

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Liberalism Divided – Judicial Power and Constitutional Authority

D&W Auto Supply v. Department of Revenue, 602 S.W.2d 420 (KY 1980)

In 1978, the Kentucky state legislature adopted the Litter Control Act. The statute established various anti-littering programs for the state and paid for the cost of those programs by imposing a tax on sellers of certain specified goods with packaging that was regarded as contributing to the litter problem. A group of merchants whose inventory included such already packaged goods sued in state court to block the collection of the tax on a variety of grounds. The case was summarily dismissed and appealed to the state supreme court, which unanimously decided in favor of the merchants and struck down the statute.

The state supreme court focused on one particular challenge: the claim that the Litter Control Act did not receive the votes of the majority of legislators. This violated the state constitutional requirement that all bills receive the votes of an absolute majority of the legislature and not merely the majority of those voting. Both sides agreed that the bill had not received the vote of a majority of the legislators in the lower chamber (though it had received a majority of the votes cast). The presiding officer and Clerk of the House made a mistake in certifying that the bill had been constitutionally passed into law. But the Kentucky court and the courts of many other states had long followed the “enrolled bill” doctrine, which held that certified statutes should be presumed by the courts to have been adopted by the appropriate legislative procedures. In this case, the judges overturned that precedent and adopted the “extrinsic evidence” doctrine, which allowed courts to overcome the presumption of statutory validity if clear and convincing evidence was presented that the constitutional requirements for passage had not been met. The state legislature had provided for such judicial review in a narrow set of circumstances but had not approved the general abandonment of the enrolled bill doctrine or judicial review in a case such as this.

Why would the courts adopt such a presumption of validity? Under what circumstances should a court be willing to question whether a law had been properly adopted? Are courts limited to reviewing defects in following constitutional procedures, or may they also investigate whether a legislative chamber had complied with its internal rules and procedures? Is the certification of legislation an issue that has been constitutionally committed to the legislative branch, or is this a proper question for judicial evaluation? Should it matter who is raising the objection – an affected private interest, or a legislator whose vote was not properly counted? If the presiding officer were to declare a bill passed in a contested voice vote, could the courts later investigate whether the “ayes” really had it? Could legislators be forced to testify in order to provide evidence of procedural propriety?

STEPHENS, J.

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The [Litter Control] Act was initially introduced in the Kentucky House of Representatives and, as it wound its way through the legislative process, was known and identified as House Bill 253. It appears conclusively in the record that when House Bill 253 came before that body for final action, it “passed” by a vote of 48 “ayes” and 43 “nays.”

....
Section 46 of the Kentucky Constitution sets out certain procedures that the legislature must follow before a bill can be considered for final passage. In addition, that section mandates that no bill shall become law unless “it receives the votes of at least two-fifths of the members elected to each House,

and a majority of the members voting,” with the following exception: “Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House.”

It is conceded by all parties and clearly established by the record that the Litter Control Act, HB 253 of the 1978 regular session of the Kentucky General Assembly, received only 48 votes on its final passage in the House of Representatives. Since there are 100 members of that House, if the Act is an appropriation, its passage did not comply with a clear constitutional mandate.

At this point, logic suggests that the decision of this Court is obvious, *viz.* since the Act makes an appropriation and since it received less than 51 votes in the House, it is violative of the Kentucky Constitution. However, we are immediately confronted with the huge stumbling block of what is described as the “enrolled bill” doctrine.

HB 253 was signed by the presiding officers of the House of Representatives, and was certified by the Clerk of the House as conforming with all House procedural rules and, in effect, as conforming with all constitutional requirements. Under the enrolled bill doctrine as it now exists in Kentucky, a court may not look behind such a bill, enrolled and certified by the appropriate officers, to determine if there are any defects.

From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated, it imports absolute verity, and is unimpeached by the [legislative] journals. *Lafferty v. Huffman* (KY 1896).

Thus spake Judge Hazelrigg in enunciating the enrolled bill doctrine.

Section 46 of the Kentucky Constitution requires that the final vote on a bill be taken by “yeas” and “nays.” In *Lafferty*, passage of the law in question violated this provision, yet the bill was properly enrolled and approved by the governor. In declining to look behind the law to determine the propriety of its enactment, the court enunciated three reasons for adopting the enrolled bill rule. First, the court was reluctant to scrutinize the processes of the legislature, an equal branch of government. Second, reasons of convenience prevailed, which discouraged requiring the legislature to preserve its records and anticipated considerable complex litigation if the court ruled otherwise. Third, the court acknowledged the poor record-keeping abilities of the General Assembly and expressed a preference for accepting the final bill as enrolled, rather than opening up the records of the legislature. Since 1896, this court has concurred in the reasoning applied in *Lafferty*, regardless of what procedural or constitutional defects have been alleged and proved.

Kentucky is not alone in adherence to the enrolled bill doctrine. At least 19 of our sister states follow the rule which conclusively presumes the validity of a bill passed by the legislature and signed by the legislative officers. . . .

Nowhere has the rule been adopted without reason, or as the result of judicial whim. There are four historical bases for the doctrine. (1) An enrolled bill was a “record” and, as such, was not subject to attack at common law. (2) Since the legislature is one of the three branches of government, the courts, being coequal, must indulge in every presumption that legislative acts are valid. (3) When the rule was originally formulated, record-keeping of the legislatures was so inadequate that a balancing of equities required that the final act, the enrolled bill, be given efficacy. (4) There were theories of convenience as expressed by the Kentucky court in *Lafferty*.

. . . . [W]e can summarize the criticism as follows: (1) Artificial presumptions, especially conclusive ones, are not favored. (2) Such a rule frequently (as in the present case) produces results which do not accord with facts or constitutional provisions. (3) The rule is conducive to fraud, forgery,

corruption and other wrongdoings. (4) Modern automatic and electronic record-keeping devices now used by legislatures remove one of the original reasons for the rule. (5) The rule disregards the primary obligation of the courts to seek the truth and to provide a remedy for a wrong committed by any branch of government.

In light of these considerations, we are convinced that the time has come to re-examine the enrolled bill doctrine.

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It is clear to us that the major premise of the *Lafferty* decision, the poor record-keeping of the legislature, has disappeared. Modern equipment and technology are the rule in record-keeping by our General Assembly. . . .

It is also apparent that the “convenience” rule is not appropriate in today’s modern and developing judicial philosophy. The fact that the number and complexity of lawsuits may increase is not persuasive if one is mindful that the overriding purpose of our judicial system is to discover the truth and see that justice is done. . . .

Lastly, we address the premise that the equality of the various branches of government requires that we shut our eyes to constitutional failings and other errors of our coparceners in government. We simply do not agree. Section 26 of the Kentucky Constitution provides that any law contrary to the constitution is “void.” The proper exercise of judicial authority requires us to recognize any law which is unconstitutional and to declare it void. . . .

We believe that a more reasonable rule is the . . . “extrinsic evidence” rule. Other jurisdictions have embraced this rule, which we hereby adopt as the law of this case and future cases. Under this approach there is a prima facie presumption that an enrolled bill is valid, but such presumption may be overcome by clear, satisfactory and convincing evidence establishing that constitutional requirements have not been met.

We therefore overrule *Lafferty v. Huffman* and all other cases following the so-called enrolled bill doctrine, to the extent that there is no longer a conclusive presumption that an enrolled bill is valid. With regard to the present case, we declare the “Litter Control Act” void as violative of section 46 of the Kentucky Constitution.

The judgment of the Franklin Circuit Court is *reversed*. . . .

CHIEF JUDGE PALMORE did not participate in the case.

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