AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era – Federalism

Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887)

In 1879, the city of Memphis declared bankruptcy. The municipal government that emerged out of Reconstruction was already overextended when a yellow-fever epidemic swept the city and devastated the local population and economy. The state of Tennessee repealed the city charter and established a taxing district to take its place on the western border of the state next to the Mississippi River. The state legislature set the taxes, appropriated funds to operate the local government and appointed a three-person commission to administer local public services. At the behest of local businesses, the state in 1881 imposed a weekly tax (in the form of a license for the privilege of conducting business) on all "drummers" operating within Shelby County. Drummers were traveling salesmen who operated as agents of wholesalers, showed samples of goods, and took orders to be filled by the wholesaler. Drummers were frequently employed to extend the business of city merchants into the countryside and were rapidly growing in number after the Civil War despite the passage of anti-drummer statutes in several states.

Sabine Robbins was a drummer employed by the firm of Rose, Robbins & Co., which was based in Cincinnati, Ohio, and sold stationery and other writing materials. Robbins was unlicensed in 1884. For this reason, he was prosecuted and fined ten dollars (the cost of a one-week license) in a local Tennessee court for soliciting trade by use of samples within the county. Robbins appealed to the state supreme court, which upheld the fine. He then appealed to the U.S. Supreme Court, which reversed the state court in a 6–3 decision. The Court determined that the tax on drummers was a violation of the interstate commerce clause as a burden on interstate commerce and effectively discriminating against out-of-state merchants.

Did the Court require the presence of superseding congressional legislation in order to void the state tax? What are the constitutional limits on the taxation power of the states? Why are drummers not a local business activity that can be regulated and taxed like other local business activity? Could the same case have been brought by a drummer operating out of Nashville, Tennessee? If the state could tax drummers, could it also tax mail-order catalogs? Could it tax local access to Internet stores? Could states ban drummers entirely?

JUSTICE BRADLEY, delivered the opinion of the Court

. . . .

[The question before us] is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley v. Board of Wardens of Philadelphia* (1852). . . .

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Justice Johnson in *Gibbons v. Ogden* (1824) . . . and has been affirmed in subsequent cases. *State Freight Tax Cases* (1873). . . .

3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities. . . . But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

. . . .

In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? . . . A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. . . . Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding.

. . . .

But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. . . . The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual

states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

. . . . As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown v Houston* (1885). . . . But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

. . . .

It would not be difficult . . . to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents. . . .

If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

The judgment of the Supreme Court of Tennessee is *reversed*. . . .

CHIEF JUSTICE WAITE, joined by JUSTICE FIELD and JUSTICE GRAY, dissenting

. . . .

The license fee is demanded for the privilege of selling goods by sample within the Taxing District. The fee is exacted from all alike who do that kind of business, unless they have "a licensed house of business" in the district. There is no discrimination between citizens of the state and citizens of other states. The tax is upon the business, and this I have always understood to be lawful, whether the business was carried on by a citizen of the state under whose authority the exaction was made, or a citizen of another state, unless there was discrimination against citizens of other states. . . . And I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals. But what can be the difference in principle? . . . In either case he goes to the district to ply his trade and make his sales from the goods he exhibits. . . .

As the law is valid so far as the inhabitants of the state are concerned, no inhabitant can engage in this business unless he pays the tax. If citizens of other states cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other states. This could never have been intended by the legislature, and I cannot believe the Constitution of the United States makes such a thing necessary. The Constitution gives the citizens of each state all the privileges and immunities of citizens in the several states, but this certainly does not guarantee to those who are doing business in states other than their own immunities from taxation on that business to which citizens of the state where the business is carried on are subjected.

. . . . Merchants in Tennessee are by law required to pay taxes on the amount of their stocks on hand and a privilege tax besides. Under these circumstances it is easy to see that if a merchant from another state could carry on a business in the district by sending his agents there with samples of his goods to secure orders for deliveries from his stock at home, he would enjoy a privilege of exemption from taxation which the local merchant would not have unless in some form he could be subjected to taxation for what he did in the locality. . . .

. . . .