



2017

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William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, in *CAMBRIDGE COMPANION TO THE FEDERALIST* (Jack Rakove & Colleen Sheehan eds., Cambridge University Press forthcoming 2017)

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August 25, 2017

The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary

William M. Treanor¹

In late May 1788, with the essays of the *Federalist* on the Congress (Article I) and the Executive (Article II) completed, Alexander Hamilton turned, finally, to Article III and the judiciary. *The Federalist's* essays 78 to 83 – the essays on the judiciary - had limited effect on ratification. No newspaper outside New York reprinted them,² and they appeared very late in the ratification process – after eight states had ratified. But, if these essays had little immediate impact – essentially limited to the ratification debates in New York and, perhaps, Virginia – they were a stunning intellectual achievement. Modern scholars have made Madison's political and constitutional theory the great story of the *Federalist*, and *Federalist* 10, in particular, has long been “in the center of constitutional debate.”³ But careful study of essays 78 through 83 reveals that Hamilton had an innovative and consequential vision of the law and the judicial role that deserves at least as much attention as Madison's contributions.

As he championed the Constitution's provision on the judiciary, Hamilton had a worthy intellectual opponent - the Anti-Federalist writing under the pseudonym Brutus – and Brutus's critique provided Hamilton's analytic framework. The power of the challenges posed by Brutus was immediately evident. Shortly after Brutus' first essay appeared in the *New York Journal*, James Madison wrote to Edmund Randolph that “a new Combatant . . . with considerable

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²Elaine F. Crane, *Publius in the Provinces: Where was The Federalist Reprinted Outside New York City?*, 21 WM. & MARY Q. 589, 590 (1964).

³GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* xv (1981).

address & plausibility, strikes at the [Constitution's] foundation.”⁴ Brutus's most compelling essays were essays eleven through fifteen, where he attacked the proposed federal judicial system. Brutus forcibly advanced a basic theme: "nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."¹¹

For Hamilton, Brutus was not only a worthy opponent, he was, apparently, a consistent opponent. Most scholars believe Brutus was Melancton Smith, a New York lawyer who had served in the Continental Congress. Hamilton and Smith had already engaged in a historically significant debate. When Alexander Hamilton in 1784 made his pathbreaking argument in favor of judicial review as an attorney in case of *Rutgers v. Waddington*, Smith wrote the revolutionary era's most significant critique of judicial review, a pamphlet arguing that the position that a court could invalidate a statute was “absurd.”¹² And Smith was to be Hamilton's primary antagonist at the New York State ratifying convention in the summer of 1788, where he was the leading critic of the Constitution, and their debates were to be one of the intellectual high points of the ratification conventions.

Scholars have paid close attention to individual arguments made by Hamilton, particularly his famous description of the judiciary as the “least dangerous” branch and his seminal defense of judicial review in *Federalist 78*, the most complete justification of the doctrine before *Marbury*. While this close analysis is merited, it is also essential to view Hamilton's essays through a broader lens, to study these six essays as a whole. When one

⁴ Letter from James Madison to Edmund Randolph (Oct. 21, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 199 (William T. Hutchinson et al. eds., 1977).

¹¹ Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 261 (Michael P. Zuckert & Derek A. Webb eds., 2009).

¹² Melancton Smith et al., *Pamphlet on Rutgers v. Waddington*, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 3, 9.

carefully examines the debate between Publius and Brutus, one sees that Federalist 78-83 offer a systematic and novel response to the competing vision of the judiciary and juries advanced by Brutus. Hamilton developed a new theory of the judiciary and legal decisionmaking that gave coherence and logical force to Article III. While the drafters of Article III had dramatically departed from revolutionary era precedent, Federalists, prior to Publius, had not explained that departure. Hamilton offered a new vision that made sense of Article III.

Overwhelmingly, Brutus eloquently championed a traditional point of view, one that reflected faith in juries and legislative decision-making, suspicion of judges, and confidence in the states. By contrast, Hamilton developed the case for federal courts and their role in establishing uniform laws, and he challenged powerfully settled practices and the principles that had guided the treatment of the judiciary in the state constitutions. Hamilton offered a recognizably modern view of the law that combined profound respect for the considered judgments of “the people” as they engaged in constitution-making, faith in judicial expertise and the judiciary’s commitment to the rule of law, suspicion of juries and ephemeral legislative majorities, and the need for uniformity in the proposed constitutional system. Specific legal doctrine –his broad conception of the scope of judicial review, the need for lower federal courts, the importance of the supremacy of the Constitution, and the establishment of the judiciary as a wholly independent branch of government - were derived from this larger conception. His tacit debate with Brutus thus reflects a broader transition in the ways in which Americans conceived the power of judges and juries and even the role of law. The significance of Hamilton’s path-breaking and deeply coherent contribution has likely been underestimated because so much of what was novel in 1788 has evolved into the common wisdom. Hamilton’s conception of the judicial role in the federal system and his vision of the law reflected an insight and an intellectual power that can fairly be described as genius. His contemporaries and near contemporaries lauded the extraordinary power of his legal thinking.

Justice Story remembered, “I have heard [Secretary of War and Treasury] Samuel Dexter, John Marshall, and [New York] Chancellor Livingstone say that Hamilton’s reach of thought was so far beyond theirs that by his side they were schoolboys – rush tapers before the sun at noon day.”¹⁸ The praise was well-merited. Examination of the six essays on the judiciary reveals that brilliance.

Background to the Federalist Papers

Responding to the perceived legislative excesses of the revolutionary era, the drafters of the Constitution decisively broke with the framework established under the state constitutions by elevating the judiciary to the status of a co-equal and wholly independent branch of government. They also broke with the structure established by the Articles of Confederation by making the judiciary a separate branch of the national government and by expanding its jurisdiction dramatically. While traditional views celebrated juries, the drafters did not guarantee jury trials in civil cases. Finally, to a remarkable extent, they accepted judicial review, a concept that had already provoked controversy in a handful of cases by revolutionary era courts. Yet even as they re-created the judiciary, the framers gave this topic little attention. They were guided by an emerging consensus, rather than by an articulated rationale. On the other side of the ratification debate, Anti-Federalists had similarly not developed a sophisticated justification for their position on Article III – even though it was a focus of their attack - until Brutus’ essays appeared. As a result, Brutus and Publius were not simply championing conventional Anti-

¹⁸ CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: VOLUME ONE 149 n.1 (1922) .

Federalist and Federalist causes; they were creating a larger theoretic framework that made sense of their compatriots' views.

While the idea that there are three separate branches of government is now a bedrock principle of constitutionalism in the United States, the notion that the judiciary was a separate branch of government was controversial at the time of independence. Blackstone's *Commentaries* treated the judiciary as a part of the executive.¹⁹ That conception had its American adherents. John Adams, for example, wrote in 1766: "the first grand division of constitutional powers is, into those of legislation and those of execution." The judiciary was part of the executive: "[H]ere the King is by the constitution, supreme executor of the laws, and is always present in person or by judges, in his courts, distributing justice among the people."²⁰ In contrast, it was Montesquieu who first articulated a conception of British constitution as composed of three branches and declared that "there is no liberty, if the judiciary power be not separated from the legislative and executive."²¹ But, when Montesquieu spoke of the judiciary,

¹⁹ According to Blackstone, the King "has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary that courts should be erected to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers." 1 WILLIAM BLACKSTONE, COMMENTARIES *267. See also FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 210 (1985) (for Blackstone, "the judicial power was a subordinate of the executive."). Locke's conception of separation of powers resembled Blackstone's in that the judiciary was part of the executive. He divided government into the legislative, the executive (which included the judiciary), and the federative (which involved dealings with foreign powers). See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382-84 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

²⁰ John Adams, *Clarendon*, No. 3 (Jan. 27, 1766), reprinted in THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1986). On the acceptance of this view in the colonies, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 159-60 (1969).

²¹ Montesquieu, *Spirit of Laws*, reprinted in THE FOUNDERS' CONSTITUTION, *supra* note 20.

his focus was on juries, not judges, which made it hard to conceive of the judiciary as a separate department of government.²²

Moreover, in many practical respects the judiciary *was* subordinate to both the legislature and the executive. Colonial legislatures often exercised judicial functions. They resolved private petitions, which were often disputes between parties; they tried cases in equity; they granted new trials. This exercise of authority was popular among colonists – decisions were being made by representative assemblies rather than crown-controlled judges. Colonists were sharply critical of the judiciary because, unlike in Great Britain, their judges served at the pleasure of the Crown. In addition, governors and councils were courts of appeals in civil cases in the colonies, and, even though it no longer heard appeals from English common law courts, the English Privy Council heard appeals from governors and councils.²³ This system of appeals and the lack of tenure protection supported the belief that the judiciary was part of the executive.

The Declaration of Independence illustrates how concerned Americans were about executive interference with courts and juries. Five of the twenty-nine “injuries and usurpations” it listed involved courts or juries. In particular, the Continental Congress attacked George III because “[h]e has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

²² *See id.* (“The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.”) Montesquieu’s focus on the jury, as opposed to judges, in his description of the exercise of judicial power was, however, inconsistent with the increasing power that eighteenth century British judges were exercising. *See* Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1063 (2007) (“Being French, Montesquieu tended to be long on theory and short on practice. . . .”) [hereinafter Rakove, *Judicial Independence*].

²³ WOOD, *supra* note 20, at 155, 159; Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998). Tenure during good behavior had been established in Great Britain by the Act of Settlement of 1701.

Following Montesquieu, most of the first state constitutions proclaimed that there were three branches of government. As the Virginia Constitution of 1776 stated, “[T]he legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercises the powers properly belonging to the other.”²⁴ But, despite such assertions, judicial powers and independence remained severely limited. Legislatures increasingly resolved private disputes.²⁵ New Jersey’s and South Carolina’s constitutions provided for Privy Councils that would have ultimate judicial authority.²⁶ More significant, the judiciary was subject to legislative control. In most states the legislatures, not the governor, played a critical role in the selection of judges. Except in Maryland and Pennsylvania, they either appointed the judges themselves or shared the appointment power with the executive. Judicial tenure protection was weak. Five states gave judges only fixed terms, and they were sometimes quite short – a year in Connecticut and Rhode Island.²⁷ While in the remaining eight states constitutional provisions stated that judges would hold office during good behavior, five of the eight provided for judicial removal upon recall by

²⁴ VA. CONST. of 1776, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3821 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. For similar provisions, *see* MD. CONST. of 1776, art. VI, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS 1686, 1687; N.C. CONST. of 1776, art. IV, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS 2787, 2787; GA. CONST. of 1777, art. I, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS 777, 778; MASS. CONST. of 1780, art. XXX, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS 1888, 1893; N.H. CONST. of 1784, art. XXXVII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS 2453, 2457. In New Jersey and South Carolina, however, the judiciary was not treated as a separate and independent branch. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 264-65 (2001).

²⁵ WOOD, *supra* note 20, at 155-56, 454.

²⁶ S.C. CONST. of 1776, art. V, XVI, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS 3241, 3244 (creating Privy Council from members of executive and legislature that would operate as a Court of Chancery); N.J. CONST. of 1776, art. IX *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS 2594, 2596 (Governor and the Legislative Council to be court of last resort).

²⁷ WOOD, *supra* note 20, at 148, 160-61.

the legislature, and in New York judges had to retire at 60.²⁸ While precise provisions varied from state to state, judges ultimately were dependent on the legislature, since no state guaranteed both lifetime tenure and a fixed salary. The drafters of the state constitutions thus made the court *more* dependent on the legislatures than they had been in the colonial era. As they created courts, state constitution-makers were motivated by hostility to crown (or executive) control, rather than a principled embrace of judicial independence.

As legislatures began to govern, they inevitably acted in ways that advanced some interests in the states at the expense of others. As historian Jack Rakove has written, “[T]he Revolution . . . created the first sustained impulse to legislate, and under pressing conditions that required stopgap measures that were burdensome, intrusive, and often hastily adapted under adverse circumstances.”³⁰ Confronted with the reality of exercises of legislative power (particularly statutes that disadvantaged creditors or curtailed the rights of loyalists), prominent Americans began to re-examine their faith in popular assemblies and to reconsider the role of courts. Madison and others came to focus on the importance of judicial independence as essential to checking legislative abuse.³¹ Even more notably, the infant doctrine of judicial review became an important manifestation of this new conception of the judiciary as constraining the legislature, and judicial review became closely linked to the emerging concept of written constitution as fundamental law, superior to normal legislative acts. Scholars debate whether a handful of seventeenth century and early eighteenth century British cases – the most prominent being *Bonham’s Case*³² – reflect exercises of the power of judicial review or are better understood as

²⁸ GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 136 (1997).

³⁰ Rakove, *Judicial Independence*, *supra* note 22, at 1066.

³¹ WOOD, *supra* note 20, at 454; Rakove, *Judicial Independence*, *supra* note 20, at 1066.

³² *Bonham’s Case* (1610) 77 Eng. Rep. 646, 652 (“[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void . . .”). This statement was cited

exercises of statutory construction. But, regardless of whether British courts had once very occasionally engaged in judicial review, by the time of the American Revolution, the doctrine of parliamentary supremacy was well-established in Great Britain. As Blackstone asserted, “[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it”³³

Thus, as the revolutionary era began, the idea that courts could invalidate statutes defied legal convention. Nonetheless, in a small group of cases in the years after independence, parties asked courts to do just that. In an even smaller number, courts accepted that invitation.³⁴ The most prominent cases in which courts were asked to invalidate statutes – the Rhode Island case of *Trevett v. Weeden*,³⁶ Virginia’s *Case of the Prisoners*,³⁷ and New York’s *Rutgers v. Waddington*³⁸ - involved assertions of legislative authority that affected groups that were disadvantaged in the legislative process: loyalists and creditors. While each case shows that judicial review was an issue that courts were starting to grapple with, they also show that it was controversial.

In *Trevett*, a Rhode Island court invalidated a statute that denied a jury trial to creditors who refused to accept the state’s paper money as equivalent to the gold or silver provided for in

with approval in *Day v. Savage* (1614) 80 Eng. Rep. 235, 237 and in *City of London v. Wood* (1701) 88 Eng. Rep. 1592, 1602.

³³ 1 WILLIAM BLACKSTONE, COMMENTARIES *91, *160.

³⁴ William Michael Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455, 473-96 (2005). My discussion of the early judicial review cases in this essay follows the discussion in the Stanford article.

³⁶ There was no published opinion in *Trevett*. The principal record is a pamphlet written by James Varnum, Weeden’s attorney, who argued for the exercise of judicial review. James M. Varnum, *The Case, Trevett v. Weeden*, reprinted in BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971).

³⁷ *Commonwealth v. Caton*, 8 Va. (4 Call) 4 (1782). The published opinion is incomplete and often in error. For a fuller discussion of the case, drawing on the papers of the participants, see William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

³⁸ While the opinion in *Rutgers* was not published, it was printed in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393 (Julius Goebel, Jr. et al. eds., 1964) [hereinafter LAW PRACTICE OF ALEXANDER HAMILTON]. For a recent account of the case focusing on the way in which the legal system mediated competing claims of Loyalists and Patriots, see PETER CHARLES HOFFER, *RUTGERS V. WADDINGTON: ALEXANDER HAMILTON, THE END OF THE WAR FOR INDEPENDENCE, AND THE ORIGINS OF JUDICIAL REVIEW* (2016).

their contracts. A furious legislature summoned the judges to appear before it to explain their decision. Four of the five judges offered explanations for their action, and all were replaced. Only the judge who was silent retained his position. *Trevett* illustrates not only that judicial review was controversial in Rhode Island, but that judicial independence was limited.

The issue in the *Case of the Prisoners* was the validity of a pardon of three loyalists that arguably satisfied the requirements of the state constitution but that clearly did not satisfy the requirements imposed by statute. Of the eight judges on the Virginia Court of Appeals, two ruled in favor of the prisoners and six ruled against them. The opinions reflect a full range of positions on the validity of judicial review. Only three of the eight judges asserted that they had the power to invalidate unconstitutional statutes. The case is particularly noteworthy, not simply because it gives an early instance of consideration of judicial review, but because it introduced a range of important Virginians to the issue. Edmund Randolph as Attorney General argued that the court did have the power to invalidate the statute but should choose to uphold it. Madison followed the case and asked Randolph and one of the judges for their notes. The case was also known to a young John Marshall, whose future law teacher George Wythe, while ruling against the prisoners, nonetheless asserted that courts had the power to invalidate statutes. Legend has it that Marshall was present when the decision was announced.

The most important case from the vantage point of *The Federalist* was *Rutgers v. Waddington*, a case in which a young Alexander Hamilton, appearing as an attorney for one of the parties, urged the state court to exercise judicial review. Hamilton, representing a British merchant who had operated a tavern in New York City during the British occupation, argued that the court should invalidate a statute barring the merchant from introducing into evidence the military order authorizing him to operate the tavern. He made two claims, both reflecting a

sophisticated approach to the exercise of judicial review. First, he argued that the statute violated the law of nations and was unconstitutional because the state constitution contained a provision adopting “the common law of England.”³⁹ Although the constitution did not explicitly refer to the law of nations, Hamilton broadly interpreted the common law by invoking English authorities who had relied on the law of nations in cases concerning the wartime capture of property. Second, he argued that the statute violated the Treaty of Paris, which had been ratified pursuant to the national powers implicit in the Declaration of Independence. The Declaration, Hamilton asserted, “is the fundamental constitution of every state.”⁴⁰ When the state statute and an exercise of national authority conflicted, the latter controlled: “When two laws clash that which relates to the most important concerns ought to prevail.”⁴¹

Hamilton’s arguments reflected a structural approach to judicial review. There was no clear textual conflict between the statute and the state constitution, and Hamilton did not invoke natural law. Rather, he argued that the statute was unconstitutional because it was at odds with broad constitutional principles – the state constitution’s implicit embrace of international law and the primacy of the Declaration. In other words, the statute was unconstitutional because it was inconsistent with the basic structure of governance established by the state constitution.

Despite the sophistication of this argument, Hamilton achieved only limited success as an advocate for judicial review. Although the Mayor’s Court largely ruled in his favor on the matter of statutory interpretation, its opinion carefully avoided the question of the legitimacy of

³⁹ N.Y. CONST. of 1777, art. XXXV, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS 2623, 2634.

⁴⁰ Alexander Hamilton, Brief No. 6, *reprinted in* LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 38, at 374.

⁴¹ Alexander Hamilton, Brief No. 6, *reprinted in* LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 38, at 381 (quoting Cicero).

judicial review.⁴² Nonetheless, the opinion was widely read as an exercise of judicial review. The New York Assembly adopted a resolution attacking the court for having “dispense[d] with” a statute.⁴³ Melancton Smith wrote a pamphlet that read the decision as an exercise of the power of judicial review and sharply attacked the legitimacy of this idea, and his work was the most complete critique of judicial review produced in the revolutionary era.⁴⁴

Foreshadowing the arguments of Brutus, Smith attacked judicial review on several grounds. Judicial review was at odds with popular government, he argued: it “render[ed] abortive the first and great privilege of freemen, the privilege of making their own laws by their representatives.”⁴⁵ Second, judicial review threatened individual rights: “For if the power of abrogating and altering [statutes] may be assumed by our courts, and submitted to by the people, then, as far as liberty, and the security of property are concerned, they become useless as other opinions which are not precedents, and from which judges may vary.”⁴⁶ Finally, the judicial independence created by the constitutional grant to judges of tenure in office during good behavior exacerbated the risks created by judicial review: “[P]ower is . . . transferred to judges who are independent of the people.”⁴⁷ Thus, for Smith, as it would be for Brutus, judicial review was dangerous because it would place courts above the legislature, enable them to act without control, and allow them to threaten popular sovereignty and individual liberty.

Thus, the three landmark cases – *Trevett*, the *Case of the Prisoners*, and *Rutgers* – reflect a move towards a greater judicial role than had been evidenced in revolutionary era state

⁴² For the opinion in the Mayor’s Court, see LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 38, at 399-417. For an analysis of the decision, see Treanor, *supra* note 37, at 484-87.

⁴³ N.Y. Assemb. Res., 8th Assemb. (Oct. 4-Nov. 29, 1784), *reprinted in* LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 38, at 312.

⁴⁴ Smith et al., *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 3. Smith is listed as the lead author and is generally thought to have written the essay. See *id.*

⁴⁵ *Id.* at 9.

⁴⁶ *Id.*

⁴⁷ *Id.*

constitutions; they also show how controversial that increased role was. Given this background, the federal constitution's provisions on the judiciary and the relevant debates in Philadelphia are both striking and surprising.

The federal constitution has notably strong guarantees of judicial independence. Indeed, as legal scholar Gerhard Casper has observed, it reflects the “[e]xtreme solution – an appointed judiciary guaranteed salary for life, subject only to impeachment. No state offered this combination.”⁴⁸ The Constitution also goes farther than Great Britain had, where both houses of Parliament could remove judges by petition.⁴⁹ Not only is the conclusion the drafters reached surprising in historical context, it is surprising how uncontroversial it was at the convention. There was a consensus that federal judges should serve during good behavior, and Connecticut was the only delegation that favored qualifying making judges removable by Congress. The framers also readily agreed that judicial salaries should not be subject to decrease.⁵⁰

The drafters also designed a federal court system of broad jurisdiction. The Continental Congress (a legislative body) exercised both executive and judicial powers. Before the adoption of the Articles of Confederation, Congress had the power to resolve disputes between states, and it had created a Court of Appeals in Cases of Capture.⁵¹ Under the Articles, Congress had the power to set up tribunals "for the trial of piracies and felonies committed on the high seas" and

⁴⁸ CASPER, *supra* note 28, at 138-39.

⁴⁹ Act of Settlement 1701, 12 & 13 Will 3, c. 2. See James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1235 (2007).

⁵⁰The only controversial matter with respect to compensation was whether salaries could be increased. Madison had moved to prohibit increase of salaries - but this was rejected on the grounds that the approach did not take into account the possibility of inflation. See MCDONALD, *supra* note 19, at 53.

⁵¹ Robert Pushaw, *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 468-69 (1999).

"for receiving and determining finally appeals in all cases of captures."⁵² It also was empowered to act as "the last resort on appeal in all disputes and differences . . . between two or more States" and to appoint temporary "commissioners or judges to constitute a court for hearing and determining the matter in question"⁵³ Thus, Congress had control over the nation's judicial functions; also significantly, those functions were distinctly limited.

The weakness of this structure had long concerned Hamilton. In 1783 he decried the fact that under the Articles "the most approved and well-founded maxims of free government, which requires that the LEGISLATIVE, EXECUTIVE and JUDICIAL authorities should be deposited *in distinct and separate hands* . . . [and] the want of a FEDERAL JURIDICATURE, having cognizance of all matters of general concern in the last resort."⁵⁴ He objected to the national government's lack of enforcement authority for its decisions and its need to rely on the states to implement its acts.⁵⁵ As Hamilton observed in *Federalist* 21, the Confederation presented the "striking absurdity" of "a government destitute even of the shadow of constitutional power to enforce the execution of its own laws."⁵⁶

With little discussion, the drafters decisively rejected the limited judicial powers of the Articles and created an independent national judicial system with final authority to decide "Cases" of national importance and certain enumerated categories of "Controversies." They also required jury trials in all criminal cases except for impeachments. The most significant controversy among the drafters was whether a set of lower federal courts should complement the

⁵² Articles of Confederation of 1781, art. IX, sec. 1.

⁵³ Articles of Confederation of 1781, art. IX, sec. 2.

⁵⁴ Alexander Hamilton, *Resolutions for a General Convention* (1783), reprinted in *THE FEDERALIST* 4 (John C. Hamilton ed., 1866).

⁵⁵ Pushaw, *supra* note 51, at 469.

⁵⁶ *THE FEDERALIST* No. 21 (Alexander Hamilton).

Supreme Court. Strong nationalists like James Madison and James Wilson sought to mandate the establishment of such courts, while other delegates (led by John Rutledge and Roger Sherman) sought to empower state courts to decide federal rights of action in the first instance. Ultimately, the drafters settled on a compromise fashioned by Madison that authorized Congress to create lower federal courts but also left it free to empower state courts to act as lower federal courts.⁵⁷

Just as the drafters departed from state constitutions in creating strong protections for judicial independence, so their views of judicial review also reflected dramatic change. Judicial review is not explicitly recognized in the constitutional text, and most of the discussion of judicial review at the convention arose in the context of debate over a Council of Revision, a joint executive-judicial body unsuccessfully championed by Madison and Wilson that would have had the power to veto legislation.⁵⁸ Eight of the framers who reflected a broad range of views on other matters - Madison, Wilson, Gouverneur Morris, Luther Martin, Elbridge Gerry, George Mason, Hugh Williamson, and Sherman – all spoke in favor of judicial review. In contrast, only John Dickinson and J. F. Mercer spoke against it.⁵⁹ This apparent support for judicial review reflected the growing acceptance of the view that courts had the power to

⁵⁷ JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES* 6 (2009). *See also* MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79-80 (1913) (“The most serious question was that of the inferior courts. The difficulty lay in the fact that they were regarded as an encroachment upon the rights of the individual states. . . . The matter was compromised: inferior courts were not required, but the national legislature was *permitted* to establish them.”); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1620 (2008) (“This was the compromise, orchestrated by James Madison, between those who wanted to establish lower federal courts and those who thought they were unnecessary. The two camps split the difference by leaving the creation of the lower federal courts to Congress’ discretion.”).

⁵⁸ *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 21-36, 71-83 (Max Farrand ed., 1966) [hereinafter RECORDS].

⁵⁹ *See* 1 RECORDS, *supra* note 58, at 97 (Gerry); 2 RECORDS, *supra* note 58, at 27 (Sherman); 2 RECORDS, *supra* note 58, at 28, 92, 299 (G. Morris); 2 RECORDS, *supra* note 58, at 73 (Wilson); 2 RECORDS, *supra* note 58, at 73 (Mason); 2 RECORDS, *supra* note 58, at 76 (Martin); 2 RECORDS, *supra* note 58, at 376 (Williamson); 2 RECORDS, *supra* note 58, at 420 (Madison). It should be noted that Madison’s position on judicial review was complex and not consistent. *See* LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 93-127, 145-169 (2005). For the statements in opposition to judicial review, *see* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 298 (Mercer); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299 (Dickinson).

invalidate statutes they deemed unconstitutional. In the first Congresses that followed ratification, senators and representatives repeatedly asserted that courts would review statutes for constitutionality.⁶⁰ Although many legal scholars still wrongly portray the decision in *Marbury* as the “establishment” of judicial review, before 1803 there were 31 cases in state and federal courts in which a statute was invalidated and seven more in which at least one dissenting judge ruled a statute unconstitutional.⁶¹

Yet the limited extent of this discussion of the judiciary is just as noteworthy as the drafters’ striking departure from earlier conceptions of the judiciary. As Forrest McDonald has observed, “The delegates devoted less time to forming the judiciary – and less attention to careful craftsmanship – than they had expended on the legislative and executive branches.”⁶² The need for a federal judicial system (comprising at least a Supreme Court) and for judicial independence is largely assumed, as is the legitimacy of judicial review. As a result, while the conception of the judicial role at the Convention was novel and the apparent subject of an emerging consensus among the participants, the theoretical justification for that new approach was left undeveloped. It was stipulated rather than articulated.

If the drafters had reached a general consensus about the judiciary, it soon became apparent that Anti-Federalists did not share their view. Article III quickly became a main object of their repeated and forceful attacks. Opponents of the Constitution forcefully and repeatedly attacked Article III. A look at the substantive provisions of the Bill of Rights illustrates how

⁶⁰ Maeva Marcus, *Judicial Review in the Early Republic*, in LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA 25, 33-35 (Ronald Hoffman & Peter J. Albert eds., 1996).

⁶¹ Treanor, *supra* note 34, at 497-554 (surveying cases).

⁶² MCDONALD, *supra* note 19, at 253.

central these concerns were: five of the first eight adopted amendments were principally concerned with courts or juries.⁶³

Yet, even as Anti-Federalists challenged specific provisions of the Constitution, no one initially stepped forward to offer a coherent framework for their critique of the judiciary. In late January 1788, Melancton Smith noted that “very little has yet been written” “on Judicial powers of it [the Constitution].” Smith bemoaned the failure of the Anti-Federalists to pursue this question. “It appears to me this part of the system is so framed as to *clinch* all the other powers, and to extend to them in a silent and imperceptible manner to any thing and every thing, while the Court who are vested with these powers are totally independent, uncontrollable and not amenable to any power in any decisions they may make.”⁶⁴

A week later, Brutus launched an attack on the Constitution’s plan for the judiciary in his eleventh essay. The identity of Brutus has long been a matter of debate. For many years, most scholars focused on Robert Yates, one of New York’s two Anti-Federalist delegates to the constitutional convention.⁶⁵ More recent scholars, however, have shown that both the literary style and the types of argument advanced indicate that Yates was not the author, and they have convincingly argued that the essays were either written by Melancton Smith⁶⁶ or someone with

⁶³ CASPER, *supra* note 28, at 133.

⁶⁴ Letter from Melancton Smith to Abraham Yates (Jan. 23, 1788), *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 332, 333.

⁶⁵ Paul Leicester Ford, *Note – The Letters of Sydney. Written by Robert Yates*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 295 (Paul Leicester Ford ed., 1892); CECELIA M. KENYON, *THE ANTIFEDERALISTS* lxxxvii, 323 (1966); JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT: ANTECEDENTS AND BEGINNINGS TO 1801* 292-93, 308-12 (1971); Terence Ball, *Letters of Brutus*, in *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 436 (Terence Ball, ed. 2003). Bernard Bailyn has suggested that Brutus was either Robert Yates or Abraham Yates, Jr. *THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART ONE: SEPTEMBER 1787 TO FEBRUARY 1788* 1149 (Bernard Bailyn ed., 1993). Saul Cornell has written that “the identit[y] of Brutus . . . remains a mystery.” SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788-1828* 96 n.23 (1999).

⁶⁶ See, e.g., William Jeffrey, Jr., *The Letters of ‘Brutus’ -- A Neglected Element in the Ratification Campaign of 1787-88*, 40 U. CIN. L. REV. 643, 645 (1971); DAVID J. SIEMERS, *THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND*

whom he was close connected.⁶⁷ The timing of Essay 11 – following shortly after Smith’s letter to Yates – provides additional support for the thesis that Smith was Brutus.

Essay 11 begins innocuously enough: “The nature and extent of the judicial power of the United States, proposed to be granted by the constitution, claims our particular attention.”⁶⁸ Over the next two months, Brutus published five strong and thoughtful essays challenging the Constitution’s plan for the judiciary. He focused on the dangers of judicial independence and the ways in which federal courts’ exercise of judicial review and construction of the Constitution would cripple the states. He ended Essay 16 with a dire warning about the Constitution’s framework and the an people’s inability to control federal courts: “[W]hen this power [of construing the language of the Constitution and of exercising judicial review] is lodged in hands

FORBEARANCE 121 (2003) (“Brutus’ identity is uncertain, but speculation has centered on Melancton Smith.”); John Burrows, *The Authorship of Two Sets of Anti-Federalist Papers: A Computational Approach*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 418-19 (computational analysis of vocabulary provides “compelling” evidence that Melancton Smith was Brutus).

⁶⁷ Michael Zuckert & Derek Webb, *Introduction*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at xxix. Zuckert and Webb offer strong evidence that Smith was the Federal Farmer and that he was Brutus, largely because both the Federal Farmer and Brutus advanced arguments that Smith made elsewhere. At the same time, they point out that it was unlikely that the same person wrote both sets of essays: they differ significantly too much in style and it is unlikely that one person would write two different series “overlapping in time and topic.” *Id.* at xxviii. Thus, they postulate that one was likely written by Smith and the second by someone strongly influenced by Smith.

It should be noted that Federal Farmer, like Brutus, voiced deep suspicion of the federal judiciary, although he devoted much less attention to the subject. Federal Farmer expressed particular concern that the federal judiciary would be able to abuse power because its actions, typically only affecting one person, would escape popular attention. See Letters from The Federal Farmer XV, Jan. 18, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, at 127-29. Both Brutus and Federal Farmer expressed concern about the Constitution’s failing to protect the jury trial right, Federal Farmer celebrated the jury more than Brutus, applauding its importance as a representative decisionmaking body. See Letters from The Federal Farmer XV, Jan. 18, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, at 132-34. For further discussion of Federal Farmer’s criticism of Article III, see CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, at 89-90.

In this essay, I take the view that Brutus was Smith, rather than someone influenced by Smith. That conclusion accords with the weight of recent scholarship. Perhaps of greater importance, where Federal Farmer devotes comparatively little attention to the judiciary, the judiciary is of central concern to Brutus. As Zuckert and Webb observe, “It is of more than passing interest that *Federal Farmer’s* treatment of institutions is weak just where *Brutus’s* is strong – on the judiciary.” Zuckert & Webb, *supra* note 11, at xxxi. In particular, Smith’s concern with judicial review, as reflected in his memo in the aftermath of *Rutgers*, support the idea that he was Brutus, since Brutus also focused extensively on judicial review (and Federal Farmer did not).

⁶⁸ Essays of Brutus XI, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 233.

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.*”⁶⁹

In Federalist Papers 78-83, Hamilton responded to Brutus’s challenge by articulating a comprehensive theory of the role of the federal judiciary. But these essays were not the first occasion on which Publius discussed the federal judiciary. A wide variety of judicial issues was discussed in earlier papers. In *Federalist* 16, for example, Hamilton indicated that the Constitution contemplated judicial review, asserting that federal courts would have the power to “pronounce the resolutions of [Congress] . . . to be contrary to the supreme law of the land, unconstitutional, and void.”⁷⁰ Hamilton and Madison each wrote of the need for a federal court to resolve controversies authoritatively and to impose uniformity. In Federalist 22, Hamilton had asserted that “[a] circumstance which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation.” In making the case for a federal judiciary, he gave particular emphasis to the consistent interpretation of treaties: “The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.” Madison

⁶⁹ Essays of Brutus XVI, Apr. 10, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 262.

⁷⁰ THE FEDERALIST No. 16 (Alexander Hamilton) (“But if the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. . . . The success of it would require not merely a factious majority in the legislature, but the concurrence of the courts of justice and of the body of the people. If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional, and void.”).

in *Federalist 39* had stressed the need for an ultimate federal judicial authority to resolve conflicts between the state and national governments and suggested that the Constitution's guarantees of judicial independence ensured that disputes would be fairly resolved.⁷¹ In *Federalist 51*, Madison had suggested that, under the constitutional framework, federal courts would necessarily exercise the power of judicial review, although he also suggests that it would have been better if the framers had instead adopted his revisionary council.⁷²

Madison's observations on the judiciary reflected three main points. First, as he argued at the close of *Federalist 39*, the Supreme Court would bear the responsibility of adjudicating the boundaries of federalism, acting "impartially" as a disinterested observer. Second, judges had to be made as independent of legislative control and manipulation as possible. But third, and of critical importance, all the political advantages in a republic would flow to the legislature, which enjoyed the most direct connection to the people. The judiciary and the executive were the inferior departments, and the great challenge of the separation of powers in a republic, as Madison famously remarked in *Federalist 48*, was to protect these weaker institutions against the "impetuous vortex" of the legislature.

Thus, before *Federalist 78*, Publius had touched on most of the salient issues involving the judiciary. Publius had discussed the importance of judicial checks on legislative abuses, recognized the significance of judicial independence, acknowledged the weakness of the

⁷¹ Madison wrote: "It is true that in controversies relating to the boundary between the two jurisdictions [state and federal], the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality." THE FEDERALIST No. 39 (James Madison).

⁷² "In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them [the law]: as the Courts are generally the last in making their decisions, it results to them by refusing or not refusing to execute a law, to stamp it with a final character. This makes the Judiciary Dept. paramount in fact to the Legislature, which was never intended and can never be proper." For a good discussion of Madison's thinking in *Federalist 51* on judicial review, see WILLS, *supra* note 3, at 153-54.

judiciary (in comparison to Congress), stressed the need for uniformity in the federal legal system, and assumed the existence of judicial review. But the treatment of the judiciary was limited. Federalist 78-83 did not depart from the positions previously advanced. Rather, these essays expanded the prior positions and, unlike the previous papers, developed a theory of the federal judicial role.

Hamilton's essays on the judiciary systematically confronted the full range of issues raised by Article III, and his analysis merits reconstruction at some length. *Federalist 78* is by far the most significant essay.⁷⁹ Its ostensible purpose was to explain why the judiciary should be an independent branch of government, but here Hamilton also developed both a justification for judicial review and a description of its proper scope. *Federalist 78* establishes the framework of Hamilton's conception of the federal judiciary and informs the spirit of the more tightly focused essays that follow. Federalist 79 defended the Constitution's guarantees of judicial independence through tenure in office and compensation. Federalist 80 justified the grant of jurisdiction to federal courts. Federalist 81 explained the Supreme Court's establishment as the court of last resort, the capacity of Congress to create lower federal courts, and the Supreme Court's jurisdiction. Federalist 82 analyzed the relationship between state and federal courts. Finally, the longest essay, Federalist 83, answered one of the Anti-Federalists' most persistent criticisms by defending the Constitution's failure to guarantee jury trials in civil cases.

⁷⁹ It is, for example, the Federalist Paper on the judiciary most frequently cited in law reviews, and by a wide measure. A search in the Lexis database on September 16, 2016 found that it had been cited 3149 times. The other essays were cited 254 times (Federalist 79), 660 times (Federalist 80), 841 times (Federalist 81), 285 times (Federalist 82), and 480 times (Federalist 83). It is also the most cited in Supreme Court decisions, though here the citation count is much closer: Federalist 78 (48 citations); Federalist 79 (12 citations); Federalist 80 (28 citations); Federalist 81 (35 citations); Federalist 82 (21 citations); Federalist 83 (11 citations).

Brutus and Publius were engaged in enterprises that mirrored each other. Anti-Federalists had harshly attacked many provisions of Article III, but without articulating a general theory to support their attacks. Brutus formulated that larger analytic framework; he built on traditional notions of the judicial role and contended that the new federal courts would undermine state authority. In contrast, the drafters at the convention had moved decisively away from the traditional notions espoused by Anti-Federalists, embracing judicial independence and judicial review and fashioning a role for federal courts that preserved the proposed constitutional order. But they had not conceptualized an overarching justification for their positions. Publius, brilliantly developed a theory to defend this new conception of the judicial role in general and the function of federal courts in particular.

Federalist 78

Federalist 78 establishes the overall framework for the ensuing essays and implicitly responds to Brutus's critiques. Developing a rationale for the judicial role reflected in the Constitution, Publius argues that respect for the rule of law, liberty, and popular decision-making all require that the judiciary be a separate and independent branch of government and that judicial independence requires lifetime tenure. Articulating a justification for the acceptance of judicial review, he contends that courts need the power to invalidate statutes in order to protect the Constitution's supremacy over statutes, and the essay reflects a structural concept of judicial review. Responding to the challenge that the vast powers of the federal judiciary would threaten the states, Publius develops a concept of the judiciary as the "least dangerous" branch and as guided by expertise, not politics.

Brutus had argued that "nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."⁸¹ His contention that the federal judiciary would eviscerate the states rested on a vision of how federal courts would exercise judicial review. Brutus argued that federal courts would review congressional statutes, particularly those trenching on state authority, deferentially. They would interpret the Constitution "not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states."⁸² Conversely, they would scrutinize state statutes quite strictly: "In proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become so trifling and unimportant, as not to be worth having."⁸³ Brutus implicitly assumes that federal courts will use a structural approach to judicial review: they will look to broad principles of constitutional structure in deciding which statutes to uphold (congressional statutes) and which to strike down (state statutes).

As the Supreme Court learned how to exercise its power of judicial review, it would grow uncontrollable. Brutus noted that British judges were subject to oversight: "In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgment of the court, yet,

⁸¹ Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 261.

⁸² Essays of Brutus XII, Feb. 7, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 239-40.

⁸³ Essays of Brutus XII, Feb. 14, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 245.

they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions.”⁸⁴ The United States Supreme Court would escape such limitations. It “would be exalted above all other power in the government, and subject to no controul” Brutus warned.⁸⁵ “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.”⁸⁶ Brutus bemoaned the fact that the Constitution gave judges tenure during good behavior and prohibited reductions in their salaries. They “are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.”⁸⁷

In predicting that federal judges would expand national power and cripple the states, Brutus made two basic arguments. First, he focused on those clauses that would enable courts to expand national power and curtail the authority of the states. Federal courts would read the Constitution’s preamble to “give latitude to every department under it [the national government], to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.”⁸⁸ Second, the self-interest of judges would further incline them to create a powerful national government: “Every body of men invested with office are tenacious of power; . . . this of itself will operate strongly upon the courts to give such

⁸⁴ Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 260.

⁸⁵ Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 257.

⁸⁶ *Id.*

⁸⁷ Essays of Brutus XI, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 234.

⁸⁸ Essays of Brutus XII, Feb. 7, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 242.

meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority.”⁸⁹ In addition, Brutus raised the possibility that expanded judicial powers would increase judicial business and, hence, judicial fees.⁹⁰ Thus, the federal judiciary would have incentives to expand national powers and curtail state powers.

Congress would, in turn, build on these judicial decisions to expand the scope of national power, and it would do so with greater success than if it had been operating without the assistance of the federal courts. Brutus wrote that Congress “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.”⁹¹ In the absence of federal courts, Congress “would have explained it [the Constitution] 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.”⁹² But the federal judiciary would shield Congress from this danger. Brutus challenged the concept that the separation of powers would ensure that the branches will check each other. Rather, Brutus Congress and the courts will naturally collaborate to expand their power.

Implicitly responding to Brutus, *Federalist 78* offers a dramatically different conception of the judicial role. In Hamilton’s account, federal judges will be making decisions based on the

⁸⁹ Essays of Brutus XI, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 238.

⁹⁰ *Id.*

⁹¹ Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 261-62.

⁹² *Id.* at 262.

law, not on self-interest, and guarantees of judicial independence are necessary to enable judges to act as they should, rather than yielding to political pressure or personal interest.

At the outset of *Federalist* 78, Hamilton observed that it “is not disputed” that the lack of a federal judiciary was a manifest weakness of the Confederation. The critical issue was not whether federal courts should exist at all, but how to appoint federal judges, determine their tenure, and settle “[t]he partition of the judiciary authority between different courts, and their relations to each other.” The method of appointment followed the procedure for other federal officers and therefore needed no separate analysis. Turning to the issue of judicial tenure, Hamilton accurately noted that this had been a focus of Anti-Federalist criticism. Federal judges would hold office during “good behavior,” following the famous precedent set by the parliamentary Act of Settlement of 1701. This was the same tenure established by many state constitutions, including New York’s, and Hamilton praised its wisdom: “[I]n a republic it is . . . [an] 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.” These overarching goals – preventing legislative “encroachments and oppressions” and preserving the rule of law – informed the conception of the judicial role that Hamilton advanced.

Hamilton then moved to the larger issue of separation of powers, emphasizing both the judiciary’s status as one branch of government and its place as “the weakest of the three departments of power.” As he explained in a famous passage:

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 judiciary . . . 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.

Thus, the judiciary is the “least dangerous” branch. It is limited both because the judiciary has no enforcement power – only the executive can enforce judgments if the losing party refuses to follow the court’s decision – and because judicial decision-making is constrained. The court is simply exercising “judgment,” not giving effect to its “WILL.” Courts are bound by the rule of law. They “secure a steady, upright, and impartial administration of the laws.” Because the judiciary is doubly constrained by its lack of independent power and by its obligation to judge according to the law, “liberty can have nothing to fear from the judiciary alone.” In contrast, if the judiciary is not a separate and independent branch, liberty is at risk. Invoking Montesquieu on the importance of separating the power of judging . . . from the legislative and executive powers,” Hamilton argued that “from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.” To secure the judicial independence that the security of liberty required, “nothing can contribute so much to its firmness and independence as permanency in office.” (504-05)

Hamilton’s description of the judiciary as “the least dangerous branch” has profoundly influenced modern constitutional theorists. Perhaps most notably, it provided the title for

Alexander Bickel's classic work, *The Least Dangerous Branch*,⁹³ which argued for a constrained judicial role. But *Federalist* 78, viewed in historical context, is not a plea for judicial restraint. The concept of the judiciary as a separate branch was itself controversial prior to the drafting of the Constitution. Thus, in making his strong case for judicial independence, Hamilton was identifying a novel structural element of the Constitution that departed from standing norms and practice. He also stressed that the judiciary's status as a separate and independent branch was essential to liberty. "[T]he general liberty of the people can never be endangered" by the judiciary, he argued, "I mean so long as the judiciary remains truly distinct from both the legislature and the Executive." The threat to the proper separation of the branches and judicial independence was ongoing: "The Judiciary is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches." Judicial independence was particularly significant in a "limited Constitution" because the Constitution "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." Only courts could police those limitations: "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."

Like its treatment of judicial independence, the discussion of judicial review in *Federalist* 78 has great significance. British legal theory had rejected judicial review, the handful of judicial review cases in this country during the revolutionary era had been controversial, and, while most of the framers seemed to favor it, the topic received only peripheral attention at Philadelphia.⁹⁴

⁹³ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁹⁴ See Treanor, *supra* note 34, at 469-71 (discussion of statements about judicial review in the federal convention and during the ratifying debates).

The analysis of judicial review in *Federalist 78* became the most significant discussion of the subject in the years before the Court invalidated part of the Judiciary Act of 1789 in the 1803 case of *Marbury v. Madison*.

Federalist 78's treatment of judicial review is significant for other reasons, particularly in describing the circumstances when this authority should be exercised. Here, again, the connection to Brutus matters. Strikingly, just as Melancton Smith's arguments against Hamilton in *Rutgers* anticipated Brutus's critique, so the structural approach Hamilton employed in *Rutgers* was a template for the interpretive approach he adopted in *Federalist 78*. Some scholars have argued that *Federalist 78* embraced a broad conception of judicial review enabling courts to review statutes for their consistency with unwritten natural law.⁹⁵ Others have held that Hamilton thought courts should invalidate only statutes that were clearly unconstitutional.⁹⁶ The most accurate reading of *Federalist 78*, however, falls into neither camp.

Brutus had argued that federal courts would use judicial review to expand national authority and constrain the powers of the states and that federal judges asserting this authority would be uncontrollable. Hamilton, in contrast, stressed the constraints under which courts would operate, and he emphasized the distinction between law and politics. Courts were to decide cases on the basis of law. "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." Judicial review involved a court's consideration of two laws: a statute and the Constitution. "If there should happen to be an

⁹⁵ BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 25 (1942).

⁹⁶ SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 90 (1990).

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.” The court, Hamilton made clear, was not superior to the legislature. It was simply giving controlling effect to the will of the people. As Hamilton had observed at the outset of *Federalist* 78, courts exercised neither “FORCE nor WILL, but merely judgment.”

The exercise of judgment was not merely mechanical invalidation of clearly unconstitutional statutes. Hamilton used the word “tenor” as he described the inconsistency between a statute and the Constitution that necessitated invalidation. “[S]pecified exceptions to the legislative authority . . . can be preserved in no other way than through the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” (505) “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 exercise, is void.” (505) The term “tenor” connoted underlying principles: in John Ash’s dictionary, “tenor” is “a general drift, the general sense.”⁹⁷ Similarly, Samuel Johnson defined the term as “general course or drift.” Thus, much as he had done as an advocate in *Rutgers*, when he invoked the law of nations and the federal treaty power without a clear basis in constitutional text for relying on either, Hamilton was contending that a statute at odds with the “general drift” of the constitution should be invalidated by courts.

Implicitly responding to Brutus, Hamilton carefully explained why judicial review was necessary. Because the Constitution created the government, it was superior to any legislative act: “No legislative act, . . . contrary to the Constitution, can be valid. To deny this, would be to

⁹⁷ JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1795).

affirm, that the deputy is greater than his principal.” The legislature could not be assumed to be “the constitutional judges of their own powers”: nor could the Constitution “intend to enable the representatives of the people to substitute their *will* to that of their constituents” who had adopted the constitution. Courts exercising judicial review were simply choosing which of two laws was superior – the constitution or the statute. Hamilton stated, “A constitution is, in fact, and must be regarded by the courts as a fundamental law.” In exercising judicial review, courts gave precedence to that fundamental law: “If there should happen to be an irreconcilable variance, that which has that 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.”

Responding to another argument of Brutus, Hamilton contended that judicial review did not make the courts superior to legislatures. Judicial review, he wrote, “only supposes that the power of the people is superior to both [the legislature and the courts]; 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 out to be governed by the latter rather than the former.” (506) Where Brutus had argued that federal courts would be political and unconstrained, Hamilton countered that the exercise of judicial review was consistent with normal exercises of judicial authority. He analogized the assertion of judicial review with the judicial determination to follow a later statute rather than an earlier one. Preference for the later statute “is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing.” (507). Similarly, judicial review was appropriate because “the nature and reason of the thing . . . teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority.” (507). The argument that “the courts on the pretence of a repugnancy, may substitute

their own pleasure to the constitutional intentions of the legislature” (507) would be equally applicable to constitutional adjudication as to adjudication involving two statutes and, indeed, “every adjudication upon any single statute.” In all these circumstances, courts had an obligation to judge according to the law, not to impose their views: “The courts must declare the sense of the law; and it 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.” (507-08).

The importance of judicial review, in turn, necessitated judicial independence, and, in developing his argument for judicial independence, Hamilton also recognized the importance of judicial protection of groups of people in society who might be harmed by majorities. Hamilton stated that “ill humors . . . disseminate[d] among the people themselves . . . [might] occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.” (508) Such attacks on “the Constitution and the rights of individuals” reflected “ill humors” that would “speedily give place to better information, and more deliberate reflection.” Unless these beliefs became part of the Constitution, courts should reject the statutes that reflected those beliefs: Judicial independence was necessary to ensure that courts would protect the Constitution and “minor part[ies]” against temporary majorities: “[I]t 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 have been instigated by the major voice of the community.” (509)

Judicial independence was also important when courts confronted statutes that, while not unconstitutional, harmed particular groups in society. “[T]he independence of the judges may be

an essential safeguard against . . . the injury of the private rights of particular classes of citizens, by unjust and partial laws.” (509) “[T]he firmness of the judicial magistracy is of vast importance in mitigating the severity of such laws.” (509)

Hamilton did not explain exactly what he meant by the “serious oppressions of the minor party in the community,” but his argument is consistent with the types of cases in which revolutionary courts had exercised judicial review. As previously noted, the most prominent of these cases involved legislation that adversely affected politically unpopular groups, such as loyalists or creditors.⁹⁸ In *Federalist* 78, Hamilton sees judicial review as protecting the considered judgment of the majority that adopted the Constitution against temporary legislative majorities, and it protects individual liberty. The references to legislation affecting particular minorities evidence another argument in favor of judicial review: it protects segments of the polity that legislatures seek to deprive of their rights. This argument accords well with Madison’s concern in *Federalist* 10 for the protection of “parties and interests.” (61) It reflects a larger shift in rights thinking in which the critical problem was no longer seen as protecting the people against the concentrated power of the state, but, rather, as protecting the minority against a majority.

In the early republic, federal courts were to review the constitutionality of state legislation disadvantaging political minorities. The Constitution’s supremacy clause, which made the Constitution “the supreme Law of the Land,”⁹⁹ superior to state (and federal) legislation, provided a textual basis for such review. Notably, the first occasion on which the

⁹⁸ For further discussion see Treanor, *supra* note 34, at 473-96.

⁹⁹ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

Court overturned state legislation – the 1796 case of *Ware v. Hylton* – involved a revolutionary era statute that discriminated against loyalists, much like the statute in *Rutgers*. The statute provided that payment into the Virginia loan office of a debt owed a loyalist extinguished that debt. The Supreme Court invalidated the statute, finding that it ran afoul of the Treaty of Paris, and two Justices explicitly relied on the Supremacy Clause in their opinions.¹⁰⁰

Yet, while the Supremacy Clause provided a textual basis for federal court review of state statutes, Federalist 78 does not invoke the clause. Similarly, Hamilton does not cite the “arising under”¹⁰¹ clause, the other clause that scholars and courts have focused on as a textual basis for judicial review. His focus is, instead, on the larger theoretical justification for judicial review as following from the separation of powers. In Federalist 81, Hamilton makes this point more directly. He asserts:

I admit, however, that the constitution ought to be the standard of construction for the laws, and that wherever there is evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstances peculiar to the plan of the convention. . . .¹⁰²

Hamilton is here making (somewhat) explicit a point that is implicit in his approach in Federalist 78. Judicial review is not “deducible from any circumstances peculiar to the plan of the convention.” Rather, it follows from the enforcement of a popularly adopted written constitution by an independent judiciary.

¹⁰⁰ *Ware v. Hylton*, 3 U.S. 199, 236 (Chase, J.); *Id.* at 284 (Cushing, J.).

¹⁰¹ “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .” U.S. CONST. art. III, § 2, cl. 1.

¹⁰² THE FEDERALIST NO. 81, at 543 (Jacob E. Cooke ed., 1961).

Hamilton closed *Federalist 78* by attempting to justify the Constitution's decision that judges would hold office during good behavior. "Periodical appointments, however, regulated, or by whomsoever made, would, in some way or other, be fatal to their [judges'] independence." (510) The act of judging required "long and laborious study" (510) and lifetime tenure would be necessary to encourage lawyers to become judges. Hamilton ended *Federalist 78* by appealing to the British practice of tenure during good behavior: "The experience of Great Britain affords an illustrious comment on the excellence of the institution." (511) Hamilton's position on tenure reflects the overall disagreement *Federalist 78* has with Brutus. Brutus saw federal judges as driven by self-interest to expand national power and to limit state power. External checks are necessary to keep judges from abusing their power. But for Hamilton federal judges operate within a legal system that calls for their "judgment," not their "WILL." They check legislatures through the exercise of judicial review, but their power is limited. Indeed, judges need protections such as lifetime tenure to gain the independence requisite to carrying out their role faithfully.

Federalist 79

Federalist 78 presented a broad framework for Hamilton's conception of the judicial role under the Constitution and Article III. *Federalist 79* turned to specific elements of the first section of Article III: tenure in office and compensation. In analyzing the elements of the Constitution that (improperly) made the judiciary superior to the other branches of government, Brutus had expressed particular concern about its provisions on salary and removal from office. "There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries," Brutus complained, "and in many cases their power is superior

to that of the legislature.”¹⁰³ *Federalist 79* responded to that argument. The constitutional provision that barred diminution of judicial salaries was essential to judicial independence, Hamilton asserted. “Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *power over a man’s subsistence amounts to a power over his will.*” (512). Similarly, any provision allowing for removal from office for lack of ability would be unwise because it would be exploited for political reasons: “An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of judgment or the common good.” (514) Where Brutus saw protections for the judiciary as a flaw because they enabled judges to engage in a self-interested pursuit of power, Hamilton offered arguments that reflected a faith in the integrity of judicial decisionmaking and a belief that the Constitution established the protections necessary to protect that integrity. Hamilton closed by objecting to mandatory retirement, such as New York’s age limit of 60. He wrote, “In a republic, where fortunes are not affluent, and pensions not expedient, the dismissal of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench.”

Federalist 80

In its opening provision, Article III Section 2 of the Constitution declares “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the

¹⁰³ Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 257.

United States, and treaties made, or which shall be made, under their authority.” Brutus construed this provision as broad and dangerous. His analysis pivots on his interpretation of the word “equity” in the grant to federal courts of power over “all cases in law and equity, under this Constitution, the laws of the United States and treaties.”

The word “equity” has a non-technical meaning: its synonym is “fairness.” But “equity” also has a technical legal meaning. In the English legal system, there were two sets of courts with overlapping jurisdiction. As legal scholars, James E. Pfander and Nassim Nazemi have recently written, “Courts of law heard suits for damages, among other things, and entered judgments enforceable through seizure of person or property. Courts of equity, by contrast, did not award damages as such but issued orders that compelled the parties, on pain of contempt, to comply with the court’s conception of what equity and good conscience required. . . [Unlike courts of equity,] courts of law did not recognize equitable defenses, such as fraud, mistake, and unconscionability, and they did not make discovery available to the parties.”¹⁰⁴

In interpreting the jurisdictional grant, Brutus drew on the non-technical meaning of “equity” and argued that the Constitution problematically gave federal courts the power to decide cases based on their idea of what was fair. Federal courts “would be authorized to explain the Constitution, not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the federal government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.”¹⁰⁵ They could “explain the constitution according to the reasoning

¹⁰⁴ James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 11 (2013).

¹⁰⁵ Essays of Brutus XII, Feb. 7, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 239-40.

spirit of it, without being confined to the words or letter.”¹⁰⁶ Inspired by the “reasoning spirit” of the Constitution, judges would view federal powers expansively. They will give “latitude to every department under it to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of different parts.”¹⁰⁷ Conversely, “the states will lose [their] rights, until they become so trifling and unimportant, as not to be worth having.”¹⁰⁸

Implicitly responding to Brutus’ argument that these jurisdictional grants would eviscerate the authority of the states, Hamilton carefully examined the precise ways in which federal courts would affect the states, and he contended that those powers were both limited and necessary elements of a federal system. For example, discussing “cases arising under the Constitution,” he focused on the need to enforce the explicit constitutional prohibition on emitting paper money. (520) In discussing jurisdiction over territorial disputes, he argued that “[w]hatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal supervision and control.” (518) “From this review of the particular powers of the federal judiciary, as marked out in the Constitution,” Hamilton concluded, “it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of that system.” (522) Where Brutus had portrayed the grants as open-ended, Hamilton held that they as constrained and as necessary to resolve particular categories of legal disputes.

¹⁰⁶ Essays of Brutus XI, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 236.

¹⁰⁷ Essays of Brutus XII, Feb. 7, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 242.

¹⁰⁸ Essays of Brutus XII, Feb. 14, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 245.

Where the linchpin of Brutus' argument was his expansive interpretation of "equity" as a permissive device allowing federal courts to decide cases in conformity to the "spirit and intention" of the Constitution, Hamilton focused on the technical meaning of the word, arguing that it actually had a narrow meaning grounded by prior judicial practice. "There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud, accident, trust or hardship*, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States." (520). Invoking New York "practice," he said there is a "formal and technical distinction between LAW and EQUITY." (521) The countervailing positions of Brutus and Hamilton with respect to the Constitution's grant of judicial authority mirror their positions with respect to judicial review: Brutus portrayed judicial decision-making as open-ended and political; for Hamilton, judicial decision-making was constrained and governed by legal principles.

Federalist No. 81

Hamilton used the next essay to return to Article III, Section 1: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In this essay, he covered a range of Anti-Federalists criticisms concerning "the partition of the judiciary authority between different courts, and their relations to each other." (522). He justified the Supreme Court's establishment as the court of last resort and defended the discretionary power of Congress to create lower federal courts. Significantly, he indicated that, because of the nature of sovereignty, states could not be sued in federal court for revolutionary era debts, a position that the Court was to reject in the 1793 case *Chisholm v. Georgia*, but that the Eleventh Amendment was to adopt. Finally, he

rebutted Anti-Federalist concerns that the Court’s appellate jurisdiction would lead to the “abolition of the trial by jury.” (533

Hamilton began by discussing the general authority of the Supreme Court. This was the essay on the judiciary in which Hamilton addressed Brutus most directly. Without citing Brutus by name, Hamilton presented, in quotations, an extensive paraphrase of Brutus’ equity-based argument that the Supreme Court would be “uncontrollable and remediless” because it will “constru[e] the laws according to the *spirit* of the Constitution” and because the Constitution gave the Supreme Court ultimate authority, whereas in Great Britain “the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature.” (523).¹⁰⁹

Hamilton dismissed the concern that the Supreme Court would interpret statutes according to the Constitution’s spirit by observing that in constitutional interpretation the Supreme Court would have no “greater latitude . . . than may be claimed by the courts of every State” in construing their constitutions. (524). In addition, while the Supreme Court had the power to invalidate a statute “wherever there is evident opposition” between the statute and the Constitution, “this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, it is equally applicable to most, if not all the State governments.” (524). As in *Federalist* 78, Hamilton was again championing judicial review, explaining that it follows from the general principle of a limited constitution, rather than being a distinctive attribute of the proposed

¹⁰⁹ Scholars have previously pointed out that the unattributed quote is, in fact, a paraphrase of Brutus. See GOEBEL, *supra* note 65, at 316; Ball, THE FEDERALIST WITH LETTERS OF “BRUTUS,” at 393 n.2. For the original in Brutus, see Essays of Brutus XII, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 239; Essays of Brutus XV, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 257.

Constitution. Nothing in the Constitution would lead the Supreme Court to adopt a different approach to constitutional interpretation than any state court would follow.

Hamilton forcefully rebutted Brutus' argument that the final decision in legal cases should belong "to a part of the legislature." (525) Judges were better positioned to decide cases because, unlike legislators, they would be selected for their legal expertise and given the independence provided by tenure during good behavior. Unlike judges, legislatures would reflect "the pestilential breath of faction" and be prone to decisions based on passions: "From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application." (524-25). Again, as in *Federalist* 78, Hamilton was contrasting judicial and legislative decision-making and suggesting that judges will decide based on reason, rather than because of the influence of passion and faction. The constraints on judicial power would be effective:

Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. (526)

Hamilton then turned to Congress' power to create lower federal courts. As previously discussed, during the constitutional convention, after considering Wilson and Madison's proposal to create lower federal courts and Sherman and Rutledge's proposal to have state courts act as lower federal courts, the delegates adopted what a compromise under which Congress

could create lower federal courts but could also choose instead to authorize state courts to act as lower federal courts.¹¹¹ In *Federalist* 81, Hamilton’s allegiance clearly lies with the earlier Wilson-Madison proposal. Hamilton acknowledges, almost grudgingly, the alternative option of having state courts operate as federal courts,¹¹² but he quickly explains why that would be unwise: state judges might reflect “local spirit”; without secure tenure in office, they “will be too little independent to be relied on for an inflexible execution of the national laws”; state judges’ weakness in deciding federal issues might necessitate “in practice . . . [an] unrestrained course to appeals,” and allowing a broad right of appeal would be “a source of public and private inconvenience.” (528)

Hamilton then offered his own plan for the potential design of lower courts: between four and six federal districts should be created and “[t]he judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts.” (528) Hamilton thus addressed Anti-Federalist concerns that lower federal courts would be distant from the parties – which would make litigation time-consuming and expensive – and that states would be removed from judicial decision-making under the Constitution.

Hamilton next considered the division of authority within the federal court system. The scope of the Supreme Court’s original jurisdiction was clear: “cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party.” (529)¹¹³ “[T]he original jurisdiction of the Supreme Court would be confined to two classes of causes, and those

¹¹¹ See TAN. For further discussion, see Pfander, *supra* note 57, at 6; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 PENN. L. REV. 45, 54 (1975).

¹¹² “To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much ‘to constitute tribunals,’ as to create new courts with the like power.” THE FEDERALIST NO. 78, at 527-28 (Jacob E. Cooke ed., 1966).

¹¹³ Capitalization added by Hamilton.

of a nature rarely to occur.” (530). Lower federal courts would have original jurisdiction over all other matters heard in federal court.

In the midst of this discussion, Hamilton embarked on a “digression” of significance. In Essay 13, Brutus raised the specter that individuals from one state would be able to sue another state in federal court to collect on revolutionary war debts. “Every state in the union” he wrote, “is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering...” Hamilton dismissed this fear as groundless, noting that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” (529) Hamilton’s argument also suggests, however, that states would be suable for actions they took *after* ratification. He wrote, “The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.” In other words, once a state is no longer a separate “nation” – because, with ratification of the Constitution, it has become part of a nation – it would be suable.¹¹⁵

The question whether states could be sued in federal courts was a significant one in the ratification debates. In Virginia, in particular, Patrick Henry and other Anti-Federalists followed Brutus in attacking the Constitution as allowing individuals, under diversity jurisdiction, to bring suit in federal court to collect on Revolutionary War debts. Like Hamilton, Madison and

¹¹⁵ This argument is developed in James E. Pfander, *History and State Suiability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1304-06 (1998).

Marshall responded that states would not be suable in federal court (although, in contrast, Randolph said that states could be sued in federal court for pre-existing debts).¹¹⁶

In 1793, in *Chisholm v. Georgia*,¹¹⁷ the Supreme Court (with Justice Iredell dissenting) held that it had jurisdiction to hear a suit against Georgia brought by a citizen of another state who was seeking to collect on a revolutionary era debt. The Eleventh Amendment was adopted in the aftermath of *Chisholm*. Modern Supreme Court case law has asserted that the Eleventh Amendment followed Federalist 81 and established a principle of state sovereignty immunity against suit by individuals.¹¹⁸ But Federalist 81 did not stand for this broad proposition. It stood for the more limited proposition that Article III did not permit suit against states on debts incurred *prior* to the Constitution. The question whether the Eleventh Amendment incorporated that narrower principle is a separate one, but close reading of the *Federalist* shows that Hamilton's concern was with revolutionary war debts.¹¹⁹

Following his “digression” about state suability, Hamilton's discussed the Supreme Court's appellate jurisdiction – “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make”¹²⁰ - and addressed the Anti-Federalist argument that the clause was “an implied supersedure of the trial by jury.” (530) Anti-Federalists repeatedly asserted that, if the Supreme Court could determine facts, it could readily disregard the jury's factual determinations. Hamilton countered that the Supreme Court had to be able to review facts in certain types of appeals, such as cases in which the trial did not involve a jury. (He noted

¹¹⁶ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (Jonathan Elliot ed., 1827) [hereinafter DEBATES] (Mason); DEBATES, *supra* at 543 (Henry); DEBATES, *supra* at 533 (Madison); DEBATES, *supra* at 555-56 (Marshall); DEBATES, *supra* at 573 (Randolph). For further discussion, see Pfander, *supra* note 115, at 1309-13.

¹¹⁷ *Chisholm v. Georgia*, 2 U.S. 493 (1793).

¹¹⁸ See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

¹¹⁹ For a more detailed discussion, see Pfander, *supra* note 115.

¹²⁰ U.S. CONST. art. III, § 2.

that this was the practice in New York in admiralty, probate and chancery cases.) There were some cases in which the Supreme Court should not review facts: most cases tried before a jury would fall into this category. Yet given the diverse range of state practices concerning the role of juries, it would be impossible to fashion a constitutional standard about when the Court could appropriately review facts. The Constitution therefore appropriately delegated to Congress the power to create “exceptions” to the Court’s appellate jurisdiction; Congress could be trusted to use that power to bar the Court from re-considering facts whenever it would be inappropriate for the Court to do so. “[A]n ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.” (533).

Federalist No. 82

While the previous essays on the judiciary were largely framed as responses to Anti-Federalist arguments, *Federalist 82* explores the relationship of the state and federal courts without reference to Anti-Federalist critiques. Hamilton was writing on almost a blank slate, since the concept of interconnected state and federal courts was novel. His analysis on this topic had a sophistication and completeness that no other writing from the founding era rivalled. It is, like so much else in these essays, a tour de force.

Following the general principle of *Federalist 31* regarding state powers under the Constitution, Hamilton held that “the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.” (535) Because the Constitution left the existing jurisdiction of state courts intact, “the most natural and the most defensible construction” (535) was that they would retain concurrent jurisdiction in such cases

(although appeal would lie to the Supreme Court). Similarly, since the state and federal courts were “parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.” (536)

Thus, unless Congress prohibited it in specific instances, state courts could hear the same types of cases that could be heard in federal courts. But the logic of the constitutional system meant that state courts could not have the final word in such cases. “The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the United States.” (537) The Constitution did not, however, address the question whether appeals had to go to the Supreme Court or whether state court decisions could be appealed to a lower federal court. Hamilton argued that, in the absence of such a determination, there was no “impediment to the establishment of an appeal from the State court to the subordinate national tribunals.” (538) There would be “many advantages” to giving federal district courts the final word on appeal from state courts. In particular, it would allow state courts to hear a broad range of “federal causes” in the first instance without burdening the Supreme Court by requiring it to resolve them on appeal. (538)

The most significant element of the essay is Hamilton’s conclusion that, even in cases initially brought in state courts, federal courts would have the final word over matters involving federal laws and the Constitution. The issue was later to be the center of national controversy. In the Supreme Court’s landmark 1816 case of *Martin v. Hunter’s Lessee*,¹²¹ Justice Story held that Congress could constitutionally give the Supreme Court appellate jurisdiction over state courts in

¹²¹ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

cases involving a federal issue, and the decision provoked heated critique by champions of states' rights, most prominently Spencer Roane of the Virginia Court of Appeals (whose decision Story and the Supreme Court had overturned).¹²² But Story was not proclaiming a new idea. Hamilton had recognized long before that the supremacy of federal courts was implicit in the Constitution's structure.

Federalist No. 83

By far the lengthiest *Federalist* essay concerning the judiciary is the final one, *Federalist* 83, which addresses the Constitution's failure to guarantee juries in civil trials. (It is almost twice the length of *Federalist* 78, the second longest of the essays.) Although largely overlooked today,¹²³ the essay's subject was one of pressing, indeed immense concern to Anti-Federalists.¹²⁴ Hamilton notes at the outset that the absence of a requirement for juries in civil trials was "[t]he objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States." (538) In Brutus' words, "'the trial by jury, which has so justly been the boast of our fore fathers as well as ourselves is taken away under them.'" (B 14, 521).

Despite its length, *Federalist* 83 presented a simple argument: because different states have different practices concerning jury trials, it was impossible to fashion a constitutional standard on the subject. "The great difference between the limits of the jury trial in different states is not generally understood," (545) Hamilton stated, and he offered a survey of the types

¹²² See F. Thornton Miller, *John Marshall versus Spencer Roane: A Reevaluation of Martin v. Hunter's Lessee*, 96 VA. MAG. HIST. & BIOGRAPHY 297 (1988).

¹²³ See Crane, *supra* note 2.

¹²⁴ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 233-35 (discussing Antifederalist opposition to Constitution on the grounds that it "undermined the good old jury").

of cases heard by juries in the different states and how they differed. He drew two conclusions from that survey: “First, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.” (547).

The most notable aspect of the essay is not Hamilton’s technical argument about the impossibility of fashioning a workable national rule. What is more striking is the profound gap between his view of juries and the common Anti-Federalist perception. The fact that the lack of a provision for civil juries trials was, by Hamilton’s estimate, the most common objection to the Constitution in New York “and perhaps in several of the other States” is evidence of a profound faith in jury decision-making. Anti-Federalists treated jury trial “as the very palladium of free government.” (543). Brutus saluted “the inestimable right of trial by jury.”¹²⁵ It has “so justly been the boast of our fore fathers.”¹²⁶

In marked contrast, Hamilton stressed the limited competence of juries, observing that “there are many cases in which the trial by jury is an ineligible one.” (548) Juries could not decide prize cases, for example, because their members “lacked a thorough knowledge of the laws and usages of nations.” (548). Similarly, matters considered by courts of equity were “too complicated” for trial by jury. (550) “[T]he establishment of the trial by jury in *all* cases would have been an unpardonable error in the plan.” (553).

¹²⁵ Essays of Brutus XIV, Mar. 6, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 254.

¹²⁶ Essays of Brutus XIV, Mar. 6, 1788, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 11, at 256.

Hamilton fundamentally disagreed with the Anti-Federalists' faith in juries as legal decision-makers. The very structure of his essays reflects a basic shift in perspective. For Anti-Federalists, jury decisionmaking was of central importance. For Hamilton, it was not, and he relegated it to the end of his discussion of the judiciary. After five essays celebrating judges and their expertise, he dealt with juries in one concluding essay, and it was a highly critical essay. Anti-Federalists like Brutus did not portray legal reasoning as the product of distinctive expertise. Judges would be guided by self-interest and had to be checked. Juries could be trusted to reach proper decisions. Hamilton, in contrast, championed the legal expertise of judges.¹²⁷

Conclusion

As a lawyer and as a legal thinker, Hamilton was a prodigy. He began his legal studies in 1782 and chose to instruct himself, rather than follow the traditional clerkship route. Within six months, he had been admitted to the bar, and the study manual he prepared, "Practical Proceedings in the Supreme Court of the State of New York," "was so expertly done, its copious information so rigorously pigeonholed, that it was copied by hand and circulated among New York law students for years," biographer Ron Chernow reports.¹²⁸ Still only somewhere in his mid- to late -twenties – his birth year is a matter of dispute - he soon was one of the leading lawyers in New York City, and he made his landmark judicial review argument in *Rutgers* only two years after he began his legal studies.

And his profound contributions to the law only grew as his career unfolded. He was one of the leading figures at the Philadelphia convention (although not as significant as Madison and

¹²⁷ JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 328 (1996) ("[B]y placing the subject of the jury last in the six essays he devoted to Article III, [Hamilton] illustrated a shift in emphasis that did distinguish Federalist and Anti-Federalist perceptions of judicial power.").

¹²⁸ RON CHERNOW, ALEXANDER HAMILTON 168 (2005).

Wilson), a major force for nationalism. He was the intellectual leader of the Federalists at the crucial New York ratifying convention as the Federalists, despite being the overwhelming minority at the start of the convention, eked out a two vote victory. (Melancton Smith also played a key role. The intellectual leader of the Anti-Federalists, he declared his support for the Constitution after the Virginia convention's ratification.) As Treasury Secretary, he played the critical role in constitutional interpretation during the Washington administration, establishing an enduring legacy. His memorandum to Washington supporting the constitutionality of the Bank of the United States convinced the President to sign the Bank Bill, and it laid the groundwork for Chief Justice Marshall's 1819 decision in *McCulloch v. Maryland*. That memorandum created a lasting framework for a broad reading of the Constitution's grants of national power, both by offering an expansive interpretation of the "necessary and proper clause" and by championing the doctrine of implied powers. His *Pacificus* Essays, defending Washington's Neutrality Proclamation, articulated a capacious view of executive power generally and in the foreign affairs area in particular, and they continue to shape constitutional debate, serving as the touchstone for advocates of presidential power. When in 1794 the Supreme Court first considered the constitutionality of an act of Congress in *Hylton v. United States*, he argued on behalf of the United States in support of a carriage tax adopted when he was Treasury Secretary, and the Court followed his expansive conception of the federal taxing authority and upheld the statute.

And, of course, he was, with Madison (and Jay), Publius, In his remarkable contributions to the *Federalist*, essays 78 through 83 stand out because of their intellectual and historic significance. The framers had abandoned the faith in legislative decisionmaking that informed the early state constitution. They were creating a system of governance that involved

the primacy of a written constitution adopted by “We the People” and a dramatically changed and expanded judicial role. But they had not developed a theory that made sense of this emerging consensus. Hamilton offered a path-breaking theoretical framework that justified that new role, and he explicated with insight and care the specific legal doctrine implicit and explicit in the Constitution.

Scholars have long focused on the Madisonian constitutional and legal vision in the *Federalist*, and particularly *Federalist* 10. Hamilton’s vision of the judiciary deserves equivalent attention – and perhaps more. By defending judicial independence and the concept of the judiciary as a separate and co-equal branch, articulating a structural concept of judicial review, criticizing juries, conceptualizing both concurrent state and federal jurisdiction and a strong role for federal courts in the new constitutional system, and championing the rule of law, he was developing a linked set of principles that have become so familiar that we have missed how original they were when Hamilton proclaimed them. A tour de force, *Federalist* 78-83 developed a modern theory of the judicial role.

The contribution of Hamilton’s essays is even clearer when their influence at the founding is contrasted with that of *Federalist* 10 and Madison’s theory of the virtues of an extended republic. While scholars have long assumed that the influence of *Federalist* 10 was powerful, legal scholar Larry Kramer has convincingly shown that “[t]he theory of the extended republic, particularly those aspects that are important to theorists today, played essentially *no* role in shaping the Constitution or its ratification.”¹²⁹ *Federalist* 10 was ignored until it was

¹²⁹ Larry Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 616 (1999).

discovered (and vilified) in 1913 by Charles Beard in “An Economic Interpretation of the Constitution of the United States.”¹³⁰

Thus, the contribution of Federalist 10 is fundamentally different from the contribution of Hamilton’s essays on the judiciary. In developing the idea that an extended republic addressed the problem of factions and self-interested majorities, Madison offered a brilliant explanation for the way in which the Constitution resolved a fundamental problem, but he did not shape his contemporaries’ understanding of the Constitution. Hamilton’s insights were not merely brilliant and creative, they transformed the way in which courts and the law were understood. When this difference is recognized, Hamilton’s contributions to the *Federalist* are even more deserving of celebration than Madison’s. While both Madison and Hamilton were path-breaking political thinkers, Hamilton created a path that others followed.

Moreover, Hamilton’s contribution is not simply at the level of grand theory; he also shaped a series of critical legal doctrine. Hamilton wrote at a time in which judicial review and constitutional interpretation were in their infancy, and the *Federalist*, particularly Federalist 78, offers a very specific and influential approach to the role courts should play in the exercise of the power of judicial review. He also confronted a series of complex legal issues that the Constitution gave rise to – such as the suability of states, the concurrent jurisdiction of state and federal courts, the merger of equity and common law, whether federal courts were to be the final decisionmaker in matters involving federal laws and the Constitution – and presented thoughtful analyses of what he saw as the Constitution’s answers. Thus, Hamilton offered not only a broad vision of the role of courts, he offered a coherent analysis of how particular legal doctrine fit into that vision, and, writing before ratification, he anticipated and cogently analyzed the issues that

¹³⁰ CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 156-57 (1913).

the Court was to grapple with in such landmark cases as *Chisholm*, *Marbury*, and *Martin v. Hunter's Lessee*.

It is a breathtaking contribution, but what almost defies belief is that he wrote the Federalist Essays on the judiciary a mere six years after he began studying for the bar. Law is an accretional discipline, unlike, say, math or music. It is mastered (if at all) only after years of study, experience, and reflection. Law, famously, has no prodigies. But a look at the Federalist Papers indicates that there was an exception to this rule, a legal thinker who produced a work of genius when new to the profession. Hamilton, at the time this essay is written, is prominently associated with a rap opera.¹³¹ But the closest musical counterpart to Hamilton is a composer of classical music. Hamilton was the law's Mozart.

¹³¹ LIN-MANUEL MIRANDA, *HAMILTON: AN AMERICAN MUSICAL* (2015).