Supplementary Material

Chapter 5: The Jacksonian Era—Individual Rights/Property/Due Process

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Wynehamer v. People, 2 Parker Crim. Rep. 490 (NY 1856) (expanded)

Thomas Toynbee was arrested for selling a glass of brandy to a customer. This act violated a New York law that declared, "Intoxicating liquor, except as hereinafter provided, shall not be sold, or kept for sale, or with intent to be sold, by any person, for himself or any other person." Toynbee was convicted and required to pay a $50 fine. Toynbee's sentence was reversed by the Supreme Court of New York, which declared unconstitutional the ban on intoxicating beverages. The state appealed that decision to the New York Court of Appeals. The Court of Appeals combined Toynbee's case with that of James Wynehamer, whose conviction for selling intoxicating liquors had been affirmed by a different lower state court.

The New York Court of Appeals declared unconstitutional the legislative ban on selling intoxicating liquors. Both Judge Comstock and Judge Selden insisted that the New York law violated property rights protected by the due process clause of the state constitution. What were those property rights? How did the judges distinguish between laws that regulate property and laws that confiscate property? Do you find that distinction convincing? Suppose evidence came to light in 1850 that intoxicating beverages caused heart disease. Would the New York ban on intoxicating beverages be constitutional?

JUDGE COMSTOCK

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. . . It is . . . universally admitted that when this law was passed, intoxicating liquors, to be used as a beverage, were *property* in the most absolute and unqualified sense of the term; and as such, as much entitled to the protection of the constitution as lands, houses, or chattels of any description. From the earliest ages they have been produced and consumed as a beverage, and have constituted an article of great importance in the commerce of the world. In this country, the right of property in them was never, so far as I know, for an instant questioned. In this state, they were bought and sold like other property; they were seized and sold upon legal process for the payment of debts; they were, like other goods, the subject of actions at law, and, when the owner died, their value constituted a fund for the benefit of his creditors, or went to his children and kindred, according to law or the will of the deceased. . . .

It may be said, it is true, that intoxicating drinks are a species of property which performs no beneficent part in the political, moral, or social economy of the world. It may even be urged, and I will admit, demonstrated with reasonable certainty, that the abuses to which it is liable are so great that the people of this state can dispense with its very existence, not only without injury to their aggregate interests, but with absolute benefit. The same can be said, although, perhaps, upon less palpable grounds, of other descriptions of property. Intoxicating beverages are by no means the only article of admitted property and of lawful commerce in this state, against which arguments of this sort may be directed. But if such arguments can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of the legislature, and the guarantees of the constitution are a mere waste of words.

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These observations appear to me quite elementary, yet they seem to be necessary in order to exclude the discussion of extraneous topics. They lead us directly to the conclusion that all property is alike in the characteristic of inviolability. If the legislature has no power to confiscate and destroy

property in general, it has no such power over any particular species. There may be, and there doubtless are, reasons of great urgency for regulating the trade in intoxicating drinks, as well as in other articles of commerce. In establishing such regulations merely, the legislature may proceed upon such views of policy, of economy, or morals, as may be addressed to its discretion. The whole field of discussion is open, when the legislature, keeping within its acknowledged powers, seeks to regulate and restrain a traffic, the general lawfulness of which is admitted; but when the simplest question is propounded, whether it can confiscate and *destroy* property lawfully acquired by the citizen in intoxicating liquors, then we are to remember that all property is equally sacred in the view of the constitution, and therefore that speculations as to its chemical or scientific qualities, or the mischief engendered by its abuse, have very little to do with the inquiry. Property, if protected by the constitution from such legislation as that we are now considering, is protected because *it is property* innocently acquired under existing laws, and not upon any theory which even so much as opens the question of its utility. If intoxicating liquors are property, the constitution does not permit a legislative estimate to be made of its usefulness with a view to its destruction. In a word, that which belongs to the citizen in the sense of property, and as such has to him a commercial value, cannot be pronounced worthless or pernicious, and so destroyed or deprived of its essential attributes.

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We must be allowed to know, what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries; and that it is this use which has imparted to them, in this state, more than ninety-nine hundredths of their commercial value. It must follow that any scheme of legislation which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity, and by any person, a criminal offence—which declares them a public nuisance—which subjects them to seizure and physical destruction, and denies a legal remedy, if they are taken by lawless force or robbery, must be deemed in every beneficial sense, to deprive the owner of the enjoyment of his property.

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It has been urged upon us, that the power of the legislature is restricted, not only by the express provisions of the written constitution, but by limitations implied from the nature and form of our government. . . .

. . . [It is not] necessary to push our inquiries in the direction indicated. There is no process of reasoning by which it can be demonstrated that the "Act to prevent Intemperance, Pauperism and Crime," is void upon principles and theories outside of the constitution, which will not also, and by an easier induction, bring it in direct conflict with the constitution itself.

I am brought, therefore, to a more particular consideration of the limitations of power contained in the fundamental law: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. No person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." . . .

No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that the law of the land, or "due process of law," may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away.

The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute the

sentence. If this is the "law of the land," and "due process of law," within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation pass a law to take away the liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed, by the constitution, in the same category with liberty and life.

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We are brought, then, directly to the question, does the "Act to prevent Intemperance, Pauperism and Crime," in a just constitutional sense, deprive the citizens of this state of their property in intoxicating liquors? We have already seen that this species of property is just as inviolable as any other. That by the operation of this law its commercial value is annihilated; that it cannot be sold; that it is unlawful to keep it; that all legal protection is withdrawn from it; and that it becomes a public nuisance. . . .

Material objects . . . are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

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The statute under consideration, without reference to its provisions for the seizure and physical destruction of intoxicating liquors, by force of its prohibitions alone, sweeps them from the commerce of the state, and thus annihilates the quality of sale, which makes them valuable to the owner. This is destructive of the notion of property.

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Unless, therefore, the right of property in liquor is denied altogether, and this has never been done, or unless they can be distinguished from every other species of property, and this has not been attempted, the act cannot stand consistently with the constitution. The provisions of the constitution should receive a beneficent and liberal interpretation, where the fundamental rights of the citizen are concerned. But, in the case before us, its plain and obvious meaning is enough. "No person can be deprived of his property without due process of law" by the legislature or any other power of the government.

When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.

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. . . [O]ur attention has been directed to a supposed analogy between the act under consideration and the license and excise laws of this and other states, the constitutionality of which is not questioned. I think the analogy does not exist. However difficult it may be to define, with accuracy and precision, the line of separation, there is a broad and perfectly intelligible distinction between what is plainly regulation on the one side, and what is plainly prohibition on the other. . . . The statute we are examining passes the utmost limit of regulation, and does not even wear a disguise. It is plainly prohibitory in every feature, and in its entire scope and policy. Some of the excise acts referred to were of great stringency, considered as regulations merely of traffic in intoxicating liquors; but none of them totally prohibited their sale as a beverage, or denied to them as such, the essential qualities of property, or placed them without the protection of the laws.

It is certain, that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Neither of these propositions is denied; but they necessarily lead to another—that between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation. All reasoning, therefore, in favor of upholding legislation which belongs to one class, because it is often difficult to distinguish it from that which belongs to the other, must be fallacious, because it is simply reasoning against admitted conclusions.

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Statutes conferring upon municipal corporations powers, which, in their execution and ultimate result, inflict incidental or consequential injury upon the property of individuals—injury for which it is said the law affords no remedy—have been adjudged constitutional. In legislation of this kind it is also supposed some warrant can be found for the act under consideration. Here, again, the analogy fails. Laws of this character proscribe no species of property. They may injure it in their remote and accidental result, but they do not, like this act, say it shall not be allowed to exist at all, or strike directly at the qualities and attributes, without which it can have no legal existence. The constitutional requirement is, that no person shall be *deprived of his property,* and that private property shall not be taken for public use without just compensation. It is nowhere declared, that in the exercise of the admitted functions of government, private property may not receive remote and consequent injury without compensation. . . .

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JUDGE SELDEN

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Does the statute in question, then, deprive any class of citizens of their property without "due process of law?"

Property is the *right* of any person to possess, use, enjoy and dispose of a thing. The term, although frequently applied to the thing itself, in strictness, means only *the rights* of the owner in relation to it. . . . A man may be *deprived* of his property in a chattel, therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his *rights* in regard to it annihilates his property in it. It follows, that a law which should provide, in regard to any article in which a right of property is recognized, that it should neither be sold or used, nor kept in any place whatsoever within this state, would fall directly within the letter of the constitutional inhibition, as it would, in the most effectual manner possible, deprive the owner of his property, without the interposition of any court, or the use of any process whatever.

It may be said that the constitutional provisions in question cannot, in the nature of things, apply to a case where a law enacted for beneficent purposes operates *directly* upon its subject, and thus accomplishes *per se* the end in view; that in such a case it is impossible to interpose any judicial action between the enactment and its execution; and that the clause can only apply to cases where there is to be some manual interference with the rights of person or of property.

But there is no such limitation in the constitution; and the few guarantees it contains should not be curtailed by any narrow or refined process of interpretation. Such a construction would virtually nullify the provision—as the most oppressive and tyrannical ends may be accomplished by simply withdrawing from individual rights the protection of law. All vested rights to franchises would be placed, by this interpretation, so far as the state constitution is concerned, entirely at the mercy of the legislature. To give the clause, therefore, any value, it must be understood to mean, that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty, or property, EXCEPT AS THE CONSEQUENCE of some judicial proceeding, appropriately and legally conducted. It follows, that a law which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the constitution.

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JUDGE T. A. JOHNSON dissenting:

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That intemperance, pauperism and crime are evils, with which the government is necessarily compelled to deal, none will deny. In the judgment of the legislative bodies, by which this statute was enacted, one great source of all these great, oppressive and dangerous evils was the traffic in intoxicating liquors. So injurious, in their opinion, has this traffic become under existing restrictions, in its consequences upon the community, that it ought to be subjected to still more rigorous and extensive restrictions and prohibitions, and impressed with additional features of criminality. If the legislature had

the power to enact a law to accomplish this end, the right to choose the means best calculated to effect it was necessarily vested in it; unless, indeed, the use of such means is forbidden by the constitution. . . . The argument is, that the value of property as an article of trade is an essential element of it as property, and that to the extent to which the restriction or prohibition diminishes its value for such purposes, to the same extent the owner is deprived of his property, although neither the title nor the possession of such owner is in any respect interfered with; and that this is accomplished by the operation of the act, independent of any trial or judgment, in other words, without due process of law. Is not this a strained and unwarrantable construction and application of this provision of the constitution? Clearly it is. This provision has no application whatever to a case where the market value of property is incidentally diminished by the operation of a statute passed for an entirely different object, and a purpose in itself legitimate, and which in no respect affects the title, possession, personal use or enjoyment of the owner. Such a construction would prohibit all regulations by the legislature, and all restrictions upon the internal trade and commerce of the state; it would place the right of traffic above every other right, and render it independent of the power of the government. "Deprived" is there used in its ordinary and popular sense, and relates simply to divesting of, forfeiting, alienating, taking away property. It applies to property in the same sense that it does to life and liberty, and no other. . . .

The act does, indeed, by other provisions, directly provide for depriving the owner of his property by forfeiture and destruction; but that is where it is kept for an unlawful purpose, and after a trial and judgment. That provision has no bearing upon the question under consideration. When the property is taken from the owner and destroyed, he is then deprived of it by virtue of the act, not before. It might be urged, with precisely the same pertinency and force, that a statute which prohibits certain vicious actions, and declares them criminal, deprives persons of their liberty, and is therefore in derogation of the constitution. The constitutional provision referred to was intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture and destruction, without a trial and conviction by the ordinary modes of judicial proceeding. There is no pretence that the plaintiff in error in this case was not convicted by due course and process of law.

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A distinction has been attempted to be drawn between the power to restrict, by way of regulation, and the power to prohibit. But this distinction, if there be one, is altogether too narrow and uncertain to serve as the test of the rightful exercise of a power like that of making laws for the government of a state. The right to restrict and regulate includes that of prohibition. . . .

This whole controversy, so far as it involves any question of principle, is narrowed down to a struggle for the right of the individual to traffic, in whatever the law adjudges to be property, at his discretion, irrespective of consequences, over the right of government to control and restrict it within limits compatible with the public welfare and security. Everything beyond this is merged in considerations of expediency. This right of the owner to traffic in his property never was, since the institution of society, a right independent of the control of government. It is a right surrendered necessarily to the government, by every one when he enters into society and becomes one of its members. A government which does not possess the power to make all needful regulations in respect to its internal trade and commerce, to impose such restrictions upon it as may be deemed necessary for the good of all, and even to prohibit and suppress entirely any particular traffic which is found to be injurious and demoralizing in its tendencies and consequences, is no government. It must lack that essential element of sovereignty, indispensably necessary to render it capable of accomplishing the primary object for which governments are instituted, that of affording security, protection and redress to all interests and all classes and conditions of persons within their limits. . . .

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As there is nothing, therefore, in the constitution, either of this state or of the United States, which takes away or limits the rights of the legislature to make such regulations in regard to the traffic in property amongst the citizens of the state, and to impose such restrictions and prohibitions upon it as it shall deem necessary for the public good, this act, so far as it restricts and prohibits the sale of intoxicating drinks, must be pronounced a valid, constitutional act, and entitled to obedience from every citizen of the state.

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[JUDGES MITCHELL and WRIGHT also dissented]