The Supreme Court ultimately defines and applies the Constitution. Through judicial review, both legislative and executive decisions may be overruled by the courts if they are unconstitutional. The courts also interpret statutory law to decide, for example, the permissible scope of executive or state actions under federal law.

Alexander Hamilton, in the following selection from *The Federalist*, stresses judicial independence and judicial power to exercise constitutional review of legislative acts.

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FEDERALIST 78

Alexander Hamilton

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges; 2nd. The tenure by which they are to hold their places; 3rd. The partition of the judiciary authority between different courts, and their relations to each other.

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 . . . that nothing can be said here which would not be useless repetition.

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 behavior;* which is conformable to the most approved of the state constitutions. . . . The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

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. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. 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 for the efficacious exercise even of this faculty.

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, 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; I mean so long as the judiciary remains truly distinct from both the legislature and executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." 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; 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.

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 no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right 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.

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.

If it be said that the legislative body are themselves the constitutional judges of their 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. 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 must therefore belong 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; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

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. . . .

It can be no weight to say, that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions 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 the body.

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 officers, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill-humors 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 meantime, to occasion dangerous innovations in the government, and serious oppression of the minor party in the community. . . . 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.

But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill-humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they mediate, to quality their attempts. . . .

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 compliance 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.

There is yet a further and a weighty reason for the permanency of judicial offices, which is deducible from the nature of the qualifications they require. 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. . . .

From *Federalist 78* students can observe that the intent of the framers of the Constitution, at least as expressed and represented by Hamilton, was to give to the courts the power of judicial review over legislative acts. But the Constitution did not explicitly establish the power of judicial review. Although the cause of this omission is not known, it is reasonable to assume that the framers felt that judicial power implied judicial review. Further, it is possible that the framers did not expressly mention judicial review because they had to rely on the states for adoption of the Constitution; judicial power would extend to the states as well as to the coordinate departments of the national government.

The power of the Supreme Court to invalidate an act of Congress was stated by John Marshall in *Marbury v. Madison,* 1 Cranch 137 (1803). At issue was a provision in the Judiciary Act of 1789 that extended the *original jurisdiction* of the Supreme Court by authorizing it to issue writs of mandamus in cases involving public officers of the United States and private persons, a power not conferred upon the Court in the Constitution. Marbury had been appointed a justice of the peace by President John Adams under the Judiciary Act of 1801, passed by the Federalists after Jefferson and the Republican party won the elections in the fall of 1800 so that President Adams could fill various newly created judicial posts with Federalists before he left office in March 1801.

Marbury was scheduled to receive one of these commissions, but when Jefferson took office on March 4, with Madison as his secretary of state, it had not been delivered. Marbury filed a suit with the Supreme Court requesting it to exercise its original jurisdiction and issue a writ of mandamus (a writ to compel an official to perform his or her duty) to force Madison to deliver the commission, an act which both Jefferson and Madison were opposed to doing. In his decision, Marshall, a prominent Federalist, stated that although Marbury had a legal right to his commission, and although mandamus was the proper remedy, the Supreme Court could not extend its original jurisdiction beyond the limits specified in the Constitution; therefore, that section of the Judiciary Act of 1789 permitting the court to issue such writs to public officers was unconstitutional. Incidentally, the Republicans were so outraged at Adams' last-minute appointments that there were threats that Marshall would be impeached if he issued a writ of mandamus directing Madison to deliver the commission. This is not to suggest