This authority is necessary, Hamilton contended, because there “is hardly a subject of litigation, between individuals, which may not involve those ingredients of fraud, accident, trust, or hardship, which would render that matter of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states.”REF

For example, Hamilton continued, it is “the peculiar province” of “a court of equity to relieve against what are called hard bargains: These are contracts in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate.”REF According to Hamilton, then, the equity jurisdiction of the federal courts was bestowed so that they would have all the tools necessary to handle private disputes between individuals and not to give them a greater freedom of constitutional interpretation. Similarly, in Federalist No. 83 Hamilton observed that the “great and primary use of a court of equity, is to give relief in extraordinary cases, which are exceptions to general rules.”REF Here again, the power has nothing to do with constitutional interpretation and therefore does not open the vistas of judicial power that Yates feared.

This is not to say that Hamilton utterly rejected the idea that courts would seek the “spirit” of the Constitution in exercising judicial review. On the contrary, in Federalist No. 81 he tacitly conceded that the possibility of such an inquiry was inseparable from the activity of courts under any “limited constitution”—that is, under any “constitution that attempts to set bounds” to the legislative power. Even here, however, Hamilton emphasized that in any such inquiry “the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition” the former must overrule the latter. On Hamilton’s view, then, recurrence to the spirit of the Constitution may sometimes be necessary, but it is still to be done in a spirit of judicial restraint—and not to be used as an occasion for judges to project their own understanding of justice onto the Constitution.

For Hamilton, then, the Constitution, properly understood, does not invite judges to exercise judicial review based on their own convictions about the spirit of justice that ought to inform the Constitution. Nevertheless, this does not mean that Hamilton thought that judges’ opinions about justice could never properly influence their decisions. Indeed, one reason for having an independent judiciary was so judges could, acting on the basis of their own conceptions of justice, act as a check on the legislature.

Hamilton was careful to emphasize, however, that while a judge's sense of justice might properly influence his interpretation of a law, it could not properly be the basis on which to strike a law down.

In Federalist No. 78, Hamilton noted that “the independence of judges” was needed not only “with a view to” preventing “infractions of the Constitution,” but also in order to protect against “the injury of the private rights of particular classes of citizens, by unjust or partial laws” arising from the “occasional ill humors in the society.” “Here also,” he noted, “the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.”REF

While this passage certainly countenances that judges will be guided by their own sense of justice in certain cases, it is also important to emphasize that, according to Hamilton's account, this will not happen in exercises of the power of judicial review. Hamilton's discussion here acknowledges a distinction between unconstitutional laws and unjust laws. A law might be perfectly constitutional, a violation of no specific provision of the Constitution, and nevertheless flagrantly unjust, an abusive application of powers that the government legitimately possesses. Congress, for example, might enact regulations of foreign commerce designed primarily to advantage certain companies with political influence. Such laws would be manifestly unfair, but could not be unconstitutional, since the Constitution expressly authorizes Congress to make laws regulating commerce with foreign nations.

When confronted with such an unjust law that violates no provision of the Constitution, the courts have no authority to strike it down or declare it void. The most they can do is to confine its operation and moderate its effects through the exercise of their authority in applying it. They may, for example, interpret it narrowly so that fewer cases fall within the sweep of its unjust aims. This is not the same thing, however, as declaring the law to be a nullity. Many today would take it for granted that the courts will and should strike down any law that is unjust. Hamilton reminds us that the power of judicial review was not intended to be so expansive.

When confronted with such an unjust law that violates no provision of the Constitution, the courts have no authority to strike it down or declare it void. The most they can do is to confine its operation and moderate its effects through the exercise of their authority in applying it.

Along the way, Hamilton also anticipated and rejected the idea of a “living Constitution.” Again, that modern theory of constitutional interpretation holds that judges should update the Constitution to keep it in tune with contemporary values. According to Hamilton, however, the duty of the courts is not to lead the way to constitutional “innovations” but to prevent novel interpretations by adhering to the original meaning of the Constitution.REF Living constitutionalism supposes that a change in the community's understanding of government, the law, and morality should be used as the standard by which judges declare the meaning of the Constitution to have changed. In contrast, Hamilton reminds his readers that “until the people have, by some solemn and authoritative act”—such as ratification of an amendment to the Constitution—“annulled or changed the established form, it is binding on them collectively as well as individually.”REF Living constitutionalism asks judges to discern what values

are now dominant in public opinion. This is the same as asking them to discern the popular contemporary interpretation of the Constitution. Hamilton, however, insists that judges should not “consult popularity.” Instead, if they perform their function correctly, “nothing would be consulted but the Constitution and the laws.”REF

Hamilton’s account in *The Federalist* also strove to correct Yates’s vision of judicial supremacy. According to Hamilton, far from being the highest power in the government, the judiciary was instead “beyond comparison the weakest of the three departments of power” and accordingly, “the least dangerous to the political rights of the Constitution.” After all, in contrast to the executive and the legislature, the courts hold neither the sword nor the purse of the community, “no direction either of the strength or of the wealth of the society.”REF

Hamilton’s account implicitly denies Yates’s claim that the executive is subordinate to the judiciary and absolutely bound to execute its directives. In defending his claim that the judiciary is the weakest and least dangerous branch, Hamilton observed that it has “neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments.”REF This assurance would make no sense unless Hamilton assumed that the executive might, in some cases, refuse its “aid” in carrying out the judgments of courts. Similarly, in *Federalist* No. 81, Hamilton held that “the supposed danger of judiciary encroachments on the legislative authority, which has been on many occasions reiterated, is, in reality, a phantom.” This is the case, Hamilton held, because, among other reasons, of the “comparative weakness” of the judiciary and “its total incapacity to support its usurpations by force.”REF

Again, Hamilton’s assurance here depends on the assumption that the executive might legitimately decide not to lend its “force” to support a judicial decision that could be considered an “encroachment” or a “usurpation.” This, in turn, supposes that the executive may make its own determination on such questions. Today, many Americans assume that a President would behave lawlessly if he refused to carry out a court order. Such a blanket assumption, however, finds no basis in Hamilton’s account of the relationship of the judicial power to the executive power. On the contrary, Hamilton suggests that the executive would behave properly in refusing to give effect to a court order that is itself a lawless usurpation or encroachment on the powers of one of the other branches of the government.

Also in *Federalist* No. 81, Hamilton explicitly disputed Yates’s claim that the Congress of the United States—unlike the Parliament of Great Britain—has no power to correct the legal errors of the courts. This understanding, Hamilton suggested, is based upon “false reasoning upon misconceived fact.”REF Hamilton observed—and here he agreed with Yates—that neither the British Parliament nor the Congress of the United States can reverse a “judicial sentence by a legislative act.” Such a move is forbidden not by any explicit provision of the Constitution of the United States or of British law, but rather by “general principles of law and reason.” “A legislature, without exceeding its province, cannot reverse a determination once made, in a particular case.”REF Hamilton immediately added, however,

that the legislature “may prescribe a new rule for future cases,” and that this principle “applies, in all its consequences, exactly in the same manner and extent, to the state governments” in America as well as “to the national government, now under consideration.”REF

In responding to Yates in this way, Hamilton was affirming that under the Constitution the Congress can, contrary to Yates’s fears, correct an interpretation of the law or the Constitution put forward by an erring judiciary. Although it cannot change the judgment of a court as applied to the parties to a case, it can, if it finds a court’s constitutional interpretation incorrect, reassert its own constitutional interpretation in subsequent legislation that it intends to guide the judiciary in future cases. For Hamilton, then, Yates is wrong to present the Supreme Court as the final arbiter of the meaning of the Constitution, whose interpretations necessarily control the other branches.

Hamilton’s presentation of the relationship of the judicial power to the executive and legislative powers lends no support to the modern view of judicial supremacy.

Hamilton’s presentation of the relationship of the judicial power to the executive and legislative powers—his suggestion that the latter have a legitimate authority to contend against the constitutional interpretations of the former—lends no support to the modern view of judicial supremacy. It rather suggests the theory that scholars have come to call “departmentalism” or “coordinate review”—the idea that the three main departments of government, legislative, executive, and judicial, are equal, each required to interpret the Constitution authoritatively for itself in the exercise of its own powers.

Indeed, *The Federalist* does more than imply departmentalism. It openly countenances it. Writing in *Federalist* No. 49, in the context of his discussion of separation of powers, James Madison held that the “several departments being perfectly coordinate by the terms of their common commission” from the people, “it is evident” that none of them “can pretend to an exclusive and superior right of settling the boundaries between their respective powers.”REF

The Departmentalist Tradition

Departmentalism is not just a quirk of *The Federalist Papers*, finding no other foothold in our nation’s political traditions. It was asserted by many of the leading statesmen of the founding period and the 19th century. For example, during the celebrated congressional debates on the President’s authority to dismiss from office subordinate executive officers, James Madison defended the right of Congress to place in a law a clause purporting to give an authoritative interpretation of the Constitution.

Some members objected that “the legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the judiciary is called upon to declare its meaning.” In response, Madison admitted that in the “ordinary course of government” the “exposition of the laws and Constitution devolves upon the judicial” branch. He immediately, however, proceeded to call into question the claim that this authority belonged exclusively to the judiciary. “I beg to know,” he said, “upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the

several departments.” The Constitution, Madison continued, is a grant of power from the people to the government and each of its branches. Therefore, “if the constitutional boundary” between the departments “be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on this point.”REF

This understanding was also held by Thomas Jefferson. Writing to William H. Torrance in 1815, Jefferson addressed the question “whether the judges are invested with exclusive authority to decide on the constitutionality of a law.” Jefferson held that “certainly there is not a word in the Constitution which has given” this power to judges “more than to the Executive or Legislative branches.” Generally, Jefferson observed, “that branch which is to act ultimately, and without appeal, on any law, is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other coordinate authorities.” Each branch, he suggested, must decide “for itself” the meaning and the constitutional validity of the laws under which it had to act. Jefferson acknowledged that this approach might lead to “inconveniences” through the various branches reaching “contradictory decisions” about the meaning of the Constitution. He held, however, that such problems are “a necessary failing in all human proceedings,” and that “accommodation” of such differences would “generally” result from “the prudence of the public functionaries, and the authority of public opinion.”REF

Both Hamilton and Madison emphasized the place of the people as the ultimate source of authority in the American system and, accordingly, their power, exercised through elections, of settling questions of constitutional power.

Jefferson’s suggestion that “public opinion” would adjust clashes among the three branches about the meaning of the Constitution points us back to *The Federalist*. In that work, both Hamilton and Madison emphasized the place of the people as the ultimate source of authority in the American system and, accordingly, their power, exercised through elections, of settling questions of constitutional power. Writing in *Federalist No. 33*, Hamilton raised the question: Who would decide what is a legitimate use of Congress’s power under the Necessary and Proper Clause? He answered that “the national government, like every other, must judge, in the first instance, of the proper exercise of its powers; and its constituents in the last.”REF Similarly, in *Federalist No. 44*, Madison contended that the people themselves would have to be the ultimate judges of the constitutionality of the actions of the government. If the government were to usurp power, the “success of the usurpation” would “depend” in the “first instance” on “the executive and judiciary departments, which are to expound and give effect to the legislative acts.” In the “last resort,” however, a “remedy” would have to be sought from “the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.”REF

The notion of judicial supremacy was also rejected by President Andrew Jackson in his famous message communicating the reasons for his veto of a bill to recharter the second Bank of the United States. Jackson’s veto was prompted in part by constitutional objections to the bill. He noted that some critics of his position considered his constitutional objections as moot in light of the Supreme Court’s

decision in *McCulloch v. Maryland* (1819) upholding the constitutionality of the bank. “It is maintained by the advocates of the bank,” he observed, “that its constitutionality ought to be considered as settled by precedent and by the decision of the Supreme Court.” Jackson, however, claimed that he could “not assent” to such a conclusion:

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of the government. The congress, the executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.REF

Like Jefferson and the authors of *The Federalist*, Jackson also suggested that the ultimate judges of the meaning of the Constitution would have to be the people of America themselves. “Mere precedent,” he contended, “is a dangerous source of authority, and should not be considered as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered well settled.”REF

Finally, no less a figure than Abraham Lincoln rejected judicial supremacy, defended departmentalism, and as a statesman acted on this understanding of the relationship among the branches of government. As a rising star of the newly established Republican Party, Lincoln was critical of the Supreme Court’s decision in *Dred Scott v. Sandford* (1857), in which the Court had held that Congress had no power to forbid slavery in the federal territories and that African-Americans—even free ones—could not be citizens of the United States. Responding to Lincoln’s criticisms, Stephen Douglas, Lincoln’s great political rival, accused Lincoln of lawlessness and thus endorsed something very like the modern conception of judicial supremacy. The Supreme Court had definitively settled the constitutional questions presented in the *Dred Scott* case, Douglas contended. Therefore, those who resisted “the final decision of the highest judicial tribunal” aimed “a deadly blow” at “our whole republican system of government,” threatening to undermine “the Constitution” and “the supremacy of the laws.”REF

Lincoln responded by making the same distinction that Alexander Hamilton had made in *The Federalist*. He admitted that no other authority could correct the Supreme Court’s resolution of a particular case. The “first” use of a “judicial decision,” Lincoln said, is “to absolutely determine the case decided.” The second use, he continued, is to establish “precedents” or “authorities” that “indicate to the public how other similar cases will be decided when they arise.” Lincoln then added that the authority of precedents—and hence their ability to control the other branches of government—depended on certain “circumstances.”

“If,” said Lincoln, “this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the Court more than once, and had there been affirmed and reaffirmed through a course of years, it then might be—perhaps would be—factious, nay, even revolutionary, to not acquiesce in it as a precedent. But when, as it is true we find it wanting in all these claims to public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having quite yet established a settled doctrine for the country.”REF

Accordingly, Lincoln concluded that he and other Republicans had a right to regard the Dred Scott decision as “erroneous” and to do what they could to get the Court to reconsider and overrule it.REF

Moreover, Lincoln followed the authors of *The Federalist* and figures like Thomas Jefferson in linking the rejection of judicial supremacy to the role of the people themselves—the highest authority in our republican form of government—in finally settling contested constitutional questions. In his First Inaugural Address, Lincoln again conceded that the decision of the Supreme Court “must be binding in any case upon the parties to a suit as to the object of that suit,” and that such decisions “are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government.” Nevertheless, he added, “the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”REF

Lincoln not only propounded these views, he acted on them. As a candidate for the United States Senate in 1858, Lincoln campaigned on the promise that he would vote to restore the Missouri Compromise prohibition on slavery in the federal territories. That is, he campaigned promising to vote for legislation that the Supreme Court had already held to be unconstitutional in the Dred Scott decision. Similarly, as President Lincoln’s Administration issued passports to free African-Americans—thus affirming, in the name of the executive branch, their status as American citizens, which had been denied by the Supreme Court in the same ruling. Finally, as President, Lincoln, in order to protect the public safety in the face of a growing rebellion, suspended habeas corpus, ignoring a court ruling holding that he had no power to do so. In defense of his action, Lincoln explained in a message to Congress the interpretation of the Constitution on which he had acted. And he had Attorney General Edward Bates issue an opinion on the issue, which restated the doctrine of departmentalism in terms that would have been familiar to the authors of *The Federalist*, as well as to earlier statesmen such as Jefferson and Jackson.

According to Bates, the Founders, in “framing the Constitution,” had been “actuated by an especial dread of unity of power.” Accordingly, they “adopted the plan of ‘checks and balances,’ forming

separate departments of government, and giving to each department separate and limited powers.” “These departments,” Bates continued, “are coordinate and coequal; that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both of them together.” The founders had not attempted to “create an arbiter” among these three departments “to try to adjudge their conflicts and keep them within their respective bounds.” Instead, “they were left... each independent and free to act out its own granted powers, without any ordained legal superior possessing the power to revise and reverse the action,” with the aim that “the three departments, mutually coequal and independent, would keep each other within their proper spheres by their mutual antagonism.”

Bates further indicated that judicial supremacy—or, indeed, the supremacy of any of the departments of power—would be inconsistent with this system of separation of powers established by the Founders. If one of the departments were permitted to be the authoritative arbiter among the three, were allowed to “determine the extent of its own powers, and also the extent of the powers of the other two,” that one would “control the whole government,” and would “in fact” assume the “sovereignty” that the founders had intended to remain divided.REF

Judicial Impeachment

Finally, Hamilton’s treatment of the judiciary in *The Federalist* assured the ratifying public that, contrary to Yates’s claims, Congress would be free to use the power of impeachment to ensure that judges not abuse their authority to interpret the laws and the Constitution. For Hamilton, unlike for Yates, the constitutional standard of judicial tenure during “good behavior” permitted Congress to impeach and remove judges not only for criminal corruption but also for usurpations of authority properly belonging to the other branches of the government.

In *Federalist No. 81*, Hamilton once again took up the Anti-Federalist fear of “the supposed danger of judiciary encroachments on the legislative authority.” This peril, Hamilton contended, was nothing more than a “phantom” of the overworked imaginations of the opponents of the Constitution. Such judicial usurpation would be prevented, he argued, not only by the general weakness of the courts in comparison to the other two branches but also by “the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other.” This power “alone,” Hamilton averred, “is a complete security” against an overreaching judiciary. “There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the resentment of the body intrusted [sic] with it, while the body was possessed of the means of punishing their presumption, by degrading them from their stations.”REF

Hamilton defended this understanding of the power of impeachment in other debates, both at the time of ratification and later. In the summer of 1788, while participating in the New York Ratifying Convention, Hamilton attempted to ease fears of the opponents of the Constitution that the federal courts would unfairly take the part of federal tax collectors against their state counterparts. In response to these concerns, Hamilton asked: “Is it not to be presumed that” federal judges “will express the true

meaning of the Constitution and the laws? Will they not be bound to consider the concurrent jurisdiction; to declare that both the taxes shall have equal operation; that both powers, in that respect, are sovereign and coextensive? If they transgress their duty, we are to hope that they will be punished.”^{REF} This last remark clearly refers to the possibility of impeachment, a process that Hamilton here anticipates can be applied to judges who misconstrue the laws and the Constitution.

In 1802, Hamilton—in a series he called *The Examination*, written under the pen name Lucius Crassus—took issue with the Jeffersonians in Congress who sought to repeal the recent judiciary act and thus abolish the offices of federal judges who had already been appointed to their positions. He noted that the proponents of the measure contended that such a power in Congress was necessary to protect against the possibility of judicial despotism. If “the judges hold their offices by a title absolutely independent of the legislative will,” this argument ran, “the judicial department becomes a colossal and overbearing power, capable of degenerating into a permanent tyranny, at liberty, if audacious and corrupt enough, to render the authority of the legislature nugatory by expounding away the laws.”

In response, Hamilton contended that the Constitution provides complete protection against such abuses without any power in Congress to abolish judicial offices. The solution to the problem of judicial “abuse of power,” he held, can be found in the “authority of the House of Representatives to impeach” and “of the Senate to condemn” judges. Thus the “judges are in this way amenable to the public justice for misconduct, and, upon conviction, removable from office. In the hands of the legislature itself is placed the weapon by which they may be put down and the other branches of the government protected. The pretended danger, therefore, is evidently imaginary—the security perfect!”^{REF}

Conclusion

The Federalist’s understanding of the judicial power is significantly more modest than that entertained by many Americans today. Publius does not present the power of judicial review as the first job of the federal courts, nor does he present that power as having as wide a scope as many now assume it to have. Moreover, The Federalist does not support the judicial supremacy that is so often asserted today, not only by judges, but also by citizens and statesmen. It instead teaches—along with several prominent statesmen of the Founding and the 19th century—that all three branches of the federal government are equal in their authority to interpret the Constitution in the course of performing their own duties. Finally, The Federalist teaches that Congress may rightly discipline the judiciary by impeaching and removing from office judges who abuse the judicial power by intruding improperly on the legitimate powers of the other branches.

Some might contend that this Founding vision has been superseded by contemporary expectations that the courts will exercise a more robust power over the other branches of the federal government. Nevertheless, The Federalist’s account of the place of the judiciary deserves reconsideration as being more compatible with the freedom and dignity of the American people—the true sovereign authority

in our great republic. It is more consistent with the freedom of the American people because it leaves them more at liberty to govern themselves, to exercise their authority to decide the great questions that confront our country in each generation. This liberty of self-government must, of course, be limited, and The Federalist's account of the judicial power provides such limits, insofar as it acknowledges the power of courts to strike down unconstitutional laws. But Publius' understanding ensures constitutional safety, while at the same time maximizing the people's authority by limiting the use of judicial review to clear cases of unconstitutional action on the part of the people's representatives.

The Federalist's account of the judicial power is more consistent with the dignity of the American people as the country's sovereign because it ensures that, although their will can be checked by courts defending the clear and settled meaning of the Constitution, it cannot be subordinated to the will of judges who make the Constitution mean what they want it to mean in order to secure outcomes that they regard as just. It is also more consistent with the people's dignity because, by rejecting judicial supremacy, it ensures that when the people's will is thwarted by the courts, the people still retain the authority to reassert that will when they have not been persuaded by the reasoning of the judges. This surely is essential to the self-respect of a self-governing people, that they must be persuaded, not commanded, by the courts. And this, too, is the promise of the American experiment: self-government under the laws and the Constitution, not under the discretionary supervision of judges.

—Carson Holloway, PhD, is Professor of Political Science at the University of Nebraska–Omaha and Visiting Scholar in the B. Kenneth Simon Center for Principles and Politics, of the Institute for Constitutional Government, at The Heritage Foundation. He is the author of *Hamilton Versus Jefferson in the Washington Administration* (Cambridge University Press, 2015) and the co-editor of *The Political Writings of Alexander Hamilton* (Cambridge University Press, 2017), Vols. 1 and 2.

Authors

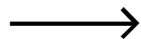
Carson Holloway

Visiting Scholar, 2014-15 Visiting Fellow in American Political Thought

[Read Full Report +](#)

Collections

[First Principles Essays](#)



report

[The First Principles of Ronald Reagan's Foreign Policy](#)

Nov 20, 2020 38 min read

report

[Capitalism in the 1619 Project](#)

Apr 20, 2021 23 min read