



UNLOCKING
THE
FEDERALIST PAPERS

Discussion Guide

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6 The Independent Judiciary

*The Judiciary has neither
Force nor Will, but
Merely Judgement*

STUDENT DISCUSSION GUIDE

VIEW THE VIDEO

Thoughtfully view the video which can be found at <http://www.RootsofLiberty.org/videos>.

ANALYZE THE SOURCE

Closely read the following excerpt from *Federalist No. 78* (written by Alexander Hamilton) and be prepared to discuss the questions that follow:

...[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter [the Constitution as the supreme law of the land] and disregard the former [subsequent laws passed by Congress or state legislatures.]

...The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the

substitution of their pleasure to that of the legislative body....

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

1. Why would a legislative body pass a statute (law) contradicting the Constitution?
2. Why must the courts “adhere” to the Constitution and disregard laws that are unconstitutional? Can you think of examples from history or contemporary cases when the Supreme Court has declared a law to be unconstitutional?
3. What guide should the Court use to determine the “sense” of laws?
4. What is the difference between WILL and JUDGEMENT? Why should the judiciary use one and not the other?

5. Imagine that Congress passes a law that every justice on the Supreme Court agrees is, in every aspect, constitutional but one of the justices thinks the law is completely unnecessary. What recourse, if any, does that justice have?
6. How does the judiciary prevent the legislature from “encroachments” upon the liberties of its citizens? Is this sufficient to maintain limited government?
7. How does “permanent tenure” (a lifetime appointment) enable judges to perform the “arduous duty” of preventing legislative “encroachments?”



EXPLORE THE ESSAY

Thoughtfully read the essay, *The Judiciary has neither Force nor Will, but Merely Judgement: The Independent Judiciary*, and be prepared to discuss the following questions:

1. Why do you think the Constitution says so little about the qualifications and responsibilities of federal judges?
2. The Constitution created the Supreme Court. To date, how many other federal courts have been created by Congress?
3. Why is judicial independence so important in a republic?
4. How do the ideas of “good behavior” (generally, lifetime tenure) and a “fixed provision for their support” (a pre-determined salary) contribute to judicial independence?
5. Why is interpretation of the law the “proper and peculiar province” of the courts?
6. What is the difference between judicial “WILL” and judicial “JUDGEMENT”? Why is this distinction so important?
7. Do you agree with Hamilton that the Constitution implicitly grants the power of judicial review to the federal courts? Why or why not?
8. Explain how each of these cases reflects the constitutional principles of both judicial review and checks and balances: *Marbury v. Madison* (1803), *Worcester v. Georgia* (1832), and *Brown v. Board of Education of Topeka* (1954).
9. If the executive controls “the sword” of political power and the legislature controls the “purse” of political power, what influence does the judiciary have?
10. Do you agree that “the federal judiciary remains the guardian of the Constitution”? What role, if any, should the other branches and the people play in safeguarding the Constitution?

CONNECT TO CURRENT ISSUES

Research one of the issues listed below to determine the appropriate role of an independent judiciary in 21st century America.

- ▶ Senate confirmation of federal judges
- ▶ any recent Supreme Court case, e.g.,
 - *Windsor v. US* (2013)
 - *Christian Legal Society v. Federal Election Commission* (2010)
 - *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services et al.* (2012)
 - *District of Columbia v. Heller* (2008)
 - *Morse v. Frederick* (2007)
 - *Citizens United v. Federal Election Commission* (2010)
 - *New London v. Kelo* (2005)



SHOW WHAT YOU KNOW

Write a thoughtful, analytical essay answering any one of the questions from **Analyze the Source** or **Explore the Essay**.

Research the meaning and implications of “original intent” and “judicial activism,” and write a thoughtful essay explaining which is the more valid approach to constitutional interpretation.



LEARN MORE

The *Federalist Papers* referenced in this article are also discussed by these other authors in *Roots of Liberty*:

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On-Line Versions of the *Federalist Papers*

- ▶ The Avalon Project: Documents in Law, History and Diplomacy
<http://avalon.law.yale.edu>
- ▶ On Line Library of Liberty
<http://oll.libertyfund.org>

Teaching American History: The Federalist-Anti-Federalists Debates

- ▶ <http://teachingamericanhistory.org/fed-antifed>