AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 3: The Founding Era – Judicial Power and Constitutional Authority

An Elector, [James Iredell], **"To the Public"** (1786)[1]

Though only in his 20s, James Iredell became the intellectual leader of the revolutionary movement in North Carolina and a leading lawyer in the United States. After independence, he played a critical role in organizing the state judiciary and establishing its legal system. Although he did not attend the Philadelphia Convention, he was a principal Federalist in the anti-Federalist state. He was the youngest of George Washington's first selections for the U.S. Supreme Court, but his influence on the Court was cut short by his early death in 1799.

On the occasion of this essay's publication in the North Carolina newspapers, Iredell was involved in a case that was before the state supreme court. He argued that the state law at issue violated the North Carolina constitution. The law required the courts to dismiss suits to recover property that had been confiscated from British loyalists and sold by the state. Iredell was one of the lawyers representing Elizabeth Cornell Bayard, whose Loyalist father had deeded his estate to her before fleeing the state. North Carolina had nonetheless confiscated the estate and sold it Spyers Singleton. Bayard sued to recover the property, but the statute blocked her way. The court had delayed ruling on the constitutional issue as the judges tried to mediate a settlement between the parties. During the delay, Iredell took to the newspapers to build for his position that the judges could and should strike down the law as unconstitutional. The parties would not settle, and the court ruled on the motion the next year in the case of Bayard v. Singleton *(1 N.C. 5 [1787]). Bayard was the first case in which the North Carolina Supreme Court struck down a state law as unconstitutional. Iredell's argument in this article was one of the first defenses of the idea of judicial review ever published.*

When the court handed down its ruling, Iredell's friend Richard Spaight was serving as a North Carolina delegate to the federal constitutional convention in Philadelphia. Spaight wrote Iredell from Philadelphia expressing his doubts about this new power of judicial review. In his response, Iredell elaborated on the importance of such a power in the American constitutional system.

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I have not lived so short a time in the State, nor with so little interest in its concerns, as to forget the extreme anxiety with which all of us were agitated in forming the constitution, a constitution which we considered as the fundamental basis of our government, unalterable, but by the same high power which established it, and therefore to be deliberated on with the greatest caution, because if it contained any evil principle, the government formed under it must be annihilated before the evil could be corrected. It was, of course, to be considered how to impose restrictions on the legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. . . . We . . . should have been guilty of the basest breach of trust, as well as the grossest folly, if in the same moment when we spurned at the *insolent despotism* of great Britain, we had established a *despotic* power among ourselves. Theories were nothing to us, opposed to our own severe experience. We were not ignorant of the theory *of the necessity of the legislature being absolute in all cases*, because it was the great ground of the British pretensions. . . . Other governments have been established by chance, caprice, or mere brutal force. Ours, thank God, sprang from the deliberate voice of the people. We provided, or meant to provide . . . for the security of every individual, as well as a fluctuating majority of the people. We knew the value of liberty too well, to suffer it to depend on the capricious voice of popular favor, easily led astray by

[1]Excerpt taken from James Iredell, *Life and Correspondence of James Iredell*, ed. Griffith J. McRee, vol. 2 (New York: D. Appleton and Company, 1858), 145–149, 168–170.

designing men, and courted for insidious purposes. Nor could we regard, without contempt, a theory which required a greater authority in man than (with reverence be it spoken) exists even in the Supreme Being. For His power is not altogether absolute—His *infinite power* is limited by His *infinite wisdom*.

I have therefore no doubt, but that the power of the Assembly is limited and defined by the constitution. It is a *creature* of the constitution. (I hope this is an expression not prosecutable.) The people have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit upon any other; and the Assembly have no more right to obedience on other terms, than any different power on earth has a right to govern us; for we have as much agreed to be governed by the Turkish Divan as by our own General Assembly, otherwise than on the express terms prescribed.

There are consequences that seem so natural, and indeed so irresistible, that I do not observe they have been much contested. The great argument is that though the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the meantime, their act, whatever it is, is to be obeyed as a law; for the judicial power is not to presume to question the power of an act of Assembly.

To these positions, not unconfidently urged, I answer: –

1. That the remedy by petition implies a supposition, that the electors hold their rights by the *favor of their representatives*. The mere stating of this is surely sufficient to excite any man's indignation. What if the Assembly say, we shall elect only once in two years, instead of electing annually, are we to petition them to repeal this law? To request that they will be graciously pleased not to be our tyrants, but to allow us the benefit of the government we ourselves have chosen, and under which they alone derive all their authority?

But 2. The whole people may resist. A dreadful expedient indeed. We well know how difficult it is to excite the resistance of a whole people, and what a calamitous contingency, at best, this is to be reduced to. Bu it is a sufficient answer, that nothing can be powerful enough to effect such a purpose in a government like ours, but *universal oppression*. A thousand injuries may be suffered, and many hundreds ruined, before this can be brought about. . . . How many things have been done by majorities of a large body in *heat* and *passion*, that they themselves afterwards have repented of! Besides, would the *minority* choose to put themselves in the power of a majority? Few men, I presume, are always in a *majority*. None, therefore, could have even a chance of being secure, but sycophants that will forever sacrifice reason, conscience, and duty, to the preservation of a temporary popular favor. . . .

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These two remedies then being rejected, it remains to be inquired whether the judicial power hath any authority to interfere in such a case. The duty of that power, I conceive, in all cases is to decide according to the *laws of the State*. It will not be denied, I suppose, that the constitution is a *law of the State*, as the *fundamental* law, and unalterable by the legislature, which derives all its power from it. One act of Assembly may repeal another act of Assembly. For this reason, the latter act is to be obeyed, and not the former. An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is void, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of assembly they presume to enforce is warranted by the constitution, since if it is not, the act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people*, not *mere servants of the Assembly*. And the danger, about which there is so much alarm, attending the exercise of this power is, in my opinion, the least that can be imagined to attend the exercise of any important power whatever. For the judges, besides the natural desire which must be entertained by every man living in a popular government, of securing the favor of the people, are in fact dependent on the Assembly; for though their duration in office is permanent, at least as long as the act is in being which establishes their court, *their salaries are precarious*; and in fact are they only nominally independent in point of station, when the Assembly may every session determine how much they shall have to subsist upon. . . . [T]he dependence here . . . may in some instances produce an actual bias the other way, which, in my humble opinion, is the great danger to be apprehended.

But it is said, if the judges have this power, so have the county courts. I admit it. The country courts, in the exercise of equal judicial power, must have equal authority. But every argument in respect

to the judges (except their dependence for salary), and other obvious ones, occur in great fore against this danger, besides the liberty of appeal, which ultimately rests every thing, almost, with the superior courts. The objection, however, urged by some persons, that sheriffs and other *ministerial* officers must exercise their judgment too, does not apply. For *if the power of judging rests with the courts*, their decision is final as to the subject matter. Did ever a sheriff refuse to hang a man, because he thought he was unjustly convicted of murder?

Richard Dobbs Spaight, Letter to James Iredell (1787)

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The late determination of our judges at Newbern, must, in my opinion, produce the most serious reflections in the breast of every thinking man, and of every well-wisher to his country. It cannot be denied, but that the Assembly have passed laws unjust in themselves, and militating in their principles against the Constitution. . . . I do not pretend to vindicate the law, which has been the subject of controversy: it is immaterial what law they have declared void; it is their usurpation of the authority to do it, that I complain of, as I do most positively deny that they have any such power; nor can they find any thing in the Constitution, either directly or impliedly, that will support them, or give them any color of right to exercise that authority. Besides, it would have been absurd, and contrary to the practice of all the world, had the Constitution vested such powers in them, as they would have operated as an absolute negative on the proceedings of the Legislature, which not judiciary ought ever to possess . . . If they possessed the power, what check or control would there be to their proceedings? Or who is there to take the same liberty with them, that they have taken with the Legislature, and declare their opinions to be erroneous? None that I know of. . . .

It must be acknowledged that our Constitution, unfortunately, has not provided a sufficient check, to prevent the intemperate and unjust proceedings of our Legislature, though such a check would be very beneficial, and, I think, absolutely necessary to our well-being: the only one that I know of, is the annual election, which, by leaving out such members as have supported improper measures, will in some degree remedy, though it cannot prevent, such evils as my arise. . . .

James Iredell, Letter to Richard Dobbs Spaight, (1787)

. . . . In a republican Government (as I conceive) individual liberty is a matter of the utmost moment, as, if there be no check upon the public passions, it is in the greatest danger. The majority having the rule in their own hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit? These considerations, I suppose, or similar ones, occasioned such express provisions for the personal liberty of each citizen, which the citizens, when they formed the Constitution, chose to reserve as an unalienated right, and not to leave at the mercy of any Assembly whatever. The restriction might be attended with inconvenience; but they chose to risk the inconvenience, for the sake of the advantage; and in every transaction we must act in the same manner: we must choose between evils of some sort or other: the imperfection of man can never keep entirely clear of all. . . . It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another. . . . Suppose . . . that the Assembly should repeal the law naming the day of election, (for that is not named in the Constitution,) and adjourn to a day beyond it, and pass acts and these acts be attempted to enforced in the courts. Must not the court decide whether they will obey such acts or no? And would it be approved of (except by a majority of the *de facto* Assembly) if they should say, "We cannot presume to declare that the Assembly, who were chosen for one year have exceeded their authority by acting after the year expired." It really appears to me, the exercise of the power is unavoidable, the Constitution not being a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot willfully blind themselves.