Supplementary Material

Chapter 3: The Founding Era—Criminal Justice/Juries and Lawyers

Trevett v. Weeden (1786)[1]

John Weeden sold meat in Newport, Rhode Island. He accepted only silver or gold coins as payment. In 1786, the Rhode Island legislature passed laws establishing a system of paper money. Persons who refused to accept the state's paper money were penalized. Guilt was determined without a jury trial. After Weeden refused to accept that currency, John Trevett brought an action against him to collect the statutory penalty. Weeden employed General James M. Varnum, a political leader of Rhode Island and well-respected lawyer, as his defense attorney. Varnum argued that trial by jury was a fundamental constitutional right, and therefore, that the legislation in question was unconstitutional and void.

The Rhode Island Supreme Court declared unconstitutional the law dispensing with a jury trial. No reasons for that decision were reported. The general assembly of Rhode Island responded to Trevett v. Weeden *by demanding the justices appear before the legislature and explain their actions. After the justices briefly justified the decision, the general assembly by a close vote rejected a measure removing the justices from office.*[2]

The opinion in Trevett *was never officially published, but Varnum wrote a lengthy account of the case, which included his arguments. When reading Varnum's account, consider the relationship between substance and procedure in early American constitutional law. Why does Varnum regard trial by jury to be a fundamental right? Varnum conceded that Weeden had broken the law. His argument condemned the legislative decision to force merchants to accept paper money. Given this argument, might Varnum have been more interested in the jury power to effectively nullify the paper money law than the jury power to determine whether Weeden had violated that law?*

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. . .[T]he trial by jury is a fundamental right, a part of our legal constitution: . . . the Legislature cannot deprive the citizens of this right. . . .

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In the Charter granted to our forefathers, the following paragraph claims our particular attention: "That all and every the subjects of us . . . which are already planted and settled within our said Colony of Providence Plantations . . . shall have and enjoy all liberties and immunities of free and natural subjects . . . as if they . . . were born within the realm of England.

This concession was declaratory of, and fully confirmed to the people the Magna Charta, and other fundamental laws of England. . . . And accordingly, in the very first meeting of the General Assembly, after receiving the charter, . . . they made and passed an act, "declaring the rights and privileges of this Majesty's subjects within this Colony," where by it is enacted, "that no freeman shall be taken or imprisoned, or be deprived of his freehold or liberty, or free customs, or to be outlawed, or exiled or otherwise destroyed, nor shall be passed upon, judged or condemned, but by the lawful judgment of his peers, or by the laws of the land. . . ."

[1] Excerpt taken from James Varnum, "The Case of Trevett against Wheeden," *American State Trials,* volume 4, ed. John D. Lawson (St. Louis, MO: F.H. Lawson Law Book Co., 1915).

[2] For more background information, see Charles Warren, "Earliest Cases of Judicial Review of State Legislation by Federal Courts," *Yale Law Journal* 32 (1922):15, 16–22.

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Have the citizens of this State ever entrusted their legislators with the power of altering their constitution? If they have, when and where was the solemn meeting of all the people for that purpose? . . .

. . .

Have the Judges a power to repeal, to amend, to alter laws, or to make new laws? God forbid! In that case they would become Legislators. Have the Legislators power to direct the Judges how they shall determine upon the laws already made? God forbid! In that case they would become Judges. The true distinction lies in this, that the Legislative have the incontrollable power of making laws not repugnant to the constitution: The Judiciary have the sole power of judging those laws, and are bound to execute them; but cannot admit of any act of the Legislative as law, which is against the constitution.

. . .The trial by jury . . . is a fundamental, a constitutional law; and therefore is binding upon the Judges by a double tie, the oath of allegiance, and the oath of office.

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The life, liberty, and property of the citizens are secured by the general law of the State. We will then suppose . . . that the General Assembly should pass an act directing that no citizen should leave his house, nor suffer any of his family to move out of the same, for the space of six months, upon the pain of death. This would be contrary to the laws of nature. Suppose they should enact that every parent should destroy his first-born child. That would be contrary to the laws of God. But, upon the common principles, the Court would be as much bound to execute these acts as any others. For if they can determine upon any act, that it is not law, and so reject it, they must necessarily have the power of determining what acts are laws, and so on the contrary. There is no middle line. The Legislature hath power to go all lengths, or not to overleap the bounds of its appointment at all. So it is with the Judiciary; it must reject all acts of the Legislative that are contrary to the trust reposed in them by the people, or it must adopt them all.

But the Judges, and all others, are bound by the laws of nature in preference to any human laws, because they were ordained by God himself anterior to any civil or political institutions. They are bound, in like manner, by the principles of the constitution in preference to any acts of the General Assembly, because they were ordained by the people anterior to and created the powers of the General Assembly.

. . .Is it consistent with common right or reason, that any man shall be compelled to receive paper, when he hath contracted to receive silver? That for bread he shall receive a stone, or for fish a serpent? Is it consistent with common right or reason that he shall receive the paper dollar for dollar with silver, when it is fully known that the discount in general is from three to four for one, among those who receive the paper at all and that there are very many who totally refuse it. That he should be called from his business, and subjected to a fine for his refusal, when there is not a man in the State, but upon principles of justice to himself and family would have done the same? . . .

. . . Is not the act repugnant when it authorizes the Judges to "proceed to trial without any jury, according to the laws of the land?" . . .

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We have attempted to show . . . [t]hat the trial by jury is a fundamental, a constitutional right—ever claimed as such—even ratified as such—ever held most dear and sacred: That the Legislature derives all its authority from the constitution—hath no power of making laws but in subordination to it—cannot infringe or violate it: That therefore the act is unconstitutional and void: That this Court hath power to judge and determine what acts of the General Assembly are agreeable to the constitution; and, on the contrary, that this Court is under the most solemn obligations to execute the laws of the land, and therefore cannot, will not, consider this act as a law of the land.

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