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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

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Kneedler v. Lane I, 45 Pa. 238 (1863)

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 Democratic 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 LOWRIE delivered the opinion of the Court.

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. . . . [T]he question has become a question of politics, and the great parties of the country have divided upon it. People have not awaited the decision of the courts on the subject, and could not be expected to do so; but have studied and decided it for themselves, or have rallied, in opposing ranks, in support of leaders who profess to have studied it, or have done so. Our own history shows that our courts have no moral authority adequate to bring such divisions into unity. That sort of authority requires a much larger degree of mutual confidence between the courts and the people than is usual in our experience, especially in times of popular excitement.

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It is … only upon the power to raise armies that this act can be founded, and as this power is undisputed, the question is made to turn on the ancillary power to pass "all laws which shall be necessary and proper" for that purpose: Art. 1, 8, 18. It is therefore a question of the mode of exercising the power of raising armies. Is it admissible to call forced recruiting a "necessary and proper" mode of exercising this power?

The fact of rebellion would not seem to make it so, because the inadequacy or insufficiency of the permanent and active forces of the government for such a case is expressly provided for by the power to call forth the usually dormant force, the militia; and that therefore is the only remedy allowed, at least until it has been fully tried and failed. . . .

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If it may, it may do so even when no war exists or threatens, and make this the regular mode of recruiting; it may disregard all considerations of age, occupation, profession, and official station; it may take our governors, legislators, heads of state departments, judges, sheriffs, and all inferior officers, and all our clergy and public teachers, and leave the state entirely disorganized; it may admit no binding rule of equality or proportion for the protection of individuals, states, and sections. . . .

. . . . If any such mode had been in the intention of the fathers of the constitution, they would certainly have subjected it to some rule of equality or proportion, and to some restriction in favor of state rights, as they have done in other cases of compulsory contributions to federal necessities. We are forbidden by the constitution from inferring the grant of this power from its not being enumerated as reserved; and the rule that what is not granted is reserved, operates in the same way, and is equivalent to the largest bill of rights.

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Besides this, the constitution does authorize forced levies of the militia force of the states in its organized form, in cases of rebellion and invasion, and, on the principle that a remedy expressly provided for a given case,

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excludes all implied ones, it is fair to infer that it does not authorize forced levies in any other case or mode. The mode of increasing the military force for the suppression of rebellion being given in the constitution, every other mode would seem to be excluded.

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. . . . By [this law] all men, between the ages of twenty and forty-five, are "declared to constitute the national forces," and made liable to military duty, and this is so nearly the class which is usually understood to constitute the militia force of the states that we may say that this act covers the whole ground of the militia, and exhausts it entirely. It is, in fact, in all its features, a militia for national, instead of state purposes, though claiming justification only under the power to raise armies, and accidentally under the fact of the rebellion. . . .

It seems to me this is an unauthorized substitute for the militia of the states. If valid, it completely annuls, for the time being, the remedy for insurrection provided by the constitution, and substitutes a new and unprovided one. Or rather, it takes that very state force, strips it of its officers, despoils it of its organization, and reconstructs its elements under a different authority, though under somewhat similar forms. . . . The state militia is wiped out if this act is valid, except so far as it may be permitted by the federal government. . . .

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If Congress may institute the plan now under consideration, as a necessary and proper mode of exercising its power "to raise and support armies," then it seems to me to follow with more force that it may take a similar mode in the exercise of other powers, and may compel people to lend it their money; take their houses for offices and courts; their ships and steamboats for the navy; their land for its fortresses. . . . If we give the latitudinarian interpretation, as to mode, which this act requires, I know not how to stop short of this. I am sure there is no present danger of such an extreme interpretation, and that even partisan morality would forbid it; but if the power be admitted we have no security against the relaxation of the morality that guides it, I am quite unable now to suppose that so great a power could have been intended to be granted, and yet to be left so loosely guarded.

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It is with very real distress that I find my mind forced into this conflict with an act of Congress of such very great importance in the present juncture of federal affairs; but I cannot help it, and the question is so presented that I cannot evade it. . . .

Certainly, in this great struggle, we owe nothing to the rebels but war, until they submit, unless it be that we do not let the war so depart from its proper purpose as to force them to submit to a constitution and system different from that against which they have rebelled. But we do owe it to each other, to minorities and individuals, that no part of that sacred compact of union shall become the sport of partisan struggles, or be subjected to the anarchy of conflicting moralities, urged on by ambitious hopes veiled in the background. Our solemn oaths and plighted faith have made that compact the shield of state constitutions, institutions, and peculiarities, and of their right to their own free development, against all arbitrary and intermeddling action of the central government (which in all free countries represents a party), and I venture to hope that that shield will continue to afford its intended protection.

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Order.-- . . . Preliminary injunction (in each case) granted for the protection of the plaintiff . . . .

JUSTICE WOODWARD, concurring.

The people were justly jealous of standing armies. Hence they took away most of the war power from the executive, where, under monarchical forms, it generally resides, and vested it in the legislative department. . . . To these representatives of the states and the people, this power of originating war was committed, but even in their hands it was restrained by the limitation of biennial appropriations for the support of the armies they might raise. . . . The war power, existing only for the protection of the people, and left, as far as it was possible to leave it, in their own hands, was incapable of being used without their consent, and therefore could never languish for enlistments. They would be ready enough to recruit the ranks of any army they deemed necessary to their safety. Thus the theory of the constitution placed this great power, like all other governmental powers, directly upon the consent of the governed.

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Times of rebellion, above all others, are the times when we should stick to our fundamental law, lest we drift into anarchy on one hand, or into despotism on the other. The great sin of the present rebellion consists in violating the constitution, whereby every man's civil rights are exposed to sacrifice. Unless the government be kept on the foundation of the constitution, we imitate the sin of the rebels, and thereby encourage them, whilst we weaken and dishearten the friends of constitutional order and government. . . .

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As the constitution anticipates and provides for such calamities, it is a reproach to its wisdom to say that it is inadequate to such emergencies. No man has any historical right to cast this reproach upon it. No current experience proves it. It never can be proved except by an unsuccessful use of the legitimate powers of the constitution against rebellion, and then the thing proved will be that the instrument needs amendment, which its

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machinery is flexible enough to allow. . . .

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JUSTICE THOMPSON, concurring.

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JUSTICE STRONG, dissenting.

The necessity of vesting in the federal government power to raise, support, and employ a military force, was plain to the framers of the constitution, as well as to the people of the states by whom it was ratified. This is manifested by many provisions of that instrument, as well as by its general purpose, declared to be for "common defence." Indeed such a power is necessary to preserve the existence of any independent government, and none has ever existed without it. It was therefore expressly ordained in the eighth article, that the Congress of the United States should have power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." . . . Nor is this all. It is obvious that if the grant of power to have a military force had stopped here, it would not have answered all the purposes for which the government was formed. It was intended to frame a government that should make a new member in the family of nations. To this end, within a limited sphere, every attribute of sovereignty was given. . . . The power to call the militia into the service of the federal government is limited by express terms. It reaches only three cases. The call may be made "to execute the laws of the Union, to suppress insurrections, and to repel invasions," and for no other uses. The militia cannot be summoned for the invasion of a country without the limits of the United States. They cannot be employed, therefore, to execute treaties of offensive alliance, nor in any case where military power is needed abroad to enforce rights necessarily sought in foreign lands. This must have been understood by the framers of the constitution, and it was for such reasons doubtless that other powers to raise and maintain a military force were conferred upon Congress, in addition to those which were given over the militia. By the same section of the eighth article of the constitution it was ordained, in words of the largest meaning, that Congress should have power to "raise and support armies," a power not to be confounded with that given over the militia of the country. . . . If there be any restriction upon the mode of exercising the power, it must be found else-where than in the clause of the constitution that conferred it. . . . This part of the constitution, like every other, must be held to mean what its framers, and the people who adopted it, intended it should mean. We are not at liberty to read it in any other sense. We cannot insert restrictions upon powers given in unlimited terms, any more than we can strike out restrictions imposed.

. . . The powers of the federal government are limited in number, not in their nature. A power vested in Congress is as ample as it would be if possessed by any other legislature--none the less because held by the federal government. It is not enlarged or diminished by the character of its possessor. . . . In *Gibbons v. Ogden* (1824) . . . the Supreme Court of the United States laid down the principle that all the powers vested by the constitution in Congress are complete in themselves, and may be exercised to their utmost extent, and that there are no limitations upon them, other than such as are prescribed in the constitution.

It is not difficult to ascertain what must have been intended by the founders of the government when they conferred upon Congress the power to "raise armies." At the time when the constitution was formed, and when it was submitted to the people for adoption, the mode of raising armies by coercion, by enrolment, classification, and draft, as well as by voluntary enlistment, was well known, practiced in other countries, and familiar to the people of the different states. . . .

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The argument most pressed in support of the alleged unconstitutionality of the act of Congress is, that it interferes with the reserved rights of the states over their own militia. . . . It ignores the fact that Congress has *also* power over those who constitute the militia. The militia of the states is also that of the general government. It is the whole able-bodied population capable of bearing arms, whether organized or not. Over it certain powers are given to Congress, and others are reserved to the states. . . . Whether gathered by coercion or enlistment, they are equally taken out of those who form a part of the militia of the states. Taking a given number by draft no more conflicts with the reserved power of the states than does taking the same number of men in pursuance of their own contract. . . .

. . . [T]he complainants are not entitled to the injunctions for which they ask, and I think they should be denied.

JUSTICE READ, dissenting.

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The power to raise armies for the United States being vested solely in Congress, the legislative branch of

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the government, it must “exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense:” *Federalist*, No. 23. “The result from all this is, that the Union ought to be invested with full power to levy troops, to build and equip fleets, and to raise the revenues which will be required for the formation and support of an army and navy in the customary and ordinary modes practiced in other governments:” Id.; and “there can be no limitation of that authority which is to provide for the defense and protection of the community in any manner essential to its efficacy, that is, in any manner essential to the formation, direction, or support of the national forces:” Id. . . .

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If there ever was an occasion to call every man into the service of his country, it is the present one, when we are engaged in combating the most formidable, wicked, and causeless rebellion known in history, of which the object of its traitorous leaders is to destroy the Union, to erect a purely slave confederacy, and to make Pennsylvania a border state, exposed to the annual inroads of unprincipled enemies. I am, therefore, for using the whole population, if necessary, of the loyal states to extinguish this treasonable rebellion. I have no idea of allowing northern sympathizers to stay at home, whilst loyal men fight their battles and protect their property. I would oblige all such men to render their full share of military service, and if I had the power I would place the New York rioters in the front ranks of the army.

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The doctrine contended for by the plaintiffs' counsel is simply the Calhoun heresy of nullification, exploded by General Jackson, applied not by a convention or a state legislature, but by a state judiciary, who may, by preliminary injunctions, stop the raising of armies . . . thus paralyze the arm of government when stretched out to repel a foreign foe, or to suppress a rebellion, backed by several hundred thousand men in the field. I cannot agree that this court can nullify an act of Congress by any prohibitory writ.

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Now, neither in this provision nor in the report of the revisers, nor in any of the decisions of the court, do I find any warrant to grant injunctions to stop the proceedings of officers of the United States, under acts of Congress regularly enacted. If such be our power, then the sooner the legislature interposes its legitimate power to alter the law, and to prevent the various courts of the state from exercising a jurisdiction with which they never intended to invest them, the better.[1]

I am therefore of opinion that, under the Act of Assembly, we have no such jurisdiction as is here claimed.

[1] Observe that Justice Read’s specific concern here is not with the power of judicial review itself, but with the power of state courts to issue injunctions against federal executive officers on constitutional grounds—eds. note.

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