

THE USES OF STATE CONSTITUTIONAL HISTORY:
A CASE NOTE

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The study of state constitutional history clearly is an orphan child. Students of our constitutional past generally have concentrated their attention on the federal Constitution and even more narrowly on the United States Supreme Court. State constitutional case law has been especially neglected, except for the occasional decision that appears to be a precursor to a federal case or doctrine.¹ The consequence of this disinterest in the history of state constitutional cases has been the impoverishment both of our understanding of American legal history and of the fundamental issues raised by the enterprise of defining and limiting governmental power through written constitutions. This Article suggests that both legal history and constitutional jurisprudence would benefit from enhanced attention to those traditions of argument and interpretation that center on the fundamental law of the several states rather than on the federal Constitution. State constitutional history, in short, is "usable," at least in the sense of intellectual enlightenment. The Article makes this argument by way of a brief case study, but first, a couple of cautionary warnings about the general thesis are necessary.

History, first of all, has a proper use, but that use depends on careful attention to the demands—and the limits—of responsible historical scholarship.² Ransacking the past for isolated "good quotes" is bad history and bad law (although, of course, at times politically effective).

My second caution is a related one: We cannot assume, as a matter of *a priori* truth, that there is a unitary tradition of constitutional law across the several states or even within a single one. The existence of a meaningful tradition is an assertion to be proven rather than a premise to be assumed. This is a point of more than "mere" methodological significance. One of the most common sources of mis-

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¹ An example of the rare exception is *Wynehamer v. People*, 13 N.Y. 378 (1856), which usually receives a citation as a state forerunner of federal substantive due process. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 562 n.15 (2d ed. 1988).

² I have explored these issues more thoroughly in Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (proposing a set of fourteen rules that responsible judges should adhere to as they attempt to ascertain the original meaning of the Constitution).

understanding and anachronism in constitutional history stems from the desire to identify a common set of ideas and arguments shared by groups labeled "the founders," "framers," "'traditional' constitutional lawyers," or similar appellations. This desire easily leads one to find more agreement and intelligibility in the past than was in fact there. We must take seriously the possibilities of radical disagreement among judges interpreting a state constitution as well as of internal contradictions within the thinking of particular individuals. One good example of this type of disagreement can be found in the debates in the 1780s over the Pennsylvania Constitution.³ Everyone involved in the discussion agreed that Pennsylvania ought to have a "republican" form of government, but the supporters of the 1776 constitution and its critics held radically different views of what republicanism might be.

Another example of deep—and deeply interesting—disagreement over state constitutional law is to be found in the case, *Kemper v. Hawkins*,⁴ on which this Article is focused. *Kemper*, decided in 1793 by the Virginia General Court, raised some thought-provoking questions concerning the Virginia Constitution's distribution of judicial power; even more interestingly, the case prompted the judges of the general court to engage in a lively debate over the nature of judicial review.⁵ *Kemper* sheds important light on the development of American thinking about the relationship between judges and constitutions in the decade and a half between the drafting of the United States Constitution and *Marbury v. Madison*.⁶ An understanding of the divergent views of judicial review expressed by the *Kemper* judges, furthermore, is of more than antiquarian interest: *Kemper* raises the central jurisprudential question of what judges are doing when they decline to obey a statute for constitutional reasons. Are they "striking down" an offensive action of the legislature and thereby fulfilling a unique role as the guardians of the constitution? Or are they simply refusing to participate in what they themselves perceive as unconstitutional legislative action without denying that for other actors and other viewpoints the challenged statute may be legal and binding? Or, as John Marshall seems to have said in *Marbury*, is judicial review nothing more than a corollary of the ordinary judicial role: the court must decide which of a set of conflicting legal rules is the

³ See generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 232-36 (1969).

⁴ 3 Va. (1 Va. Cas.) 20 (Gen. Ct. 1793).

⁵ See *id.*

⁶ 5 U.S. (1 Cranch) 137 (1803).

authoritative one, and that between an act of the legislature and an act of the people the latter must prevail?⁷

Twentieth-century American constitutional theory tends to assume that the *Marbury* approach is the basic and legitimate rationale for judicial review. Such an assumption suggests that judicial review should be an occasional and extraordinary event akin to a judicial decision that a subsequent statute has repealed an earlier law *sub silentio*. If two statutes are in irreconcilable conflict, a court must decide which to follow, but that necessity does not imply that the court should look for such conflict or view itself as the chosen defender of the later (or the earlier) law. The *Marbury* vision of judicial review implies that judicial review, rather than exemplifying some special function of courts in the American constitutional order, is mundane—nothing more than a necessary part of the judge's ordinary job of declaring what the law is. A great deal of recent constitutional scholarship from every political corner has concerned itself with the project of easing or resolving the paradox of courts exercising great political power on the basis of a quite narrow and even technical understanding of the act of judging.⁸ Perhaps light may be shed on the problem by examining a time and a political system that had not canonized *Marbury*.

I. THE SETTING OF *Kemper v. Hawkins*

The court structure of prerevolutionary Virginia essentially consisted of two quite separate layers. On the one hand were the local county and corporation courts, exercising jurisdiction over a variety of petty civil matters, the day-to-day criminal law supervision of misconduct by free persons, and the social control of slaves.⁹ In the capital, the governor and council sat as a general court with original and appellate jurisdiction and both legal and equitable powers.¹⁰ A

⁷ See *id.* at 176-80.

⁸ See generally R. BORK, *THE TEMPTING OF AMERICA* (1990).

The exercise of judicial review has been justified as necessary to protect powerless minorities, see, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-179 (1980), or to protect individual rights, see, e.g., J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 60-128 (1980), or as authorized by the framers of the Constitution, see, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 300-06 (1977).

⁹ 2 A.E. DICK HOWARD, *COMMENTARIES ON THE CONSTITUTION OF VIRGINIA* 687-90 (1974). For a contemporaneous account of the activities of a colonial county court see *CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA* (P. Hoffer & W. Scott eds. 1984).

¹⁰ See A. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS* 44 (1981).

variety of problems emerged in the colonial period from the oligarchical and unprofessional nature of the local courts and from the general court's inaccessibility and inadequacy for an increasingly legalistic society.¹¹ The Revolution provided "occasion and opportunity" to address those problems, and "[c]ourt reform was a perennial theme of politics during the early years of the new state."¹²

The Virginia Constitution of 1776 directed the general assembly to "appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, [and] Judges of Admiralty."¹³ Between 1776 and 1779 the state legislature, acting under this constitutional mandate, restructured the central judicial system, while leaving the local courts basically unchanged.¹⁴ The general court, the high court of chancery, and the court of admiralty were each established as multi-member panels; for reasons of economy, the general assembly directed that the court of appeals be made up of the entire body of central court judges,¹⁵ a pattern familiar from English legal history.¹⁶

Continued dissatisfaction with the administration of justice on the local level led within a decade to the passage of a district court act establishing a system of professionalized trial courts staffed by ordering the central court judges to ride circuit in addition to their other duties.¹⁷ The judiciary collectively refused to act under the statute, complaining in a "remonstrance" to the legislature that it unconstitutionally interfered with their salaries and independence.¹⁸ In response, the legislature completely remodeled the central judicial system.¹⁹ The new scheme established a court of appeals with its own membership, but it staffed the district courts by imposing double-

¹¹ *See id.*

¹² 5 THE PAPERS OF JOHN MARSHALL xxviii (C. Hobson ed. 1987). The introductory essay to this volume, which covers Marshall's law practice from 1784-1800, is a brief but superb description of the legal system of Virginia in the period of *Kemper*. *See id.* at xxiii-lx.

¹³ VA. CONST. of 1776, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 51, 54 (W. Swindler ed. 1979).

¹⁴ *See* 2 A.E. DICK HOWARD, *supra* note 9, at 690-91.

¹⁵ *See* Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 135 (1788).

¹⁶ As Virginian readers of Lord Coke would have known, the Exchequer Chamber, which from 1585 exercised appellate review jurisdiction over the King's Bench, was made up of the common pleas justices and the barons of the Exchequer. *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 119 (2d ed. 1979).

¹⁷ *See* Cases, 8 Va. (4 Call) at 138-39.

¹⁸ *See id.* at 140-47 (setting out *The Respectful Remonstrance of the Court of Appeals*). The judges, having determined that the restructuring was unconstitutional, "had only to consider what ought to be their conduct in the mean time. The result of which was, that they ought not do any thing officially in the execution of an act which appeared to be contrary to the spirit of the constitution." *Id.* at 146.

¹⁹ *See id.* at 147-48.

duty on the judges of an expanded general court.²⁰

The Virginia judges accepted commissions under the new act,²¹ but problems emerged immediately. Cases in which most or all members of the new court of appeals had a personal financial interest were sufficiently common to lead the general assembly in November 1789 to direct the general court judges to sit as substitute appeals judges in such cases, an expedient that reproduced the same practical and constitutional difficulties the judges' 1788 *Remonstrance* had found unacceptable. For the moment, however, the judges acquiesced in the arrangement and the court met on several occasions between 1789 and 1794.²² The reduction of the high court of chancery to a single judge also caused problems by exacerbating the difficulty of obtaining timely equitable relief in appropriate cases.²³ In response, the general assembly, in December 1792, enacted a statute granting the district courts certain equitable powers.²⁴ The following May, Mary Hawkins prayed for an injunction against enforcement of a judgment obtained by Peter Kamper in the Dumfries District Court.²⁵ The general court judge sitting on circuit, Spencer Roane, was inclined (as he later explained) to obey the statute and consider the motion for the injunction, but because of his concern over the statute's constitutionality he referred that issue to the entire general court.²⁶ In November 1793, the judges of the general court present in Richmond unanimously concluded that the statute violated the state constitution and consequently, the district court ought not exercise powers under it.²⁷

²⁰ See *id.* at 147. The judicial reorganization statute attempted to balance the concerns of the judges that led to their refusal to act under the earlier district court statute with the legislature's concern for frugality. Even though the new act established a separate court of appeals and doubled the general court's membership to ten, it required the appointment of only four new judges to the previous eleven judge system (three chancellors, three admiralty judges and five general court judges); the members of the admiralty court, now superseded by the new federal district courts, were transferred to the general court, and two of the chancellors were moved to the new court of appeals. See *id.* at 147-48.

²¹ See *id.* at 148.

²² See *id.* at 150.

²³ See *id.* at 148.

²⁴ See *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 20-21 (Gen. Ct. 1793). "[T]he eleventh section of the district court law . . . gives the district court in term time, or a judge thereof in vacation, the same power of granting injunctions to stay proceedings on any judgment obtained in a district court, and of proceedings to the dissolution or final hearing of suits commencing by injunction, under the same rules and regulations as are now prescribed to the high court of chancery." *Id.* at 22-23 (Nelson, J.).

²⁵ *Id.* at 21 (statement of the reporter).

²⁶ *Id.* at 22.

²⁷ *Id.* at 97-98 (statement of the court).

II. THE *Kamper* DEBATE OVER THE NATURE OF JUDICIAL REVIEW

There were a variety of arguments against the constitutionality of the 1792 act. One was purely textual: the state constitution directed the general assembly "by joint ballot [to] appoint judges of the supreme court of appeals, and general court, judges in chancery, judges of admiralty &c."²⁸ As Judge William Nelson pointed out, "the insertion of the word *judges* between the *general court* and *chancery*" arguably "evinced an intention that the judges of the general court and those in chancery should be distinct persons," although Nelson conceded that this was "so critical a construction" of the text that by itself it was not persuasive.²⁹ A second line of argument, accepted by the entire court, relied on the Virginia Constitution's definition of the means by which state judges were to be appointed: legislative election by joint ballot of the two houses sitting together followed by commissioning by the governor.³⁰ The extension of equity powers to the district courts could be interpreted as purporting to make those judges chancery judges as well by passage of an ordinary statute and without executive commission.³¹ Two judges, Nelson and St. George Tucker, found that the 1792 act contravened the constitutional arrangements for judicial impeachment: the constitution placed trials of chancery judges before the general court, and trials of general court judges before the court of appeals, arguably in an effort to avoid requiring judges to sit on the trial of a colleague.³² The hybrid chancery-district judge, at least for matters arising out of his exercise of equity jurisdiction, seemingly would be tried before his brethren in violation of this constitutional purpose.³³

The unanimity of the general court in finding the 1792 act unconstitutional, and in therefore refusing to obey it, was accompanied by striking disagreement over why they were entitled so to act, and, indeed, over what exactly it was they were doing. The *Kamper* judges recognized (what modern lawyers sometimes forget) that there is no single, relatively clear and uncontroversial notion of "judicial review";

²⁸ *Id.* at 33 (Nelson, J.) (quoting VA. CONST. of 1776, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 51, 54 (W. Swindler ed. 1979)).

²⁹ *Id.* (emphasis added).

³⁰ See *id.* at 35 (Nelson, J.), 52-53 (Henry, J.).

³¹ See *id.* at 52-53 (Henry, J.).

³² *Id.* at 33-34 (Nelson, J.), 89-90 (Tucker, J.).

³³ *Id.* Tucker, alone of the *Kamper* judges, accepted two additional arguments: that the separation of law and equity was constitutionally mandated and that the previous appeals court's refusal to obey the initial reorganization statute was an authoritative precedent. *Id.* at 88-89, 94-97 (Tucker, J.).

rather there are differing rationales. There are, in fact, a variety of ways to understand the place of judges in an American constitutional order, each of which includes at least an implicit account of what "the constitution" itself is, and what power judges can and should wield when they review legislative acts for their constitutionality.

At one end of the *Kemper* spectrum of opinion was Judge James Henry. Henry, originally an admiralty judge, sat on the old court of appeals under the pre-1788 scheme as well as on the special court of appeals the general assembly hobbled together for judicial conflict-of-interest situations. Having decided that without a special election and commission he would not wield equity powers, Henry found the apparent "inconsistency in my conduct"³⁴ somewhat uncomfortable. Although the fact that he served on the special court was in his view justified by the general understanding and positive law of the pre-1788 period, he conceded that after 1789 "I consider this special court, with respect to me, who have been neither appointed nor commissioned since the passing of that law, as unconstitutional."³⁵ Henry nevertheless insisted that he had acted properly in serving on the special court: "The case cannot often happen; it is exceedingly disagreeable to be faulting the legislature; and, perhaps, one particular mischief had better be submitted to, than a public inconvenience."³⁶

A judge's personal conclusion³⁷ that a legislative act transgressed the constitution, in Henry's view, did not render the legislation "unconstitutional" in any strong sense, for Henry did not regard judicial interpretations as privileged against legislative constructions of the constitution.³⁸ The repeated encounters between the judges and the general assembly over the structure of the courts were "unhappy differences of opinion between . . . the different departments of government."³⁹ They were appropriately to be handled in the case of limited or "temporary"⁴⁰ issues by judicial acquiescence and in the event of a major disagreement resolvable finally only "by calling a convention of the people."⁴¹ Judicial review for Henry seems to have been an expedient for a particular situation, one in which he was being called upon to exercise jurisdiction "of a permanent nature"

³⁴ *Id.* at 53 (Henry, J.).

³⁵ *Id.* at 55.

³⁶ *Id.*

³⁷ *Cf. id.* at 51. ("Where I am not bound by regular adjudications of the superior court, I cannot rest on other men's opinions. I must and will think for myself.")

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 50.

not conferred upon him by the forms prescribed in the constitution.⁴² Henry's decision not to obey the 1792 act was a purely self-defensive act, a refusal to act beyond his "duly authorized" powers and nothing more.⁴³

Judges William Nelson and John Tyler articulated views of judicial review similar to each other's—and to John Marshall's a decade later in *Marbury*. Both understood judicial review as one form of the general business of courts of determining what law applied in particular cases. As Nelson observed, with reference to statutory repeals-by-implication of earlier legislation, it was no "novelty" for courts "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*."⁴⁴ When the constitution and a statute both appear relevant to a case and appear furthermore to conflict, it is the court's judicial obligation to decide which law governs by comparing the two.⁴⁵ As the constitution "is to the *governors*, or rather to the departments of *government*, what a law is to individuals,"⁴⁶ a statute conflicting with it simply is not a law for "the prior *fundamental law* has prevented its *coming into existence as a law*."⁴⁷ A judicial decision against a law's constitutionality, for Nelson and Tyler, thus was not (as Henry argued) merely a declaration by the judges that they personally would not overstep their own view of the constitution's forms,⁴⁸ but a "judicial act" declaring the law "void"⁴⁹ and "of no obligation."⁵⁰ Judicial review, in short, derived both its significance (courts have the power to declare a statute to be "no law") and its limitations (a court's only function is to decide which law applies in a particular case) from its definition as a straightforward part of the ordinary judicial business of comparing legal rules.⁵¹ Nelson stated that "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 leg-

⁴² *Id.* at 53.

⁴³ *Id.*

⁴⁴ *Id.* at 31 (Nelson, J.) (emphasis added).

⁴⁵ Tyler stated,

I will not in an extra-judicial manner assume the right to negative a law . . . 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 . . . I shall not shrink from a comparison of the two, and pronounce sentence as my mind may receive conviction.

Id. at 61 (Tyler, J.).

⁴⁶ *Id.* at 24 (Nelson, J.) (emphasis added).

⁴⁷ *Id.* at 32 (emphasis added).

⁴⁸ See *supra* text accompanying notes 34-43.

⁴⁹ *Kemper*, 3 Va. (1 Va. Cas.) at 32 (Nelson, J.).

⁵⁰ *Id.* at 61 (Tyler, J.).

⁵¹ See *id.* at 30 (Nelson, J.).

islature.—But, when the cases of individuals are brought before them judicially, they are bound to decide.”⁵² This position amounted to an anticipatory repudiation of the view of Nelson’s colleague Spencer Roane, who would argue that the judiciary was the special guardian of the constitution.⁵³ Tyler emphasized the existence of substantive limits on judicial review: “the violation [of the constitution] must be plain and clear”⁵⁴ and the courts “cannot supply defects [nor] reconcile absurdities, if any there be” in the constitution.⁵⁵

Nelson and Tyler presented early versions of what has become the canonical understanding of judicial review associated with *Marbury v. Madison*. But there were yet other views of the matter (which, as I suggested, at least Nelson explicitly rejected), put forward by Spencer Roane and St. George Tucker. Both Roane and Tucker understood judicial review as more than a mere corollary of the duty to decide cases—indeed they viewed it as a particular and unique function of the courts in an American constitutional order.⁵⁶

Tucker’s account of judicial review took off from a point close to Nelson and Tyler. Before the American Revolution the “constitution” of a country was nothing more than the collection of those acts and procedures the government previously had done and followed.⁵⁷ “[T]he judiciary, having no *written constitution* to refer to, were obliged to receive whatever *exposition* of it the legislature might think proper to make.”⁵⁸ The American creation of written constitutions, however, gave those constitutions “‘a real existence,’” and gave courts a written letter on the basis of which to judge the legitimacy of the legislature’s acts.⁵⁹ For Tucker, unlike Nelson and Tyler, this implied that the judiciary enjoyed a unique place in the constitutional scheme. He stated: “[T]his exposition [of the constitution] 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.”⁶⁰

The exclusive interpretive role of the courts that Tucker asserted

⁵² *Id.*

⁵³ *Id.* at 38-39 (Roane, J.).

⁵⁴ *Id.* at 61 (Tyler, J.).

⁵⁵ *Id.* at 62.

⁵⁶ *Id.* at 38 (Roane, J.).

⁵⁷ *Id.* at 78 (Tucker, J.).

⁵⁸ *Id.* (emphasis added).

⁵⁹ *Id.* It became possible for constitutional “principles [to] be ascertained from the living letter, not from obscure reasoning or deductions only.” *Id.*

⁶⁰ *Id.* at 78-79.

was then used to support his arguments against legislative interference with the constitution's distribution of jurisdiction among various courts. A vigorous protection of judicial independence was necessary in order to preserve "the principles of our government" that appoint "the judiciary as a barrier against the possible usurpation, or abuse of power in the other departments."⁶¹ The logic of Tucker's argument also led him to identify the state court of appeals, the highest court in the commonwealth, as possessing a unique function: its decisions, he said, "are to be resorted to by all other courts, as expounding, in their truest sense, the laws of the land."⁶² The idea of a judicial monopoly over interpretation, combined with a hierarchical judicial system, led Tucker to identify a single judicial body as the source of authentic ("truest") constitutional thought.⁶³

Roane articulated a similarly aggressive vision of judicial review, although in rather different terms. He had initially doubted whether any form of judicial review was "authorized," but "on more mature considerations . . . 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."⁶⁴ Like Tucker, Roane viewed the courts as the proper and exclusive interpreter of the laws, including the constitution. "It is the province of the judiciary to expound the laws"⁶⁵ Roane described the case in which a constitutional issue about a statute is raised as a "controversy . . . between the legislature on one hand, and the whole people of Virginia (though [sic] the medium of an individual) on the other."⁶⁶ In such a struggle between the people and the governors, the courts constituted the "proper" decisionmaker, even if (as in *Kemper*) the judges' own personal interests were involved. The exercise of judicial review for Roane was not simply a necessary part of the

⁶¹ *Id.* at 87.

⁶² *Id.* at 93.

⁶³ *Id.*

⁶⁴ *Id.* at 35-36 (Roane, J.). Roane later described these "fundamental principles" broadly and extra-textually:

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.

Id. at 40.

⁶⁵ *Id.* at 38.

⁶⁶ *Id.* at 39.

judicial task of deciding which law to apply in individual cases: courts exercising the power act as the people's champions; "they are bound to decide, and they do actually decide on behalf of the people."⁶⁷

The different accounts of judicial review offered by the general court judges in *Kamper v. Hawkins* raised a variety of issues that remain of theoretical and practical importance. Do judges properly enjoy a monopoly on authoritative constitutional interpretation, as Roane and Tucker believed, or is the legislature equally entitled to its opinion, as seems to have been Henry's opinion? Is the power of judicial review based on the judge's general obligation to decide cases (Nelson and Tyler thought so), or do courts have a special role in defending the people and the constitution against unconstitutional and oppressive actions? Should the power be wielded with restraint and only in clear cases of unconstitutionality, or should judges seek to uphold not only the constitution's letter but also its spirit? *Kamper* reveals that these questions are not merely modern concerns, but were the subject of dispute at the very beginning of the American constitutional order.

III. THE SIGNIFICANCE OF *Kamper v. Hawkins*

The Virginia General Court's decision in *Kamper v. Hawkins* to hold unconstitutional a long forgotten state statute yields important lessons for American constitutional historians. On the most basic level, *Kamper* raises questions about the origins of American judicial review. Nine years before *Marbury v. Madison*, in a setting fraught with political significance, the Virginia court unanimously asserted the judiciary's power to disregard statutory law deemed to be unconstitutional. *Marbury*, perhaps rightly, often is seen as a remarkably clever ploy by Marshall and his colleagues: the case afforded Marshall the opportunity to read President Jefferson a lesson on the rule of law and at the same time, by holding unconstitutional the Judiciary Act's apparent grant of original jurisdiction in the case, the Supreme Court was able to avoid a direct confrontation with the executive.⁶⁸ *Kamper*, in contrast, exacerbated friction between the state legislature and the judiciary by forcing the politically hot issue of the local

⁶⁷ *Id.*

⁶⁸ See, e.g., R. McCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960) ("The [*Marbury*] decision is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.").

administration of justice back onto the legislature's agenda. It did so, furthermore, in the almost immediate aftermath of the legislature's wholesale overhaul of the judicial system. In that context, *Kemper* was no mere potshot from the bench, but a direct "warning to the legislature to keep [its] hands off the judiciary."⁶⁹ The judges' boldness in doing so, and their success in a practical sense (the general assembly eventually responded by establishing a separate system of superior courts of chancery), suggest that some form of judicial review was widely accepted as an element of American constitutionalism by the mid-1790s.⁷⁰

Further investigation of state constitutional history will strengthen the conclusion that *Marbury's* exercise of judicial review took place against a background of state discussion and activity that rendered that part of Marshall's opinion rather uncontroversial. Only the eclipse of state constitutional law has led to *Marbury's* entronement as the case that "established" judicial review.⁷¹

Marbury's post hoc stature has played a major role in modern constitutional theory. At least since Thayer's famous article on *The Origin and Scope of the American Doctrine of Constitutional Law*⁷² constitutional lawyers have treated the exercise of judicial review as the extraordinary exercise of a power requiring special justification in a representative democracy.⁷³ Even theorists supportive of an active role for the judiciary often concede that they are arguing *against* a historical expectation of judicial "restraint."⁷⁴ *Kemper* suggests that, at least in the earliest period, Americans held divergent views about the scope and justification of judicial review. Judges Nelson and Tyler,

⁶⁹ A. ROEBER, *supra* note 10, at 225.

⁷⁰ Some form of judicial review was endorsed by Republicans (Roane and Tucker were active Anti-Federalists), as well as Federalists. See, e.g., Kent, *An Introductory Lecture to a Course of Law Lectures* (1794), reprinted in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 936, 943 (C. Hyneman & D. Lutz eds. 1983) (asserting the power of the judiciary to "[d]etermine the constitutionality of Laws [as] necessary to preserve the equilibrium of the government"). By the end of the decade a Republican attorney defending a journalist charged under the 1798 Sedition Act could state that "it seems to be admitted on all hands, that, when the legislature exercise a power not given them by the constitution, the judiciary will disregard their acts." *United States v. Callender*, 25 F. Cas. 239, 253 (C.C.D. Va. 1800) (No. 14,709) (argument of counsel); see also *id.* at 255 (Chase, J.) (stating that the power to declare a statute void is "expressly granted to the judicial power of the United States" by the Constitution).

⁷¹ It is possible that *Kemper's* relationship to *Marbury* was even more direct. John Marshall practiced before the general court and conceivably could have been present when the judges announced their opinions. See F. STITES, JOHN MARSHALL 16-17, 25 (1981) (discussing Marshall's legal practice in Richmond in the 1780s and 1790s).

⁷² Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

⁷³ See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 21-23 (1962).

⁷⁴ See, e.g., M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 16-17 (1982).

for example, understood the power as a necessary corollary of their obligation to decide cases according to law, and their implicit understanding of their role in the constitutional order was correspondingly limited (and similar to John Marshall's view in *Marbury*).⁷⁵ Tucker and Roane, however, viewed judicial review in a different light. For Tucker, "the duty of expounding [the state constitution] must be exclusively vested in the judiciary."⁷⁶ He believed judicial review to be the normal and essential function of the courts under a written constitution.⁷⁷ When a statute is challenged as repugnant to the constitution, Roane asserted, "the controversy is between the legislature . . . and the whole people of Virginia."⁷⁸ Roane and Tucker held correspondingly broad understandings of the grounds on which judges might wield their authority as tribunes of the people. In Roane's terms, the court should consult not only "the letter of the Constitution" but also its "fundamental principles" and "spirit."⁷⁹

Further study of state constitutional history will show that *Kamper* was not an aberration, and that founding era Americans held a much broader range of views on the methods of constitutional interpretation and the role of the judiciary than many modern constitutional lawyers acknowledge. More than mere antiquarian interest flows from this point. In an era in which the federal judiciary's constitutional activity is increasingly shaped by a particular, and purportedly historical vision of American constitutionalism, it is incumbent on lawyers and state judges to examine the extent to which that vision is appropriate or historically justified in individual states. Recent developments in state constitutional law are sometimes criticized as merely responsive to the politics of the United States Supreme Court. As *Kamper* illustrates, state constitutional history is a rich source of reflection and precedent for the creation of genuinely independent state constitutional jurisprudences.

⁷⁵ See *supra* notes 44-55 and accompanying text.

⁷⁶ *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 79 (Gen. Ct. 1793) (Tucker, J.).

⁷⁷ *Id.*; see also *supra* notes 57-63 and accompanying text.

⁷⁸ *Kamper*, 3 Va. (1 Va. Cas.) at 39 (Roane, J.); see also *supra* notes 64-67 and accompanying text.

⁷⁹ *Kamper*, 3 Va. (1 Va. Cas.) at 40 (Roane, J.). Tucker's discussion of the appropriate method of interpreting the United States Constitution in his edition of Blackstone makes it clear that he agreed with Roane on the necessity of going beyond the letter of the instrument. See 1 BLACKSTONE'S COMMENTARIES, app. note D, at 154 (St. Geo. Tucker ed. & comm. 1803 & photo. reprint 1969) (invoking a "maxim of political law" and international law views of treaties to justify strict construction of federal powers).

