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AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Powers of the National Government

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McCray v. United States, 195 U.S. 27 (1904)

Oleomargarine, or simply margarine, was invented in France in 1869 in response to a national competition to develop a digestible and cheap fat to solve a public health problem among the poor. Based initially on animal fats, and later on vegetable oils, margarine could be produced at half the price of butter, but with apparently similar nutritional benefits, convenience and taste. The dairy industry quickly mobilized to block its spread. In some places (such as Pennsylvania and Canada), they won an outright ban on margarine. In others (such as Britain), they won only labeling requirements. Most commonly, they won regulations prohibiting margarine from being colored yellow to look like butter (more creatively, New Hampshire required that it be colored pink).

The Oleomargarine Act of 1886 imposed a tax of ten cents per pound on margarine that was artificially colored to look like butter and a tax of one quarter of one cent otherwise. The federal government charged Leo McCray, a retailer, for knowingly buying for resale a fifty-pound package of colored margarine that was stamped at the lower rate. McCray responded in part that this oleomargarine was not "artificially" colored because its color had derived from the inclusion of butter in its ingredients, and therefore did not fall within the terms of the statute for the higher tax. If the higher rate did apply, however, he argued that the differential tax was an unconstitutional invasion of the police powers of the states and an arbitrary regulation of his liberty and property. In a 6-3 decision, the U.S. Supreme Court upheld the tax, concluding that the taxation power was largely unrestrained in how it might be exercised.

JUSTICE WHITE delivered the opinion of the Court.

. . . .

2d. *Did Congress in passing the acts which are assailed, exert a power not conferred by the Constitution?*

That the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement. . . .

The last case referred to *(In re Kollock* [1897]*)* involved the act of 1886, and the court, speaking through Mr. Chief Justice Fuller, said . . .:

"The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

. . . .

Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

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It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail.

. . . .

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in *Champion* v. *Ames*

. . . .

. . . . As quite recently pointed out by this court . . . the often quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland,* that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority.

. . . .

Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject.

. . . .

Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. . . . Indeed, in the cases referred to the distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great that it was held no violation of the due process clause of the Fourteenth Amendment was occasioned by state legislation absolutely forbidding the manufacture, within the State, of oleomargarine artificially colored.

. . . .

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

Affirmed.

THE CHIEF JUSTICE, JUSTICE BROWN and JUSTICE PECKHAM, dissenting.

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