Publius's Theory of Judicial Restraint

The prevailing consensus that *The Federalist* advocates an extensive power of judicial review is mistaken. Instead, *The Federalist* defends judicial review of federal legislation for the narrow purpose of preventing clear violations of enumerated rights. Publius argues that separation of powers and federalism disputes can be resolved politically because the Constitution is self-enforcing. Officials in different branches and levels of government will enforce constitutional limits on each other. The Supreme Court is too small, homogenous, and unaccountable to be trusted with the principal responsibility for drawing constitutional boundary lines. Practice, rather than judicial review, should resolve structural questions. Judicial review is necessary to protect individual rights because infringements occur when other structural protections fail. The enumerated rights in the Constitution are sufficiently clear that the risk of judges abusing their power is low. Judges will use a deferential standard of review and Congress should impeach those who do otherwise.

The Federalist contains one of the first extended defenses of judicial review. But despite its significance, there is fundamental disagreement over what it advocates. As Dean Treanor notes, *The Federalist*'s position on judicial review "can be parsed in radically different ways." (Treanor 2005, 472). After writing seventy-seven essays that barely mention the judiciary, Publius suddenly seems to argue in *Federalist 78* that courts should have sweeping authority to interpret and enforce the Constitution against both the states and the other branches of government (Wright 1961, 72; Sosin 1989, 262). Why does Publius provide a detailed account of how the legislature and executive—as well as the states and the national government—will mutually check one another, only to then suggest that management of these conflicts should be entrusted to a small body of unelected judges wielding a power unmentioned in the Constitution? *The Federalist* looks like it abandons its conviction that individuals cannot be trusted with unchecked power in favor of a belief that justices should have an uncontrollable power to act as impartial guardians of the Constitution. How is *The Federalist*'s position on judicial review reconcilable with what comes earlier in the work?

Contrary to most prior scholarship, I argue that Publius envisions a limited role for the Supreme Court, consistent with arguments earlier in *The Federalist*. Roughly speaking, federal judicial review can resolve three types of controversies: (1) conflicts between branches of the federal government, (2) conflicts between the federal and state governments and (3) conflicts concerning federal and state infringements of individual rights. Publius's argument is that the Supreme Court should, except in limited circumstances, restrict itself to using a deferential interpretive standard for the third type of conflict, concerning individual rights. Separation of powers cases should be limited to core aspects of the judicial process. Federalism disputes should be taken up only if violence is imminent and assessed with a bias in favor of federal laws.

Scholars that read Publius as advocating something more mistakenly import into *The Federalist* a contemporary understanding of judicial review.

Understanding Publius's judicial theory provides insight into the foundations of the American constitutional tradition. States, animated by new theories of popular sovereignty during the revolutionary era, confronted the problem of how to ensure their written constitutions limited the governments they created (Haines 1914, 40; Harrington 2003; Treanor 2005, 473; 2020, 466; Corwin 1957, 24; Gerber 2011; Wood 1998, 453). Gradually, Americans arrived at judicial review as an important part of the solution. Recent scholarship sheds light on the state precedents for judicial review that occurred prior to the publication of *The Federalist* and on how the pre-*Marbury* Supreme Court used judicial review in *The Federalist*'s wake (Whittington 2009, 2019). We now know judicial review was more common both before and after the founding than previously thought. But while this research provides vital context for understanding *The Federalist*'s argument, it does not answer the question of why Publius thinks judicial review is legitimate or how Publius thinks judicial review should operate. Read closely, Publius is not a prophet of modern judicial power. Instead, Publius advocates a new role for the judiciary, while retaining eighteenth-century American suspicions of arbitrary power and unelected officials. The result is an innovative and influential argument for expanding judicial power that retained significant conditions on its scope. Yet as judicial review expanded, scholars updated Publius, rather than admit the practice of judicial review was diverging from what *The Federalist* advocates.

Getting *The Federalist* right on judicial review is important. First, it informs the debate between scholars who defend judicial review (Dworkin 1997; Whittington 1999) and those who suggest the institution should be curtailed or eliminated (Waldron 2016; Tushnet 2000; Weiner

2019; Doerfler & Moyn 2021). Seeing that Publius's argument falls in between those camps demonstrates that early advocates of judicial review, rather than embracing one extreme or another, began somewhere in the middle.

Second, *The Federalist* is an authority in American constitutional law (*Cohens* v. *Virginia* 1821; Story [1873] 2011). The Supreme Court frequently relies upon *The Federalist* in its opinions (*Printz* v. *United States*, 1997; *West Virginia* v. *EPA* 2022), and justices across the ideological spectrum try to enlist Publius's support (Festa 2007, 75; Melton 1996; Melton and Miller 2001; Corley, Howard and Nixon 2005, 329; Martinez and Richardson 2000, 314; Wilson 1985; Lupu 1998, 1329; Tillman 2002, 617; Coenen 2006, 527; Durchslag 2005, 247; Pierson 1924, 728). But judicial battles over the "real" Publius are misguided because Publius fundamentally disagrees with the modern practice of judicial review. *The Federalist's* limited conception of the judicial power is at odds with the modern consensus, shared by both liberal and conservative justices, that judicial review should be exercised over almost all constitutional questions without deference to the interpretations of other branches. Using *The Federalist* to justify judicial resolutions of controversial political questions that Publius thought should be left to the political branches is dishonest. It distorts our understanding of the work and contributes to the false impression that founding era political thought was anti-democratic. Clarifying *The Federalist's* position on judicial review helps remove the historical pedigree for activist judicial decision making.

I start by reviewing prior work on Publius's judicial theory. I argue that interpretations based on narrowly parsing the judicial papers in isolation from the rest of the work, along with attempts to assimilate Publius's views to those of Hamilton and Madison, are mistaken. *The Federalist* must be read as a holistic work, with an understanding that the authors who together

make up Publius often advocate views they do not personally hold. In the next section, I use an alternative method that focuses on how the judicial papers fit into the larger project of *The Federalist*. I highlight four possible contradictions between Publius's political theory and judicial review. Understanding how Publius resolves these contradictions is key to *The Federalist's* account of judicial power. I show that this approach explains why Publius rarely mentions the judiciary in the sections on federalism and the separation of powers. The last section outlines Publius's theory of judicial restraint. It holds that the Supreme Court should have the power to bind the other branches of the federal government and the states but should exercise that power rarely and with deference to the judgment of politically accountable institutions.

Activist versus Restrained Readings of the Judicial Power in *The Federalist*

Publius's stance on judicial review confounds scholars across the political spectrum and produces interpretations that do not fall along neat ideological lines. Two other reasons likely account for the diversity. First, the modern consensus that the Supreme Court should hold almost plenary control over the Constitution creates a strong incentive for scholars of all stripes to find justification for the practice in the founding era. If the Supreme Court had not dramatically departed from *The Federalist*'s position on judicial review, vast areas of public law scholarship in the United States simply would not exist because decisions would be left to voters and politicians, rather than judges and the lawyers and professors who try to influence them. Second, the judicial passages involve three interpretive difficulties that are often ignored or discounted.

The first difficulty is that *The Federalist* is a long book, with the section on the judiciary coming at the end. Some commentators attempt to extract Publius's theory of judicial review by

only referencing the judicial papers.[1] But just as it is dangerous to infer Plato or Hobbes' position on religion by reading only the last chapters of *Republic* or *Leviathan*, so too is it risky to assess Publius's position on the judiciary based solely on the final *Federalist* papers. Although *The Federalist* is a series of political pamphlets by multiple authors, not a philosophic treatise, it was a planned work (*1,* 4). Each paper was intended to build on what came before.

The second stumbling block is that Publius is not a real person, but rather the pseudonym of Alexander Hamilton, James Madison, and John Jay. Yet there is good reason to treat Publius as the author of *The Federalist* (Furtwangler 1984, 61; Mansfield 2020, 558; Diamond 1992, 38; Wills 1981, 1-95; Kessler 1986, 6; Carey 1984; Epstein 1984, 2; White 1987, 156; Millican 1990, 133).[2] Both Hamilton and Madison, the primary authors, would change their positions on judicial review during their subsequent political careers (Crosskey 1953, 1010, 1026; Ketcham 1956; Levy 1963, 5; Paulsen 1994, 260; Shklar 1981, 947).[3] Although both desire a stronger federal government, the pressing issue of ratification forced them to converge on a consistent set of arguments that would convince skeptical Americans to ratify the new Constitution. Despite tension between Hamilton and Madison regarding state challenges to federal law, the difference is one of emphasis, rather than principle. More is gained by examining the argument between Publius and the anti-federalist Brutus, than from trying to tease out distinctions between Hamilton and Madison. Small inconsistencies in *The Federalist* cease to appear pronounced when placed in the context of the debate between federalists and anti-federalists. Hamilton and Madison's earlier and later writings are thus red herrings for understanding *The Federalist*. The

[1] On the importance of reading *The Federalist* as a whole: (Furtwangler 1984, 147; Dietze 1960, 31; Carey 1989, xxiii).
[2] For disagreement: (Banning 1998, 198; Mason 1952; Smith 2007; Grove 2019; Dietze 1960, 19)
[3] (Corwin 1957, 50; Burns 1935; Patterson 1939; Kramer 2020, 353; Zuckert 2009) disagree regarding Madison. (Weiner 2019, 63; 2012, 123; Rakove 2002; O'Brien 1991) take a middle approach, highlighting continuities and discontinuities in Madison's thinking about the judiciary.

work represents the views of neither, but rather a principled middle position distinct from what each advocated both before and after. Publius was the author contemporary readers encountered and Hamilton and Madison ensured that author was consistent.[4]

The third difficulty concerns the novelty of judicial review at the time *The Federalist* was written. Although Montesquieu argued earlier in the eighteenth century that the judiciary should be an independent branch of government, the theory of an independent judiciary, let alone judicial review, was still in its infancy (Gerber 2011, 24; Treanor 2020, 467; Rakove 2007, 1065). While state judiciaries exercised judicial review prior to the Constitutional convention in several cases (Treanor 2005, 457), the practice was less than a decade old when Publius wrote. Critics of judicial review, such as the anti-federalist Brutus, were highlighting problems, leaving Publius to make the positive case for the institution. Publius's goal is to dispel suspicions of judicial review, not raise doubts. It is thus easy to miss that many of *The Federalist*'s arguments are in tension with judicial review.

Interpretations of Publius's judicial theory can be separated into activist and restrained camps. Activist interpreters imply that Publius advocates judicial review with: (1) Full scope—the Supreme Court interprets the entire text of the Constitution; (2) Supremacy—the Supreme Court's interpretations of the Constitution are binding on the president, congress, and the states and (3) Independent judgment—the Court does not defer to legislative or executive interpretations of the Constitution (Dietze 1962, 277; Treanor 2020, 484; Barber 1988, 836; Steinfeld 2021, 422; Millican 1990, 199; Tushnet 1987, 1688). This is misleading. Read hastily

[4] Examples include the viability of a large republic (*9* (Hamilton)*, 10* (Madison)), the importance of implied powers (*23* (Hamilton); *44* (Madison)), the superiority of modern over ancient political science (*9* (Hamilton); *38* (Madison)), the congruence of the Constitution with republican government (*70* (Hamilton), *39* (Madison)), and the priority of avoiding conflict (*8* (Hamilton); *43* (Madison)).

and out of context, the judicial papers look like they contain a simple syllogism—the Constitution is law, the Court is responsible for interpreting the law, so everyone must follow the Court's interpretation of the Constitution. But Publius's argument in favor of judicial review is nuanced and highly qualified. Without an awareness of the issues of personal ambition, political representation, energetic government, and epistemological uncertainty that Publius discusses earlier in the work, these qualifications are incorrectly dismissed by activist interpreters as rhetorical flourishes, rather than as vital aspects of the argument. For instance, Barber cites Publius's insistence that judicial review applies only to "specified exceptions" only to immediately suggest that "[a]s for the scope of judicial review, Publius does not regard expressed constitutional provisions as the sole source of standards for exercises of judicial power" (Barber 1988, 854-55).

A few interpreters of Publius acknowledge the discrepancy that an activist interpretation creates with the rest of the work but insist that Publius changed course after reading Brutus's critique of the federal judiciary (Corwin 1957, 8, 21, 47; Wright 1961, 72; 1949, 15; Levy 1963, 4; Sosin 1989, 260; Diamond 1977, 278). This exaggerates the amount of contradiction in Publius's argument and assumes Publius was willing to undermine himself without explanation. The sections preceding the discussion of the judiciary emphasize the need for the president to act without constraint by a council (*70*, 342). It is unlikely that, only a few weeks after extolling a unitary executive, Publius about faced and concluded that the Supreme Court should inhibit the president whenever it disagrees with his or her constitutional judgment.

The few scholars who think Publius argues for a more restrained Court generally identify the wrong elements present in Publius's account of judicial review. Snowiss (1990, 81) and Wills (1981, 133) go the farthest, denying that Publius thinks the judiciary interprets the Constitution at

all. They suggest Publius envisions a Court invalidating laws only when their provisions are so manifestly unconstitutional that the legislature has conceded their illegitimacy. But Publius states that the Court determines the "meaning" of the Constitution. Even with a deference standard, Publius assumes constitutional questions will raise interpretive problems that require the Court to use its judgment. By contrast, Paulsen, Clinton, Yoo and Prakash, suggest Publius argues the Supreme Court should interpret the entire Constitution without deferring to the judgment of other branches, but that its holdings only bind the parties to its cases, not Congress or the President (Paulsen 1994, 249; Prakash and Yoo 2003, 923; Clinton 1989, 70). They ignore Publius's insistence on deferential judicial interpretation and the need for the Court's decisions to bind other branches to protect individual rights. They also overemphasize passages where Publius encourages extrajudicial interpretation, failing to note that Publius does so only on issues where individual rights are not at stake. Yoo (1996, 1385) and Paulsen (1994, 269) place undue emphasis on a passing reference to the judiciary and the president in *Federalist 44* to prove that Publius is stressing judicial and executive interpretive authority. But the context, an aggressive interpretation of the Necessary and Proper Clause, suggests deference to legislative interpretation (Corwin 1957, 44).

Finally, a few scholars argue that Publius thinks that the Court should defer to the other branches and limit itself primarily to enforcing explicit prohibitions in the text (Weiner 2019, 84; Franck 1996, 39; Epstein 1986, 188; Carey 1989, 140; Wolfe 1994, 78). This interpretation is on the right track. But these authors do not resolve the crucial question of whether Publius sees the Court's decisions as binding on the rest of the government.[5] They thus leave open whether

[5] (Wolfe 1994, 78) offers a brief exception, suggesting that Publius argues judicial decisions should "ordinarily" be authoritative for the other branches.

Publius's theory is one in which the Court is simply weak, or one where the Court has real power that should be exercised with restraint by deferring to other branches' judgment and restricting itself to a limited class of constitutional cases. In what follows, I argue that Publius envisions the latter. *The Federalist* advocates a powerful but confined Court, rather than a weak Court whose decisions can be ignored.

Latent Tensions with Judicial Review in *The Federalist*

Besides the interpretive problems highlighted above, the main challenge is that Publius's political theory seems incompatible with judicial review. *The Federalist* must be read as a whole to see that these possible contradictions between Publius's political and legal ideas lead Publius to make significant qualifications to his argument for judicial review. Reading the end of *The Federalist* without a thorough grasp of the beginning creates confusion.

One possible contradiction, however, is never overlooked by readers: the counter-majoritarian difficulty. An unelected Supreme Court invalidating laws passed by a popularly elected legislature does not appear compatible with republicanism. Publius, as a defender of the Constitution's republican character, squarely addresses this by arguing for judicial review's compatibility with popular sovereignty (Potter 2002, 134). I spend little time on this argument because the idea that judicial review derives its legitimacy from the Constitution's popular ratification is now familiar (Corwin 1957, 13; Rakove 1996, 130). But four other possible contradictions must be carefully examined.

Problem One: Judicial Partiality

The first tension concerns judicial partiality. Unrestrained judicial review puts justices in charge of the Constitution. Yet all officials, according to Publius, are ambitious. If the judiciary gains authority over all the rules, what prevents ambitious justices from abusing their power?

To see this problem more clearly, it is necessary to examine *The Federalist's* discussion of the separation of powers. Publius argues that the first question of government is how to "oblige [the government] to control itself." (*51*, 252). Publius's answer is that "the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." (*id*, 251). Each part of the government, by relating to the other parts in the correct way, keeps the government within its proper bounds. Publius warns that "parchment barriers" are no match "against the encroaching spirit of power." (*48*, 241; *cf. 49*, 247; *71*, 350; *73*, 358). Simply writing down what each branch is supposed to do is not enough. Formal institutions crumble like paper in the face of an ambitious human nature (Bailyn 2017, 61). Government is not like baseball, where umpires enforce rules on players. There is no umpire, and the players must enforce the rules on each other.

Prior to *The Federalist*, the traditional solution to this problem was to put virtuous citizens in office who respect the rules. But Publius frankly admits that "[e]nlightened statesman will not always be at the helm." (*10*, 43). Whereas ancient republics tried to make better citizens, Publius tries to make better rules (Wright 1949, 6; Mansfield 2020, 564; Epstein 1986, 47; Diamond 1992, 57, 107; Pangle 1990, 127; Frank 2014, 75; Howe 1987, 494; Shklar 1977). But better rules do not mean more rules or rules with greater detail. People seek to advance themselves regardless of what the constitution says or how clearly it says it (*cf. Brutus XI*, 505). Instead, the Constitution counters rule breakers by ensuring that each violation is countered by another

official with the incentive and power to do so (Nourse 1996, 488).[6] "Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place." (*51*, 252). Besides electoral accountability, rules that arrange naturally ambitious and interested people into offices that oppose each other are the primary mechanisms for ensuring the government controls itself (Diamond 1992, 50; White 1987, 159; Wright 1949, 11). Each office holder uses their powers to check the power of other office holders and is checked in turn. Publius stresses that no institution be allowed final control over the extent of its own powers, as no one can be trusted as a judge in their own cause (*10*, 42).

Unlike some modern constitutional theorists, Publius never suggests that the Supreme Court, or any other part of the government, can act as a "forum of principle" (Bickel 1986, 202) or as a repairman for "democratic process failures." (Ely 1980, 75). This is not because Publius thinks principles are unimportant, or that democratic process failures will not occur. Publius admits that impartial statesmen exist (*63*, 307; Zuckert 1992, 136). Elections "refine and enlarge" the public's views, selecting those who are most likely to "discern the best interest of their country." (*10*, 44; Weiner 2020, 404; Wills 1981, 246). But Publius's overriding point is that it is hard to consistently put "enlightened" statesmen in charge. Beyond establishing elections, the Constitution makes little attempt to produce virtuous leadership (Storing 1981, 73; Pangle 1990, 104; Diamond 1992, 31; Zuckert 1992, 138; Wright 1949, 13; Rakove 1996, 243). Congress lacks power over education and there is nothing but an age criterion to run for office. The Senate, being selected by the state legislatures, is expected to produce better representatives through successive elections (*62*, 300). But even the Senate's powers are strictly defined.

[6] (Kramer 2020, 341; Wills 1981, 186) provide alternative theories based on public opinion and virtue respectively.

Publius considers the people as potential watchdogs. But setting the people up as a referee over the Constitution is undesirable because the reigning "spirit of party" will lead them to change things for the worse and prevent the Constitution from becoming stable (*49*, 246-247; Epstein 1986, 133; Wills 1981, 24). The people's job is to vote for decent representative who will advance their interests and support their state governments in revolt should the system collapse into tyranny (*28*, 130; *46*, 232; Epstein 1986, 54; Diamond 1992, 136).

Judicial review is problematic because it has the potential to shred this constitutional structure. Because judicial review is unspecified in the Constitution, it is potentially a free-floating invitation for the Supreme Court to enforce the entire Constitution. The risk is that the Court will assume the role of impartial umpire, despite its members being just as prone to the ambition, partisanship, and self-interestedness that affect all other officials. Such power would imbalance the government by subjecting it to the uncontrolled proclivities of a single tribunal. Publius thus specifies in the judicial papers which parts of the Constitution are subject to judicial review. Having just argued that no single individual or group of officials can be relied upon to impartially control the government (Wright 1949, 11), it would be nonsensical for Publius to turn around and imply that judges should have that responsibility.

Problem Two: Legal Impediments to Energetic Government

The stakes surrounding the question of when judicial review should operate are heightened by Publius's conviction that undue interference in matters of national security will be fatal to the republic. Under the Articles of Confederation, the states cannot last (*15-22*). They will either be conquered by foreigners (*3-5*), fall to fighting one another (*6-9*), or succumb to internal insurrection (*9-10, 43,* 214). Publius tells Americans that they should ratify the Constitution

because it creates a government strong enough to solve these pressing problems (Edling 2020; Tarcov 1986; Epstein 1986, 14; Dietze 1960, 177; White 1987, 150). The Constitution gives Congress the power to tax individual citizens so that the common defense is no longer held hostage to each state paying its fair share (*23*, 107), and it sets up an executive branch that will always be in office, ready to energetically respond to emergencies (*70*, 341).

Defense is no small matter. "[T]he great principle of self-preservation… [is that] at which all political institutions aim, and to which all such institutions must be sacrificed." (*43*, 216; *cf. 8*, 34). Publius makes it clear that because "no possible limits can be assigned" to the amount of "casualties and dangers" that might occur in the future (*31*, 143), there is no *ex-ante* cap on the government's power to tax and spend (*23*, 107, *30*, 139; Weiner 2020, 403). "The idea of restraining the legislative authority, in the means for providing for the national defence, is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened." (*26*, 119). Where everything the nation has might be needed, there is no line beyond which one might say, 'Too far.'

These extensive means are to be combined with an energetic executive capable of putting them to vigorous use. Publius argues that the executive must have "unity." One person needs to be in charge (*70*, 342). Unity enables "Decision, activity, secrecy and dispatch" and "may be destroyed...by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others…" (*id*). Once laws are made, Publius suggests nothing is gained by waiting to implement them (Epstein 1986, 173). Deliberation is useful for legislatures, not executives. Subjecting the executive's decisions to control by a council risks compromising the speed and decisiveness necessary to execute the laws well (*70*, 347). Unity also facilitates "responsibility" by ensuring the people know who to fire should the president fail or abuse their power.

This suggests that the Court should not interfere with the national government's powers related to security. Because the taxing and spending powers admit of no principled limit, there is no boundary for the Court to police. Nor should the Court attempt to stymie the executive from carrying out their duties as the Commander in Chief. The point of a single president is to decisively carry out legislative decisions and put down security threats. Intrusive legal challenges threaten to fatally slow that action. Beyond this, a meddling Court might confuse the public and serve as a scapegoat for an incompetent president. Publius is aware of the risks of an energetic executive. But Publius does not suggest the Court as a solution beyond the enforcement of individual enumerated rights. The legislature and the executive can both check each other and are ultimately accountable to the people via election. The Constitution trades some liberty for increased physical security (*1*, 3). All the rights in the world will do the American people no good if they succumb to external or internal violence.

Problem Three: Collapsing the Extended Sphere

There was no conception in the eighteenth century that judges could represent citizens in the same way as an elected representative (Kramer 2005). Brutus evinces this attitude by insisting on elections (*IV*, 459) and Publius does not disagree: "Frequent elections are unquestionably the only policy by which this dependence and sympathy [with the people] can be effectually secured." (*52*, 257). By looking at the kind of legislature Publius envisions for elected representatives, it becomes clear that Publius would not deem the Supreme Court a good legislative institution.

To begin, Publius emphasizes the difficulty of consistently finding virtuous individuals to look after the long-term good of the Republic. Sometimes you get representatives "whose wisdom may best discern the true interest of their country…" (*10*, 44). But "[o]n the other hand,

the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may…betray the interests of the people." (*id).* Representative government is a mixed bag. Sometimes you end up with legislators who govern better than the average person, but sometimes you end up with someone much worse.

Publius thinks several features are necessary for a good legislature to ensure that even bad representatives achieve good outcomes. First, the legislature must be of sufficient size to represent an "extended" commercial republic with a variety of interests (Epstein 1986, 47; Diamond 1992, 57, 107; Dahl 2006, 15; Pitkin 1972; White 1987, 142; Howe 1986, 504; Shklar 1976, 1291; Adair 1974, 151; Carey 1989, 26).[7] The point of the new national government is to be big, for "it is this circumstance principally which renders factious combinations less to be dreaded…" (*10*, 45). A republic should encompass so many people in so many places with so many interests that it is unlikely that a majority "faction" can form to "execute plans of oppression." (*10*, 45; *cf.* Diamond 1992 31, 54). Even if there is a latent majority adverse to the "rights and interests" of others, people will hesitate to reveal their unjust designs to so many other individuals and will be too physically separated to carry out their oppressive intentions (White 1987, 143). If the legislature of an extended republic is not of sufficient size, it cannot represent the diversity of American interests (*10*, 44-45).

Second, legislatures are accountable (*57*, 278; Pitkin 1972; Weiner 2020, 408; Epstein 1986, 154). Representatives come from somewhere—they are part not just of the People, but of a particular state or district (*56*, 274; *53*, 262). They might not know what the People want, but

[7] I follow a more 'pluralist' reading of *The Federalist*, that emphasizes interested representatives compromising on policies. For more 'republican' readings that emphasize the selection of virtuous representatives: (Sunstein 1985, 38, 1987, 1560; Wills 1981; Banning 1998, 195; Kessler 1986; Millican 1990, 124; Morgan 1974; Kramnick 1988, 12; Gibson 1991, 2020; Sheehan 2020)

they know what *their* people want. And they know that if they ignore those wants, they will be voted out of office and end up back with the people. Publius goes to great lengths to justify the safety of two-year terms for the House (*53*, 259), and six-year terms for the Senate (*62*, 302). Only the "peculiar qualifications" of the judiciary justify life tenure conditional on good behavior (*51,* 252).

Finally, representatives come from different backgrounds (*35*, 159). Some representatives are farmers, others are mechanics, and some are professionals. While representatives may tend to be rich, each has interests that they hold in common with their poorer associates that are opposed to the interests of the other classes. Thus, the most common faction—between the rich and poor—gets broken up into more manageable conflicts between tillers, traders, and professionals (*10,* 42).

The Supreme Court does not meet Publius's standards for a good legislature. First, there are not enough justices. "[H]owever small the Republic may be, the Representatives must be raised to a certain number, in order to guard against the cabals of a few…" (*10,* 44; *cf. 55,* 270). The small number creates a temptation to form a "cabal" inimical to the public good. You could increase the number of justices to fix this, but legal uncertainty would increase as concurrences and dissents multiply. Publius makes this point when judging the Supreme Court insufficiently large to decide impeachments. Because impeachment is likely to "connect itself with the pre-existing factions" such that "there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt," it would be necessary to render "that tribunal [the Supreme Court] more numerous than would consist with a reasonable attention to economy." (*65*, 319). Weighty decisions that implicate factious interests require numerous decision makers to prevent bias, a

requirement that rules out a legal court from trying impeachments and, presumably, from legislating.

Second, justices can come from anywhere without regard to their distribution amongst the states. New York might get eight, Delaware might get one, and everyone else might get zero. While Publius cautions readers to make do with less representation than they are used to, zero representation is not a level Publius endorses. A revolution was recently fought about zero representation—a revolution of which Publius was in favor.

Third, justices serve for life. When they vote their own interests, it is not easy to replace them. They do not return to the people unless they want to, or Congress impeaches them. Finally, the justices are generally alike. Assuming that the justices are all lawyers (*78*, 383), their backgrounds are identical from the perspective of Publius's theory. Justices do not know what farmers or mechanics want. What they know are the needs and wants of the professional classes.

Justices acting as "representatives" collapses the extended sphere from its gigantic territorial limits down to the tiny grounds of the national courthouse and the homogenous backgrounds of its members. If the Supreme Court acts as a tiny "super-legislature," Publius suggests we should expect it to become dominated by a factious majority intent on benefiting the professional classes, particularly those associated with the law.[8] The fact that the Supreme Court is a single body, unlike Congress, allows it to quickly translate its will into reality. There is no repartee between different 'halves' of the Supreme Court that encourages deliberation and compromise—there is just a hand vote that can be taken in a matter of seconds. Such a body cannot discern public interests, given a selection method that ties them to nowhere, nor would it

[8] (Bonica and Sen 2021, 72) provide contemporary evidence.

implement the public interest, given its proclivity to faction. It is unsurprising that Publius never suggests the Supreme Court should engage in legislative type action, such as creating new rights (Weiner 2019, 87).

Problem Four: Substituting Legal Interpretation for Experience

Perhaps the clearest indication that Publius does not put much stock in judicial review is the contention in *Federalist 37* that experience and practice will resolve gaps and ambiguities in the Constitution's text. *Federalist 37* is odd and brilliant. Rather than address a specific part of the Constitution, or a contemporary political question, Publius instead reflects on general problems of sense perception and language. *Federalist 37*'s general argument is that because all knowledge is imperfect to some degree, knowledge about the Constitution is also imperfect (Epstein 1986, 112; Weiner 2019, 73; Wills 1981, 52; Baude 2019; Lupu 1997, 1334; Nourse 1996, 495; Tushnet 1987, 1683; Mansfield 2020, 571; Gienapp 2018). Parsing the Constitution's words can only get us so far because the convention's ability to perceive what was needed and explain their solution was inevitably limited. Skeptical readers of the Constitution must lower their expectations. More certainty about the Constitution can only come over time, as practical politics works out the best solutions to questions the text does not answer.

Publius highlights the difficulty of writing a constitution that combines "the requisite stability and energy in government, with the inviolable attention due to liberty, and to the republican form." (*37,* 170). The issue is that the requirements conflict (Zuckert 1992, 133). "The genius of republican liberty" requires that there be many offices of short duration, while stability requires few offices of long duration (*id).* Beyond the duration and number of offices, the Convention had to draw the line between the authority of the states and the federal government, as well as the line between the branches, both of which "puzzle the greatest adepts in political science." (*37,*

171). Writing the Constitution was exceedingly difficult and "a faultless plan was not to be expected." (*37*, 169).

Publius illustrates why by articulating "three sources of vague and incorrect definitions." The first is that even natural objects resist having their precise boundaries mapped. Knowing where "vegetable life" ends and "unorganized matter" begins puzzles "[t]he most sagacious and laborious naturalists." (*37*, 171). The lines only get fuzzier when one passes on "to the institutions of man." Whereas nature has "perfectly accurate" delineations that the eye cannot perceive due to its own failures, human institutions are perceived not only by imperfect eyes, but are themselves fuzzy and imperfect things. For example, no one has yet found the limits of the "common law," even in Britain, "where accuracy in such subjects has been more industriously pursued than in any other part of the world." (*37*, 172). And to cap it off, what is perceived cannot be perfectly communicated, for "no language is so copious as to supply words and phrases for every complex idea." As the complexity of ideas increases, so too does the difficulty of their communication. The result is that even God's "luminous" meaning becomes "dim and doubtful, by the cloudy medium through which it is communicated" i.e. human speech. Even if Jesus wrote the Constitution, we would still not have an answer to every constitutional question.

That the Constitution is as good as it is, Publius suggests, is itself a kind of miracle that suggests the "finger of that Almighty Hand." (*37*, 173). Whereas ancient republics were founded by single persons who used superstition to gain assent to their reforms (*38*, 174), the Constitution is sufficiently comprehensible to be chosen after free debate amongst the people. And, most significantly for judicial review, what remains unclear in the Constitution will be clarified over time through the give and take of practical politics. "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as

more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." (*37*, 172). While "adjudications" suggests a role for the Court, the reference to "discussions," and the skepticism of "technical skill" indicate that it is primarily political decision making and practice that will answer many constitutional questions (Rakove 2002, 1532). Only in this way, Publius suggests, will it be possible to overcome the "[q]uestions that daily occur in the course of practice" of running a government.

The Constitution did not come with a legal dictionary, nor does Publius provide one in *The Federalist*.[9] Instead, Publius's argument is that language is always vague and citizens should be modest in their attempts to discern the full meaning of the Constitution from its bare words. The Convention made mistakes when drafting the Constitution, and even its successes are imperfectly communicated. Publius does not argue that the Constitution will become fully known through 'interpretation,' but rather insists on the need for "discussions." That the Supreme Court goes unmentioned is unsurprising. The epistemological and metaphysical difficulties Publius foregrounds cannot be solved by clever lawyering.

The Limited Relevance of Judicial Review to Federalism and the Separation of Powers

Given the foregoing problems, it seems unlikely that Publius would advocate judicial review at all. But before explaining how *The Federalist* justifies judicial review's role in the protection of individual rights, it is important to rule out the possibility that Publius endorses two modern uses of judicial review: resolving separation of powers and federalism disputes. Publius's suspicion of "parchment barriers" implies that it is not desirable for one institution to police all constitutional boundaries. The system is designed to be self-enforcing. Each actor in the system

[9] Compare (Hobbes 1994, 30, 36).

has both incentives and powers to administer the rules. To the extent that the lines between powers are murky, future deliberation and practice will fix them. As both governments' powers are "dependent upon the great body of the citizens," it is the people's "sentiments" that will settle the "sphere of jurisdiction." (*46*, 228-229; *cf. 16*, 75; *45*,224*; 27*, 125). By voting for more or less energetic candidates to serve in the state and federal governments, or the executive and the legislature, the people can decide, within limits, where the Constitution's lines are drawn.

Unsurprisingly, the judiciary is barely mentioned in Publius's discussion of the separation of powers and federalism. Instead, Publius focuses on the elected institutions. Publius does suggest that the Court can play a limited but decisive role in controversies between the states and the national government. But overall, Publius argues that when it comes to two of the great issues of American constitutionalism, battles are supposed to take place at the ballot box, rather than in the courtroom.

A Final and Biased Forum for Federalism Disputes

There is a false split between interpreters of Publius's position on judicial power and federalism. Some think that because Publius indicates judicial review is unimportant for policing the boundary between the state and federal governments, the judiciary lacks the power to do so. Kramer writes, "No mention was made of courts or judicial review" (Kramer 2005, 88; *cf.* Kramer 2001, 43) in the sections on federalism, even though judicial review is mentioned in *Federalist 39*. Others argue that because Publius briefly suggests that federalism issues are justiciable (*44*, 221; *39*, 186), the judiciary should act assertively on such questions. Treanor interprets Publius as claiming that "the Supreme Court would bear the primary responsibility of adjudicating the boundaries of federalism, acting 'impartially' as a disinterested observer" (Treanor 2020, 478; *cf.* Dietze 1962, 278). Neither is correct. Both miss that Publius holds that

judicial intervention in federalism disputes is generally undesirable but necessary in limited circumstances.

Publius argues forcefully that the states can protect themselves from encroachments by the national government because they enjoy numerous advantages under the new Constitution. Their control over local laws ensures citizen attachment; their more representative legislatures breed popular familiarity and trust; every state legislature gets to pick two senators to carry state interests into congress; and every amendment requires three-fourths of the states to ratify, to name only a few (*45*, 225-28; *46*, 230-234; *17*, 76). Publius makes it clear that under normal circumstances, there is no need for judicial intervention between the states and the national government in the states' favor (Kramer 2000, 257, 2001, 43, 2005, 88; Wechsler 1954, 546; Choper 1977, 1567; Rakove 1997, 1049; Wills 1981, 163; Diamond 1992, 131).

But normal circumstances do not always hold. When controversies become heated, there is need for an "impartial tribunal" to "prevent an appeal to the sword, and a dissolution of the compact." (*39*, 186; *cf.* Crosskey 1953, 1010; Paulsen 1994, 237; Weiner 2019, 76; Rakove 1997, 1050, 2007, 1069; O'Brien 1991, 275; Whittington 2005, 586; Corwin 1957, 44). But *The Federalist* teaches that there are no impartial tribunals: "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." (*10*, 42) Who resolves federalism disputes is thus a choice between biases (Brutus *XI*, 504; Barber 1988, 453; Rakove 2002, 1527; 1996, 187; Zuckert 2020, 191). The deciding court is either fully national in character or not (Wills 1981, 165). Choosing the national government was not inevitable. A popular pamphlet, published just before the convention, argued for a tribunal to manage federalism disputes staffed by appointees selected by the state legislatures (Crosskey 1953, 977). But the convention opted for a Supreme Court and a

supremacy clause that makes the Constitution superior to all state laws. Because the Supreme Court is picked by national officers and is a part of the national government, there was a decision to bias final decisions against the states. While this goes unstated, it is in accord with Publius's nationalistic bias (Diamond 1992, 134; Millican 1990, 12). Publius notes slyly that the tribunal could only "safely" be established under the national auspices, a position that is apparently so obvious that it "is not likely to be combatted." (*39,* 186; *cf. 22,* 104).

This reticence to involve the judiciary in federalism disputes is compounded by the fact that the limits of congressional power are not easily definable, "being at once more extensive and less susceptible of precise limits" than the boundaries of the other branches (*48*, 242; Rakove 1998, 1051; Wills 1981, 47). Judges should hesitate to interfere because legislative power is in some ways just judicial power on a larger scale. For "what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens…?" (*10*, 42; Rakove 2002, 1526). Trying to resolve questions over ambiguous grants of power would simply convert the Court into the legislature. The Necessary and Proper clause indicates that Article I lists "object[s]" that Congress can legislate to achieve, not the "particular powers" themselves, for otherwise the Constitution "would have involved a complete digest of laws." (*44*, 220; *cf. 14*, 61; *27*, 127; *39*, 186; *41*, 195). The number of implied powers is potentially infinite. So long as they are directed towards a proper "object" in Article I, the power is permitted (Epstein 1986, 43; Sorenson 1992). This suggests the Court should hesitate before finding a statute exceeds Congress' enumerated authority.

The Absence of Judicial Review from the Separation of Powers

While the Court has a limited role in federalism disputes, Publius gives no indication that it has any responsibility for maintaining the separation of powers (Epstein 1986, 140; Entin 1990, 185, 219; Wright 1949, 11).[10] Publius's discussion of the separation of powers occurs primarily in *Federalist 47-51*. The goal is to dispel the idea that the "separation of powers" means that there should be no overlap in powers between the branches (*48*, 240; Vile 1998, 175). Because the legislature in a republic tends to subsume the other two branches, it is necessary for the other branches to be independent and capable of checking its power. As already noted, the Constitution's solution is for each department to defend itself by ensuring office holders have both an interest in maintaining their independence and the power to do so. There is no need for one office to have the power of defending the others. In fact, such power would likely compromise the system, as it could result in the very concentration of power that Publius fears. Because the branches are "co-ordinate," no branch "can pretend to an exclusive or superior right of settling the boundaries between their respective powers…" (*49*, 245; *cf. 48*, 240-241; Prakash and Yoo 2003, 922; Paulsen 1994, 232).

Each branch that is not the legislature needs some legislative power to defend itself. The executive gets the veto (*51*, 253; *73*, 358). But Publius says nothing about the judiciary until the judicial papers. Publius notes only that the judiciary is made independent of the legislature by life tenure and laments that legislatures "have decided rights which should have been left to judicial controversy…" (*48*, 243). There are no references to judicial review. To modern readers, accustomed to a Supreme Court that adjudicates between the President and Congress, this seems strange. Who else but the Court manages the division between the legislature and the executive?

[10] Amnesia on this point is modern. *Federalist 51*, the canonical statement of Publius's view on the separation of powers, is cited by the Supreme Court only once prior to 1960 (Lupu 1998, 406).

But Publius writes under very different assumptions. Political theory prior to *The Federalist* had no role for the judiciary in the separation of powers. Neither Locke nor Blackstone theorize an independent judiciary (Treanor 2020, 467; Epstein 1986, 186), and even Montesquieu, who argues that the judiciary is a co-equal branch, explains that it has no role in separating powers (Montesquieu 1989, 160; Epstein 1986, 130; Wills 1981, 121; Vile 1998, 102).

But why does Publius not clarify how the judiciary will protect itself? The theory of checks and balances suggests such institutional self-defense would be appropriate. Publius alludes to judicial self-defense in *Federalist 78* when he suggests "that all possible care is requisite to enable it to defend itself against their [the other branches'] attacks" (*78*, 378). But even there, Publius is likely referring to life tenure rather than judicial review. Historical context helps resolve the puzzle. While *Bonham's* case, decided in 1610 by Lord Coke, may be an early (but mistaken) inspiration for judicial review (Sosin 1989, 63; Corwin 1957, 21; Kramer 2005, 19), the institution first emerged in recognizable form in the states following the American Revolution (Haines 1914, 38; Treanor 2005, 468; Snowiss 1990, 16).[11] State judiciaries, however, did not use judicial review to maintain the boundaries between all branches, but only to defend judicial responsibilities, such as the jury trial and pleading standards, from legislative encroachment (Levy 1967, 10; Crosskey 1953, 968; Treanor 2005, 458). The only known exception is *The Case of the Prisoners*, in which the Virginia supreme court was asked to decide which house of the Virginia legislature had the pardon power. While the Virginia court discussed judicial review, it remains unclear whether judicial review was exercised (Treanor 1994, 531;

[11] Some argue that colonial experience with the privy council, which could annul colonial laws that conflicted with British statutes, also accustomed Americans to judicial review (Haines 1914, 68; Bilder 2006, 504; Thayer 1893, 130; Clinton 1989, 45; Whittington 2019, 43; Wolfe 1994, 74) though others disagree (Sosin 1989, 140; Corwin 1957, 18; Steinfeld 2021, 6). (Bilder 2004, 192) notes the presence of privy council terminology in Hamilton's treatment of the judiciary in *The Federalist*.

2005, 489; Harrington 2003, 75; Snowiss 1990, 17). Judicial review was sufficiently well known by the time of the Constitutional convention that a sizable number of delegates understood and approved of it (Steinfeld 2021, 27; Treanor 2005, 470; Beard 2012, 69; Prakash and Yoo 2003, 928; Rakove 2007, 1068; Wolfe 1994, 74).

This may explain why judicial review goes unmentioned in *The Federalist's* separation of powers papers. In *Federalist 51*, where Publius culminates the analysis, the paper begins by noting that there will not be "a full development" of the idea of checks and balances but only "a few general observations." (*51*, 251). Given the historical background, Publius may assume readers of *The Federalist* are familiar with the idea that the judiciary should invalidate legislative encroachments on judicial responsibilities. Publius seems to allude to this later, writing that "The benefits of the integrity and moderation of the judiciary have already been felt in more states than one…" (*78*, 382). Defending the judiciary as an institution is also how the early Supreme Court generally used judicial review (Whittington 2009, 1270). What cannot be inferred is an argument that the judiciary should manage separation between the executive and the legislature. That idea would have been revolutionary, as there was no historical precedent for it nor discussion at the constitutional Convention. It would also contradict Publius's arguments about the need for a "unitary" executive uninhibited by an advisory council (*70*, 342). Publius would not have remained silent if judges were supposed to intervene every time the executive exercises a power that is not illegal but arguably legislative in nature.

Publius's Theory of Judicial Restraint

Where does this leave Publius's understanding of judicial review? First, there are reasons to think that judicial review is not an extensive power, given the dangers of an unrepresentative

judiciary and the uncertainty over when and where judicial review should operate. Second, it is clear what Publius does not think judicial review is primarily for—managing the boundary between the states and the federal government or managing the line between the President and Congress. Finally, while Publius never says that the judiciary should use its power to defend itself from legislative encroachments, Publius's theory suggests it should do so and this accords with historical practice.

But then why does Publius bother to write about judicial review? If it is ancillary to the constitutional system, there would be no need to describe it in detail. Yet *Federalist 78* contains an extensive discussion of judicial review, despite only a few hints in the earlier papers that the Constitution establishes it.

The answer is Brutus, who published a series of essays sharply critiquing the proposed federal judiciary, the last of which was published roughly two months prior to the publication of *Federalist 78*. Brutus accuses the Constitution of creating a national judiciary that will decide cases according to its "reasoning spirit" (Brutus XI, 503; XII, 508), usurping the power rightly allocated to the representative branches and trampling the authority of the states (Diamond 1977, 269; Storing 1981, 50; Jeffrey 1971, 654; Slonim 2006, 13; Rakove 1996, 186; Paulsen 1994, 245; Federici 2012, 114; Sosin 1989, 260; McDowell 1982, 103; Treanor 2020, 464). The Preamble "gives sufficient colour" to expansive interpretations of the Constitution, and the Court's equity power will enable the Court to enforce these interpretations against citizens and the states (XI, 505). Because the Supreme Court is the last to interpret the Constitution, nothing stands in the way of them making the Constitution say what it wants. "[T]he judges under this constitution will control the legislature, for the supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress…there is no power above them to set

aside their judgment." (XV, 524). Brutus's essays on the judiciary force Publius to answer four questions: Why allow judges the power of judicial review? What parts of the Constitution are subject to judicial review? How should judges go about exercising the power? And who stops them should they abuse their power?

Publius responds by reorienting the analysis. The main problem is not the judiciary, which has "neither Force nor Will," (*78*, 378), but a legislature that may overstep its authority. Because citizens can vote, there is a low risk of minority tyranny but a high risk of majority tyranny (*10*, 43). "If a majority be united by a common interest, the rights of the minority will be insecure." (*51*, 254, *cf. 78*, 381). To protect all citizens, including those who lose elections, the convention produced a "limited constitution" (*78*, 378). This means a constitution "which contains certain specified exceptions to legislative authority…" (*78*, 378-379; *cf. 80*, 386-387, 390; *84*, 417-418). The emphasis is on "specified exceptions" (Epstein 1986, 44; Weiner 2019, 84; Franck 1996, 40; Carey 1989, 140).[12] Publius points out that there is text in the Constitution stating what Congress cannot do, such as pass *ex post facto* laws.[13] These prohibitions are why the Constitution already has a Bill of Rights, contrary to antifederalist accusations (*84*, 417). But given that all institutions try to expand their power, Congress will eventually try to infringe those rights. Once this occurs, the main safeguards will have failed. Accountability through term limited representation, the executive veto, and bicameralism will sometimes be insufficient to stop an electoral majority from infringing a minority's rights. Of course, the last safeguard—the

[12] (Millican 1990, 199; Barber 1988, 864; Dietze 1962, 277) suggest, implausibly, that Publius thinks the Court is not limited to the text of the Constitution when adjudicating rights.

[13] There are also multiple restrictions on the powers of the state governments, such as the ban on their minting coins, or taxing imports (*80*, 386). Exclusive national responsibility for these issues was a chief defect of the Articles of Confederation (*22*, 104). That Publius considers judicial review essential for ensuring uniform adherence to these limitations on state authority is uncontroversial (*e.g.* Carey 1989, 140).

people's right to form a new government—remains. But this is not a deterrent the Constitution wants to consistently rely upon (*49*, 246).[14]

Enter the Court. The "specified exceptions" to legislative power are law because they are written in the Constitution. "The interpretation of the laws is the peculiar province of the Courts." (*78*, 379). Just as courts regularly resolve conflicts between laws, so too can the courts adjudicate conflicts between regular statutes and the Constitution. This does not make the Court "superior to the legislature" because the Court is acting on behalf of the real "master" (*78*, 379)—the people, who agree in advance to forbid Congress from taking certain actions by their ratification of the Constitution. Publius does not claim that judges should exercise this power because of their superior virtue or because they are legal experts (though Publius concedes legal expertise will be needed to interpret federal statutes) (*78,* 383). Rather, it is the justices' life tenure, with the corresponding insulation from majoritarian politics, that enables the Court to adjudicate fairly between the legislature and the rights of the people. Publius's theory assumes that members of the Court will develop an institutional identity centered around keeping Congress in check, rather than advancing the interests of a faction. In a world before mass political parties, this was not an unreasonable assumption. And even the modern Court, riven as it is by partisanship, remains united across a range of substantive rights, such as the protections required by the First Amendment.

But how is this argument reconcilable with Publius's earlier arguments that raise problems for judicial review? If one takes the "parchment barrier" idea seriously, then the party

[14] This argument was first made by James Iredell in 1787, who would become one of the first justices on the Supreme Court (Iredell 1858, 147). While there is no direct evidence that Hamilton was exposed to Iredell's argument, several scholars suggest the similarity is unlikely a coincidence (Haines 1914, 40; Snowiss 1990, 46; Casto 2009; Corwin 1957, 25; Harrington 2003, 82; Kramer 2001, 68).

being infringed upon—in this case, the people—should use their power to push back, not the courts. But there are at least two problems. First, the rights infringed are likely rights held by a minority of the community, making electoral accountability unlikely to work (*78,* 381; *cf.* Iredell 1858 147, 173). Either minorities will suffer under legislative tyranny or try to engage in extralegal action. Oppressed citizens might mob, or call for a new convention, or try to intimidate Congress by threatening to revolt or initiate a civil war. These actions either will not work or, if successful, would recreate the very instability the Constitution is designed to mitigate, as the convention was called in part out of fear of uprisings like Shay's Rebellion (*6,* 21; *21,* 95; *28,* 129; *74,* 363). The advantage of the Constitution over its ancient predecessors is in its "*total exclusion of the people, in their collective capacity* from any share" in the government (*63,* 309). Thus, Publius argues, "It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature…" (*78,* 379; *cf.* Wood 1999, 796; Snowiss 1990, 74). The federal courts will take responsibility, on behalf of the people, for preventing Congress from doing what the Constitution explicitly forbids. This does not mean that the people have no role. Ultimately, they deter the government from devolving into tyranny with their right to revolt (*28,* 130; *46,* 232). But unlike the other branches, or the states, it is helpful for the judiciary to intervene on the people's behalf so that minorities can be protected and the blunt tools that the people have in their collective capacity need not be used.

But other than this minor deviation, Publius remains strictly within the boundaries of previous arguments. Publius does not suggest that the judiciary can create new laws restricting government action. Instead, Publius presumes the opposite, for the court is as much a creature of the Constitution as the legislature, unable to add or subtract from the text (Paulsen 2004, 249; Potter 2002, 136; Berns 1985, 66). Nor is there risk that the courts will intervene in the wrong

disputes, for Publius's emphasis throughout the judicial papers is on specific exceptions to legislative authority. These exceptions are clear markers for when judicial review should operate. While the limits of legislative power are difficult to define, executive power is "simple" and the judiciary is guided by "landmarks still less uncertain…" (*48*, 242; Weiner 2020, 403; Rakove 2002, 1526). The concerns about language in *Federalist 37* will not inhibit the judiciary. Deciding whether a statute is a bill of attainder, or an *ex post facto* law, is far easier than determining whether a law is necessary and proper for the regulation of commerce among the states. Prior to the actual Bill of Rights, there are no vague prohibitions in the Constitution, like restrictions on "the liberty of the press," that are incapable of precise definition (*84*, 420). At no point in the judicial papers does Publius suggest that judges can find Congress to have exceeded its powers without reference to an explicit textual prohibition.[15]

But Publius does suggest that the Court's decisions within the scope of its authority are final and binding on the other branches. Publius writes that it is the duty of the Court to determine "the meaning of any particular act proceeding from the legislative body" (*78*, 379; *cf. 22*, 104). The use of the words "*meaning*" and "*any*" is an endorsement of judicial supremacy. There is, according to Publius, no act of Congress that is unreviewable by the Supreme Court. The logic of the argument implies that Court interpretations must be respected by the other branches (Millican 1990, 199; Wolfe 1994, 78). If Congress or the executive could ignore the Court's decision, Publius would not discuss the impeachment of justices as a remedy for abuses of judicial review (*81*, 395; *79*, 385). Instead, Publius would write that the other branches should

[15] Publius may also suggest that there are parts of the Constitution reserved for legislative interpretation: "If it be said that the legislative body are themselves the constitutional judges of their own powers…this cannot be the natural presumption where it is not to be collected from any particular provisions…" (*78*, 379) While Publius may only mean that there is no provision establishing legislative supremacy, given the double negative, a possible reading is that there *are* provisions 'where it *is* to be collected' that Congress is the judge of its own powers (Barkow 2002, 246).

ignore the judgment based on their own assessment of the Constitution's meaning, an argument Publius does not make. While Publius's endorsement of judicial supremacy might look like a contradiction of the earlier argument that no branch "can pretend to an exclusive or superior right of settling the boundaries between their respective powers" (*49,* 245), it is not. This is because Publius, in *Federalist 78,* is not speaking about a 'boundary' between the branches—questions of which branch gets to do what—but of "exceptions" to federal power—total bans on specific types of federal action. Publius leaves room for a wide range of extrajudicial constitutional interpretation that allow the various branches, along with the states and the federal government, to work out constitutional boundary lines, just as *Federalist 48* suggests. But *Federalist 78* clarifies that when the Court invalidates a law, that decision binds the entire government.[16]

Publius is also consistent when he argues for a restrained standard of review. Judges should invalidate laws only when there is an "irreconcilable variance" (*78,* 379; *cf.* Weiner 2019, 85; Federici 2012, 115; Haines 1914, 183; Iredell 1858, 175; Wolfe 1994, 77) with the Constitution and should sustain them if there is "any fair construction" that might reconcile them with the Constitution's text (*78,* 380). Publius, addressing Brutus directly, points out that "there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution…" (*81*, 393). Misconstructions by the Court may occur, "but they can never be so extensive as to amount to an inconvenience, or…affect the order of the political system." (*81,* 395). Numerous precedents will bind and confine the Court to these limited determinations (*78,* 383; Rakove 2007, 1071). While the Court

[16] (Paulsen 1994, 251; Prakash and Yoo 2003, 926; Yoo 1996, 1386) argue that Publius's suggestion that the judiciary is 'weak' because it relies on executive enforcement of its judgments implies independent executive interpretive authority. But Publius is only making an empirical observation that it is impossible for the Court to accumulate the powers of the other branches (Epstein 1986, 191). Nowhere does Publius suggest that the president should annul judicial decisions based on their own interpretation of the law.

can use its power to soften harsh laws (*78*, 382), there is no suggestion that the Court, like the president with the veto, can use its power to invalidate laws simply because they are unjust (a distinction made salient by Publius's emphasis in the executive papers that the veto can be overridden (*73*, 359-361)). And if the Court overreaches, there is the "important constitutional check … impeachments…This is alone a complete security." (*81*, 395; *cf. 79*, 385; Weiner 2019, 87; Federici 2012, 120; Franck 1996, 48). Unlike Brutus (*XI*, 501), Publius anticipates that Congress will remove justices who expand judicial review beyond its limited boundaries. There is no need to trust that judges are more virtuous or professional because the legislature can remove them should they stray too far from enforcing the explicit prohibitions listed in the Constitution.[17]

One tension remains. Madison suggests that the Supreme Court, in limited circumstances, will adjudicate whether Congress has gone beyond its enumerated powers (*39*, 186). But Hamilton, in both *Federalist 78* and *Federalist 80*, argues that federal courts will only invalidate federal and state laws when they exercise a power explicitly forbidden by the Constitution (*78*, 378-379; *80*, 387, 390; *cf. 16*, 74-75).[18] Whereas Madison indicates enumerated powers have justiciable limits, Hamilton does not. The disagreement is foreshadowed in *Federalist 33*, where Hamilton asks, "who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union?" (*33*, 150). Rather than suggest the Supreme Court, Hamilton writes that it is "the national government…in the first instance…and its constituents in the last." (*id*). As the Supreme Court only decides "cases and controversies," the implication is

[17] This quickly proved illusory, as the controversial impeachment of Justice Chase set a precedent against using impeachment to check the Supreme Court (Lillich 1960).

[18] In *Federalist 16*, Hamilton suggests state courts should invalidate state laws passed with the intention of subverting federal authority (*16*, 74-75). The only subversive state laws are presumably ones that the Constitution forbids states from passing, suggesting no conflict between Hamilton's position in *16* and the position in *78* and *80*.

that "the national government" refers only to Congress and the President (Wright 1961, 72, 1949, 14; Sosin 1989, 262; Rakove 1996, 195; Corwin 1957, 45).[19] If Congress and the President encroach on state authority without infringing individual rights, Hamilton indicates only the people can hold Congress to account. But Madison argues that the Supreme Court should weigh in if the matter is sufficiently serious. Regardless of whether one picks Madison or Hamilton on the question, Publius's theory is still restrained in comparison to modern practice.

Conclusion

Judicial review, according to Publius, is first and foremost about "[t]hat inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice…" (*78*, 382) But "inflexible" does not mean that the Court decides without giving due weight to congressional and executive interpretations of the Constitution. Publius argues that the Court should use a deferential standard of constitutional review, looking for laws that clearly violate express prohibitions on legislative power. The Constitution is a hard-won compromise, and the Supreme Court has the power to hold the state and federal governments to its provisions. But beyond the clear limits in the text, the Court should leave space for the Constitution to do its work. The system is designed not to enshrine solutions once and for all but to allow for ongoing deliberation and compromise between the people's representatives. The Court is not external to the system, entrusted with drawing the line in separation of powers and federalism disputes. Instead, the Court is a part of the government, entrusted with a specific role. It should protect its own powers, look out for violations of enumerated rights, and let the political process take its course.

[19] (Millican 1992, 107; Clark 2003, 331) disagree, arguing that Hamilton is referring to the Supreme Court.

The Federalist is not a how-to-guide for constitutional law. While it addresses practical questions concerning the Constitution, its primary purpose is to explain how the Constitution conforms with and furthers important political and philosophical principles valuable to Americans in the late 18th Century. Those principles are flatly inconsistent with the modern practice of judicial review. There is no path connecting Publius's view of human nature as susceptible to corruption to the idea that unelected justices should have almost unlimited control over the Constitution. Constitutional law and American politics are ill-served by cherry picking Publius's arguments to justify judicial decisions that Publius does not think courts should be making. Using *The Federalist* to provide a patina of legitimacy for judicial resolutions of controversial questions risks inuring Americans to undemocratic decision making and disillusioning them with the political thought of the founding era.

Bibliography

Adair, Douglass. 1974. *Fame and the Founding Fathers*. ed. Trevor Colbourn. Indianapolis: Liberty Fund, Inc.

Banning, Lance. 1998. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca London: Cornell University Press.

Barber, Sotirios A. 1988. "Judicial Review and the Federalist." *University of Chicago Law Review* 55(3): 836–87.

Barkow, Rachel E. 2002. "More Supreme than Court - The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy." *Columbia Law Review* 102(2): 237–336.

Baude, William. 2019. "Constitutional Liquidation." *Stanford Law Review* 71(1): 1–70.

Beard, Charles A. 2012. *The Supreme Court and the Constitution*. Courier Corporation.

Berns, Walter. 1985. "The Constitution as Bill of Rights." In *How Does the Constitution Secure Rights?*, AEI studies, eds. Robert A. Goldwin and William A. Schambra. Washington: American Enterprise Institute for Public Policy Research.

Bickel, Alexander M. 1986. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd edition. New Haven: Yale University Press.

Bilder, Mary Sarah. 2006. "The Corporate Origins of Judicial Review." *Yale Law Journal* 116(3): 502–67.

———. 2008. *The Transatlantic Constitution: Colonial Legal Culture and the Empire*. First Paperback Edition. Cambridge, Mass.: Harvard University Press.

Bonica, Adam, and Maya Sen. 2021. *The Judicial Tug of War: How Lawyers, Politicians, and Ideological Incentives Shape the American Judiciary*. New York: Cambridge University Press.

Burns, Edward M. 1935. "Madison's Theory of Judicial Review." *Kentucky Law Journal* 24(4): 412–23.

Carey, George W. 1984. "Publius—A Split Personality?" *The Review of Politics* 46(1): 5–22.

———. 1989. *The Federalist: Design for a Constitutional Republic*. Urbana: University of Illinois Press.

Casto, William R. 2009. "There Were Great Men before Agamemnon." *Vanderbilt Law Review* 62(2): 371–406.

Choper, Jesse H. 1977. "The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review." *Yale Law Journal* 86(8): 1552–1621.

Clark, Bradford R. 2003. "Unitary Judicial Review." *George Washington Law Review* 72(Issues 1-2): 319–53.

Clinton, Robert Lowry. 1989. *Marbury v. Madison and Judicial Review*. Lawrence, Kan: University Press of Kansas.

Coenen, Dan T. 2006. "A Rhetoric for Ratification: The Argument of the Federalist and Its Impact on Constitutional Interpretation." *Duke Law Journal* 56(2): 469–544.

Corley, J. D., Pamela C., Robert M. Howard, and David C. Nixon. 2005. "The Supreme Court and Opinion Content: The Use of the Federalist Papers." *Political Research Quarterly* 58(2): 329–40.

Corwin, Edwin. 1957. *Court Over Constitution*. Princeton University Press.

Crosskey, William. 1953. *Politics and the Constitution in the History of the United States*. Stated First Edition. Univ. of Chicago Press.

Dahl, Robert A. 2006. *A Preface to Democratic Theory*. Expanded ed. edition. Chicago: University of Chicago Press.

Diamond, Ann. 1976. "The Anti-Federalist Brutus." *Political Science Reviewer* 6: 249–81.

Diamond, Martin. 1992. *As Far as Republican Principles Will Admit*. AEI Press.

Dietze, Gottfried. 1962. *The Federalist: A Classic on Free Government and Federalism*. Baltimore: Johns Hopkins Press.

Durchslag, Melvyn R. 2005. "The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?" *William & Mary Bill of Rights Journal* 14(1): 243–350.

Edling, Max. 2020. "'A Vigorous National Government': Hamilton on Security, War, and Revenue." In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Revised ed. edition. Cambridge, Mass.: Harvard University Press.

Entin, Jonathan L. 1990. "Separation of Powers, the Political Branches, and the Limits of Judicial Review." *Ohio State Law Journal* 51(1): 175–228.

Epstein, David F. 1986. *The Political Theory of The Federalist*. First Edition. Chicago: University of Chicago Press.

Federici, Michael P. 2012. *The Political Philosophy of Alexander Hamilton*. Baltimore: Johns Hopkins University Press.

Festa, Matthew J. 2007. "Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing the Federalist, 1986-2007." *Seattle University Law Review* 31(1): 75–106.

Franck, Matthew J. 1996. *Against the Imperial Judiciary: The Supreme Court Vs. the Sovereignty of the People*. University Press of Kansas.

Frank, Jason. 2014. *Publius and Political Imagination*. Reprint edition. Rowman & Littlefield Publishers.

Furtwangler, Albert. 1984. *The Authority of Publius: A Reading of the Federalist Papers*. Ithaca, N.Y: Cornell Univ Pr.

Gerber, Scott D. 2011. *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*. 1st edition. Oxford ; New York, N.Y: Oxford University Press.

Gibson, Alan. 1991. "Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of Federalist 10." *History of Political Thought* 12(2).

———. 2020. "Madison's Republican Remedy: The Tenth Federalist and the Creation of an Impartial Republic." In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

Grove, John G. 2019. "The Federalist on the Public Will: The Split Personality Revisited." *Polity* 51(1): 95–125.

Haines, Charles. 1914. *American Doctrine of Judicial Supremacy*. Macmillan.

Hamilton, Alexander, James Madison, and John Jay. 2003. *The Federalist: With Letters of Brutus*. ed. Terence Ball. Cambridge, U.K. ; New York: Cambridge University Press.

Harrington, Matthew P. 2003. "Judicial Review before John Marshall." *George Washington Law Review* 72(Issues 1-2): 51–94.

Hobbes, Thomas. 1994. *Leviathan: With Selected Variants from the Latin Edition of 1668*. Underlined, Notations edition. ed. Edwin Curley. Indianapolis: Hackett Publishing Company.

Howe, Daniel W. 1987. "The Political Psychology of The Federalist." *The William and Mary Quarterly* 44(3): 485.

Iredell, James. 1858. *Life and Correspondence of James Iredell: One of the Associate Justices of the Supreme Court of the United States*. ed. Griffith John McRee. Appleton.

Jeffrey, William Jr. 1971. "The Letters of Brutus - A Neglected Element in the Ratification Campaign of 1787-88." *University of Cincinnati Law Review* 40(4): 643–63.

Kent, James, and Charles M. Barnes. 1884. *Commentaries on American Law*. Little, Brown.

Ketcham, Ralph L. 1956. "James Madison and Judicial Review." *Syracuse Law Review* 8(2): 158–65.

Kramer, Larry. 2000. "Putting the Politics Back into the Political Safeguards of Federalism." *Columbia Law Review* 100(1): 215–93.

———. 2001. "Foreword: We the Court." *Harvard Law Review* 115(5): 5–169.

———. 2005. *The People Themselves: Popular Constitutionalism and Judicial Review*. 1st edition. Oxford: Oxford University Press.

———. 2020. "James Madison's Constitutional Politics." In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

Kramnick, Isaac. 1987. “The ‘Great National Discussion’: The Discourse of Politics in 1787.” *The William and Mary Quarterly* 45(1): 31.

Levy, Leonard. 1967. “Judicial Review, History, and Democracy: An Introduction.” In *Judicial Review and the Supreme Court,* ed. Leonard Levy. Harper Torchbooks.

Lupu, Ira C. 1997. “Time the Supreme Court and the Federalist.” *George Washington Law Review* 66(5 & 6): 1324–36.

———. 1998. “The Most-Cited Federalist Papers.” *Constitutional Commentary* 15(3): 403–10.

Mansfield, Harvey. 2020. “The Republican Form of Government in The Federalist.” In *The Cambridge Companion to The Federalist,* eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

Martinez, J. Michael, and William D. Richardson. 2000. “Federalist Papers and Legal Interpretation.” *South Dakota Law Review* 45(2): 307–33.

Mason, Alpheus Thomas. 1952. “The Federalist--A Split Personality.” *The American Historical Review* 57(3): 625–43.

McDowell, Gary. 1982. “Were the Anti-Federalists Right? Judicial Activism and the Problem of Consolidated Government.” *Publius* 12(3): 11.

Melton, Buckner F. Jr. 1996. “The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996.” *Kentucky Law Journal* 85(2): 243–346.

Melton, Buckner F. Jr., and Jennifer J. Miller. 2001. “The Supreme Court and The Federalist: A Supplement, 1996-2001.” *Kentucky Law Journal* 90(2): 415–40.

Millican, Edward. 2014. *One United People: The Federalist Papers and the National Idea*. University Press of Kentucky.

Montesquieu, Charles de. 1989. *The Spirit of the Laws*. 12th edition. Cambridge University Press.

Morgan, Robert J. 1974. “Madison’s Theory of Representation in the Tenth Federalist.” *The Journal of Politics* 36(4): 852–85.

Nelson, William Edward. 2000. *Marbury V. Madison: The Origins and Legacy of Judicial Review*. University Press of Kansas.

Nourse, Victoria. 1996. “Toward a Due Foundation for the Separation of Powers: The Federalist Papers As Political Narrative.” *Texas Law Review* 74(3): 447–522.

O’Brien, David M. 1991. “The Framers’ Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism.” *The Review of Politics* 53(2): 251–88.

Patterson, C. Perry. 1939. “James Madison and Judicial Review.” *California Law Review* 28(1): 22–33.

Paulsen, Michael Stokes. 1994. “The Most Dangerous Branch: Executive Power to Say What the Law Is.” *Georgetown Law Journal* 83(2): 217–346.

Pierson, Charles W. 1923. “Federalist in the Supreme Court.” *Yale Law Journal* 33(7): 728–35.

Pitkin, Hanna F. 1972. *The Concept of Representation*. 1st edition. Berkeley, Calif.: University of California Press.

Potter, Kathleen O. 2002. *The Federalist’s Vision of Popular Sovereignty in the New American Republic*. New York: Lfb Scholarly Pub Llc.

Prakash, Saikrishna B., and John C. Yoo. 2003. “The Origins of Judicial Review.” *University of Chicago Law Review* 70(3): 887–982.

Rakove, Jack N. 1996. *Original Meanings: Politics and Ideas in the Making of the Constitution*. 1st Paperback Edition. New York: Vintage.

———. 1997. “The Origins of Judicial Review: A Plea for New Contexts.” *Stanford Law Review* 49(5): 1031–64.

———. 2001. “Judicial Power in the Constitutional Theory of James Madison.” *William and Mary Law Review* 43(4): 1513–48.

———. 2006. “The Original Justifications for Judicial Independence.” *Georgetown Law Journal* 95(4): 1061–76.

Sheehan, Colleen. 2020. “The Republicanism of Publius.” In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

Shklar, Judith N. 1977. “Publius and the Science of the Past.” *Yale Law Journal* 86(6): 1286–98.

———. 1981. “The Federalist as Myth.” *The Yale Law Journal* 90(4): 942.

Slonim, Shlomo. 2006. “Federalist No. 78 and Brutus’ Neglected Thesis on Judicial Supremacy.” *Constitutional Commentary* 23(1): 7–32.

Smith, Troy E. 2007. “Divided Publius: Democracy, Federalism, and the Cultivation of Public Sentiment.” *The Review of Politics* 69(4): 568–98.

Snowiss, Sylvia. 1990. *Judicial Review and the Law of the Constitution*. First Print edition. New Haven: Yale University Press.

Sorenson, Leonard R. 1992. “Madison on the Meaning of the ‘General Welfare,’ the ‘Purpose’ of Enumerated Powers, and the ‘Definition’ of Constitutional Government.” *Publius: The Journal of Federalism* 22: 14.

Sosin, Jack M. 1989. *The Aristocracy of the Long Robe: The Origins of Judicial Review in America*. New York: Greenwood Press.

Steinfeld, Robert J. 2021. *"To Save the People from Themselves": The Emergence of American Judicial Review and the Transformation of Constitutions*. Cambridge: Cambridge University Press.

Storing, Herbert J. 1981. *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution*. New edition. ed. Murray Dry. Chicago: University of Chicago Press.

Story, Joseph. 2008. *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States Before the ... by Thomas M. Cooley. 4th Ed. 2 Vols.* 4th edition. ed. Thomas M[cIntyre] Cooley. Clark, NJ: Lawbook Exchange Ltd.

Sunstein, Cass R. 1985. "Interest Groups in American Public Law." *Stanford Law Review* 38(1): 29–88.

———. 1987. "Beyond the Republican Revival." *Yale Law Journal* 97(8): 1539–90.

Tarcov, Nathan. 1986. "The Federalists and Anti-Federalists on Foreign Affairs." *Teaching Political Science* 14(1): 38–45.

Thayer, James B. 1893. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7(3): 129–56.

Tillman, Seth Barrett. 2002. "The Federalist Papers as Reliable Historical Source Material For Constitutional Interpretation." *West Virginia Law Review* 105(3): 601–20.

Treanor, William Michael. 1994. "Case of the Prisoners and the Origins of Judicial Review." *University of Pennsylvania Law Review* 143(2): 491–570.

———. 2005. "Judicial Review before Marbury." *Stanford Law Review* 58(2): 455–562.

———. 2020. "The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary." In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

Tushnet, Mark. 1987. "Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers." *Southern California Law Review* 61(6): 1669–1700.

Vile, M. J. C. 1998. *Constitutionalism and the Separation of Powers*. 2nd edition. Indianapolis: Liberty Fund.

Wechsler, Herbert. 1954. "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government." *Columbia Law Review* 54(4): 543–60.

Weiner, Greg. 2012. *Madison's Metronome: The Constitution, Majority Rule, and the Tempo of American Politics*. Reprint edition. Place of publication not identified: University Press of Kansas.

———. 2019. *The Political Constitution: The Case against Judicial Supremacy*. Lawrence: University Press of Kansas.

———. 2020. “The Federalist on Congress.” In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

White, Morton. 1989. *Philosophy, The Federalist, and the Constitution*. New York: Oxford University Press.

Whittington, Keith. 2005. “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court.” *American Political Science Review* 99(4): 583–96.

———. 2009. “Judicial Review of Congress Before the Civil War.” *The Georgetown Law Journal* 97: 76.

———. 2019. *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present*. Illustrated edition. Lawrence, Kansas: University Press of Kansas.

Wills, Garry. 2001. *Explaining America: The Federalist*. Reprint edition. New York: Penguin Books.

Wilson, James G. 1985. “The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers.” *Brigham Young University Law Review* 65: 74.

Wolfe, Christopher. 1994. *The Rise of Modern Judicial Review: From Judicial Interpretation to Judge-Made Law*. Revised edition. Rowman & Littlefield Publishers.

Wood, Gordon S. 1998. *The Creation of the American Republic, 1776-1787*. Chapel Hill: Omohundro Institute and University of North Carolina Press.

———. 1999. “The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less.” *Washington and Lee Law Review* 56(3): 787–810.

Wright, Benjamin. 1949. “The Federalist on the Nature of Political Man.” *Ethics* 59(2, Part 2): 1–31.

———. 1961. “Introduction.” In *The Federalist*, Harvard University Press, 1–88.

Yoo, John C. 1996. “The Judicial Safeguards of Federalism.” *Southern California Law Review* 70(5): 1311–1406.

Zuckert, Michael. 1992. “The Virtuous Polity, The Accountable Polity: Liberty and Responsibility in The Federalist.” *Publius: The Journal of Federalism* 22: 20.

———. 2020. “The Federalist’s New Federalism.” In *The Cambridge Companion to The Federalist*, eds. Jack N. Rakove and Colleen A. Sheehan. Cambridge University Press, 464–514.

———. 2009. “Judicial Review and the Incomplete Constitution: A Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism.” In *The Supreme Court and the Idea of Constitutionalism*, eds. Steven Kautz, Arthur Melzer, Jerry Weinberger, and M. Richard Zinman. University of Pennsylvania Press, 53–77.

Zvesper, John. 1984. “The Madisonian Systems.” *Western Political Quarterly*: 21.

Cohens v. Virginia. 1821. 19 US (Supreme Court).

Printz v. United States. 1997. 521 US (Supreme Court).

West Virginia v. EPA. 2022. 142 US (Supreme Court).