



Federalist No. 78

Publius (Alexander Hamilton)

A View of The Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour

May 28, 1788

This is the first of five essays written by Hamilton on the Judiciary. In this essay, we also find the fifth of six essays in The Federalist that identify specific authors of Antifederalist writings. Here it is the "Protest of the Minority of the Convention of Pennsylvania, Martin's speech, etc."

1. "We proceed now to an examination of the judiciary department."
2. The coverage of the judiciary is in two parts: A) "the manner of constituting it" and B) "its extent."
3. There are three A) "objects." "1st. The mode of appointing the judges. 2nd. The tenure by which they are to hold their places. 3rd. The partition of the judicial authority between different courts and their relations to each other." [See Federalist 81.]
4. A) 1st. See Federalist 76 and 77.
5. A) 2nd. "As to tenure by which the judges are to hold their places: this chiefly concerns [I] their duration in office, [II] the provisions for their support, [III] the precaution for their responsibility." The remainder of the essay covers the case for [I] their duration in office. {Article III, Section 1.}
6. "The standard of good behavior...is certainly one of the most valuable of the modern improvements in the practice of government." It helps the judiciary to resist "legislative encroachment." 7-17 makes the case for "permanent tenure" to resist the encroachment of the legislature.
7. The judiciary "will always be the least dangerous to the political rights of the Constitution.... It may truly be said to have neither FORCE nor WILL but merely judgment."
8. The judiciary is "the weakest of the three departments of power," and its "natural feebleness" needs fortification.
9. "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." It is the "duty" of the courts, "to declare all acts contrary to the manifest tenor of the constitution void."
10. The opposition thinks that this "doctrine would imply a superiority of the judiciary to the legislative power."
11. But "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."
12. The courts are an "intermediate body between the people and the legislature" to keep the latter within their proper sphere. The legislature cannot be "the constitutional judges of their own powers." The Constitution is the fundamental law and it belongs to the courts to "ascertain its meaning" and to secure "the intention of the people" over "the intention of their agents" whenever there is "an irreconcilable variance between the two." "The interpretation of the laws is the proper and peculiar province of the courts." Since the Constitution is the "fundamental law," it therefore belongs to the Supreme Courts "to ascertain its meaning."
13. This does not "suppose a superiority of the judicial to the legislative power."
14. "In determining between two contradictory laws...it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction" they ought to "be reconciled to each other." When "impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other."
15. "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter

and disregard the former.”

16. “It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure for the constitutional intentions of the legislature.... The courts must declare the sense of the law,” and not “be disposed to exercise WILL instead of JUDGMENT.”

17. “The permanent tenure of judicial offices” is critical if the courts are to be “the bulwarks of a limited Constitution against legislative encroachments.”

18. “Permanent tenure” can help to resist the “ill humors” that may momentarily “lay hold” of the people to violate the Constitution. “As faithful guardians of the Constitution,” the courts must restore the norm of “more deliberate reflection.”

19. “Permanent tenure” can also help to resist legislative efforts to injure “the private rights of particular classes of citizens, by unjust and partial laws.”

20. “Permanent tenure” is needed so that courts provide “inflexible adherence to the rights of the Constitution, and of individuals.”

21. “Permanent tenure” is needed to attract individuals with the “requisite integrity,” and the “requisite knowledge” to handle the “variety of controversies which grow out of the folly and wickedness of mankind.” But “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.”

22. “Good behavior” for justices has the added benefit of securing “good government.”

-Gordon Lloyd

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401 College Avenue | Ashland, Ohio 44805 (419) 289-5411 | (877) 289-5411 (Toll Free)

info@TeachingAmericanHistory.org

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