

FOREWORD

Title

Interest and Irritation: Brown v. Maryland and the Making of a National Economy

Author

Henry P. Callegary

Publication Date

November, 2016

Keywords

Commerce Clause, Tariff, Trade, Constitutional Law, John Marshall, Alexander Brown & Sons, Maryland, Roger Taney, William Wirt, Baltimore

Abstract

This paper examines the United States Supreme Court case Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), which struck down Maryland's licensing fee on wholesalers of imported goods. In doing so, the Court reaffirmed its commitment to a national economic policy, instead of a state-centric system. This paper explores the context of the decision, including profiles of the parties involved, the attorneys for both sides, the lower court decisions, and the majority opinion and dissent from the United States Supreme Court. Additionally, this paper follows the lineage of the case through to the present day, examining its doctrinal impact and lingering effects on contemporary issues of taxation and commerce.

Disciplines

Law, constitutional history, American economic development, commerce clause analysis

I. Introduction

The Supreme Court's ruling in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) reaffirmed one of the most significant elements of the United States Constitution: the federal government's exclusive power to regulate international trade and interstate commerce. Additionally, this case created a new doctrine which the Court would employ for well over a century: the "Original Package" doctrine. *Brown v. Maryland* is significant for these two reasons alone, but as with every case, it was also a product of its times. Decided during a period of rapid territorial and economic change, this case represented a clear indication that the Court sought to unite the states under one economic banner. Additionally, it had a major impact on the nation's first investment bank: Alexander Brown & Sons, which were based in Baltimore, Maryland. The decision helped them and many other importers throughout the nation, and therefore had an important local, as well as national, economic and legal impact.

The Court made clear in *Brown* that it is solely the purview of the federal government, through acts of Congress and implementation by the Executive Branch, to regulate trade and interstate commerce. This ruling struck down a statute by the State of Maryland which required importers of foreign goods to pay a fee to the state government, but the impact of the ruling was far more significant than simply deeming one law unconstitutional. Instead, the Court firmly stood on the side of a strong national government and a unified economy where the states could not enact radically different economic rules and regulations. Therefore, *Brown v. Maryland* takes its place as one of a line of cases including *McCulloch v. Maryland*, 17 U.S. 316 (1819) and *Gibbons v. Ogden*, 22 U.S. 1 (1824) which reaffirmed that it was the federal government, and not the various states, that would dictate the economic rules, regulations, and ultimately, development, of the United States of America.

II. Narrative of the Facts

Baltimore in 1820 was a growing city. Its population had grown by over 25% since 1810.¹ It had stood firm in the face of a British bombardment just six years earlier during the War of 1812. And it remained the third largest city in the young nation.² Baltimore was one of the great port cities as well. Its proximity to the Southern and Western states made it a perfect location for the importation of goods, namely linens from Great Britain.³ While cotton later became the primary base for clothing, linens were considered superior at the time and were in high demand.⁴ One of the men who benefited greatly from this trade was Alexander Brown, the central player in the Supreme Court case that would share his name.

Mr. Alexander Brown arrived in Baltimore in 1800.⁵ Born in Ireland in 1764, Brown began working in the linen production industry as a young man.⁶ He emigrated to the United States due to increasing political turbulence between the Irish locals and the British occupiers.⁷ He left just two years after the failed Irish Rebellion of 1798, which saw the British military aggressively put-down the island's revolutionary population.⁸ This was not a good environment to build a new business. Brown came to Baltimore for two separate reasons. The first was that members of his family were already living in the city, which made the immigration and transition

¹ Boston University, "Population history of Baltimore from 1790 – 1990," <http://physics.bu.edu/~redner/projects/population/cities/baltimore.html> (accessed October 12, 2016).

² *Id.*

³ John Crosby Brown, *A Hundred Years of Merchant Banking: A History of Brown Brothers and Company*, 10 (1909).

⁴ *Id.* at 11.

⁵ Mary Elizabeth Brown, *Alexander Brown and His Descendants, 1764-1916*, 8 (1917).

⁶ *Id.*

⁷ *Id.*

⁸ Shannon Heath, *Irish Uprising of 1798*, University of Tennessee, <http://web.utk.edu/~gerard/romanticpolitics/uprising.html> (accessed December 23, 2016).

process easier.⁹ The second was that Baltimore, with its ideal location, and Brown, with his familiarity with the linen industry, was the perfect city to set up a linen importation business.¹⁰

Brown was incredibly successful after arriving in Baltimore. Along with his sons, Brown came to dominate the linen importation market.¹¹ Within several years, their firm managed to become the preeminent importer/exporter in Baltimore, owning their own fleet of ships that traveled back and forth between Baltimore, Liverpool, and Belfast.¹² He sold tobacco and cotton to the British, while purchasing linens and bringing them back to the United States for sale.¹³ Alexander Brown & Sons was also the nation's first investment bank, taking a lead role in financing many projects, including the Baltimore & Ohio Railroad.¹⁴ The success of his company made Alexander Brown an influential figure in Maryland's political scene as well, and he corresponded with prominent politicians such as Congressman Alexander McKim, who he frequently lobbied on matters relating to his business.¹⁵

But while Mr. Brown made his fortune, Baltimore's economy was struggling. The city had thrived as a port that was geographically closer to the Southern and Western states than more northern urban centers like New York, Philadelphia, and Boston.¹⁶ But New York, Pennsylvania, and other states were investing heavily in internal improvements designed to more easily transport goods to the growing western states.¹⁷ Baltimore, and Maryland, were falling behind.

⁹ John Crosby Brown, *A Hundred Years of Merchant Banking: A History of Brown Brothers and Company*, 10 (1909).

¹⁰ *Id.*

¹¹ John Crosby Brown, *A Hundred Years of Merchant Banking: A History of Brown Brothers and Company*, 19-24 (1909).

¹² *Id.* at 20.

¹³ *Id.* at 19.

¹⁴ *Id.* at 23

¹⁵ Mary Elizabeth Brown, *Alexander Brown and His Descendants, 1764-1916*, 107 (1917).

¹⁶ John Crosby Brown, *A Hundred Years of Merchant Banking: A History of Brown Brothers and Company*, 21 (1909).

¹⁷ *Id.*

Additionally, the Panic of 1819 had rocked the nation's economic growth, threatening domestic producers and reducing state revenues dramatically, as consumers and businesses cut back on their purchases.¹⁸ It was in this climate that Maryland Governor Charles Goldsborough signed into law a bill that required all retailers of imported goods in the state to pay a fee to the state government.¹⁹ Titled "An act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purpose," (hereinafter known as the Revenue Act) this law would be modified several times, with a final version which expanded the fee to include wholesalers being adopted in 1821.²⁰ The final legislation itself was simple: Any retailer or wholesaler who sold imported goods was required to purchase a license from the State of Maryland for \$50 (approximately \$970 in 2016).²¹ Failure to do so would require the retailer to pay both the initial fee, as well as \$100 in fines (approximately \$1,900 today).²²

A noteworthy element of the Revenue Act was that it had the support of governors from both major political parties at the time: The Federalists and the Democratic-Republicans.²³ Governor Goldsborough was a Federalist, the party which traditionally supported using protective measures (namely taxes on imports) to support nascent domestic industries and generate revenue for "internal improvements," such as roads, canals, and bridges.²⁴ Therefore, Governor Goldsborough's decision to support a bill which would provide greater funds to the state's coffers, while simultaneously supporting domestic producers by increasing the cost of

¹⁸ Ohio History Central, *Panic of 1819*, http://www.ohiohistorycentral.org/w/Panic_of_1819 (accessed October 12, 2016).

¹⁹ "An act laying duties on licenses to retailers of dry goods, and for other purpose." (1819).

²⁰ "An act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purpose." (1821).

²¹ *Id.*

²² *Id.* These figures were determined by using the inflation calculator <http://www.in2013dollars.com/>, which in turn utilizes data from the Bureau of Labor Statistics and a historical study on inflation by Professor Robert Sahr of Oregon State University.

²³ National Governor's Association, *Maryland: Past Governor's Bios*, https://www.nga.org/cms/home/governors/past-governors-bios/page_maryland.html (accessed October 15, 2016).

²⁴ Cynthia Clark Norton & Elaine C. Paige Turney, *Encyclopedia of Tariffs and Trade in U.S. History: The Encyclopedia*, Vol. 1, 323, (2003).

imported goods, made sense. Democratic-Republican support for the act is a bit more surprising. However, Governor Samuel Sprigg, a Democratic-Republican who defeated Goldsborough in 1819, would support the legislation throughout its modifications during the early 1820s.²⁵ While the Democratic-Republicans were known as the party of free trade, lower tariffs, and general opposition to excessive government spending, Sprigg saw the same challenges facing Maryland as Alexander Brown had earlier, although they drew different conclusions. Sprigg chose to support the Revenue Act in order to fund investments in “internal improvements” to compete with larger states like New York and Pennsylvania.²⁶

It did not take long before Alexander Brown & Sons ran afoul of the Revenue Act. Despite being one of the most powerful businessmen in the United States at the time, Alexander Brown chose not to pay the licensing fee required of the Revenue Act.²⁷ While he certainly could have afforded the fee, Brown was a staunch supporter of free trade (both for practical and philosophical reasons).²⁸ He saw the Revenue Act as threatening to both the concept of free trade, and because it was quite conceivable that other states would follow Maryland’s lead and impose greater and greater costs for companies that sold imported goods.²⁹ Therefore, Alexander Brown & Sons continued to sell imported goods while refusing to comply with the terms of the Revenue Act.³⁰ Unsurprisingly, Alexander Brown along with his sons George, John, and James, were indicted in Baltimore City Court in the spring of 1822.³¹ They were convicted, and their

²⁵ National Governor’s Association, *Governor Samuel Sprigg*, https://www.nga.org/cms/home/governors/past-governors-bios/page_maryland/col2-content/main-content-list/title_sprigg_samuel.default.html (accessed October 15, 2016)

²⁶ Henrich Ewald Bucholz, *Governors of Maryland from the Revolution to the Year 1908*, 91–94. (1908)

²⁷ Mary Elizabeth Brown, *Alexander Brown and His Descendants, 1764-1916*, 112 (1917).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Mary Elizabeth Brown, *Alexander Brown and His Descendants, 1764-1916*, 112 (1917).

conviction was upheld by the Maryland Court of Appeals in 1825.³² At this point, Brown could have simply paid the fine and returned his focus to the business that had proved quite profitable. But instead, he chose to continue to fight, and appealed his case to the United States Supreme Court.³³

Brown's wealth allowed him to retain two of the nation's best attorneys to represent him in front of the Supreme Court. He was represented by William Wirt, who was currently serving as the Attorney General of the United States, and Jonathan Meredith, a prominent Baltimore attorney and businessman.³⁴ Wirt was a native Marylander, born in Bladensburg on November 8, 1772.³⁵ He was admitted to the Virginia bar just 20 years later, and became a friend and associate of many of that state's political luminaries, namely Thomas Jefferson and James Monroe.³⁶ Wirt would spend the next thirty years working in both the legal and political worlds. He was elected to the Virginia House of Delegates in 1808 as a Democratic-Republican, while in 1824 he argued on behalf of the United States in the seminal dormant Commerce Clause Case *Gibbons v. Ogden*.³⁷ Throughout this period he was also one of the most prominent attorneys in Baltimore, setting up a private practice in the city in 1818.³⁸ He had several motivations for moving to Baltimore, including "It is a larger theatre and the business, I understand, much greater (than Richmond, VA)... The bar is not so strong, nor so firmly fixed in the saddle as in Richmond.... There are frequent appeals from Baltimore to the Supreme Court."³⁹

³² *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

³³ Mary Elizabeth Brown, *Alexander Brown and His Descendants, 1764-1916*, 112 (1917).

³⁴ *Id.*

³⁵ John P. Kennedy, *Memoirs of the Life of William Wirt: Attorney-General of the United States*, 1 (1872).

³⁶ James Grant Wilson and John Fiske, "Wirt, William," *Appleton's Cyclopedia of American Biography* (1889).

³⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

³⁸ John P. Kennedy, *Memoirs of the Life of William Wirt: Attorney-General of the United States*, 202 (1872).

³⁹ Transcribed by Steven M. Klepper, *Letter from William Wirt to Francis Walker Gilmer* (Jan. 14, 1818), University of Virginia; Special Collections (Gilmer Letterbooks, No. 38-588).

It was Wirt's most prestigious appointment that led him to Baltimore. President James Monroe, Wirt's friend, appointed him to the position of United States Attorney General in 1817.⁴⁰ While this position had a great deal of power, it lacked an actual agency behind it, and the Attorney General was expected to supplement his income with a private law practice.⁴¹ Wirt decided that Baltimore was the ideal location to run that practice, and spent on average six months of the year in that city, while only residing in Washington, D.C. for three months while he litigated cases in front of the Court.⁴² William Wirt's Baltimore connections explain why he was hired by Alexander Brown & Sons in 1827 to help litigate their case in front of the United States Supreme Court.

While Wirt was Alexander Brown's most prominent attorney, he did not actually present the oral arguments to the Supreme Court in *Brown v. Maryland*. That distinction fell to Jonathan Meredith. Born in Philadelphia on October 4, 1784, Meredith moved to Baltimore to practice law in 1805.⁴³ He quickly rose to prominence in the city's legal community and became known for his expertise in banking and commercial law.⁴⁴ Meredith eventually rose to the position of legal consultant for the Bank of the United States' branch in Baltimore, as well as for the Bank of Baltimore.⁴⁵ His experiences made him an obvious choice to help represent Alexander Brown & Sons, as their case required an understanding of shipping, finance, and the Commerce Clause of the United States Constitution. Meredith was also an associate of William Wirt, who deemed

⁴⁰ Anya Jabour, *Marriage in the Early Republic: Elizabeth and William Wirt and the Companionate Ideal*, 99-103 (1998)

⁴¹ Galen N. Thorp, *William Wirt*, 33 J. SUP. CT. HIST. 223, 232 (2008).

⁴² *Id.* at 233.

⁴³ Library of Congress, *Jonathan D. Meredith Papers: A Finding Guide*, 4 (2012), <http://rs5.loc.gov/service/mss/eadxmlmss/eadpdfmss/2012/ms012148.pdf>, (accessed November 1, 2016).

⁴⁴ *Id.*

⁴⁵ Library of Congress, *Jonathan D. Meredith Papers: A Finding Guide*, 4 (2012), <http://rs5.loc.gov/service/mss/eadxmlmss/eadpdfmss/2012/ms012148.pdf>, (accessed November 1, 2016).

Meredith “a safe companion and an easy friend.”⁴⁶ The two attorneys worked together on several cases of local and national prominence, and their paring in *Brown v. Maryland* ensured a harmonious legal team for Alexander Brown & Sons.⁴⁷

The State of Maryland was also well represented in their trial before the Supreme Court. The state’s two attorneys were Roger Brooke Taney and Reverdy Johnson. Both men were native Marylanders, although Taney was 19 years older than his junior partner (born in 1777, while Johnson was born in 1796).⁴⁸ Taney, much like Wirt, was both a lawyer and politician. He was elected to the Maryland House of Delegates as a Federalist in 1799 and rose to the position of State Senator in 1816.⁴⁹ Taney moved his legal practice from Frederick to Baltimore in 1823.⁵⁰ The next year, he left the largely dormant Federalist Party and joined the Jacksonian Democrats.⁵¹ This proved to be a wise decision, as Taney would go on to have a successful career in subsequent Democratic administrations.⁵² Taney was also a devout Catholic; a religion that was in the clear minority in the largely Protestant United States.⁵³

Taney and William Wirt maintained a competitive rivalry during the 1820s.⁵⁴ Both men were well respected litigators, and frequently went up against one another in trial.⁵⁵ They also represented the same side from time to time, and through their work corresponded frequently.⁵⁶ Interestingly, Taney was not an incredibly successful lawyer, and despite his prestige lost quite a

⁴⁶ John P. Kennedy, *Memoirs of the Life of William Wirt: Attorney-General of the United States*, 250 (1872).

⁴⁷ *Id.* at 241.

⁴⁸ PBS, *Roger Taney*, http://www.pbs.org/wnet/supremecourt/democracy/robes_taney.html, (accessed November 1, 2016).

⁴⁹ *Id.*

⁵⁰ Bernard Steiner, *The Life of Roger Brooke Taney*, 81 (1922).

⁵¹ *Id.* at 83-84.

⁵² PBS, *Roger Taney*, http://www.pbs.org/wnet/supremecourt/democracy/robes_taney.html, (accessed November 1, 2016).

⁵³ Bernard Steiner, *The Life of Roger Brooke Taney*, 85 (1922).

⁵⁴ Steven M. Klepper, *The Elite Federal Bar in Baltimore, 1818 to 1834*, https://mdappblog.com/2014/02/25/the-elite-federal-bar-in-baltimore-1818-to-1834/#_edn50 (accessed November 3, 2016).

⁵⁵ *Id.*

⁵⁶ *Id.*

few cases in front of the Maryland Court of Appeals.⁵⁷ Nonetheless, Taney was chosen to represent the State of Maryland in front of the highest court in the country in 1827 and face-off against Wirt once again.⁵⁸

Taney selected Reverdy Johnson as his junior counsel in *Brown v. Maryland*.⁵⁹ Johnson was much younger than Taney, and was only admitted to practice law in 1815.⁶⁰ However, he quickly developed a strong legal and personal relationship with the elder litigator.⁶¹ Johnson became a very successful attorney in Baltimore during the 1820s, and ran a much more lucrative practice than that of Taney.⁶² He was also a political figure, and was elected to the State Senate in 1821 and served until 1829.⁶³ Despite his rapid success at such a young age, Johnson had never argued a case before the Supreme Court until Taney brought him on as junior counsel in 1827.⁶⁴

In many respects, *Brown v. Maryland* was destined to become an important case for both Maryland and the national economy. It dealt with matters of national unity, international trade, interstate commerce, and states' rights. These were many of the same issues that dominated the political debates at the time. The attorneys on both sides were some of the most prestigious litigators in Maryland, and included three lawyers who were currently or would go on to serve as Attorney General, and one as Chief Justice of the Supreme Court. The fact that Chief Justice John Marshall wrote the majority opinion further cements the clear significance of a case that would help define a nation.

⁵⁷ Bernard Steiner, *The Life of Roger Brooke Taney*, 89 (1922).

⁵⁸ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

⁵⁹ Bernard Steiner, *The Life of Roger Brooke Taney*, 94 (1922).

⁶⁰ Bernard Steiner, *The Life of Reverdy Johnson*, 10 (1914).

⁶¹ *Id.*

⁶² Bernard Steiner, *The Life of Roger Brooke Taney*, 89 (1922).

⁶³ Michel Holt, *Reverdy Johnson: 1850-1850*, <http://millercenter.org/president/essays/johnson-1850-attorney-general>, (Accessed November 10, 2016).

⁶⁴ Bernard Steiner, *The Life of Reverdy Johnson*, 11 (1914)

III. The Decisions

Alexander Brown, along with his sons George, John, and James, were officially indicted by a Baltimore City grand jury on November 4, 1822, for violating the Revenue Act. Later that month, their case was heard in front of the Baltimore City Circuit Court. Chief Judge Nicholas Brice presided over the chamber during the trial.⁶⁵ The defendants were represented by Jonathan Meredith, who would represent the party throughout the entirety of the case, and William H. Winder, a prominent local Federalist and successful trial attorney.⁶⁶ The State of Maryland was represented by Attorney General Thomas Dorsey.⁶⁷ The Attorney General's presence at the initial trial showed just how significant this case was, and that the State anticipated a protracted legal battle. The arguments at the trial court level were centered on the facts of the case, with Dorsey presenting evidence that Alexander Brown & Sons knowingly sold imported goods without paying the licensing fee required by the Revenue Act, and Meredith and Winder arguing that the facts of the indictment were insufficient.⁶⁸ The court ultimately sided with the state, holding that the facts in the indictment were "good and sufficient" enough to establish that the Browns had violated the Revenue Act.⁶⁹

The Browns appealed the City Circuit Court ruling to the Maryland Court of Appeals, which was the only appellate court in Maryland at the time.⁷⁰ The Court of Appeals accepted the appeal, but did not hear the case until December of 1823.⁷¹ Once again, Alexander Brown &

⁶⁵ *Dockets of the United States Supreme Court, Roll 1, 1791-1384: Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).*

⁶⁶ Robert J. Brugger, *Maryland, A Middle Temperament: 1634-1980*, 178 (1996).

⁶⁷ *Dockets of the United States Supreme Court, Roll 1, 1791-1384: Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).*

⁶⁸ *Dockets of the United States Supreme Court, Roll 1, 1791-1384: Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).*

⁶⁹ *Id.*

⁷⁰ Maryland Court of Special Appeals was not established until 1966.

⁷¹ *Dockets of the United States Supreme Court, Roll 1, 1791-1384: Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).*

Sons were defended by Meredith and Winder, while the State was represented by Dorsey.⁷² Interestingly, the arguments by both sides were largely the same as they were at the trial court level.⁷³ Meredith and Winder's primary defense was that the State had failed to present adequate evidence to warrant a guilty conviction, while Dorsey argued the opposite.⁷⁴ Unsurprisingly, the Court of Appeals agreed with the trial court and affirmed their ruling.⁷⁵ In a decision rendered in June 1824, Chief Judge John Buchanan wrote that the State had presented enough evidence to maintain the guilty ruling.⁷⁶

Interestingly, Brown & Sons' attorneys did not raise constitutional arguments against the Revenue Act until filing an appeal of the Maryland Court of Appeals' ruling.⁷⁷ This omission points to the likelihood that the Browns wanted the case to reach the Supreme Court so that it would be decided on constitutional grounds. This makes sense for two reasons: First, there is no evidence that Alexander Brown & Sons could not afford to pay the (relatively) small sum of money required by the Revenue Act, or that they couldn't afford the penalty for violation of the Act. Second, the decision to appeal the case twice implies a level of interest and passion surrounding the legal issue. However, this was a risky gambit, as the Court may have refused to hear the case (since Constitutional issues were not raised at the lower court level). But Brown & Sons' wealth allowed them to take this risk, as they either could have paid the fine or refused to pay for the license again and pursued a different strategy in court if they were indicted again.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Regardless of Brown's and his attorneys' motivations, the Supreme Court agreed to hear the case on a writ of error on February 28, 1825.⁷⁸ They would not hear the case until March 1, 1827. During that time, the attorneys on both sides would change. Jonathan Meredith would remain as the lead counsel for Alexander Brown & Sons, while Winder was replaced by United States Attorney General William Wirt in a move that showed the power and influence of the firm. Thomas Dorsey was no longer Attorney General in Maryland, being replaced by Thomas Kell in 1824.⁷⁹ However, it was prominent young trial attorneys Roger B. Taney and Reverdy Johnson who would argue the case in front of the nation's highest court.⁸⁰

Jonathan Meredith made oral arguments on behalf of the appellants.⁸¹ He began by arguing that the Revenue Act was an unconstitutional exercise of Maryland's taxing power.⁸² While he conceded that the Constitution did not prevent the states from taxing their citizens and businesses, he argued that this power was not unlimited when it conflicted with powers constitutionally vested in the federal government.⁸³ He went on to state that the founders established these limits to ensure that the states did not establish laws that were repugnant to the very nature of constitutional government through state statutes which conflicted with federal law.⁸⁴ Therefore, the Constitution placed restrictions on the states' ability to tax, including restrictions on the power to tax imports through tariffs and duties.⁸⁵ Meredith pointed to Article 1, Section 10 of the Constitution, which in the second clause states:

⁷⁸ *Minutes of the United States Supreme Court, Roll 1, Volume Number A-D, Feb 1. 1790-Aug. 4 1828, Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

⁷⁹ *Archives of Maryland Historical List Attorneys General, 1777-*, <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/attygen.html>, (accessed November 8, 2016).

⁸⁰ Mary Elizabeth Brown, *Alexander Brown and His Descendants, 1764-1916*, 112 (1917).

⁸¹ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *2 (U.S. 1827) (Citation is to Lexis transcript of reporter's notes).

⁸² *Id.*

⁸³ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *2, 3-5 (U.S. 1827).

⁸⁴ *Id.* at 4-5.

⁸⁵ *Id.* at 4.

“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.”⁸⁶

Meredith went on to argue that the Revenue Act directly conflicted with this constitutional provision.⁸⁷ While Maryland was not directly taxing imports, it was requiring businesses and individuals who imported and sold imported goods to pay a fee to the state.⁸⁸ Meredith claimed that this was a tax on imports in everything but name, since it would be required every time an imported good was sold (which was the reason for importing something in the first place.)⁸⁹ While the tax is collected at different points (a direct tariff would be collected at the time of import, while this fee was collected before sales could be made), the effect was indistinguishable.⁹⁰ In a creative twist, Meredith argued that by placing this de facto tariff on imports, Maryland was threatening the ability of the federal government to raise revenue.⁹¹ After all, if the state raised the associated fee high enough, it could effectively annihilate trade into Maryland. At that point, the federal government would not be able to make money in Maryland off their import tariffs, a constitutionally protected domain.⁹² Meredith conceded that the \$50 fee is small, but argued that the Court should consider the broader principal at stake in this case: the ability of the states to place prohibitive tariffs on imports.⁹³

⁸⁶ U.S. CONST. art. I, § 10, cl. 2.

⁸⁷ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *2, 5 (U.S. 1827).

⁸⁸ *Id.*

⁸⁹ *Id.* at 6-7.

⁹⁰ *Id.* at 8-10.

⁹¹ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *2, 8-10 (U.S. 1827).

⁹² *Id.*

⁹³ *Id.*

Finally, Meredith concluded by arguing that if the Revenue Act was allowed to stand, then Maryland would be able to manage its own foreign policy regarding trade.⁹⁴ He further argued that this directly contravenes the Commerce Clause of the Constitution.⁹⁵ Maryland, and any state that followed suit would be allowed to require license fees to sell particular goods, or goods made in particular countries, in such a way that it could effectively contravene the federal government's economic and foreign policies. Essentially, if the law was upheld, then the states could use license fees to work around two constitutional limits that were designed to prevent this exact situation.⁹⁶

Roger Taney and Reverdy Johnson responded on behalf of Maryland.⁹⁷ They began by arguing that the Revenue Act did not tax imports or importers.⁹⁸ Rather, it taxed importers when they chose to wholesale imported goods in the state.⁹⁹ In this way it was no different than requiring an innkeeper to pay a fee if they chose to operate in Maryland.¹⁰⁰ Taney's and Johnson's central argument was that the Constitutional limitation on states taxing imports dealt specifically with the act of importing the goods, not their sale later.¹⁰¹ Essentially, the tariff is a fee on the right to bring the good into the United States.¹⁰² They went on to argue that the goods are regulated by the state once they have passed through the port or custom house.¹⁰³ They are the property of the importer at that point, and receive the same protection under state law as other kinds of property.¹⁰⁴

⁹⁴ *Id.* at 11-12.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* at 12-13.

¹⁰⁰ *Id.* at 13.

¹⁰¹ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *2, 13-14 (U.S. 1827).

¹⁰² *Id.*

¹⁰³ *Id.* at 14-15.

¹⁰⁴ *Id.*

The State's next argument was centered on an originalist interpretation of the Constitution. Article One, Section Ten, Clause Two refers to "imports," and was intended to refer to the importation of goods, not the goods themselves.¹⁰⁵ Taney and Johnson argued that if the state was prohibited from taxing imported goods, then they could never place any tax, fee, or regulation on them.¹⁰⁶ Going to the logical extreme, they claimed that this would prevent the state from prohibiting the sale of gunpowder in the center of a major city.¹⁰⁷ Next, they argued that the appellant's claim is centered around a gross expansion of federal power not permitted by the Constitution.¹⁰⁸ While Taney and Johnson conceded that the right to tax importation was solely in the hands of the federal government, they argued that the Revenue Act applied to regulating the sale of goods.¹⁰⁹ If the Act were struck down, then that would be a statement of the Court that the federal government, and not the states, were in charge of regulating who was allowed to sell goods.¹¹⁰ This power is not explicitly stated in the Constitution, and therefore would represent a clean break with the intent of the Founders.¹¹¹

Taney's and Johnson's final argument addressed the claims made by Jonathan Meredith that the Revenue Act violates the Commerce Clause.¹¹² They directly attacked the appellant's "slippery slope" argument that if the Revenue Act could stand, the states could tax the sale of imports into annihilation, and thereby interfere with foreign commerce.¹¹³ Taney and Johnson found this claim preposterous. By that same logic, they argued, the states could not pass any law effecting commerce within their state because it could hypothetically be taken to the extreme and

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* at 18-23.

¹⁰⁹ *Id.*

¹¹⁰ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *2, 21 (U.S. 1827).

¹¹¹ *Id.*

¹¹² *Id.* at 24.

¹¹³ *Id.*

used to extinguish said commerce.¹¹⁴ Instead, they argued that these regulations would never be taken to the extreme because the people of the states would reject those laws, and the states themselves would suffer the most.¹¹⁵ Essentially, they argued that laws such as the Revenue Act would never come to the point of effecting foreign commerce, as they would become unpalatable to the citizens of the state long before then.¹¹⁶

Chief Justice John Marshall delivered the Court's 8-1 opinion in *Brown v. Maryland* on March 12, 1827.¹¹⁷ After a brief description of the Revenue Act and the facts leading up to this case, Marshall identified the two central questions before the Court: Did the Act violate the prohibition on states placing duties on imports, and did the Act intrude on Congress's power to regulate foreign and interstate commerce?¹¹⁸ He began by addressing whether the Act constituted a tax on imports.¹¹⁹

Marshall's inquiry started by addressing "the meaning of the words, 'imposts, or duties on imports or exports.'"¹²⁰ This is because of his contention that the Court should interpret the Constitution in the most straightforward and literal manner when possible. He quickly defined imposts and duties as "a custom or a tax levied on articles brought into a country."¹²¹ More significantly, he defined imports as "things imported."¹²² Therefore, a duty on imports is a duty on things imported, not on the act of importing.¹²³ This is extremely important, as it cut directly

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 26.

¹¹⁶ *Id.*

¹¹⁷ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419 (1827).

¹¹⁸ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 437 (1827).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 437-438.

against Maryland’s central argument that the Constitution forbade taxing the importation of goods by the states.¹²⁴

Following his literalist discussion, Marshall moved in a broader (and arguably more significant) direction. He referred to the years prior to the ratification of the Constitution, when no issue caused more “interest...or irritation” than the laying of duties on imports.¹²⁵ This was because each state had different economic strengths and weaknesses, so tariffs on imports ranged widely between the states.¹²⁶ Marshall claims that the Constitutional prohibition on states placing restrictions on tariffs on imports was the direct result of this disunity and that “in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress.”¹²⁷ Based on this reading, there is no difference between prohibiting the states from placing duties at the point of importation versus at the point of sale. Both are state efforts to effect the price of importing goods for sale.¹²⁸

Next, Marshall addressed Taney’s and Johnson’s claim that no state would ever place duties on importers that would rise to the level of stifling commerce.¹²⁹ While Marshall acknowledged this was unlikely, the Founders wanted to avoid even the possibility of this from happening. It was not unforeseeable that:

The great importing States would thus levy a tax on the non importing 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 favourable to importation.¹³⁰

¹²⁴ *Brown v. Maryland*, 1827 U.S. LEXIS 398, *12 (U.S. 1827).

¹²⁵ *Brown*, 25 U.S. (12 Wheat) 419, 438 (1827).

¹²⁶ *Id.*

¹²⁷ *Id.* at 439.

¹²⁸ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 439 (1827).

¹²⁹ *Id.* at 440.

¹³⁰ *Id.*

At this point in his opinion, it was clear that Marshall looked upon the Revenue Act skeptically, and saw it as a tax on imported goods. But he chose not to end his opinion there. Instead, he turned his focus to Maryland's claim that striking down the Act would prevent the states from taxing or regulating the commerce of any imported good at any point.¹³¹ Marshall responded by creating, without suggestion from the appellant's argument, what became known as the "Original Package" doctrine.¹³² In addressing when a state may tax imported goods, Marshall stated:

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.¹³³

Marshall spent the next several paragraphs of his opinion fleshing out the details of the doctrine. He directly addressed Taney's and Johnson's claims that striking down the Act would prevent the state from regulating where imported goods, like gunpowder could be sold.¹³⁴ Marshall makes the straightforward statement "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" so that they may protect their citizens.¹³⁵ Next, he addressed the claim that the tax is on importers, and not on imports.¹³⁶ A simple understanding of economics would show that a tax on importers is a de facto tax on imports, as it would have the same effect of raising their costs, because "all must perceive, that a tax on the sale of an article, imported only for sale, is a tax on

¹³¹ *Id.* at 440-441.

¹³² Meriam-Webster Dictionary, *Original Package Doctrine*, <http://www.merriam-webster.com/dictionary/original%20package%20doctrine>, (Accessed November 8, 2016).

¹³³ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 441-442 (1827).

¹³⁴ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 442-443 (1827).

¹³⁵ *Id.*

¹³⁶ *Id.* at 444.

the article itself.”¹³⁷ Since the effect is the same, the ban on duties must be extended to a ban on taxing the importer.¹³⁸ This analysis changes when the goods being sold are merged into the general economy. Rather than conducting a nuanced analysis for when the effect of a tax or fee acts as a de facto tariff on imports, Marshall simply draws a firm line that goods in their “Original Package” may not be taxed directly or indirectly.¹³⁹

Marshall is quick to say that states may continue to tax other professions, so long as the tax does not run counter to an explicit constitutional provision (as taxing importers does.)¹⁴⁰ Marshall uses an effective comparison to sum up his point: the government is prohibited from taxing exports. Citizens would be rightfully mad if they were to attempt to get around this prohibition by taxing exporters as they sold their goods at the port, and simply claiming that they weren’t taxing exports but just taxing exporters.¹⁴¹ The logic fails to hold up in that instance, just as it failed in the case of the Revenue Act.

While the “Original Package” doctrine became the major “takeaway” from this case, it only takes up several sentences of the Chief Justice’s opinion. Instead, Marshall spends most of the opinion discussing how allowing states to place duties on imports would constitute a major threat to the national economy and interstate and foreign commerce (which will be discussed shortly). Marshall’s opinion is consistent with his decisions in many other cases in that era. He consistently chose to strike down state regulations that weakened the federal government’s ability to regulate the economy, or threatened to divide the states.¹⁴² His decision in *Brown v. Maryland* was no different.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 441-442.

¹⁴⁰ *Id.* at 444.

¹⁴¹ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 445 (1827).

¹⁴² *See McCulloch v. Maryland*, 17 U.S. 316 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

After establishing that the Revenue Act violated the ban on states placing duties on imports, Chief Justice Marshall turned to the question of whether it infringed on Congress's role as the sole regulator of interstate and foreign commerce.¹⁴³ Marshall began by once again reminding the reader of the situation prior to the ratification of the Constitution, when "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."¹⁴⁴ He next referred to the case of *Gibbons v. Ogden*, in which the Court established that the power to regulate commerce does not end at a state's boundaries. For this reason, Marshall established that the authorization to import goods does not just constitute an allowance to bring foreign goods into the United States, but also to allow the sale of them.¹⁴⁵ After all, the point of importing a good is to sell them to customers, which is a form of commerce.¹⁴⁶ Following this logic, "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."¹⁴⁷

Marshall went on to reiterate his previously stated point that there is no practical distinction between taxing an import and taxing an importer.¹⁴⁸ While this may directly conflict with a state's taxing power, Marshall made clear that "when this happens, that which is not supreme must yield to that which is supreme."¹⁴⁹ For this reason, the taxing power of a state is secondary to the federal government's interest in regulating foreign commerce. He made it clear

¹⁴³ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 445(1827).

¹⁴⁴ *Id.* at 445-446.

¹⁴⁵ *Id.* at 447.

¹⁴⁶ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 446 (1827).

¹⁴⁷ *Id.* at 448.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 448-449.

that this prohibition on taxing importers also applies to taxing retailers selling goods produced in other states.¹⁵⁰

Because it violated the ban on states placing duties on imported goods and because it interfered with foreign and interstate commerce, Justice Marshall and seven other justices struck down Maryland's Revenue Act, remanding the case back to the Court of Appeals with instructions for a judgement on behalf of Alexander Brown & Sons.¹⁵¹ Once again, Marshall struck at a state law for interfering with a national system of economic growth and interconnectivity. His goal in this ruling reinforces his belief that the United States would only succeed if it had a unified economic policy, or else it would fall back into the dysfunction that defined the era of the Articles of Confederation.¹⁵² Though not as well-known as *Gibbons* or *McCulloch*, *Brown v. Maryland* was a significant case in establishing that the United States would be joined together not just politically, but economically as well, and that it would be Congress, and not state legislatures, that would establish economic policies.

Seven other justices joined with Marshall in finding the Revenue Act unconstitutional.¹⁵³ However, Associate Justice Smith Thompson did not join in this opinion and filed a dissent.¹⁵⁴ Thompson was appointed to the Court by President James Monroe four years before the case was argued, and he would go on to serve until his death in 1843.¹⁵⁵ He was a staunch and consistent opponent of Marshall during that time, and generally took a pro-states' rights line throughout his tenure on the bench.¹⁵⁶ Therefore, Thompson's decision to dissent in a case that overturned a state regulation is not surprising.

¹⁵⁰ *Id.* at 449.

¹⁵¹ *Id.* at 459-460.

¹⁵² *Id.* at 438-439.

¹⁵³ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 449 (1827).

¹⁵⁴ *Id.*

¹⁵⁵ Jean Edward Smith, *John Marshall: Definer of a Nation*, 470 (1998).

¹⁵⁶ Christopher Tomlins, *The United States Supreme Court: The Pursuit of Justice*, 522 (2005).

Thompson began his dissent by describing the statute in question before bluntly stating that “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.”¹⁵⁷ This was Thompson’s central conflict with the majority’s decision. He took a much narrower view of what constituted interstate and foreign commerce than the Chief Justice, and described at length how the statute only applied to someone selling imported goods (i.e. a retailer or wholesaler) without a license in Maryland.¹⁵⁸ Thompson also noted that a fee for importing goods would clearly be unconstitutional, and that is not what the Revenue Act dealt with.¹⁵⁹ Next, Thompson stated that since the Revenue Act only dealt with sellers paying a licensing fee to the state, and did not address the act of importing or discriminate against businesses in other states, it could not be considered an interference with interstate or foreign commerce.¹⁶⁰ He cited *Gibbons v. Ogden* at length, emphasizing that “the completely internal commerce of a State, then, may be considered as reserved for the State itself.”¹⁶¹

Next, Thompson turned to describing his ideal rule for when commerce becomes foreign or interstate: “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” as long as the good is not intended for interstate commerce.¹⁶² He found the Maryland statute to be inside the allowed boundaries. Additionally, Thompson accepted Taney’s and Johnson’s argument that the fee did not constitute a duty or tariff since it was not paid at the point of importation.¹⁶³

¹⁵⁷ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 451 (1827).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 452.

¹⁶⁰ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 451-452 (1827).

¹⁶¹ *Id.* at 453.

¹⁶² *Id.*

¹⁶³ *Id.* at 454.

Another point of contention for Thompson was the “Original Package” doctrine itself. To begin with, he believed that the “The prohibition to the States is against laying any impost or duty on imports. It is the merchandise that is exempted from the imposition” and that this protection did not extend to the importers or retailers.¹⁶⁴ But even accepting that the individual or businesses selling the products could be protected, Thompson finds the distinction between sellers of the imports in their original package versus those who are selling the imports later to be entirely arbitrary and problematic, writing “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?”¹⁶⁵

Thompson’s central problem with the majority’s opinion is that it took an expansive view of both the Commerce Clause and the prohibition on state’s laying duties on imports. He spent a considerable amount of his dissent arguing that this ruling represented a significant curbing of the states’ taxing power, which was protected by the Constitution.¹⁶⁶ He added that “Whether such regulations (fees) are wise and politic, is not a question for this Court” and that they should only be struck down if they were an obvious duty on the act of importing foreign goods.¹⁶⁷ Thompson then turned his focus to Marshall’s argument that allowing this statute to stand would allow the states to tax and regulate importers into annihilation.¹⁶⁸ He found this argument unpersuasive, and ultimately stated that the same logic could be applied to almost any tax or regulation currently allowed if they were taken to the extreme.¹⁶⁹ Finally, Thompson wrote that this case is different from *McCulloch v. Maryland*, as taxing sellers of imports does not infringe

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 458 (1827).

¹⁶⁷ *Id.* at 456.

¹⁶⁸ *Id.* at 457.

¹⁶⁹ *Id.*

on a core government function.¹⁷⁰ For these various reasons, Thompson could not join with Marshall and dissented.

Brown v. Maryland was more than just a case about the constitutionality of a licensing fee. Rather, it was a case that showcased the two competing views surrounding state's rights versus the national power when it came to economic regulation. Jonathan Meredith's arguments and Justice Marshall's opinion effectively articulate the central rationale for why a strong federal government is needed to regulate the economy. Allowing state statutes like the Revenue Act to stand risked leading to a nation where each state essentially crafted its own trade and commercial policies. This approach would prevent large, multistate businesses from being able to grow as effectively and risked throwing the country into economic chaos if the states each had wildly different taxing laws for importers and sellers of imported goods. Marshall and a majority of his colleagues clearly saw this threat as a serious one, and were reminded of the days of the Articles of Confederation where the federal government lacked the ability to respond to issues of national importance due to the power of the states.

On the other hand, Justice Thompson and counsel for Maryland believed in deference to the states unless legislation clearly interfered with foreign or interstate commerce. It is clear from Thompson's opinion that he feared an overly powerful federal government more than disjointed economic policies. This reflected the Jeffersonian view that a strong national government created the possibility of tyranny and a curbing of economic, social, and political liberties. This view also placed much more faith in the voters of the states, as evidenced by Taney's and Johnson's belief that the voters would never allow the state government to place unduly harsh burdens on businesses. Finally, Thompson's views also reflected the Jeffersonian belief that the federal government should not put policies into place that were supportive of large businesses and

¹⁷⁰ *Id.* at 458.

industry. It was more important to respect state sovereignty and the will of the people through their representatives in government than to push for policies that promoted national economic growth.

When faced with these two arguments, Marshall's alternative makes much more sense. This is partially because the ensuing 189 years have seen the United States become a much more unified and integrated economy that depends heavily on international trade. It is difficult to imagine our world had Thompson's view taken hold. Nonetheless, Marshall's argument is stronger for several reasons. First, the experience under the Articles of Confederation showed the very real dangers of allowing the states to have primacy in economic regulation. Disjointed economic policies make the cost of doing businesses across state lines higher, and limits the ability of the federal government to enact policies for the betterment of the nation if they happen to hurt one state. Second, Marshall was astute in finding that allowing the Revenue Act to stand would allow the states to pass any number of "back door" taxes and fees to circumvent the limitations placed in the Constitution. In this respect, Marshall was truly defending the spirit of the Constitution, while Thompson's literalism threatened to gut the document of its teeth. Finally, Marshall's opinion reflects the general trend of the Court to support national economic policies at the expense of state power. Consistency is important from the Court so policymakers can generally predict whether legislation will be upheld or not. Abruptly breaking from the trajectory of the time would cut against this important principle.

It is worth noting that Marshall's opinion is not without downsides. The major beneficiaries of the decision were importers who did not have to pay the fee anymore and large businesses operating across state lines who benefitted from uniform trade policies. On the other hand, domestic producers and the states were on the wrong end of the decision. Domestic linen

manufacturers no longer had the protection of the state when competing with international producers, and Maryland was denied a significant source of revenue. However, the biggest winner in this case were consumers. They no longer had to pay an artificially higher price for imported goods, and could use the additional money they would not have to spend on imported goods somewhere else, potentially on domestic producers of other goods. Therefore, this ruling had an egalitarian effect, as it empowered consumers by giving them greater purchasing power.

The Court's ruling in *Brown v. Maryland* was an important step towards promoting a unified economic policy in which the federal government took primacy over the states. Therefore, this decision represented the continual march towards the United States becoming the economic superpower that it is today. Along with other important decisions by the Marshall Court, *Brown* took a more open view of the Commerce Clause which the national government would go on to use for the sake of economic development and regulation that would benefit the clear majority of Americans. Essentially, *Brown* reinforced Chief Justice Marshall's belief that the United States could only reach its full potential if it was united under one, and not many, economic policies.

IV. Effects of the Case

The decision by the Court in *Brown v. Maryland* had significant effects that are still felt today. Broadly speaking, the ruling reaffirmed the Court's commitment to a federal, rather than a state, driven economic policy in which the federal government had the sole authority to regulate foreign trade and interstate commerce. But more narrowly, the Court also established an important legal doctrine which remained good law up until the 1970s, almost 150 years after the ruling. Known as the "Original Package" Doctrine, this principle was based on a relatively small part of Chief Justice Marshall's opinion, yet it is arguably the most well-known "takeaway" from

his decision. Taken together, the broad economic impact of *Brown v. Maryland*, along with the long-lived impacts of the “Original Package” Doctrine show that this case has had significant effects on constitutional law and economic development in the United States.

Broadly speaking, the Court’s ruling in *Brown* fit into a tapestry of decisions by the Marshall Court that strengthened the federal government’s role in regulating commerce at the expense of the states. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Court struck down a Maryland statute that imposed a tax on all banks operating, but not chartered, in the state.¹⁷¹ In practice, this mean that Maryland was imposing a tax only on the congressionally-chartered Second Bank of the United States, the sole bank operating, but not chartered, in the state.¹⁷² The Court based its ruling on several factors. First, the Chief Justice (writing for a unanimous bench) held that the Bank was constitutional as it was consistent with the previously chartered First Bank of the United States, which was approved only after significant legislative debate.¹⁷³ The Court was unwilling to discount the importance of Congressional discourse in a Republican system of government.¹⁷⁴ Second, Marshall held that the it was not the states, but the people, who provided the ultimate power to the Constitution.¹⁷⁵ Therefore, the states did not have the ability to essentially nullify federal laws just because they did not support them.¹⁷⁶ Next, the Court held that the “Necessary and Proper” clause of the Constitution allowed for the creation of a national bank to perform other duties explicitly stated in the Constitution.¹⁷⁷ Finally, the Court found that if the National Bank was constitutional, then Maryland could not hinder its duties by

¹⁷¹ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁷² *Id.*

¹⁷³ *McCulloch v. Maryland*, 17 U.S. 316, 401-402 (1819).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 403-404.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 413-415.

forcing it to pay a significant tax.¹⁷⁸ The ruling in *McCulloch* essentially permitted the federal government to involve itself more greatly in the national economy in cases where “the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution.”¹⁷⁹

One year later, the Marshall Court further expanded the federal government’s role in regulating the economy. In *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court held that Congress, and not the states, had the power to regulate commerce between the states.¹⁸⁰ The ruling struck down a New York law granting exclusive steamboat monopolies, as it dealt with commerce between New York and other states.¹⁸¹ The crucial finding in the case was that “commerce” as defined in the Constitution is not simply the trade and traffic of goods, but rather economic activity writ large.¹⁸² Additionally, Marshall took a broader view of what constitutes interstate commerce, stating that “commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”¹⁸³ Once again, the Marshall Court took a broad view of the Constitution, a view they would take in *Brown* as well. Ultimately, *McCulloch*, *Gibbons*, and *Brown* all fit together as cases in which the Court rejected the argument that the states had the ultimate power to regulate and decide the economic course of the nation. Instead, they embraced a broader, and more federally managed, model.

Along with the aforementioned economic impact of the case, *Brown* also saw the origination of a significant doctrine which the Court affirmed until the 1970s. Known as the

¹⁷⁸ *Id.* at 431.

¹⁷⁹ *Id.* at 421.

¹⁸⁰ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁸¹ *Gibbons v. Ogden*, 22 U.S. 1, 189-190 (1824).

¹⁸² *Id.*

¹⁸³ *Id.* at 194.

“Original Package” Doctrine, this principle was derived from a line in Justice Marshall’s opinion where he states that an import “remaining the property of the importer, in his warehouse, in the original form or package in which it was imported” cannot be taxed.¹⁸⁴ This ruling equally applied to goods imported across state lines.¹⁸⁵ Essentially, this meant that the state could not place taxes upon imported goods until after they entered into the general stream of commerce.¹⁸⁶ Interestingly, this holding is only related to the primary issue in *Brown* in an ancillary way, as Maryland was never directly taxing the imports, but rather placed a fee on importers themselves.¹⁸⁷ Nonetheless, this doctrine became the most significant takeaway from the case, and provided significant precedential value until it was overturned by the Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Therefore, this doctrine maintained its validity for 149 years. Even Chief Justice Taney, who argued in favor of upholding the tax in front of the Court later voiced his support for the ruling by stating:

(Brown) was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question. . . . The opinion of the court, delivered by Chief Justice Marshall, shows that it [the case] was carefully and fully considered by the court. And the court decided that this state law, was a tax on imports, and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance.¹⁸⁸

The “Original Package” doctrine was frequently referenced by the Court, and appeared in a number of cases addressing different parts of the economy. In *Low v. Austin*, 13 Wall. 29 (1872), the Court struck down a tax on a stock of wines that included imported wines that were in their original package. A tax on an auctioneer calculated by the number of imported goods sold was similarly struck down in *Cook v. Pennsylvania*, 97 U.S. 566 (1878). The “Original

¹⁸⁴ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441-42 (1827).

¹⁸⁵ *Id.* at 449.

¹⁸⁶ *Id.* at 441-442.

¹⁸⁷ *Id.* at 436.

¹⁸⁸ *Almy v. State of California*, 24 How. 169, 173 (1860).

Package” doctrine remained in place even after the post-*Lochner* Court began to accept greater state regulation of commerce. In *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), the Court struck down an Ohio tax on bales of hemp imported into the state and stored in their original packaging. Writing for the majority, Chief Justice Stone succinctly summed up the “Original Package” doctrine in writing:

Although one Justice dissented in *Brown v. Maryland*, *supra*, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported.¹⁸⁹

The holding in *Brown* was also used to strike down other state regulations outside of taxes on imported goods. In *Leloup v. Port of Mobile*, 127 U.S. 640 (1888), the Court struck down a local fee that a telegraph company was required to pay before doing business in the city. Justice Bradley found that this fee was a tax on doing business, and that it therefore ran parallel to the holding in *Brown* where the Court ruled that a tax on imports was an interference with interstate commerce (as well as a violation of Congress’s exclusive power to regulate trade.)¹⁹⁰ This ruling certainly goes further than the initial ruling in *Brown*, which was centered on the fact that the tax was essentially on imports (and not just because it was a tax on the business before it was allowed to operate), but it does reflect the important legacy of the case.¹⁹¹

Brown remained good law until 1976, when the Court finally replaced the “Original Package” doctrine in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Justice Brennan found that Justice Marshall’s opinion in *Brown* had actually been misinterpreted by the Court in the century-and-a-half since the case was decided.¹⁹² Essentially, he held that the state could levy

¹⁸⁹ *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 657 (U.S. 1945)

¹⁹⁰ *Leloup v. Port of Mobile*, 127 U.S. 640, 646-647 (1888),

¹⁹¹ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827).

¹⁹² *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 282-283 (1976).

taxes on imported goods, as long as the tax was not specifically targeted at imports or on importers.¹⁹³ The Court in that case upheld a state tax on tires that included tires imported from overseas.¹⁹⁴ They found that the tax was not in violation of the Commerce Clause, even though the tires were in their original packaging, because the tax applied equally to all tires.¹⁹⁵ The Court found that the “Original Package” doctrine was no longer the deciding formula to determine if a state tax or fee violated the Commerce Clause.¹⁹⁶ Instead, they found that the key distinction is whether the law discriminated against imports.¹⁹⁷ Ironically, Justice Brennan believed “that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an ‘impost’ or ‘duty.’”¹⁹⁸

An interesting modern corollary for *Brown* and other cases dealing with economic discrimination by the states is the so-called “Amazon Tax” issue. Twenty-two states have laws that tax internet distributors (such as Amazon.com). The Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) held that state taxes on online retailers who physically operated in the states or had distribution centers and warehouses in the state were constitutional.¹⁹⁹ However, South Dakota recently passed legislation requiring retailers that sell \$100,000 or more in goods in the state to pay a tax, even if they do not physically operate in the state.²⁰⁰ Several other states have passed similar legislation which attempt to gather some revenue from online retailers.²⁰¹ The South Dakota statute is currently being challenged by the American Catalog Mailers

¹⁹³ *Id.* at 283.

¹⁹⁴ *Id.* at 276.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 298.

¹⁹⁷ *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976).

¹⁹⁸ *Id.*

¹⁹⁹ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)

²⁰⁰ S.D. Senate Bill 109 (2016).

²⁰¹ Amazon.com, *About Sales Tax*, <https://www.amazon.com/gp/help/customer/display.html?nodeId=468512>, (accessed November 20, 2016).

Association and the trade group NetChoice.²⁰² While this case doesn't precisely follow *Brown*, it is a modern parallel in that it deals with the states attempting to extract revenue (and protect local retailers) from businesses that are not seen as operating in, or benefiting, the locality.

VI. Aftermath of the Parties

Brown v. Maryland is notable for being a case where the litigants and parties involved went on to arguably greater notoriety and success *after* appearing before the Supreme Court. This is especially the case for the representatives of the State of Maryland (Roger Taney and Reverdy Johnson), although it is also true of the appellant's attorneys (William Wirt and Jonathan Meredith) and Alexander Brown & Sons. This case involved many prominent figures in Jacksonian America who maintained their significance, or saw it grow, after Chief Justice Marshall struck down the Revenue Act.

For the State of Maryland, both Roger B. Taney and Reverdy Johnson would go on to greater acclaim after the resolution of the case. Taney was named Maryland Attorney General, taking office in September of 1827.²⁰³ Four years later, he was named President Andrew Jackson's interim Secretary of War, and United States Attorney General later that same year.²⁰⁴ Jackson appointed Taney as Secretary of the Treasury during a Congressional recess (circumventing the need for Senate confirmation) in 1833, and in that position he oversaw the disinvestment of the Bank of the United States.²⁰⁵ However, Taney was not confirmed for a full-term as Treasury Secretary once the Senate returned from recess.²⁰⁶ After returning to private legal practice for several years, Taney was nominated by Jackson to serve as Chief Justice of the

²⁰² *American Catalog Mailers Association et al. v. Gerlach*, Complaint 32CIV16-___ (2016).

²⁰³ Biography.com, *Roger Taney*, <http://www.biography.com/people/roger-b-taney-21164235#synopsis>, (accessed November 20, 2016).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ United States Senate, *Andrew Jackson*, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm#5>, (accessed November 20, 2016).

United States Supreme Court.²⁰⁷ He was confirmed in 1836, succeeding Chief Justice John Marshall, the man who he had argued *Brown v. Maryland* in front of nearly a decade earlier.²⁰⁸ But unlike Marshall, Taney did not go down in history as a great justice. Instead, he is most widely remembered for authoring the majority opinion in *Dred Scott v. Sanford* where he wrote that Congress had no authority to prohibit slavery in new federal territories.²⁰⁹ Taney would remain Chief Justice until his death in 1864.²¹⁰

Reverdy Johnson had a less famous, but still significant, career than Taney following *Brown*. After years of successful legal practice in Baltimore and service in the Maryland State Senate, Johnson was appointed United States Senator for Maryland as a Whig in 1845.²¹¹ He served in that position until 1849, when he was confirmed as United States Attorney General under Zachary Taylor.²¹² He would step down after President Taylor's death in 1850, but remained an active political and legal figure.²¹³ Johnson represented John Sanford in front of his former co-counsel, Chief Justice Taney, in *Dred Scott v. Sanford*, but would go on to support the abolition of slavery during the 1860s.²¹⁴ He would later serve as a Senator and advisor to President Andrew Johnson before returning to his legal practice.²¹⁵ Reverdy Johnson passed away in 1876.²¹⁶

²⁰⁷ Biography.com, *Roger Taney*, available at <http://www.biography.com/people/roger-b-taney-21164235#synopsis>, (accessed November 20, 2016).

²⁰⁸ *Id.*

²⁰⁹ *Dred Scott v. Sanford*, 60 US 393 (1857).

²¹⁰ Biography.com, *Roger Taney*, available at <http://www.biography.com/people/roger-b-taney-21164235#synopsis>, (accessed November 20, 2016).

²¹¹ Michel Holt, *Reverdy Johnson: 1850-1850*, available at <http://millercenter.org/president/essays/johnson-1850-attorney-general> (accessed November 10, 2016).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*, 74 (2011).

²¹⁵ Michel Holt, *Reverdy Johnson: 1850-1850*, <http://millercenter.org/president/essays/johnson-1850-attorney-general> (accessed November 10, 2016).

²¹⁶ *Id.*

William Wirt and Jonathan Meredith both had successful careers following the resolution of *Brown*. Wirt would remain Attorney General until Andrew Jackson's election in 1829, after which he returned to Baltimore to practice law.²¹⁷ He argued two of the most significant Supreme Court cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, in which he represented the Cherokee Nation in their legally successful (although ultimately ill-fated) effort to keep their tribal territory within Georgia.²¹⁸ In 1832, Wirt ran for President against Jackson as the nominee of the Anti-Masonic Party.²¹⁹ While ultimately unsuccessful, Wirt did carry the state of Vermont.²²⁰ He would once again return to the practice of law before his death in 1834.²²¹

Of all the attorneys involved in *Brown*, Jonathan Meredith is arguably the least-well known. However, he went on to have a successful career as a lawyer in Baltimore. Meredith spent the rest of the 1820s and 1830s as attorney for the Bank of Baltimore and continued to work with Wirt.²²² In the 1840s and 1850s he expanded his practice to include work with the Bank of the United States.²²³ Although he never became a major political figure in Maryland or nationally, Meredith's successful argument in front of the Supreme Court (and against two future United States Attorneys General) places him in the ranks of elite litigators. He passed away in 1872.²²⁴

Alexander Brown & Sons would also go on to immense financial and business success after the resolution of their case. The company continued to grow throughout the 1820s and

²¹⁷ John P. Kennedy, *Memoirs of the Life of William Wirt: Attorney-General of the United States*, 258-260 (1872).

²¹⁸ John P. Kennedy, *Memoirs of the Life of William Wirt: Attorney-General of the United States*, 335-350 (1872).

²¹⁹ *Id.* at 365-385.

²²⁰ *Id.* at 382.

²²¹ *Id.* at 424.

²²² *Library of Congress, Jonathan D. Meredith Papers: A Finding Guide*, 4 (2012),

<http://rs5.loc.gov/service/mss/eadxmss/eadpdfmss/2012/ms012148.pdf>, (Accessed November 1, 2016).

²²³ *Id.*

²²⁴ *Id.*

1830s, eventually taking the lead in financing the Baltimore and Ohio Railroad.²²⁵ The firm was a financial powerhouse, helping to stem economic panics and even seeing George Brown elected Mayor of Baltimore.²²⁶ Alexander Brown passed away in 1834, seven years after the decision in *Brown*, and after seeing the immense growth of his firm from a small local importer to a national power.²²⁷ After almost two centuries of success, Alexander Brown & Sons was purchased by Bankers Trust in 1997, although the name still survives as a branch of Raymond James.²²⁸

VI. Conclusion

Brown v. Maryland is a seminal, yet underrated, Supreme Court case. Coming before the Court during a time of rapid economic change in the United States, it presented a unique opportunity for the justices to shape the development of the still-young nation. The United States had yet to firmly establish itself as a dominant economic power, and there were only 24 states in the Union at the time. The central question in front of the Court in *Brown* was whether the United States would be guided by a centralized economic policy decided by Washington, or whether the various states would be given great leeway over matters of commerce, even when they effected foreign and interstate trade. The Court's decision placed them squarely behind the notion of a unified national economy, and while the United States varied in how much economic centralization should take place, they have never reverted to a system akin to the Articles of Confederation, which ruling in favor of the Revenue Act could have led to.

²²⁵ Bill Atkinson, A. *Brown to merge in \$1.7 billion deal Old Baltimore firm, Bankers Trust are called 'superb fit,'* Baltimore Sun, April 7, 1997, http://articles.baltimoresun.com/1997-04-07/news/1997097069_1_bankers-trust-alex-merger/2.

²²⁶ *Id.*

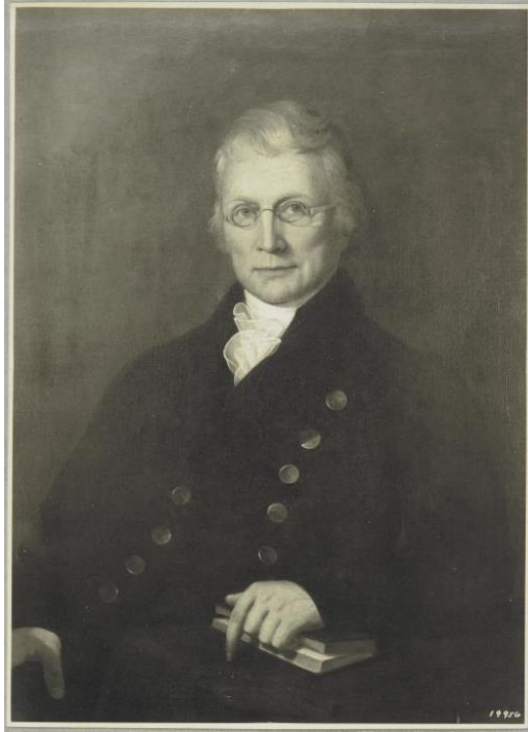
²²⁷ Bill Atkinson, A. *Brown to merge in \$1.7 billion deal Old Baltimore firm, Bankers Trust are called 'superb fit,'* Baltimore Sun, April 7, 1997, http://articles.baltimoresun.com/1997-04-07/news/1997097069_1_bankers-trust-alex-merger/2.

²²⁸ Raymond James, *Acquisition Announcement*, available at http://www.raymondjames.com/alex_brown/, (Accessed November 20, 2016).

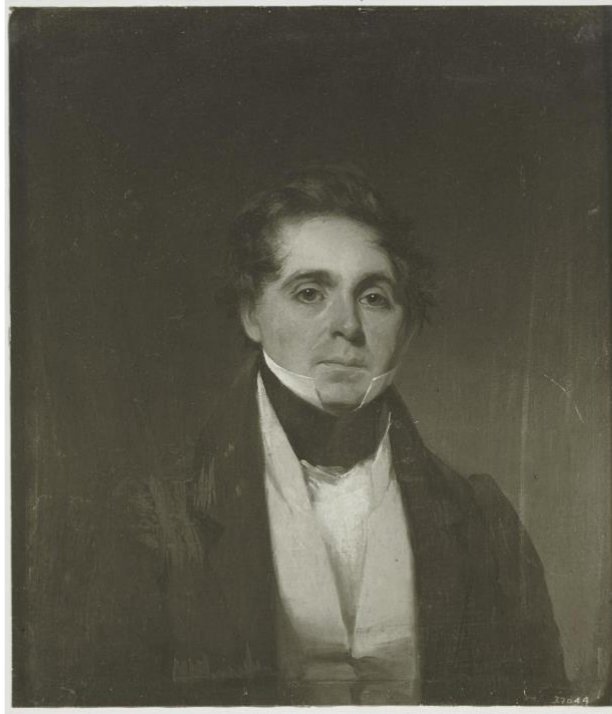
Additionally, While the “Original Package” doctrine is no longer the law of the land, *Brown v. Maryland* still maintains a significant impact on the Court’s interpretation of the Commerce Clause. Since 1827, the states have been prohibited from employing discriminatory taxes against imported goods in an attempt to protect their local businesses and producers. While the specific definition of what constitutes discriminatory taxation may have evolved, the principal of the Court’s ruling in *Brown* remains intact. The Court has certainly never made an about-face and decided that the states may levy tariffs on imports from other countries or states. This shows the continued impact and validity of the central finding in *Brown*: That the states may not use the tax code to increase the costs of imports coming into their state, a finding which shows the continued importance and validity of Chief Justice Marshall’s vision for an economically united nation with a strong central government at the helm.

Appendix

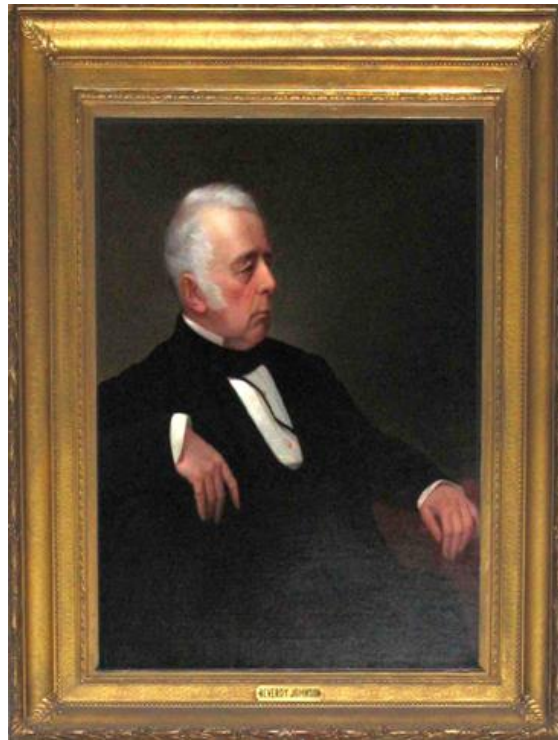
Alexander Brown (Frick Art Reference,
<http://digitalcollections.frick.org/digico/#/details/bibRecordNumber/b10583932/Photoarchive>)



Jonathan Meredith (Frick Art Reference)



Reverdy Johnson (Maryland State Archives,
http://msa.maryland.gov/msa/speccol/sc5500/sc5590/html/johnson_r_mcr400.html)



Roger B. Taney (Frick Art Reference,
<http://digitalcollections.frick.org/digico/#/details/bibRecordNumber/b13113070/Photoarchive>)



United States Attorney General William Wirt (Frick Art Reference,
<http://digitalcollections.frick.org/digico/#/details/bibRecordNumber/b11457508/Photoarchive>)



Chief Justice John Marshall (Britannica Online, <https://media1.britannica.com/eb-media/36/133536-004-55364F10.jpg>)



Justice Smith Thompson (The Supreme Court Historical Society, http://supremecourthistory.org/assets/015_thompson.jpg)

