Thomas Jefferson's Reaction

Before doing this activity, read the [summary of the decision](http://www.streetlaw.org/en/Page/292/Summary_of_the_Decision). Then read the following quotations by Thomas Jefferson.

1. "The question whether the judges are invested with exclusive authority to decide on the constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the Executive or Legislative branches."

    *—Thomas Jefferson to W. H. Torrance, 1815. ME 14:303*
2. "But the Chief Justice says, 'There must be an ultimate arbiter somewhere.' True, there must; but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress or of two-thirds of the States. Let them decide to which they mean to give an authority claimed by two of their organs. And it has been the peculiar wisdom and felicity of our Constitution, to have provided this peaceable appeal, where that of other nations is at once to force."

  *—Thomas Jefferson to William Johnson, 1823. ME 15:451*
3. "But, you may ask, if the two departments [i.e., federal and state] should claim each the same subject of power, where is the common umpire to decide ultimately between them? In cases of little importance or urgency, the prudence of both parties will keep them aloof from the questionable ground; but if it can neither be avoided nor compromised, a convention of the States must be called to ascribe the doubtful power to that department which they may think best."

   *—Thomas Jefferson to John Cartwright, 1824. ME 16:47*
4. "The Constitution . . . meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch."

*—Thomas Jefferson to Abigail Adams, 1804. ME 11:51*
5. "To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps. Their maxim is boni judicis est ampliare jurisdictionem [good justice is broad jurisdiction], and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves."

*—Thomas Jefferson to William C. Jarvis, 1820. ME 15:277*
6. "In denying the right [the Supreme Court usurps] of exclusively explaining the Constitution, I go further than [others] do, if I understand rightly [this] quotation from the Federalist of an opinion that 'the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.' If this opinion be sound, then indeed is our Constitution a complete felo de se [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scare-crow . . . The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."

*—Thomas Jefferson to Spencer Roane, 1819. ME 15:212*
7. "This member of the Government was at first considered as the most harmless and helpless of all its organs. But it has proved that the power of declaring what the law is, ad libitum, by sapping and mining slyly and without alarm the foundations of the Constitution, can do what open force would not dare to attempt."

   *—Thomas Jefferson to Edward Livingston, 1825. ME 16:114*
8. "My construction of the Constitution is . . . that each department is truly independent of the others and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal."

*—Thomas Jefferson to Spencer Roane, 1819. ME 15:214*

**QUESTIONS TO CONSIDER**

1. What is Thomas Jefferson's position on the concept of judicial review? Review the first quotation. What argument(s) does he present?
2. Does Jefferson agree or disagree with Chief Justice Marshall about the need for an "ultimate arbiter" to resolve disputes? Who does Jefferson think should be the ultimate arbiter?
3. According to Jefferson, how should disputes between the federal and state government be resolved?
4. In the seventh quotation, Jefferson says, "This member of the Government was at first considered as the most harmless and helpless of all organs." Who is he referring to when he says "this member of government?"
5. What does Jefferson fear will happen if the Supreme Court of the United States is given the power of judicial review? Include excerpts from the quotations in your answer.
6. Based on what you have read, how did Jefferson feel about the Supreme Court's decision in the case of Marbury v. Madison? How would he have decided the case? Provide support for your argument.
7. Do you agree with Marshall or Jefferson? Should the Supreme Court of the United States have the power of judicial review? Why or why not?

# The Power of the Judicial Branch: The Federalist Number 78

###### INTRODUCTION

When the Constitution was first written, many people supported it. However, there were some people who were opposed to it. The framers feared that not enough states would ratify it and decided to write a series of persuasive papers to influence people's opinion. They attempted to convince people that the structures and concepts in the Constitution were right for a country seeking to balance power between a national government, state governments, and the people. The series of articles written by Alexander Hamilton, James Madison, and John Jay, appeared in local newspapers under the pseudonym Publius. Later, these articles were compiled and published as a book called The Federalist Papers. Others who opposed the Constitution compiled their response in a document called The Anti-Federalist Papers.

The Federalist Number 78 and the corresponding Anti-Federalist document dealt specifically with the judicial branch of government. Read the excerpts from each of these texts then answer the questions that follow.

### *The Federalist No. 78*

WE PROCEED now to an examination of the judiciary department of the proposed government.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR. . . . In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . 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.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two . . . that . . . the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislative and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the 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.

If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . .If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices . . . The experience of Great Britain affords an illustrious comment on the excellence of the institution.

###### QUESTIONS TO CONSIDER

1. Explain the following passage. "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . [it] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." What does the author mean by this?
2. Examine the following passage."For there is no liberty, if the power of judging be not separated from the executive and legislative powers." What does the author mean by this? Which principle of government does this support?
3. According to the author, why are the courts vital to a limited constitution?
4. Why does the author believe that judges have permanent tenure?
5. What is the author's attitude toward the proposed Supreme Court of the United States?

# The Power of the Judicial Branch: The *Anti-*Federalist 78

###### INTRODUCTION

When the Constitution was first written, many people supported it. However, there were some people who were opposed to it. The framers feared that not enough states would ratify it and decided to write a series of persuasive papers to influence people's opinion. They attempted to convince people that the structures and concepts in the Constitution were right for a country seeking to balance power between a national government, state governments, and the people. The series of articles written by Alexander Hamilton, James Madison, and John Jay, appeared in local newspapers under the pseudonym Publius. Later, these articles were compiled and published as a book called The Federalist Papers. Others who opposed the Constitution compiled their response in a document called The Anti-Federalist Papers.

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### *Antifederalist No. 78 - 79*

. . . The supreme court under this constitution would be exalted above all other power in the government, and subject to no control. . . .

The judges in England, it is true, hold their offices during their good behavior, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union. . . . But the judges under this constitution will control the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress. They are to give the constitution an explanation, and there is no power above them to set aside their judgment . . . there is no power above them that can control their decisions, or correct their errors.

. . . this court will be authorised to decide upon the meaning of the constitution; and that, not only according to the natural and obvious meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature . . . The supreme court then has a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are . . . subject to have their decisions set aside by the house of lords, for error . . . But no such power is in the legislature. The judges are supreme and no law, explanatory of the constitution, will be binding on them.

When great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful checks should be formed to prevent the abuse of it . . . I suppose the supreme judicial ought to be liable to be called to account, for any misconduct, by some body of men, who depend upon the people for their places; and so also should all other great officers in the State, who are not made amenable to some superior officers. . . .

###### QUESTIONS TO CONSIDER

1. According to the document, how does the Supreme Court of the United States differ from the highest court in Great Britain?
2. What is the author's attitude toward the proposed Supreme Court of the United States? Which statements or phrases in the document support your opinion?
3. What recommendation does the author make?
4. Compare this document withThe Federalist Number 78. What are the major points on which the authors disagree? On which point(s) do they agree?
5. How would the United States be different today if the proposals outlined in the Anti-Federalist had been accepted?

Political Cartoon Analysis

**DIRECTIONS**

Analyze the cartoon below in terms of its meaning related to the *Marbury* v.*Madison* case.

1. What do you see in the cartoon? Make a list. Include objects, people, and any characteristics that seem to be exaggerated.
2. Which of the items on the list from Question 1 are symbols? What does each symbol stand for?
3. What is happening in the cartoon?
4. What is the cartoonist's message?
5. Do you agree or disagree with the message? Explain your answer.

