AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 2: The Early National Era – Judicial Power and Constitutional Authority

Kamper v. Hawkins, 3 Va. 20 (1788)

The Virginia legislature in 1792 attempted to combine two judicial offices, the district court and the court of chancery, into a single tribunal. The relevant act declared that district court justices would have the power to issue injunctions. This power was traditionally exercised only by chancery courts. Shortly after the law was passed, Mary Hawkins asked a district court judge for an injunction against Peter Kamper, which would block Kamper from carrying out a legal decision he had won against Hawkins the previous year. Kamper appealed to the Supreme Court of Appeals, claiming that the Virginia legislature could not constitutionally combine common law and equity courts.

The state court unanimously found for Kamper. The five justices of the Virginia Supreme Court of Appeals delivered separate opinions, each declaring that courts had the power to declare laws unconstitutional and that the Virginia law was unconstitutional. The justices disputed the precise grounds of unconstitutionality. Several justices declared that Virginia could never vest the same justices with common law and equitable power. Others thought Virginia could, but that a separate appointment was necessary. Kamper *is most notable for the extensive analysis of judicial review in each opinion. Justice Spencer Roane, who delivered a detailed justification for the power of state courts to declare state laws unconstitutional, would later become a stanch opponent of vesting federal courts with the power to declare state laws unconstitutional. Decided in the same year that the U.S. Constitution was ratified,* Kamper *is one of the earliest cases in which an American court exercised the power of judicial review to declare a law unconstitutionally and legally void. Despite that, it was accepted with little controversy in Virginia legal and political circles. As you read these opinions, consider what arguments were offered for judicial review when the power was still new and uncertain. What differences do you see in these several opinions? How different is the law at issue in this case from the repeal act at issue in* Stuart v. Laird *(1803), and why might the two courts have responded differently?*

JUDGE NELSON delivered the opinion of the Court.

I. . . . [A]though it has been decided by the judges of the court of appeals, . . . that a law contrary to the constitution is void--I beg leave to make a few observations on general principles.

The difference between a free and an arbitrary government I take to be--that in the former limits are assigned to those to whom the administration is committed; but the latter depends on the will of the departments or some of them. Hence the utility of a written constitution.

A Constitution is that by which the powers of government are limited.

It is to the governors, or rather to the departments of government, what a law is to individuals--nay, it is not only a rule of action to the branches of government, but it is that from which their existence flows, and by which the powers, (or portions of the right to govern,) which may have been committed to them, are prescribed--It is their commission--nay, it is their creator. . . .

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Who then can change it? --I answer, the people alone.

But it has been supposed that the legislature can do this.

To decide this question, I have already stated that the legislature derived their existence from the Constitution. . . .

And can the legislature impugn that charter under which they claim, and to which by their acts they themselves have acknowledged an obligation? I apprehend not, nor can any argument against this position be drawn from an acquiescence in some acts which may be unconstitutional

1st. Because we may presume, that if there be any such, their unconstitutionality has not yet been discovered by the legislature, which, if it had been done, (from the instance before recited, and some other instances) we have reason to think, would have produced a similar declaration from that body. --And

2dly, Because no individual may have yet felt the operation of them, and consequently they have not been brought to investigation.

But the greatest objection still remains, that the judiciary, by declaring an act of the legislature to be no law, assumes legislative authority, or claims a superiority over the legislature.

In answer to this, --I do not consider the judiciary as the champions of the people, or of the Constitution, bound to sound the alarm, and to excite an opposition to the legislature. --But, when the cases of individuals are brought before them judicially, they are bound to decide.

And, if one man claim under an act contrary to the Constitution, that is, under what is no law, (if my former position, that the legislature cannot impugn the Constitution, and consequently that an act against it is void--be just,) must not a court give judgment against him?

Nor is it a novelty for the judiciary to declare, whether an act of the legislature be in force or not in force, or in other words, whether it be a law or not.

In many instances one statute is virtually repealed by another, and the judiciary must decide which is the law, or whether both can exist together.

The only difference is, that in one instance that which was once in existence is carried out of existence, by a subsequent act virtually contrary to it, and in the other the prior fundamental law has prevented its coming into existence as a law.

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That if the clause under consideration be unconstitutional, it is void.

II. The second point--whether it be unconstitutional, is next to be considered.

By the fourteenth section of the Constitution, " the two houses of assembly shall, by joint ballot, appoint judges of the supreme court of appeals, and general court, judges in chancery, judges of admiralty, &c. . . .

My inference is, that a judge in chancery, and a judge of the general court, were intended under the Constitution to be distinct individuals. . . .

On the whole, I am for certifying to the court below, that the motion for an injunction be overruled, the clause under which it is prayed being unconstitutional.

JUDGE ROANE, concurring

. . . . I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof.

I consider the people of this country as the only sovereign power. --I consider the legislature as not sovereign but subordinate; they are subordinate to the great constitutional charter, which the people have established as a fundamental law, and which alone has given existence and authority to the legislature. . . .

But if the legislature may infringe this Constitution, it is no longer fixed; it is not this year what it was the last; and the liberties of the people are wholly at the mercy of the legislature.

A very important question now occurs, viz. whose province it is to decide in such cases. It is the province of the judiciary to expound the laws, and to adjudge cases which may be brought before them--the judiciary may clearly say, that a subsequent statute has not changed a former for want of sufficient words, though it was perhaps intended it should do so. It may say too, that an act of assembly has not changed the Constitution, though its words are expressly to that effect; because a legislature must have both the power and the will (as evidenced by words) to change the law, and it is conceived, for the

reasons above mentioned, that the legislature have not power to change the fundamental laws. In expounding laws, the judiciary considers every law which relates to the subject: would you have them to shut their eyes against that law which is of the highest authority of any, or against a part of that law, which either by its words or by its spirit, denies to any but the people the power to change it? In cases where the controversy before the court does not involve the private interest, or relate to the powers of the judiciary, they are not only the proper, but a perfectly disinterested tribunal; --e. g. if the legislature should deprive a man of the trial by jury--there the controversy is between the legislature on one hand, and the whole people of Virginia (though the medium of an individual) on the other, which people have declared that the trial by jury shall be held sacred.

In other cases where the private interest of judges may be affected, or where their constitutional powers are encroached upon, their situation is indeed delicate, and let them be ever so virtuous, they will be censured by the ill-disposed part of their fellow-citizens: but in these cases, as well as others, they are bound to decide, and they do actually decide on behalf of the people; for example, though a judge is interested privately in preserving his independence, yet it is the right of the people which should govern him, who in their sovereign character have provided that the judges should be independent; so that it is in fact a controversy between the legislature and the people, though perhaps the judges may be privately interested. The only effect on the judges in such case should be, to distrust their own judgment if the matter is doubtful, or in other words to require clear evidence before they decide in cases where interest may possibly warp the judgment.

From the above premises I conclude that the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof. By fundamental principles I understand, those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.

To come now more immediately to the question before the court; can those who are appointed judges in chancery, by an act of assembly, without ballot, and without commission during good behavior, constitutionally exercise that office? . . .

If there can be judges in chancery who have no commission during good behavior, their tenure of office is absolutely at the will of the legislature, and they consequently are not independent. The people of Virginia intended that the judiciary should be independent of the other departments: they are to judge where the legislature is a party, and therefore should be independent of it, otherwise they might judge corruptly, in order to please the legislature, and be consequently continued in office. . . . For these reasons, and others which it would be tedious to enumerate, I am of opinion, that the clause in question, is repugnant to the fundamental principles of the Constitution. . . .

JUDGE HENRY, concurring.

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The judiciary, from the nature of the office, and the mode of their appointment, could never be designed to determine upon the equity, necessity, or usefulness of a law; that would amount to an express interfering with the legislative branch, in the clause where it is expressly forbidden for any one branch to interfere with the duties of the others. The reason is obvious, not being chosen immediately by the people, nor being accountable to them, in the first instance, they do not, and ought not, to represent the people in framing or repealing any law.

There is a proposition which I take to be universally true in our constitution, which to gentlemen whose ideas of parliament, and parliamentary powers, were formed under the former government, may not be always obvious; it is this--We were taught that Parliament was omnipotent, and their powers beyond control; now this proposition, in our constitution, is limited, and certain rights are reserved as before observed. . . .

Our deputies, in this famous convention, after having reserved many fundamental rights to the people, which were declared not to be subject to legislative control, did more; --they pointed out a certain

and permanent mode of appointing the officers who were to be intrusted with the execution of the government. Though the choice of the officers was intrusted to the wisdom of the legislature, yet the manner of conducting this choice was fixed; hereby declaring in the most solemn manner, the public will and mind of the people to be, that the laws when made, should be executed by officers chosen and appointed, as therein is directed, and not otherwise; whereas under the former government, the legislature seemed to have had no bounds to their authority but the negative of the crown, and the public officers were appointed and displaced at the pleasure of the governing powers which then were. . . .

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JUDGE TYLER, concurring.

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What is the Constitution but the great contract of the people, every individual whereof having sworn allegiance to it? --A system of fundamental principles, the violation of which must be considered as a crime of the highest magnitude. . . . [C]an one branch of the government call upon another to aid in the violation of this sacred letter? The answer to these questions must be in the negative.

But who is to judge of this matter? the legislature only? I hope not. --The object of all government is and ought to be, the faithful administration of justice. --It cannot, I hope, be less the object of our government, which has been founded on principles very different from any we read of in the world, as it has ingrafted in it a better knowledge of the rights of human nature, and the means of better securing those rights. . . . Hence it may reasonably be inferred, that if the commonwealth itself is subordinate to this department of government at times, so therefore will necessarily be the acts of the legislature, when they shall be found to violate first principles, notwithstanding the supposed "omnipotence of parliament," which is an abominable insult upon the honor and good sense of our country, as nothing is omnipotent as it relates to us, either religious or political, but the God of Heaven and our constitution!

I will not in an extra-judicial manner assume the right to negative a law, for this would be as dangerous as the example before us; but if by any legal means I have jurisdiction of a cause, in which it is made a question how far the law be a violation of the constitution, and therefore of no obligation, I shall not shrink from a comparison of the two, and pronounce sentence as my mind may receive conviction. --To be made an agent, therefore, for the purpose of violating the constitution, I cannot consent to. --As a citizen I should complain of it; as a public servant, filling an office in one of the great departments of government, I should be a traitor to my country to do it. But the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good. . . .

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JUDGE TUCKER, concurring.

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But here an objection will no doubt be drawn from the authority of those writers who affirm, that the constitution of a state is a rule to the legislature only, and not to the judiciary, or the executive: the legislature being bound not to transgress it; but that neither the executive nor judiciary can resort to it to enquire whether they do transgress it, or not.

This sophism could never have obtained a moment's credit with the world, had such a thing as a written Constitution existed before the American revolution. . . . What the constitution of any country was or rather was supposed to be, could only be collected from what the government had at any time done; what had been acquiesced in by the people, or other component parts of the government; or what had been resisted by either of them. Whatever the government, or any branch of it had once done, it was inferred they had a right to do again. The union of the legislative and executive powers in the same men, or body of men, ensured the success of their usurpations; and the judiciary, having no written constitution to refer to, were obliged to receive whatever exposition of it the legislature might think

proper to make. But, with us, the constitution is not an "ideal thing, but a real existence: it can be produced in a visible form:" its principles can be ascertained from the living letter, not from obscure reasoning or deductions only. The government, therefore, and all its branches must be governed by the constitution. Hence it becomes the first law of the land, and as such must be resorted to on every occasion, where it becomes necessary to expound what the law is. This exposition it is the duty and office of the judiciary to make. . . . Now since it is the province of the legislature to make, and of the executive to enforce obedience to the laws, the duty of expounding must be exclusively vested in the judiciary. But how can any just exposition be made, if that which is the supreme law of the land be withheld from their view? . . . .

But that the constitution is a rule to all the departments of the government, to the judiciary as well as to the legislature, may, I think, be proved by reference to a few parts of it.

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Art. 16 secures the free exercise of our religious duties, according to the dictates of every man's own conscience. Should the legislature, at any future period, establish any particular mode of worship, and enact penal laws to support it, will the courts of this commonwealth be bound to enforce those penalties?

From all these instances it appears to me that this deduction clearly follows, viz. that the judiciary are bound to take notice of the constitution, as the first law of the land; and that whatsoever is contradictory thereto, is not the law of the land.

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