Introduction to Federalist #78

Hamilton was almost certainly correct in asserting in *Federalist* 78 that the need for a federal judiciary was widely accepted. If there was to be a national government with the power to enact laws, inevitably those laws would be broken and disputes would arise. In fact, conflict between various states had already occurred during the period of Confederation when there existed only a judiciary committee in the Continental Congress to resolve them. The absence of an executive power under the Articles of Confederation meant that the decisions of this committee could be ignored with impunity.

Even though there was general agreement that a national judiciary was necessary, the relative strength of that department of government was hotly debated Two features of the proposed judicial branch were particularly worrying to the Antifederalist side: the power of judicial review and life-tenure for judges Although juries, which were drawn from the ranks of the citizenry, were representative and trustworthy, judges were seen as an unelected elite and were not trusted to support the will of the people. The states' constitutions had granted judges either long-terms of office or the power to overturn state laws, but not both of these powers simultaneously. Some states, New York for example, had committees to review constitutional challenges. If the courts could overturn laws passed by the people's representatives, this unelected elitist institution would be placed above the will of the people.

The Antifederalist author, Brutus, writing in the *New York Journal* predicted that rather than be limited strictly by precedent and the words of the Constitution, federal judges would make decisions based on what they believed was the "spirit" of the Constitution. This is precisely the charge made today by those who believe in a strict interpretation of the Constitution guided by the original intent of its authors. Brutus furthermore claimed that federal judges would use their decisions to increase the powers of the federal government at the expense of states. Many people experienced the implementation of court rulings from *Gibbons v. Ogden* to *Roe v. Wade* as a long string of violations of States' rights.

Against this background of mistrust, Hamilton wrote of the necessity for a strong, independent judiciary.' He points out that the judicial branch lacks any power to enforce its decisions relying instead on the executive branch. Life tenure, he argues, is a necessary defense for the courts It is the only guarantee that the judiciary will not become a political tool of one of the other branches. The court must also be protected from the pressure of popular majorities. It must have the independence to uphold the Constitution and protect the rights of unpopular groups or individuals against the wishes, if necessary, of the majority In North Carolina and Rhode Island, court~ had been censured and judges dismissed when they dared to rule in favor of creditors who were being forced to accept nearly worthless paper money, In New York, the highest court lost its popular support and therefore its authority when it ruled against a state law which violated a US. peace treaty, a mandate of Congress, and the law of nations.

Hamilton argued in Federalist #78 that the right of judicial review, rather than placing the courts above the representatives of the people,

merely gave the courts the right to uphold the fundamental expression of the peoples' will--the Constitution--against temporary biases, schemes of legislators or interest groups who might occasionally gain popular support. If the people want to alter their fundamental law, the Constitution could be revised. In the meantime, the Supreme Court must have sufficient power to protect it.

As to the charge that federal judges would use the power of the court to enlarge the sphere of federal powers, he asserts without proof that they will decide federal versus state questions with impartiality. This is one of the weakest points in his argument. Just as the Antifederalists predicted, the right of judicial review plus the Supremacy Clause which places federal law above state law together with the ambiguous phrasing of much of the Constitution have permitted federal courts to recast the balance of power in favor of the federal government. It can be argued that this increased federal power has been necessitated by global events, changes in technology, and the emergence of new national challenges. It can be argued that we benefitted as individuals and as a nation when the rights of U S citizenship were fully defined and uniformly enforced by the federal government. However, it is very difficult to claim that the modem balance of power between the federal and states' governments is the one described by the Constitution or the one promised by proponents like Hamilton.

In this essay, Hamilton is writing in support of a strong, independent judicial branch. He believes that the power of judicial review is an essential part of that strength. Although many agreed with Hamilton that the judicial branch would be the weakest of the three branches of government, they worried that if the Supreme Court could overturn any law of any state, the sovereignty and independence of the states would be eliminated. It is, in part, these fears that Hamilton is addressing.

Define these terms before you read the essay: judicial review, fundamental, judiciary, judicial branch, precedents, moderate (adj)

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Original

(1) WE PROCEED now to an examination of the judiciary department of the proposed government.

(2) In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

(3) 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.

(4) 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.

(5) 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; the precautions for their responsibility.

(6) According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; 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 behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modem improvements in the practice of

Modern

(1) We turn our attention now to an examination of the judiciary branch of the proposed government.

(2) The usefulness and necessity of a federal court system have been clearly pointed out in previous Federalist Papers as part of the discussion of the shortcomings of the government under the Articles of Confederation. It is not necessary to restate those arguments here because the importance of having some sort of federal judiciary is not being disputed. The only questions which have not been answered concern the manner in which the judicial branch is to be constructed and the event of its powers. In this essay therefore, we will limit our discussion to those questions.

(3) The question of how the judicial branch is to be constructed includes several parts: First. The method of appointing judges. Second. The conditions of their terms of office. Third. The subdivision of the judiciary branch into different courts and the relationship of those courts to each other.

(4) First. The method of appointing judges is the same as the method of appointing any other non-elected official of the federal government.· This has been thoroughly discussed in The Federalist No. 76 and 77. Nothing more can be said here that would not be useless repetition.

(5) Second. The conditions of their employment primarily concern the length of their terms of office, who will pay them and how much, and methods for holding them accountable.

(6) According to the new Constitution, all federal judges will hold office during good behavior. This means that they will serve for an unlimited amount of time unless they commit some offense for which they can be impeached. The most approved of State constitutions grant the same term of office for State judges. New York is one of those states. The fact that the opponents of the new government have questioned the wisdom

(6 cont.) 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.

(7) 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 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.

(8) This simple view of the matter suggests several important consequences. It proves incontestably, 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 legislature and the 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 a 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,

(6 cont.) of this, shows that their love of quarreling has warped their imaginations and their judgments. An unlimited term during good behavior for judges is one of the most valuable modem improvements in the practice of government. In a monarchy, it protects judges from the overreaching power of the king. In a republic, it is no less effective in protecting the judicial branch from being overpowered by the legislative branch. And it is the best solution which can be devised in any government to insure the consistent, honest and impartial management of the laws.

(7) Careful consideration of the different branches of government will reveal that the judicial branch will always be the least dangerous to Constitutional rights because it has the least power with which to threaten them. The executive branch not only appoints officials but also holds the sword of the nation. That is, the President commands the armed forces. The legislature commands the purse. In other words, the Congress controls the financial resources of the nation. Furthermore, Congress writes the laws which determine how the duties and rights of every citizen will be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse. It controls neither the strength nor the wealth of the nation, and has absolutely no ability to put its decisions into action. It may be truly said that the judiciary has neither force nor will but merely judgment. It must ultimately depend on the executive branch to insure that its decisions take effect.

(8) The simple view of the matter implies several important consequences. It has been proven that the judiciary is unarguably the weakest of the three branches of government. It can never successfully attack either of the other two branches. Furthermore, a government must be constructed so that the judicial branch can defend itself from the attacks of the other two. It is equally clear that although an occasional act of the judiciary will tend to diminish the rights or freedoms of the people, in general their liberty can never be endangered by that branch as long as its powers are truly separated from those of the legislature and the executive. I agree, that "there is no liberty if the power of judging is not separated from the legislative and executive powers."* Finally, there are several points to be made in support of the permanent terms of office

(8 cont.) 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.

(9) 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 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.

(10) Some perplexity respecting the rights 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 ground on which it rests cannot be unacceptable.

(11) 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 authorize, but what they forbid.

(8 cont.) which would give independence to the judicial branch. Liberty can have nothing to fear from the judiciary alone and everything to fear from its combination with either of the other branches. The harmful effects of such a combination would result from the dependence of the judicial branch on the other branch. This harm will result unless the separation between the branches is real and not just apparent. Because of its weakness, the judicial branch is in constant danger of being overpowered, overawed or overly influenced by the other branches. Nothing would contribute so much to the stability and independence of the judiciary as permanent terms of office. In fact, it is correct to assume that life terms are the most important component in the structure of the judicial branch. It is primarily this feature which guarantees the protection of justice and order in a society.

(9) The complete independence of the courts of justice is especially necessary under a Constitution which limits the powers of the legislature. The legislature may not, for example pass bills of attainder, or *ex post facto* laws. However, these limitations will be preserved only by the courts, whose duty it must be to declare all acts invalid which contradict the clear meaning of the Constitution. If the courts do not have this power, all rights guaranteed on paper would amount to nothing.

(10) Some are worried about the courts' ability to find legislative acts unconstitutional because they believe this power implies that the judicial power is superior to the legislative power. They insist that when one part of government can overturn the acts of another part, it must necessarily possess a superior authority. As the power of judicial review (the power to declare laws unconstitutional) is of great importance both in the States' constitutions as well as in the new federal Constitution, a brief justification of it is appropriate.

(11) When the action of a person, or group, to whom power has been given contradicts the meaning of the document which gave them that power, that action is invalid. There is no position which is more clearly justified. No law, therefore, which contradicts the Constitution can be valid. To deny this would be to claim that the deputy is greater than his

(12) 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 irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

(13) 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.

(14) 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

(cont. 11) superior; that the servant is above the master; that the representatives of the people are superior to the people themselves; that men who have been given certain powers may not only take unauthorized actions but may actually do what those powers forbid.

(12) Some would claim that the members of the legislature are themselves the correct judges of their own powers according to the Constitution. Furthermore, their interpretation of the Constitution is final and the other two branches are obliged to follow it. However this cannot be automatically assumed since it is not found in any part of the text of the Constitution. There is no reason to suppose that the Constitution intends that the will of the elected representatives be substituted for the win of the people. It is far more rational to suppose that the courts were designed to mediate between the people and the legislature to insure, among other things, that the legislature stay within the Constitutional limits of its authority. The interpretation of the laws is the proper and special function of the courts. A constitution is the fundamental law, the basis of all other laws, and must be treated as such by the judges. It is therefore their responsibility to determine its meaning as well as the meaning of any law passed by the legislature. If there is a direct contradiction between a law and the Constitution, the one which is more valid and to which we owe the most loyalty ought to be chosen. In other words, the Constitution must be given preference over the statute, the will of the people must prevail over the will of their representatives.

(13) This does not imply that the judiciary is superior to the legislative power, but that the power of the people is superior to both. So that, if the will of the legislature expressed in its law opposes the will of the people declared in the Constitution, the judges ought to abide by the will of the people. Their decisions ought to be guided by laws which are fundamental, not laws which are not.

(14) This exercise of deciding between two laws can be illustrated by the following example. It sometimes happens that there are two laws which wholly or partially contradict each other and neither law contains a provision indicating how such a contradiction is to be solved. It is the responsibility of the court to solve the problem by determining the meaning of the law and its application. If it is possible through any honest interpretation of the two laws,

(cont. 14) determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a 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.

(15) 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 preferred 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.

(16) It can be of no weight to say that the courts, on the pretense 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 prove any thing, would prove that there ought to be no judges distinct from that body.

(17) 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.

(cont. 14) each should be preserved. Both reason and law demand this. But where this is impractical, it becomes necessary to uphold one law and abolish the other. The rule that courts have used in the past is that the most recently passed law should be upheld and the older law rejected. But this is merely the sensible solution to a practical problem, not a rule derived from a written law. It is not a rule imposed on the courts by the legislature. Instead it has been adopted by the courts to direct their own conduct in interpreting the law because it is realistic and appropriate. They thought it was reasonable that when two laws issued by the same legislature contradicted each other, the most recent law most accurately reflected what the lawmakers intended and so should be given preference over the older bill.

(15) But when different legislatures, one higher than the other, one having original authority and the other an authority derived from the authority of the first, issue two contradictory laws, the opposite rule should apply. It is reasonable and appropriate in this situation that the older law passed by the higher legislature should be followed rather than the more recent act of the lower legislature. It is equally correct that whenever a particular law conflicts with the Constitution, it is the duty of the judiciary to uphold the Constitution and to disregard that law.

(16) It is pointless to claim that the courts may use their power to find a law unconstitutional in order to substitute their own desires for the rightful intentions of the legislature. That could just as well occur when laws passed by two different legislatures contradict each other, or when the courts are merely interpreting a single law. The courts must interpret the meaning of the law. If they ever wish to impose their will rather than using their judgment, the result will always be the substitution of whatever they may want for the desires of the legislature. If this argument proves anything at all, it proves that there should never be any judge independent from the legislature.

(17) However, if the courts are to be considered a fortification against the expansion of legislative power, then there is a strong argument for the permanent term of office for judges. Nothing else will contribute so much to that independent spirit in judges which is essential to the reliable performance of such difficult duties.

(18) This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, 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 meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the mends 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.

(19) 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 humors 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 iniquitous intention are to be expected from the scruples of the courts, are, in a manner compelled, by

(18) The independence of judges is equally important in guarding the Constitution and individual rights from occasional public anger spread either by the cunning of deceitful men or arising from an unfortunate coincidence of events. Even though this type of public displeasure quickly disappears once the truth is known and people have had time to think more carefully about it, in the meantime it can lead to dangerous changes in the government and the oppression of minorities in the community. I am sure that the friends of the new Constitution will never agree with its enemies when they question one of the fundamental beliefs of republican government which asserts the right of the people to alter or abolish an existing constitution whenever they find that it does not promote their well-being. Yet this principle should not be interpreted to mean that the representatives of the people are justified in violating the existing constitution whenever a majority of the people they represent are possessed by a temporary bias. Nor does it mean that the courts should overlook violations by legislators who are following the mood of the public any more than they should overlook violations which arise entirely from plots by legislators. Until the people have by some solemn and official action, cancelled or changed the established constitution, they are bound individually and collectively to uphold it. No assumption of, or even knowledge of, the people's desires can justify unconstitutional actions by their government representatives until the people have taken the serious action of cancelling or altering their constitution. But it is easy to see that it would require uncommon courage on the part of judges to do their duty as faithful guardians of the constitution when violations of the Constitution by legislators had been made in response to the expressed wishes of a majority of the people.

(19) But it is not only in regard to violations of the Constitution that an independent judiciary will act as a safeguard against occasional public anger. Violations of tbe Constitution sometimes injure only the private rights of particular groups of citizens by unjust or unequal laws. A strong judiciary is essential in lessening the severity of such laws and in limiting their use. A strong judiciary not only serves to moderate the harm caused by laws which may have already been passed but it also acts as a restraint on the legislature to prevent them from passing such laws in the first place, When they see that the success of their dishonorable intentions will be blocked by a conscientious judiciary, their

(cont. 19) 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 to-morrow 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.

(20) 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 legislature, 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.

(21) There is yet a further and a weightier 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 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 readily be conceived from the variety of controversies

(cont. 19) desire to achieve their unjust cause will force them to curb their attempts. This feature of the new Constitution is calculated to have more of an influence on the essential quality of the government than most people realize, More than one State has already experienced the benefits of having an honest and moderate judiciary. And, although the judiciary may have displeased those whose sinister plans they thwarted, they must also have received the respect and appreciation of all who are virtuous and fair. Reasonable men of all descriptions ought to prize whatever will strengthen the qualities of moderation and integrity in the courts. No one can be sure that he will not be the victim of the same injustice tomorrow by which he was the winner today. And everyone must now feel that the inevitable result of this insecurity is to weaken the foundations of national and individual confidence and to replace it with a general sense of distrust and distress.

(20) The inflexible and unchanging devotion to Constitutional rights and to natural rights, which we consider indispensable in the courts of justice, certainly cannot be expected from judges who hold their offices by temporary appointment. Appointment to a limited term, regardless of how or by whom it is made, would in some way or another be fatal to the independence of the judiciary. If either the executive or the legislative branch held the power to make limited judicial appointments, there is a danger that the court would tend to yield improperly to that branch. If that power were given to the people or to representatives chosen by the people for this special purpose, there would be too great a tendency to consult popular opinion when making a decision that should only be made by consulting the Constitution and the law.

(21) There is another important reason for the permanency of judicial officers which can be determined from the qualifications these jobs require. It has been often and truly said that having a great quantity of laws is one of the disadvantages that accompany the advantages of a free government. It is essential that judges be restrained by strict rules and precedents which clarify and define their duty in every individual case that comes before them so that they will not make arbitrary decisions. It is easy to understand from the variety of court cases which result from the foolishness and wickedness of mankind that the records of these previous cases must inevitably increase to a considerable number. It is

(cont. 21) 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 character; and that a temporary duration in office, which would naturally discourage such characters from quitting 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.

(22) 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 BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably 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.

(cont. 21) clear that acquiring a competent knowledge of all of these cases would require long and difficult study. Hence. there will be only a few men in any society who will have sufficient skills to qualify them for the position of a judge. Taking into account the weaknesses of human nature, the number of people who will have both the necessary skills and the necessary integrity is even smaller Considering these facts we see that there will be few suitable men of good character for the government to choose from. A short term of office would discourage many qualified men from leaving well-paid law practices to accept a judgeship. This would tend to place the administration of justice into hands less capable and less qualified to carry it out with dignity and for the benefit of the public. In the present condition of this country, and the condition it is likely to be in for a long time to come, the problem of not attracting the most qualified men is more serious than you might think. However, it must be admitted that the other disadvantages caused by limited terms of office are even more serious.

(22) When all aspects of this subject are considered, there can be no doubt that the Philadelphia convention acted wisely in using as models those constitutions which establish unlimited terms for their judicial offices. Instead of being blamed for this, their plan would have been inexcusably flawed if it had excluded this important feature of good government. The experience of Great Britain provides a shining example of the excellence of unlimited terms.