AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Judicial Power and Constitutional Authority

Commonwealth v. Anthes, 71 Mass. 185 (1855)

Several early state constitutions specified that juries were to be judges of both law and fact, and lawyers would argue the meaning of the law, including constitutional law, to juries in defending their clients at trial. The Massachusetts state constitution was not as clear, but the practice had been similar there, and a state statute recognized that authority in juries. In an opinion by the eminent Chief Justice Lemuel Shaw, the state supreme court decided in Commonwealth v. Porter *(51 Mass. 263 [1845]) that juries did not have the right to ignore the ruling of a trial judge that a liquor license law was unconstitutional. The decision was seen by many as a needed effort to cut off a mounting problem of jury nullification of a range of policies, from state temperance legislation to federal fugitive slave laws. A state constitutional convention drafted a new constitution that included a provision that would have overruled* Porter, *but the constitution itself was not ratified. The state legislature then passed a statute in 1855 that gave the juries in criminal cases the right to "decide at their discretion . . . both the fact and the law involved in the issue."*

The issue soon came back before Chief Justice Shaw. Philip Anthes was indicted for selling liquor and tried to argue at trial that the temperance law was unconstitutional. The trial judge ruled that the jury could not determine questions of constitutionality. On appeal, the state supreme court divided 4-2 to support its earlier decision in Porter. *In his majority opinion, Shaw gave the statute a "saving construction." If it meant what everyone else on the court, and elsewhere, thought it meant, then Shaw thought it was unconstitutional. If it were interpreted as an innocuous statute that had no effect on* Porter, *then it could be upheld. The other judges took a more straightforward approach. The bottom line for the court was that the legislature did not have the constitutional authority to shift the power to interpret the law from judges to juries. Shaw was ahead of his time, but other courts eventually caught up. By the late nineteenth century, state courts and the U.S. Supreme Court had followed the Massachusetts supreme court in declaring that judges, not juries, had the power to say what the law is.*

CHIEF JUSTICE SHAW delivered the opinion of the Court.

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Such then is the nature and character of a criminal prosecution in every system of jurisprudence; it necessarily embraces two question; first, whether there is such a law as the indictment assumes; and next, whether the accused has violated it.

The one requires the most accurate and complete knowledge both of the written and unwritten law, and, in America, an equally thorough and practical knowledge of constitutional law, as they are to be derived from records and adjudged cases, ancient and modern, and books of acknowledged authority in which they are embodied, from statutes, and from the constitutions of the United States and the state in which the case arises, and the adjudications thereon.

The other is a question of fact, to be decided by competent evidence, to be weighed and considered in reference to its tendency to prove the acts charged to have been done by the defendant; and the question is, are these facts true? The adjudication of this question, in addition to the integrity and impartiality requisite to the decision of both, requires experience, practical knowledge of affairs, and a quick and accurate discernment of the motives, reasons and intentions by which persons in various circumstances are actuated.

Both are of an important character, upon the correct decision of which in every case the security of the rights of life, liberty and property essentially depends; but they are essentially distinct in their nature, requiring different modes of training and preparation.

Now, to whom do the Constitution and the laws of this commonwealth entrust the ultimate and final duty and power of adjudicating on these distinct questions? . . .

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In my opinion, it is for the judges to adjudicate . . . upon the whole question of law, and for a jury to adjudicate upon the whole question of fact.

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For the reasons before given, I am of the opinion that the statute of 1855 . . . was not intended by the legislature to change, and has not, in its legal operation and effect, changed and varied the provisions of law prescribing and limiting the relative powers and functions of judges and jurors in criminal trials. . . . The argument is, that from and after the passing of this statute the jury have a right to adjudicate, by the exercise of their own reason and judgment, and decide against the direction of the court, though received and well understood, whether there is such a rule of law; if a statute, what is the legal meaning and effect of it, what does it prescribe, and under what qualifications and limitations, and whether or not it is repugnant to the constitution of the United States or of this Commonwealth. . . . If [the statute] were intended by the legislature to have the construction contended for, and can properly bear that construction . . . then it becomes necessary to consider its constitutionality. And in my opinion a statute, which should in explicit terms provide that jury should have such a power as that claimed to be conferred on them by this statute, would be repugnant to the Constitution of the Commonwealth, and to that extent inoperative and void.

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. . . .[I]n the view I take of the Constitution, as a whole and in all its details, in its pervading spirit, as well as in its form and substance, it was the great purpose of its founders to provide a system of free government for all coming time; to this end to ensure certainty in the making and administration of laws. . . . To ensure that certainty, it was indispensable that there should be a faithful, firm, and uniform administration of law, deciding on the constitutionality and interpretation of every written law. . . . This was carefully provided for by a distinct, coordinate judiciary department.

The founders of our constitution understood, what every reflecting person must understand, from the nature of the law, in its fundamental principles, and in its comprehensive details, that it is a science, require a long course of preparatory training, of profound study and active practice, to be expected of no one who has not dedicated his life to its pursuit; they well understood that no safe system of jurisprudence could be established, that no judiciary department could be constituted, without bringing into its service jurists thus trained and qualified. The judiciary department was intended to be permanent and coextensive with the other departments of government, and, as far as practicable, independent of them; and therefore it is not competent for the legislature to take the power of deciding the law from the judiciary department, and vest it in other bodies of men, juries, occasionally and temporarily called to attend courts, for the performance of very important duties indeed, but duties very different from those of judges, and requiring different qualifications.

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JUSTICE BIGELOW, concurring.

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JUSTICE DEWEY, dissenting.

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Legislation is usually resorted to, not to reaffirm existing laws or decisions of the court, but to correct some supposed defect or omission in former statutes, or to introduce some change in the law as administered and declared by the court. . . .

. . . . [W]e cannot shut our eyes to the fact, that there had been recently promulgated the decision of this court in *Porter's case* . . . and that, to a certain extent, there was an opinion in the community, adverse to that decision. . . .

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By the organic law of the Commonwealth the whole lawmaking power of the State is committed to the legislature, subject only to such restrictions as are expressed or implied therein. This authority is very broad and general. . . . There is no express provision forbidding the legislature to enlarge the powers of juries in the trial of criminal cases. The only supposed prohibition is that arising by implication from other provisions in the Constitution, alleged to be inconsistent with such exercise of legislative authority.

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It certainly is not to be assumed that a statute is in violation of the Constitution, because it is one affecting the administration of justice, or trials in courts of law. The legislative department has, from time to time, changed materially the powers of the court, by prescribing their jurisdiction; assigning one class of duties to a single judge, and others exclusively to the full bench; by enacting codes of practice in utter annihilation of the good learning and ancient doctrines of the bench, and prescribing rules of evidence directly at variance with those of the common law, as held by the court. . . .

. . . . If this statute shall be found to be adverse to the proper and effective administration of the criminal law, a constitutional remedy is at hand, in the exercise of the legislative power to repeal or modify it not because it is unconstitutional, but because it is not "for the good and welfare of the Commonwealth."

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JUSTICE THOMAS, dissenting

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