AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 6: The Civil War/Reconstruction Era – Powers of the National Government

Kneedler v. Lane II, 3 Grant 523 (1864)

Some Pennsylvania men who "were in daily expectation of being . . . mustered into the military service" under the Conscription Act sued the officers of the Enrolling Board of the Fourth Congressional District of Pennsylvania in state court, claiming that the federal draft law was unconstitutional and requesting a preliminary injunction to halt enforcement of the law. The U.S. attorney for the district refused to appear before the Pennsylvania Supreme Court at this stage in the proceeding. In a sharply divided 3-2 decision, Chief Justice Walter Lowrie delivered the opinion for the Court, with two of his brethren writing concurring opinions; Justices Strong and Read dissented. The Democratic Lowrie was himself a lame duck, having been defeated the month before in his bid for reelection by a Union Party candidate. His colleague, the Democrat George Washington Woodward, who had once been unsuccessfully nominated to the U.S. Supreme Court, had just lost a campaign for the governor's office but retained his seat on the Pennsylvania court. As was expected, two months after the decision was issued, the newly elected Daniel Agnew joined the Court and the justices responded to a motion to dissolve the preliminary injunction. With Agnew joining the original dissenters, the Court then decided by a 3-2 vote to reverse its decision and declare the draft to be constitutional.

JUSTICE STRONG delivered the opinion of the Court.

When the injunctions were ordered in these cases I endeavored to show that the act of Congress of March 3d, 1863, is constitutional; that consequently the bills exhibit no wrong done, or threatened to be done, to the complainants, and that for this reason they have no equity. I have heard nothing since which has raised even a doubt of the correctness of the opinion I then gave. Very much might be added to what I said in vindication of the constitutional power of Congress to enact the law, and in refutation of the objections urged against it; but I should hardly be justified in entering again upon a discussion of that subject before these cases came up for final decrees.

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Nor ought it to be overlooked that the orders for the injunctions were in their character extraordinary and unprecedented. When before was an act of Congress ever declared unconstitutional by a State court in deciding upon a motion for an interlocutory order? A just respect for the government under which we live demands that if there was a mistake in such a case, the court should seize with avidity the earliest opportunity to rectify it instead of persisting in the error under cover of a rule adopted only to secure its own convenience. . . .

. . . [A]s I am satisfied that the bills of complainants have no equity, and that the act of Congress is such as Congress has the constitutional power to enact, I think the orders for preliminary injunctions made in all these cases should be rescinded, and that the motions for the injunctions should be overruled.

Such being the opinion of a majority of the judges of the Supreme Court, the orders are directed to be vacated, and the motions for injunctions are overruled.

JUSTICE READ, concurring.

. . . Upon a calm and dispassionate reconsideration of the question, I am firmly of opinion that

this act is a perfectly constitutional exercise of the power vested in Congress by the Constitution, and binding upon us as judges of the Supreme judicial tribunal of the State, and upon all the people of the United States. Upon this point I shall say nothing more.

Another question urged upon us, by one of the counsel, was our power to prohibit and restrain by injunction officers of the United States, acting under the authority and in strict conformity to an act of Congress, from performing their official duties, and thus practically nullifying it within the State of Pennsylvania. For such a position no authority was or could be cited. No State court before the filing of these bills had ever been asked to exercise such a power against the General government, unless a precedent is to be found in the conduct of South Carolina in the days of President Jackson.

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In his Farewell Address, this great man, after expressing the debt of gratitude he owed to his *beloved country* for the many honors conferred upon him, uses this language to his fellow- citizens: "The unity of government, which constitutes you one people, is also now dear to you. It is justly so." "Citizens by birth or choice of a common country, that country has a right to concentrate your affections. The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism, more than any appellation derived from local discriminations."

The armies of the Union are not fighting for any single State, but they are fighting for their common country, the United States of America, as Americans; and those who have perished in this contest for the preservation of the Union have died under the National flag, which I trust will soon wave over the whole undivided territory of our glorious and once happy Union.

JUSTICE AGNEW, concurring.

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. . . [The case] touches the vital powers of the government, arrested violently in their execution by a State tribunal at a time of great peril. The government was not represented at the preliminary hearing, and ought not to be prejudiced by the fault (if any) of its agents. Government, which acts only through agents quickened by no personal interest, is never to be considered derelict where the default is still open to correction. . . . The court heard but one side, the opponents of the law. The hearing took place in the midst of an exciting political campaign, when the spirit of party was assailing the law with furious lashes, and vigorously hounding on all its own adherents to the cause to be in at the death. The decision was by a bare majority, against the earnest dissent of two judges, and partially established non-coercion, a doctrine rooted in, and half-brother to secession. The late Chief Justice, whose honest mind, I have no doubt, felt penetrated by these surroundings in delivering the opinion of the majority, had expressed some distrust of his own convictions, and conceded that further argument on final hearing might possibly change the result.

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It is said that the new member of the bench is bound by the rule of *stare decisis.* I bow to this safe maxim wherever it applies, and conceive it would be sad indeed if the reputation of this court were to suffer by my breach of it.

But it is admitted that on a final hearing I must decide as my views and conscience dictate. And why not now? I find the case before me, and I certainly cannot decide it against all my convictions of law, duty, and patriotism. . . .

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On what principle, therefore, is *stare decisis* quoted to me? Is it merely to sustain the decision of a bare majority against a strong dissent, establishing the doctrine that national forces cannot be raised to suppress insurrection, nor, indeed, used for such a purpose; made in a one-sided hearing of the opponents of the law, in a preliminary way, during a time of high excitement, when partisan rage was furiously assailing the law- -a decision tending to encourage a general rush into the court, and to put an end to the levying of troops, and inciting to forcible resistance under a persuasion of the law's invalidity? The decision has become no rule of right, and has fixed no status of society, while it is founded, in my judgment, in most pernicious error. Surely this is no case for *stare decisis.*

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Believing that law, duty, patriotism, and justice require the preliminary order to be rescinded, I proceed to the grounds which, in my judgment, place the power of the government above successful disproof.

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Can the national armies be raised or recruited by draft?

That the United States are a nation, and sovereign in the powers granted to them, is not denied. Their national characteristics are seen in the powers themselves, and their supremacy provided for in the instrument. They possess all the functions of a nation in the law-making, executing, and judging powers.

We cannot conceive of a nation without the inherent power to carry on war. The defence of person and property is a right belonging by nature to the individual and to every individual, and is not taken away by association. It therefore belongs to individuals in their collective capacity whenever thus threatened or assailed. The Constitution, following the natural right, vests the power to declare war Congress, the representatives of the people. It is noticeable that the Constitution recognizes this right as pre existing, for it says, "to *declare* war," which presupposes the right to *make* war. The power to declare war necessarily involves the power to carry it on; and this implies the means-- saying nothing *now* of the express power "to raise and support armies," as the provided means.

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But the power to carry on war, and to call the requisite force into service, inherently carries with it the power to coerce or draft. A nation without the power to draw forces into the field in fact would not possess the power to carry on war. The power of war without the essential means is really no power--it is a solecism. Voluntary enlistment is founded on contract. A power to command differs essentially from a power to contract. The former flows from authority; the latter from assent. The power to command implies a duty to obey, but the essential element of contract is freedom to assent or dissent. It is clear, therefore, that the power to make war without the power to command troops into the field, is impotent; in point of fact is no governmental power, because it lacks the authority to execute itself.

So much can be argued conclusively, from the fact that the Union is a government of national powers, and has the express authority to declare war, and provide for the common defence and general welfare.

But when we reach the express grant of the means of making war, we find it a general grant of the power "to raise and support armies," without any exception as to the extent, the mode, or the means, only that appropriations for the purpose shall not be made for more than two years, which strengthens the grant in every other respect.

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It is conceded that in construing the Constitution we must take it as a whole, and not confine the question to a single isolated grant of power. But where a general power is vested in plain and absolute language, without exception or proviso, for high, vital, and imperative purposes, which will be crippled by interpolating a limitation, the advocate of the restriction must be able to point out somewhere in the Constitution a clause which declares the restriction, or a higher purpose which demands it. . . .

Can it be that this Heaven-ordained Union, the light of nations, the hope of the world, the protector of States, the defender of personal rights, the guarantee of free government, shall depend for its own safety and for the performance of all its high duties on the ever-changing hues of popular opinion, or the varying moods of State executives? . . .

Must we forget all history and our own short recollections? Must we ignore that conduct of States which brought the Constitution into existence, "in order to form a more perfect union, establish justice, *insure domestic tranquillity, provide for the common defence, promote the general welfare*, and secure the *blessings of liberty* to ourselves and posterity?" Then, after all this, must we forget the whiskey insurrection, the opposition to the embargo and to the war of 1812, the South Carolina nullification and the Dorr rebellion?

Must we blot out our own memory of the last three years, when States and people rose against the Constitution and authority of the Union, and ordained them null and void--when the ministers of justice and all Federal officers in those States resigned or were forced to retire--when the forts, arsenals and other property of the government were seized and its armies surrendered? Must we forget that when the States were first called on for troops, States not then in rebellion, through their executives, hurled

back the President's proclamation into his face, and that troops sent to the succor of the government, to save its capital from capture and its archives from destruction, were murdered in the streets of a neighboring city? Are we to ignore the fact staring Congress in the face at the time of the passage of this very law, that the impulses which first drew out volunteers were dying away--that as war was prolonged, and death, disease, and discharge thinned the ranks of the voluntary element, as disasters overtook us and the scales of battle hung in doubtful equipoise, the spirit of enlistment drooped, flagged, and died away, while the ties of home and interest, and the spirit of disaffection, more potent than patriotism, asserted their sway over the remaining elements?

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[I]t is a mistake, in fact, to say this law exhausts the militia. It enrolls probably all, for how can any be drafted without all be known? But the draft is confined to so many as are needed for the emergency, while the others remain in the militia. And if you deny the power to repeat the draft, what is that but to say your force shall not increase with the necessity?

Nor is it true that the enrolment under this law exhausts the militia. Neither the law of Congress, nor the laws of the State, so far as we know them, have enrolled all able-bodied men capable of militia duty. A wide margin yet exists in the law of the nation, but we do not hear of this margin being written all over in the seceded States.

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For all these reasons, I concur in rescinding the order for a preliminary injunction.

CHIEF JUSTICE WOODWARD, with whom JUSTICE THOMPSON joins, concurring.

. . . . After Judge Lowrie was out of office, to wit, on the 17th day of December, the defendants, by counsel, appeared before Judge Strong, at Nisi Prius, who had been assigned to that court for that month, and moved to dissolve the injunction. This motion was grounded on no answer, plea, demurrer, affidavit, or reason filed of record. It is understood that plaintiff's counsel had notice of the motion, and appeared and objected to it, but it was granted, and the other members of the court summoned to an argument upon it on the 30th of that month. . . .

I have said all the citizens of the commonwealth were bound to respect [the original] decree. I include, of course, the judges of this court. A dissenting judge is as much bound by the decrees and judgments of the majority, regularly entered, as the majority themselves. . . .

Upon this principle I maintain, then, that a dissenting judge cannot, upon the same state of record and of facts on which the majority have granted an injunction, dissolve that injunction, nor set the majority to reviewing their decision. If he may, it is apparent that a dissenting judge may undo the work of the whole court, or, what is worse, make them go over the same ground again and again. . . .

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The time and manner of bringing forward this motion would seem to indicate that it was a sort of experiment upon the learned judge who has just taken his seat as the successor of Judge Lowrie. Does anybody suppose it would have been made if Judge Lowrie had been re- elected? I presume not. Are we to understand, then, that whenever an incoming judge is supposed to entertain different opinions on a constitutional question from an outgoing judge, every case that was carried by the vote of the retiring judge is to be torn open, rediscussed, and overthrown? od save the commonwealth, if such a precedent is to be established. . . . I cannot admit that a popular election should overthrow a judicial record. I maintain that the decision of 9th November is the law of this court, and will be until it is regularly reversed or avoided, according to established judicial rules, and as such is entitled to be respected and obeyed by all orderly and loyal citizens.

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[I]t is supposed that a State court cannot lawfully resist the execution of an act of Congress. Here a distinction exists which never ought to be lost sight of. State courts have no power to interfere with or resist the *process or judgments of the Federal courts*, and the rule is reciprocal--the Federal courts have no power to disregard the process or judgments of State courts. . . .

Of course, the appellate jurisdictions of the Supreme Court of the United States are to be excepted from this remark. In the forms of the Constitution that court may review certain proceedings of State courts; but in all other respects, even where concurrent jurisdiction exists over the subject matter, the Federal and State courts mutually respect that jurisdiction which first attaches. The case of *Ableman v. Booth* (1859), so much relied on, belongs to this class of questions upon judicial process, and all that fell from the chief justice in that case is to be restrained to the facts of the case. This is a rule always necessary to be imposed upon judicial language. That case is authority for nothing but the well-settled doctrine that State authorities cannot resist the *judicial process* of the United States.

But these defendants were not acting under any judicial process of the United States. They were mere ministerial agents of the executive department engaged in executing what we held to be an unconstitutional act of Congress, and, therefore, are not within the rule above stated, nor within the authorities cited to sustain that rule. . . .

I think these authorities fully sustain the proposition of the learned counsel, that a State court has the right to prevent the invasion of the personal liberty of the citizen of the State by officers of the United States, acting under color of an unconstitutional law, when the act complained of is not the subject of suit, prosecution, or proceeding in the courts of the United States.

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JUSTICE THOMPSON, concurring.