AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Powers of the National Government

Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853)

The Jacksonian Era was a boom period for the construction of railroads, especially in the northern states. States often borrowed heavily to invest in railroad companies in exchange for new construction that, it was anticipated, would spur economic growth. In practice, many of the railway lines did not prove to be profitable, the railroads were not able to pay back the investment, and the governments that had invested in the companies were forced either to raise taxes or to default on the debt. In the 1840s, Pennsylvania, along with many other state governments, could no longer pay afford to pay interest on its debts from failed canal-building ventures, leading to a sharp rise in state property taxes. One reaction by states to this financial crisis was to push future infrastructure investment down to the local level, for example, by authorizing cities and counties to issue their own debt (backed by their own taxes) to invest in railroads. Merchants and manufacturers were often eager for localities to fund new railroad construction that might increase the trade in their goods, but the property owners who would have to pay the taxes if the rail lines proved unprofitable were bitterly opposed.

In the late 1840s and early 1850s, the Pennsylvania legislature authorized the city of Philadelphia to buy, with borrowed money, shares in two railroad companies. In turn, the companies, which had depots just outside the city limits, were to lay new track to extend those railways to additional towns in the interior of the state. A group of Philadelphia taxpayers sought an injunction in the state courts blocking the city from investing in the railroads on the grounds that the legislature did not have the constitutional authority to delegate to the city the power to tax local residents to support internal improvements elsewhere in the state and, more fundamentally, could not constitutionally impose potentially ruinous taxes on some citizens without restraint. The city, represented by attorneys hired by the railroads, responded that there were no constitutional provisions restricting the legislature from setting whatever tax policy it wished. By a narrow 3-2 majority, the all-Democratic and elected state supreme court declined to act on the taxpayers' unprecedented legal argument. The "vigorous dissents" were not reported. Chief Justice Jeremiah Black wrote the lead opinion for the Pennsylvania court. Black would soon leave the court to serve as U.S. attorney general for President James Buchanan, who unsuccessfully nominated him to the U.S. Supreme Court during the secession crisis. This state court decision under the state constitution was politically and legally important within Pennsylvania, but it was also highly influential across the nation as a statement about the limited scope of judicial review and the nature of the taxation power.

Having failed to limit these government investment schemes through judicial action, the anti-investment advocates turned to the legislature. In 1857, they succeeded in getting a series of amendments added to the state constitution prohibiting the government from buying stock or from using government credit for the benefit of private companies. The Philadelphia Public Ledger celebrated the constitutional reform: "The chief object of government is simply to defend the weak from the aggressions of the strong, by maintaining the equal rights of all. It is not for a government to make itself into a bank, or canal, or railroad company, or all combined, any more than it is to assist one sect of religion to establish itself at the expense of all others. But its aim should be simply to remove all obstruction, and allow every grand and useful institution to develop itself and grow freely by its own inherent energies unmolested."

CHIEF JUSTICE BLACK delivered the opinion of the Court.

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. . . . Whether the legislature can pass a valid act giving to a municipal corporation the power of subscribing to the stock of a railroad company, is the sole question before us.

This is, beyond all comparison, the most important cause that has ever been in this Court since the formation of the government. The fate of many most important public improvements hangs on our decision. If all municipal subscriptions are void, railroads, which are necessary to give the state those advantages to which everything else entitles her, must stand unfinished for years to come, and large sums, already expended on them, must be lost. . . .

The reverse of this picture is not less appalling. It is even more so, as some view it. If the power exists, it will continue to be exerted, and generally it will be used under the influence of those who are personally interested, and who do not see or care for the ultimate injury it may bring upon the people at large. . . .

But all these considerations are entitled to no influence here. We are to deal with this strictly as a judicial question. However clear our convictions may be, that the system is pernicious and dangerous, we cannot put it down by usurping authority which does not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it. . . .

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We are urged . . . to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. . . .

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I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us.

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On the other side, the weight of authority is overwhelming. I am not aware that any State Court has ever yet held a law to be invalid, except where it was clearly forbidden. . . .

There is another rule which must govern us in cases like this; namely, that we can declare an Act of Assembly void, only when it violates the constitution *clearly, palpably, plainly*; and in such manner as to leave *no doubt* or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts. . . .

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But I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden cannot be thrown on a single individual, under pretense of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. . . . An Act of Assembly, commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order or decree.

. . . . I am of opinion with the Supreme Court of Kentucky, that a tax law must be considered valid, unless it be for a purpose, in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at the first blush.

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. . . .

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A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable, stipulated toll from those who pass over it, does not make its main use a private one. The public has an interest in such a road, when it belongs to a corporation, as clearly as they would

have if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth. . . .

It is a grave error to suppose that the duty of a state stops with the establishment of those institutions which are necessary to the existence of government; such as those for the administration of justice, the preservation of the peace, and the protection of the country from foreign enemies; schools, colleges, and institutions, for the promotion of the arts and sciences, which are not absolutely necessary, but highly useful, are also entitled to a public patronage enforced by law. To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign, as plain and as universally recognized as any other. It is on this principle that the mint and post-office are in the hands of the government; for they are but aids to commerce. . . . Canals, bridges, roads, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power, and at the public expense, in every civilized state of ancient and modern times. . . .

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But it is insisted that the right of a city or county to aid in the construction of public works, must be confined to those works which are within the locality whose people are to be taxed for them. . . . I have already said that it is the *interest* of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road. . . .

But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers, and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law. . . .

We must take it for granted that the councils and the Mayor have fairly represented the majority of their constituents. It may operate with great hardship on the minority, but in this country it is private affairs alone, and not public, that are exempt from the domination of majorities. It may be conceded that the power of piling up these enormous public burdens, either on the whole people, or on a portion of them, ought not to exist in any department of a free government; and if our fathers had foreseen the fatal degeneracy of their sons, it can scarcely be doubted that some restriction on it would have been imposed. But we, the judges, cannot supply the omission.

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. . . . I do not propose to shift any part of the responsibility upon our predecessors, or upon the judges in other states, who have heretofore decided the question, and therefore I have examined it as if it were a case of the first impression; but it would be wrong to close without saying that the conclusion here reached is sustained by the highest tribunals in Virginia, New York, Connecticut, Tennessee, Kentucky, Illinois, and Ohio. These cases are entitled to our highest respect. . . .

I am of opinion that the motion for a special injunction ought to be refused.

JUSTICE WOODWARD, concurring.

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By subscribing to the stock of these railroad companies, the city of Philadelphia will become a member of the companies. They are private corporations. . . . Is it a municipal purpose? Does it come within the circle of objects which municipal corporations were designed to accomplish? Without going into the history and common law of such corporations, I unhesitatingly answer these questions in the negative. There is no congruity between such an enterprise and the legitimate purposes of municipal corporations. They were designed to regulate the internal affairs of the places in which they were located. Police, health, streets, lanes, alleys, and the like, are the appropriate subjects of municipal administration; and though a city may go beyond its boundaries to purchase necessaries for its existence, safety, and comfort, yet its jurisdiction is properly exercised only within its territorial limits, and on subjects that pertain to its domestic economy and well-being. Railroads, to connect distant points of country, to

develop physical resources, and to promote commerce, are great public benefactions, and emphatic expressions of the energies of an age distinguished for activity and bold adventure. But they come not within or near that class of objects which we have been taught to consider as municipal purposes. Yet when the legislature enables a city to lend a hand to such enterprises, where is the *constitutional* provision which the judiciary can say is violated? . . .

. . . . The people alone are competent to set bounds to a clearly granted and unquestionable power. The judiciary cannot assign limits to that which the people have decreed shall be unlimited. If they could, the judiciary would be the only real sovereign in the state, and might hinder the most salutary legislation. . . .

I have no doubt of the right and duty of the judiciary to declare a law unconstitutional, when it clearly contravenes any of the provisions of the state or federal constitutions; but it is a power to be exercised with great caution. For nearly fifty years of our political existence, under the constitution of 1790, no Act of Assembly was set aside for unconstitutionality. . . . Since the constitution of 1838 was adopted, several acts of the Assembly have been declared unconstitutional, but they were all clear cases. . . .

The power of legislation by representatives of their own choosing, is one of the invaluable privileges of the people. It is this which makes them a free state. This is self-government – the best of all kinds of government, and therefore least in need of clogs and restraints. When, through inadvertence, this power is applied to objects forbidden by the letter of the constitution, the interposition of the judicial arm is properly invoked. But so long as it keeps within its appointed orbit, judges cannot interfere with its progress, without themselves departing from their proper sphere.

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JUSTICE KNOX, concurring.

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. . . . [H]ow far may the legislature go in the exercise of a legislative power? I submit that there is no limit to this authority until it is met by the mandate of the constitution, "Thus far, but no farther." I am aware that under this rule acts may be passed which will, in the minds of many persons, be contrary to natural justice, and subversive of the just rights of the people. The remedy is to be found in further constitutional restrictions upon legislation, not in restraints imposed by the judiciary. The limit of the power of the people's representatives, in my judgment, should be written upon the pages of the constitution, rather than remain in the breast of our judges.

There is, to my mind, great danger in recognizing the existence of a power in the judiciary to annul legislative action, without some fixed rule by which such power is to be measured. Our opinions are so diversified and varied, that what to one mind may seem clearly right and proper, to another will appear to be fraught with imminent danger. If we have not a certain standard by which to test the constitutionality of legislative enactments; if each judge is to be governed by his own convictions of what is right or otherwise, I fear that restraints upon judicial, rather than upon legislative action, will be demanded by a people ever jealous of the accumulation of power in the hands of the few.

From whence is derived the power of the judiciary to declare unconstitutional an act of legislation? Is it not because of the supremacy of the organic law, and the sworn duty of judges to maintain it? If this law is not written, who shall declare its existence?

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As a member of this Court I have nothing to do with the question of expediency. This must be determined, first, by the legislature in granting the power to subscribe; and second, by the people, either by their own votes, or through their selected agents, in availing themselves of the authority thus granted.

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JUSTICE LEWIS, and JUSTICE LOWRIE, Jr., dissenting.