

**The Least Dangerous Branch: Does the Supreme Court reflect Hamilton's vision?**

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Since the passing of Justice Antonin Scalia last February, many questions linger regarding the future of the Supreme Court. However, perhaps the most important question to be answered looks to the past and the present: does the 21st century model of the Supreme Court still accurately reflect the ideas iterated by Alexander Hamilton in his essay [*Federalist 78*](http://www.constitution.org/fed/federa78.htm)?

Before this article seeks to find an answer, it is important to give context. Hamilton, one of the most influential Founding Fathers, penned a series of essays along with James Madison and John Jay entitled *The Federalist* under the pseudonym Publius.  The goal of these essays was to rally support for the ratification of the Constitution by creating arguments as to why ratification was imperative and why the Constitution would be successful.  Specifically, Hamilton authored *Federalist 78*in 1788, where he offered his opinion of the Supreme Court’s role in government.  In light of the country abandoning the Articles of Confederation, much  contention existed between citizens regarding the Supreme Court.  The Articles of Confederation did not outline a judicial branch, much less a federal, truly “supreme” court.  The purpose of Hamilton’s*Federalist 78* was to assuage many of the fears and doubts shared by Americans regarding the Supreme Court.  There are a few premises assumed by Hamilton that should be considered: the concept of judicial review, the idea that the Supreme Court is the “least dangerous branch,” and the thesis that Court is the greatest protector of liberty.

**Judicial Review: Where does it stand?**

The concept of judicial review, which in U.S. constitutional law articulates that the Supreme Court can rule on the constitutionality of a legislative act, has been prevalent for centuries in many different governments and capacities. Many constitutional scholars assert that when Hamilton implied the concept in *Federalist 78*, it was thus introduced into U.S. constitutional law.  Hamilton says, “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.” Although he never directly wrote the words “judicial review,” Hamilton’s words signal that the Court has the power to overturn legislative acts—the definition of judicial review.  It is this paper that lead Richard Brookhiser, author of [*Alexander Hamilton, American*](http://www.nytimes.com/books/99/04/25/reviews/990425.25beschlt.html), to label Hamilton as the “grandfather of judicial review.” To ask if the principle of judicial review is still present in today’s court would be rhetorical—of course it is.  Many of the most landmark cases of the Court’s history involved the upholding or overturning of congressional acts.  Perhaps the best example of this in recent years is [*National Federation of Business v. Sebelius*](https://www.oyez.org/cases/2011/11-393)(2012), in which the Supreme Court ruled that the Affordable Care Act’s individual mandate is constitutional.  Other recent examples include [*McConnell v. FEC*](https://www.oyez.org/cases/2003/02-1674)(2003), regarding the Bipartisan Campaign Reform Act, a campaign finance law, or any of the cases similar to [*U.S. v. Lopez*](https://www.oyez.org/cases/1994/93-1260)(1995), which held that the Gun-Free School Zone Act was unconstitutional during the 1990’s Rehnquist Court.  Thus, there is no doubt that the Supreme Court reflects Hamilton’s idea of judicial review in modern standards.  If it didn’t, it wouldn’t be doing its job.

**“The Least Dangerous Branch?”**

With the recent Republican block of President Obama’s appointment, Chief Judge Merrick Garland, to fill the vacant seat on the bench, it is clear to see that people from both sides of the aisle realize the power of the Supreme Court.  Otherwise, we wouldn’t have an eight justice court handing down split decisions. But why is it so powerful? And how does that power compare to the other branches? A few reasons exist as to why the Supreme Court is so powerful, but they all stem from the same source: the Supreme Court can interpret the Constitution.  The fact that the Court can utterly change the entire U.S. system of constitutional law with one precedent-setting case, controversial decision, or swing-voting justice illustrates the influence that the justices have.  But is their influence fair?  Justices of the Supreme Court have lifetime appointments.  There are, as with anything, pros and cons to this arrangement.  While justices do not have to be subjected to representing the American electorate and can therefore make decisions without electoral bias, they are also immune, if they desire, to the input of the American people. Since when is the reality of nine unelected justices who can fundamentally change the political and social aspects of Americans not dangerous?  Justices can make controversial decisions that cause divides in public opinion without consequence.  If a congressman were to vote for a bill with which his constituents disagreed, he probably would not be reelected.  Even a president is highly affected by public opinion.  Justices are not subjected to that same standard and can only be removed from tenure if they violate the good behavior standard found in Article III of the U.S. Constitution.  This presents a danger, as it is more difficult for the people to check the power of the government.

There is also the notion that some justices “legislate from the bench,” This concept, which argues that rulings are based more on political considerations, is called judicial activism.  Many argue that it had its start with some of the 14th Amendment cases of the 20th Century ([*Brown v. Board of Education*](https://www.oyez.org/cases/1940-1955/347us483) (1954), which ruled that segregation was unconstitutional, is an example.) Judicial activism does not imply that these cases aren’t decided on a valid constitutional basis. Brown certainly was based on the analysis of the 14th Amendment, but it also cannot be ignored that a political and social movement had begun to expand civil rights in the United States at the time of its decision. Although recently praised by Democrats and criticized by Republicans, judicial activism has had its fair share of justices from both sides of the aisle who demonstrate its qualities.  Chief Justice William Rehnquist, a Conservative, could be considered a judicial activist judge.  He subscribed to the belief that power should be left to the states, and many of his decisions reflect this under his “devolution revolution” court.  Earlier, *U.S. v. Lopez*was mentioned, but [*U.S. v. Morrison*](https://www.oyez.org/cases/1999/99-5) (2000) and [*Gonzales v. Raich*](https://www.oyez.org/cases/2004/03-1454) (2005) are both examples of a time when the Supreme Court returned power to the states by ruling a federal act unconstitutional. Justice Harry Blackmun could be considered an activist judge, especially after he wrote his famous opinion in [*Roe v. Wade*](https://www.oyez.org/cases/1971/70-18)(1973).  If the Supreme Court is supposed to be nonpartisan, as was the Founders’ intention, then why should justices be able to use their political beliefs to make decisions?  This presents danger, as justices are using their own political considerations to make decisions that set precedent for future cases.

But that’s just it: it presents danger.  It could be dangerous.  Depending on who you talk to, it is dangerous.  Conclusively, if we examine the overarching effect of the Supreme Court, they are not pressing issues.  Yes, justices may be unelected, but the Founders valued judicial independence.  Controversial decisions that can’t be checked are just a consequence of that.  And yes, modern justices do bring their own political considerations into decision-making, but we’d be foolish to say that it’s never happened before.  As much as we may not like it, the decisions made by the Court are inherently political.  The justices that eventually sit on the Supreme Court are nominated by presidents who generally hold the same political beliefs as them.  This has been present ever since Chief Justice John Marshall.  John Marshall, a Federalist, was appointed by John Adams, also a Federalist, to keep Federalist power in one branch of government when Thomas Jefferson and the Democratic Republicans took the executive and legislative branches in the election of 1800.  1803’s infamous case, *[Marbury v. Madison](https://www.oyez.org/cases/1789-1850/5us137%22%20%5Ct%20%22_blank)*, was partially a political decision, as John Marshall himself was the Secretary of State at the time that Marbury did not receive his commission.  These issues have been prevalent throughout the entire existence of the Supreme Court.  It is undeniable that the current Court is progressive in many ways, and some critics may say that it is too activist.  But, if it really becomes a larger issue, the executive branch can nominate justices who practice more restraint or the Senate could vote to not confirm a justice who is more activist.

So is the Supreme Court really less dangerous than its counterparts?  Indeed, Hamilton never said that the Supreme Court wasn’t dangerous, only that it was the least dangerous.  We must not forget that despite the Supreme Court’s flaws, its ultimate responsibility is to protect the Constitution and check the other branches of government.  As Hamilton discusses, the Supreme Court does not hold the “power of the purse” (Congress) or the “power of the sword” (executive). Instead, it *is*the Court’s responsibility to ensure that the power of the purse or the sword does not encroach upon the people or violate the Constitution. Given that duty, coupled with the fact that the flaws of the Supreme Court are not fatal, leads to the conclusion that the modern Supreme Court is probably still the least dangerous branch.

**Greatest Protector of Liberty**

Regardless of politics, both Democrats and Republicans alike would agree that the Supreme Court is the greatest protector of liberty. More pertinent is the question regarding the ways in which it is the greatest protector.  Democrats value that the Supreme Court has the ability to expand rights, while Republicans value that the Supreme Court has the ability to protect rights already guaranteed.  For example, many prominent progressive politicians like Senator Bernie Sanders (I-VT.) praised the 2015 decision of *[Obergefell v. Hodges](https://www.oyez.org/cases/2014/14-556%22%20%5Ct%20%22_blank)*, which expanded the right to marriage to same-sex couples.  Many other Republican politicians like Senator Ted Cruz (R-TX.) speak out about the importance of the Supreme Court to uphold 2nd Amendment rights to bear arms.  This contrasting view of expanding rights versus protecting existing rights brings to the forefront one of the fundamental differences of another debate: whether or not  the Supreme Court should view the Constitution as a “living document” or in an “originalist” manner.

Justice Stephen Breyer argues for the Constitution to be understood as a “[living document”](http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-77-2-Breyer.pdf).  He believes that the Constitution was purposefully vague and is meant to be flexible and change with the times.  This interpretation allows for the expansion of civil rights and liberties.  Justice Breyer says that the “living document” interpretation allows the Court to maintain the Constitution’s framework that “everyone has equality before the law,” Through applying this approach to 14th Amendment, many rights have been expanded: privacy, abortion, marriage, sex, contraception, education, and many more.  Justice Scalia argued for an “[originalist](http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf%22%20%5Ct%20%22_blank)” approach, in that the Court should rule based on the meaning of the Constitution’s text at the time it was adopted.  Justice Scalia iterates that this interpretation is flexible because the legislative branch should be responsible for changing the Constitution through Article V’s amendment process.  This allows the Courts to determine if the Constitution explicitly contains rights, which will be better protected if they are in an amendment rather than precedent case law.  However, this article is not a debate between which is the appropriate approach to the Constitution.  The interpretation debate serves to prove that the Supreme Court is the greatest protector of liberty, and the issue at hand is determining the appropriate mechanism for protecting liberty.

**Bottom Line & Final Thoughts**

The modern Supreme Court still reflects the values set forth in *Federalist 78.*  Yet, there are many other issues within the Supreme Court that Hamilton, nor any of the Founders, could not have predicted.  It’s safe to say that the Founders would probably be in awe of the Supreme Court today  Remember, the Supreme Court was an experiment for the United States, as no federal judiciary existed prior to the Constitution.  Many of the Founders were unsure if the Supreme Court would even work, and it’s fair to say that much of Hamilton’s writing was a well-developed hypothesis of how the judicial branch would operate.  Not to mention, we must take into account that the writing of the Federalist Papers was a political maneuver.  The Federalist Papers’ purpose was to get the Constitution ratified by appeasing those who were unsure of its success.  It is possible that a lot of what was contained in *Federalist 78*, especially since it was so close to the end of the publication of the papers, were arguments created to address problems citizens had with Article III of the Constitution.  Additionally, we assume that the 21st century Supreme Court is the least dangerous branch as Hamilton discussed.  But, is it even fair for Hamilton to assert that one branch is more or less dangerous when checks and balances exist?  Checks and balances prevent branches of government from becoming too powerful. Why would the relative power of a branch matter if they can all ultimately be checked? This is by no means to dismantle the validity of what Hamilton has to say, but to question the accuracy of our assumptions.

Largely, however, the biggest problem that I do not think Hamilton foresaw was how partisan our Court is becoming.  Yes, the Supreme Court does deal with inherently political topics. It has for centuries.  However, the Supreme Court is supposed to be a nonpartisan institution.  We know this from the emphasis placed on judicial independence by the Framers of the Constitution.

We do not need a more liberal Supreme Court.  We do not need a more conservative Supreme Court.  We need a Supreme Court comprised of justices who pledge to faithfully uphold the Constitution *without*political bias.  As long as we nominate highly partisan judges, as long as we confirm highly partisan judges, as long as partisan politicians refuse to confirm judges, and as long as we say that our Supreme Court needs to lean toward one political affiliation over the other, the sanctity of the Supreme Court’s nonpartisan doctrine will continue to diminish.  Until then, we shall continue to hope that the values found in Hamilton’s *Federalist 78* will survive an increasing partisan Court.