Unit 4
Part 3- Judiciary

Creative Lessons
for success with
AP US Government & Politics

www.jonathanmilner.org

The AP Exam

In AP US Government and Politics we will better understand the American political system by focusing on six main units of study: The Constitution, Political Culture, The Political Process, Political Institutions, Public Policy, & Civil Rights & Liberties.

Unit	Title and Topics	Percent of AP Exam
1	**The Constitution** Separation of Powers Checks and Balances Federalism Theories of Democracy	**10%**
2	**Political Culture** The Political beliefs of Citizens How Citizens learn their Political Beliefs Public Opinion How Citizens Participate in Politics	**15%**
3	**Political Process** Interest Groups Political Parties Public Opinion, Participation, and Voting Campaigns and Elections Mass Media	**15%**
4	**Institutions of Government** Congress Presidency **Judiciary** Bureaucracy Institutions, the Political Process, & Citizens	**40%**
5	**Public Policy** Policymaking in Federalism Formulating Policy Agendas Policymaking Institutions, Citizens &Political Process	**10%**
6	**Civil Rights and Liberties** Rights and the Judiciary Your Rights The 14th Amendment and Rights	**10%**

UNIT 4 – Institutions of Government
Part 3 - Judiciary

Unit	Title and Topics	Percent of AP Exam
4	**Institutions of Government** Congress Judiciary **Judiciary** Bureaucracy Institutions, the Political Process, and Citizens	**40%**

Unit Four
Political Institutions
Part 3 – Judiciary
Students will be able to:

- Identify the major powers of the judiciary
- Analyze the reasons for the evolution of judicial power throughout US history
- Understand the history of the US judiciary
- Identify the duties and evaluate the relative power of different actors in the judicial branch
- Identify the key features of judicial philosophy
- Describe the course of a case as it moves through the judicial branch
- Evaluate the relative power of the three branches of government
- Evaluate the impact of public opinion on the judiciary
- Describe the relationship between the judicial branch and linkage institutions such as the media, interest groups, and political parties

Unit 4 is divided into the following sections

1. Congress
2. Judiciary
3. **Judiciary**
4. Bureaucracy

You'll find tons of ancillary materials and links to all the videos and materials at http://politicsstudio.wikifoundry.com/page/Judiciary

Day 1- Introduction to Judiciary

Time
- 60 minutes of prep 60 minutes of class time

Materials - Attached
- **Unit 4 Schedule - Judiciary**
- **Institutions of Government Review: *Last One Standing* (for teachers only)**
- **Judiciary Introduction Guide (for teachers only, do NOT copy for students)**
- **Judiciary Fact Sheet and Key**
- **Judicial Video Intro Graphic Organizer**
- **Autonomous Learning Teams**
- **Alexander Hamilton & Federalist No. 78**

Materials - <u>Not Attached</u>
- **Judiciary Test Review Material** https://www.jonathanmilner.org/lessons/gopo-pro

Agenda
- Today's AIM: **A**genda, **I**ntent (goals), & **M**aterials
- Infographic
- Institutions of Government Review
- Judiciary Introduction
- Autonomous Learning Teams
- Homework and tweet recap

AIM - Go over **A**genda, **I**ntent – *introduction to judiciary*, & **M**aterials

Infographic - Find today's infographic at https://www.jonathanmilner.org/starters/

Institutions of Government Review: *Last One Standing*

Judiciary Introduction - See **Judiciary Introduction Guide** (attached)

Autonomous Learning Teams
Line the class up from oldest to youngest. Randomly group the students into teams of 4. explain how **Autonomous Learning Teams** works and have teams generate a question.

Homework
Read **The Federalist No. 78** and complete **Alexander Hamilton & Federalist No. 78**

Tweet Recap
Students do the following to be shared tomorrow in class with your colleagues:
On paper or on Twitter, share one interesting thing you learned in class today #apgopo.

Unit 4 Schedule - Part 3 - Judiciary

Day	Topic	Assignment Due
1	Introduction to the Judiciary	Come to class ready to learn, learn, learn!
2	Alexander Hamilton & Federalist No. 78	Alexander Hamilton & Federalist No. 78
3	Federal Justice Simulation	Federal Justice Simulation + Autonomous Learning Teams Source List
4	Supreme Court Introduction	Supreme Court Terms
5	Judicial Philosophy	Write: are you a judicial conservative or judicial activist and why? Autonomous Learning Teams Story Board
6	Judiciary Journal Review Round Robin Autonomous Learning Teamwork	Judiciary Journal Review
7	Autonomous Learning Teams	Autonomous Learning Teams Sharing
8	Judicial Selection	Judicial Action Sharing
9	Supreme Court Case Project Day 1	**Landmark Supreme Court Case Project**
10	Supreme Court Case Project Day 2 Review Day*	All tests and reviews available at https://www.jonathanmilner.org/lessons/gopo-pro

*The judiciary unit will be covered in the **Judiciary and Bureaucracy Test** which is given at the end of the next section.

Judiciary Goals

By the end of the Judiciary section of unit IV, students will know:

1. Powers of the Judiciary
2. Core concepts of judicial philosophy
3. How a case moves through the judicial branch
4. The judicial appointment process
5. Act on their knowledge

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Institutions of Government Review

Institutions of Government Review: *Last One Standing*
Get in teams of 4. Give each team a #.
Teams list any 5 express powers of President.
In order, ask teams to name one express power of President.
If a group lists a power that is in the Constitution, write it on the board.
If a teams lists a power that is NOT in the Constitution, they are out & exiled to Canada.
Call on all the groups, in order, until there is only one group that is still naming accurate express powers. They are the winner.

Judiciary Introduction Guide

Judiciary Brainstorm Introduction for Students

- On your **Judiciary Schedule** do the following:
- List 3 facts you know about the judiciary:
- Write 1 thing you'd like to learn or 1 question about the judiciary, e.g.:
  Project Polls Everywhere onto your overhead:
  https://www.polleverywhere.com/free_text_polls/IzH9ewAVq2jfnOy
    - Why do we have 9 justices on the Supreme Court?
    - Why don't we hold elections for federal judges?
    - What happens if the president doesn't want to enforce judicial rulings?
- Brainstorm the three main Constitutional powers of the Judicial branch:
- We'll learn more about judicial powers in our homework tonight & in the unit.

Judiciary Goals

By the end of the Judiciary section of unit IV, students will:

1. Know the major powers of the judiciary
2. Understand the core concepts of judicial philosophy
3. Be able to describe how a case moves through the judicial branch
4. Understand the judicial appointment process
5. Act on their knowledge

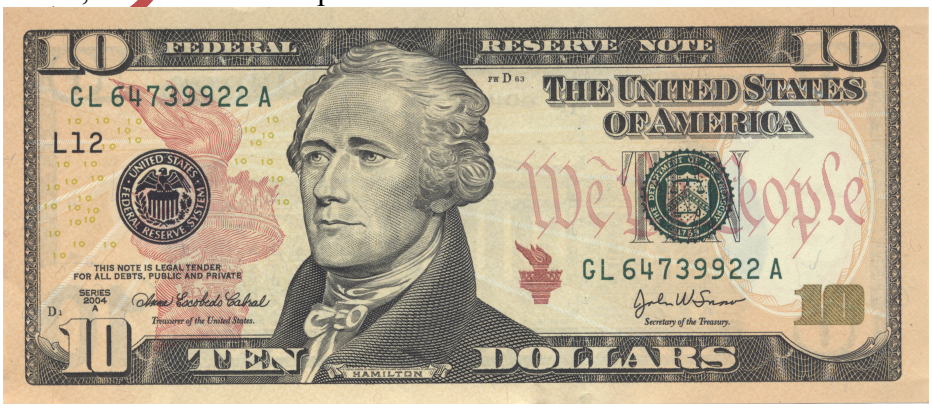
Judiciary Fact Sheet

Each page of the judicial fact sheet contains many truths and one lie. On each page, put an X next to the number that you believe is a lie and put a star next to the number that is the most interesting, curious, or surprising fact. Have students share their favorite and most dubious facts in teams of four for four minutes then in entire class. As a class, go over all the questions paying special attention to falsehoods.

Judiciary Video Intro with Graphic Organizer

http://politicsstudio.wikifoundry.com/page/Federal+Justice+System

Students will complete the **Judiciary Video Graphic Organizer** as they watch the justice introduction videos at above link. We will share findings in class tomorrow. If you run out of time, students can complete this for homework or in class tomorrow.



Judicial Fact Sheet

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1. The Constitution sets forth no specific requirements for becoming a federal judge. Members of Congress, however, who typically recommend potential nominees, and the Department of Justice, which reviews nominees` qualifications, have developed their own informal criteria. There are no technic, legal, or constitutional boundaries to you or even your little brother or sister becoming a federal judge. Still, it's probably not going to happen.

2. The first Catholic justice was Justice Roger Taney who was appointed in 1836. The first Jewish justice was Louis Brandeis, appointed in 1916. The first justice with a hipster beard was Morrison Waite, appointed in 1874. The first African-American justice was Thurgood Marshall, who before being appointed to the bench in 1967 argued the landmark Brown versus Board decision. The first female justice to sit on the Supreme Court was Arizona's Sandra Day O'Connor, appointed in 1981. The first Latino justice to join the Supreme Court was Sonia Sotomayor, appointed by Barack Hussein Obama in 2009.

3. Today, the average tenure of a Supreme Court Justice is 15 years and the average age of the Supreme Court Justices is 71. Throughout US history, 1/3 of all Supreme Court justices have served beyond age 75.

4. The average age of the current Supreme Court of the United States (SCOTUS) is older than the average age of the Rolling Stones.

5. Over one million state and federal laws were passed between 1954 and 2002, but the Supreme Court struck down only 555 of these laws. That's less than 0.054%. To put it a different way, for every 5,000 state and federal laws passed, the Supreme Court will only strike down 3.

6. When the first session of the Court convened in 1790, the tradition of justices wearing wigs still lingered. Justice William Cushing was the only justice to arrive at the court wearing the white wig he had worn on the Massachusetts bench. The ribbing he took from boys outside the court apparently turned the tide against the headgear, and he took the advice of Thomas Jefferson: "For heaven's sake, discard the monstrous wig which makes the English judges took like rats peeping through bunches of oakum."

7. Images sculpted into the building pay tribute to a diverse set of historical lawmakers and icons of justice, which include the Pope's miter, an English crown, Confucius, Moses, Muhammad, Napoleon, and the Ten Commandments.

8. During the Supreme Court's first term (1790) it had no docket & made no decisions. When the nation's capitol moved to Washington D.C., in 1800 it did not even have a courtroom. Congress provided a small committee room in the basement of the Capitol, where the Court remained until the Civil War. **The Court** was housed in the Old Senate Chamber from 1861 to 1935. The chamber wasn't spacious; the justices ate lunch in the robbing room. Chief Justice William Howard Taft led the drive for a Supreme Court building, which opened in 1935.

9. Article III federal judges are appointed for life, and they can only be removed through an impeachment process.

10. In 1789, the Chief Justice's salary was $4,000, while associate justices made $3,500. By 2015, the Chief Justice's salary had risen to $258,100, with associate justices receiving $246,800.

11. The tradition of the "conference handshake" began with Chief Justice Melville W. Fuller in the late 1800s. Before they take their seats at the bench, each justice shakes hands with the others. Chief justice Fuller cited the practice as a way to remind justices that, although they may have differences of opinion, they share a common purpose.

12. The longest serving justice was William O. Douglas, who retired in November 1975, after 36 years and six months on the bench. John Rutledge had the briefest Court tenure. He was appointed chief justice and served for four months, at which point the Senate rejected his nomination.

13. Samuel Chase was the only Supreme Court justice to be impeached. The politically motivated charges failed in the Senate, however, in 1805.

14. During the Supreme Court's third term (1796) Chief Justice Oliver Ellsworth convinced the other justices to start wearing clothes underneath their robes.

15. The last Democrat to name a Supreme Court Chief Justice was Harry S. Truman.

16. A Supreme Court term begins on the first Monday in October, and runs through late June or early July. The term is divided between "sittings" for the hearing of cases and delivering of opinions, and intervening "recesses" for the consideration of the business before the Court and writing of opinions. Sittings and recesses alternate every two weeks or so.

17. George Washington appointed the most Supreme Court justices (11). Only Franklin D. Roosevelt came close, with 9 appointments. Of all one-term presidents, Taft appointed the most Supreme Court justices (6). Jimmy Carter is the only president to serve a full term without nominating a Supreme Court justice.

18. Two Supreme Court Justices have been featured on U.S. currency: Salmon P. Chase on the $10,000 bill and John Marshall on the $500 bill. Marshall was replaced by William McKinley (the 25th president) before all such bills were discontinued in 1969.

19. Justice Byron ("Whizzer") White is the only justice to be in the College Football Hall of Fame.

20. The youngest Supreme Court appointee was Joseph Story (32). The oldest sitting justice was Oliver Wendell Holmes, who served until he was 90.

21. William H. Taft was the only president to also serve as a Supreme Court justice**, but not the only presidential candidate.** Charles Evans Hughes came very close to defeating Woodrow Wilson in 1916 for the White House. Hughes resigned from the court to run against Wilson, and he later rejoined the court in the 1930s as its chief justice, replacing Taft.

22. John Marshall Harlan II served from 1955 to 1971. His grandfather was the legendary John Marshall Harlan, who served on the court from 1877 to 1911. The elder Harlan was known as the Great Dissenter for his opposition to rulings that promoted Jim Crow laws in the South.

23. The famous 1960s group, Diana Ross and the Supremes were named after the Supreme Court in honor of the landmark Tinker versus Des Moines ruling.

24. On January 7, 1972, Lewis F. Powell Jr., and William H. Rehnquist were sworn in during a special sitting of the court. When two justices join the court on the same day, seniority is determined by age.

25. In recent years, the court has received some 10,000 annual requests to review cases, but hears only about 80. The justices usually only take on cases involving significant legal principles or cases in which lower courts have disagreed about the interpretation of federal laws. Most of the court's cases come to it on appeal from lower federal courts and state courts; however, the Supreme Court has original jurisdiction (the right to hear a case for the first time, before any appellate review) in a few instances, such as cases involving ambassadors or disputes between two or more states. Because the justices primarily hear cases on appeal, it's uncommon for witnesses or evidence to be presented in court. Instead, attorneys submit written legal arguments (briefs) in advance and justices typically listen to oral arguments, in which each side has 30 minutes to make a presentation, during which the justices can ask questions. (The courtroom is open to the public during oral arguments, which are not allowed to be televised or photographed; since 1955, the court has made audio recordings of oral arguments, which are released after the arguments are over.) The justices later meet in private to discuss and vote on each case. In the event of a tie vote, the decision of the lower court is upheld.

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Judiciary Video Intro Graphic Organizer

Watch the video introduction to the federal justice system. The video is rated R so make sure you've gotten a permission slip signed by your parents before you watch it.*
http://politicsstudio.wikifoundry.com/page/Federal+Justice+System

Did you know that the video you are watching won an Oscar for best video about the judiciary? More people deserve to see this wonderful film. Let's help promote it!
What would be a good title for the video that will make moviegoers flock to the cinema?

You are the person who writes press releases for newly released movies. You want to explain very succinctly to your potential audience what the video is about. Write a blurb of just a few sentences to summarize the video and what is so amazing about it:

List two questions you have about the information from this video:

List three facts you know about the judiciary thanks to this Oscar winning video:

List one thing you understand about the judiciary (understanding means going beyond the facts to make some sense or meaning out of the information. It's hard to do. Try it.):

On the back of this sheet, make a graphic organizer, flow chart, or some sort of visual representation to help you organize the information from the video.

* Not really

Autonomous Learning Teams

It's time for you to **pursue** your **curiosity**.
Team Member Names:

¿What are **two question** about the judiciary that **interest you**?
In five minutes, you will give the teacher a draft of your 2 questions.
1-

2-

By the end of class, the teacher will help you choose 1 unique question to pursue.
The Big Question:

In **two days**, each team will be expected to give the teacher a list of three specific sources you will use for research in order to answer the question. For example:
Article on The Supreme Court and Public Opinion; Federal Judicial Center website on how cases move through courts; C-SPAN Virtual Tour of Supreme Court.

In **four days**, each team will be expected to give the teacher a storyboard (rough draft) of your presentation on their answer to the question. This could be written, drawn, or in a PowerPoint slideshow.

In **six days**, each team will be expected to share a five-minute presentation of their question and what they learned as they tried to answer it.
The team presentation may be completely offline, with white board, triptych, or poster board; or online as a Prezi, Tumblr, blog, or other digital archive.

Some examples of **curious questions** to pursue include:

- How much power does the court have?
- Is the judiciary the most powerful branch?
- What would happen if our justices didn't serve for life?
- How has the justice system changed over the years?
- Has a Supreme Court Justice ever been impeached and if so how did the trial work?
- How does the court affect us in our everyday life?
- What is the most important SCOTUS case of the 20th century? Of the 21st century?
- If you could have dinner with any member of SCOTUS, who would it be and why?
- Because of the court, what kind of rights do students have?
- Who is the most influential justice ever?
- How does the US justice system differ from other judiciaries around the world?
- What would the framers have thought about the current justice system?

ALEXANDER HAMILTON & *FEDERALIST NO. 78*

http://www.constitution.org/fed/federa78.htm
1787
Answer any 24 of the following

1. Alexander Hamilton wrote that, "*The judiciary …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."* Wait a second, what did Hamilton just say? Could you please translate the preceding Hamilton quote into a 140-character Tweet:

2. Do you agree with Hamilton that the judiciary is the least dangerous branch?

3. And if Hamilton is correct that the judiciary is the lest dangerous branch, in your humble opinion, what is the most dangerous branch?

4. And could you prove it with a fact or two, please:

5. Furthermore…sayeth Hamilton, *"The judiciary has no influence over either the sword or the purse. It may be said to have neither FORCE nor WILL but merely judgment," What* does Hamilton mean by the *"sword"* and the *"purse"?*

6. And what is that FORCE and WILL stuff and why did he capitalize it (he really did)?

7. Hamilton goes on to write, that the power of the judiciary "*must depend upon the aid of the executive arm even for the efficacy of its judgments."* What does that mean?

8. And once you figure out what that quote means, do you think Hamilton is correct?

9. How much power would the judiciary have if there were no executive branch?

10. But wait, Hamilton's not done… *"It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power."* Based on the checks and balances written into the Constitution, and the actual contemporary behavior of the government, do you agree with Hamilton's assessment in his preceding quote?

11. Now Hamilton's going to get off the relative powers of the branches riff and get to the part about an independent judiciary. He writes, *"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."* What does independence mean?

12. What is Hamilton arguing for here, and do you agree with him?

13. In your opinion, what would happen if we had elections for Supreme Court Justices?

14. Now Hamilton turns his attention to another aspect of the judiciary… *"The complete independence of the courts of justice is peculiarly essential in a limited Constitution…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."* What practice of the federal courts does this argument support?

15. "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." According to the quote by Hamilton above, when laws and the constitution collide, who wins?

16. *"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."* According to Hamilton, who should be the keeper of the constitutional conscience?

17. According to Hamilton, which is more valid and important, laws or constitution?

18. According to Hamilton, what should judges do when laws stand in opposition to the Constitution?

19. In your opinion, does all of this empower judges and the judiciary too much?

20. Use a direct quote from Federalist 78 to answer the following. Why, Mr. Hamilton, should judges serve for life?

21. Use a direct quote from Federalist 78 to answer the following. What, Mr. Hamilton, should happen when laws are un-Constitution?

22. If you rewrote the Constitution today (don't do it), how would you change the judiciary?

23. Overall, does Hamilton's argument convince you?

24. When the Supreme Court recently ruled that laws limiting same-sex marriage are unconstitutional there was a backlash from many people who said that the justices were, "making law." What would Hamilton say to that?

The Federalist No. 78

The Judiciary Department

Independent Journal
Saturday, June 14, 1788
[Alexander Hamilton]

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

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.

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; the precautions for their responsibility.

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 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 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.

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[1]; 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."[2] 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, 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 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 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.

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.

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.

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 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.

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.

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.

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 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 friends of the proposed Constitution will never concur with its enemies,[3] 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 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 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.

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.

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 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.

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.

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