

**ANALYTICAL READING ACTIVITIES**  
**TOPIC 2.8**

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# AP United States Government and Politics

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## Topic 2.8: The Judicial Branch

### Source Analysis

#### Before You Read

By now, you have learned about the different views on government as represented by the Federalist and Anti-Federalist groups. As you prepare to read these documents that show the different opinions on the judiciary, use the table below to recall what you know about the differences and reflect on the reasons and significance of these differences on the formation of our government.

What was the Federalist view of government?	
What was the Anti-Federalist view of government?	
Why did the Federalists and Anti-Federalists have different viewpoints?	
How is each side's viewpoint reflected in our political institutions today?	

*Required Document: Excerpts from The Federalist No. 78: The Judiciary Department by Alexander Hamilton*

*Paired with: Excerpts from Brutus No. 15, March 20, 1788*

#### Related Concepts:

- Debate over the Constitution
- Separation of Powers
- Checks and Balances
- Supreme Court
- Role of the Court
- Judicial Review
- Judicial Behavior

#### Comparison

*Explain the reasons for similarities and/or differences; explain the relevance, implications, or significance of similarities and/or differences.*

#### Source Analysis

*Explain how the implications of the author's argument or perspective may affect political principles, institutions, processes, policies, and behaviors.*

# The Federalist No. 78

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As you read the text, consider how Hamilton's essay relates to our system of separation of powers and checks and balances. Also consider how he argues that a strong, independent judiciary is also essential to the protection of the people's liberties.

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Federalist No. 78: The Judiciary Department

Author: Alexander Hamilton

To the People of the State of New York:

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. ...

According to the plan of the convention, all 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 and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments.

## Check Your Understanding

Paraphrase Hamilton's purpose and focus for this essay (as outlined in the opening paragraph) in the space below that paragraph.

## Check Your Understanding

What does Hamilton mean when he says "good behavior"?

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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 even for the efficacy of its judgments.

### Source Analysis

According to Hamilton's argument, why does lifetime appointment secure an "impartial administration of the laws"?

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### Check Your Understanding

What does Hamilton mean by the power of the "sword" and the power of the "purse"?

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### Connect to Content

Hamilton claims the judiciary has no influence over either "sword" or "purse." Write a claim explaining whether there is any way in which the judiciary could potentially influence the "sword" or the "purse."

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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 the Executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”\*

\*Quote from French political philosopher, Montesquieu

And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing 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 co-ordinate 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.

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.

### Source Analysis

Highlight or underline why, according to Hamilton’s argument, is it important to give the judiciary some protections against the other two departments or branches.

### Source Analysis

According to Hamilton’s argument, how is liberty secured by the separation of powers? Why might this not work?

### Check Your Understanding

According to Hamilton, how does lifetime tenure or “permanency in office” of judges and justices help to secure justice?

### Check Your Understanding

Highlight or underline Hamilton’s definition of a “limited Constitution.”

Limitations of this kind can be preserved in practice no other way than through the medium of 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.

**Source Analysis**

According to Hamilton's argument, what is the duty of the courts in a limited Constitution and how might that duty be impaired?

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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 ground on which it rests cannot be unacceptable.

**Source Analysis**

Underline the assumption of the Anti-Federalists that Hamilton is addressing here.

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.

**Source Analysis**

Based on Hamilton's argument, what would be the danger of allowing Congress to determine the constitutionality of their acts? How does this further develop his counterargument to critics of judicial review?

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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.

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.

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. ...

### Source Analysis

How does Hamilton further define the role of the courts? What line of reasoning does he employ here to support his claim?

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### Check Your Understanding

In the space below the paragraph, summarize how Hamilton refutes the critique that the power of judicial review would make the Court superior to the other branches.



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, 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.

There is yet a further and a weightier reason for the permanency of the 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. ...

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices . . .

PUBLIUS.

### Connect to Content

How is Hamilton's argument expressed in the workings of our government today?

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### Academic Vocabulary

Define the word *precedents* as used in this paragraph.

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### Check Your Understanding

Highlight or underline the additional reason outlined here in support of lifetime tenure of federal judges/justices.

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## After You Read

### Thinking Like a Political Scientist

#### Reasoning Process: Comparison

What claim put forward by those opposed to a strong and independent judiciary does Hamilton address?

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How does he answer that claim? What does his response tell you about the Framers' intentions regarding the institutional design of the judiciary?

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### Political Science Disciplinary Practices

#### Source Analysis

How does Hamilton support his claim that life tenure (good behavior) is a necessity for an independent judiciary?

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How does Hamilton's defense of lifetime tenure and of judicial review relate to the principles of separation of powers and checks and balances?

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## Brutus No. 15

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As you read documents from the founding era, you will notice that some of the spelling of common words is different from the way we spell them today. Sometimes editors modernize those spellings, and sometimes the documents are presented exactly as they were written.

In this document, the following words are presented with older spellings. How would we spell these words today?

controul \_\_\_\_\_ behaviour \_\_\_\_\_

favour \_\_\_\_\_ authorised \_\_\_\_\_

As you read the text, consider how Brutus responds to our system of separation of powers and checks and balances. Compare the argument in Brutus to that of Hamilton in *Federalist No. 78*.

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Brutus XV

March 20, 1788

I said in my last number, that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.

... The great reason assigned, why the judges in Britain ought to be commissioned during good behaviour, is this, that they may be placed in a situation, not to be influenced by the crown, to give such decisions, as would tend to increase its powers and prerogatives. While the judges held their places at the will and pleasure of the king, on whom they depended not only for their offices, but also for their salaries, they were subject to every undue influence. ... —They were absolutely dependent upon him both for their offices and livings. The king, holding his office during life, and transmitting it to his posterity as an inheritance, has much stronger inducements to increase the prerogatives of his office than those who hold their offices for stated periods, or even for life.

### Check Your Understanding

Highlight or underline the author's purpose in writing this essay.

Hence the English nation gained a great point, in favour of liberty. When they obtained the appointment of the judges, during good behaviour, they got from the crown a concession, which deprived it of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people.

But these reasons do not apply to this country, we have no hereditary monarch; those who appoint the judges do not hold their offices for life, nor do they descend to their children. The same arguments, therefore, which will conclude in favor of the tenor of the judge's offices for good behaviour, lose a considerable part of their weight when applied to the state and condition of America. But much less can it be shewn, that the nature of our government requires that the courts should be placed beyond all account more independent, so much so as to be above controul.

I have said that the judges under this system will be independent in the strict sense of the word: To prove this I will shew—That there is no power above them that can controul their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.

1st. There is no power above them that can correct their errors or controul their decisions – The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits. – In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

### Check Your Understanding

How did lifetime tenure for British judges help secure the rights of the people against the monarch?

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### Source Analysis

Highlight or underline why the British system of government differs from conditions in America.

### Source Analysis

Highlight or underline the claim Brutus is making here.

### Source Analysis

What evidence does Brutus use to support the claim that the judiciary is superior to the other branches? (You may need to read the text on the next page to fully answer this question.)

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2d. They cannot be removed from office or suffer a diminution [sic] of their salaries, for any error in judgement or want of capacity.

It is expressly declared by the constitution,—“That they shall at stated times receive a compensation for their services which shall not be diminished during their continuance in office.”

The only clause in the constitution which provides for the removal of the judges from office, is that which declares, that “the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors. ...”

—Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, high crimes and misdemeanors.

3d. The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it.

In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. ...

The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.

### Check Your Understanding

Highlight or underline the provision Brutus cites as the only way to remove judges.

### Source Analysis

What are the limitations of that provision?

### Check Your Understanding

How is Brutus defining the power of judicial review?

### Source Analysis

How is he supporting the claim that the power of judicial review places the judiciary above the legislature?

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. ...

... the general legislature, might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution. – If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees.

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature.

A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; ...

but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but with a high hand and an outstretched arm.

### Check Your Understanding

Circle where, according to Brutus, the design of the judiciary may threaten state governments.

### Check Your Understanding

Highlight or underline the remedy the people have if the legislature was given the power to interpret the Constitution and “exceeded their powers” in doing so.

### Source Analysis

Why, according to Brutus, would this “remedy” not apply to the Supreme Court as outlined in the Constitution?

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## After You Read

### Thinking Like a Political Scientist

#### Reasoning Process: Comparison

Based on his argument, explain how Brutus' view differs from Hamilton's on lifetime tenure for judges.

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Discuss some of the implications of one of these differences.

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### Political Science Disciplinary Practices

#### Source Analysis

How does this essay contribute to earlier Anti-Federalist arguments that the real purpose of the new Constitution was to consolidate the nation under one government by, over time, eliminating the power of the states?

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## Making Connections

Based on the evidence, who do you think makes the more compelling argument, Brutus or Hamilton? Specifically, does the Supreme Court have too much power or is it the “least dangerous” branch of our federal government? Support your response with examples.

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Some have argued that the Supreme Court, being unelected, has too much power in our system to “make new policy” through its decisions. While others believe that the Court has been an important check on both legislative and executive power. What do you think? Support your response with examples.

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