Brown Vs. Maryland

Brown Vs. Maryland

SooperKanoon Citation : sooperkanoon.com/79101

Court : US Supreme Court

Decided On : 1827

Appeal No. : 25 U.S. 419

Appellant : Brown

Respondent : Maryland

Judgement :

Brown v. Maryland - 25 U.S. 419 (1827)
U.S. Supreme Court Brown v. Maryland, 25 U.S. 12 Wheat. 419 419 (1827)

Brown v. Maryland

25 U.S. (12 Wheat.) 419

ERROR TO THE COURT OF

APPEALS OF MARYLAND

SYLLABUS

An act of a state legislature, requiring all importers of foreign goods by the bale or package, &c.;, and other persons selling the same by wholesale, bale, or package, &c.;, to take out a license, for which they shall pay fifty dollars, and in case of

neglect or refusal to take out such license subjecting them to certain forfeitures and penalties is repugnant to that provision of the Constitution of the United States which declares that

"No state shall, without the consent of Congress, lay any impost or duty on imports or exports, except what maybe absolutely necessary for executing its inspection laws,"

and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

The power to regulate commerce, given to Congress by the Constitution, is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. If the power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles 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 shall be complete, should cease

at the 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 it is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, as the importation itself. It must be considered as a component part of the power to regulate commerce. Congress has not only a right to authorize importation but to authorize the importer to sell.

This was an indictment in the City Court of Baltimore against the plaintiffs in error upon the second section of an act of the Legislature of the State of Maryland, passed in 1821, entitled, "An act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purposes." The second section of the act provides

"That all importers of foreign articles, or commodities, of dry goods, wares, or merchandises by bail or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c.;, and other persons selling the same by wholesale,

Page 25 U. S. 420

bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars, and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act, to which this is a supplement."

The penalties and forfeitures prescribed by the original act, which was passed in 1819, were, a forfeiture of the amount of the license tax and a fine of $100, to be recovered by indictment.

The defendants having demurred to the indictment, a judgment was rendered upon the demurrer against them in the city court which was affirmed in the Court of Appeals, and the case was brought, by writ of error, to this Court.

Page 25 U. S. 436

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland affirming a judgment of the City Court of Baltimore on an indictment found in that court against the plaintiffs in error for violating an act of the Legislature of Maryland. The indictment was founded on the second section of that act, which is in these words:

"And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spiritous liquors, &c.;, and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for

which they shall pay fifty dollars, and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement."

The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offense, and that judgment is now before this Court.

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 burden of proof lies on him who denies its constitutionality. The plaintiffs

Page 25 U. S. 437

in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that 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."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

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?"

An impost, or duty on imports is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor consequently the prohibition, unless the true meaning of the clause so confines it. 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

Page 25 U. S. 438

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. The succeeding words of the sentence which limit the prohibition show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which

is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent that the exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

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. 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. Whether the prohibition to "lay imposts or duties on imports or exports" proceeded from an

apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. 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. No object of any description can be accomplished by laying a duty on importation which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused, and if the fear of its abuse is to constitute an argument against its

Page 25 U. S. 440

existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce or even to lessen it.

We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. 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. Conceding to the full extent which is required that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing states would thus levy a tax on the nonimporting states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. 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.

The counsel for the State of Maryland insist with great reason that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation,

Page 25 U. S. 441

which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue and which they have heretofore been admitted to possess. These words must therefore be construed with some limitation, and if this be admitted, they insist that entering the country is the point of time when the prohibition ceases and the power of the state to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases and the power of the state to tax commences, we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious that this construction would defeat the prohibition.

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

Page 25 U. S. 442

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.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise as

well as to bring it into the country, and certainly the argument is supported by strong reason as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties, and if the United States possesses the power of conferring the right to sell as the consideration for which the duty is paid, every principle of fair dealing requires that it should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and reexported in the same vessel, goods landed and carried over land for the purpose of being reexported from some other port, goods forced in by stress of weather and landed but not for sale are exempted from the payment of duties. The whole course of legislation on the subject shows that in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition that the constitutional prohibition ceases the instant the goods enter the country by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may

bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found on examination not to belong necessarily to the principle, and consequently not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

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 traveling 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 plate or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the state to make sales in a peculiar way.

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. If he prefers placing it in a public magazine, it is because he stores

it there, in his own opinion, more advantageously than elsewhere. 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.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right not only to bring the articles into the country but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no further than to prevent the states from doing that which it was the great object of the Constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals or the thing itself is taxed through his person. This the state has a right to do because no constitutional prohibition extends to it. So a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution.

Page 25 U. S. 445

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As to export, it is said, means only to carry goods out of the country, so to import means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on

exports, and the United States is forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States has the same right to tax occupations which is possessed by the states. Now suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares, that "no state 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 was regulated by foreign nations with a single view to

Page 25 U. S. 446

their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress indeed possessed the power of making treaties, but the inability of the federal government to enforce them had

become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. 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,* 9 Wheat. 1, 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 coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

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 the 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, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

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 an extraordinary circumstance would expose them? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced -- that the good sense of the states is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is where does the power reside? not how far will it be probably abused. 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.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation and principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens or their property within its territory.

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 cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of

justice in the courts of the Union or the collection of the taxes of the United States or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of reexportation? The laws of trade authorize this operation and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another for the purpose of traffic or from taxing the transportation of articles passing from the state itself to another state for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further or to give additional illustrations of it, because the subject was taken up and considered with great attention in *McCulloch v. Maryland,* 4 Wheat. 316, the decision in which case is, we think, entirely applicable to this.

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.

We think there is error in the judgment of the Court of Appeals of the State of Maryland in affirming the judgment of the Baltimore City Court because the 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 and the cause remanded to that court with instructions to enter judgment in favor of the appellants.

MR. JUSTICE THOMPSON dissented.

It is with some reluctance and very considerable diffidence that I have brought myself publicly to dissent from the opinion of the Court in this case, and did it not involve an important constitutional

Page 25 U. S. 450

question relating to the relative powers of the general and state governments, I should silently acquiesce in the judgment of the Court although my own opinion might not accord with its.

The case comes before this Court on a writ of error to the Court of Appeals of the State of Maryland upon a judgment rendered in that court against the defendants. The proceedings in the court below were upon an indictment against the defendants, merchants in the City of Baltimore, trading under the firm of Alexander Brown & Sons, and to recover against them the penalty alleged to have been incurred for a violation of an act of the legislature of that state by selling a package of foreign dry goods without having a license for that purpose as required by said act, and the only question which has been made and argued is whether the act referred to is in violation of the Constitution of the United States.

The act in question was passed on 23 February, 1822, and is entitled "A supplement to the act laying duties on licenses to retailers of dry goods, and for other purposes." By the second section, under which the penalty has been recovered, it is enacted

"That all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spiritous liquors, &c.;, and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars, and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement."

By the original act, passed in 1819, retail dealers in foreign merchandise are required to take out a license, and the supplemental act requires that wholesale dealers should likewise take out a license to sell. These acts, being *in pari materia,* are to be taken together, and their effect and operation manifestly is nothing more than to require retail and wholesale dealers in foreign merchandise to take out a license before they should be authorized to sell such merchandise.

Page 25 U. S. 451

The act does not require a license to import or demand anything more of the importer than is required of any other dealer in the article imported. The license is for selling, and is general, applying to all persons -- that all importers, and other persons selling by wholesale, bale, or package, &c.;, shall, before they are authorized to sell, take out a license, &c.;

I understand it to be admitted that these laws, so far as they relate to retail dealers, are not in violation of the Constitution of the United States, and if so the question resolves itself into the inquiry whether a distinction in this respect between a retail and wholesale dealer in foreign merchandise can exist under any sound construction of the Constitution.

The parts of the Constitution which have been drawn in question on the discussion at the bar, and with which the law in question is supposed to be in conflict, are that which gives to Congress the power to regulate commerce with foreign nations and among the several states and that 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.

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. The indictment describes them as such and alleges the sale to have been in that place, and nothing 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 is proper here to notice that although the indictment alleges that the defendants did import and sell, yet the district attorney, in framing the indictment, very properly considered offense to consist in the selling, and not in the importation without a license. No one will pretend that if the indictment had only alleged that the defendants did import a package of foreign dry goods without a license, it could have been sustained. The

Page 25 U. S. 452

act applies to the importer, and other persons selling by wholesale, and the allegation that the defendants did import is merely descriptive of the double character in which they were dealing, both as importers and sellers. The indictment would undoubtedly have been good had it merely alleged that the defendants sold the package without a license. So that neither the act nor the form in which the complaint is presented makes any discrimination between the importer and any other wholesale dealer in foreign merchandise, but requires both to take out a license to sell; nor does it 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. This is not only the plain and obvious interpretation of the terms used in the Constitution, commerce with foreign nations, but such has been the construction adopted by this Court. In the case of *Gibbons v. Ogden,* 9 Wheat. 194, the Court, in speaking of the grant of the power of Congress to regulate commerce, said

"It is not intended to comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state and which does not extend to or affect other states; such a power

would be inconvenient, and is certainly unnecessary. The enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language on the subject of the sentence must be the exclusively internal

Page 25 U. S. 453

commerce of a state. The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

And again, p. 22 U. S. 208 ,

"The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject [commerce] to a considerable extent."

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. And this is the light in which this question has been considered by this and other courts of the United States, 9 U. S. 5 Cranch 368; 13 U. S. 9 Cranch 104; 1 Mason 499. 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.

Page 25 U. S. 454

The compensation required by this law to be paid for a license to sell cannot be considered an impost or duty within the sense and meaning of these terms as used in the Constitution. They refer to the foreign duty, and not to any charge that may grow out of the internal police of the states. It may indirectly fall on the imported articles, and enhance the price in the sale, but even this is not an expense imposed on the importer or other seller, but is borne ultimately by the consumer.

But the broad principle has been assumed on the argument that the payment of the foreign duty is a purchase of the right and privilege not only of introducing the goods into the country, but of selling them free from any increased burden imposed by the states, and unless this principle can be sustained, the law in question is not in violation of the Constitution.

The counsel, however, aware that the principle thus broadly laid down, if practically carried out to its full extent, would lead to consequences so obviously untenable that it would at once show the unsoundness of the principle itself, have limited its application to the first wholesale disposition of the merchandise. Can such a distinction, however, by sustained? There is nothing certainly in the letter of the Constitution to support it, nor does it fall within any reasonable intendment growing out of the nature of the subject matter of the provision. The prohibition to the states is against laying any impost or duty on imports. It is the merchandise

that is exempted from the imposition. The Constitution nowhere gives any extraordinary protection to the importer. So that if the law was confined to the importer only, he could find no exemption from the operation of state laws. Nor is there, according to my judgment, any rational grounds upon which the Constitution may be considered as extending such exemption to wholesale, and not to retail dealers. If the payment of the foreign duty is the purchase of the privilege to sell as well as to introduce the article into the country, where can be the difference whether this privilege is exercised in the one way or the other? The retail merchant often imports his own goods, and why should he be compelled to take out a license to sell

Page 25 U. S. 455

when his neighbor, who imports and sells by wholesale, is exempted? But the distinction is altogether fruitless, and does not effect the object supposed to have been intended, *viz.,* to take from the states the power of imposing burdens upon foreign merchandise, that might tend to lessen or entirely prevent the importation, and thereby diminish the revenue of the United States. It is very evident that no such purpose can be accomplished by limiting the protection to the first sale. It was admitted that after the first sale, and the article becomes mixed and incorporated in the general mass of the property of the country, and to be applied to domestic use, it loses this pretended privilege. But everyone knows that whatever charge or burden is imposed upon the retail sale affects the wholesale indirectly as much as if laid directly upon the wholesale. The retail dealer takes this charge into calculation in the purchase from the wholesale merchant, and which, of course, equally affects the importation. Suppose the fifty dollars required to be paid by the wholesale dealer was imposed on the retail merchant, would it not equally affect the importation? It would equally increase the burden and enhance the expense of the article when it comes into the hands of the consumer, and on whom all the charges ultimately fall. And if these charges are so increased by the state governments in any stages of the internal trade as to check their sale for consumption, it will necessarily affect the importation. So that nothing short of a total exemption from state charges or taxes, under all circumstances, will answer

the supposed object of the Constitution. And to push the principle to such lengths would be a restriction upon state authority not warranted by the Constitution.

It certainly cannot be maintained that the states have no authority to tax imported merchandise. But the same principle of discrimination between the wholesale and retail dealer as to a license to sell would seem to me, if well founded, to extend to taxes of every description. And it would present a singular incongruity to exempt a wholesale merchant from all taxes upon his stock of goods and subject to taxation the like stock of his neighbor who was selling by retail.

Page 25 U. S. 456

It is laid down in No. 32 of the Federalist (and I believe universally admitted)

"That the states, with the sole exception of duties on imports and exports, retain authority to tax in the most absolute and unqualified sense, and any attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause in the Constitution."

Although an impost or duty may be considered a tax in its most enlarged sense, yet every tax cannot be understood to mean an impost or duty in the sense of the Constitution. As here used, it evidently refers to the foreign duty imposed by revenue laws. It would be a singular use of the term "impost" to apply it to a tax on real estate, and no one, I presume, would contend that all imported articles upon which the duties have been paid are exempt from all state taxation in the hands of the consumer. And yet this would follow if duty and tax are in all respects synonymous, for the Constitution declares that no state shall lay any duty on imports, *viz.,* the article imported. To avoid these consequences, which are certainly inadmissible, the inhibition to the states must be understood as extending only to foreign duties, and not to taxes imposed by the states after the imports become articles of internal trade and for domestic use and consumption; they then become subject to state jurisdiction.

This law seems to have been treated as if it imposed a tax or duty upon the importer or the importation. It certainly admits of no such construction. It is a charge upon the wholesale dealer, whoever he may be, and to operate upon the sale, and not upon the importation. It requires the purchase of a privilege to sell, and must stand on the some footing as a purchase of a privilege to sell in any other manner, as by retail, at auction, or as hawkers and peddlers, or in whatever way state policy may require. Whether such regulations are wise and politic is not a question for this Court. If the broad principle contended for on the part of the plaintiffs in error that the payment of the foreign duty is a purchase of the privilege of selling be well founded, no limit can be set by the states to the exercise of this privilege. The first sale may be made in defiance of all state

regulation, and all state laws regulating sales of foreign goods at auction and imposing a duty thereupon are unconstitutional so far, at all events, as the sale may be by bale, package, hogshead, barrel or tierce, &c.; And indeed if the right to sell follows as an incident to the importation, it will take away all state control over infectious and noxious goods whilst unsold in the hands of the importer. The principle, when carried out to its full extent, would inevitably lead to such consequences.

It has been urged with great earnestness upon the Court that if the states are permitted to lay such charges and taxes upon imports, they may be so multiplied and increased as entirely to stop all importations. If this argument presents any serious objection to the law in question, the answer to it, in my judgment, has already been given: that the limitation, as contended for, of state power, will not effect the objects proposed. Whether this additional burden is imposed upon the wholesale or retail dealer, it will equally affect the importation, and nothing short of a total exemption from all taxation and charges of every description will take from the states the power of legislating so as in some way may indirectly affect the importation.

But arguments 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.

The doctrine of the court in the case of *McCulloch v. Maryland,* 4 Wheat. 316, has been urged

Page 25 U. S. 458

as having a bearing upon this question unfavorable to the validity of the law. But it appears to me that that case warrants no such conclusion. It is there admitted that the power of taxation is an incident of sovereignty, and is coextensive with that to which it is an incident. And that all subjects over which the sovereign power of a state extends are objects of taxation. The Bank of the United States could not be taxed by the states, because it was an instrument employed by the government in the execution of its powers. It was called into existence under the authority of the United States, and of course could not have previously existed as an object of taxation by the states. Not so, however, with respect to imports; they were in existence and under the absolute jurisdiction and control of the states before the adoption of the Constitution. And it is therefore as to them a question of surrender of power by the states and to what extent this has been given up to the United States. And it is expressly admitted in that case that the opinion did not deprive the states of any resources they originally possessed, nor to any tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the

institution in common with other property of the same description throughout the state. But the tax was held unconstitutional because laid on the operations of the bank, and consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution, and this instrument, created by the government of the Union. But these objections do not apply to the law in question. The government of the Union found the states in the full exercise of sovereign power over imports. It was one of the sources of revenue originally possessed by the states. The law does not purport to act directly upon anything which has been surrendered to the general government, *viz.,* the external commerce of the state. It may operate indirectly upon it to some extent, but cannot be made essentially to impede or retard the operations of the government; not more so than might be effected by a tax on the stock held by individuals in the bank of the United States. And indeed the power

Page 25 U. S. 459

of crippling the operations of the government in the former case would not be so practicable as in the latter, for it has the whole range of the property of its citizens for taxation, and to provide the means for carrying on its measures. So that it would be beyond the reach of the states materially to affect the operations of the general government by taxing foreign merchandise, should they be disposed so to do.

I am accordingly, of opinion that the judgment of the Court of Appeals of the State of Maryland ought to be affirmed.

JUDGMENT. This cause came on, &c.;, on consideration whereof this Court is of opinion that there is error in the judgment rendered by the said Court of Appeals in this, that the judgment of the City Court of Baltimore condemning the said Alexander Brown, George Brown, John. A. Brown, and James Brown to pay the penalty therein mentioned ought not to have been so rendered against them, because the act of the Legislature of the State of Maryland entitled "An act supplementary to the act laying duties on licenses to the retailers of dry goods, and for other purposes," on which the indictment on which the said judgment was

rendered is founded, so far as it enacts,

"that all importers of foreign articles of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, or other distilled spiritous liquors, &c.;, selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars, and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement"

is repugnant to the Constitution of the United States and void; wherefore the said Court of Appeals, before whom the said judgment of the said City Court of Baltimore was brought by appeal, ought not to have affirmed, but should have reversed the same. Wherefore it is CONSIDERED by this Court that the said judgment of the said Court of Appeals affirming the said judgment of the City Court of Baltimore

Page 25 U. S. 460

be REVERSED and ANNULLED, and that the cause be remanded to the said Court of Appeals, with directions to reverse the same.