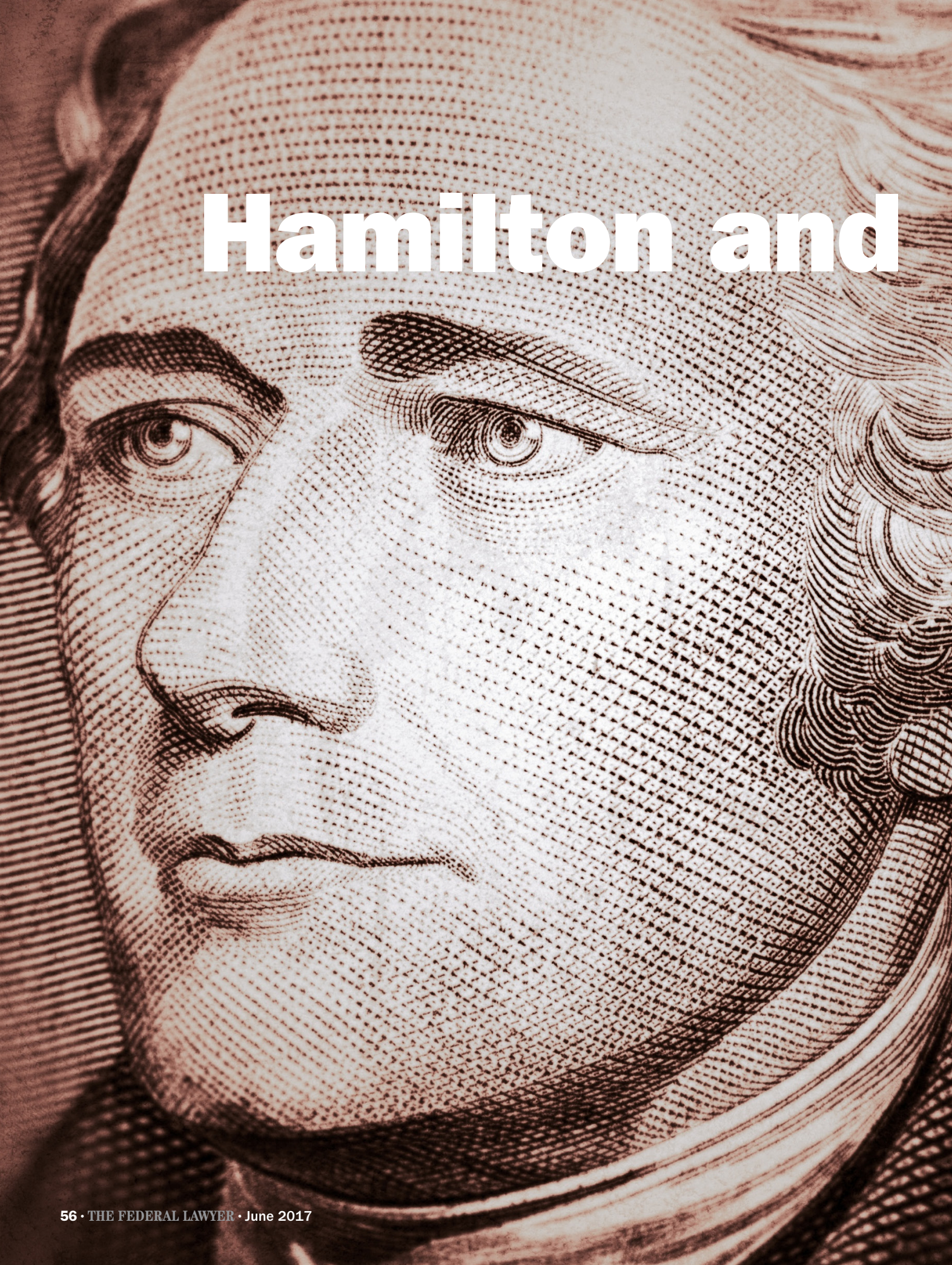


Hamilton and

Judicial Review

MIKE GABRAIL

Marbury v. Madison[1] is the pivotal decision of the U.S. Supreme Court in which Chief Justice John Marshall declared the right of the federal courts to review congressional legislation to determine if such legislation is inconsistent with the Constitution of the United States of America.[2] But while the chief justice is entitled to a share of the credit for that precedent, there is another Founding Father who merits credit as well: the first treasury secretary of the United States, Alexander Hamilton.

Hamilton has received a lot of attention in the past year thanks to the hit Broadway musical titled, appropriately, "Hamilton." And while Americans know him for implementing the structure of what would become our financial system today, as well as for being killed in a duel by then-Vice President Aaron Burr, many don't know about Hamilton's foray in law while practicing in New York City. In fact, he and Burr actually acted as co-counsel together in a few cases.[3]

Getting back to *Marbury*, a little-known fact about Hamilton was his advancement of judicial review through both the *Federalist Papers* and his own legal practice. After the American Revolution, Hamilton made much of his living from defending British Loyalists in New York City against suits brought under the Trespass Act. The Trespass Act was a New York state statute that gave American patriots the ability to sue anyone who had occupied, damaged, or destroyed the patriots' properties that they left behind during British occupations.[4] Those sued were British Loyalists, given that they would have been the only individuals to stay behind enemy lines during British occupations.

In the seminal case of *Rutgers v. Washington*—heard in the New York City Mayor's Court in 1784—Hamilton put forth one of the first arguments calling for judicial review of state laws that were inconsistent with federal law.[5] More specifically, Hamilton prevailed in arguing that the Trespass Act conflicted with the United States' treaty obligations to Great Britain and therefore was pre-empted, and that the court had the ability to make this determination and strike down the Act.[6] This was a clear call for judicial review of legislation.

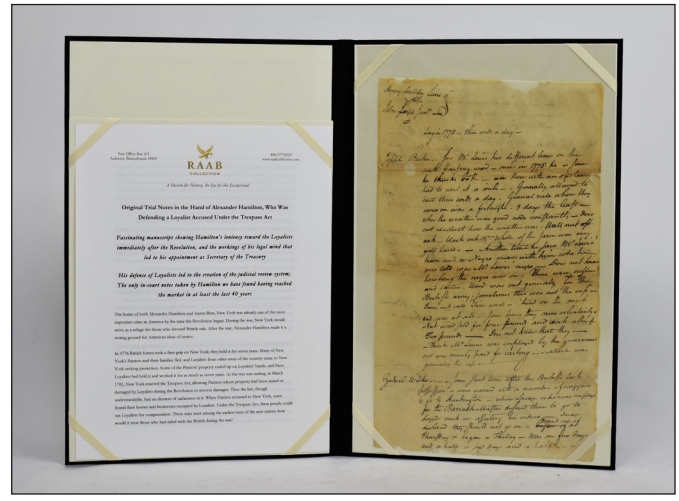
Hamilton used this argument as the basis for judicial review in the *Federalist Papers*, where he argued that the Supreme Court could invalidate congressional legislation found to be inconsistent with the Constitution.[7] In fact, Hamilton wrote:

> The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[8]

Hamilton's reference to the "limits assigned to their authority" was a clear nod to the limits placed on Congress by the Constitution. Moreover, Hamilton went on to explain:

> If there should happen to be an irreconcilable variance between the two [the Constitution and legislation] … the Constitution ought to be preferred to the statute.…[9]

From the outset, Hamilton recognized that the Constitution permitted the Supreme Court to be an ultimate arbiter of whether legislation was constitutional. This interpretation was not lost on many people, including the Anti-Federalists who acknowledged that the Constitution gave this right to the Supreme Court, but argued it to be a power that the Court should not have.[10]



Pictured above are original handwritten trial notes of Alexander Hamilton while defending an accused British Loyalist of violating New York's Trespass Act. These are in the possession of the author and are the only known trial notes of Hamilton to be in the possession of a private collector.

As one Anti-Federalist, Robert Yates, explained while writing under the pseudonym "Brutus," the Supreme Court shall have the right "to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away."[11] Even while damning such judicial review, this ardent Anti-Federalist acknowledged the intent of the Constitution to give this power to the Supreme Court.

Today, we take judicial review for granted and some even bemoan it as the ability of nine wise jurists (or less, depending on vacancies) to impose their own ideological construction of the Constitution on the masses. And it is best to remember that there really is no check on the Supreme Court to make such determinations (apart from amending the Constitution—an unwieldy process to say the least).

Many view the power of judicial review as a negative. But really, it is no different than Congress overriding a veto of legislation meant to curb presidential power that the Congress finds to be unconstitutional. Nor is it any different than a president issuing a veto on the basis that he or she finds a congressional act to be unconstitutional (assuming Congress does not override the veto). Both of these scenarios have finality without another "review."

What seems to create anxiety is the belief that the members of the Supreme Court are tasked with interpreting laws without ideological influence—anything short of this is judicial activism, critics say. But often (if not always), the individuals claiming judicial activism are those that are simply dissatisfied with the outcome. So is it judicial activism or is our judgment of the Supreme Court clouded when we lose?

In *Bush v. Gore*, some contend that five "conservative" justices voted to deliver the presidency to the Republican candidate while the four "liberal" justices voted to give it to the Democratic candidate.[12] These critics assert that the "conservative" justices voted based on their ideological preference of who should be president. But they fail to acknowledge that by the same logic, the "liberal" justices did the same thing, the only difference being that the "liberal" justices "lost."

Perhaps the complaints come because we are unwilling to accept that mistakes happen, as they often do, in the everyday administration of the law. But what is the alternative? Allow a legislative veto of a Supreme Court decision? Allow a presidential veto of a Supreme Court decision? In such a scenario, we remove the only branch of government whose task is to objectively determine the existence of an illegal action of government. Placing a similar power within an elected branch of government will result in the injection of popular politics and blatant ideological preferences into the process.

The Supreme Court's prerogative in judicial review is not perfect. But perhaps we need to identify that something such as judicial review may never be perfect. Rather, it is the best option that we have. In the end, there must be finality with one of the branches, so why not the one that does not need to sway with the winds of polling or the electorate? And instead of besmirching the Supreme Court over an unpopular decision, we should try our best to perfect the Supreme Court by putting justices on the bench who will truly be as objective as is humanly possible. ☉

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Endnotes

[1]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
[2]*Id.* at 177-178.
[3]*See* Paul Collins, Duel with the Devil: The True Story of How Alexander Hamilton and Aaron Burr Teamed Up to Take on America's First Sensational Murder Mystery (2014).
[4]*Rutgers v. Waddington* (1784): State Legislation that Conflicts with the Provision of a United States Treaty is Void, Historical Soc'y of the N.Y. Courts, www.nycourts.gov/history/legal-history-new-york/legal-history-eras-02/history-new-york-legal-eras-rutgers-waddington.html (last visited Mar. 7, 2017).
[5]*Id.*
[6]*Id.*
[7]The Federalist No. 78 (Alexander Hamilton).
[8]*Id.*
[9]*Id.*
[10]Antifederalist Paper 78-79 The Power of the Judiciary (Part 1), Fed. Papers Project, thefederalistpapers.org/antifederalist-paper-78-79 (last visited Mar. 6, 2017).
[11]*Id.*
[12]*See Bush v. Gore*, 531 U.S. 98 (2000).