AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 4: The Early National Era—Criminal Justice/Juries and Lawyers

---

Zylstra v. Corporation of City of Charleston, 1 Bay 382 (SC 1794)

Zylstra was prosecuted for violating a city ordinance banning persons from operating a tallow chandler's shop within the city of Charleston. The Court of Wardens, sitting without a jury, convicted Zylstra and fined him 100 pounds. Zylstra appealed that verdict to the Courts of Common Pleas and General Sessions of the Peace of South Carolina. Zylstra claimed the local ordinance that permitted the Board of Wardens to try his case violated his state constitutional right to due process and trial by jury.

The Court of Common Pleas agreed that the Charleston ordinance was unconstitutional. The justices ruled that trial by jury was a fundamental right and that localities had no right to try criminal offenses before a body that exercised executive and legislative powers. Zylstra *was one of the first cases in which a state court struck down local laws that violated the state constitution. Many of those decisions struck down laws that violated constitutional protections for trial by jury. Why might this be so? Consider some possible explanations.*

1. *States were particularly prone to violate constitutional rights to trial by jury.*
2. *Trial by jury was a particularly fundamental right.*
3. *Judges believed that they had special expertise in what constituted trial by jury.*
4. *Judges believed that they would face less political repercussions if they declared laws regulating judicial procedure unconstitutional than if they declared other measures unconstitutional.*

JUSTICE BURKE

. . . The ground of this mighty claim to legislate and recover high penalties, to bind the person and property of a citizen, without a trial by his peers, is the original charter of 1783, which extended their authority *to that of a justice of the peace, and no more*. In 1784, they applied to the legislature for an augmentation of power—they obtained that of imprisoning for non-payment of fines, and a jurisdiction to the Court of Wardens co-extensive in one instance, with that which the Court of Common Pleas possesses, viz. that of deciding causes as far as 20l.[1] without the intervention of a jury; except where the title of land may come in question. In this, and in all cases beyond 20l. the Court of Wardens are completely shut out from intermeddling, in as express language as could be made use of.

Thus therefore, the bye-law under which Zylstra was prosecuted, was utterly void; for the Corporation was not vested with competent legislative authority; and they had as little judiciary power to try a cause and give judgment for 100l. as they held as legislators: therefore, for the Court of Wardens to hear and determine such a cause, without the intervention of a jury, was what no Court in the State durst presume; it being repugnant to the genius and spirit of our laws, all of which recognize jury trial, which is also guaranteed to us expressly by our constitution. The conviction therefore, of Zylstra, being nugatory, the execution or further proceeding ought, in my opinion, to be stayed.

JUSTICE GRIMKE, concurring

[omitted]

[1] 20l is twenty pounds.

JUSTICE WATIES

. . .

The only question I shall consider is, whether the Court of Wardens can hold plea of a suit for the recovery of this penalty? I am of opinion that it cannot, and this opinion is founded on the following reasons—1st. Because the power claimed is not granted by any express words of any general law. 2dly. Because, if it is expressly granted; yet it is void as being repugnant to the constitution of the State.

. . .

By the 2d section of the 9th article, it is declared, that "No freeman of this State shall be in any manner deprived of his life, liberty, or property, but by the *judgment of his peers*, or by *the law of the land*." And by the 6th section of the same article, it is further declared, that "The *trial by jury*, as heretofore used in this State, shall be for ever *inviolably preserved*."

How then can a law be valid, which constrains a citizen to submit his person and his property, to a tribunal that proceeds to give judgment on both, without the intervention of a jury? Does these words of the constitution "*or by the law of the land*," authorize it? Do they mean *any law* which may be passed, directing a different mode of trial? Such a construction would be incompatable with the declaration of this privilege; it would be taking away all the security which that intended to give it; it would do more, it would be making the constitution itself authorize the means of destroying a right which it afterwards declares shall be inviolably preserved. For if a law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature.

But when we consider the true import of these words, and allow them the construction which all the commentators upon Magna Charta, (from whence they are taken) have concurred in giving them, they will then be found to afford a real security to the citizens for the preservation of this right, and to become an effectual bar to the innovations of the legislature.

. . .

But it may be said, it is too late now to question the authority of the Court of Wardens, because it was created before the making of the constitution, and is therefore confirmed by it.

If the constitution was the first acquisition of the rights of the people of this country; if *then*, for the first time, the trial by jury was ordained, and the right then commenced, there would be some ground for this conclusion. But the trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors in succession from that period to our own time; having never been departed from, except in [rare circumstances]. This right then, is as much out of the reach of any law, as the property of the citizen; and the legislature has no more authority to take it away, than it has to resume a grant of land which has been held for ages. It is true that the reasons which in England make this privilege so valuable, and have produced such enthusiastic eulogies on it, do not all exist here. There, it is considered as a barrier between the rights of the people and the usurpations of the government. Here, it can be wanted for no such purpose; the government and the people have the same common interests, and the same common views; yet, there are other reasons sufficient to endear this privilege to us, and give it a rank among the first of those which belong to us as freemen. In a country like ours, so thinly peopled; where, as in all societies, every man of any consideration has extensive private connexions, and often a secret interest in courting popular favour; if the power of proceeding to judgment in all cases, was committed to a permanent body of men, it would sometimes happen, that private affection or party views would intermingle in the trial of right, and prevent a fair and impartial decision. But when the rights of the citizens are to be determined on by 12 men, changed at every Court, and indiscriminately drawn from every class of their fellow citizens, there will be a better chance generally, that the poor will receive an equal measure of justice with the rich, and that the decision of facts will be according to the truth of them.

. . .

There is, however, one other objection, which I cannot forbear taking notice of, as it shews a peculiar impropriety in giving to that Court, a jurisdiction in this case, and is of too serious a concern to

the rights of the citizens, to be overlooked. It arises from the nature of the city charter. Any one who will consider this at all, must see in it a most unnatural combination of the legislative, the executive, and judicial powers. Heretofore it has been thought essential to civil liberty, to keep these powers widely asunder; the separation of them was supposed to characterize a free government, and the union of them, a despotic one. But by virtue of the charter, the City Council makes bye-laws; they appoint, as is frequently the case, some of their own members the commissioners to carry them into effect; and the same members afterwards may take their seats as judges, to determine on any breaches of them which may have been committed. It may sometimes happen too, that in the course of their duty as commissioners, they are witnesses to the violation of some bye-law; they may then add one more character to this multiform political monster, and exhibit legislators, executors, prosecutors, witnesses, and judges, all in the same persons.

There surely could not be contrived by the most ingenious tyrant, a more compleat instrument for all the purposes of oppression. I speak, however, of its form and structure only; for I do not believe that it has yet been employed in doing mischief; I rather believe it has been made to do much good. But it has not been harmless, because it wanted power to be hurtful; the citizens are wholly indebted for this to the honor and integrity of the persons who have hitherto composed the Corporation. It gives me pleasure to make them this acknowledgement, and I feel a still greater one in reflecting on this curious testimony in favour of a free government, which proves incontestably, that the happiness and welfare of the society is the interest of *individuals*, since the instruments of evil and mischief are, in the hands of freemen, not only harmless, but even convertible sometimes into the means of general good. But this might not always continue, and a trust of this sort is dangerous even with freemen; it is right therefore, to adhere to fundamental principles of security.

. . .

JUSTICE BAY declared himself of the same opinion, and concurred fully with the other Judges.