AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Jacksonian Era—Federalism

Rice v. Foster, 4 Del. 479 (1847)

Edward Rice leased a tavern to John Foster. Their contract specified that the precise rent would depend on whether Foster had the legal right to obtain a license to sell intoxicating liquors. In February 1847, the state legislature of Delaware passed a law giving all counties the right to decide by referendum whether judges should have the right to grant or recommend that persons be given liquor licenses. This is commonly referred to as the local option. Two months later, the citizens of New Castle County, where the Rice/Foster tavern was located, decided by majority vote that no licenses would be issued in that county. When Foster paid the lower rental fee, Rice sued. His lawsuit claimed that Foster was obligated to pay the higher fee because the state law mandating the local option was unconstitutional.

The Court of Errors and Appeals of Delaware unanimously ruled that the state local option law was unconstitutional. Chief Justice Booth's opinion maintained that the state legislature could not delegate to local majorities the power to determine whether to prohibit alcohol. Booth begins his opinion with a general analysis of basic constitutional principles. What are those constitutional principles? How does he derive his conclusion from those principles? Is he right that referenda are anti-Republican? What method of constitutional interpretation does Booth employ? Are his methods similar to those used in the twenty-first century or are they distinctive to his time and place?

BOOTH, CHIEF JUSTICE

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The proposition that an act of the legislature is not unconstitutional unless it contravenes some express provision of the constitution is, in the opinion of this court, untenable. The nature and spirit of our republican form of government; the purpose for which the constitution was formed, which is to protect life, liberty, reputation and property, and the right of all men to attain objects suitable to their condition without injury by one to another; to secure the impartial administration of justice; and generally, the peace, safety and happiness of society, have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass. An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning; and can have no more obligatory force, than when it opposes some express prohibition contained in that instrument. It is irrational to maintain, that such an act is a law, when it defeats the very object and intention of granting legislative power. Therefore an act, such as that mentioned in the argument, to make a man a judge in his own cause, would not be valid; because it never was the intention of the constitution to vest such power in the legislature, the exercise of which violates the plainest principles of natural justice. So also an act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government. . . .

The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the Constitution of the United States, and of the first constitution of this State, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism. Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker: the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate it by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party, acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of revolutionary France, in the days of her short-lived, misnamed republic, shocked the friends of rational liberty throughout the civilized world. There, in the midst of the most refined and polished nation of Europe, the guillotine dispensed with the forms of law as unmeaning pageants; and under the capricious mandates of popular frenzy, running wild in pursuit of the phantom of a false, licentious liberty, "suspicion filled their prisons, and massacre was their gaol delivery."

In the convention of 1787, which formed the Constitution of the United States, the spirit of insubordination, and the tendency to a democracy in many parts of our country, were viewed as unfavorable auguries in regard both to the adoption of the constitution, and its perpetuity. The members most tenacious of republicanism, were as loud as any in declaiming against the vices of democracy. Mr. Gerry, of Massachusetts, the friend and associate of Mr. Jefferson, thought it "the worst of all political evils." The necessity of guarding against its tendencies, in order to attain stability and permanency in our government, was acknowledged by all. Even the propriety of electing by an immediate vote of the people, the first branch of the national legislature, was seriously questioned by some of the ablest members, and warmest advocates of a republican form of government. . . . In the debates on the federal constitution in the Virginia convention, Mr. Madison, always the advocate of popular rights, subject to the wholesome restraints of law, remarked, "that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions; and that these in republics, more frequently than any other cause, have produced despotism." . . . To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority.

The Constitution of the State of Delaware begins by asserting the great principles on which it is founded; and the aim and object of establishing our form of government. The first article contains a declaration of those inherent rights which belong to every individual in society; of certain restrictions imposed on the legislative, executive, and judicial power; and of the right of the citizens to meet together in an orderly manner, and to apply to persons entrusted with the powers of government, for redress of

grievances, or other proper purposes, by petition, remonstrance, and address. . . . The same article of our constitution concludes with a declaration in the name of the people, that everything contained in that article is reserved by them, out of the general powers of government thereinafter granted. All powers therefore, not reserved, are surrendered by the people to those entrusted with the powers of government, to be exercised only in accordance with the principles and design of the constitution, and the genius of our republican system. . . . The sovereign power therefore, of this State, resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution, and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance, or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. And although the people have the power, in conformity with its provisions, to alter the constitution; under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government. It is equally clear, that neither the legislative, executive, nor judicial departments, separately, nor all combined, can devolve on the people, the exercise of any part of the sovereign power with which each is invested. The assumption of a power to do so, would be usurpation. The department arrogating it, would elevate itself above the constitution; overturn the foundation on which its own authority rests; demolish the whole frame and texture of our republican form of government, and prostrate everything to the worst species of tyranny and despotism, the ever varying will of an irresponsible multitude. The powers of government are trusts of the highest importance; on the faithful and proper exercise of which, depend the welfare and happiness of society. These trusts must be exercised in strict conformity with the spirit and intention of the constitution, by those with whom they are deposited; and in no case whatever can they be transferred or delegated to any other body or persons; not even to the whole people of the State; and still less to the people of a county. It is a plain proposition of law, that a power, or authority, vested in one or more persons to act for others, involving in its exercise judgment and discretion, is a trust and confidence reposed in the party, which cannot be transferred or delegated. The making of laws is the highest act of sovereignty that can be performed in a free nation; and, therefore, the legislative power may be truly said to be the supreme power of a State. Its exercise requires superior intellectual faculties, improved by study and experience; although it seems to be a common notion with many pretended advocates of popular rights at the present day, that every man is instinctively fitted to be a member of the legislature. If the legislative functions can be transferred or delegated to the people, so can the executive or judicial power. The absurd spectacle of a governor referring it to a popular vote, whether a criminal, convicted of a capital offence, should be pardoned or executed, would be the subject of universal ridicule: and were a court of justice, instead of deciding a case themselves, to direct the prothonotary to enter judgment for the plaintiff, or defendant, according to the popular vote of a county, the community would be disgusted with the folly, injustice, and iniquity of the proceeding. All will admit, that, in such cases, the people are totally incompetent to decide correctly. Equally incompetent are they to exercise with discernment and discretion, collectively, or by means of the ballot-box, the power of legislation; because, under such circumstances, passion and prejudice incapacitate them for deliberation; and the tricks of demagogues, excited feelings, party animosities, and the corrupting influences always brought to bear upon popular elections, would banish reason, reflection, and judgment. If the delegation of the legislative power of the State to the people of a county, to make laws through the medium of a ballot-box; involving in it an abandonment by the legislature, of the trust reposed in them, which they have sworn to execute with fidelity; does not seem to many persons to be destructive of the constitution, and to lead to all the dangers of a democracy, against which the founders of our government were so anxious to guard; it can be only because it is presented under the specious

appearance of a profound deference and devotion to the popular will; and because its destructive tendencies are clouded and obscured by the incense of adulation offered to the majesty of the people.

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. . . . If the members of the legislature, by the convictions of their own judgment, were assured that the sad evils of intemperance flowed from the existence of these laws, it was their duty to repeal them; or to introduce such modifications as might destroy their baneful influence. This course was required of them, although the will of the constituents of many of the members might have been opposed to it. The doctrine of the common law is, that a member of a legislative body, although elected by a particular county or district, is bound, in the performance of his functions, to act not merely for the benefit of his own constituents, but for the whole State. The opinions and will of his constituents ought always to command the most respectful attention; but if clearly opposed to his deliberate judgment, to the principles of the constitution, to the dictates of sound morality, or to the public welfare; as an honest and upright man, he ought not to obey them. The representative (says Mr. Burke) owes to his constituents, not only his industry, but his judgment; and he betrays, instead of serving them, if he sacrifices it to their opinions. Our legislature, acting with the best intentions, and following the precedents set by the legislatures of other States, the constitutionality of which had never been brought to the test of a legal decision, declined the responsibility which it was their duty to assume; and thus devolved the performance of their trust on the people of each county; in order that a majority, on whom no responsibility rested, might decide a question, which none had the authority to decide, but the legislature.

The laws licensing the sale of spirituous and vinous liquors are valid laws; and must remain in full force, until repealed or modified by the regular and constitutional exercise of the legislative power; by a law passed by the Senate and House of Representatives, in General Assembly met. No such law has been, or was intended to be passed by the legislature. . . .

. . . . [T]he legislature are invested with no power to pass an act, which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body, by whose will also existing laws are to be repealed, or altered and supplied. The act of the 19th of February, 1847, is of this character. In a legal sense, it is not a law; it is not complete and positive in itself. It is not a rule prescribed by the supreme power of the State to its citizens, enforcing some duty or prohibiting some act; but was to become a rule only when enacted or sanctioned by the popular vote of a county; and then to be a rule prescribed not by the constitutional legislative power of the State, but by the power of the majority in a county over the minority. . . .

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But the defendant's counsel contend, that the act of February, 1847, is valid, because it is merely a conditional act; to take effect upon a contingency, upon the result of a popular election. Admitting it in that sense of the term to be a conditional act, and further, that it is an act perfect and complete in itself, and instead of giving power to the people of a county to repeal, enact, change, and re-enact laws, it expressly repealed the license laws and prohibited the sale of intoxicating liquors in every part of the State; but before it shall go into operation, let us suppose that it is to be submitted to the vote, not of the people of a county, but of the people of the whole State, for their approval or disapproval. If approved by the majority, it is to become a law; if disapproved, it is not to become a law. This presents the case in the most favorable point of view for the defendant. But were such the character of the act, it would as clearly be unconstitutional, as it is in its present form. In the one case, the people of the State are constituted a component part of the legislature: in the other, the legislative power of the State is delegated to the people of a county. In the former case, a new power in legislation is introduced, unknown to the constitution; but which the legislature undertake to grant, by requiring the assent or dissent of the people to the enactment of laws; a power commonly called the veto power; and which was expressly refused to the executive, by

the convention that formed the constitution. In the latter case, by vesting the law making power in the people, the legislature venture to introduce a pure democracy, and thus to subvert the constitution of this State, and infringe upon that of the United States, which guarantees to every State, a republican form of government. The very object of having two distinct branches of the legislature, and each to act separately from the other, is, to avoid hasty and precipitate legislation, and the evils arising in single assemblies, from passion, prejudice, party animosities, and the intrigues of demagogues. If the legislature were to pass a bill, not by the action of each house separately, (the course prescribed by the common law,) but by both houses in joint meeting, it would be void. But they assume the power of authorizing the people collectively, not of the State, but of a county, to make a law, which the legislature themselves collectively, cannot make.

. . . . The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the worst evils that can befall a republican government; and the legislation depending upon them, must be as variable, as the passions of the multitude. Each county will have a code of laws different from the others; murder may be punished with death in one; by imprisonment in another; and by a fine in a third: slavery may exist in one, and be abolished in another. The law of to-day will be repealed or altered to-morrow, and everything be involved in chaos and confusion. The General Assembly will become a body merely to digest and prepare legislative propositions; and their journals a register of bills to be submitted to the people for their enactment. Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary, and excited majorities, will be thrown down; and a pure democracy, "the worst of all political evils," will hold its sway under the hollow and lifeless form of a republican government.

HARRINGTON, JUSTICE.

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It is conceded by all that legislative power cannot be delegated. That case assumes that the legislature may pass a conditional law. Both of these propositions are true. The error in the argument is in supposing them to be alternative or inconsistent. Doubtless, the legislature may pass many conditional laws; but there are many conditions that would make such laws improper. A law opening a road, on condition that the owner of the land over which it passes will give it for that purpose: a law for building a bridge, on condition that individuals will contribute to the cost in certain proportions: a law altering, abridging or enlarging the vested powers of corporations aggregate, subject to the consent of such corporations; or a law giving to school districts a portion of the school fund, on condition that such districts will raise an equivalent or proportional sum—are all instances of proper conditional legislation; even though the assent of the corporators in the one case to the change of their charter, or of the district in the other to accept the donation, and comply with its terms, should be signified by a majority vote. These are all good conditions, capable of being performed without in any way interfering with the legislative will. But a law declaring an offence, or providing a punishment, or repealing an existing law, on condition that the Governor, or any other individual, shall assent to it, is as plainly unconstitutional. It is the naked veto power. It substitutes for, or rather adds to, the legislative will, another will which it makes necessary to the existence of the law. This is unconstitutional. No one doubts it. No one will pretend that a law with such a condition would be good. Yet what is the difference in principle between that, and the condition of the act of 1847. It "authorizes the people to decide by ballot," whether a new law of the State shall prevail; whether an old law of the State shall be repealed—nay; it goes further, and authorizes the people of a county again and again to repeal or re-enact this law at pleasure, without any return to the legislature, or further expression of their will. Is not this plainly substituting the will of the people for the

will of the legislature; is it not in fact, abandoning the power of legislation on the subject? What is the subject matter of this act? The policy of permitting any license for the sale of intoxicating liquor. Who can say from this bill what was the judgment of the last legislature on that subject? The bill, instead of announcing the absolute will of the representatives of the people on this question, gives no intimation of their judgment upon it; but "authorizes" the people "to decide" whether this new law, or the old law, shall be the law of the land. This fact, apparent on the face of the act, would seem to be conclusive against it. There is no power but the legislature that can make the retailing of liquor an indictable offence, or repeal an existing law; and the legislature can neither devolve this power upon another, nor call into operation the will or agency of any other power for this purpose. The act in question assumes to do both; but no man can say from the law itself, or from the journals of the legislature, whether it was the judgment and will of any member of that body, that the retailing of liquor should be an indictable offence, or that existing laws on that subject should be repealed. Yet it is this judgment and will of the legislature that is law; if, therefore, the act gives no evidence of legislative will, how can it be a law. Law is a rule of conduct prescribed by legislative power—the result of legislative judgment, and the manifestation of legislative will: this act prescribes no rule, expresses no judgment, manifests no will of the legislature; but leaves it to the judgment and will of the people to "decide by ballot whether the license to retail intoxicating liquors shall be permitted among them." The most that can be possibly claimed for such an act as the expression of legislative will is, that it is to be a law, enacted by the legislature, on condition that a majority of the people of one of the counties approves of it. But this is the very condition which has been conceded to be unconstitutional in the case of a bill subject to the approval of the Governor. What is the difference? A law depending for its existence on the approval of one man, is the same in principle with a law depending on the approval of any number of men, or of the whole people. For it is not pretended that any legislative power resides in the people, any more than in the Governor. What difference is there, then, between the two cases?

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It is true that, in this country, law may be said in one sense to depend on the consent of the citizens; but it is a general consent expressed through their representatives in the act which makes the law, and never depends on subsequent individual approval. The people have agreed to be bound by the judgment and will of their representatives, as expressed in their legislative acts, because all the people are there represented; but they have never agreed to be bound by the judgment and will of a majority of the citizens of any county, where they are in no respect represented. Neither have they ever agreed that their representatives should place them in this dilemma. It is the right and the duty of the representatives of the people in legislature assembled to make the law according to their own judgment. In this judgment the people confide; in this body the people are all represented; and by its judgment, as expressed in the law which it announces, the people are all bound, for the very reason that it is their own act, done by their authorized agents. But when these representatives, by an imperfect legislative act, assume to subject their constituents to the judgment and will of any other body, however numerous; expressed in any other form, however imposing; the delegation of such power is unauthorized and invalid, and the execution of it is not an act of legislation but of usurpation, which the citizen is not obliged, and the other departments of government are not at liberty, to obey.

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THE CHANCELLOR

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