

Supplementary Material

Chapter 4: The Early National Era – Federalism

Brown v. Maryland, 25 U.S. 419 (1827)

In 1821, the state of Maryland imposed new taxes on the retailers of dry goods. Among other provisions, the law required that all importers of foreign dry goods buy a license from the state for fifty dollars before their goods could be sold at wholesale within the state. Brown declined to pay the tax on the grounds that it was an unconstitutional state tax on imports and an unconstitutional interference with the congressional authority to regulate foreign commerce. A court in Baltimore found him liable for the tax and penalties, and the Maryland state supreme court upheld the order. Brown appealed to the U.S. Supreme Court, which reversed the state court and struck down the state tax as unconstitutional in a 6–1 decision.

Notably, state attorney general Roger Taney defended the tax before the Marshall Court. In the Brown case, Taney argued that federal power extended only over the act of importing goods, which concluded once a resident of a state took ownership of the goods. The state tax was directed at wholesalers, not importers. Taney was opposed by the U.S. Attorney General William Wirt and the future attorney general of the state of Pennsylvania. After ascending to the Supreme Court, Taney later conceded that John Marshall had the better argument.

Brown established the doctrine that goods were articles of international and interstate commerce so long as they were still contained within their original packaging. Once an owner broke the goods out of the container in which they had been shipped, the goods become a part of local commerce and subject to state taxation and regulation. Otherwise, they remain under federal jurisdiction. Is this a sensible way of distinguishing between interstate and intrastate commerce? What are the benefits and problems of this approach? Is Marshall correct that the right to sell is a necessary implication of the right to import? Is Thompson right that we should focus on the act of importation rather than the goods being imported? What implications would that approach have for state regulatory authority? How useful is the idea that the interpreter should look to the “mischief” that a constitutional provision was designed to solve in order to determine what the provision might mean?

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CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

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The cause depends entirely on the question, whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality. The plaintiffs in error take the burthen upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

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1. The first inquiry is into the extent of the prohibition upon States “to lay any imposts or duties on imports or exports.” . . .

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

. . . . What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. . . .

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed [inspection laws]. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. . . . There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. . . .

. . . . It might, with the same reason be said, that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise. . . . When we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

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The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

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This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them

with the general property of the State, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to place, or other furniture used by the importer.

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The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. . . . We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

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We think, then, that the act under which the plaintiffs in error were indicted, its repugnant to that article of the constitution which declares, that "no States shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. . . . It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of *Gibbons v. Ogden* (1824) in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power 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.

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If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse Congress has a right, not only to authorize importation, but to authorize the importer to sell.

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What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such extraordinary circumstances would expose them? No apology could be received, or even offered. Such a state of things

would break up commerce. . . . The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

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We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. . . .

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

. . . [T]he act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be *reversed*. . . .

JUSTICE THOMPSON, dissenting.

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It is very obvious, that this law can, in no manner whatever, affect the commercial intercourse between the States; it applies purely to the internal trade of the State of Maryland. The defendants were merchants, trading in the city of Baltimore. . . . [N]othing appears to warrant an inference, that the package of goods sold was not intended for consumption at that place; and the law has no relation whatever to goods intended for transportation to another State. . . . [It does not] appear to me, that this law, in any manner, infringes or conflicts with the power of Congress to regulate commerce with foreign nations. It is to be borne in mind, that this was a power possessed by the States respectively before the adoption of the constitution, and is not a power growing out of the establishment of the general government. It is to be viewed, therefore, as the surrender of a power antecedently possessed by the States, and the extent of the surrender must receive a fair and reasonable interpretation with reference to the object for which the surrender was made. This was principally with a view to the revenue, and extended only to the external commerce of the United States, and did not embrace any portion of the internal trade or commerce of the several States. . . .

If such be the division of power between the general and State governments in relation to commerce, where is the line to be drawn between internal and external commerce? It appears to me, that no other sound and practical rule can be adopted, than to consider the external commerce as ending with the importation of the foreign article; and the importation is complete, as soon as the goods are introduced into the country, according to the provisions of the revenue laws, with the intention of being sold here for consumption, or for the purpose of internal and domestic trade, and the duties paid or secured. . . . This, it will be perceived, does not embrace foreign merchandise intended for exportation, and not for consumption; nor articles intended for commerce between the States; but such as are intended for domestic trade within the State: and it is to such articles only that the law of Maryland extends. I cannot, therefore, think, that this law at all interferes with the power of Congress to regulate commerce; nor does it, according to my understanding of the constitution, violate that provision, which declares that

no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

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[A]rguments drawn against the existence of a power from its supposed abuse are illogical, and generally lead to unsound conclusions. And this is emphatically so when applied to our system of government. It supposes the interest of the people, under the general and State governments, to be in hostility with each other, instead of considering the two governments as parts only of the same system, and forming but one government for the same people, having for its object the same common interest and welfare of all.

If the supposed abuse of a power is a satisfactory objection to its existence, it will equally apply to many of the powers of the general government; and it is as reasonable to suppose that the people would wish to injure or destroy themselves, through the instrumentality of the one government as the other.

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