Institution and Virtue in the Judiciary

Stephen H. Wirls
Franklin and Marshall College

This essay reconsiders The Federalist's design of the Judiciary. The argument has two themes. In general, The Federalist does not neglect ambition in the case of judicial power. Rather, The Federalist presents a coherent institutional order that is fully informed by this problem. It defines the central judicial function quite narrowly and describes an elaborate a constellation of influences to contain judicial will within these boundaries. This end and these means impose a very narrow scope on judicial review.

The more specific theme concerns the place of virtue in that institutional design. The Federalist's discussion of other, truly discretionary functions introduces the need for some virtue to condition judicial will in the absence of the guidance of law. This concern for virtue in relation to other powers confirms the limited scope of judicial review. Moreover, the need to secure and preserve some virtue in judges imposes further restrictions on functions and powers.

The purpose and scope of the Judiciary's power to interpret and enforce the law of the Constitution has always been disputed. Rarely, however, has the political science of the framers been employed in evaluating judicial functions. Abstractly desirable ends and powers should be evaluated in relation to the probability of good results, and the framers' political science provides various means for understanding and influencing probabilities. The powers and functions of the other branches have been studied as elements of an elaborately ordered constellation of influences. This essay will examine The Federalist's Judiciary as a complex of often reciprocally related ends, powers, functions, structural designs, and human probabilities.

Two lines of argument eventually address the review power. On the one hand, the institutional order was to secure the "steady, upright, and impartial administration of the laws" (Hamilton, Madison, and Jay 1961, 465). To that end the review power was narrowly defined and confined On the other hand, virtue was an alternative to strictly institutional regulation for directing political action to some public good. The framers used "numerous and various" means to keep officers "virtuous whilst they continue to hold their public trust" (350). Institutional analysis must address the question of virtue as the discretion necessary to secure a public good approaches the limits of what can be secured through institutional regulation of lesser motives. The Federalist's Judiciary depended upon certain virtues, but in relation to powers that, unlike the original review authority, entailed significant discretion. The Federalist account is guided by a practical principle of reciprocity between virtues and powers: the quality of probable virtues determines what powers can be used well, and powers are critical components of the structure that will attract and sustain those virtues. The examination of virtue in the Judiciary leads to a few conclusions on the narrower question of the review power: virtue was not a concern in The Federalist's defense of this power, which supports a strict interpretation of its intended scope; the anticipated virtues would not secure a prudent use of a broad review power; and, to preserve the virtues essential to other functions, the review power must be strictly confined.

Institutional Analysis and the Judiciary

In some areas of American politics, institutional analysis has been used to locate a middle ground between formal, legal approaches and various types of what could be called realism, i.e., studies of power, influence and decision that focus on independent personal dispositions and modes of choice. Institutional analysis has returned to a dominant element in the political science of the framers, one which is especially evident in The Federalist Papers (Epstein 1984). The argument is that "the organization of political life makes a difference" and that institutions are, contra behavioralism's premise, not simply "arenas within which political behavior, driven by more fundamental factors, occurs" (March and Olsen 1989, 1).

The Presidency has been a particular focus of recent institutional studies (Bessette and Tulis 1981). Theodore Lowi argues that an institutional approach has the practical advantage of identifying workable

reforms that will change behavior and results (1985, 135-136). The structure of the office stands between motivations and power, using varied means to direct the use of power. Accountability and responsibility are structured through the design of the office in size, term and so forth. The powers, especially as they are mixed with those of other institutions, both stimulate action and regulate it by ordering rewards, punishments, and inter-institutional disputes.

The institutional order can be a prudent substitute for an exacting definition of powers, providing for a more fluid, dynamic relationship in trust and distrust between the various parties, thus allowing powers to fluctuate within "a horizon of law" (Bessette and Tulis 1981, 27-29) without allowing any particular instance to establish a ruling principle. In other words, institutions can cut short the logical reach of principles and doctrines and allow for less rigid results, thereby accommodating variations in circumstances and in human capacities and qualities (March and Olsen 1989, 55-56; Mansfield 1989, 274, 278).

In the abstract, this would seem to be a valuable perspective to bring to the Judiciary, and especially to the review power. Yet the apparent disproportion between the institution of the Judiciary and this power poses a number of problems. As a comparison: no matter how the Presidency's powers are understood in principle, principle does not rule. These powers are in most cases open to Congressional influence, and principle is but one element in a more fluid, practical--and constantly disputed-- ordering of ambition checking ambition. The Judiciary's form and powers free it from the direct influence of other branches: its powers are not mixed with other branches; the mode of appointment and life tenure free it from accountability; the criteria for and clumsy process of impeachment restrict its use as a regular means of control. Institutional elements seem neither to define a limit on the scope of any power nor to provide modes of limiting in practice the reach of any doctrine or principle. Specifically, the power to interpret and enforce the Constitution as law defines a role so comprehensive, so enticing to ambition, as to undermine the constitution of a court of law. The structure seems to speak of an exceptional trust in this "least dangerous" branch (Hamilton, Madison, and Jay 1961, 465). Otherwise the power of review would be thoroughly misplaced, considering the prominent skepticism concerning better motives and the specific concern over ambition in the political science of the framers (Agresto 1984, 65-67, 164-167; Perry 1982, 126-128). It seems that either the institution is

incoherent or that institutional regulation has been replaced by an inexplicable reliance on virtue.

"Brutus," an anti-Federalist critic of the constitutional plan, spells out the reach of the review power in principle and the probable effects of that power on judicial disposition and comportment. Equal and independent branches require a source of power superior to them all. The Judiciary, however, has the power to "decide upon the meaning of the constitution ...according to the natural and ob[vious] meaning of the words" and, from its common law or equity powers, "also according to the spirit and intention of it" (Storing 1985, 185). So while Congress "can only exercise such powers as are given [it] by the constitution," the Judiciary can "controul the legislature" because it can "determine what is the extent of the powers of the Congress" (185). In sum, the "judges are supreme--and no law, explanatory of the constitution, will be binding on them" (186).

Brutus sees, in the absence of any intrusive check, no institutional influences on dispositions and decisions that would limit in effect the use of the power to interpret the Constitution. Even if explicit authority was not extended to interpreting spirit and intention, those limits would be parchment barriers. Consequently, ambition will tend to redefine the role, and destroy the constitution, of a court that is "independent of the people, of the legislature, and of every power under heaven" (183).

On the one hand, Brutus could be accused of having a deficient conception of institutional regulation. One function of and case for institutions is that they "increase capability by reducing comprehensiveness"; by "inhibiting the discovery of and entry into some potential conflicts, a structure of rules organized into relatively discrete responsibilities channels political energies into certain kinds of conflicts and away from others" (March and Olsen 1989, 17, 24, 27). Institutional structures can establish roles, "rules of appropriate behavior,"and "duties and obligations," not only by "direct coercion," but also by using what is "internalized through socialization or education" (3, 22). Of particular interest are "standards of professions," the "expectations of patrons," and trust based on "appropriateness more than a calculation of reciprocity" (30, 38). Role and identity help limit the scope of conflict and deliberation: "actions are fitted to situations by their appropriateness within a conception of identity" (38, 23, 160-162). Identity and role can be defined so that they are more or less commensurate with the probable skills of personnel.

An institution that exercises what March and Olsen call "integrative" functions must deliberate about common or communal goods

and principles rather than the mere aggregation of in- terests. Such functions, especially when assigned to an institution that is independent of the most potent modes of accountability and regulation, raise a particular concern over qualities of character. Judges must act in accord with duty and principle rather than in response to interests of others or their personal ambitions (114, 118-119).

According to March and Olsen, the institutional structure of courts necessarily involves the problem of "competence and integrity" or virtue (126-129, 131-132). However, as Brutus argues, while the independence of the judiciary is essential to a strict association with the law, it may, when joined with the review power, create a role or involve judges in broader conflicts that will be attractive to ambition; good use of this power would require a rare prudence and integrity. Brutus assumes that the institution will not foster the virtues neces- sary to master ambition and guide deliberation to the public good.

As we shall see, all of the institutional aims and elements mentioned above are present in Hamilton's explanation of the Judiciary's elaborate institutional design. The question is, in the face of Brutus's criticism, whether and how they are as- sembled into a coherent institutional order.

The General Constitutional Principles

While the framers organized selection and tenure to increase the probability that certain positions would be filled by the more skilled and virtuous, they did not rely on the continuous presence of "enlightened statesmen" let alone a "philosophical race of kings" or some other disinterested regulator of political order and power (Hamilton, Madison, and Jay 1961, 80, 218-219, 315). Consequently, the institutional order attends to the "defect of better motives." Because the main danger is the spirit of ambition, so ambition "must be made to counteract ambition," and institutional arrangements must turn "the private interest of every individual" into "a sentinel over the public rights," i.e. the powers of his institution (322). Public office can engage and use personal interest and ambition to assert and defend an institution's public rights as the source of power, prestige and, possibly, fame. The need for defense reflects the simple fact that desires and passions will not respect "parchment barriers." That grasping nature would seem to necessitate, as Brutus argues, access by other institutions to decisions that might affect their powers.

The Federalist also explains how thoroughly the Constitution was shaped by the obscurity of divisions of function and power, and by problems of following the logic of any one principle. The Constitution had to institute the proper balance between competing goods, each of which will have its imprudent partisans (Hamilton, Madison, and Jay 1961, 34-35). Stability, requiring longer terms, and energy, requiring a "single hand," compete with "liberty" and "republican form," requiring shorter terms and many more hands or voices. Each is essential to safe and good government, but any one carried to its full extent would preclude incorporation of the others (224-231). Moreover, full implementation of any one principle would liberate human proclivities that are dangerous to all political good. Abstractly beneficial powers are blended, given only in part, not only to check abuse but also to direct ambition to pursue, if without full authority, important goods. A fine example is the president's power to recommend legislative measures. More to the point, the rule of law, if followed to its extreme, would establish the Judiciary as the authoritative and comprehensive interpreter of the Constitution as a whole. The degree to which this principle is put into practice depends upon, among other factors, the practical costs of treating the Constitution as ordinary law and the probabilities that the power necessary to implement the principle will be exercised well.

If the only behavioral maxim informing these practical constructions were the probable "depravity" of human beings, then the inference of an unusual, and perplexing, trust from the unmixed powers of an independent Judiciary would be plausible. But the framers also relied on "other qualities in human nature which justify a certain portion of esteem and confidence" (Hamilton, Madison, and Jay 1961, 346). The guarded phrasing indicates that these "other qualities," which may be evident in private individuals, do not, in themselves, justify a trust of those in office.

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.... The means relied on in this form of government for preventing their degeneracy are numerous and various (350-351).

This consideration upsets the inference of some general trust and urges a more precise search for those qualities and for the circumstances in which they could "justify a certain portion of esteem and confidence." We should expect the constitution of the Judiciary to be an elaborate mix of ends, means and materials.

Judicial Review and the Judicial Function

The Judiciary is "described by landmarks still less uncertain" than any other branch (Hamilton, Madison, and Jay 1961, 310). Hamilton's over-arching purpose in Federalist 78 is a defense of an exceptional judicial tenure as essential to, most generally, the "steady, upright, and impartial administration of the laws," of which judicial review is an extraordinary dimension (465). The character of the primary and ordinary function or end, and the means of institutionalizing it, dominate the whole and, in particular, define and control the scope of judicial review.

The Judiciary is very susceptible to being "overpowered, awed, or influenced" by the more popular and powerful branches. The menace of ambition, "encroachments and oppressions," comes from the other branches and especially from the legislature. Control over the laws, the purse, and the sword will excite ambition, and meaner passions. Popularity opens legislative deliberations to the influence of "ill humors in society." Only judges with permanent tenure could be expected to have the "firmness," "independent spirit," and "fortitude" necessary to the proper administration of the laws (Hamilton, Madison, and Jay 1961, 466, 469).

Hamilton does not argue that the dispositions of those who are or will be judges is distinctive. The Judiciary will be "least dangerous to the political rights of the Constitution" because it is "least in capacity to annoy or injure them" (Hamilton, Madison, and Jay 1961, 465: emphasis added). Rather, the Judiciary's weakness and permanence turn its spirit or ambition inward, to defend and to gain satisfaction from its function as a court of law. Weakness helps enforce a role and modes insofar as little can be gained from corrupting the law (Epstein 1984, 191). Thus, what insures that the Judiciary will not "in any sensible degree ...affect the order of the political system" is not only the incapacity to execute an "active resolution" but also, and consequently, "the general nature of judicial power, ...the objects to which it relates, ...the manner in which it is exercised" (Hamilton, Madison, and Jay 1961, 484-485). Hamilton argues that confidence in judicial comportment depends on these constituents of the

general judicial role and institution. He implies that these constituents are fairly narrowly defined and reciprocally related. Altering them would alter the tendencies in behavior.

The Judiciary was not fortified by additional, mixed powers, as was the Presidency by, for example, the veto which both protects the office against usurpation and involves the president in legislative deliberations. Judicial participation in a council of revision, to fortify and otherwise aid the executive in reviewing legislative acts, was rejected by the Constitutional Convention. Those arguing for judicial participation sought refinements in the technical qualities and the justness of the legal code. The most prominent, and apparently decisive, objections were that judges are not generally qualified for statesmanship and policy judgments, and that both the judges and the public confidence therein will be corrupted by involvement in partisan and policy disputes (Farrand 1966, v.II, 73-80, 298- 300). On the other hand, Hamilton compares the very peculiar skills appropriate to judging to the probable qualities and habits of legislators (Hamilton, Madison, and Jay 1961, 483). These ends--securing the benefits of those peculiar skills and maintaining the properly judicial dispositions and deliberation-- must control the type and scope of functions, of powers, and thus the nature and scope of disputes subject to judicial resolution.

The institutional order must insure that in the exercise of judicial power "nothing would be consulted but the Constitution and the laws" (Hamilton, Madison, and Jay 1961, 471). But how are the institutional elements to be maintained in the right balance, especially as the Constitution's presence within the judicial purview seems to explode potentially neat and confined order, both in theory and in practice? With one exception, though, Hamilton's explanation of judicial review consistently has the ordinary judicial function imposing a very narrow range on Constitutional adjudication. A careful look at this discus- sion must precede the examination of the other institutional elements.

Because Hamilton is defending judicial review against Brutus' concerns about judicial ambition and supra-constitutional domination, his explanation of the "true doctrine" may seem almost fatuous. But this doctrine is not the sum of his defense. Moreover, this doctrine can be forceful in a variety of ways. The general grounds on which it rests--that all acts of agents exceeding the "tenor of the commission" are void--denies both judicial and legislative superiority by subordinating them to the extraordinary will of the people as expressed in the Constitu- tion. While it establishes a formal foundation for judicial review by elevating the law of

the Constitution over acts of the no longer sovereign legislature, it also asserts the equality of the branches (Snowiss 1990, 77; cf. Wills 1981, 128). It helps establish the Constitution as a central element in the discourse of ambition counteracting ambition, and it both supports and qualifies resistance to judicial ambition by other institutions and ultimately by the people. Though Hamilton reaffirms Brutus' constitutional theory, he must address the potential inequality from judicial interpretation superceding legislative interpretation. He does this by defining powers and constructing controls in accord with the Judiciary's ordinary functions and limited competence.

However, the general point about constitutionally invalid laws does not define the purview of the Judiciary. At only one point does Hamilton seem to speak broadly, noting that "interpretation of the laws is the proper and peculiar province of the courts," that judges should regard the Constitution as a "fundamental law," and that it "therefore belongs to them to ascertain its meaning" (Hamilton, Madison, and Jay 1961, 467). But even here he speaks more precisely of the Judiciary as an "intermediate body between the people and legislature," of "limits assigned to [legislatures'] authority," and of a standard of "irreconcilable variance." Moreover, every other part of the discussion indicates that the specific power of judicial review is not as broad as its general foundation.

In general, the legislature's "construction of its own powers" is not "conclusive upon the other departments." This statement also embraces the president's veto as a mode of enforcing constitutionality. The judicial power to void laws does not encompass the whole Constitution but only specific Constitutional provisions that are compatible with the ordinary objects and modes of the judicial function.

Indeed, Hamilton compares the act of voiding an unconstitutional statute to the common, narrowly discretionary act of ignoring or voiding the older of two contradictory statutes (Hamilton, Madison, and Jay 1961, 468-469). Judicial review raises no concerns for judicial power beyond those raised by ordinary adjudication. Its proper exercise, it seems, requires no additional or exceptional skills and qualities of character. This conclusion makes sense only if we attend to the rest of Hamilton's explication with care. Hamilton ends his discussion of the review power with a description that is similar to that with which he began: the courts should be "bulwarks of a **limited Constitution**" (469, emphasis added; also 482-483). The scope of the review power depends upon how those limits are defined.

A "limited constitution" may require a power of judicial review. But a limited constitution is one containing "specified exceptions" to the legislative authority:

> 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 (Hamilton, Madison, and Jay 1961, 466, emphasis added).

The "manifest tenor" does not seem to be left open to much interpretation; the "specified exceptions" define what are the judicially cognizable "bounds to the legislative discretion" (483). The authority to void a statute is engaged only when a court faces an "irreconcilable variance" between that statute and one of the "reservations of particular rights or privileges" in the Constitution, such as the prohibition of ex-post facto laws. Hamilton confines its purview to clauses that are textually specific, that require only ordinary, if specifically, judicial skill to interpret, and that confine constitutional adjudication to the ordinary judicial realm of disputes over the legal rights of individuals. By implication, questions concerning the construction of affirmative grants of power are excluded from judicial consideration. Later, Hamilton distinguishes between what is not authorized and what is forbidden, and apparently assigns regulation only of the latter to the Judiciary. This would confine judicial scrutiny to the restrictions in Article I, Sections 9 and 10, while leaving the powers in Section 8 to be regulated by other institutions and orders.

Elsewhere, notably in the 33rd paper, The Federalist does not mention the Judiciary as the corrective for the misuse of broad legislative powers, even though the intention is clearly to ease any fears about such powers. The government's "consti- tuents" are the final judges; they will "appeal to the standard they have formed" and take "such measures ...as the evidence may suggest and prudence justify" (Hamilton, Madison, and Jay 1961, 203). The argument, especially in relation to taxation and defense, is that these powers must be open to discretionary latitude because they must address circumstances of indefinite force and scope. They should not be refined into precise law as such (167; also papers 24-26 and 31 generally), but are to be regulated by the constituted character of the relationships between President, House and Senate, by the federal structure, and by

popular resistance to "unwarrantable measures" (297-298, 300; Wood 1969, 538-543).

Against the charge that Congress could, for example, use its broad taxing power to restrict the press, Hamilton argues that this liberty "must altogether depend on public opinion, and on the general spirit of the people and of the government." More generally, "legislative discretion, regulated by public opinion," is the "only solid basis of all our rights" (Hamilton, Madison, and Jay 1961, 514-515; cf. Snowiss 1990, 43). Generally overlooked in discussions of the original review power is Madison's argument, in Federalist 49, against Jefferson's proposal for instituting periodic constitutional conventions to correct imbalances of powers. Madison accepts Jefferson premise of co- equal branches and does not propose the apparently obvious alter- native of judicial regulation. The Federalist's alternative is the system of checks and balances, introduced in the following two papers, in which the Judiciary has almost no part.

Hamilton does not seem to be cleverly tailoring sheep's clothing for the Judiciary. His aim is to preserve the integrity of the ordinary judicial function which makes a critical contri- bution toward developing in individuals a general confidence and a sense of obligation (Hamilton, Madison, and Jay 1961, 108, 110, 111-117, 120, 303). The Federalist distinguishes the elements to be regulated by the scheme sketched in the 51st paper from the elements that are properly judicial. The latter are confined, on the whole, to those textually specific clauses that are, and can be defended as being, closely related to ordinarily judicial disputes about individual rights and injuries, requiring only ordinary judicial qualities to manage well (cf. Wills 1981, 140- 150, 157).

Moreover, precisely because these "specified exceptions" concern individuals, violations thereof would be less likely to engage the other regulating forces. They require another, more responsive guardian. For the same reason, these clauses, unlike the grants of powers, are remote from the main objects of the pride, ambition and deliberation of the stronger branches. Federalist 78 explains the extraordinary provisions to secure judicial fortitude even in this limited range of disputes. Elsewhere in The Federalist doubts are expressed about judicial fortitude when deliberating in areas of greater discretion and in partisan disputes involving the stronger branches. As we shall see, Hamilton speaks of a very conditional trust in the wisdom and virtue of judges. The review power was designed to be in accord with ordinary judicial modes and skills and to avoid corrupting the institutional ordering of judicial modes and dispositions.

Discretion, Depravity and Virtue

While we might infer from this narrow definition of the Judiciary's constitutional purview that this institution is shaped by the skepticism about human motivations and qualities so prominent in rest of the Constitutional order, such circumspection is made explicit where Hamilton ascends from functions strictly subordinated to the law to those more discretionary or constructive. The defense of these other judicial functions is grounded not simply on weakness and a directed spirit that supports "fortitude" but also on virtues which will direct deliberations that reach beyond the law.

To address the problem when "occasional ill-humors in society" injure "the private rights of particular classes of citizens, by unjust and partial laws," Hamilton promotes a function that entails judicial will: judges can and should mitigate "the severity and confine the operation of such laws," but only in individual cases (Hamilton, Madison, and Jay 1961, 470, 483; Wood 1969, 458). This judicial intervention will have the broader effect of "moderating legislatures," but through particular instances of frustration. Though private rights are involved, such laws are not, or are not specifically, unconstitutional and do not engage the power to void a law. If the argument above is correct, Hamilton has formalized the definition of unconstitutionality that engages the review power.

The problem of abuse of powers by majority factions is addressed in Federalist 10's argument concerning size and diversity. In Federalist 78, Hamilton defines the only remedy proper to the Judiciary. Yet this judicial "mitigating" will not be guided by law. Though judges are not authorized to convert these rights or the general principles of justice and impartiality into Constitutional law, they must use them to guide their judgments. We should expect some discussion of qualities of character that would condition these exertions of will to serve a public good. Hamilton in fact speaks of "integrity and moderation." Attracting and fostering these virtues depends upon some particular conditions.

It does not seem to be incidental that at this point Hamilton discusses the "esteem and applause" from the Judiciary's proper partisans, the "virtuous and disinterested" (Hamilton, Madison, and Jay 1961, 470-471). Political institutions will attract as partisans those whose interests might be served by it, and partisans can encourage and repay the favor with support and praise. On the one hand, this is a dangerous relationship because partisan aims are often driven by interest and passion, and partisan applause can, by satisfying vanity and a love of praise, undermine

institutional regulation by encouraging a change of ends, roles and appropriateness, thus the object of integrity. On the other hand, this interaction can be salutary. The love of fame, the "ruling passion of the noblest minds," is the passion most readily associated with virtue and the public good (437, 111).

The love of fame is more appropriate in a president, who must be an "energetic" executive and can, in pursuit of fame, serve the public good through "extensive and arduous enterprises" (Hamilton, Madison, and Jay 1961, 414, 423, 437). It is less appropriate in an institution that is to be moderate and must be discouraged from attempting "active resolutions." Hamilton, nonetheless, indicates the importance of using and managing a love of applause and praise. Minimally, this disposition ties the calculations of ambition to opinion, to enduring opinion, and so to actions that will merit praise beyond the moment and upon reflection. If the institutional order can attract the right audience, it can use applause to bolster the appropriate virtues, which will, in turn, influence discretion. In sum, fostering effective virtues depends upon managing the reciprocal relationship between the nature of the audience and the powers, qualities and dispositions of the officials.

While Hamilton anticipates the applause of the "disinterested and virtuous," he adds that of "considerate men of every description" who have an interest in supporting judicial integrity and moderation: "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today" (Hamilton, Madison, and Jay 1961, 470). This interest is common to all citizens, even those who might, in relation to the other branches, be strongly partisan. By confining an institution's utility or benefits, the institutional order, in a sense, selects the motive for applause and so the character of the audience. Assuming that no greater passion or advantage from irregular judicial activity overwhelms it, self-interest rightly understood should lead citizens to forgo immediate advantages and to support a properly judicial character.

This is The Federalist's only use of the term "moderation" to describe the disposition of an institution. The Senate is described as a "temperate and respectable body of citizens." That similar quality is, as with the Judiciary, closely connected to the institution being "well-constructed," particularly in relation to duration in office and responsiveness to popular will. Consequently the Senate "may be justly and effectually answerable for the attainment" of "objects that require a continued attention, and a train of measures" (Hamilton, Madison, and Jay 1961, 384). This

responsibility will lead it to temper the more popularly responsive House. Similarly, a moderating disposition in the Judiciary is fostered through its independence, its peculiar modes and responsibilities, and its audience.

Integrity is, it seems, a more personal quality. In The Federalist, "integrity" is directly related, in proximity and use, to "virtue." Both are regularly paired with the other general qualifications: wisdom, talents or abilities (Hamilton, Madison, and Jay 1961, 391, 458-459). They seem to be all but synonymous. Both integrity and virtue, but especially integrity, denote the requisite quality of character when powers entail greater, and less observed, discretion. This is evident in the distinction between a president's "deviation from the instructions of the Senate" and "a want of integrity in the conduct of negotiations committed to him" (406). It seems to be the quality of character or disposition that directs deliberation to pursue the public good or, more precisely, to uphold in practice the public purpose of one's office and responsibilities against personal and partial interests (431-432). Integrity is, therefore, closely related to honor and duty.

However, integrity is not a very reliable means of regulation. It can fail due to "honest errors" from ignorance and misconception. While a selection process may be designed to secure men with a "reputation for integrity" (Hamilton, Madison, and Jay 1961, 391, 414), "interest" can "corrupt ...integrity" (79). A "stern virtue," later called "integrity," that "could neither be distressed nor won into a sacrifice of duty" is "the growth of few soils" (441-442). Integrity must be guarded from "degeneracy" by ordering punishments, by limiting and mixing powers, and by eliminating occasions and incentives for corrupt calculation (441, 451, 457-458, 459, 473, 501). The office must be given sufficient value, through powers, honor, and the potential for reaping the rewards of integrity, among which are gratitude and fame (431-432, 434-435). Integrity is, obviously, a disposition of some force. But it can be relied upon only under fairly complex institutional controls.

If ambition is concomitant with public power, then securing the desired portion of moderation and integrity in this independent institution would depend to some degree upon its weakness, upon a limited scope of disputes and deliberation, and upon its incapacity to form a broader, "active" resolution. Otherwise new avenues would be opened to judicial ambition, and courts would tend to become a point of contention for passionate and in- terested factions, the applause of which would support partial and irregular uses of its power. Weakness and the institu- tionalized focus on ordinary judicial functions and modes help define audience, and

the audience's applause re-enforces the proper modes, duty, and integrity. Under these conditions, it seems, Hamilton has confidence in the strength of modest virtues to condition the use of this limited discretion.

The virtue of integrity returns, and the demands upon it increase, in Hamilton's discussion of the most discretionary and constructive function to be performed by the highest court. Hamilton's discussion speaks clearly about the limited trust in this modest virtue:

> To avoid arbitrary discretion in the courts, it is indispensible that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them...[T]he records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge (Hamilton, Madison, and Jay 1961, 471).

Hamilton reminds us that the judges for whom he had just defended some latitude of will are nonetheless susceptible to "ordinary depravity"; earlier he had mentioned the dangers of "individual oppression" by judges in particular cases (466). The general remedy is to bind them closely to the law. The distinctive function of the highest appellate court, one which departs from functions and modes of an ordinary court of law, is to order particular interpretations into a coherent system of law that shall be used to regulate the lower courts. The origin of this function lies not only in the need for a "uniform rule" (150, 476, 494) but also in the imperfections of all general laws; they must be "considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" (229).

The discretionary latitude to distil and enforce general rules of law is exceptional, and it requires rare skill and a higher degree of integrity. The professional training necessary to acquire the requisite wisdom for this most demanding of judicial functions may also help define the duty. But

Hamilton distinguishes wisdom and integrity. Professional training, as such, does not necessarily instill or preserve an integrity commensurate to that duty. Integrity, in this case, must support the labor, discipline and judgment required to order a "very considerable bulk" of precedents into coherent principles and rules, and to enforce those rules consistently.

Moreover, a high degree of integrity is necessary not only because the this power has a general effect on law and its administration, but also, and especially, because the exercise of this power is less open to scrutiny and informed appraisal. Unlike moderating unjust laws in specific cases or voiding a law that violates a specified exception, this function entails myriad fine judgments concerning a mass of complex and arcane prece- dents. Few will have the requisite wisdom and disposition to scrutinize these judgments. The proper exercise of this authority, less observed or observable, apparently depends upon the unusually strong influence of what Hume calls "an inward peace of mind, a consciousness of integrity" which is "very requisite to happiness" (1946, 123).

Four points in Hamilton's discussion should be stressed. First, designing or evaluating any one element of an institution requires careful consideration of the many reciprocal relations between functions, powers, audience, skills and virtues. Second, where judicial activities depart from the strict guidance of law, the virtues necessary to such a function must be identified, and the institution, through its various means, must foster those virtues. Third, that this last function rather than judicial review is the most unusual and demanding is indicated by Hamilton's concern for the rare skill and virtue essential to securing beneficial results in fact. Conversely, Hamilton's attention to depravity, skills and virtue in this case indirectly confirms the limited scope of judicial review, the discussion of which raised none of these worries.

Finally, The Federalist counsels low expectations; though the virtues upon which some judicial functions depend are not, abstractly understood, extraordinary, they are nonetheless rare in human beings and difficult to sustain against the passions and temptations which accompany public power and responsibility. Although the regulatory function of the highest appellate court will entail some recourse to general standards of justice and the common good, such recourse will be limited by the dominant place of ordinary law in its deliberations and by the strict confines of that court's constitutional purview. In any case, this function does not assume the more extraordinary integrity and political prudence that could justify a broader review power, one that entails an expansive discretion concerning

the most funda- mental questions of justice and political order. In general, the Constitution and The Federalist do not establish or promote powers or functions that depend for good results upon the accidental presence of simply exceptional virtues.

Hamilton's account of the constitution of the Judiciary is coherent. It exemplifies the framers' intricate institutional management of competing goods and human probabilities to the end of safe and good government. Their general aim was to secure the "steady, upright, and impartial administration of the laws." Every point is informed by a skeptical attitude toward human character and dispositions (cf. Howe 1897, 500-501). For the sake of good administration of the law, the Judiciary was made independent of shared powers, intrusive checks, and the "most effectual" control through limited terms securing "proper responsibility to the people" (Hamilton, Madison, and Jay 1961, 351). Nonetheless, a constellation of influences was designed to focus the judicial spirit on its strictly judicial modes and ends, and to regulate discretion through carefully fostered virtues.

Institution and Virtue in Contemporary Jurisprudence

The framers seem to have overestimated the capacity of this institutional order to maintain the distinction between judicially proper and improper parts of the Constitution. They seem to have underestimated: the latitude for will and creativity within the given functions; the genius of John Marshall (Snowiss 1990, chap. 5); the tendency of Congress to "abdicate all final responsibility to the Judiciary" (Corwin 1987, 62); the effects of public confidence in judicial integrity; and the influence of new doctrines from new, interested, audiences. Hamilton certainly anticipated problems with less than specific "exceptions" in a bill of rights, and his analysis helps illuminate problems posed by new doctrines which often promote thoroughly discretionary and constructive functions.

The Federalist's understanding of constitutional adjudica- tion both simplifies and complicates the prescriptions of originalists or strict interpretivists, who also point to the importance of doctrine in, for example, defining the audience and the aim of applause. On the one hand, their emphasis on the text of the law parallels The Federalist's understanding of the judicial function and mode. But they must strain somewhat to derive original, yet workable, prescriptions from the various constitutional provisions (Levy 1988 and Bork 1990, chap. 7). The Federalist's account

eliminates some of these problems by further radicalizing the program, as the Judiciary was not authorized to give more precise legal meaning to the general powers. On the other hand, originalists must depend, not upon a modest virtue within a constellation of regulating forces, but upon a self-imposed restraint, a higher integrity that would move the cat to put itself back in the bag.

The Federalist's practical reason poses various challenges to creative or non-interpretivist approaches. Many such arguments promote high and highly discretionary functions. While these functions may be derived from the ordinary function of protecting individual rights, they are nonetheless directed by thoroughly disputable theories or personal judgments about political and human well-being. It matters little whether these arguments are based on the defects of an outmoded Constitution or on general and comprehensive ends such as justice, moral growth, dignity, autonomy.

Michael Perry's writings are good examples because they have tried both to tie judicial deliberations to the Constitution and to bring the judicial function into accord with various elements of the framers' constitutionalism. In his later work, however, the text of the Constitution becomes a signifier of "aspirations" in the "American political tradition." Moreover, only "some provisions are symbolic of fundamental aspirations," not all of the aspirations are "worthwhile," and these aspirations are "indeterminate" (1989, 72; 1988, 133, 135). A judge must be selective and "should rely on **her own beliefs** as to what the aspiration requires" (1988, 149; the emphasis is Perry's). Perry's argument raises the problem of skills and virtues to guide this broad discretion, but his dependence upon a very sophisticated "self-restraint" merely begs the question (1988, 170-172).

Indeed, the first step toward defining judicial powers might be an explication of necessary and abstractly desirable functions. But both a functional defense of non-interpretive review and a conceptual link between an ordinary judicial function and some discretionary, constructive power--between ordering legal principles and developing moral principles--must account for the effects these activities will have on attitudes, dispositions and other functions. They must also account for the probability of sound results, i.e., for common human deficiencies and the capacity of an institutional arrangement to attract and foster with regularity the skills and virtues necessary to guide the exercise of such responsibilities toward good results in fact.

The difficulties evident in a comprehensive view led the framers to modest functions and powers. As the Judiciary moves beyond those limits, virtue becomes all the more critical and problematic: the institutional influences on powers and spirit are weakened, and discretionary judgment must address highly delicate and complex practical and moral questions. The character truly fit for such tasks would necessarily embrace an extraordinary degree of philosophical sophistication, moral wisdom, practical wisdom, courage and moderation. Put another way, new doctrines, powers and responsibilities move judges outside of the institutional context that could sustain appropriate virtues and habits while controlling the growth of new audiences and ambitions.

Though more from a concern over the undemocratic nature of judicial rule than for any deficiency of skill and virtue, Perry has, in an earlier work, turned to institutional checks in order to bring extraordinary judicial power into accord with the constitutional system. However, this remedy would probably tend to discourage the desired exercise of that power. Perry promotes, in particular, Congress's control of appellate jurisdiction (1982, 128-139). But for Congress to use this check in a deliberately Constitutional manner, rather than solely against wildly unpopular decisions, it would have to adopt doctrinal and institutional conceptions closer to those Hamilton describes. However, this unlikely development would, if Hamilton's reasoning is correct, tend to turn the judicial spirit away from the creative, discretionary functions being advocated.

Moreover, the introduction of truly proportionate checks would undermine some of the original plan's aims. Hamilton argues that independence from democratic and ambitious intrusions is essential to securing not only rule of law in fact but also a popular confidence in judicial integrity that fosters a general sense of obligation. Engaging intrusive checks against broad discretionary authority, involving the Judiciary more directly in highly passionate disputes with all the maneuvering and hedging they entail, would tend to corrupt dispositions and erode confidence in judicial integrity.

We may have seen such results in recent confirmation battles, which have focused on the specific policy outcomes of some of the more creative rulings. The skills and virtues necessary to resolve delicate and disputable moral and regime questions are rare in themselves. But they are surely not dis- coverable or dispositive in a selection process reflecting the highly politicized nature of the very functions that require those virtues. It

may also be that the process can no longer deliberately seek and promote more modest qualities such as legal wisdom, moderation, and integrity.

Institutional checks were not, in the main, grounded in democratic principles as such but rather in a sophisticated, prudent understanding of human dispositions. Some parts of that understanding justified extensive mixtures of powers. But insofar as there are "other qualities in human nature which justify a certain portion of esteem and confidence" (Hamilton, Madison, and Jay 1961, 346), intrusive checks or even manipula- tion of personal interests to serve public goods are not the only means of regulating the use of power. And insofar as good republican government requires more than well-checked powers, those other means must be employed. In some cases, therefore, the framers aimed at more than damage limitation and indirect service to the public good. Good government requires deliberately constructive responsibilities that, in turn, require unusual skills and qualities of character to direct discretion toward the public good. The most important practical limit is the capacity of institutional orders to sustain those qualities or manage their absence.

NOTES

I thank the Department of Government and the College for granting me a leave of absence and the John M. Olin Foundation for generous support through its Junior Faculty Fellowship Program.

1. On civic virtue and the republican tradition in American politics and thought see Bailyn (1968), Mood (1969), Pocock (1975). For a fine critical review of the arguments, see Pangle 1988, Chapter 4,. Wood (483-499, 506-558, 610-615) discusses the transition from republican virtue to the virtues of a "natural aristocracy" or elite, but not the very limited trust and the finer institutional means of regulation.
2. See also Vile 1967, 7-9. March and Olsen (1989) draw heavily on very general patterns of behavior with, in the main, bureaucratic orders as their focus. Consequently, they do not address in any detail the central problem of the framers; regulating unusual ambition in positions of rule.
3. Snowiss (1990) explores this influence of the doctrine of equal branches on the scope of the review power, as well as the early relationship between promotion of review power and presence and absence of

other checks on the legislature (15-16). But she sticks, in the main, to doctrinal questions and does not pursue the problems of ambition, discretion, and virtue or the particulars of institutional design (64-65, 102).

4. Cf. Wills' "high degree of public virtue" (1981, 192 and, generally, 185-192).
5. "In the smallest court or office, the state forms and methods, by which business must be conducted, are found to be a considerable check on the natural depravity of mankind" (Hume 1985, 24 ("That Politics May be Reduced to a Science")).
6. On the "efficiency" strand of the separation of powers doctrine, see Gwyn 1965, 37-39.
7. Consider the peculiar "connection" between the Senate and the Presidency (Hamilton, Madison, and Jay 1961, 323) in relation to the veto. Hamilton argues that exceptional tenure is necessary to support the Judiciary as a "faithful guardian of the Constitution," but it does not follow that it is the comprehensive or exclusive guardian. For example, consider the presidential oath. And elsewhere, Federalist speaks of the people as "natural guardians of the Constitution" (117).
8. Snowiss rests much of her similar case on doctrine, on the theoretical distinction between ordinary law (which restrains individuals) and fundamental law (which restrains political power). The latter is inherently political and closely related to the social compact and to revolution (1990, 28-34, 73). Any judicial review, then, is exceptional, related to natural law, and not confined to specific provisions (59-63). But as she admits, Hamilton's account has a strictly positive foundation (72, 78). It does, I argue, confine constitutional purview to specific provisions, and this account rests more on practical questions of judicial competence, virtue, trust, and institutionalized restraint on the one hand, and legislative discretion and regulation on the other. Snowiss does discuss the practical question weakness (1993. The importance of such considerations are suggested by her stress on a standard of uncertainty, the "doubtful case" rule (38, 42-43, 57-58), and the distinction between explicit provisions and written provisions (71-72, 78, 81-82).
9. See also Farrand 1966, II 376. For a parallel discussion of "evident opposition" and "manifest contravention of the articles of Union"

as the basis for voiding state laws, see Hamilton, Madison, and Jay 1961, 475-476.

10. See Epstein (1984, 44-45, 187-89) for this and the following point. He uses this reading to account for the otherwise astoundingly negligible function of the Judiciary---thing beyond mere self-defense--in the system of checked and balanced powers sketched in the 51st paper. On this point, see also Montesquieu 1949, 153 and 156, and Pangle 1973, 132. The Federalist does not speak of judicial regulation of presidential powers, other than as ordinary courts standing between individuals and the executive as such.
11. On the importance of the strict rule of law to the feeling of security that is the key to liberty, see Montesquieu 1949, 72, 75, 150, 153.
12. Those delegates to the Constitutional convention favoring judicial review understood it as a very narrow, defensive power (Corwin 19-87, 55-56; Farrand 1966, II 73-78 and Suppl. 297). At the convention, Madison distinguished cases arising under the constitution that are of a "Judicial Nature" and argued that the "right of expounding the Constitution in cases not of this nature ought not to be given to, that Department." He notes that this distinction was "generally supposed" in the vote on jurisdiction (Farrand 1966, II 430). This distinction is difficult to understand if the Constitution is to be treated simply as law. Using Federalist 78 as a guide, cases of a judicial nature would be those concerning individual rights, and not cases involving powers and inherently disputable issues requiring extensive practical deliberation. Recall the discussion above concerning a council of revision. Hamilton's more strictly positive implementation of this principle avoids some of the dilemma of responsibility posed by the "doubtful case" rule, as discussed by Snowiss (1990, 64-55).
13. See Hamilton, Madison, and Jay 1961, 398 for doubts about judicial "fortitude" in impeachment trials and for a comparison of the "awful discretion" in such trials and the "strict rules" that "limit the discretion of courts." Moreover, courts are unlikely, in such cases, to have sufficient "credit and authority" to. reconcile the people to a decision contradicting their "immediate representatives." At risk in such conflicts would be the "inflexible and uniform adherence to the rights of the Constitution and of individuals" (470). On the exceptions by way of a "political questions" doctrine, see Scharpf

1966. US v Nixon seems to reduce this 'doctrine' to a mere, if handy, escape from the problems of confronting executive powers.

14. Montesquieu (1949, 159) argues that an independent judiciary moderates government by ensuring that the laws will be applied to all. To preserve this effect and to foster a sense of security, he denies any judicial authority to modify or moderate the commands of laws themselves. Hamilton may promote a moderating discretion to qualify what Montesquieu (153) sees as the "terrible" aspect the judiciary acquires from its immediate role in punishing.

15. Obviously, either through the accretion of precedents or through a ruling by the highest appellate court, such moderation through application could have a more general effect. This function parallels some of the intended effects of the veto. power, though that power extends to the law itself, and the president's considerations should reach "any impulse unfriendly to. the public good" (Hamilton, Madison, and Jay 1961, 443). The probability that a president "will listen to the admonitions of duty and responsibility" depends upon the "probability of the sanction of his constituents who would hardly suffer their partiality to delude them in a very plain case" (445.). Compare this to the discussion of judicial integrity and audience below.

16. James Wilson put a fine point on the matter; "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect" (Farrand 1966, II 73). Snowiss (1990, 42-43., 57-58) argues that Wilson's statement makes no. sense if the Constitution had been understood as "supreme ordinary law."

17. On the love of fame, the "applauses of others," and virtue, see Hume 1946, 103, 114-115; and 1985, 86 ("Of the Dignity or Meanness of Human Nature"):. "to love of the fame of laudable actions approaches so near the love of laudable actions for their own sake that it is almost impossible to have the latter without some degree of the former." For Hume' s influence on Hamilton, see Stourzh 1970, 21, 77-78, and especially 101-102.

For similar discussions of directing ambition through a sense of "honor" or "integrity" derived from a love of esteem or praise, see Francis Hutcheson 1968, 25-26, 76-77, 79, 164; Adam Smith 1982, II iii 3, III 2.5; and Hamilton 1985, 461-65 (letter to Bayard).

8. On the one hand, Hamilton anticipates the effective presence of Smith's (1982, I i 3, 5-7; II i-ii). and Hutcheson's (1968, 49-51, 54-56) abstract standard of morality, i.e., the sentiments of the "disinterested" or "impartial" observer. On the other hand, he also employs Hume's calculations of utility or good effects. Wills (1981) does not discuss this link to the Scottish thinkers.

   March and Olsen (1989, 38) speak of trust as "based on a conception of appropriateness more than a calculation of reciprocity". Hamilton ties appropriateness to some calculation of interest. In general, this discussion suggests that March and Olsen draw too sharp a distinction between ambition and virtue.

9. On the difference between integrity and a duty defined by rules, see Smith 1982, III 5.1. The Federalist also mentions integrity most frequently in discussion of branches with longer tenure and of resistance to actions of the majority or the legislature. The treaty power, which involves the more independent Senate and President in secret negotiations with powers having the means to corrupt, demands an account of integrity or virtue (Hamilton, Madison, and. Jay 1961, 391, 393, 396, 406, 414, 452).

10. Hamilton's discussion of deliberation' over the constitutional plan offers a general account of virtue: "Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good." But, especially considering the unregulated context, "this is a thing more ardently to be wished than seriously to be expected" (Hamilton, Madison, and Jay 1961, 33). Madison speaks of exceptional cases of individual founders chosen for "pre-eminent wisdom and approved integrity" (231; Hume 1985, 39).

11. On the absence of a provision for moral education in The Federalist, see Pangle 1988, 104-111.

12. For a study of institutional change that is closely related to doctrine and audience, see Tulis 1988. He arrives at a similar problem of skills and virtue (176, 202-204). See also Mansfield 1989, 297.

13. "This is a body, which if rendered independent & kept strictly to their own department merits great confidence for their learning and integrity." (Jefferson 1984, 942-946)

14. On a similar problem concerning the relation between the constitution and the political order, it is not exactly the Judiciary but rather "time only can mature and perfect so compound a system, can

liquidate the meaning of all the parts and adjust them to each other in a harmonious WHOLE" (Hamilton, Madison, and Jay 1961, 491). See stoner 1987, 213 and Snowiss 1990, 55-57, 220. On the general distrust of equity and common law powers, see Wood 1969, 292-305.

25. Reid (1815) argues that this is a concession by Hume to a "natural intuitive judgment of conscience" and that justice as an "**artificial virtue approved solely for its utility**, is given up" (IV 327: the emphasis is Reid's). On the importance of "self-approbation" -- being pleased by the "praiseworthiness" of an action"--and the rarity of integrity, see Smith 1982, III 2.5., 2.25, 3.11.
26. Compare Snowiss' argument that the legalization of the Constitution is a "relatively superficial phenomenon" because "it was achieved by application of ordinary law techniques to the Constitution" (1990, 197) and Rabkin (1989) on how, in administrative law, policy and law are distorted when policy disputes are resolved through the judicial orders and modes. This authority requires judges to have extraordinary skills and "heroic" virtues rather than probable ones (4-11, 55-63, 112-113, 131-143).
27. Cf. Lerner 1979, 120-126, 130. The Founders, Lerner argues, expected professional training to enhance the virtue of "duty" and so to distinguish judges and their judgments from "ordinary men." His investigation suggests the possibility of a judicial "locus of high statesmanship," but also more "equivocal conclusions." The latter, I think, emerges clearly from a full examination of the institutional order.
28. Compare Chayes' (1989) use of the common law mode to justify a grossly broader function of doing "justice" in constitutional matters and Stoner's (1987) more thoughtful examination of the latitude this mode brings to constitutional adjudication. Still, Stoner does not account for many of the functional and institutional restrictions discussed above. Hamilton does admit that in cases "concerning the public peace with foreign nations," some "considerations of public policy" should "guide their inquiries" (Hamilton, Madison, and Jay 1961, 504).
29. As recognized by Madison in 1834 (Snowiss 1990, 185-187). This might have been anticipated in Hamilton's stress on the effects of "good administration" and on the prominence of "magistrates"--judges and executives--in the public mind. Magistrates have the

most direct influence on "hopes and fears," and the object of those passions may be, following Montesquieu, personal security. Madison, at least in Federalist 10, concentrates on factious passions and interests which will pursue their ends through the legislature.

30. March and Olsen 1989, 161-162 suggest a dynamic in the "structure of action and justification" that could explain the gradual evolution of even a well-defined institution: actions are often chosen in relation to role or appropriateness, but justified in relation to consequences. Those justifications would tend to alter later conceptions of role and appropriateness.
31. For a review of various non-interpretivist programs and standards, see McDowell 1989. On the new audience and the philosophical complexity of recent doctrines, see Bork 1990, 133-138.
32. The passionate contention inside and outside these hearings over specific results in the authoritative hands of unaccountable judges seems to belie Perry's description or prescription that judges engage in dialogue or "transformative moral discourse" (1988, 163-164).

REFERENCES

AGRESTO, John. 1984. *The Supreme Court and Constitutional Democracy*. Ithaca: Cornell University Press.

BAILYN, Bernard. 1968. *The Origins of American Poltics*. New York: Knopf.

BESSETTE, Joseph and Jeffrey Tulis, eds. 1981. *The Presidency and the Constitutional Order*. Baton Rouge: Louisiana State University Press.

BORK, Robert H. 1990. *The Tempting of America*. New York: Free Press.

CHAYES, Abram. 1989. How the Constitution Establishes Justice. In Goldwin and Schambra, eds.: Chapter 2.

CORWIN, Edward S. 1987. *Corwin on the Constitution* vol 2 (The Judiciary) ed. Richard Loss. Ithaca: Cornell University Press.

EPSTEIN, David F. 1984. *The Political Theory of The Federalist*. Chicago: University of Chicago Press.

FARRAND, Max, ed. 1966. *The Records of the Federal Convention of 1787*. 4 vols. New Haven: Yale University Press.

GOLDWIN, Robert A. and W.A. Schambra, eds. 1989. *The Constitution, the Courts, and the Quest for Justice*. Washington: American Enterprise Institute.

GWYN, W.B. 1965. *The Meaning of the Separation of Powers*. New Orleans: Tulane University Press.

HAMILTON, Alexander. 1985. *Selected Writings and Speeches of Alexander Hamilton*. ed. Morton J. Frisch. Washington: American Enterprise Institute.

HAMILTON, Alexander, James Madison, and John Jay. 1961. *The Federalist Papers*. ed. Clinton Rossiter. New York: New American Library.

HOWE, Daniel W. 1987. The Political Psychology of *The Federalist*. *William and Mary Quarterly*. 44: 485-509.

HUME, David. 1946. *An Enquiry Concerning the Principles of Morals*. LaSalle, Ill: Open Court.

_____. 1985. *Essays: Moral, Political, and Literary*. ed. Eugene F. Miller. Indianapolis: Liberty Classics.

HUTCHESON, Francis. 1968. *A System of Moral Philosophy*. New York: Augustus Kelley.

JEFFERSON, Thomas. 1984. *Writings*. ed. Merrill Peterson. New York: Library of America.

KESLER, Charles R. ed. 1987. *Saving the Revolution*. New York: Free Press.

LERNER, Ralph. 1979. *The Thinking Revolutionary: Principle and Practice in the New Republic*. Ithaca: Cornell University Press.

LEVY, Leonard W. 1988. *Original Intent and the Framers' Constitution*. New York: Macmillan.

LOWI, Theodore J. 1985. *The Personal President: Power Invested, Promise Unfulfilled*. Ithaca, Cornell University Press.

MCDOWELL, Gary L. The Politics of Original Intention. In Goldwin and Schambra, eds.: Chapter 1.

MANSFIELD, Harvey C., Jr. 1989. *Taming the Prince: The Ambivalence of Modern Executive Power*. New York: Free Press.

MARCH, James G. and Johan P. Olsen. 1989. *Rediscovering Institutions: The Organizational Basis of Politics*. New York: Free Press.

MONTESQUIEU. 1949. *The Spirit of the Laws*. trans. Thomas Nugent. New York: Hafner.

PANGLE, Thomas L. 1973. *Montesquieu's Philosophy of Liberalism*. Chicago: University of Chicago Press.

_____. 1988. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosopy of Locke*. Chicago: University of Chicago Press.

PERRY, Michael J. 1982. *The Constitution, The Courts, and Human Rights*. New Haven: Yale University Press.

_____. 1988. *Morality, Politics, and Law*. New York: Oxford University Press.

_____. 1989. 'Interpreting' the Constitution. In Goldwin andSchambra, eds.: Chapter 5.

POCOCK, J.G.A. 1975. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. Princeton: Princeton University Press.

RABKIN, Jeremy. 1989. *Judicial Compulsions: How Public Law Distorts Public Policy*. New York: Basic Books.

REID, Thomas. 1815. *Works*. 4 vols. Charlestown: Samuel Etheridge.

SCHARPF, Fritz W. 1966. Judicial Review and the Political Question: A Functional Analysis. *Yale Law Journal*. 75: 517- 597.

SMITH, Adam. 1982. *The Theory of Moral Sentiments*. eds. D.D. Raphael and A.L. Macfie. Indianapolis: Liberty Classics.

STONER, James. 1987. Constitutionalism and Judging in *The Federalist*. In Charles R. Kesler, ed.: Chapter 10.

STORING, Herbert J., ed. 1985. *The Anti-Federalist: An Abridgement* by Murray Dry. Chicago: University of Chicago Press.

STOURZH, Gerald. 1970. *Alexander Hamilton and the Idea of Republican Government*. Stanford: Stanford University Press.

SNOWISS, Sylvia. 1990. *Judicial Review and the Law of the Constitution*. New Haven: Yale University Press.

TULIS, Jeffrey K. 1987. *The Rhetorical Presidency*. Princeton: Princeton University Press.

VILE, M.J.C. 1967. *Constitutionalism and the Separation of Powers*. Oxford: Clarendon.

WILLS, Garry. 1981. *Explaining America: The Federalist*. Garden City: Doubleday.

WOOD, Gordon S. 1969. *The Creation of the American Republic: 1776-1787*. Chapel Hill: University of North Carolina.