Supplementary Material

Chapter 5: The Jacksonian Era—Individual Rights/Personal Choice and Public Morality

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People v. Gallagher, 4 Mich. 244 (1856)

Thomas Gallagher sold intoxicating liquors. His sales violated the temperance law that Michigan passed in 1855. That law forbade the sale of intoxicating liquors as a beverage. Local authorities arrested, tried, and convicted Gallagher. Gallagher appealed the verdict to the Supreme Court of Michigan. He claimed that the Michigan law banning the sale of intoxicating liquors violated state constitutional rights to property and natural rights.

The Supreme Court of Michigan ruled that the state temperance law was constitutional. Judge Johnson first rejected claims that courts could protect unenumerated natural rights. He then insisted that state officials could determine that the sale of intoxicating beverages inflicted "a moral injury" on society. On what basis did Judge Johnson reach these conclusions? Why did Judge Pratt disagree? The judges debated property rights to sell alcohol rather than liberty rights to drink alcohol. This emphasis on property rather than liberty is typical of Jacksonian constitutional decision making. Consider when reading the cases why Jacksonians framed issues in terms of property rather than liberty. Could you frame abortion as a property right? Does the selection of a liberty or property frame matter?

JUDGE JOHNSON

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. . . [I]t is contended . . . that there are certain natural rights so intimately blended with our social condition, so sacred in their character, and so essential to the welfare and well-being of society, that, by their own inherent power and virtue, they become exempt from all legislative encroachments; that these rights are not dependent upon any written law, but are themselves the foundation of all law.

The principal objection to this proposition is the great practical difficulty of defining, with any degree of certainty, what these rights are.

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There are indeed many *dicta,* and some great authorities, holding that acts contrary to first principles of right, are void. The principle is unquestionably sound as a governing rule of a legislature, in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal or unjust operation of its statutes. Such a construction ought never to be given to legislative language, if it be susceptible of any other more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal the statute on that ground alone. But it is only in express constitutional provisions limiting legislative power, and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactments. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too undefined, either for its own security or the protection of private rights. . . .

It is urged that we have no guaranty or security for the preservation of those rights, if they are the subject of unlimited encroachments. . . . It would be pretty difficult to assign any reason why they are not as safe in the hands of one department as another. It may be true that legislative bodies, acting from temporary impulses, without sufficient time for discussion and deliberation, are more likely to be

influenced by the highly excited condition of the public mind than courts of law. But the elements of the two bodies are the same—their motives the same: both are acting for themselves and their immediate constituents, to whom they are accountable; besides, over half a century's experience has demonstrated beyond cavil that the apprehension of evil upon *this ground,* if any apprehension ever existed, is utterly unfounded. Great wrongs may undoubtedly be perpetrated by legislative bodies, but this is only an argument against the exercise of discretionary power. It weighs nothing, for no government can exist without the existence of that power somewhere. Unfortunately the scheme has never yet been devised by human invention by which the power to do great good has not been mingled with the power to do some evil.

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But, conceding the doctrine contended for, that there are natural rights which cannot be infringed by legislative enactment, is the right in question one of that character? The public evils of the intemperate use of ardent spirits, which are the result of an unrestricted use of them, are denied by none. If there can be any difference of opinion upon the subject, it is as to the means best calculated to remove the evil. It is one of a public character. It extends to all classes of society, and adheres to our race with a pertinacity and fatality that would satisfy the mind of the most skeptical that the *evil,* at least, if not the remedy proposed, is *constitutional.* It has long been the subject of deep and anxious study, both with the philanthropist and statesman, by what means, if any, the evil could be abated. It has been for centuries the subject of legislation, and for ages the subject for exhortation; and, after the exhaustion of the one without any satisfactory results, the other has been resorted to. Whether that other will meet the expectation of the public mind, whether it will prove as efficacious in eradicating a great public evil as its fond projectors have anticipated, is a matter about which we need not spend our time in speculation; upon *that* subject there may be a very great difference of opinion. But there is no difference of opinion about the magnitude of the evil. It is one worthy of the attention of the legislature; one that peculiarly commends itself to their consideration.

And now, unless the means by which they have attempted to suppress the evil of that extraordinary character as to conflict with these great natural rights, which, for the sake of the argument, we have conceded to exist, the law must be deemed to be in force. The legislature could scarcely have done less; they saw that intemperance was an evil; they saw that the evil was very much aggravated by the unrestricted traffic of intoxicating liquors; and for certain purposes, and to a certain extent, they prohibited that traffic, and *this,* it is insisted, is the exercise of an unconstitutional power. No man is deprived of his property, and no man is prohibited from using his property; and no man is prohibited from selling it, except for certain purposes; but he is prohibited in that respect, because, by so doing, he would inflict a moral injury upon society, and if a public evil of this character, and of this magnitude, cannot be suppressed by the simple means here resorted to by the legislature, it may be well said that there is an end to all legislative power. For we understand that argument to be *this:* The remedy proposed conflicts with our natural rights; these rights are undefined, and of course depend upon their character; but who is to apply the test? Why, the legislature in the first instance, and if they fail to apply the true one, then it becomes the duty of the court. Suppose that we should be of the opinion, contrary to that of the legislature, that this evil did not justify the means resorted to for its suppression, who could not see that the power of the legislature to pass an ordinary police law depended upon the opinion of the judiciary as to whether such a law was calculated to prove beneficial to the public; or, in other words, that the validity of the law depended upon the exercise of a discretionary power of the court; for the whole question turns upon the nature of this right, namely, the *unrestricted right* to sell spirituous and intoxicating liquors. The legislature has said that no man shall exercise this unrestricted right, no man shall sell liquors to be used as a beverage, because, by so doing, he inflicts an injury upon the public; but, says the defendant, irrespective of the evil, this right to sell liquors is a *natural right,* and you have no power to pass a law infringing that right. How does he prove it? Not by any adjudged cases; there are none; nor by anything in the constitution preserving to him this right; but it is to be determined by the nature and character of the right. And what is the process by which that determination is made? Are we nicely to compare the value of this right with the injury which the exercise of it would inflict upon the public, and strike the balance? Or are we to compare it with other individual rights, which, by the general

legislation of the country, have been made subservient to the public interests? It will not be difficult to see that it is of no importance whether the *one* rule or the *other* is adopted; they both resolve themselves into the same question: a question of policy; a question very suitable and proper for the discussion and deliberation of a legislative body, but one which cannot be entertained by this court.

On the whole, we regard the adoption of this law by the legislature but the exercise of a power strictly constitutional.

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JUDGE PRATT, dissenting:

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That this *prohibitory act* constitutes a bold and daring invasion of private property, on the part of the legislature, I have no doubt; and that the opinion of my judicial brethren in this cause contains doctrines which are in direct conflict with fundamental principles, and subversive of our system of government, is to me clear and susceptible of the most absolute demonstration.

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That liquors, which citizens of the state are now, by the highly penal act in question, prohibited from manufacturing or vending, constitute property, is a self-evident proposition. They are certainly useful for a thousand purposes, independent of their use as a beverage. This no sane man doubts. The fact is generally, if not universally, conceded by the strongest advocates of prohibition; and the legislature, in terms, admits it, and by the act assumed to make the necessary provisions accordingly. Spirituous liquors are necessary in the prosecution of many of the most valuable arts, as well as for mechanical, manufacturing and medicinal purposes. The various medical tinctures in the drug shops throughout the world, which have been devised by medical men of science and skill, and valuable and useful for many of the maladies and ills incident to man, are necessarily prepared and preserved with spirits.

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Fermented and distilled liquors . . .have been for centuries manufactured, sold, and used as a beverage; they have largely entered into the commerce of the world, and have been universally considered, and legally held as personal property of use and value. The right of manufacturing, selling, and using as a beverage, has, from the beginning, not only been tolerated, but it has been universally recognized as a natural right throughout the civilized world; a right which has been for ages, in this and other countries, sanctioned and confirmed by municipal laws, the validity of which have never anywhere been questioned, either by jurists or statesmen. In the United States, from the landing of the Pilgrims down to the present day, fermented and distilled liquors have always, in a popular and legal sense, constituted personal property of use and value, articles of trade and commerce, and have been manufactured and sold, imported and exported, more or less, in every state of the Union. Citizens thus engaged have been protected in their right of property thus acquired, not only by the constitution and laws of the general government, but by the constitution and laws of the respective states, the same as other citizens have been protected in their business pursuits, and in their respective rights of property lawfully acquired. . . .

Liquors, then, whether produced by fermentation or distillation, do legally constitute property of use and value; and the owner of this species of personal property, when lawfully acquired, is, upon every principle, and by every consideration, entitled to the possession and use of it. The use legally includes the right of keeping, selling, or giving it away, as the owner may deem proper. This is a natural primary right incident to ownership: a right in which the owner, by the principles of the common law, and by the fundamental principles and maxims upon which our republican system of government was founded, is as much entitled to protection as he is in the use of any other personal property lawfully acquired. . . . This species of personal property, then, is, by the government and laws, placed upon an equal footing with all other property. And the right of property, lawfully acquired, is one of the natural rights of man, which civil government was originally instituted to protect its subjects in. . . .

Under our system of civil compact, each and every citizen has the right to claim and demand of the government protection in the unmolested enjoyment of life, liberty, and property. . . . The right and

use of private property, when lawfully acquired, is a natural reserved right, a right which has never been surrendered by the people, or in any manner ceded to the legislature, or any other earthly power, for any purpose whatever, except so far as private property may become necessary for public use, and then it can only be taken on the necessity for its use by the public being first determined by a jury of twelve freeholders residing in the vicinity of the property, and on paying a just compensation therefor. Such are the express stipulations incorporated into the fundamental law of the state, and the legislature is as much bound by them as any other department of the government. Any attempt, therefore, on the part of the legislature, to exercise control over private property, otherwise than thus expressly stipulated, either by the inhibition of its manufacture and sale, or otherwise, is but the assumption of high-handed despotism, and subversive of our civil compact.

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The act violates natural rights, and divests a portion of our fellow-citizens of their legal vested interest in property honestly acquired. It subverts and substantially destroys the trade and business of all those who were, at the time of the passage of the act, engaged in manufacturing this species of property. It clearly violates that provision of our state constitution expressly intended to protect private property. It makes no distinction between liquors on hand before, and those acquired since its passage, but indiscriminately applies to all, and it is, therefore, in its nature and operation, an *ex post facto* law, as it impairs prior vested rights.

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But let us see for a moment what the constitution is, and what it is not. It is, as I understand it, the established form and theory of a constitutional system of government; and its provisions in the main are only general declarations of fundamental principles which are to govern the different departments in their action. . . . Inherent rights are from nature and nature's God; but remedies are the invention of men. In a state of nature, men respectively devise and assert their own remedies, and resort to their own means for protection. But when they enter into civil compact, to avoid the dangers of anarchy and violence, they surrender the device and assertion of remedies to government, and rely upon government for protection in the unmolested enjoyment of their natural rights and privileges. The legislature, therefore, may in its discretion prescribe the mode of protection, and the manner and measures of every remedy; but cannot take away, abrogate or destroy the rights.

. . . If the doctrine is true that the legislature can, by the exercise of an implied discretionary power, pass any law not expressly inhibited by the constitution, then it is certain that a hundred laws may be enacted by that body, invading directly legitimate business pursuits, impairing and rendering worthless trades and occupations, and destroying the substantial value of private property to the amount of millions of dollars. That body may, by enactment, upon this principle, entirely prohibit the manufacture and sale of gunpowder, fire-arms, dirks, daggers and bowie-knives, all of which are used for the destruction of human life, and which are the means used for the destruction of thousands annually. It may entirely inhibit the sale and use of arsenic, prussic acid, opium, calomel, and every other kind of drug destructive to life when improperly used. It may also inhibit the manufacture, sale and use of tobacco and cigars. The consumption of these articles costs the American people millions, and they are, by medical men of science and skill believed to be injurious to health, and extremely pernicious to the health and habits of young men. It may prescribe particular drinks, and prohibit entirely the use of all others. It may prescribe some particular kinds of food, and make it criminal to use any other. It may also prescribe one particular mode of preparing food for use, and inhibit every other. A judicious selection of food, as well as a judicious mode of preparing it for use, must be indeed very important to health. It may also prohibit the adoption of the ridiculous and extravagant fashions for dress, which are introduced into this country semi-annually from France and England, to the ruin of thousands. It may also prohibit the manufacture and sale of cards, dice, chess and backgammon boards, because they are sometimes used by gamblers. It may also prohibit the youth of the state from dancing, or the enjoyment of any other youthful recreations, as some persons deem them to be demoralizing in their tendency; and, upon the same principle, and for the same reason, it may prohibit the publication and sale of the miserable yellow-covered novels that are thrown out into circulation at the present time by thousands and tens of thousands. . . . But who, I ask, believes that the legislature possesses the power, or that the people, in their

sovereignty, ever intended to confer on that body such unlimited omnipotence? As appears to me, no man of reason and reflection can believe it. The proposition is an absurdity on the face of it, and cannot be supported upon principle or theory. The despotic measures of the mother country, which induced the people of the colonies to revolt and fly to arms, were not more odious or inconsistent with every principle of justice, liberty, and equal rights, than the power and measure contended for.

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That intemperance is a great evil, no sane man can doubt. Nor can any one regret the existence of the evil any more than I do. But the evil, great as it is, can never be remedied in this country by despotic penal laws—laws which are in open violation of private rights and the principles and maxims of our social compact. Penal laws for the punishment of criminals are necessary, but they have never yet reformed the world, in a moral or religious point of view; nor will men ever be reformed, or made better, by the use of such means. Neither the cause of temperance nor religion can be advanced by political action or penal laws.

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