AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era – Separation of Powers

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## Cincinnati, Wilmington and Zanesville, Rail Road Company v. The Commissioners of Clinton County, 1 Ohio St. 77 (1852)

*Ohio, like many states in the early nineteenth century, invested heavily in "internal improvements," the construction of roads, bridges and canals, which were seen as critical engines of growth, linking towns and farms to distant markets. These expensive projects were often undertaken by private companies chartered by the state for that purpose, with the company earning back the investment through tolls. In the rush to build, however, states began to go further – they authorized companies to issue bonds that were backed by the taxpayers. In time, many of these investments proved to be unprofitable, and the states were besieged by creditors. In light of that experience, many state constitutions were revised to prohibit or limit the government's ability create such debts.*

*Ohio's law of March 1, 1851 reflected these pressures and followed a common model. The act authorized the commissioners of Clinton County to buy the stock of a newly formed company that was to build a railroad through the county, but only if the voters of the county first approved the initiative. If the voters approved the measure, the commissioners were to issue bonds to finance the investment and raise taxes to cover any difference between the debt owed and the revenue from the railroad investment. The voters did in fact approve the measure, but the county commissioners refused to issue the bonds. The railroad company sued the commissioners in state court, seeking a writ of mandamus directing the commissioners to issue the bonds.*

*The commissioners argued that the state law was unconstitutional. Most importantly, the commissioners contended that the requirement of voter approval before the law could take effect amounted to a delegation of legislative power from the state legislature itself to the voters of the Clinton County, contrary to the state constitutional requirement that all legislative powers be exercised by the state legislature with its features of bicameralism, statewide representation, and the like. Like the taxpayers in* Sharpless v. Mayor of Philadelphia, *21 Pa. 147 (1853), the commissioners also argued that government could not properly invest in a private company and collect tax revenue for the purposes of financing it. The Ohio court also rejected this argument.*

*The case provided an early and influential statement on the "nondelegation doctrine," the doctrine that legislative powers cannot be exercised by any entity other than the legislature itself. As the judges of the Ohio Supreme Court noted, at stake in the case was the fate of millions of dollars worth of government bonds that had already been issued under similar statutes. More broadly, voter approval before such bonds were issued was seen as an important check on government abuse and corruption, and the case raised the question of whether this innovative mechanism of popular accountability was consistent with the traditional checks and balances embodied in the constitution. In future years, the idea of referenda by which voters could make laws directly without the participation of the state legislature put even more pressure on the idea that all legislative powers were to be exercised by the legislature and no other body. This opinion of the Ohio court shaped those later debates over whether this version of "direct democracy" was constitutional or an inappropriate delegation of legislative power to a set of voters. In upholding the provision for voter approval of bond issues in this case on the grounds that the voters were merely putting into "execution" a law that was already "perfect, final, and decisive in all its parts," the court placed an obstacle in front of later efforts to allow voters to circumvent the legislature entirely and to initiate and make laws directly at the polls.*

JUSTICE RANNEY delivered the opinion of the Court.

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The question thus presented, is one of the very first importance, not only on account of the principles arising, but of the immense interests involved in its determination. . . . But these considerations, important as they must be conceded to be, can have no further influence upon our inquiries, than to induce very careful and mature investigation and deliberation. . . .

. . . . It seems now . . . to be generally, if not universally conceded, that it is the right, and consequently the duty of the judicial tribunals, to determine, whether a legislative act drawn in question in a suit pending before them, is opposed to the constitution of the United States, or of this State, and if so found, to treat it as a nullity. How any doubt could ever have been entertained upon this subject, is a matter of no little astonishment; and yet the history of our own State shows, that the power was, at one time, not only doubted, but positively denied; and judges, for a fearless discharge of this duty, were subjected to impeachment by the house of representatives. The triumph of this great principle, vital to all constitutional government, must be attributed, in no small degree, to a clearer comprehension of the nature and purposes of fundamental laws, and the powers of the legislative body derived from them.

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But while the right and duty of interference in a proper case, are thus undeniably clear, the principles by which a court should be guided, in such an inquiry, are equally clear. . . . It is never to be forgotten, that the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority, and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case. . . .

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But the authority of the General Assembly is much too broadly stated, when it is claimed that all their acts must be regarded as valid, which are not expressly prohibited by the constitution. A moment's attention to principles, which must be regarded as fundamental, in all the American systems of government, will demonstrate the unsoundness of such a conclusion. One of these principles, lying at the very foundation of these systems, and expressly asserted in section 1, article 8, of the [Ohio] constitution of 1802, is, that all political power resides with the people. . . .

They have, therefore, the most undoubted right to delegate just as much, or just as little, of this political power with which they are invested as they see proper, and to such agents or departments of government as they see fit to designate. To the constitution we must look for the manner and extent of this delegation; and from that instrument, alone, must every department of the government derive its authority to exercise any portion of political power. . . .

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From these considerations, it follows that it is always legitimate to insist that any legislative enactment, drawn in question, is void, either, because it does not fall within the general grant of power to that body, or because it is expressly prohibited by some provision of the constitution.

And this brings us to the specific objections relied upon to show the act in question a nullity. . . .

I. That the General Assembly cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one. This inability arises no less from the general principle applicable to every delegated power requiring knowledge, discretion, and rectitude, in its exercise, than from the positive provisions of the constitution itself. The people, in whom it resided, have voluntarily relinquished its exercise, and have positively ordained that it shall be vested in the General Assembly. It can only be reclaimed by them, by an amendment or abolition of the constitution, for which they alone are competent. To allow the General Assembly to cast it back upon them, would be to subvert the constitution and change its distribution of powers, without their action or consent. The checks, balances, and safeguards of that instrument, are intended no less for the protection and safety of the minority, than the majority: hence, while it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence, and integrity of the whole representation of the State.

But while this is so plain as to be admitted, we think it equally undeniable, that the complete exercise of legislative power by the General Assembly, does not necessarily require the act to so apply its provisions to the subject matter, as to compel their employment without the intervening assent of other persons, or to prevent their taking effect, only, upon the performance of conditions expressed in the law.

Indeed, the whole body of our legislation, as well as that of every other State, is divided between laws which imperatively command or prohibit the performance of acts, and those which only authorize or permit them. . . . The county commissioners, in each county, are authorized, but not required, to erect public buildings, and to erect and establish poor houses, in their respective counties, and to levy taxes for these purposes. In these cases, with many others that might be mentioned, the discretion is vested in the county commissioners.

. . . . The law is, therefore, perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed—if employed it rules throughout: if not employed it still remains the law, ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

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