

“NEITHER FORCE NOR WILL”

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If we are to choose which provision of the constitution has turned out to be the stupidest, we must be allowed to use hindsight. In the beginning, there were provisions that made good sense in their day, but time has been hard on them. With the use of hindsight, I choose the second sentence of Section 1 of Article III: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour. . . .”

Perhaps there are others who, like me, find the phrase “during good behaviour” to be highly ambiguous. And some of these may even join me in finding the standard interpretation of that phrase rather strange. But I waive all such matters, and I am willing to go forward on the assumption that a community consensus has settled the meaning of the phrase, which is, that our judges shall serve for life, unless they choose to resign, or unless they are impeached. Having accepted that “good behaviour” means “life tenure,” I will say that this provision is stupid.

However, I admit that this judgment does draw heavily upon the use of hindsight, and I do not wish to impugn the judgment of the drafters. When they wrote, the project of constitution-making was new, and the relevant experience was lacking. Having an independent judiciary was more theory than reality for them, and they had not experienced a regime in which judges declared governmental acts to be unconstitutional. Of course, judicial review was not foreign to them; they were familiar with the precedents and approved of the concept. Even so, it was not a lived reality. In setting up this new and powerful institution, they had to proceed upon assumptions, and it is not strange that some of these assumptions might turn out to be false.

Consider, for example, Hamilton’s famous discussion of the judiciary in *Federalist* No. 78. Recall that the context for this discussion is whether the judiciary would have the capacity to upset the political balance of power.

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Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

When I read this passage, I am always charmed by the elegance of such classic eighteenth century prose, and it always takes me a little while to cast off the spell and descend to the ugly task of analysis. When I do, my first reaction is, "How quaint!" And indeed, analysis seems almost beside the point. To be charmed by the antique quality of this paragraph is perhaps the only appropriate response; Hamilton's world seems so far removed from ours that it is otiose to assess his description of the judiciary as though it were a description of our judiciary. Consider, by way of a parallel, his description of the President as dispensing honors and holding the sword and his description of Congress as commanding the purse and prescribing rules. There is an antique charm to this description, but it would be both churlish and irrelevant to dissect it, to test its accuracy as political science. (Today, I suppose that one would start with the role of money and the mass media in politics, and go forward from that starting point, if one wished to talk about "the political rights of the Constitution.")

We should not be surprised, of course, that we differ from Hamilton in our most fundamental assumptions about government and law, but perhaps it may be worthwhile to emphasize that we do indeed differ from him in how we understand judging. For example, I do not think that many (any?) scholars would say today that judging does not involve "force or will." Hamilton was confident that he could draw a line between political will and judicial judgment; I think that most of us are not quick to assume that this can be done.

Perhaps one way to highlight the difference between Hamilton's assumptions and ours is to look at his description of the "job qualifications" for a judge, which appear somewhat later in Federalist No. 78.

There is yet a further and weighty reason for the permanency of the judicial offices which is deducible from the nature of the qualifications they require. It has frequently been remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable 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; and it will be readily conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the 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.

We have, in recent years, witnessed some rather interesting controversies over judicial appointments, and I trust it takes no citation to remind everyone that the participants in the debates differed sharply about "qualifications." Your memory may differ from mine, but I do not recall anyone arguing that a deep, scholarly knowledge of the precedents was the fundamental prerequisite for the job. Why not? Because none of us believes that our judges are "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." None of us believes that Hamilton has correctly described the type of judiciary, the type of judges, that we live with today. Of course, it would be foolish to criticize Hamilton for failing to be a prophet on this point. But I do feel free to criticize those among us who refuse to wake up and see that our reality is different.

Let us proceed then from assumptions that match our day:

- (1) we have a strong and independent judiciary;
- (2) our judges have the power to change the law, both common law and constitutional law;

(3) our judges will exercise their power to change the law based upon their judgments about justice and utility;

(4) this power to change the law is not unlimited, since there are political, institutional, and moral restraints that all judges feel;

(5) this power has been used in the past sometimes for the good, sometimes for the bad;

(6) we ought to accept and continue this power, but we should also limit it.

If you grant these assumptions, then the question arises: should we give these judges, especially those who sit on the Supreme Court, life tenure? Not I. I would limit their tenure. For example, one might guarantee life tenure as a judge, but limit the period for which a judge might serve on any one court. Perhaps a Supreme Court Justice should serve on that court for only ten or fifteen years, and then move down to a lower court. I pick a term of about that length because I think that most Supreme Court Justices do their best work during the period of their fifth to tenth years. As a rough generalization, I would say that it is uphill to that plateau, and then downhill afterwards. By downhill, I don't mean that they tend to become senile. Instead, they just run out of new ideas; after their tenth year, almost all judges start defending what they did in their early career, and consequently, it would be good for them to move on. Any argument over details of my proposal, however, would be idle, unless there is agreement on fundamental principle.

Is there agreement on fundamental principle? At this point, I should be launching into a review of the possible arguments, pro and con. And were I really clever, I could use this dialectic of pro and con to generate the requisite fundamental principles by which we could assess whether changing Article III, Section 1, sentence 2, would be a good idea. But my imagination fails me. I simply can't imagine why anyone would argue that a judge should have life tenure on the Supreme Court. My imagination is not that good.