Sharpless v. Philadelphia: Jeremiah Black and the Parent Case on the Public Purpose of Taxation

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The centennial of the public purpose doctrine of taxation is an appropriate time to recall its curious origin in the dramatic case of *Sharpless v. Philadelphia*,[1] in the Pennsylvania Supreme Court in 1853. A distinguished legal company attended its birth in this leading case on public financing of private railroad construction; no less than three of the participants in the litigation were sometime, but unsuccessful, nominees to the United States Supreme Court. The issues, arguments and personalities represent some of the most important emergent elements in a transitional period of American legal development.

While the *Sharpless* case has had occasional modern notice,[2] its full significance as the germinal statement of the public purpose doctrine in tax law has escaped systematic exposition. The attention of the legal profession, quite naturally, has followed subsequent authoritative statements of the public purpose doctrine, notably those of the United States Supreme Court in the *Loan Association* case,[3] *Jones v. Portland*,[4] and *Green v. Frazier*,[5] and of such treatise-writers

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[1] 21 Pa. 147, 59 Am. Dec. 759 (1853); dissents were printed, 2 AM. L. REG. 27 and 85 (1853).

[2] The able study of LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, 113-125 (1948), relates the case to economic and political developments in Pennsylvania, but ignores its significance in development of the public purpose doctrine. WILLIAM N. BRIGANCE, JEREMIAH SULLIVAN BLACK, A DEFENDER OF THE CONSTITUTION AND THE TEN COMMANDMENTS 34 (1934), barely mentions the case and completely ignores the public purpose formulation by Black, perhaps his most significant doctrinal contribution to American law. See also the discussion by Breck P. McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137, 140 (1930), reprinted, 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW, bk. 5, p. 1 (1938). The two dissenting opinions were not reported officially, and their availability in the contemporary AMERICAN LAW REGISTER, cited *supra*, note 1, seems completely to have escaped modern notice.

[3] Loan Association v. Topeka, 20 Wall. 655 (U.S. 1874).

[4] 245 U.S. 217 (1917).

[5] 253 U.S. 233 (1920).

as Thomas M. Cooley in his *Constitutional Limitations*[6] and *Taxation*.[7] Consequently the creative significance of the parent case, so widely cited in one of the great legal controversies of the nineteenth century, has largely been overlooked in the present age.[8]

During the second quarter of the nineteenth century, sanguine expectation of public benefit from state sponsorship of internal improvements ran ahead of technical ingenuity and facilities, and even more important, the speculative optimism overtaxed the poorly articulated administrative machinery and fiscal devices of the state governments. The financial panic of 1837 ensued. But confidence returned quickly and railroad development in the "Early Railroad Age"[9] went ahead at a tremendous pace during the two decades before the Civil War, under different financial sponsorship. While the states were liquidating or repudiating their internal improvement obligations, private railroad promoters found favor in state legislatures which authorized various levels of local government to mortgage their future with public bond issues to pay for subscriptions to stock of mushrooming private railroad corporations.[10] These bond issues had to be serviced by local taxation, and as bondholders turned to the courts to enforce payment, recalcitrant taxpayers resisted the increasing burden of taxation with equal vigor.

A vast body of railroad financing litigation flooded the American courts, state and national (by diversity jurisdiction) during the third quarter of the nineteenth century. In the *Sharpless* case, Chief Justice Jeremiah S. Black of the Pennsylvania Supreme Court contributed the public purpose doctrine to the conceptual arsenal used in this litigation. The doctrine served generally to sustain the validity of local public railroad subsidies; but subsequently it gained independent stature as a judicially-implied constitutional limitation upon various forms of public enterprise and subsidy to private economic ventures.[11]

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[6] A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION c. 14 (1st ed. 1868) and subsequent editions.

[7] A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS c. 4 (1st ed. 1876) and subsequent editions.

[8] See for example, JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 338 (1950).

[9] So called by THOMAS C. COCHRAN AND WILLIAM MILLER, THE AGE OF ENTERPRISE c. 4 (1942). See also, BALTHASAR H. MEYER, CAROLINE E. MACGILL and others, HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860 (1917).

[10] See esp., FREDERICK A. CLEVELAND AND FRED W. POWELL, RAILROAD PROMOTION AND CAPITALIZATION IN THE UNITED STATES (1909).

[11] While the public purpose doctrine has been used by the courts of nearly every state, and in all levels of the federal courts, it still has found some form of explicit statement in but sixteen state constitutions.

In Pennsylvania, taxpayer resistance to public subsidy for internal improvements developed in the face of a long and prominent tradition of mixed enterprise.[12] But the resistance was merely a local manifestation of a national movement to restrict the fiscal powers of government[13] bent upon speculative promotion of an economy whose image was rapidly acquiring national proportions. Thus, while the Commonwealth was seeking to unload its internal improvement holdings, anti-subscription forces mobilized to oppose a stock subscription by the city of Philadelphia to the Pennsylvania Railroad in 1846.[14] While railroad promoters found ready allies among merchants and professional, manufacturing and labor interests, the propertied interests in the anti-subscription movement argued that the city subscription would be in excess of charter powers in the absence of specific legislative authorization. A curiously fugitive holding of the state Supreme Court seemed to sustain this contention,[15] but legislative authorization of the subscription in 1848 destroyed the very foundation of the legalistic plea. During the next several years, the state Supreme Court gave the anti-subscription forces little satisfaction, although its attitude shifted from one of ebullient confidence in the scheme of local internal improvement subsidy to one of seasoned doubt between 1847 and 1853. In the earlier year, the court sharply rebuked a challenge of taxation for "additional revenue" to retire the state internal improvement debt, dismissing counsel with the statement that the plaintiff was "behind the age" and "resisted all improvement," personifying groups which had forced the state to resort to costly local expedients for completion of its internal improvement system.[16] In 1849, the court sustained legislative authorization for local subscription to a turnpike company, rejecting a plea to implied constitutional limitation upon the tax power with a very broad assertion of legislative competence:

> From the commencement of the government, our representative bodies have exerted the unchallenged power to levy taxes, mediately or immediately, for every purpose deemed by them legiti-

[12] HARTZ, *op. cit. supra* note 2, at 82 *ff.*

[13] Horace Secrist, *An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States,* UNIVERSITY OF WISCONSIN BULLETIN No. 637 (1914).

[14] HARTZ, *op. cit. supra* note 2, at 104-113.

[15] M'Dermond v. Kennedy, Brightly 332 (Pa. 1839). The court affirmed, without opinion, a decision of a county common pleas court that a borough tax for subscription to a railroad was not a "borough purpose" within terms of the local charter. The decision was not printed in the official reports and its rediscovery and publication was an incident in the 1846 Philadelphia subscription controversy. See editor's notes, Brightly 338, and 3 PA. L. J. 490 (1872).

[16] Shitz v. Berks County, 6 Pa. 80, 82 (1847).

> mate. . . . No one has yet dreamed of doubting the validity of that power, when applied in maintenance of the ordinary roads of the country.[17]

Justice Bell noted a recent "fashion to impeach the action of legislative bodies, as unconstitutional, when it happens not to accord with the party's notion of propriety and abstract right." The court would not be moved by such considerations, and must see some "express prohibition or necessary implication" before it would declare legislation unconstitutional.[18]

While 6,000 miles of railroad were built in the eighteen-forties, the fifth decade brought 21,000 more miles of construction, as eastern cities entered into frantic competition for the markets of the Ohio Valley and Great Lakes regions. The Erie Railroad reached Lake Erie at Dunkirk, New York, in 1851 and the New York Central pushed a line through to Buffalo three years later. Chicago got its first rail connection to the East in 1853, and the Baltimore and Ohio line reached Wheeling, Virginia, on the Ohio River, the same year. Meanwhile the Pennsylvania Railroad, chartered in 1846 to link Harrisburg and Pittsburgh, had nearly completed that construction and was reaching out for connections with Indianapolis and Cincinnati.[19] Interests in Philadelphia were concerned lest the commerce of the Lehigh Valley be turned along northern railroads to New York City. On May 6, 1852, the Pennsylvania General Assembly authorized Philadelphia and several other cities and counties to subscribe to stock of the Philadelphia, Easton and Water-Gap Railroad, frankly projected as a bid to retain this market by a rail link from Philadelphia via Easton and Waverly, in Bradford County, to the New York and Erie line in southern New York State. Then on April 9, 1853, the Assembly authorized Philadelphia to subscribe 10,000 shares of stock of the Hempfield Railroad which would connect the Pennsylvania line in Westmoreland County, with Wheeling to meet the competitive threat of the Baltimore line into the Ohio River basin. In each instance the city was authorized to borrow by bond issues, for purchase of the railroad stocks; and interest and principal of the bonds would be provided for "as in other cases of loans to said city," that is, by taxation.

On April 14, 1853, the select and common councils of Philadelphia authorized the Hempfield subscription. Anti-subscription forces mobilized again to combat this new expenditure and prospective taxa-

[17] Commonwealth *ex rel.* Dysart v. M'Williams, 11 Pa. 61, 71 (1849).
[18] *Id.* at 70.
[19] CLEVELAND and POWELL, *op. cit. supra* note 10, at 82; COCHRAN and MILLER, *op. cit. supra* note 9, at 55; MEYER and MACGILL, *op. cit. supra* note 9, at 396.

tion, and served notice that William Sharpless and others would petition the state Supreme Court for an injunction against the subscription. On May 10, Mayor Charles Gilpin of Philadelphia subscribed 10,000 shares of Hempfield stock and on the same day, the city councils authorized him to make a similar subscription to Water-Gap stock whenever 15,000 shares had been subscribed by others. Defendants' counsel submitted their answer on July 15, and oral argument of the case, at Philadelphia, occupied the last week of July.[20]

The Counsel

The talent assembled for the *Sharpless* case seemed to bear out Chief Justice Black's observation that the court was "well assisted" by counsel who argued with "an ability fully proportioned to the immense magnitude of the interests, public and private, which were at stake."[21] Four of the counsel, two on each side, and Justices Black and Ellis Lewis of the court, are noticed in the *Dictionary of American Biography*.[22]

Benjamin Brewster, who headed counsel for the petitioner, was a leader of the Philadelphia bar and a Democrat who switched to the Republican Party. Thirty-seven years old at the time, he served as attorney general of Pennsylvania just after the Civil War, and gained national prominence as President Arthur's Attorney General and prosecutor of the Star Route postal frauds in 1881-1884. Associated with Brewster was G. Mallery, apparently young Garrick Mallery, just admitted to the bar, who subsequently abandoned the law to become a pioneer in the development of systematic meteorological observation, and an authority on Indian pictography. Thomas Williams, a prominent Pittsburgh attorney and a founder of the Republican Party in Pennsylvania, associated himself voluntarily with Brewster; according to his biographer, he was allowed to present an argument "as the voice of all who were in arms against the constitutionality of these acts." While the official report makes no mention of Williams' role, he subsequently attacked the decision and became a leader of the movement which gained a constitutional amendment four years later, to prohibit the sort of legislation at issue in the *Sharpless* case. Williams wrote the call for the Republican national convention of 1860 which nominated Lincoln, served in Congress,

[20] 21 Pa. 147, 149-151; HARTZ, *op. cit. supra* note 2, at 114.
[21] 21 Pa. 175.
[22] See entries there, for Justices Black (1810-1883) and Lewis (1798-1871); attorneys Benjamin H. Brewster (1816-1888) and Garrick Mallery (1831-1894) for the petitioners; and George M. Dallas (1792-1864) and John M. Read (1797-1874) for the defense.

and was a House manager of the impeachment of President Johnson.[23]

John Merideth Read and George Mifflin Dallas led the defense for Philadelphia. Philadelphia solicitor E. Olmsted, J. P. Brock, and St. George Campbell were associated with them. Read was a native of Philadelphia; while he was serving as United States district judge in eastern Pennsylvania, President Tyler nominated him in 1841 to be an Associate Justice of the United States Supreme Court; but the Senate adjourned without acting on the nomination.[24] Read served as attorney general of Pennsylvania for a few months in 1846, and in the same year, argued the invalidity of Philadelphia railroad subscription in the absence of legislative authorization.[25] He was a leader in the formation of the Free Soil Party, and an early adherent of the Republican Party in the state; in 1858 he was elected to the state Supreme Court, and became Chief Justice by seniority in 1872, shortly before his death.

Dallas, Vice President of the United States in Polk's administration, was best known for his diplomatic service. He was secretary to Albert Gallatin on the peace mission to Russia in 1813 and carried back the terms of peace to the United States the next year. He campaigned for Calhoun in 1824, and supported Andrew Jackson; he served as deputy attorney general, then mayor, of Philadelphia; and in 1837 he returned briefly to Russia as United States minister. In 1856, President Pierce appointed him minister to Great Britain; in that capacity he negotiated the Dallas-Clarendon Convention of 1856 for adjustment of American and British interests in Central America.

The Court

The Pennsylvania Supreme Court of 1853 was the first elected under a constitutional amendment of 1850. Five justices had been elected in 1851, and four of them were Democrats—Jeremiah S. Black, Walter H. Lowrie, Ellis Lewis, and the venerable John Bannister Gibson, then 71 years old. Gibson had been on the bench for more than three decades, and Chief Justice since 1827. One Whig candidate, Richard Coulter, managed to get on the court in 1851. Black had led the Democratic ticket, with 1,200 more votes than Gibson. When the judges drew lots for terms of varying length to initiate a staggered system of election, Black drew the short three-

[23] BURTON A. KONKLE, 1 LIFE AND SPEECHES OF THOMAS WILLIAMS c. 12, 13 and *passim* (1905).

[24] CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 119, 120 (1937).

[25] JOHN M. READ, OPINION . . . AGAINST THE RIGHT OF THE CITY COUNCILS TO SUBSCRIBE FOR STOCK IN THE PENNSYLVANIA RAILROAD (Philadelphia 1846).

year term and thereby became Chief Justice; but he insisted that Gibson retain his central seat, and the patriarch sat on there until his death on May 3, 1853. Black must have moved over sometime during the preliminary proceedings in the *Sharpless* case.[26] Meanwhile, Coulter had died in April, 1852, and George Washington Woodward replaced him by appointment. President Polk had nominated Woodward from a Pennsylvania district bench to the United States Supreme Court in 1845, on the recommendation of Secretary of War George Dallas, the father of the defense attorney in the *Sharpless* case. Senator Cameron of Pennsylvania opposed confirmation, and it was rejected by a margin of nine votes in January, 1846.[27] Woodward won election to a fifteen-year term on the court in October, 1852, and served until 1867, as Chief Justice during the last four years. He then served in Congress as a Democrat from 1867 to 1871; and joined his lifelong friend Black as a delegate to the 1872 Pennsylvania Constitutional Convention. John C. Knox, a Democrat, was commissioned May 23, 1853 to succeed Gibson, and was elected for a fifteen-year term in October, 1853. Justice Lewis, a lifelong Democrat, had served as Pennsylvania attorney general and president judge of a state district court before his election to the Supreme Court in 1851, when he drew the six-year term. He succeeded Black as Chief Justice in 1854, and retired to private life at the end of his term, declining a unanimous Democratic nomination for reelection.

Black was moving into perhaps the most dramatic legal career of the entire group. Born in Somerset County, Pennsylvania, in 1810, of prosperous German and Scotch-Irish farming stock, young "Jere" Black had little formal education, but he read widely, absorbing the lore and style of the Bible, Shakespeare, Horace and Milton. He entered the law office of Chauncey Forward, a prominent western Pennsylvania attorney and Democratic leader, soon engaged in vigorous legal practice, married Forward's daughter in 1836, and was appointed president judge of the sixteenth Pennsylvania judicial district in 1842. A lifelong Democrat, he won election to the state Supreme Court in 1851 and was reelected three years later by a 47,000-vote margin, the only member of his party to survive on the state ticket that year. He campaigned for Buchanan, who appointed him Attorney General of the United States on March 6, 1857. In that office his most notable activity was litigation of California land titles, in which he acquired the knowledge of Spanish land law that

[26] BRIGANCE, *op. cit. supra* note 2, at 28, 29.
[27] WARREN, *op. cit. supra* note 24, at 146-147.

later enabled him to recoup his fortunes by private practice during the Civil War.

Black presented the government case in *Ableman v. Booth*[28] whose decision affirmed federal power to enforce its laws without state interference. In December, 1860, he briefly succeeded Lewis Cass as Buchanan's Secretary of State, and on February 5, 1861, was nominated to fill the months-old vacancy on the United States Supreme Court left by the death of Justice Daniel. But Democratic strength had wasted away in the last months of the Buchanan administration and Black was bitterly attacked by Republican and abolitionist forces. On February 21, the Senate voted 26-25, not to consider the nomination. Buchanan considered nomination of John M. Read, of counsel in the *Sharpless* case, but finally took no action.[29]

Black accepted appointment as reporter to the Supreme Court, and edited two volumes of its reports. Although in political disfavor for his association with the Buchanan administration and for his opposition to the legal implications of declaration of war against seceding states, Black quickly made a fortune as counsel in the California land title litigations; one fee was $180,000, fabulous in those days of the American bar.[30] He vigorously opposed Reconstruction policies, and successfully championed civilian rights against military justice as chief counsel in *Ex Parte Milligan*.[31] Black was prepared to defend Jefferson Davis should the Confederate leader be formally charged with conspiracy in the assassination of President Lincoln, and he helped President Johnson to draft his veto of the Reconstruction Act of 1867 and his third annual message to Congress. Black took the habeas corpus case of William H. McCardle,[32] the southern editor held for trial by a military commission, and publicly scolded the Supreme Court for its delay of decision until Congress repealed the Habeas Corpus Act of 1867 which had given it appellate jurisdiction. He joined, then withdrew from the defense of President Johnson against impeachment,[33] appeared opposite John Archibald Campbell in reargument of the *Slaughterhouse Cases*[34] in 1873, was mentioned as a Democratic vice-presidential candidate in 1872 and

[28] 21 How. 506 (U.S. 1859).

[29] WARREN, *op. cit. supra* note 27, at 365, spelling the name Reed; obviously a misprint, see his own index.

[30] BRIGANCE, *op. cit. supra* note 2, at 143.

[31] 4 Wall. 2 (U.S. 1866).

[32] *Ex parte* McCardle, 6 Wall. 318 (U.S. 1867).

[33] BRIGANCE, *op. cit. supra* note 2, at 181, repudiates the version of this incident in CLAUDE G. BOWERS, THE TRAGIC ERA 180-181 (1929).

[34] 16 Wall. 36 (U.S. 1873).

1876, debated religion with Robert G. Ingersoll, and corrected fellow-delegates in their quotation from Shakespeare in the Pennsylvania Constitutional Convention of 1872-1873. He successfully defended Secretary of War Belknap in his impeachment in 1874, with the plea that he had been "no worse a crook than his political associates." In his last public appearance in 1883, he appeared before the Pennsylvania Legislature to support railroad regulation with a plea reminiscent of his argument in the *Sharpless* case a generation before:

> It being settled that the railroads and canals belong of right to the State for the use of the people, and that the corporations who have them in charge are mere agents to run them for their owners, it will surely not be denied that all proper regulation should be made to prevent those agents from betraying their trust.[35]

Black's personal qualities are of interest for their suggestion that he was capable of the doctrinal innovation represented in his public purpose opinion in the *Sharpless* case. He was a large man of hot temper, strong feeling freely expressed, and remarkable memory, who liked to argue cases at length and in detail without notes. He cultivated eccentricities of dress and manner which spread his fame among contemporaries. His approach to the law was not scholarly, although his mastery of Spanish language and law in the California land cases was impressive. He tended to reduce the law to fundamental principles which his marked linguistic and forensic capacity enabled him to present with clarity and simplicity. Justice David Davis, who gave the majority opinion in the *Milligan* case, described Black as "the most magnificent orator at the American bar,"[36] while another contemporary deemed him "a rhetorician without a superior—the best phrase-maker I ever heard." His verbal enthusiasm was not confined to legal matters. In 1861, he characterized Lincoln as "very small potatoes and few in a hill," and called Horace Greeley "a mush toad spotted traitor to the Constitution . . . . Shall this political turkey buzzard be permitted to vomit the filthy contents of his stomach on every decent man in the country without having his neck twisted?"[37] Black's biographer accepts the judgment that he was capable of imaginative verbal formulation:

> Black was indeed a phrase-maker, seldom content with the common currency which serves the purpose of more placid men. His phrases were of special mintage, coined with precision, and

[35] CHAUNCEY F. BLACK, ESSAYS AND SPEECHES OF JEREMIAH S. BLACK 174 (1886); his entire "Argument" is reprinted, 172-178. See BRIGANCE, *op. cit. supra* note 2, at 286.

[36] BRIGANCE, *op. cit. supra* note 2, at 265.

[37] Letters, quoted, CARL B. SWISHER, ROGER B. TANEY 562, 491 (1935).

> marked with distinctive hues. This quality, above all others, was the trade-mark of his style. In part it sprang from his choice of colorful words and striking figures; arguments were made vivid by the flash of a metaphor, and deepest philosophy was illumined by tropes.[38]

Perhaps Black's most enduring coinage was the public purpose doctrine of taxation in the *Sharpless* case. Obviously he was a man capable of such invention; but the evidence of his retentive memory and wide reading habits makes it equally plausible that he read the phrase—perhaps outside legal literature—and saved it or found it called forth by the appropriate occasion. In the absence of positive evidence as to its source, either possibility seems equally plausible.

Arguments

Counsel for the petitioners challenged legislative authorization of the Philadelphia railroad subscriptions on several broad constitutional grounds. The legislature had improperly delegated a "high function" to the city—one which might not be delegated. The financing of the subscriptions would take private property without compensation, in violation of the constitution. And these subscriptions were for "remote advantage" and beyond proper purposes of the city, because none of the proposed rail construction lay within the corporate limits.[39]

Brewster's discussion of tax purpose contained hints and negative statements of the public purpose idea which could have appealed to Black, and may have furnished grist for his formulation of the concept. Brewster insisted that "If the city subscribes, it will do so as a private person, and they cannot tax to pay a private demand."[40] He also cited the *Post* case in which a New York supreme court justice had stated the public purpose idea four years previously.[41] Overlooking the fact that the *Post* case had been overruled in 1851, Brewster said the case "decides that before the State or a town can tax private property they must either give compensation, or take it as

[38] BRIGANCE, *op. cit. supra* note 2, at 262.

[39] See "Opening Argument" of B. H. Brewster, Philadelphia Daily Pennsylvanian, July 27, 1853, 2. Petitioners' position has been reconstructed from this 5,000-word report, from the court reporter's summary at 21 Pa. 151-153, from HARTZ, *op. cit. supra* note 2, c. 4, and from KONKLE, *op. cit. supra* note 23, at 225-227.

[40] Pennsylvanian, July 27, 1853, 2, col. 5.

[41] People *ex rel.* Post v. Mayor of Brooklyn, 6 Barb. 209 (N. Y. 1849), in which Justice Barculo considered "public" v. "local" purpose of taxation in a special assessment case. See also, People *ex rel.* Griffing v. Brooklyn, 9 Barb. 535 (N.Y. 1850), and People *ex rel.* Griffin v. Brooklyn, 4 Comst. 419 (N.Y. 1851), in which the Court of Appeals overruled both Supreme Court holdings.

a tax, which, to be legitimate, must be imposed equally upon the persons or property for certain purposes, as a state, county, town, village." It was also suggested that the tax which the Philadelphia subscriptions would involve was "for a purpose not within the scope of the necessary functions of a municipal corporation."[42] Brewster resorted to a timeless sort of name-calling to characterize the financing scheme:

> This is practical agrarianism—this is the doctrine which men call socialism; it is that which Skidmore and other such, once propagated to the terror and discredit of the country, when they published their immoral and dishonest social and political sentiments.[43]

Thomas Williams, the Pittsburgh attorney, seems to have outdone Brewster in appeals to "higher law" theories for a principle of constitutional limitation.[44] Hartz has observed of the anti-subscription argument:

> "Natural justice," "the great God of Nature," "public liberty," "eternal justice," "universal law," "Magna Charta," "higher matters," "right inherent, inalienable, indefeasible," "natural right," "divine law," "private right," "the law of laws"—these were the most important slogans in the anti-investment case.[45]

Williams appealed to " 'politico-economical science' and to 'laws of trade' which could not 'be violated with impunity' to demonstrate that private enterprise was 'adventurous enough to outrun at all times the actual necessities of the country.' "[46] Hartz remarks that "these higher laws of economics were as novel in the history of mixed corporation thought as the higher laws of politics that were so crucial a part of the anti-subscription case."[47]

Novel as the arguments and doctrines of Brewster may have been in Pennsylvania jurisprudence, they appear in every fundamental aspect to have been raised before courts of other states during the preceding decade of internal improvement litigation.[48] Hartz projects the *Sharpless* case as a significant episode in the transitional development of concepts borrowed from earlier anti-charter contests, into

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[42] Pennsylvanian, July 27, 1853, 2, col. 5.

[43] *Ibid.*

[44] See KONKLE, *op. cit. supra* note 23, at 227 and his note 1.

[45] HARTZ, *op. cit. supra* note 2, at 118-119.

[46] HARTZ, *op. cit. supra* note 2, at 120, citing Williams' *Argument* 50.

[47] HARTZ, *op. cit. supra* note 2, at 120.

[48] See cases cited below, note 86; also, Slack v. Maysville & L. R.R., 13 B. Mon. 1 (Ky. 1852); Griffith v. Crawford County, 20 Ohio 609 (1851); Police Jury v. McDonough, 8 La. Ann. 341 (1853); Cass v. Dillon, 2 Ohio St. 607 (1853); Dubuque v. Dubuque & P. R.R., 4 Greene 1 (Iowa 1853).

an attack upon the mixed corporation, and upon the participation of government in enterprise of any form. In this process, he suggests, the private corporation "was implicitly transformed from a villain into a hero, from a soulless entity into an enterprising individual," and the rationale became a part of the developing laissez-faire philosophy of the proper relations between government and business.[49] But argument in the *Sharpless* case was typical of a development by no means confined to Pennsylvania.

The general orientation of defense arguments for the city and for the railroad interests so eager for its patronage, was equally interesting in this context:

> [C]orporate interests desired to maintain the flow of public funds, even if this meant disparaging the strength of the corporation and disseminating doctrine which, amusingly enough, evoked the charge of Skidmorian socialism.[50]

Three lines of argument were developed in defense of the municipal railroad subscriptions. Fundamentally the respondents' case rested on a view that the legislature could borrow or tax "for any purpose" in the absence of specific limitations in the state or federal constitutions.[51] Where petitioners had insisted upon a restrictive view of legislative powers,[52] the defense argued that the legislature had plenary power to tax in the absence of specific inhibitions. And the limitations upon the eminent domain power comprised no such limitation on the tax power. Eminent domain, as an extraordinary power to take private property in instances of necessity or "manifest public utility" must not be confused with borrowing and taxation as the "ordinary and usual modes of supporting all branches of the government."[53] Moreover, there was nothing in the constitution to prevent the legislature from delegating portions of the taxing and borrowing powers to counties and various municipal corporations.

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[49] HARTZ, *op. cit. supra* note 2, at 120-122 and *passim.*

[50] HARTZ, *op. cit. supra* note 2, at 120.

[51] See *Defendants' Answer, Argument, and Appendices* 3-4, Philadelphia, 1853, cited as *Defendants' Answer.* This document appears in the Paper Books, v. 192, of the Carson Collection, Ridgeway Library, Philadelphia. Two other important contemporary items are available: the ARGUMENT OF HON. JOHN M. READ . . . DELIVERED BEFORE THE SUPREME COURT OF PENNSYLVANIA . . . , (Philadelphia, 1853), cited as Read, *Argument,* is in the Bureau of Railway Economics collection, Washington; and the "Argument of Hon. George M. Dallas," of July 26, 1853, is reported in the Philadelphia Daily Pennsylvanian, July 29, 1853, 2. See also the court reporter's summary, 21 Pa. 153-157; and discussion in HARTZ, *op. cit. supra* note 2, c. 4. A letter of Sept. 7, 1951, from the deputy prothonotary of the Pennsylvania Supreme Court, eastern district, Philadelphia, indicates that the court did not preserve briefs in 1853.

[52] Brewster, Pennsylvanian, July 27, 1853, 2, col. 5.

[53] *Defendants' Argument* 4: see Dallas, Pennsylvanian, July 29, 1853, 2, col. 4; and 21 Pa. 155.

The second line of argument was fundamentally one of economic necessity. Conceding that neither of the proposed developments would lie within the corporate limits of Philadelphia, the defense based validity of the subscriptions upon anticipated material local benefit. And the judgment as to the directness or amount of benefit was to be exercised by the legislature, not the courts.[54] The two railroads would bring trade to Philadelphia, by meeting competition from Baltimore for the Ohio Valley commerce, and by creating access to the Lehigh Valley and northeastern Pennsylvania, which might otherwise turn to the New York market area. They were thus essential to the continued prosperity of the city and its inhabitants. Questions of similar import had been decided in favor of the power of subscription by courts in eleven neighboring states, while twenty-three states had enacted similar laws. Moreover, the economic urgency of the developments being accepted, there remained only one feasible way to achieve railroad construction. Conceding abuses and "indifferent success" in state development of internal improvements, state credits now had generally been exhausted in canal, turnpike and early railroad developments. But "there is not sufficient accumulated private wealth in the United States to make the 360 railroads which are completed, or are in progress," and thus, "the whole improvement of the country depends upon these municipal subscriptions or contributions." The defense made a partial concession to the emerging rationale of separation of state and private enterprise:

> Whilst State improvements have been often unprofitable, it has been found that the results of private enterprise aided by municipal wealth, but not controlled by it, have been extremely fortunate, and it is only necessary to point to one of our own works: The Pennsylvania Railroad, in which Allegheny and Philadelphia have six millions of dollars of corporate subscription, as a most brilliant example.[55]

The third argument, a telling one, was an appeal to usage. Read, particularly, pointed to long-established traditions of public support for internal improvements in Pennsylvania, in other American states, and in several European countries. Against this body of precedent, the "laboring oar" was with the petitioners to prove that "some written provision of our fundamental law" was violated.[56] An appendix to the defendants' *Argument* listed ninety-five acts of the Pennsylvania legislature from 1796 to 1853, authorizing local public aid

[54] *Defendants' Argument* 7, 8; Dallas, Pennsylvanian, July 29, 1853, 2, col. 4, 5.
[55] *Defendants' Argument* 20. HARTZ, *op. cit. supra* note 2, at 119, observes that this was an almost unique example.
[56] READ, *op. cit. supra* note 51, at 3 and *passim*.

to internal improvements, and concluded that "municipal subscriptions have been relied upon in Pennsylvania, from a very early period, to provide capital for all species of internal improvements. . . . The variety of provisions involving this same principle is perhaps greater than in any other State."[57]

The only direct reference to public purpose in the respondents' presentations appears to have been a citation of a United States Supreme Court opinion decided in 1850, to the effect that "towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature."[58]

Opinions and Decision

Chief Justice Black opened the *Sharpless* decision with the leading opinion of three which denied the injunction. Graphically he presented an economic dilemma which he thought made the litigation "beyond all comparison, the most important cause that has ever been in this Court since the formation of the government." Pennsylvania localities already had invested "not less than fourteen millions" of dollars in railroads "which are necessary to give the state those advantages to which everything else entitles her." To grant the injunction would interrupt these developments for years to come and mean loss of funds already invested. The effect would be disastrous for the private fortunes of many honest men, and seriously endanger the credit and reputation of the state. It would even do "much to lessen the influence of our institutions on the public mind of the world." But the alternative was "not less appalling." Black thought that local investments in the railroads under the influence of persons interested in personal gain before public advantage "will probably go on until it results in some startling calamity, to rouse the masses of the people."[59] It was already evident that the speculative spirit had carried the state "to the verge of financial ruin," and a tendency was apparent to bankrupt the localities involved. None of the completed railroads had paid interest regularly, and stockholders in the largest works of neighboring states had been disappointed.[60]

> But all these considerations are entitled to no influence here. We are to deal with this strictly as a judicial question. However clear our convictions may be, that the system is pernicious and dangerous, we cannot put it down by usurping authority which does

[57] *Defendants' Argument* 53.
[58] Woodbury, J., East Hartford v. Hartford Bridge Co., 10 How. 511, 534 (U.S. 1850).
[59] 21 Pa. 159.
[60] *Id.* at 158, 159.

> not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it.[61]

The sole question before the court was whether "the legislature can pass a valid act giving to a municipal corporation the power of subscribing to the stock of a railroad company."[62] Black stated his canons of interpretation. Construction of a state power "is strict against those who stand upon the exceptions, and liberal in favor of the government itself . . . . the state may do whatever is not prohibited." The constitutional grant of legislative power to the General Assembly was complete, except as limited by authority granted to Congress under the federal constitution, by the coexistence of judicial and executive powers in the state, and by the rights reserved to the people by the Declaration of Rights. Only when these limitations were exceeded might the judiciary claim the right to declare legislative acts void. The General Assembly thus had "full and uncontrolled possession" of a "vast field of power," limited only by legislative discretion. Abuse of that legitimate power was not to be corrected by the courts whose judges were "a set of very fallible men" and "almost entirely irresponsible" in comparison with legislators who can be "scourged into retirement by their indignant masters."[63]

Moreover, the court "can declare an Act of Assembly void, only when it violates the constitution *clearly, palpably, plainly;* and in such manner as to leave *no doubt* or hesitation on our minds."[64] The plaintiffs had urged the court "to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust." But for the court to do this would be to assume the right to change the constitution, "and to interpolate into it whatever in our opinion ought to have been put there by its framers." This would "violate both the letter and spirit of the organic law as grossly as the legislature possibly could . . . . if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely."

> I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us.[65]

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[61] 21 Pa. 159.
[62] *Id.* at 158-160.
[63] *Id.* at 162. The state's first elected Supreme Court was in its third year.
[64] *Id.* at 164, Black's emphasis.
[65] *Id.* at 162; see Black's own summary at 172-173.

To grant the plaintiff's plea, some constitutional provision must be found which "expressly or by clear implication forbids the legislature to authorize subscriptions by a city to the capital stock of a company incorporated for the purpose of making a railroad."[66]

The Chief Justice rejected, seriatim, a number of pleas of unconstitutionality. The constitutional grant to the legislature of powers to regulate its own internal procedure and discipline[67] was no basis for review of laws alleged to be inconsistent with the "just rights and liberties of the people." The legislation was not an invalid contract made by the legislature; it merely authorized the localities to make contracts. The guarantee of "due course of law" for protection of lands, goods, person and reputation was not a "judicial remedy for bad legislation." The constitutional guarantee of the right of "acquiring, possessing, and protecting property" could not create any personal property right "so absolute as to exempt it from a fair share of the public burdens lawfully and constitutionally imposed."[68] Nor was there any "taking" to violate the eminent domain provision of the constitution;[69] to hold that mere depreciation, encumbrance, or incidental injury to property, and "least of all" taxation, were "taking" under the eminent domain provision would do violence both to popular as well as legal signification of the term. For "if we say that taxation and taking are the same, we are reduced to the absurdity of deciding that no tax can be levied for the most important purpose of the state, without an immediate redistribution of it among the people who pay it."[70] Similarly, the word "deprived" in the due process provision[71] could not apply when the citizen was left in undisturbed possession of his property, "whatever taxation may be imposed on it." While it would be "palpably unconstitutional" to take private property for private use, Black could discover "no taking at all" in the present case.

Indeed, it was only as taxpayers that the plaintiffs had any standing, and "the only substantial wrong complained of . . . is that a public debt is about to be created for a purpose which the plaintiffs are unwilling to join in promoting; and that the debt may, and most probably will, involve the necessity of a tax, of which they must pay their share." So the Chief Justice turned "to inquire what is the extent

[66] 21 Pa. 164.

[67] PA. CONST. Art. I, § 13 (1838).

[68] 21 Pa. 166.

[69] PA. CONST. Declaration of Rights, § X (1838).

[70] 21 Pa. 167, referring to 3 [!] Comst. 419, evidently an error; the reference is to People *ex rel.* Griffin v. Brooklyn, 4 Comst. 419 (N.Y. 1851).

[71] PA. CONST. Art. IX, § 9 (1838).

of the right to lay taxes," and developed the public purpose doctrine of taxation.

A valid tax levied by supreme legislative authority, and not in conflict with the constitution, "must be borne" since the General Assembly had the power and duty to tax "without any restriction whatever" and exercised it in its own discretion. The sole remedy for legislative abuse lay in public opinion.[72] Then, despite prior protestations, Black introduced the reservation, the principle of implied constitutional limitation, upon which the whole doctrine of the public purpose of taxation is founded:

> But I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden cannot be thrown on a single individual, under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An Act of Assembly, commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order or decree.[73]

Black probably saw no inconsistency with his own devotion, just stated, to the "words of the constitution" and the insistence upon constitutional restrictions existing "expressly or by clear implication."

Having taken the first step along this line of interpretation, the next came easily—a resort to "the theory of a republican government" that taxes must be laid equally, in proportion to the nature of the thing taxed, "and when collected, shall be applied only to purposes in which the taxpayers shall have an equal interest."

He then digressed briefly to note that no tax system could achieve perfect justice or equality of burden.

> I am of opinion with the Supreme Court of Kentucky,[74] that a tax law must be considered valid, unless it be for a purpose, in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at the first blush.
>
> Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal cor-

[72] 21 Pa. 168, citing Marshall, C. J., McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819).

[73] 21 Pa. 168.

[74] Cheaney v. Hooser, 9 B. Mon. 330 (Ky. 1848); there is an incipient public purpose argument at 345, distinguishing plausible taxation from levies "palpably not a tax" for "purposes in which [taxpayers] have no interest."

> poration to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it, into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.[75]

Here, then, were the elements in Black's formulation of the public purpose doctrine which, with variations, would echo down through the coming century in nearly every high state court, in the federal courts, and in one-third of the state constitutions:

1. The legislature possesses unlimited power to tax, as to amount and objects, unless limited by specific constitutional restrictions.
2. But a tax law is not valid simply because the legislature may call it a tax; there are some limitations inherent in the very nature of a tax.
3. One of these limitations is the purpose for which funds secured by taxation are to be spent. The object of expenditure must be of general, or *public* interest; if intended, or spent, for some *private* purpose or interest, it is no longer a tax, but something else—plunder perhaps. Such an act would not be valid legislation, but a legislative attempt to impose a sentence, order or decree.
4. This would mean usurpation of the proper sphere of the judiciary or of the executive, and would be entirely outside the legitimate granted area of legislative power.

THUS: Taxation *is* taxation *only* when the revenue it raises is spent for a *public* purpose.

But Black conceded that once the principle was stated, the "strain of the case" was to apply the principle to the facts at issue. He still must resolve the contention that these facts involved "taxation for a private purpose, because the money levied will be in effect handed over to a private corporation."

> I have conceded that a law authorizing taxation for any other than public purposes is void; and it cannot be denied that a railroad company is a private corporation.

He avoided this trap by resort to another principle of great utility

[75] 21 Pa. 168-169, Black's emphasis.

for liberal construction of state powers. "The ultimate use, purpose, and object for which the fund is raised" was the important thing, "and not . . . the nature or character of the person or corporation whose intermediate agency is to be used in applying it." Thus, the object or function to be served by the expenditure, not the agency of expenditure, determined public purpose. A railroad was "a public highway for the public benefit." The public interest in the cheapening and facilitation of travel and transportation, as well as in the "rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth" were just as apparent where a private corporation exacted "uniform, reasonable, stipulated toll" as would be the case if travel were free, or if the state operated the road for toll.[76]

Black then considered the duty of the state to promote public improvements, and again construed state powers broadly:

> It is a grave error to suppose that the duty of a state stops with the establishment of those institutions which are necessary to the existence of government; such as those for the administration of justice, the preservation of the peace, and the protection of the country from foreign enemies; schools, colleges, and institutions, for the promotion of the arts and sciences, which are not absolutely necessary, but highly useful, are also entitled to a public patronage enforced by law. To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign, as plain and as universally recognized as any other. . . . Canals, bridges, roads, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power, and at the public expense, in every civilized state of ancient and modern times. I need not say how much of this has been done in Pennsylvania; but if the works erected by the Commonwealth for the promotion of her commerce, are not public improvements, then every law relating to them is void; every citizen may repudiate his share of the state debt, if he pleases, and defend his property by force against a collector of state taxes.[77]

Extravagant as the last flourish may have been, here was a philosophy of state functions in closer harmony with his own times, with history, and with attitudes a century later, than was the view of the petitioners or of his colleague, Justice Woodward.[78] The view stands

[76] 21 Pa. 169, Black's emphasis.

[77] *Id.* at 169-170.

[78] HARTZ, *op. cit. supra* note 2, at 122-123, remarks that "The 'grave error' which the Chief Justice described is perhaps as adequate a definition as any of that amorphous concept known as 'laissez faire' which is often alleged to have governed the thinking of the period before the Civil War . . . . the significance of Black's remarks lies . . . in his insistence that the opposite notion was 'plainly' and 'universally recognized.' . . . The obvious evidence of decades was at hand to prove that the anti-subscription argument was incomparably a *piece d'occasion.*"

clearly akin to Justice Cooley's often-quoted concept, stated nearly two decades later, of "a wise statesmanship which must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people."[79] It is interesting, but not uncharacteristic of the processes of judicial opinion, that Cooley's remarks occurred in the course of an heroic attempt to stem the tide of local railroad financing so powerfully sanctioned by Black's opinion.[80]

Black next suggested that if the state was unable or unwilling to discharge its public duty to make internal improvements, it might entrust the task in whole, or in part, to private agencies, and tax the people "for a share of it, as rightfully as for the whole." It followed that if the legislature might create a state debt or levy state taxes under such an arrangement, it might "with more justice and greater propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves to promote in a similar manner a public work, in which they have a special interest. . . ." There could be no question about the validity of such local taxes, which were the foundation of the general road law.[81] And the local interest required to justify local taxation was apparent in the facts. While neither railroad would be within the limits of Philadelphia, the city's interest "does not necessarily depend upon the mere location of the road. Therefore the location cannot be an infallible criterion." Philadelphia already had a rail connection with Greensburg, the point which the Hempfield road would connect with Wheeling. How different would the interest be in this, from interest in a line which might start at "Schuylkill Fifth and Market streets" and run the entire way to Wheeling via Greensburg?[82]

> But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers, and by the legislature.

It was sufficient for the court to know that the city "may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much

[79] People v. Salem Township, 20 Mich. 452, 475 (1870).
[80] Cooley denied validity of a legislative authorization of township railroad aid primarily on the ground that public benefit was incidental to primary benefit accruing to the private railroad corporation. That is, agency, not object, determined public purpose.
[81] 21 Pa. 171.
[82] *Id.* at 172.

less of constitutional law."[83] Briefly, Black dismissed the minority hardship argument. Majority rule "may operate with great hardship on the minority, but in this country it is private affairs alone, and not public, that are exempt from the domination of majorities."[84]

The Chief Justice now considered the analogy of public use in eminent domain. This sovereign right was "always" given to private corporations performing a public duty. Since the right could not be used for a private purpose, if a "railroad, canal, or turnpike, when made by a corporation, is a mere private enterprise . . . there never was a constitutional charter given to an improvement company."[85] Finally he said that "the corporation may be aided by an exertion of the taxing power, as well as with the right of eminent domain."

Black said the legislature could enlarge municipal powers at will, except to "embark the city in a private business, or . . . make the people pay for a thing in which they have no interest."

Black thought the *Sharpless* case, one of three involving the same questions, had been ably argued, and the court had examined the question as of first impression. But opinions in seven other states appeared to sustain the court's view. All of these cases represented a "manifest triumph of reason and law over a strong conviction in the minds of the judges that the system they sustain was impolitic, dangerous, and immoral."[86] Moreover, the Pennsylvania case, *Commonwealth* ex rel. *Dysart v. M'Williams*,[87] which sustained validity of legislation authorizing township subscription to turnpike company stock, "cannot be distinguished from this, and . . . ought to have something more than respect."[88]

Justice Woodward concurred in an opinion which addressed the matter of tax purpose indirectly, avoiding Black's more novel formulation. He brushed aside questions involving policy of the legislation and thought discussion of the power of eminent domain was irrelevant. Nor could he find any limitation of the tax power to be implied from property protections of the Declaration of Rights. The principal contention of plaintiffs was addressed to "the *objects* and

[83] 21 Pa. 172.

[84] *Ibid.*

[85] *Id.* at 170. The building of a tavern, store, mill or blacksmith's shop would be "mere private purpose."

[86] Goddin v. Crump, 8 Leigh 120 (Va. 1837); Thomas v. Leland, 24 Wend. 65 (N.Y. 1840); Bridgeport v. Housatonuc R.R., 15 Conn. 475 (1843); Nichol v. Nashville, 9 Humph. 251 (Tenn. 1848); Talbot v. Dent, 9 B. Mon. 526 (Ky. 1849); Shaw v. Dennis, 5 Gil. 405 (Ill. 1849); Cincinnati, W. & Z. RR. v. Clinton County, 1 Ohio St. 77 (1852). Several cases were erroneously cited in the original report; see corrected reprint, 59 Am. Dec. 759, 781.

[87] 11 Pa. 61 (1849).

[88] 21 Pa. 176.

purposes to which the tax power is applied." He readily conceded that stock ownership in a private corporation with the risks and responsibilities involved was not a municipal purpose.

> Railroads, to connect distant points of country, to develop physical resources, and to promote commerce, are great public benefactions, and emphatic expressions of the energies of an age distinguished for activity and bold adventure. But they come not within or near that class of objects which we have been taught to consider as municipal purposes.

Yet, he asked, "where is the *constitutional* provision which the judiciary can say is violated? The power of taxation is unrestrained in the constitution, both as to extent and purpose."[89] The people might limit the tax power, but until they did, the "judiciary cannot assign limits to that which the people have decreed shall be unlimited." It had long been recognized that the judiciary might declare any law unconstitutional which "clearly" contravened provisions of the state or federal constitutions, but there had been no instance of such decision in Pennsylvania from 1790 to 1838; and under the constitution of that year, only in a few "clear cases." Indeed, Justice Gibson, "that great light of this bench, so recently extinguished, stood opposed, for many years, to the *existence* of any such judicial power."[90] If the legislature transgressed the principle of separation of powers between coordinate departments, or the reservations of the bill of rights, or the provisions of the federal constitution, the judiciary might act. "But on lower ground than this, and especially on ground so low, as the equivocal and undefined purposes of municipal corporations, Acts of Assembly have never been declared unconstitutional." The concurring views of courts in seven other states demonstrated that "the corrective of this species of legislation, novel as it unquestionably is, and pernicious, as many believe, is with the people and not with the courts."[91] On the basis of experience this seemed the safest place to leave the power of correction.

Justice Knox concurred on essentially the same ground, that there was no constitutional basis upon which to declare the legislation unconstitutional. While the power of the judiciary to take such action was unquestioned, he could not find "in the letter of the constitution any prohibition against the enactment of the law in question." He agreed that the restrictions of the eminent domain power were not

[89] 21 Pa. 182.

[90] *Id.* at 183; allusion to John B. Gibson is unmistakable; see Eakin v. Raub, 12 S. & R. 330 (Pa. 1825).

[91] 21 Pa. 183.

pertinent since a tax question was involved. And he quoted Chief Justice Marshall's assertion in *McCulloch v. Maryland*,[92] about the unlimited nature of the power of taxation, and an assertion of Justice Gibson that "as regards taxation, there is no (constitutional) limitation of it."[93] Knox granted that "under this rule acts may be passed which will, in the minds of many persons, be contrary to natural justice, and subversive of the just rights of the people." But the remedy must be "in further constitutional restrictions upon legislation, not in restraints imposed by the judiciary."

> The limit of the power of the people's representatives, in my judgment, should be written upon the pages of the constitution, rather than remain in the breast of our judges.[94]

Justices Lewis and Lowrie dissented. Contrary to Hartz' statement that they wrote no opinions,[95] the opinions simply were not printed in the official state reports, apparently under a general policy of that time.[96] The only express reflection of Black's public purpose formulation was one statement by Lewis:

> The notion of unlimited and despotic power in the Legislature to take one man's property and give it to another, for no public purpose, without compensation, never had any footing in Pennsylvania, or in any other State where the people are free.[97]

This certainly was not a rejection of the doctrine, and Black would doubtless have subscribed wholeheartedly to the statement. Both dissents were founded upon the same basic propositions. The principal error of the majority was a view of legislative supremacy which infringed upon inherent personal and property rights reserved to the people against governmental action. Lewis and Lowrie were fighting Gibson's ghost reincarnated in uncritical form, they thought, by Justice Black.[98] The grant of legislative authority to the legislature was not a grant of power to infringe fundamental rights of liberty and property. Thus, the legislature lacked the authority which it improperly tried to delegate to the localities. Railroads were private corporations, and subscription to their stock would be an enforced contract involving speculative investment in an agency beyond con-

[92] 4 Wheat. 415, 434 (U.S. 1819).
[93] In Kirby v. Shaw, 19 Pa. 258, 260 (1852).
[94] 21 Pa. 186. Moers v. Reading, 21 Pa. 188 (1853), involving similar issues, followed the *Sharpless* case by an identical three-to-two alignment of justices.
[95] HARTZ, *op. cit. supra* note 2, at 122.
[96] 2 AM. L. REG. 29-43, 85-112 (1853) printed the dissents of Lowrie and Lewis, respectively, with the explanation that "they cannot appear in the regular volume of reports, and we shall therefore admit them to our pages."
[97] *Id.* at 100.
[98] *Id.* at 88-90.

trol of the government and of the private property-owners. This was "socialism" and "a Fourier establishment upon a magnificent scale."[99] Both justices expressed their faith in the superior virtues of a laissez-faire relationship of government to private enterprise.[100] Moreover, railroad construction simply was not a proper concern of local government, to come within its competence to render financial aid. Both dissenters agreed that the legislation at issue violated the following constitutional protections, at least in spirit: reserved property rights, the right to alter or abolish forms of government, "due course of law," and the obligation of contracts.[101]

The anti-subscription forces lost in the court. But they turned, as similar groups had in other states, to promote constitutional amendments which would block investment of public funds in private enterprises. There was wide popular support for such measures, and amendments were adopted in 1857 which prohibited the legislature to extend state credit, or to authorize extension of local credit, to individuals, companies, corporations or associations, or to take stock in private enterprises.[102]

When the *Sharpless* decision was announced, Thomas Williams, the Pittsburgh attorney, answered the majority opinions with a long, closely-argued "Review"[103] which became a campaigu tract of the forces which amended the constitution four years later. Williams assailed the Chief Justice for erroneous constitutional theory, improper application of principles of legal interpretation, and logical inconsistencies. He made no frontal attack upon the public purpose principle, but challenged Black's inconsistency in deriving its foundations, and challenged its application.

The Chief Justice, Williams complained, had at one point refused the petitioners' appeal to the spirit of the constitution:

> All [the court] was asked, was to say that, if [the legislation] violated the spirit of our institutions, or impaired any of the rights which *this* Government was intended to secure, *then it was prohibited*. . . . And for this purpose, they were asked to look at the whole instrument . . . and to give a construction to the whole . . . . They were asked to say, in effect, whether one of the main objects of this Government, as declared in that instrument was, not *the security of property*, and whether the legislation re-

[99] 2 AM. L. REG. 43, 97.
[100] *Id.* at 41, 97.
[101] Lewis, J., *id.* at 37, thought at least five specific constitutional provisions were violated; Lowrie, J., *id.* at 111, cited seven provisions violated.
[102] PA. CONST. Amend XI, §§ 5, 7 (1857). See HARTZ, *op. cit. supra* note 2, at 122-125, for an account of the movement for, and adoption of the amendments.
[103] KONKLE, *op. cit. supra* note 23, at 229-289 reprints the pamphlet in entirety from an 1857 reprint.

ferred to was consistent with that object. Was there anything unreasonable in this?[104]

But Black had answered that the court could not add to the list of things which the legislature might not do. Black had professed to be guided by the words of the constitution.[105] Very well, then, Williams demanded, whence came this argument about the public purpose of taxation? He did not dispute Black's proposition that taxation for private purposes would be plunder, and that no such tax authority passed to the legislature by general grant of authority. But how did Black "make it out that taxation is a mode of raising revenue for *public* purposes only?"

> There is no authority for any such distinction in the Constitution. Unless there be something *outside*—something in the *nature* of the thing—to qualify or restrain, it makes no difference what the purpose is. A levy and assessment upon the property of the people, is a tax, whether the purpose be *public* or *private*, *legal* or *illegal* . . . . the Chief Justice here discards his own rule, by looking *outside*, and taking a common-sense view of the Constitution.
>
> But why is it, that, to make a tax legal, the purpose must be a public one? The Constitution, as already remarked, says nothing about it; and it is, perhaps, for this reason, that the power is claimed to be unlimited and discretionary. *There is a limitation, then, which is not in the Constitution.* The instincts of the Chief Justice tell him so; and where is this limitation to be found? Why, in the very nature and origin of the power itself. It is an *implied* power, resting, like the right of eminent domain, on the law of public necessity, and limited and determinable in its exercise by that law. If the Judge is right in his *premises*, it may be used for *any* purpose. By his own admission, however, it cannot. He decides, therefore, in effect, that there *is* something in the theory and genius of our institutions—in the objects and purposes of our Government—and in the nature of the power itself —which renders an express prohibition unnecessary.[106]

Williams thought that Black, on an earlier occasion, had given the proper answer to the question of public use, when in a letter to the commissioners of Somerset County, he denounced railroad subscriptions "expressly as 'a system of creating public debts, for *private* purposes.' "[107] Nearly two decades after the *Sharpless* decision, Williams still was arguing this incident in Black's career. In 1871, he wrote to the Pittsburgh *Commercial*, recalling the case:

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[104] KONKLE, *op. cit. supra* note 23 at 250, original emphasis in this and the following quotations.
[105] 21 Pa. 162.
[106] KONKLE, *op. cit. supra* note 23 at 267-268.
[107] *Id.* at 269.

> Very unexpectedly to the public, the constitutionality of these laws was sustained by a divided Court, the then Chief Justice (Black,) who had himself arrested a like attempt on the part of the Commissioners of his own county of Somerset by denouncing it as no better than robbery, turning a *summerset* on the eve of the decision, and giving his casting vote in favor of the power.[108]

The editors of the Philadelphia legal journal which printed the dissenting opinions in the *Sharpless* case also published an "able article" by "Cecil" in November, 1853, which attacked Black's opinion but virtually ignored its public purpose argument.[109] Like Lewis and Lowrie, the writer of this article thought there was invalid delegation of a sovereign legislative function, challenged the existence of "local purpose" in the subscription, and asserted that railroad construction was, if anything, a matter of general state interest. The legislation authorized "taxation of a part of the State for the benefit of the whole," in violation of proper constitutional principles of fair apportionment of tax burdens.[110] Personal liberties and property were secure from gross attack by government, but they needed protection against taxation whose operation was "stealthy, covert, often unobserved."[111]

A curious aspect of the *Sharpless* case was that Black's colleagues virtually ignored his public purpose statement, while all sides examined the more familiar question of local purpose in great detail. This question and Black's broad construction of legislative competence were the principal points attacked in the dissents and subsequent criticism.

By all the proprieties of contemporary legal debate, the public purpose doctrine should have appeared in a dissent. Generically, it was a limiting concept akin to the developing naturalist pleas for judicial limitation of legislative powers by appeal to natural or moral justice, fundamental principles of government, vested rights of property, separation of powers, and minority protections. Such appeals were present in the earliest expressed opposition to public aid for railroads,[112] but the courts rejected them quite regularly until after 1850, demanding to be shown some specific constitutional limitation

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[108] KONKLE, *op. cit. supra* note 23 at 377. No other reference to this earlier incident in Black's career has been found.

[109] *On Municipal Subscriptions to Stock of Railroad Companies*, 2 AM. L. REG. 1 (1853).

[110] *Id.* at 20.

[111] *Id.* at 4.

[112] See Hise, J., dissenting, Slack v. Maysville R.R., 13 B. Mon. 1 (Ky. 1852); also Ranney, J., dissenting, Cass v. Dillon, 2 Ohio St. 607 (1853); Kinney, J., dissenting, Dubuque County v. Dubuque R.R., 4 Greene 1 (Iowa 1853); and the opinion of Allen, J., Clark v. Rochester, 13 How. Pr. 204 (N.Y. 1856), overruled, 24 Barb. 446 (1857). See HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 99 and c. 5 (1930).

before legislation would be held unconstitutional.[113] Black accepted, and then confounded this alignment. With one positivist hand he thrust away the naturalist appeals to the spirit of the constitution while the other hand fished up the public purpose doctrine as a naturalist support for a positivist holding.

At any rate, the significance of his formulation for subsequent public purpose adjudication is clear. The conceptual range of this first clear-cut statement is impressive. The Chief Justice appears to have inverted petitioners' arguments about the private purpose of taxation,[114] and to have wrested the previous public purpose statements from their *public* v. *local* context to set the *public* v. *private* formula upon its century-long course in tax law. His public purpose dictum rapidly gained acceptance as an authoritative statement. And his formative role may, indeed, have been even broader than that in the *Sharpless* case. It is interesting and possibly significant that in 1865, Black appeared as counsel in the Pennsylvania military bounty case which first applied the public purpose test to taxation in an area other than internal improvements.[115]

Black's foundation of the public purpose principle in the nature of republican government anticipated by two decades, the more famous argument of Justice Miller in the *Loan Association* case. The view that taxation for a private purpose would infringe property rights by legislative decree in violation of separation of powers furnished another fundamental argument for the same opinion,[116] and the "plunder" argument reappeared prominently in state decisions in the eighteen seventies, including those of Justice Cooley of Michigan.[117] Black's suggestion that tax purpose must be both public and local anticipated Cooley's canons of valid taxation. And his assertion that the legislature might not authorize municipalities to embark upon private enterprise cropped up, duly accredited, in the first significant application of public purpose to that problem in 1871.[118] Black clearly recognized, and made his choice between the two fund-

[113] See Church, J., Bridgeport v. Housatonuc R.R., 15 Conn. 475 (1843); Commonwealth *ex rel.* Dysart v. M'Williams, 11 Pa. 61 (1849); People *ex rel.* Griffin v. Brooklyn, 4 Comst. 419 (N.Y. 1851).

[114] 21 Pa. 169.

[115] Speer v. Blairsville, 50 Pa. 150 (1865). The reporter's summaries do not reveal which side, if either, pleaded public purpose in the case involving constitutionality of legislation which authorized local bounty payments to encourage military service. But Justice Agnew recalled the *Sharpless* case and used its public purpose concept to sustain the legislation.

[116] 20 Wall. 655, 663 (U.S. 1874).

[117] People v. Salem Township, 20 Mich. 452, 474 (1870), citing the *Sharpless* case; see Whiting v. Sheboygan R.R., 25 Wis. 167, 185 (1870); Sweet v. Hulbert, 51 Barb. 312, 316 (N.Y. 1868).

[118] Opinion of the Justices, 58 Me. 590 (1871).

amentally opposed points of vantage from which tax purpose has been tested, when he said that the ultimate object rather than the immediate agency was the criterion of public purpose.[119] He also made another, less fortunate contribution when he seemed to confound public use in eminent domain with public purpose in taxation. Prior to the *Sharpless* decision, the courts had commonly instructed counsel pressing the similarity of the two powers that they were really distinct and should be so regarded.[120] But the argument was one of great utility to justify tax aids for internal improvements and utilities which also enjoyed condemnation powers. It recurred, inevitably perhaps, whenever both powers were in the fact situation, and Black may have contributed to its impetus which even Cooley's prestige and careful analysis could not stay.[121]

In a perspective broader than public purpose, the doctrinal features of the *Sharpless* case are not without interest. Three years before the leading *Wynehamer* case[122] in New York, Black's denial that due process was a limitation upon the tax power expressed the currently prevailing view. But the due process argument was there, pressed by counsel and accepted by the dissenting justices. State courts began to assimilate the public purpose doctrine under the due process concept after the Civil War; but the doctrine as an aspect of Fourteenth Amendment due process did not receive the imprimatur of the United States Supreme Court until 1917.[123]

In the intervening years, and before substantive due process adjudication achieved its full impetus, the public purpose doctrine of taxation served as an independently derived expression of vested rights defense of property interests in a transitional period of American law. Jeremiah Black's *Sharpless* opinion stands impressively at the threshold, with deserved pride of place.

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[119] The great majority of public purpose cases seem to fall into two categories: public purpose is sustained by primary regard to the function or benefit to be achieved; while private purpose holdings contemplate the private nature of agency regardless of ultimate object to be served.

[120] See Thomas v. Leland, 24 Wend. 65 (N.Y. 1840); Bridgeport v. Housatonuc R.R., 15 Conn. 475 (1843); People *ex rel.* Griffin v. Brooklyn, 4 Comst. 419 (N.Y. 1851); Cincinnati R.R. v. Clinton County, 1 Ohio St. 77 (1852); Police Jury v. McDonough, 8 La. Ann. 341 (1853).

[121] People v. Salem Township, 20 Mich. 452 (1870); see also, Dillon, J., Hanson v. Vernon, 27 Iowa 28 (1869); Whiting v. Sheboygan R.R., 25 Wis. 167 (1870).

[122] Wynehamer v. People, 13 N.Y. 378 (1856).

[123] Jones v. Portland, 245 U.S. 217 (1917); Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112 (1896) was a transitional case, assimilating public purpose of eminent domain (and of special assessment districts?) into Fourteenth Amendment due process.