

The Supreme Court, Judicial Review, and Federalist Seventy-Eight

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THE SUPREME COURT'S role, status, and power within our constitutional framework has, over the decades, been so thoroughly explored that it is futile to attempt a listing of the major books and articles dealing with this subject.¹ And, one is left to ask, is there anything more to be said about the Court and the various stances individuals throughout our history have taken toward it, particularly with respect to the matter of judicial review? Our feeling is that (a) there *is* something new to say about the Court and its role in our system and (b) a good deal of admittedly fine scholarship has tended to divert our attention from those questions we should be asking about the Court and its power of judicial review.

I

OUR FIRST contention is that we have to clear away a good deal of the underbrush which inevitably surrounds discussions concerning the Court. Much of this so-called "underbrush" deals with the question of whether the Court is actually a weather-vane of public morality or opinion, the

"goodness" or "badness" of its decisions, the various philosophies justices have brought to the Court and expounded in their decisions, the impact of Court decisions (that is, whether we really get around to obeying certain of its decisions), or what the system would be like if the Court were divested of its presumed power to nullify state and national laws which contravene the basic laws as set forth in the Constitution. These and like concerns are, to be sure, important and bear upon the central questions of what direction the Court will take, the degree of confidence the population places in the Court's decisions, and its general relationship to the other branches of our national government. And some of them are admittedly important because they involve us in fundamental partisan issues of the day or an era as, for example, Roosevelt's court packing proposal, the fight over the nominations of Carswell and Haynsworth, the movement to impeach Justice Douglas, the Southern resistance to the Court's integration rulings, and the myriad of Warren Court decisions

relating to the rights of the accused in criminal processes. While these disputes have tended to focus upon a number of considerations concerning the proper role of the Court, they have, for the most part, only tangentially addressed themselves to the basic issues surrounding the Court and its powers. Perhaps, this is to be accounted for by "shifting alliances" on partisan issues, where observers of the Court are one day its friends and the next, its enemies. Underlying these controversies and the arguments of the adversaries, however, there seems to be an unarticulated premise; to wit, the Court should exercise judicial review. The disputes, in other words, have been largely tactical in nature wherein there is ample room to question the motives of the participants in assuming the positions they do because in practically all such episodes political interests of the highest order were at stake. This point, we believe, is well known and hardly needs extensive documentation here.

Most serious scholars of the Court are well aware of this practice and have, as a consequence, so it would seem, tried to probe further into the basic question of whether the Supreme Court was ever intended to be involved in such disputes. More specifically, we have evolved a growing body of scholarship which has attempted to determine whether judicial review was or was not intended to be vested with the Supreme Court by those who drafted the Constitution. The sheer bulk of such endeavors precludes detailed analysis here. Generally speaking, however, the focus of such inquiries concerning the intent of the Framers has been three fold:

1. What evidence exists to show that the state or colonial courts did invalidate legislative actions? To what extent can one say that this was an accepted practice and well understood by the people? Conversely, to what degree can such practices on the part

of the Court be considered mere aberrations of such insignificant proportions that scarcely any heed was paid to them, and that, far from being a generally acknowledged power of the courts, they are to be viewed as deviations from the generally held views concerning judicial power?

2. What did the Framers of the Constitution think about judicial review? What do the proceedings at Philadelphia, transcribed in various notes, tell us about this issue? What did those who participated in the Convention privately think about the matter of judicial review as revealed by their correspondence with others?

3. What does the Constitution say, either expressly or implicitly, about the judicial powers? More exactly, does the Constitution logically require that the power of review be vested with the judiciary?

Two important observations are called for regarding these enterprises. First, one might well ask, what difference does it make what the intentions of the Framers were or what the people regarded to be the proper function of the judiciary? Why try to settle the matter through the approaches outlined above? Why can't we, the people of today, make these decisions for ourselves independent of reasoning about what the Constitution logically requires or what the Framers and their forbears might have believed? This question can best be answered by asking another: If it can be shown that judicial review was not intended or even considered and rejected, on what conceivable grounds can the Court claim this power? Moreover, how can the Court obligate those affected by its exercise of this power to obey its rulings? Of course, in asking such a question one is implicitly utilizing the contract framework and its corollary of consent (tacit or express) in determining the boundaries and nature of obligation. Is such an approach, we can ask, fair? Does it "stack" the

cards one way or the other in the seemingly endless controversies surrounding the role and function of the Court? The answer to this must be an emphatic "no" and for the following reasons:

(a) The Constitution, after all is said and done, can be viewed as a contract of the most fundamental sort, specifying as it does the institutions and powers of government. As such it is a binding document until such time as it is changed through the prescribed processes. To argue otherwise would lead to philosophical mayhem.

(b) The approach does allow for one to go beyond the Constitution, as many scholars have done, to adduce evidence concerning the customs, prevailing beliefs, and the like which form a backdrop for interpreting the Constitution and the "spirit" with which its provisions are to be interpreted and its institutions to operate. This is to say that the Constitution itself on many fundamental issues cannot be read independent of the prevailing morality of the time which, though not expressly articulated in the document, serves to give it a broader meaning, purpose, and moral framework. The contractual approach certainly makes allowances for the introduction of such an overarching morality which can also lay claim to be of binding force.

(c) The neutrality of the approach is attested to by the fact that it has been utilized extensively by those whose views regarding the Court and its powers are widely varying. The *approach*, in other words, provides one common ground for the disputants in the controversy.

(d) The method is endemic to and well recognized in the judicial process itself, particularly in controversies of similar nature which inevitably arise concerning interpretation of key provisions of the Constitution.

(e) To adopt another approach, for reasons that will be spelled out later, involves

insurmountable difficulties that seem to defy rational resolution. Indeed, it is when one does depart from the contractual approach that debate about the Court takes on all the attributes of a circle squaring expedition.

Having said this much, we turn to our second contention: The literature that has sought to determine whether or not the Court does possess the power of judicial review by studying precedents, the Convention, and the language of the Constitution (those areas cited above) has proved far from conclusive on this point. Most scholars who have approached the subject in the manner outlined above have, in fact, acknowledged as much. They do talk in terms of the preponderant weight of evidence but they differ markedly on which side of the scales the preponderant weight does fall. This is true of almost every phase of their investigations. One would imagine, for example, that the matter of preconstitutional precedents of judicial review would lend conclusive weight for one side or the other in this dispute. This is far from the case. For example, Charles G. Haines, an exponent of the doctrine of judicial review, claimed that there were eleven decisions by state and colonial courts prior to 1787 in which the power of judicial review was asserted.² This in itself is hardly convincing evidence that the practice was widely practiced and accepted, but the analyses of these cases by William Crosskey³ and Brent Bozell,⁴ both opponents of judicial review of national legislation, narrow this number to just one. To cite another example, proponents of judicial review contend that by plain inference Articles III and VI of the Constitution grant the power of judicial review to the Court. Yet, not only has the inference been called into serious question, the opponents of judicial review contend that the issue, important as it is to an understanding of

the national system, would hardly be left to inference—rather it would have been spelled out in unambiguous terms.⁵ In sum, no matter where one looks for evidence that would help us understand the nature of the contract in the sense we are speaking of it, the evidence is at best highly inconclusive. This is true of the Convention Debates, the Ratifying Conventions, the State Constitutions, and the utterances and writings of leading political figures of the time. We may surmise that this is one of the reasons much of the scholarship concerned with the Court seems to assume a stance pretty much as follows: “Judicial review whether intended or not is with us.” It then proceeds, as we have said, to study the Court from various angles which have nothing to do with the question of its legitimacy within the contractual framework we have outlined above.

To all of this the following should be noted: Scholarship in this area, to quote Charles S. Hyneman, “has not laid to rest a widespread suspicion that our judges have taken upon themselves a role which the founders of our constitutional system did not intend them to have.”⁶ Nor, might we add, is it likely that such a widespread suspicion will ever be laid to rest for it is inconceivable that after some ninety years of careful research any new evidence of sufficient magnitude and authority will be unearthed to settle the controversy. To be sure, old arguments will be rehashed periodically, an added bit of evidence may be placed on one side of the scale or the other but, so far as we can see, the question of intent and hence our obligations within our constitutional system as they relate to the judiciary will never be settled. With this in mind, we will approach the matter from another angle which hopefully will put the matter of judicial review and the legitimacy of the Court’s powers in another perspective.

II

VIRTUALLY all the literature dealing with the foundations of judicial review at one point or another touches upon *Federalist* No. 78 because in this essay of *The Federalist* the power of judicial review over national legislation is unambiguously affirmed. This much cannot be denied by either friend or foe of the doctrine. And, for reasons we will spell out below, it is our contention that from the contractual approach outlined above, essay No. 78 provides the only grounds upon which judicial review can possibly be legitimated. Before proceeding to analysis of No. 78 which will form the basis for our subsequent discussion of the modern court and its behavior, we must pause to place this essay in context so that we can better comprehend its role in the controversies surrounding judicial review.

While it cannot be denied, as we have said, that No. 78 does affirm judicial review, the essay somewhat surprisingly is usually accorded only a lukewarm reception by the proponents of judicial review.⁷ The reasons for this we may surmise are varied, but the most important, as we shall see, is that there are rather obvious theoretical difficulties with Hamilton’s justification (later used, as is well known, by Marshall in *Marbury v. Madison*) and to rest the case for judicial review on this single essay would not provide very substantial grounds for justification of this power as presently exercised. Put otherwise, the conclusion which Hamilton reaches, supportive of the doctrine, is based upon reasoning which is not solid enough to withstand the sustained attack of the anti-judicial review scholars and to be saddled with this defense certainly would not bolster their position. At best, then, No. 78 is to be taken only in conjunction with other evidence to reinforce their *conclusion* that

there was widespread agreement about the desirability or necessity of judicial review.

The anti-judicial review stance toward No. 78 is predictable. We can safely surmise that the feeling exists in this quarter that to accept Hamilton's arguments in No. 78 would amount to surrender. Besides why should they bother with an all out attack which might conceivably rebound to their detriment when the pro-judicial forces are disinclined to press the case presented in No. 78. In short, the "anti's" are in the main content to let the "sleeping dog" rest.⁸

But there is another and weightier reason, we think, why no battle over No. 78 (a battle which one might reasonably anticipate) has ever taken place, at least, to any substantial degree. This involves the question of what status is to be accorded *The Federalist*. For instance, No. 78 could be dismissed as merely reflecting the opinion of one person (Hamilton) on the question of judicial review and, as such, is not to be regarded as more definitive than the myriad of statements made by other individuals of the time. And, at a more general level, there are those who regard *The Federalist* as little more than the collection of propaganda tracts designed to secure the ratification of the proposed Constitution in New York. On the other hand, there are those who perceive a strong linkage between *The Federalist* and the Framers, particularly with respect to such matters as intent and the theoretical foundations of the constitutional system. From this point of view, *The Federalist* enjoys a quasi-constitutional status which has been recognized more than once by the courts. For the most part, however, this issue has not been central in the controversies surrounding the Court, though the arguments for one side and the other are plainly there. Yet, we surmise again, they will not be used for the simple reason that the contending parties

would eventually find themselves in an embarrassing, if not untenable position. If one, for instance, rejects the plain language of No. 78, he would then be under some scholarly compulsion to justify accepting equally clear statements found elsewhere in the papers. Likewise, if one accepts the statements in No. 78, then he would be compelled to show why like pronouncements found in *The Federalist* should not also be taken at face value. And this difficulty should not be minimized, especially in those works which have dealt extensively with the role of the judiciary for they do of necessity also deal extensively with various portions of *The Federalist*. The difficulty noted here, that of arbitrarily picking and choosing, can be avoided or ignored, however, by leaving the status of *The Federalist* in limbo—that is, to make no overall or general judgment as to its status in the manner suggested above.

Precisely at this point, so it seems to us, one has reached a juncture where he must make a critical choice with respect to the matter of judicial review and that choice comes down to an acceptance or rejection of the authority of Hamilton's assertions in No. 78. More exactly, either we take Hamilton's word for it or we do not. As we see it, unless we are going to consign *The Federalist* to the scrap heap or impute ulterior motives to Hamilton, there are very substantial, if not compelling, reasons for taking him at his word. Most certainly *The Federalist* must be accorded an evidentiary status at least equal to that of the substantiating materials introduced by the contending parties in this controversy, materials which, as we have taken pains to point out are inconclusive in settling the matter. Moreover, there is no need for inferential reasoning because Hamilton's statements are clear and addressed precisely to the point at issue at a critical period in the act of founding the new nation. And

beyond this, it hardly seems likely that Hamilton would speak so forthrightly on such a sensitive issue if he did not mean business.

Whether one accepts this view or not, one thing seems almost certain: Hamilton did set forth what must have been deemed the strongest argument for judicial review. In this connection we need only note the heavy reliance which Marshall in his *Marbury* decision placed upon Hamilton's mode of reasoning found in No. 78. Equally interesting is the fact Marshall does not employ evidence beyond this to assume (usurp?) the power of judicial review. In other words, for one reason or another, he ignored the evidence and modes of reasoning with which most contemporary students wrestle. As Professor Hyneman has noted:

If, as seems an irresistible conclusion, Marshall was convinced that language in the Constitution did not establish a power of judicial review beyond need for further evidence, one would expect him to inquire next into the announced purposes of those who constructed that document. He gives us no report on the results of that inquiry. Neither in the *Marbury* opinion nor elsewhere does he tell us what was said about interpretation and enforcement of the Constitution in the Philadelphia convention or in the several state ratifying conventions. The journals of the drafting convention and the notes made by several members of that body on which we rely so heavily today had not been printed at the time of *Marbury v. Madison*. But Marshall may well have had access to much of this knowledge by word of mouth, and it is possible that he obtained by that route a great deal more knowledge about the intentions of the framers than has been available to later scholars. He certainly knew what was said in the Virginia ratifying convention about the fundamental character of the Constitution and about judicial power

under the Constitution, for he was himself a member of that assembly.⁹

We can only conjecture that Marshall also found such undertakings inconclusive and sought to plant the roots of judicial review on the strongest possible footing.

III

WE ARE NOW prepared to turn our attention to No. 78 with an understanding of its critical role in the controversies surrounding judicial review and the power of the Court.

The essay begins by noting the provisions which have been made for the appointment of judges and their tenure or, as Hamilton put it, "to the manner of constituting it [the federal judiciary]." He writes:

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.¹⁰

The following two paragraphs clearly seemed designed to allay fears that the judiciary, because of this independence, will pose any danger to the liberties of the people. We are told, among other things, "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."¹¹ More: Unlike the executive who "holds the sword of the community" and the legislature which "not only commands the purse, but prescribes

the rules by which the duties and rights of every citizen are to be regulated," the Courts do not have "FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for efficacy of its judgments."¹²

Hamilton continues in the same vein in the next paragraph:

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.¹³

Beyond this, he writes:

. . . 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.¹⁴

What follows is a reaffirmation that the judicial branch should be as separate from the other branches as possible and constituted so as to resist their encroachments. In sum, the power of the judiciary is "next to nothing" compared with those of the coordinate branches, the people have nothing to fear from this quarter, and the judiciary, because it is so feeble, must be constituted to maintain its independence.

From this point to almost the end of the essay, Hamilton asserts and justifies the power of judicial review:

The complete independence of the courts of justice is particularly 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. 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.¹⁵

Basic to Hamilton's justification is what can be termed the "fundamental law" argument. In essence, this argument is very simple: The Constitution represents the fundamental law and all laws (ordinary legislative acts) which conflict with the fundamental law are null and void. This means explicitly, "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 Put another way, "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."¹⁷

There are, of course, as the above quotations indicate, crucial elements which must be added to this justification. First, it is within the special province of the judiciary to declare laws contrary to the Constitution void:

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, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of the 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 au-

thority. The interpretation of the laws is the proper and peculiar province of the courts.¹⁸

Second, as intimated in the above passage, the Court in nullifying legislation does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both. . ."¹⁹ And third, as a corollary of this it must be assumed that the "real," basic, or fundamental will of the people is to be found in the Constitution. Thus,

[u]ntil 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.²⁰

We have here in pretty much undiluted form Hamilton's case for judicial review, a case which is probably the strongest both in terms of justifying judicial review *and* providing an unambiguous basis for maintaining that it possesses a contractual legitimacy which carries with it a corresponding obligation on the part of individuals and institutions to observe, honor, and obey. To put this latter point in other terms, if we accept No. 78 as part of our constitutional system, we have given our consent to judicial review to the degree and the extent it is contended for in this essay.

With this in mind, then, let us take another look at No. 78, with the following in mind: The fundamental law theory is based in part upon the proposition that the agencies it creates are subordinate to it and must operate within its confines. To quote Hamilton again:

[t]o deny [this proposition] 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.²¹

A perfectly logical and reasonable line of inquiry is this: The Court is also, by Hamilton's line of reasoning, subordinate to the Constitution. There can be no question of this because the Court is as much a creature of the Constitution as the Presidency or Congress. What, then, would constitute an unconstitutional act on the part of the judiciary? Specifically, for our purposes, how can we tell when the courts have used their powers, particularly that of judicial review, unconstitutionally?

Hamilton in the following quote seems to recognize that the Court could act unconstitutionally but he does not fully answer the question at hand:

It can be of no weight to say that the courts, on the pretence 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 prove anything, would prove that there ought to be no judges distinct from that body.²²

From this passage it seems clear that the Court would be acting *ultra vires* when it uses its power of judicial review to thwart legitimate statutory law. But the key phrase here is that which differentiates WILL from JUDGMENT and this particular passage tells us very little about how to make such a differentiation. We do know, for starters, this much: The exercise of WILL is within

the province of the legislative body. This is consonant with Hamilton's earlier statement in comparing the powers of the Court with those of the executive and legislative bodies—namely, the judiciary has “neither FORCE [the major constitutional power of the executive] nor WILL [the constitutional prerogative of the legislature], but merely judgment.” We are safe in concluding that in this context WILL connotes at least a choice among alternatives or goals with the concomitant capacity to achieve, implement, or move toward the attainment of the choice. JUDGMENT would seem to have a more *passive* connotation because implementation or attainment are not as closely associated with it. However, leaving aside active and passive connotations, both JUDGMENT and WILL do involve elements of choice. The exercise of WILL may or may not involve JUDGMENT but merely preference, volition, or desire. In this sense an act of WILL can, and often does, partake of arbitrariness, *e.g.*, choosing among 97 flavors of ice cream, all of which are equally attractive to the consumer. JUDGMENT, in contrast to WILL, is usually brought to bear in the context where the range of choice is far narrower; that is, normally upon a situation, act, or circumstance. JUDGMENT, moreover, is a considered opinion or decision which is the outgrowth of a ratiocinative process wherein relevant factors (factors, that is, relevant to the decision in the particular instance) are juxtaposed, assigned priorities, and carefully weighed. Judgments, of course, may vary over an endless variety of matters so that we are inclined to call most judgments opinions, *e.g.*, was Stan Musial a better baseball player than Ted Williams? In some cases, subsequent events may bear out judgments, so that we are entitled to label some judgments “good” and others “bad.” The same is true regarding the exercise of WILL.

While much more can be said about WILL and JUDGMENT, we have enough before us to explore No. 78 with an eye to determining what rules or standards the Court is bound to follow in the exercise of its JUDGMENT, particularly when it voids an act of the legislature. Such rules and standards, we hasten to add, are integral to Hamilton's justification of judicial review for without them there would be no guides for ascertaining when the Court is acting unconstitutionally, *i.e.*, usurping the legitimate powers of the other branches. These guides and rules, we should also point out, are usually ignored in the bulk of the literature dealing with judicial review.

First, we might be led to believe that judicial review should only be exercised when Congress violates specific constitutional prohibitions on its powers. The Court we are told should certainly nullify “bills of attainder,” “*ex-post-facto* laws and the like.” However, in the very next sentence Hamilton seems to open the door for a more expansive role for the Court when he writes:

Limitations of this kind [bills of attainder, *ex-post-facto* laws and the like] 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.²³ (Emphasis added.)

The word “tenor” would suggest that the Court can move into realms beyond the specific prohibitions. And later in the essay we find evidence that this might well be the case:

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 them-

selves, 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 oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of the constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions. . .²⁴

Yet, even in this passage he sees fit to speak in terms of "momentary" inclinations "incompatible with the provisions in the existing Constitution." And we must be careful not to overlook the use of the word "manifest" when used in connection with the word "tenor." Manifest would certainly seem to mean obvious, clear, undisputed, thus confining the scope of judicial review. Moreover, "manifest tenor" is used in association with the specific prohibitions placed upon Congress all of which leads us to believe that the scope of judicial review should be narrow or, more accurately, the Court should nullify only obvious legislative violations of the Constitution or practices which are indisputably essential for its continued operation.

Second, and very much supportive of this view of the matter, is the following passage taken from that section of the essay in which he justifies judicial review:

A constitution is, in fact, and must be regarded by the judges, as a fundamen-

tal 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. . .²⁵

The words "irreconcilable variance" are plain enough and certainly impose a very stringent obligation on the Court before it voids legislation. On this account we find little evidence to support the proposition that Hamilton was in effect bestowing upon the Court a position of supremacy among the three branches.

And a third major factor that bears upon the WILL-JUDGMENT dichotomy is the following:

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. . .²⁶

Here the words "indispensable," "bound down," "strict rules and precedents" are abundantly clear in their meaning and provide still another measure which can be used for the determination of whether the judiciary has abandoned JUDGMENT for WILL.

We submit, then, that No. 78, when read in its entirety (which means reading it with the problem of WILL and JUDGMENT in the back of our minds) amounts to a perfectly sensible statement with which few, if any, would seriously contend, given the fact that we have a written charter of government. To note, as Hamilton does, the feebleness and weakness of the judiciary, the fact that it cannot take any "active resolution whatever," that it is to be a passive institution exercising only JUDGMENT, that its powers extend to declaring acts of legislature unconstitutional only when con-

trary to the "manifest tenor" of the Constitution (in the sense spelled out above), that it can only use this power when there is an "irreconcilable variance" between the statute and the Constitution, and finally, that it is "indispensable" that it be "bound down by strict rules and precedents," hardly lends support to the thesis that he sought to vest the judiciary with the kind and degree of powers which modern day "judicial activists," among others, impute to it. Put otherwise, we have noted that if judicial review is indeed a part of the contract to which we have given our tacit consent, we must, perforce (as we have argued above) go to No. 78 to see the justification for it, to understand its scope, as well as, the obligations of the Court in exercising this power. When the terms of the contract are broken by the Court, our obligation to respect or obey its power of judicial review is severed and the other branches of government, principally the Congress, are entitled, nay *obliged*, to use the constitutional means at their disposal to curb, regulate, and control the Court in such a manner so as to compel conformance with the terms of the contract. This line of reasoning is but a corollary of the line of reasoning by which the courts lay claim to the power of judicial review. The Court is equally obliged as a creature of the Constitution not to overstep its bounds or exceed its constitutional authority. To argue otherwise would be to say that the Court is above the Constitution or that the Constitution is a judicial supremacy document which it patently is not.

IV

A MARK of the times is that the foregoing analysis and approach, particularly among most constitutional scholars, seems quaint, antiquated, and overly simplistic. Nobody in his right mind, nowadays, believes that

the Court only exercises JUDGMENT or that *stare decisis* is or should be considered a binding principle in litigation. Rather, the Court is looked upon not as the custodian of the Constitution in the sense Hamilton advocated, but more as our moral guardian who will lead us by the hand to the fulfillment of our most cherished ideals, which far more often than not turn out to be those of secular, materialistic liberalism. Critical analyses of the Court usually take the form of whether it has moved too fast or too slow in reaching the destined goals in light of the opportunities which present themselves measured against the mood of the public. Mature scholars now find it worthwhile to study fastidiously the written and spoken words of the justices, usually in a vain attempt to squeeze some coherency out of their judicial theories and decisions. Intra-mural squabbles occur between those who advocate "judicial restraint" and "judicial activism."²⁷ The legal "realists"—and that they are—have abandoned the idea that there is any such thing as judicial or legal reasoning or, more exactly, that judicial reasoning is what the judges reason. Those nominated for appointment to the Court, as recent history attests, are judged fit or not on the basis of their attitudes towards our most contemporary problems (along with, we might add, how many Harvard or Yale professors will support the nominee which comes down to pretty much the same thing), a fact which confirms what we already know: The Court is as much a part of the purely political whirl as any other institution of our government.

Despite these confusing views of the Court and its role, one can detect in all of these contemporary disputes a sense of inevitability. If the people, as they are wont to do, drag their feet or protest too much about integration, prayer in the public schools, reapportionment or like matters, the mood seems to prevail that the Court

should "wait out" the storm before taking another quantum leap in the "proper" direction. How many times have we been told: "The Warren Court blazed a trail in the areas of civil rights and liberties. Subsequent Courts will have to consolidate these gains before moving ahead"? Which translated means let's calm the cattle down before herding them to market.

What can account for this tangled situation and the direction the Court has and is taking? Perhaps the most important factor was the adoption of the Bill of Rights which has served to provide a colorable pretext for the expansion of judicial powers. It may well be that Hamilton envisioned this in *Federalist* No. 84 in which he argued against the addition of any rights to the original constitution. But we do know now that Madison's prophecy in the first Congress that the Bill of Rights would not alter the fundamental structure or nature of the original constitution was wrong. And the fourteenth Amendment with its "equal protection" and "due process" clauses, as we all know, has been used as a device by the Court to "nationalize" rights, a task the Court has taken on with fervor and relish.

But the expansion of Judicial power could not have come about save for the transformation in the entire nature of our public discourse. People tend more and more to think in terms of rights, so much so that the situation has become outlandish. We hear now of the right to read rapidly, the right to die, the right to live, the right to have good teachers, the right to know, and so forth. Such a mode of thinking induces one to the available specified rights as the basis for appeals to the judiciary for redress of grievances, real or imagined, a function which the Court willingly assumed. What is ironic is that Hamilton's justification for judicial review served as the basis for legitimizing this assumption of power. But, in this process,

soon forgotten were the restriction and qualifications which were also an integral part of his argument. Totally arbitrary interpretations of virtually every right specified in the Constitution and chief clauses of the fourteenth Amendment have time and again been used to invalidate state and national legislation, thereby jettisoning the "irreconcilable variance" rule. Motives and intentions were attributed to the drafters of the Bill of Rights and the fourteenth Amendment to achieve the desired decisions and results. With this the "manifest tenor" injunction went out the window. The Court and its supporters began to harp on the familiar themes of "changing times" and "complex society" and the Court's responsibility to meet the demands of the twentieth century. Thus the "strict precedent" admonition vanished.

Hamilton's theory also served the judiciary in dismantling his very own proposition that the judiciary can take "no active resolution whatever." His theory, whatever else one might say about it, does lend dignity and meaningful purpose to the judiciary. Banking on this, but seemingly oblivious to Hamilton's restrictive injunctions, the Court gradually assumed its present status and power which are, to say the least, well beyond those envisioned by Hamilton. On more than one occasion we have seen frustrated presidents on national television tell the American people in effect: "The Court has spoken and we must, whether we like it or not, obey the Constitution." It is not at all uncommon to hear high ranking administrators and congressmen, when faced with a particular difficulty, declare that "the matter will have to be settled by the courts." In sum, the Court now has, particularly in the areas of integration and reapportionment, not only invalidated state legislation and state constitutional provisions but has set up standards with which they must comply. And, because of the new

morality concerning the sanctity of the Court, there is no one, not even the President, to say it "nay." To do so would probably create a political turmoil of immense proportions.

Our point is not the simple one: We confess that we are dismayed that the "manifest tenor" of the Constitution has been interpreted to mean that children can no longer say voluntary prayers in public schools because to allow such a practice we would vault over some allegoric "high wall"; that this manifest tenor dictates that the states cannot, even if a majority of their citizens so desire, base their legislatures on any other representational principles than "one man, one vote"; that somehow manifest tenor means that the life of the unborn begins at three months and one day; or that the Constitution manifestly

dictates that children should be carted from one neighborhood to another in order to achieve the "proper" racial balance as determined by the courts.

No, we repeat, this is not our point. Rather our point is that the Court has itself violated the manifest tenor of the Constitution and it has done so in these and like cases by failing to observe the injunctions which Hamilton set forth.

Yes, as we have said, the Hamiltonian theory may seem quaint and outdated. Its restoration, we fully realize, is now next to impossible. But at least it possesses the virtue and dignity of resting upon sound philosophic and moral grounds, characteristics notably lacking in the fatuous, but currently fashionable theories which strive to justify judicial usurpation of power in the name of democracy.

¹An annotated bibliography of the leading and most salient works dealing with these matters is to be found in Charles S. Hyneman's, *The Supreme Court on Trial* (New York: Atherton Press, 1963).

²Among others see Charles G. Haines, *The American Doctrine of Judicial Supremacy* (New York: Russell and Russell, 1959), Chapters IV and V. Haines lists the major works of Thayer and Corwin which deal with these cases.

³*Politics and the Constitution in the History of the United States*, 2 vols. (Chicago: University of Chicago Press, 1953), Vol. 2, Chapter XXVII.

⁴*The Warren Revolution* (New Rochelle, New York: Arlington House, 1966), pp. 159-215.

⁵For a discussion of this see among others Hyneman, *op. cit.* Chapter Ten; and Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), Chapter I.

⁶Hyneman, *op. cit.*, p. 123.

⁷This is true in Haines, *op. cit.*, where only a lengthy portion of No. 78 is reproduced and then, so to speak, forgotten. Also see in this regard Eugene V. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* (New Haven: Yale University Press, 1962). Rostow, a judicial activist of the highest order, is content to quote only one short passage from No. 78 which upholds the Court's power of judicial review.

⁸Outstanding in this regard is Crosskey, *op. cit.* Bozell, however, does take up Hamilton's

argument at length to show that acceptance of it would legitimize the most extreme forms of judicial activism. *Op. cit.*, pp. 314-22. But he does not cite Hamilton's important injunctions regarding the use of the judicial power of review. See our text below.

⁹Hyneman, *op. cit.*, pp. 100-1.

¹⁰*The Federalist* (New York: Modern Library ed., 1937), p. 503. All subsequent references are to this edition.

¹¹*Ibid.*, p. 504.

¹²*Ibid.*

¹³*Ibid.*

¹⁴*Ibid.*

¹⁵*Ibid.*, p. 505.

¹⁶*Ibid.*, p. 507.

¹⁷*Ibid.*, p. 506.

¹⁸*Ibid.*

¹⁹*Ibid.*

²⁰*Ibid.*, p. 509.

²¹*Ibid.*, pp. 505-6.

²²*Ibid.*, pp. 507-8.

²³*Ibid.*, p. 505. Emphasis added.

²⁴*Ibid.*, p. 508.

²⁵*Ibid.*, p. 506.

²⁶*Ibid.*, p. 510.

²⁷That is, squabbles in the sense that both camps accept wide judicial powers but vary as to the wisdom of employing them in this or that case. Contrast the approaches of Bickel, *op. cit.*, and Eugene V. Rostow, *op. cit.*, for an example of this.