Brutus and Publius on the Judicial Branch

Discussion Questions for Brutus XI:

1. *According to Brutus, why is the equity clause in Article III so dangerous?*
2. *Would you have found his argument convincing in 1788? If so, what factors would you have considered to conclude he was correct in this reasonings?*

Brutus XI, *New York Journal*, 31 January 1788 (excerpts)

. . . In article 3d, sect. 2d, it is said, "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c."

The first article to which this power extends, is, all cases in law and equity arising under this constitution.

What latitude of construction this clause should receive, it is not easy to say. At first view, one would suppose, that it meant no more than this, that the courts under the general government should exercise, not only the powers of courts of law, but also that of courts of equity, in the manner in which those powers are usually exercised in the different states. But this cannot be the meaning, because the next clause authorises the courts to take cognizance of all cases in law and equity arising under the laws of the United States; this last article, I conceive, conveys as much power to the general judicial as any of the state courts possess.

The cases arising under the constitution must be different from those arising under the laws, or else the two clauses mean exactly the same thing.

The cases arising under the constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it.

This article, therefore, vests the judicial with a power to resolve all questions that may arise on any case on the construction of the constitution, either in law or in equity.

1st. They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.

2d. The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.

"From this method of interpreting laws (says Blackstone) by the reason of them, arises what we call equity;" which is thus defined by Grotius, "the correction of that, wherein the law, by reason of its universality, is deficient; for since in laws all cases cannot be foreseen, or expressed, it is necessary, that when the decrees of the law cannot be applied to particular cases, there should some

where be a power vested of defining those circumstances, which had they been foreseen the legislator would have expressed; and these are the cases, which according to Grotius, lex non exacte definit, sed arbitrio boni viri permittet."

The same learned author observes, "That equity, thus depending essentially upon each individual case, there can be no established rules and fixed principles of equity laid down, without destroying its very essence, and reducing it to a positive law."

From these remarks, the authority and business of the courts of law, under this clause, may be understood.

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them. They have therefore no more right to set aside any judgment pronounced upon the construction of the constitution, than they have to take from the president, the chief command of the army and navy, and commit it to some other person. This plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controulable by the other, they are altogether independent of each other.

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations.

1st. The constitution itself strongly countenances such a mode of construction. Most of the articles in this system, which convey powers of any considerable importance, are conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning. The two most important powers committed to any government, those of raising money, and of raising and keeping up troops, have already been considered, and shewn to be unlimitted by any thing but the discretion of the legislature. The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution, it has been shewn, leaves the legislature at liberty, to do every thing, which in their judgment is best. It is said, I know, that this clause confers no power on the legislature, which they would not have had without it—though I believe this is not the fact, yet, admitting it to be, it implies that the constitution is not to receive an explanation strictly, according to its letter; but more power is implied than is expressed. And this clause, if it is to be considered, as explanatory of the extent of the powers given, rather than giving a new power, is to be understood as declaring, that in construing any of the articles conveying power, the spirit, intent and design of the clause, should be attended to, as well as the words in their common acceptation.

This constitution gives sufficient colour for adopting an equitable construction, if we consider the great end and design it professedly has in view—there appears from its preamble to be, "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and posterity." The design of this system is here expressed, and it is proper to give such a meaning to the various parts, as will best promote the accomplishment of the end; this idea suggests itself naturally upon reading the preamble, and will countenance the court in giving the several articles such a sense, as will the most effectually promote the ends the constitution had in view—how this manner of explaining the constitution will operate in practice, shall be the subject of future enquiry.

2d. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpared to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it; and that they will do it, appears probable.

3d. Because they will have precedent to plead, to justify them in it. It is well known, that the courts in England, have by their own authority, extended their jurisdiction far beyond the limits set them in their original institution, and by the laws of the land.

The court of exchequer is a remarkable instance of this. It was originally intended principally to recover the king's debts, and to order the revenues of the crown. It had a common law jurisdiction, which was established merely for the benefit of the king's accomptants. We learn from Blackstone, that the proceedings in this court are grounded on a writ called quo minus, in which the plaintiff suggests, that he is the king's farmer or debtor, and that the defendant hath done him the damage complained of, by which he is less able to pay the king. These suits, by the statute of Rutland, are expressly directed to be confined to such matters as specially concern the king, or his ministers in the exchequer. And by the articuli super cartas, it is enacted, that no common pleas be thenceforth held in the exchequer contrary to the form of the great charter: but now any person may sue in the exchequer. The surmise of being debtor to the king being matter of form, and mere words of course; and the court is open to all the nation.

When the courts will have a president [i.e., precedent] before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any controul?

This power in the judicial, will enable them to mould the government, into almost any shape they please.—The manner in which this may be effected we will hereafter examine.

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Discussion Questions for Brutus XV:

1. *Do you find Brutus' analysis of "good behavior" effective when he compares it with how it worked in the British system?*
2. *Do you think Brutus' argument that the judiciary needs some sort of review mechanism to maintain an appropriate system of checks and balances?*

Brutus XV, *New York Journal*, 20 March 1788 (excerpts)

I said in my last number that the supreme court under this constitution would be exalted above all other power in the government and subject to no control. The business of this paper will be to illustrate this and to show the danger that will result from it. I question whether the world ever saw in any period of it a court of justice invested with such immense powers and yet placed in a situation so little responsible. . . .

The judges in England it is true hold their offices during their good behavior but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union.—I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution. They consider themselves bound to decide according to the existing laws of the land and never undertake to control them by adjudging that they are inconsistent with the constitution—much less are they vested with the power of giving an equitable construction to the constitution.

The judges in England are under the control of the legislature for they are bound to determine according to the laws passed by them. But the 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; they are to give the constitution an explanation and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British in rendering the judges independent by granting them their offices during good behavior without following the constitution of England in instituting a tribunal in which their errors may be corrected; and without adverting to this that the judicial under this system have a power which is above the legislative and which indeed transcends any power before given to a judicial by any free government under heaven.

I do not object to the judges holding their commissions during good behavior. I suppose it a proper provision provided they were made properly responsible. But I say this system has followed the English government in this while it has departed from almost every other principle of their jurisprudence under the idea of rendering the judges independent—which in the British constitution means no more than that they hold their places during good behavior and have fixed salaries—they have made the judges independent in the fullest sense of the word. There is no power above them to control any of their decisions. There is no authority that can remove them and they cannot be controlled by the laws of the legislature. In short they are independent of the people of the legislature and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. Before I proceed to illustrate the truth of these assertions I beg liberty to make one remark—Though in my opinion the judges ought to hold their offices during good behavior yet I think it is clear that the reasons in favor of this establishment of the judges in England do by no means apply to this country.

The great reason assigned why the judges in Britain ought to be commissioned during good behavior is this that they may be placed in a situation not to be influenced by the crown to give such decisions as would tend to increase its powers and prerogatives. While the judges held

their places at the will and pleasure of the king on whom they depended not only for their offices but also for their salaries they were subject to every undue influence. If the crown wished to carry a favorite point to accomplish which the aid of the courts of law was necessary the pleasure of the king would be signified to the judges. And it required the spirit of a martyr for the judges to determine contrary to the king's will.—They were absolutely dependent upon him both for their offices and livings. The king holding his office during life and transmitting it to his posterity as an inheritance has much stronger inducements to increase the prerogatives of his office than those who hold their offices for stated periods or even for life. Hence the English nation gained a great point in favor of liberty. When they obtained the appointment of the judges during good behavior they got from the crown a concession which deprived it of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people. But these reasons do not apply to this country we have no hereditary monarch; those who appoint the judges do not hold their offices for life nor do they descend to their children. The same arguments therefore which will conclude in favor of the tenor of the judge's offices for good behavior lose a considerable part of their weight when applied to the state and condition of America. But much less can it be shown that the nature of our government requires that the courts should be placed beyond all account more independent so much so as to be above control.

I have said that the judges under this system will be independent in the strict sense of the word: To prove this I will show—That there is no power above them that can control their decisions or correct their errors. . . .

1st. There is no power above them that can correct their errors or control their decisions — The adjudications of this court are final and irreversible or there is no court above them to which appeals can lie either in error or on the merits.—In this respect it differs from the courts in England for there the house of lords is the highest court to whom appeals in error are carried from the highest of the courts of law.

2d. They cannot be removed from office or suffer a diminution of their salaries for any error in judgment or want of capacity.

It is expressly declared by the constitution—"That they shall at stated times receive a compensation for their services which shall not be diminished during their continuance in office."

The only clause in the constitution which provides for the removal of the judges from office is that which declares that "the president vice-president and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason bribery or other high crimes and misdemeanors." By this paragraph civil officers in which the judges are included are removable only for crimes. Treason and bribery are named and the rest are included under the general terms of high crimes and misdemeanors.—Errors in judgment or want of capacity to discharge the duties of the office can never be supposed to be included in these words high crimes and misdemeanors. A man may mistake a case in giving judgment or manifest that he is incompetent to the discharge of the duties of a judge and yet give no evidence of corruption or want of integrity. To support the charge it will be necessary to give in evidence some facts that will show that the judges committed the error from wicked and corrupt motives.

3d. The power of this court is in many cases superior to that of the legislature. I have showed in a former paper that this court will be authorized to decide upon the meaning of the constitution and that not only according to the natural and obvious meaning of the words but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to but above the legislature. For all the departments of this government will receive their powers so far as they are expressed in the constitution from the people immediately who are the source of power. The legislature can only exercise such powers as are given them by the constitution they cannot assume any of the rights annexed to the judicial for this plain reason

that the same authority which vested the legislature with their powers vested the judicial with theirs—both are derived from the same source both therefore are equally valid and the judicial hold their powers independently of the legislature as the legislature do of the judicial.—The supreme court then have a right independent of the legislature 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. If therefore the legislature pass any laws inconsistent with the sense the judges put upon the constitution they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords for error but in cases where they give an explanation to the laws or constitution of the country contrary to the sense of the parliament though the parliament will not set aside the judgment of the court yet they have authority by a new law to explain a former one and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme—and no law explanatory of the constitution will be binding on them. . . .

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually and by insensible degrees and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals with which the public will not be generally acquainted; one adjudication will form a precedent to the next and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them. In the meantime all the art and address of those who wish for the change will be employed to make converts to their opinion. The people will be told that their state officers and state legislatures are a burden and expense without affording any solid advantage for that all the laws passed by them might be equally well made by the general legislature. If to those who will be interested in the change be added those who will be under their influence and such who will submit to almost any change of government which they can be persuaded to believe will ease them of taxes it is easy to see the party who will favor the abolition of the state governments would be far from being inconsiderable.—In this situation the general legislature might pass one law after another extending the general and abridging the state jurisdictions and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution.—If the states remonstrated the constitutional mode of deciding upon the validity of the law is with the supreme court and neither people nor state legislatures nor the general legislature can remove them or reverse their decrees.

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Discussion Questions for Publius, Federalist 78:

1. *According to Publius, why should the judiciary be considered the least dangerous branch?*
2. *In your view, has Publius' explanation of judicial independence been born out in subsequent history?*

Publius: The Federalist 78, New York, 28 May 1788

We proceed now to an examination of the judiciary department of the proposed government. . . .

The manner of constituting it seems to embrace these several objects—1st. The mode of appointing the judges—2d. The tenure by which they are to hold their places—3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: This chiefly concerns their duration in office; the provisions for their support; and the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behaviour, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

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 legislative 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 of 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.

This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than

through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that 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. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought of course to be prefered; or in other words, the constitution ought to be prefered to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done: Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be prefered to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that 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.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would on that account be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more

states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead, universal distrust and distress.

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniencies 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 readily be 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. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quiting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behaviour as the tenure of their judicial offices in point of duration; and that so far from being blameable on this account, their plan would have been inexcuseably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

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