

## CONTROLLING LEGAL PRINCIPLES

### *Free Exercise Clause Decision – The “Contemplation of Justice”* *Gibbons v. Ogden, 22 U.S. 1 (1824)*



The laws of New York granting to Robert R. Livingston and Robert Fulton the exclusive right of navigating the waters of that State with steamboats are in collision with the acts of Congress regulating the coasting trade, which, being made in pursuance of the Constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

The power of regulating commerce extends to the regulation of navigation.

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.

But it does not extend to a commerce which is completely internal.

The power to regulate commerce is general, and has no limitations but such as are prescribed in the Constitution itself.

The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.

A license under the acts of Congress for regulating the coasting trade gives a permission to carry on that trade.

State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress.

The license is not merely intended to confer the national character.

Thoughts, Words and Actions for Plaintiff's Quintessential Rights of the First Amendment:  
*Truths that manifest Life, Liberty & Pursuit of Happiness pursuant to the Free Exercise Clause*

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

The power of regulating commerce extends to vessels propelled by steam or fire as well as to those navigated by the instrumentality of wind and sails.

Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the

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exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired, and authorizing the Chancellor to award an injunction restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the City of New York, and that Gibbons, the defendant below, was in possession of two steamboats, called the *Stouddinger* and the *Bellona*, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed to be employed in carrying on the coasting trade under the Act of Congress, passed the 18th of February, 1793, c. 3. entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the City of New York, the said acts of the Legislature of the

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State of New York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the Constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the Constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the Constitutionality of these laws, and their Legislature, their Council of Revision, and their Judges, have repeatedly concurred in this opinion. It is supported by great names -- by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority, but it is the province of this Court, while it respects, not to bow to it implicitly, and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United

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States expect from this department of the government.

As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred, nor is there one sentence in

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the Constitution which has been pointed out by the gentlemen of the bar or which we have been able to discern that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a "strict construction?" If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood,

import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects

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for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. **Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.** It describes the commercial

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intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation

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also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction acknowledged by all that the exceptions from a power mark its extent, for it would be absurd, as well as useless, to except from a granted power that which was not granted -- that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations, and the most obvious preference which can be given to one port over another in regulating commerce relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united

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in that construction which comprehends navigation in the word commerce. Gentlemen have said in argument that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in

similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies, it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition

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to this. Yet they never suspected that navigation was no branch of trade, and was therefore not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the Constitution not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the Constitution to vessels, and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be

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carried on between this country and any other to which this power does not extend. It has been truly said that "commerce," as the word is used in the Constitution, is a unit every part of which is indicated by the term.

If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words 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.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention

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been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem 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.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when

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applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them, and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of

necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry -- What is this power?

It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the

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questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often they solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations and among the several States be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally

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exercise the same power, within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the Constitution, and still retain it except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.



The appellant, conceding these postulates except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the Constitution, to legislative acts, and judicial decisions, and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the State, and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly

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exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division, and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments, nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress,

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and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is can a State regulate commerce with foreign nations and among the States while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. They say very truly that limitations of a power furnish a strong argument in favour of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports proves that this power might have been exercised had it not been expressly forbidden, and consequently that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent may still be made.

That this restriction shows the opinion of the Convention that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded, but that it follows as a consequence

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from this concession that a State may regulate commerce with foreign nations and among the States cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the Constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts and as being a new power, not before conferred. The Constitution, then, considers these powers as substantive, and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject, and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States

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to levy taxes, not from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax as a duty on imports or exports, and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a State, with the consent of Congress, and it may be admitted that Congress cannot give a right to a State in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce, but they may be also imposed with a view to revenue, and it was therefore a prudent precaution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different

classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted, but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

These restrictions, then, are on the taxing power,

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not on that to regulate commerce, and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognised in the Constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labour of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress, and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes, it must be where the

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power is expressly given for a special purpose or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers -- that, for example, of regulating commerce with foreign nations and among the States -- may use means that may also be employed by a State in the exercise of its acknowledged powers -- that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains

with the State and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers, but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one General Government whose

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action extends over the whole but which possesses only certain enumerated powers, and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress passed in 1796 and 1799, 2 U.S.L. 345, 3 U.S.L. 126, empowering and directing the officers of the General Government to conform to and assist in the execution of the quarantine and health laws of a State proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea, and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations or among the States, for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose and in virtue of this power might

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interfere with and be affected by the laws of the United States made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws, and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested that Congress may control the State laws so far as it may be necessary to control them for the regulation of commerce. The act passed in 1803, 3 U.S.L. 529, prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them, from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct, if this power was exercised not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any State might now import African slaves into its

own territory. But it is obvious that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of

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Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the preexisting right of the States to admit or exclude, for a limited period. The words are

"the migration or importation of such persons as any of the States, now existing, shall think proper to admit shall not be prohibited by the Congress prior to the year 1808."

The whole object of the exception is to preserve the power to those States which might be disposed to exercise it, and its language seems to the Court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made

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in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States until Congress should think proper to interpose, but the very enactment of such a law indicates an opinion that it was necessary, that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbours, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. 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 to a considerable extent, and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows conclusively an opinion that Congress could control the whole subject, and might adopt the system of the States or provide one of its own.

A State, it is said, or even a private citizen, may construct light houses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States or individuals who own lands may, if not forbidden by law,

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erect on those lands what buildings they please, but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant that, as the word "to regulate" implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether

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of trading or police, the States may sometimes enact laws the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States" or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress, and the decision sustaining the privilege they confer against a right given by a law of the Union must be erroneous.

This opinion has been frequently expressed in this Court, and is founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act

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inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution or some treaty made under the authority of the United States. In every such case, the act of Congress or the treaty is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a preexisting right so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur that, when a Legislature

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attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the Court, it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels enrolled as described in that act, and having a license in force, as is by the act required,

"and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the Court to contain a positive enactment that the the vessels it describes shall

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be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade," and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are,

"license is hereby granted for the said steamboat *Bellona* to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer, they are the words of the legislature, and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

The word "license" means permission or authority, and a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to

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him all the right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be, a legislative authority to the steamboat *Bellona* "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified, but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it, and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.



Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade, and that its sole purpose is to confer the American character.

The answer given to this argument that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels

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designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burthen of twenty tons and upwards, and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do -- that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct, and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed

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in the transportation of a cargo, and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership are as applicable to vessels carrying men as to vessels carrying manufactures, and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of Congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the Constitution or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the Constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such

persons as any of the States may think proper to admit until the year 1808 has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary as importation does to involuntary arrivals, and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally

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to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections 23 and 46, contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally, and, on the 2d of March, 1819, passed "an act regulating passenger ships and

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vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the Department of State, but makes no provision concerning the entry of the vessel or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required) that the preexisting regulations comprehended passenger ships among others, and, in prescribing the same duties, the Legislature must have considered them as possessing the same rights.

If, then, it were even true that the *Bellona* and the *Stoudinger* were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the Court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and

relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the

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United States permit them to enter and deliver in New York. If by the latter, those waters are free to them though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the State Court. The bill does not complain that the *Bellona* and the *Stouddinger* carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege specially that those vessels were employed in the transportation of passengers, but says generally that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels not from carrying passengers, but from being moved through the waters of New York by steam for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade and whether a vessel can be protected in that occupation by a coasting license are not, and cannot be, raised in this case. The real and sole question seems to be whether a steam machine in actual use deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself is that the laws of Congress for the regulation of commerce do not look to the

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principle by which vessels are moved. That subject is left entirely to individual discretion, and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the Legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act granting a particular privilege to steamboats. With this exception, every act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the Court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history that, in our western waters, their principal employment is the transportation of merchandise, and all know that, in the waters of the Atlantic, they are frequently so employed.

But all inquiry into this subject seems to the Court to be put completely at rest by the act already

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mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union, and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts.

The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavour to prove that which is already clear is imputable to

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a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken, and although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar demanded that we should assume nothing.

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass and that the original powers of the States are retained if any possible construction will retain them may, by a course of well digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and when sustained, to make them the tests of the arguments to be examined.

Mr. Justice JOHNSON.

The judgment entered by the Court in this cause, has my entire approbation, but, having adopted my conclusions on views

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of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have also another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.

In attempts to construe the Constitution, I have never found much benefit resulting from the inquiry whether the whole or any part of it is to be construed strictly or literally. The simple, classical, precise, yet comprehensive language in which it is couched leaves, at most, but very little latitude for construction, and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it in the best manner to effect the purposes intended. The great and paramount purpose was to unite this mass of wealth and power, for the protection of the humblest individual, his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the States that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

The strong sympathies, rather than the feeble government, which bound the States together during a common war dissolved on the return of peace, and the very principles which gave rise to the war of the revolution began to threaten the

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Confederacy with anarchy and ruin. The States had resisted a tax imposed by the parent State, and now reluctantly submitted to, or altogether rejected, the moderate demands of the Confederation. Everyone recollects the painful and threatening discussions which arose on the subject of the five percent. duty. Some States rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and at length, some repealed the laws by which they had signified their acquiescence.

For a century, the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures from which grew up a conflict of commercial regulations destructive to the harmony of the States and fatal to their commercial interests abroad.

This was the immediate cause that led to the forming of a convention.

As early as 1778, the subject had been pressed upon the attention of Congress by a memorial from the State of New Jersey, and in 1781, we find a resolution presented to that body by one of

the most enlightened men of his day, Dr. Witherspoon, affirming that

"it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every State that none may take place that shall be partial or contrary to the common interests."

The resolution of Virginia, January 21, 1781, appointing her commissioners to meet commissioners from other States, expresses their purpose to be

"to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony."

And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point:

"Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations,"

&c. "therefore, resolved," &c.

The history of the times will therefore sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing and the purpose of remedying those

evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made.

There was not a State in the Union in which there did not at that time exist a variety of commercial regulations; concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation under the authority of the Union. But where was the existing statute on this subject that a State attempted to execute? or by what State was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute books for want of the sustaining power that had been relinquished to Congress.

And the plain and direct import of the words of the grant is consistent with this general understanding.

The words of the Constitution are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

It is not material, in my view of the subject, to inquire whether the article a or the should be prefixed to the word "power." Either or neither will produce the same result: if either, it is clear that the article "the" would be the proper one, since the next preceding grant of power is certainly exclusive, to-wit: "to borrow money on the credit

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of the United States." But mere verbal criticism I reject.

My opinion is founded on the application of the words of the grant to the subject of it.

The "power to regulate commerce" here meant to be granted was that power to regulate commerce which previously existed in the States. But what was that power? The States were unquestionably supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign State. The definition and limits of that power are to be sought among the features of international law, and, as it was not only admitted but insisted on by both parties in argument that, "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent States was legitimate," there is no necessity to appeal to the oracles of the *jus commune* for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive law. The power of a sovereign state over commerce therefore amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate, and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

And such has been the practical construction of

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the act. Were every law on the subject of commerce repealed tomorrow, all commerce would be lawful, and, in practice, merchants never inquire what is permitted, but what is forbidden commerce. Of all the endless variety of branches of foreign commerce now carried on to every quarter of the world, I know of no one that is permitted by act of Congress any otherwise than by not being forbidden. No statute of the United States that I know of was ever passed to permit a commerce unless in consequence of its having been prohibited by some previous statute.

I speak not here of the treaty-making power, for that is not exercised under the grant now under consideration. I confine my observation to laws properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction, or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate foreign commerce is given in the same words,

and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The States are unknown to foreign nations, their sovereignty exists only with relation to each other and the General Government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the General Government would be

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held responsible for them, and all other regulations but those which Congress had imposed would be regarded by foreign nations as trespasses and violations of national faith and comity.

But the language which grants the power as to one description of commerce grants it as to all, and, in fact, if ever the exercise of a right or acquiescence in a construction could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

A right over the subject has never been pretended to in any instance except as incidental to the exercise of some other unquestionable power.

The present is an instance of the assertion of that kind, as incidental to a municipal power; that of superintending the internal concerns of a State, and particularly of extending protection and patronage, in the shape of a monopoly, to genius and enterprise.

The grant to Livingston and Fulton interferes with the freedom of intercourse, and on this principle, its constitutionality is contested.

When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself, inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods, but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce, the subject,

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the vehicle, the agent, and their various operations become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce.

That such was the understanding of the framers of the Constitution is conspicuous from provisions contained in that instrument.

The first clause of the 9th section not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledges it as a legitimate subject of revenue. And, although the leading object of this section



undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognise in Congress a power to prohibit where the States permit, although they cannot permit when the States prohibit. The treaty-making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the Convention as to the power of Congress over navigation: "nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

But it is almost labouring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption and continued exercise of the power, and universal acquiescence, have so clearly established

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the right of Congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steamboat, I consider it as having been solemnly recognised by the State of New York as a subject both of commercial regulation and of revenue. She has imposed a transit duty upon steamboat passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steamboat itself appears to be but a commutation, and operates as an indirect, instead of a direct, tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States among themselves rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction that, if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of would be as

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strong as it is under this license. One half the doubts in life arise from the defects of language, and if this instrument had been called an exemption instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts, as, for example, acts licensing gaming houses, retailers of spiritous liquors, &c. The act in this instance is distinctly of that character, and forms part of an extensive system the object of which is to encourage American shipping and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade, and a countervailing privilege in favour of American shipping is contemplated in the whole legislation of the United States on this subject. It is not to give the vessel an American character that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign, and to preserve the government from fraud by foreigners in surreptitiously intruding themselves into the American

commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce which would be burdensome in the active coasting trade of the States, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it to those exemptions, but to nothing more.

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A common register equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise upon complying with the requisitions of the 24th section. I consider the license therefore as nothing more than what it purports to be, according to the first section of this act, conferring on the licensed vessel certain privileges in that trade not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

Yet there is one view in which the license may be allowed considerable influence in sustaining the decision of this Court.

It has been contended that the grants of power to the United States over any subject do not necessarily paralyze the arm of the States or deprive them of the capacity to act on the same subject. The this can be the effect only of prohibitory provisions in their own Constitutions, or in that of the General Government. The *vis vitae* of power is still existing in the States, if not extinguished by the Constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the Government, brought into existence by the Constitution, they, of course, are out of the reach of State power, yet, as to all concessions of powers which previously existed in the States, it was otherwise. The practice of our Government certainly

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has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require. Witness the jurisdiction of the Circuit Courts, limited both as to cases and as to amount, and various other instances that might be cited. But the license furnishes a full answer to this objection, for, although one grant of power over commerce, should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the States must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade are made the subject of regulation by that act. And this license proves that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

It remains, to consider the objections to this opinion, as presented by the counsel for the appellee. On those which had relation to the particular character of this boat, whether as a steamboat or a ferry boat, I have only to remark that, in both those characters, she is expressly recognised as an object of the provisions which relate to licenses.

The 12th section of the Act of 1793 has these words: "That when the master of any ship or vessel, ferry boats excepted, shall be changed," &c. And the act which exempts licensed steamboats

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from the provisions against alien interests shows such boats to be both objects of the licensing act and objects of that act when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise,

1st. From the unavoidable action of some of the municipal powers of the States upon commercial subjects.

2d. From passages in the Constitution which are supposed to imply a concurrent power in the States in regulating commerce.

It is no objection to the existence of distinct, substantive powers that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities for which, by the consent of mankind, a compensation is paid upon the same principle that the whole commercial world submit to pay light money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious that

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the Constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favour of the power of the States over commerce, I cannot but think that the guarded provisions of the 10th section on this subject furnish a strong argument against that inference. It was obvious that inspection laws must combine municipal with commercial regulations, and, while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences to be correctly drawn from this whole article appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

This section contains the positive restrictions imposed by the Constitution upon State power. The first clause of it specifies those powers which the States are precluded from exercising, even though the Congress were to permit them. The second, those which the States may exercise with the consent of Congress. And here the sedulous attention to the subject of State exclusion from commercial power is strongly marked. Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power to the States as to the

only two objects which could ever tempt them to assume the exercise of that power, to-wit, the collection of a revenue from imposts and duties on imports and exports, or from a tonnage duty. As

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to imposts on imports or exports, such a revenue might have been aimed at directly, by express legislation, or indirectly, in the form of inspection laws, and it became necessary to guard against both. Hence, first, the consent of Congress to such imposts or duties is made necessary, and, as to inspection laws, it is limited to the minimum of expenses. Then the money so raised shall be paid into the Treasury of the United States, or may be sued for, since it is declared to be for their use. And lastly, all such laws may be modified or repealed by an act of Congress. It is impossible for a right to be more guarded. As to a tonnage duty that could be recovered in but one way, and a sum so raised, being obviously necessary for the execution of health laws and other unavoidable port expenses, it was intended that it should go into the State treasuries, and nothing more was required therefore than the consent of Congress. But this whole clause, as to these two subjects, appears to have been introduced *ex abundanti cautela*, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the States to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it. And thus we have the whole effect of the clause. The inference which counsel would deduce from it is neither necessary nor consistent with the general purpose of the clause.

But instances have been insisted on with much confidence in argument in which, by municipal

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laws, particular regulations respecting their cargoes have been imposed upon shipping in the ports of the United States, and one in which forfeiture was made the penalty of disobedience.

Until such laws have been tested by exceptions to their constitutionality, the argument certainly wants much of the force attributed to it; but, admitting their constitutionality, they present only the familiar case of punishment inflicted by both governments upon the same individual. He who robs the mail may also steal the horse that carries it, and would unquestionably be subject to punishment at the same time under the laws of the State in which the crime is committed and under those of the United States. And these punishments may interfere, and one render it impossible to inflict the other, and yet the two governments would be acting under powers that have no claim to identity.

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points, they meet and blend so as scarcely to admit of separation. Hitherto, the only remedy has been applied which the case admits of -- that of a frank and candid cooperation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the States and to aid in enforcing their health laws, that which surrenders to the States the superintendence of pilotage, and the

many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited abundantly to prove that collision must be sought to be produced, and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means therefore is no argument to prove the identity of their respective powers.

I have not touched upon the right of the States to grant patents for inventions or improvements generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision if they cannot exercise it so as to restrain a free intercourse among the States.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, this Court is of opinion that the several licenses to the steamboats the *Stoudinger* and the *Bellona* to carry on the coasting trade, which are set up by the appellant Thomas Gibbons in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the Constitution of the

United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding, and that so much of the several laws of the State of New York as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York by means of fire or steam is repugnant to the said Constitution, and void. This Court is therefore of opinion that the decree of the Court of New York for the Trial of Impeachments and the Correction of Errors affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New York with the steamboats the *Stoudinger* and the *Bellona* by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled, and this Court doth further DIRECT, ORDER, and DECREE that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly.