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

Supplementary Material

Chapter 5: The Jacksonian Era – Federalism

The License Cases (Thurlow v. Massachusetts), 46 U.S. 504 (1847)

In the Jacksonian era, a number of states in New England sought to limit the sale of alcohol within their borders. One prominent method for restricting liquor sales was the adoption of licensing requirements. Liquor licenses limited who could sell alcohol and under what conditions, and the granting of licenses was often sharply limited and within the discretion of local political officials. One challenge to the new state licensing laws was that they conflicted with congressional authority to regulate foreign and interstate commerce. The federal government was given the power to regulate such commerce, and the government had authorized and regulated the importation of alcohol (there were no specific regulations regarding the interstate shipment of alcohol). Critics of the licensing laws argued that state restrictions on the sale of imported goods interfered with federal powers and exceeded state authority.

Among the lawyers arguing against the states was the nationalist Daniel Webster. Not only was the fate of the temperance movement at stake in the cases, but so were key Marshall Court precedents. The Taney Court, controlled by Jacksonians, was thought to be more deferential to democratic state majorities and skeptical of congressional power. Would this mean that they would overturn earlier broadly worded precedents on the congressional commerce power? The U.S. Supreme Court unanimously upheld the statutes in a consolidated case. The justices neither found a significant difference between alcohol arriving through international or interstate commerce nor were they persuaded that it mattered that state policies might reduce taxable imports that federal policy either encouraged or allowed. The justices could not, however, agree on a rationale for upholding the state laws. Many of the justices disagreed with the Marshall Court's Brown v. Maryland *(1827) ruling, which held that imported goods were under exclusive federal authority so long as they remained in their original packaging. (Notably, Taney expressed his support for* Brown*, even though he had argued the other side of the case in 1827.) But the justices could not agree on an alternative approach on how to draw the line separating interstate and international commerce from local commerce. When did alcohol shift from the domain of federal regulatory authority and enter the domain of state regulatory authority? Could states regulate commerce itself, including interstate commerce? Or was the power to regulate interstate commerce exclusively vested in the federal government? Did the police powers of the states give them an alternative rationale by which to regulate alcohol, even if they were limited in how they could regulate commerce? In any case, the justices found no conflicting federal laws that might have forced a confrontation with* Gibbons v. Ogden *(1824) or heightened the tension between state and federal authority.*

What was at stake in these debates? Did the Court reach the proper outcome, that states could license individuals who sold liquor within state bounds? What are the salient differences among the justices, and are any of these opinions more persuasive than others in how they attempt to account for the boundary between state and federal authority? Given the arguments of the justices, would the state laws had fared differently if Congress had specifically authorized interstate or international commerce in liquor? Is the result in the License Cases *consistent with the Court's earlier precedents on the commerce clause? How do the arguments here compare with a modern case like* Gonzales v. Raich *(2005)?*

CHIEF JUSTICE TANEY delivered the opinion of the Court.

. . . . Each of the cases has arisen upon State laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities and without licenses previously obtained from the State authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States.

. . . .

The constitution of the United States declares that that constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cases to operate so far as it is repugnant to the law of the United States.

It is equally clear, that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well-being of its citizens.

. . . .

It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. The constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the constitution itself does not draw the line, the question is necessarily on for judicial decision, and depending altogether upon the words of the constitution.

. . . .

I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of that court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted . . . . A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat on of the principal objects of forming and adopting the constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

. . . . The laws of Congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy . . . . Now, if the State laws in question came in collision with those acts of Congress, and prevented or obstructed the importation or sale of these articles by the importer in the

original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. . . . And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself. . . .

. . . . it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently I think was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.

The language in which the grant of power to the general government is made certainly furnishes no warrant for a different construction, and there is no prohibition to the States. . . .

. . . .

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the

constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

. . . .

The judgment of the State courts ought, therefore, in my opinion, to be *affirmed* in each of the three cases before us.

JUSTICE NELSON concurred in the opinions delivered by the CHIEF JUSTICE and JUSTICE CATRON.

JUSTICE MCLEAN, concurring.

. . . .

In *Brown*'s case the reasoning of the court and their decision turned upon the fact, that he, being the importer of the package, had a right to sell it; that this right continued so long as the package was unbroken, and remained the property of the importer.

The plaintiff asserts no right as an importer of the article sold. He purchased it in the home market; consequently neither the general reasoning nor the ruling of the court in *Brown*'s case can control this one.

The tenth amendment of the constitution declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

. . . .

There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This remark applies equally to the federal and State governments. The federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the federal and State governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government.

. . . .

The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. . . .

A license to sell an article, foreign or domestic, as a merchant, or innkeeper or victualler, is a matter of police and of revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. . . .

The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. . . .

. . . .

The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a State. The former ceases when the foreign product becomes commingled with the other property in the State. At this point the local law attaches, and regulates it as it does other property. . . .

When in the appropriate exercise of these federal and State powers, contingently and incidentally their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained. . . .

JUSTICE CATRON, concurring.

. . . .

. . . . The assumption is, that the police power was not touched by the constitution, but left to the States as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. . . .

What, then, is the assumption of the State court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached and consequently the powers of Congress could not interfere. . . .

If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated.

Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. . . .

. . . . For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police.

. . . .

. . . . [Do] the States have power to regulate their own mode of commerce among the States, during the time the power of Congress lies dormant, and has not been exercised in regard to such commerce.

. . . .

To a true understanding of the power conferred on Congress to regulate commerce among the States, it may be proper briefly to refer to their condition and acts before the constitution was adopted, in this respect. The prominent evil was, that they taxed the commerce of each other directly and indirectly . . . .

But, as many general and all necessary local regulations existed when the constitution was adopted, and this, in all the States, affecting the end of commerce within their respective limits, the local regulations were continued, so far as the constitution left them in force. And they have been added to and accumulated to a great extent up to this time . . . . Owing to situation and climate, every port and place where commerce enters a State must have peculiarity in its regulations; and these it would be exceedingly difficult for Congress to make . . . .

. . . .

And in regard to the third, Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. . . . If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.

. . . .

In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil; nor will the States have any right to complain. And so the courts can interfere if the States assume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, it is hardly possible for Congress to deal at all with the details of this complicated matter.

. . . .

[T]he law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted; but that the State law was constitutionally passed, because of the power of the State thus to regulate; there being no regulation of Congress, special or general, in existence to which the State law was repugnant.

. . . .

JUSTICE DANIEL, concurring.

. . . .

The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulgated in the reasoning of this court in the case of Brown v. The State of Maryland – doctrines . . . which I conceive cannot, by correct induction, be derived from the constitution. . . .

. . . . Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. . . .

. . . . The power to regulate this commerce may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may as foreign commerce be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone. . . . Imports in a political or fiscal, as well as in common practical acceptation, are properly commodities brought in from abroad which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the State, or which still are subject to the power of the government for a fulfillment of the conditions upon which they have been admitted to entrance; as, for instance, goods on which duties are still unpaid, or which are bonded or in public warehouses. So soon as they are cleared of all control of the government which permits their introduction, and have

become the complete and exclusive property of the citizen or resident, they are no longer imports in a political, or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee, or may have been purchased by cargo, package, bale, piece, or yard, or by hogsheads, casks, or bottles. I can perceive no rational distinction which can be taken upon the circumstance of mere quantity, shape, or bulk; or on that of the number of transmissions through which a commodity may have passed from the first proprietor, or of its remaining still with the latter. . . .

It cannot be correctly maintained that State laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the constitution; and, I would add, with some regulation actually established by Congress in virtue of that power. . . .

. . . .

The license laws of Massachusetts, Rhode Island, and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States . . . .

These laws are, therefore, in violation neither of the constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the constitution. Viewing them in this character, my cooperation is given in maintaining them, whatever differences of opinion may exist in relation to their policy or necessity. . . .

JUSTICE WOODBURY, concurring.

. . . .

[W]hat power or measure of the general government would a prohibition of sales within a State conflict with, if it consisted merely in regulations of the police or internal commerce of the State itself? There is no contract, express or implied, in any act of Congress, that the owners of property, whether importers or purchasers from them, shall sell their articles in such quantities or at such times as they please within the respective States. . . . The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and, also, if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State, or abroad. . . .

. . . .

Now, can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article is unconstitutional, or violates acts of Congress? For that is the essence of this point. . . . The ground is . . . untenable entirely . . . .

. . . .

But, without going farther into this question, it is enough here to say, that these license laws do not profess to be, nor do they operate as, regulations of foreign commerce. They neither direct how it shall be carried on, nor where, nor under what duties or penalties. Nothing is touched by them which is on shipboard, or between ship and shore; nothing till within the limits of a State, and out of the possession and jurisdiction of the general government.

. . . .

Whether such laws of the States as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the constitution. . . .

. . . .

It is possible, that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. . . . But after articles have come within the territorial limits of States, whether on land or water, the destruction itself of what contains disease and death, and the longer continuance of such articles within their limits, or the terms and conditions of their continuance, when conflicting with their legitimate police, or with their power over internal commerce, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of State sovereignty, and indispensable to public safety. . . .

The States stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the constitution or statutes of the general government, our duty to that constitution and laws, and our respect for State rights, must require us not to interfere.

JUSTICE GRIER, concurring.

. . . .

It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people.