

## MS CONSTITUTION 101

### Module 9: The Judicial System

#### 9.3: Look at Federalist No. 78



### LOOK AT FEDERALIST NO. 78 (1788)

On May 28, 1788, Alexander Hamilton published Federalist No. 78, called “The Judicial Department.” In this essay, Hamilton described the judicial branch as the “weakest” and “least dangerous” part of the new national government because it couldn’t make laws or enforce them. Hamilton also stressed the need for an independent judiciary. To keep judges free from political pressure, the Constitution gave them protections like life-long jobs (as long as they act responsibly) and guaranteed salaries. Most importantly, Hamilton also explained the concept of judicial review—the power of federal judges to decide if laws or government actions follow the Constitution.

Federalist No. 78 is one of the most important writings about judicial review in U.S. history. It even influenced Chief Justice John Marshall’s decision in the famous case *Marbury v. Madison* (1803), which firmly established the courts’ power of judicial review. Read the following excerpts and follow the directions to focus on Federalist No. 78.

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Excerpt	Focus On...
<p><b>The judiciary, from the nature of its functions, will always be the least dangerous</b> to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.</p>	<p>Underline words or phrases that explain why the judiciary is “least dangerous.”</p> <p><b>What do you think Hamilton means here? How is the judicial branch different from the executive and legislative branches?</b></p>

Excerpt	Focus On...
<p><b>This independence of the judges is equally requisite to guard the Constitution</b> and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.</p>	<p>Underline words or phrases that explain why judicial independence is important.</p> <p><b>What did Hamilton think were the risks if judges were not independent?</b></p>

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Excerpt	Focus On...
<p>A constitution is, in fact, and must be regarded by the judges, as a fundamental law. <b>It therefore belongs to them to ascertain its meaning</b>, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute...</p>	<p><b>Underline words or phrases that explain judicial review.</b></p> <p><b>What is Hamilton saying about the Constitution?</b></p>

