



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Federalism

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Corfield v. Coryell, 6 Fed. Cas. 546 (C.C.E.D. Pa., 1823)

In this 1823 federal circuit court case, Justice Bushrod Washington, a Federalist nephew of George Washington, upheld a New Jersey law that prohibited non-residents from gathering oysters and clams. Acting under state statute, New Jersey officials had seized and sold a sloop, owned by Philadelphia lawyer Edward Corfield, caught dredging the Maurice River Cove in the Delaware Bay for oysters (the statute also made it illegal for anyone – residents or non-residents – to dredge for oysters, but the penalty for oyster dredging was only a fine). Corfield sued to recover the proceeds of the sale on the grounds that the law was unconstitutional and therefore the seizure was illegal. The law was challenged on two grounds. First, it was argued that it violated the commerce clause of Article I because oysters and clams are articles of interstate commerce and the state regulation impedes the free flow of that commerce. Second, opponents argued that the restriction violated the privileges and immunities clause of Article IV, which says “that The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” This clause of the Constitution was an abbreviated version of a provision of the Articles of Confederation, which was designed to promote “mutual friendship and intercourse among the people of the different States in this Union.” In the Articles, however, this was just a pledge of good faith among the states themselves. Now out-of-state citizens could appeal to the federal judiciary to enforce their constitutional rights. The claim here was that all American citizens should have the same basic privileges throughout the Union, and more specifically that states could not discriminate against out-of-state citizens. Did this also mean that the state had to make its natural resources available for use by non-residents on the same terms that it offered to its own citizens?

Washington refers back to Gibbons in deciding that the commerce clause left states free to regulate matters internal to the state, especially when the activity occurs prior to the transportation or movement of goods across state lines. More famously, though, he offered an opinion about the privileges and immunities of U.S. citizenship. His opinion later had substantial influence on the drafters of the Fourteenth Amendment. As you read his views, consider the implications for the scope of federal judicial supervision of the states. Precisely what kinds of state actions might trigger federal protection of the privileges and immunities of U.S. citizenship? In what way does Washington’s understanding take into account the differences between state citizenship and federal citizenship?

JUSTICE WASHINGTON delivered the opinion of the Court.

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 The first question then is, whether this act, or either section of it, is repugnant to the power granted to congress to regulate commerce? Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade. . . . It is this intercourse which congress is invested with the power of regulating, and with which no state has a right to interfere. But this power, which comprehends the use of, and passage over the navigable waters of the several states, does by no means impair the right of the state government to legislate upon all subjects of internal police within their territorial limits, which is not forbidden by the constitution of the United States, even although such legislation may indirectly and remotely affect commerce, provided it do [sic] not interfere with the regulations of congress upon the same subject. Such are inspection, quarantine, and health laws; laws regulating the internal commerce of the state; laws establishing and regulating turnpike roads, ferries, canals, and the like.

In the case of *Gibbons v. Ogden* (1824) . . . which we consider as full authority for the principles above stated, it is said, “that no direct power over these objects is granted to congress, and consequently



they remain subject to state legislation." . . . The grant to congress to regulate commerce on the navigable waters belonging to the several states, renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. But this grant contains no cession, either express or implied, of territory, or of public or private property. . . . If then the fisheries and oyster beds within the territorial limits of a state are the common property of the citizens of that state, and were not ceded to the United States by the power granted to congress to regulate commerce, it is difficult to perceive how a law of the state regulating the use of this common property, under such penalties and forfeitures as the state legislature may think proper to prescribe, can be said to interfere with the power so granted. . . .

. . . . The law does not inhibit the buying and selling of oysters after they are lawfully gathered, and have become articles of trade; but it forbids the removal of them from the beds in which they grow, (in which situation they cannot be considered articles of trade,) unless under the regulations which the law prescribes. . . . Paving stones, sand, and many other things, are as clearly articles of trade as oysters; but can it be contended, that the laws of a state, which treat as tort feorsors those who shall take them away without the permission of the owner of them, are commercial regulations? We deem it superfluous to pursue this subject further. . . .

2. The next question is, whether this act infringes that section of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?" The inquiry is, what are the privileges and immunities of citizens in the several states?" We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. . . . They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use. . . . The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe. . . .

Let judgment be entered for the defendant.