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SOME DILEMMAS IN DRAWING THE PUBLIC/PRIVATE DISTINCTION IN NEW DEAL ERA STATE CONSTITUTIONAL LAW

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Like most, I long had relatively little interest in state politics as such, despite a long-standing interest in federalism-related issues.[1] But in recent years I have been gradually drawn into state constitutionalism, thanks largely to work on a truly remarkable casebook project that incorporates state-level discussions of constitutional principles into national-level debates[2] and to the amazing work of a couple of graduate students with whom I had the good fortune to work.[3] The story of American constitutional development is radically incomplete without an account of constitutionalism in the states, which supplements, extends, and contests the interpretation and construction of the U.S. Constitution. And though individual states are often idiosyncratic, there are broad currents of constitutional law, practice, and thought that flow through the states, and distinctive patterns of law and politics that a focus on the states can help illuminate.

One immediate puzzle comes from a consideration of the New Deal period.[4] Socioeconomic and political crises put established constitutional rules and norms under pressure, and the Great Depression is, as a consequence, an important period of constitutional innovation.[5] Obviously, a

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1. *See, e.g.*, Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998); Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 PUBLIUS 1 (1996), http://publius.oxfordjournals.org/.

2. HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, 2 AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES (2013).

3. *See, e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); Sean Patrick Beienburg, Constitutional Interpretation in the States Between Reconstruction and the New Deal (Sept. 2015) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

4. *See* Keith E. Whittington, *State Constitutional Law in the New Deal Period*, 67 RUTGERS L. REV. (forthcoming 2015).

5. *See, e.g.*, G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) (examining the "crisis in adaptivity" of the U.S. Constitution in the Great Depression); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV.

tremendous amount of work has been done on the constitutional conflicts of the New Deal era at the federal level and the constitutional revolution of 1937 in the United States Supreme Court.[6] Remarkably, however, little work has been done on constitutional developments in the states during this period. To what degree did state constitutional law lead or lag federal constitutional law? To what degree did state constitutional text and law constrain the kind of policy innovations that characterized the New Deal period? To what degree were the states sites of resistance to the constitutional revolution that was taking place at the federal level? Did the constitutional battles of the New Deal have their analogues in the states, or was the federal constitutional experience itself idiosyncratic and a function of the particular array of institutions and actors that characterized national politics of the period? In this Paper, I suggest the direction of an answer to such questions. State constitutional law has been hidden in the shadows for so long that its relevance to larger problems of American constitutionalism can be easily forgotten. The handful of cases referenced here might help whet the appetite for a larger survey of constitutional development in the states, while suggesting that state-level constitutional texts and judicial decisions can put familiar issues in constitutional law in a new light.

This ties into the public/private distinction, but perhaps not in the usual ways that are currently more familiar. I traditionally think of the public/private distinction in terms of the Lockean liberal identification of a "private" sphere of religion (in particular) that is free from "public" (i.e., political and governmental) contestation and regulation.[7] In the modern context, this distinction has been expanded to a broader range of moral or cultural issues that might be protected from politicization and political interference, matters on which the state must remain "neutral."[8] In the late nineteenth and early twentieth century, however, economic affairs were also generally understood to be "private" in a similar sense and thus insulated from governmental interference; therefore, a key move of modern reform

L. REV. 1061 (2010) (describing the restructuring of judicial review in the early republic in reaction to economic crisis).

6. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE (2014); EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN (1995).

7. *See generally* JOHN LOCKE, A LETTER CONCERNING TOLERATION (Bobbs-Merrill Co., 1955) (1689).

8. On the "neutrality" debate, see, for example, RONALD DWORKIN, A MATTER OF PRINCIPLE 181–204 (1985); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); LIBERAL NEUTRALITY (Robert E. Goodin & Andrew Reeve eds., 1989); GEORGE SHER, BEYOND NEUTRALITY (1997); JEREMY WALDRON, LIBERAL RIGHTS, COLLECTED PAPERS 1981–1991, at 143–67 (1993); Gerald F. Gaus, *Liberal Neutrality: A Compelling and Radical Principle*, 8 CRIT. REV. 217 (1994), http://gaus.biz/GausOnNeutrality.pdf.

liberalism was to shift economic affairs from the private to the public sphere and thus make them more tractable to government control.[9]

Aspects of that shift are reflected in federal constitutional law, but the putatively private quality of economic behavior was often embedded in doctrinal background. Barry Cushman's account of the New Deal revolution, for example, observes that the "distinction between public and private spheres was one of the fundamental concepts of nineteenth- and early twentieth-century American law," and that the distinction was often central to a variety of areas of constitutional law during the period.[10] This conceptual background helped fill in the content of the "Court's substantive due process jurisprudence."[11] In brief, the states' police power could legitimately be used to regulate public activities for the public good, but not private activities for private good.[12] The Court, therefore, needed to be able to distinguish between those activities that were in their nature "public" and thereby subject to government manipulation and those that were "private" and thereby insulated from government intrusion. Oliver Wendell Holmes railed against this conceptual starting point when declaring that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*."[13]

But the state constitutions are different. The same conceptual framework that lawyers and judges deployed to understand a wide range of law and that Cushman (among others) described was, of course, at work in state constitutional law as well as federal constitutional law. But one of the notable features of state constitutions is that they have fewer "glittering" generalities and more mundane specifics.[14] They put the lie to John Marshall's assertion that constitutions are not to have "the prolixity of a legal code."[15]

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9. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 79–83 (Thomas Burger trans., 1991); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

10. CUSHMAN, *supra* note 6, at 47.

11. *Id.* at 47–48.

12. *See also* HOWARD GILLMAN, THE CONSTITUTION BESIEGED 20 (1996) ("partial laws that represented the corrupt use of public power by certain groups seeking to advance purely private interests"); *cf.* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 83–113 (1996) ("[T]he economy was seen in antebellum America as a site for the exercise of public power.").

13. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

14. SAMUEL GILMAN BROWN, THE LIFE OF RUFUS CHOATE 306 (Boston, Little, Brown & Co. 2d ed. 1870).

15. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

State constitutions are less content to limit themselves to the "great outlines" and "important objects" of government power and more willing to delve into "an accurate detail" of all the "subdivisions" of power and "minor ingredients" of political objects.[16] Generations of political activists have written and rewritten the state constitutional texts in an effort to exert more control over government officials and the conduct of government business. In doing so, some of the doctrinal background that Holmes inveighed against was converted into hard-wired constitutional text. The state constitutions, at least in part, embodied particular economic theories. If those theories were not exactly laissez-faire, they did create some buttresses for the traditional public-private distinction.

One is hard-pressed to read a large sample of state constitutional cases from the early twentieth century and not come away with an appreciation of the extent to which those were, in important ways, economic documents. They were centrally concerned with the management and regulation of state governance of economic activities, the extraction of economic resources for public use, the appropriation and expenditure of public funds, and the creation of fiscal liabilities. The judicial review of state action was intimately and elaborately concerned with whether state officials had rigorously observed those economic regulations and whether, ultimately, they had limited themselves to appropriate public business or tried to make use of public power in order to advance private interests.

I will briefly give three illustrations of state constitutional law engagement with the public/private distinction in the 1930s. The first, *Campbell v. McIntyre*[17] comes from Tennessee and is familiar from the federal context. In 1932, the Tennessee state legislature created a state accounting board charged with the task of examining and certifying accountants operating within the state. The requirement for certification of "public accountants" applied to anyone doing "accounting work" for more than one employer.[18] Unlike earlier regulations, this statute prohibited anyone from doing such work without a state-issued professional license ("certified public accountants" were previously a designation of expertise rather than an occupational requirement).[19] A non-certified public accountant, Campbell, challenged the statute as "unreasonable class legislation."[20] The critique of class legislation is familiar from police power jurisprudence,[21] but the Tennessee constitution offered a stronger textual hook than a mere due process

16. *Id.*
17. 52 S.W.2d 162 (Tenn. 1932).
18. *Id.* at 163 (quoting TENN. CODE ANN. 1932 § 7095 (1932)).
19. *Id.*
20. *Id.*
21. GILLMAN, *supra* note 12.

clause. Campbell complained that the statute violated the Tennessee Declaration of Rights, which provided that "disseized of his freehold, liberties or privileges" or "deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."[22] He also contended, more concretely, that the law violated the special legislation provision of the Tennessee Constitution.[23] From Campbell's perspective, the legislature had made "certified accountants a favored class with monopolistic privileges conferred upon them" and denied "private businesses the right to contract with whomsoever they wish to contract in purely personal matters."[24]

The justices were inclined to agree that "it is now more important to the preservation of constitutional government that emphasis be placed . . . upon the constitutional restraints on the police power of the legislature, rather than upon the extent to which that broad power may be exercised."[25] Pointing to *Meyer v. Nebraska*[26] as construing the "personal rights of individuals" in regard to principles that were "substantially the same" as those found in the Tennessee constitution, the Tennessee Supreme Court emphasized its duty to evaluate whether the law "has a real tendency to promote or protect the public interest and safety, whether it bears a reasonable relation to such end, and whether the interests of the public generally, as distinguished from the interests of a particular class, reasonably require the protection of this restrictive legislation."[27]

Following the lead of other state courts that had addressed the issue,[28] the Tennessee court concluded that the new licensing requirement was designed more for "the protection of accountants certified . . . and not for the protection of the public in general" and thus illegitimately confers a special privilege of entering into private contracts "upon this class" while "unreasonably" withholding it from others.[29] The quality of accounting services did not "directly affect the public, but affected only the parties" in the relationship. Therefore, state regulation of accountants was no more warranted here than when any other two private actors entered into a private contract

22. TENN. CONST. of 1870, art. I, § 8.

23. *See id.* at. art. XI, § 8 ("The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.").

24. *Campbell*, 52 S.W.2d at 163.

25. *Id.*

26. 262 U.S. 390 (1923).

27. *Campbell*, 52 S.W.2d at 164.

28. *Id.* at 163 (citing Short v. Riedell, 233 P. 684 (Okla. 1924); Frazer v. Shelton, 150 N.E. 696 (Ill. 1926)).

29. *Campbell*, 52 S.W.2d at 164.

for services or goods.[30] The "remote and indefinite" benefits to the public could not override the rights of the private individuals involved in these transactions.[31] Individuals had the right to do things in private, including risky things, so long as there was no demonstrable, directly evident harm to the general public.

The Jacksonian textual provision against the legislative conferral of special privileges upon some private actors to the detriment of others reinforced the more free-floating concerns that ran through the general due process and police powers jurisprudence.[32] Tennessee's original Declaration of Rights included a "law of the land" provision, which was carried forward in subsequent constitutions.[33] This early constitution also included a prohibition on "monopolies," declaring that they were "contrary to the Genius of a free State."[34] In 1835, Tennessee adopted a new constitution that carried forward the original Declaration of Rights. But the new constitution also included a much more elaborate restriction legislation prohibiting monopolies. This new provision included a detailed list of schemes that were to be outside the power of the legislature. The legislature was still authorized to charter corporations "as they may deem expedient for the public good," but it was prohibited from passing laws "for the benefits of individuals inconsistent with the general laws of the land" or from granting "any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."[35] While the court in *Campbell* did not dwell on the question of whether accountants such as Campbell could have brought themselves within the provisions of the new statute granting special privileges to certified public accountants, such textual provisions reinforced the general constitutional bias against creating artificial and arbitrary distinctions among citizens and bestowing special favors on the politically privileged.

A second case, *Gross v. Gates*,[36] comes from Vermont, where in 1937 the legislature directed the state's auditor of accounts to pay three thousand dollars to the widow of a deputy sheriff recently murdered in the line of duty.[37] The auditor objected, arguing that the directive violated a state constitutional principle that the government is "instituted for the common bene-

30. *Id.*

31. *Id.*

32. On the Jacksonian antipathy for special privileges, see GILLMAN, *supra* note 12, at 33–45.

33. TENN. CONST. of 1796, art. XI, § 8.

34. *Id.* § 23.

35. TENN. CONST. of 1835, art. XI, § 7.

36. 194 A. 465 (Vt. 1937).

37. *Id.* at 467.

fit . . . and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community."[38] In short, the statute ran afoul of the prohibition on the "appropriation of public funds to private uses."[39] The state constitution required that public funds only be used for public purposes, challenging the court to identify what constituted a valid public purpose and what constituted an illegitimate private benefit. The court pointed to a long legislative practice of passing special acts "for the relief of those injured while in the actual service of the State," but hesitated before the case of a public officer injured "in the service of civil process."[40] The court further hesitated to provide public funds for the benefit of the officer's family members rather than the relief of the public officer himself. The "legislative construction"[41] of the constitution, however, established that the legislature could discharge "a moral obligation that rests upon it"[42]—that was a public purpose, even if an individual privately gained from it.

The puzzle for the court was whether any such moral obligations could arise when the injured individual was not acting on behalf of the state but was instead serving a capias warrant in a civil suit when he was killed by the subject of the warrant. A majority of the court was persuaded that the deputy was nonetheless serving a public function at the time of his death, and thus his injury imposed a moral obligation on the state that was appropriately relieved by a gift to his family. The deputy may have been acting for the "benefit of a private individual" at the time of his death, but he did so "by the command of the law."[43] By contrast, a dissenting justice concluded that legislatures could not "reach the pocketbook of the taxpayers" to compensate someone injured while not in the "actual service of the State" but rather working on behalf of a "private individual," like a civil process server.[44] The *Gates* case illustrates how taxing and spending provisions of state constitutions often emphasized that funds could only be raised and expended by the state for the benefit of the public, leaving to constitutional interpreters the task of separating the public from the private.

A final case, *Ellerbe v. David*,[45] comes from South Carolina, where the legislature exempted from state taxes for 1937 the residents of designated school districts in Marlboro County who had suffered severe hail damage.[46]

38. VT. CONST. of 1793, ch. 1, art. VII.
39. *Gross*, 194 A. at 467.
40. *Id.* at 468.
41. *Id.*
42. *Id.* at 470 (Slack, J., dissenting).
43. *Id.* at 470 (majority opinion).
44. *Id.* at 471 (Slack, J., dissenting).
45. 8 S.E.2d 518, 519 (S.C. 1940).
46. *Id.* at 519.

County residents from outside of those designated districts (some of whom had also suffered hail damage) sued. While the South Carolina legislature's power to tax was not inherently limited, the state constitution directed that it provide a uniform rate of assessment and taxation, subject only to a narrow set of exemptions.[47] Those exemptions emphasized distinctly public purposes, whether municipal, educational, or charitable. For the *Ellerbe* court, it was clear that the tax exemption for the private property of the hail sufferers benefited only those individuals, "not the public at large," and advancing the "interests of private individuals is essentially of a private nature" and not a legitimate public purpose.[48] Such state constitutional provisions carefully specifying the conditions under which the state could raise or spend money or create fiscal liabilities invited, perhaps necessitated, efforts to distinguish public purposes from private benefits and draw boundaries between the public and private realms. Court cases evaluating whether taxes were imposed or public funds were spent for genuinely public purposes were myriad.[49]

The detailed constitutional provisions contained in state constitutions create a more difficult dilemma than the one faced by the U.S. Supreme Court in the 1930s. Edward Corwin complained that the U.S. Supreme Court inappropriately doubted "whether the government is entitled to expend the public funds for the primary benefit of private persons in the expectation of thereby promoting an ulterior public good."[50] The Justices might have been prone to reading such a principle into the vague requirements of the Due Process Clause, but the drafters of state constitutions had gone further in imposing restrictions on legislative discretion. Burned once too often by political corruption and ill-considered legislative schemes, voters also emphasized their desire that legislators not fritter away public resources on private enterprises.[51] Necessity being the mother of invention, politicians often responded with creative new devices for circumventing

47. S.C. CONST. of 1895, art. X, § 1.

48. *Ellerbe*, 8 S.E.2d at 521.

49. *See, e.g.*, Hutcheson v. Atherton, 99 P.2d 462 (N.M. 1940) (affirming that a county may not issue bonds to facilitate a private corporation constructing an auditorium for the celebration of the fourth centennial of the Spanish exploration of the territory); *In re* Opinion of the Justices, 190 A. 425 (N.H. 1937) (concluding that the government may spend public funds on water projects that directly benefit the state).

50. CORWIN, *supra* note 6, at 59. Corwin's objection to this line of reasoning was long-standing. *See* Edward S. Corwin, *Social Insurance and Constitutional Limitations*, 26 YALE L.J. 431 (1917) (using workmen's compensation legislation and jurisprudence to illustrate the end of "constitutional rigorism").

51. *See generally* Carter Goodrich, *The Revulsion Against Internal Improvements*, 10 J. ECON. HIST. 145 (1950) (explaining the nineteenth century state policy trend against using public funds for internal improvements); John Joseph Wallis, *Constitutionalism, Corporations, and Corruption: American States and Constitutional Change, 1842–1852*, 65 J. ECON. HIST. 211 (2005) (discussing the public finance methods adopted by the states during the nineteenth century).

fiscal limitations.[52] Courts increasingly responded by minimizing the significance of such provisions.[53] In the New Deal era, however, such provisions posed a dilemma for constitutional interpreters. As political reformers pressed politicians to identify the public benefits that could come from public expenditures to private persons, judges were forced to struggle in cases with constitutional provisions that disfavored such transactions, both momentous and mundane. These cases were premised on the understanding that it was possible to distinguish between a public and a private sphere. Where federal judges could push aside inherited doctrine as not implicating "a specific prohibition of the Constitution,"[54] as Justice Stone put it, state judges were in the trickier situation of working with explicit constitutional limitations on how legislators could raise and spend public funds.

52. *See, e.g.*, C. Robert Morris, Jr., *Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234 (1958).

53. *See* Richard Briffault, *Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 909 (2003) (noting that there was "an enormous gap between the written provisions of state constitutions and actual practice").

54. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).