AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Federalism

Leisy v. Hardin, 135 U.S. 100 (1890)

In 1888, Iowa revised its statutes regulating the sale of liquor for consistency with the bolder goals of the growing Prohibitionist movement of the late nineteenth century. The new statutory provision prohibited the manufacture, sale, or exchange of any intoxicating liquor, unless licensed to do so for medical or religious purposes. The 1888 statute specifically repealed an earlier provision that allowed sales by importers of liquor in the original packaging by which it was transported into the state.

In the summer of 1888, county marshal A. J. Hardin seized a large quantity of beer that had been produced by the Gus, Leisy & Co. brewery in Peoria, Illinois, and that had been shipped to John Leisy in Keokuk, Iowa, who offered it for sale in its original packaging (primarily in one-quarter and one-eighth barrel sizes). Leisy sued for the recovery of the alcohol on the grounds that the state statute violated the U.S. Constitution (primarily the interstate commerce clause). Leisy won in the state trial court, but the statute was upheld by the Iowa state supreme court. Leisy appealed to the U.S. Supreme Court, which struck down the law in a 6–3 decision.

The suit sparked an extensive discussion among the justices of the Court's prior decisions on the scope of state authority to regulate items in interstate commerce, and more particularly its prior decisions regarding the regulation of alcohol. By banning the sale of items shipped through interstate commerce and still in their original packaging, the law seemed in conflict with the Marshall Court's ruling in Brown v. Maryland *(1827). The Fuller Court emphasized its recent arguments that interstate trade should be unrestricted unless Congress had specifically authorized regulations or regulations were locally necessary. The dissent distinguished* Brown *on the grounds that Maryland had sought to tax goods from abroad for revenue rather than regulate goods transported across state boundaries under its police powers.*

Leisy *helped foster the rise of "package stores" along state borders where alcohol was routinely sold in small but "original" packages. Package stores operated in "dry" states in defiance of local laws prohibiting the sale of alcohol and exploited a constitutional loophole that tended to undermine state and local prohibition measures. The Prohibitionists consequently turned to federal statutes (and a constitutional amendment to facilitate federal statutes) to better achieve their goals.*

Should Iowa have been able to prohibit all liquor sales within the state borders? Should the sale of goods in their original packaging have insulated them from local regulation? When do goods become part of local, rather than interstate, commerce? What is the justification for thinking that the absence of congressional regulation is a mandate for free trade in interstate commerce? Should Iowa have been allowed to regulate until Congress passed a statute specifically allowing original-package sales of alcohol? Could Congress pass a statute allowing alcohol sales in Iowa even after the goods had been broken out of their original packaging – that is, could Congress specifically authorize sales by the glass of alcohol that had been transported from out of state, even if the state had otherwise prohibited the sale of alcohol?

CHIEF JUSTICE FULLER delivered the opinion of the Court

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden* (1824); *Brown v. Maryland* (1827).

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. *Cooley v. Board of Wardens of Philadelphia* (1852).

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Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled. *Wabash, St. Louis & Pacific Railway Co. v. Illinois* (1886).

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? Or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

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But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist [Chief Justice Taney], we are constrained to say that the distinction between subjects in respect of which

there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced [in the *License Cases* (1847)]. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns.

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The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. . . .

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. . . . [The plaintiffs] had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. . . .

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is *reversed* . . . .

JUSTICE GRAY, joined by JUSTICE HARLAN and JUSTICE BREWER, dissenting

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Among the powers thus reserved to the several States [by the Tenth Amendment] is what is commonly called the police power -- that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime.

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The police power includes all measures for the protection of the life, the health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling houses and lottery tickets. *Slaughterhouse Cases* (1873). . .

The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health or the morals of the people. Gunpowder, for instance, is a subject of commerce and of lawful use, yet, because of its explosive and dangerous quality, all admit that the State may regulate its keeping and sale.

And there is no article, the right of the State to control or to prohibit the sale or manufacture of which within its limits is better established, than intoxicating liquors. *License Cases* . . . .

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That Chief Justice Marshall and his associates did not consider the constitutional grant of power to Congress to regulate foreign and interstate commerce as, of its own force, and without national legislation, impairing the police power of each State within its own borders to protect the health and welfare of its inhabitants, is clearly indicated in [*Gibbons v. Ogden* (1824) and *Willson v. Blackbird Creek Marsh Co.* (1829)].

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But the unanimous judgment of this court in [the *License Cases* (1847)] is directly in point, and appears to us conclusively to govern the case at bar. Those cases were elaborately argued by eminent counsel, and deliberately considered by the court, and Chief Justice Taney, as well as each of six associate justices, stated his reasons for concurring in the judgment.

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An intention on the part of Congress that commerce shall be free from the operation of laws passed by a State in the exercise of its police power cannot be inferred from the mere fact of there being no national legislation upon the subject, unless in matters as to which the power of Congress is exclusive. Where the power of Congress is exclusive, the States have, of course, no power to legislate; and it may be said that Congress, by not legislating, manifests an intention that there should be no legislation on the subject. But in matters over which the power of Congress is paramount only, and not exclusive, the power of the States is not excluded until Congress has legislated; and no intention that the States should not exercise, or continue to exercise, their power over the subject can be inferred from the want of congressional legislation.

The true test for determining when the power of Congress to regulate commerce is, and when it is not, exclusive, was formulated and established in *Cooley v. Board of Wardens* . . . .

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The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the policy power, to the legislatures of the several States, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.

The statutes in question were enacted by the State of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce; they have no relation to the movement of goods from one State to another, but operate only on intoxicating liquors within the territorial limits of the State; they include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a State, (the validity of which is unquestioned,) authorizing the erection of bridges and dams across navigable waters within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the State.

If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State and sold by the importer in what are called original packages, the consequence must be that an inhabitant of any State may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union intoxicating liquors of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar

laws. It would require positive and explicit legislation on the part of Congress, to convince us that it contemplated or intended such a result.

The decision in the *License Cases*, by which the court, maintaining these views, unanimously adjudged that a general statute of a State, prohibiting the sale of intoxicating liquors without license from municipal authorities, included liquors brought from another State and sold by the importer in the original barrel or package, should be upheld and followed; because it was made upon full argument and great consideration; because it established a wise and just rule, regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to Congress and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by Congress, by the state legislatures, by the courts and by the people; and because to hold otherwise would add nothing to the dignity and supremacy of the powers of Congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.

The silence and inaction of Congress upon the subject, during the long period since the decision in the *License Cases*, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this court; rather than to warrant the presumption that Congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States.

For these reasons, we are compelled to dissent from the opinion and judgment of the majority of the court.