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THE LAW GOVERNING AN ORIGINAL PACKAGE.

In the December number (1889) of THE AMERICAN LAW REGISTER (volume 28, pages 733-747), the constructions put upon the Commerce Clause of the Constitution at different periods during the first Century of the existence of the Supreme Court were reviewed for the purpose of demonstrating the safety of our dual systems of government, under the various decisions which necessarily called for some particular limitation upon either the National or the State authority. The decision of the so-called Original Package Case, since the publication of that article, calls for a more extended review of the cases actually decided, and this, in their order of time, and with the simple object of setting forth the settled law especially governing the transmission of merchandise from State to State for the purpose of sale.

I.

The agencies established by the Articles of Confederation were not entitled to the dignified appellation of government: McLean, J. License Cases (1847), 5 How. (46 U. S.) 587.

The Articles of Confederation, which were ratified by State after State, from 1777 to March 1st, 1781, when Maryland gave her ratification, provided—
ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

The effect of this clause, and the care taken to avoid the same effect in the Constitution, were thus stated by Marshall:—

But there is no phrase in the instrument [the Constitution] which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments: (McCulloch v. The State of Maryland et al., 4 Wheat. 17 U. S. 406.)

The breadth of this clause may be understood from the sentiments of Justice BALDWIN, in his concurring opinion in the Milt case, infra.

In the Declaration of Rights in 1774, Congress expressly admitted the authority of such acts of Parliament "as were bona fide restrained to the regulation of external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subject in America, without their consent." But in admitting this right, they asserted the free and exclusive power of "legislation in their several provincial legislatures, in all cases of taxation and internal polity, subject only to the negative of their sovereign, as has been heretofore used and accustomed." Taxation was not the only fear of the colonies, as an incident or means of regulating external commerce; it was the practical consequences of making it a pretext of assuming the power of interfering with their "internal policy," changing their "internal police," "the regulation thereof," "of intermeddling with our provisions for the support of civil government, or the administration of justice." The States were equally afraid of intrusting their delegates in Congress with any powers which should be so extended by implication, or construction, of which the instructions of Rhode Island, in May, 1776, are a specimen: "Taking the greatest care to secure to this Colony, in the strongest and most perfect manner, its present form and all powers of government, so far as it relates to its internal police, and conduct of our own officers, civil and
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religious." In consenting to a declaration of independence, the Convention of Pennsylvania added this proviso, that "the forming the government, and regulating the internal police of the colony, be always reserved to the people of the colony:" (Bald. Views, 182.)

**Police Power.**

The question of the police power of the States cannot be fully entered into here for want of space, but it is necessary to observe what is meant by this phrase. To a mind constituted like that of Chief Justice Taney, the police power is nothing more or less than the sovereign power; (License Cases, 5 How. 46 U. S. 583.) This seems to have been the opinion of Justice Matthews in Bowman v. Chicago & N. W. R. Co. 125 U. S. 497, 498, when he held the Iowa Statute to be void because not an exercise of jurisdiction over persons and property within the State, but without; if the railroad company and liquors offered for transportation had been wholly within the State, then they would have been the subject not merely of laws for the benefit of health and morals, but also of certain arbitrary policies looking to local benefit alone; to all of these, the police power would extend. Chief Justice Fuller quoted these sentiments with approval in the opinion of the Court in the Original Package Case, thereby confirming a political terminology already introduced; whereby sovereignty is an attribute of the nation, while the police power expresses all the authority reserved by the Tenth Amendment of the Constitution to the States respectively as distinguished from the people.

Chief Justice Waite, in Munn v. Illinois (1877), 94 U. S. 113, 125, applied this broad definition to the State regulation of grain elevator charges, which was sustained as an exercise of constitutional authority over the conduct of one citizen towards another, in the use of private property, for the public good. And, in Stone v. Mississippi, (1879) 11 Otto (101 U. S.) 814, the Chief Justice affirmed the application of this power to the suppression of a lottery claiming protection for its charter as a contract: the protection was denied, by confining it to property, as distinguished from governmental rights, and the explanation given, that—
Many attempts have been made in this Court and elsewhere, to define the police power, but never with entire success. But the power of governing is a trust, committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." (II Otto, 101 U. S., 818, 820.)

Justice Harlan, in the Oleomargarine case of Powell v. Pennsylvania (1887), 127 U. S. 678, 685, sustained the State law, forbidding the manufacture of oleomargarine, on the ground that the legislative power to promote the general welfare was very great and the legislative discretion in the execution of that power was very large: and this, notwithstanding the dissenting opinion by Justice Field, pointed out that this particular law was really founded upon the competency of the legislature to prescribe what articles of food, out of many equally healthy, might not be sold: (Id. 689-90.) This Oleomargarine case expressly followed Mugler v. Kansas (1887), 123 U. S. 623, which in turn followed Barbier v. Connelly, of which the important sentence is quoted, at the bottom of this page.

Justice Gray, in Wurts v. Hoagland (1884), 114 U. S. 606, thus sustained a drainage law, as a constitutional exercise of legislative power, without reference to the right of Eminent Domain or the power of suppressing a nuisance.

Justice Field, notwithstanding his views in the Oleomargarine and other cases (infra page 413), recognized this view in the San Francisco laundry case, when considering the effect of the Fourteenth Amendment to the Constitution of the United States upon a local ordinance—

But neither the Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity: Barbier v. Connolly (1884), 113 U. S. 27, 31.
In the language of Justice Harlan, *(N. O. G. L. Co. v. La. L. & H. P. & M. Co. (1885), 115 U. S. 250, 661)*, this defines the police power, in the broadest sense, to include all legislation and almost every function of civil government.

*Sic utere tuo ut alienum non laedas.*

Those who regard the police power as something not touched by the Constitution, distinguish between the ordinary powers of government and those especially relating to good morals and the public health. This distinction is largely used in most of the opinions in the *License Cases*, especially in those portions of these opinions which are quoted by Justice Gray in his dissenting opinion in the *Original Package Case* *(infra).* How far there can be an agreement in holding this view of the police powers of the States, may appear by a quotation from the opinion of Justice Field, concurring with the majority of the Court in the Bowman case *(infra)*—

The reserved power of the States, in the regulation of their internal affairs, must be exercised consistently with the exercise of the powers delegated to the United States. If there be a conflict, the powers delegated must prevail, being so much authority taken from the States by the express sanction of their people; for the Constitution itself declares that laws made in pursuance of it, shall be the supreme law of the land. But those powers which authorize legislation touching the health, morals, good order and peace of their people, were not delegated, and are so essential to the existence and prosperity of the States, that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise: *(125 U. S. 503)*

The language of the same Justice, in his dissenting opinion in *Munn v. Illinois*, will make the meaning of the last sentence more distinct. There, he was speaking of the Fourteenth Amendment and usual State constitutional guarantees, that no person shall be deprived of his property without due process of law, and he distinguished the methods of exercising the power of the State over private property into three classes, the last being what is usually known as the police power—

The State may take his property for public uses, upon just compensation being made therefor.

It may take a portion of his property by way of taxation for the support of the government.
It may control the use and possession of his property so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as to not injure his neighbor—*Sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property: and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits: (94 U. S. 145.)

Naturally, Justice FIELD also dissented in the Oleomargarine Butter case (*Powell v. Pennsylvania*, 1887, 127 U. S. 678); and while concurring with the majority of the Court in *Bowman v. Chicago & N. W. RR. Co.* (1887), 125 U. S. 465, 501, took care to add that the police powers could not be used to define an article of commerce.

This definition of the police power is agreement with the sentiments of Justice WOODBURY, in the *License Cases* (1847), 5 How. (46 U. S.) 627; Justice GRIER, Id., 631; Justice MCLEAN, in the *Passenger Cases* (1849), 7 How. (48 U.S.) 283, 398, 400; Justice STRONG, in *Hannibal & St. J. RR. Co. v. Husen* (1877) 95 U. S. 465, 471; Justice MILLER, in *The Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, and *Morgan's RR. & S. Co. v. La.* (1886), 118 U. S. 455, 464; and many other Judges in cases where there is no interstate commerce question involved.

The distinction between the two views of the police power is important in all cases where the right of Congress to regulate commercial intercourse, comes into collision with an assertion of State authority excused by being an exercise of the police power. Not that there can be any doubt of the supremacy of the Constitution and the constitutional laws of the United States: *infra*, page 425. But there is a professional and consequently a lay discontent with opinions sustaining the Commerce powers of the Union, when they are examined by the solitary touchstone of these police powers of the States.

This is probably due to the superficial thought that these powers are not among those delegated to the United States. From the position of TANEY and WAITE and FULLER, there is
no weakening of State sovereignty, as commonly understood by any decision favorable to commerce among the States: the National power was granted in 1789, though possibly not used until 1890, and the rules of sixty years ago are now enforced in much the same way they were when originally applied.

The General Welfare includes an intercourse of both persons and property.

The Articles of Confederation further provided, that—

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

This clause, in a much abbreviated form, is now the First Clause of the Second Section of the Fourth Article of the Constitution (infra); and, in the latter form, is alluded to in Gibbons v. Ogden (infra) as the equal rights clause. The connection of this clause with interstate commerce arises from its object, here avowed to be for the security and perpetuity, not of mutual friendship alone, but of that interested kind which arises from intercourse. This last word was much discussed until the decision in the Passenger Cases (infra) fixed its definition. At that point in this article, the definition will be examined.

The power to regulate foreign commerce by treaty, always belonged to the general government.

The Articles of Confederation further provide, that—

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the
legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.

This clause was commented upon by Chief Justice Marshall, in *Brown v. Maryland*, at the very inception of that part of his opinion where he discussed the conflict between a tax upon an importer and the Commerce clause of the Constitution (Art. I. Sec. 8).

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them, had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity: (12 Wheat. 25 U S. 445-6.)

A legal definition of "Commerce" was soon called for in the case of *Gibbons v. Ogden* (infra); to that place the consideration of this word, in its constitutional sense, may be deferred.

The effect of a treaty upon foreign commerce, was much discussed in the *Passenger Cases* (1849), 7 Howard (48 U. S.) 283, but no decision reached as the laws of Massachusetts and New York were declared to be in conflict with the commerce clauses of the Constitution, aside from any national law or treaty. The supremacy of a treaty is secured by the Sixth Article of the Constitution, but the language of the Constitution implies that the validity of a treaty is bounded only by the "authority of the United States," and so extensive a sub-
ject must be omitted here, for future consideration. (See 1 Story, Const. § 1841, and notes by Cooley.)

II.

The construction of the Constitution should be influenced, in cases of doubt, by the objects sought in the adoption of the instrument, and its declaration of supremacy within its own sphere.

As soon as drafted, and ever since, there has been a dispute over the method of interpreting the language of the Constitution. Some consideration must necessarily be given to this fundamental principle, and there is here gathered a statement of the views expressed or quoted by the jurists of the country with the Commerce Clause of the Constitution especially before them.

State Taxation of Commerce.

Commenting upon the power of taxation given by the Constitution, Hamilton argued—

An entire consolidation of the States into one complete National sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different: I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority: The Federalist, No. 32 (No. 31 of Dawson’s ed.).

In connection with these palliating sentences of Hamilton, it is to be observed that the result of the principles of McCullough v. The State of Maryland (1819), 4 Wheat. (17 U. S.) Vol. XXXVIII.—27.
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316, affirmed and applied to importations from both foreign and sister States in Brown v. The State of Maryland (infra), subordinates the power of every State in respect to taxation, to the Constitution of the Union and the construction put upon it by the National Supreme Court. Similarly, there result from the principles of Gibbons v. Ogden (infra), affirmed and applied in the Passenger Cases (infra), the same subordination of the State taxing power, in respect to persons and the instruments of commerce. All of these principles are more fully considered a few pages later, under the appropriate sections of the Constitution.

A Strict Construction improper.

When Chief Justice MARSHALL came to read the opinion in Gibbons v. Ogden, infra, he found it worth while to begin with this preliminary remark, in relation to the Constitution,—

The 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 of 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 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. * * * 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 for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction: (9 Wheat. 22 U. S. 188.)

Three years later, when the Chief Justice came to decide Brown v. Maryland, he made another preliminary remark worthy of attention—

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power: (12 Wheat. 25 U. S. 437.)
Previously when writing the opinion in *McCullough v. Maryland*, in 1819, the question of an implied power came under discussion, as there was no direct grant of power to Congress to incorporate a bank; the power was sustained and the rule thus declared:—

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional: (*McCulloch v. The State of Maryland et al.*, 4 Wheat. 17 U. S. 421.)

Justice JOHNSON, in his concurring opinion in *Gibbons v. Ogden*, gave another objection to the too prevalent strict construction rule—

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 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: (*9 Wheat. 22 U. S. 223.*)

Fourteen years later, Justice BALDWIN was called upon to decide the question of an implication from the constitutional power of the Supreme Court over controversies between two or more States. Justice BALDWIN's views were quite diverse from those of MARSHALL, (see under the Miln Case, *infra*), and yet he too admitted the necessity of recognizing implied powers:—

That some degree of implication must be given to words, is a proposition of universal adoption: implication is but another term for meaning.
and intention apparent in the writing, on judicial inspection; "the evident consequence" (1 Bl. Com. 250), "or some necessary consequence resulting from the law," (Ld. Chan. in Bp. Sodor v. Derby, (1751,) 2 Ves. Sen. 357), or the words of an instrument, in the construction of which the words, the subject, the context, the intention of the person using them, are all to be taken into view. (Marshall, C. J., McCulloch v. Maryland, (1819), 4 Wheat. 17 U. S. 415; Baldwin, J., U. S. v. Arredondo et al., (1832), 6 Peters, 37 U. S. 739, 741.) Such is the sense in which the common expression is used in the books, "express words or necessary implication," such as arise on the words taken in connection with other sources of construction; but not by conjecture, supposition, or mere reasoning on the meaning or intention of the writing. * * * In the construction of the Constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted (Marshall, C. J., in Ogden v. Saunders, (1827), 12 Wheat. 25 U. S. 354; Cohens v. Virginia, (1821), 6 Wheat. 19 U. S. 416; Craig et al. v. Missouri, (1830,) 4 Peters, 29 U. S. 431, 432), to ascertain the old law, the mischief and the remedy: (Rhode Island v. Mass., (1838), 12 Peters, 37 U. S. 723.)

III.

The regulation of foreign and interstate commerce is exclusively vested in Congress, and the States may not legislate upon any subject entering into such commerce, unless the regulation is of a particular subject which does not require a general or uniform system and Congress has not directed otherwise. The Constitution provides, in Article One—

SECTION 8. The Congress shall have power * * * * * To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; * * * * *

This section is devoted exclusively to defining the powers conferred upon Congress: Miller, J., Morgan's RR. & S. Co. v. La. (1886), 118 U. S. 445, 467. Its meaning is not expressed in obscure language, and the words being selected with no intention to conceal power, must be understood in their natural sense: Marshall, C. J., Gibbons v. Ogden (1824), 9 Wheat., (22 U. S.) 188; Lamar, J., Kidd v. Pearson (1888), 128 U. S. I, 20.

The word "Regulate" was made the ground of an argument in the case of Gibbons v. Ogden, where it was said that the right to pass from State to State was not conferred by the Constitution, but by a higher law which every civilized man acknowledges. From this, the inference was drawn that the Congress might
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regulate the right but that the State might annihilate it. The Court assented to the former proposition, but denied the conclusion drawn as contrary to the more obvious conclusion that the power to exercise the license conferred by the regulation, must imply the continuance of the right which has been regulated by the license: (9 Wheat. 22 U. S. 211, 212.)

It will be observed that this early application of the heretical doctrine of nullification was made in a case arising in the State of New York and by an advocate for a monopoly.

It was repeated in the License Case of Pierce et al. v. New Hampshire (1847), 5 How. (46 U. S.) 504, 600, where the State Court appeared to Justice Catron to have assumed that the State had the power to declare any article of commerce to be deleterious to good morals and the public health, and consequently removed from that lawful commerce which Congress could regulate. Of course, this could not be, and yet the reasonable solution of the difficulty appeared alike to Justice Catron (ubi supra) and Justice Gray dissenting (in the Original Package Case), to be the construction of Kent, that the State might legislate until Congress interfered. Such solution preserves the power of local self-government, dear alike to the believer in the doctrine of States' Rights and of a strong National government. This solution did not become the law, as the State of New York first, and afterwards Massachusetts, compelled the Court, in the Passenger Cases, 1849 (infra), to adopt a construction which would preserve the constitutional power of Congress and yet leave the subjects of pilotage, quarantine, and the like, under the control of the various States. Congress did not act, perhaps from the curious objections of the slaveholders to a construction of the word Commerce which would include Negroes, and some of the States showed the strongest disposition to place destructive restraints upon commerce. The principles of Marshall were therefore fully carried out by his successors of quite different political principles, and in such a line of cases as to fix the interpretation of the commerce clause of the Constitution in the manner expressed at the head of this section.

Upon the general subject of the extent of this constitutional power, Justice Johnson, in his concurring opinion in Gibbons v.
Ogden, alluded to the well known condition of commercial affairs prior to the adoption of the Constitution, and concluded that the grant was of the supreme and exclusive power of each State, without regard to mere verbal criticism. In his own language,—

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 ** By common consent, those [State] laws dropped lifeless from their statute books, for want of the sustaining power, that had been relinquished to Congress: (9 Wheat. 22 U. S. 225-6.)

This construction of the word "Regulate" was approved by Justice BALDWIN in his concurring opinion in The Cherokee Nation v. Georgia (1831), 5 Peters (30 U. S.) 44; and was the basis of Chief Justice FULLER's opinion in the Original Package Case, infra. It is open, of course, to the uncertainty admitted by Justice McLEAN—

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case and so must every case be adjudged: (Passenger Cases, 1849, 7 How. 48 U. S. 402.)

The same feeling of uncertainty was expressed by Chief Justice WAITE (supra, pages 411-2) as late as 1879, and now in the Original Package Case, the present Chief Justice admits that in the absence of congressional regulation, the line bounding the power of a State over merchandise and persons from another State or a foreign country, must be laboriously traced from point to point as cases are determined by the Supreme Court of the United States. Such is the course pursued in this article, and the resulting information is summed up at its close, just before the Original Package Case is printed.

There is no restraint upon Congress in choosing the means of regulating foreign and interstate commerce.

Congress has a general power, which has been the subject of much controversy:—
To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof: (Art. 1, § 8, last clause.)

When Chief Justice MARSHALL was discussing the arguments advanced against the powers of the Bank of the United States, he met that most relied upon, by a consideration of the word "necessary" in this and in the Tenth Section of the First Article of the Constitution:

Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives, the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses, and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view: (McCulloch v. The State of Maryland et al. (1819), 4 Wheat. (17 U. S.) 414, 415.)

This was merely a more extended statement of the same thought, which the Chief Justice had expressed fourteen years earlier, in upholding the preference claimed by the United States, out of a bankrupt's estate:

In construing this clause, it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means,
and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution: *Fisher v. Blight*, (1805) 2 Cranch (6 U. S.) 358, 396.

These sentiments, with those already printed on pages 418, 419, supra, were affirmed in a series of cases culminating in the *Legal Tender Case* (1883), 110 U. S. 421, where Justice Field alone dissented from the majority of the Court composed of Waite, C. J., and Miller, Bradley, Harlan, Woods, Matthews, Gray (who delivered the opinion) and Blatchford, JJ.

*Congress must deal equally with the commerce of different States.*

The First Article of the Constitution also provides,—

**Section 9.** No tax or duty shall be laid on Articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

This section is devoted to restraints upon the power of Congress and the Executive: Miller, J. *Morgan's RR. & S. Co. v. La* (1886), 118 U. S. 455, 467; its effect upon State regulations may be deferred until the consideration of the case of *Munn v. Illinois*, infra.

When Chief Justice Marshall was defining commerce to mean not merely traffic but also intercourse, including navigation, he found additional confirmation in his construction of this term, "commerce," from the preceding words of the Ninth Section,—

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.

This method of construction was used in defining what commerce was interstate: *Gibbons v. Ogden*, infra.
Express restraints upon the States.

The First Article of the Constitution further provides,—

**SECTION 10.** No State shall, without the consent of Congress, lay any impost 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 impost, 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.

No State shall, without the consent of Congress, lay any duty of tonnage, * * * *.

This section is devoted to restraints upon the powers of the States: Miller, J. Morgan's RR. & S. Co. v. La. (1886), 118 U. S. 455, 467; and the extent to which a State may require inspection, will be considered with the case of Turner v. Maryland, infra.

*The police power of the States, must yield to the commercial power of the United States.*

The provisions of a portion of the Sixth Article of the Constitution are also worthy of note here—

This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

When Chief Justice Marshall came to that point in his opinion in Gibbons v. Ogden, where he proposed to treat the question before the Court as one of collision between the National navigation laws and the State grant to Livingston and Fitch, he was met by the argument that these laws were, in fact, equal opposing powers. To this came the clear exposition—

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 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 con-
trary 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: (9 Wheat. 22 U. S. 210-11.)

The foundation for these remarks had been securely laid five years previous, while discussing the effect of the powers of the National government upon State taxation, in the case of McCulloch v. The State of Maryland, decided in 1819 and reported in 4 Wheat. (17 U. S.) 316.

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution: (Id. 427.)

The words of the Constitution being given their obvious meaning, the police power of the States has been constantly restrained by the supremacy of the United States in those particulars, where power has been directly or impliedly conferred on the National government: Swayne, J., N. W. Fert. Co. v. Hyde Park (1878), 7 Otto (97 U. S.), 659, 663; Fuller, C. J., and Gray, J., in the Original Package Case, infra, citing many cases.

Police powers are not delegated to the United States, and not prohibited to the States, and consequently are reserved to the States.

Article Tenth of the Amendments, was adopted with the others, by the concurrence of the requisite number of the States, December 15, 1791; it provides that—

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The word "expressly" is not contained in this Amendment and the explanation of its absence has already been given: supra, page 410.

As the police power belonged to the States before the adoption
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of the Constitution, and was not taken away from them by that instrument, its existence has been constantly recognized by the Courts: Harlan, J., Patterson v. Ky. (1878), 7 Otto (97 U. S.) 501, 503, and citations; Fuller, C. J., and Gray, J., in the Original Package Case, infra.

Commenting upon this reservation of power, Chief Justice Parker, of New Hampshire, observed in one of the License Cases—

It is very clear that the power of regulating the internal trade, and matters of police of the several States, is not granted to the United States, nor prohibited to the States. As a general rule, it is undeniable that each State may manage affairs of that description as fully as it might do before the Government of the United States was formed, except in cases where there is an express prohibition in the Constitution; and if the right to pass laws which regard the prevention of crime, pauperism, and misery, and the promotion of the health and happiness of the citizens, by imposing restraints upon the sale, and upon the exclusive use of the means of intoxication (which has been supposed to be a very important branch of police), is taken away by the Constitution, it must be by some grant of power to the general government inconsistent with further legislation of that description by the several States. And if they are thus deprived of it by implication, it is lost entirely; for there is no grant of power in the Constitution which will enable the Government of the United States to exercise any such authority. There is no express or implied grant by which that government can regulate the internal trade of the States in relation to this, or any other article. It has never attempted any such thing: (13 N. H. 572-3.)

The power of Congress to recognize State laws, and to permit their operation, is considered later in these pages, under the recent Act of Congress relative to the liquor traffic.

Omitted Subjects.

The limited space at command for the examination of so important and extensive a subject, requires a somewhat close adherence to the subject announced in the title of this article; so that the omission is necessarily made of an examination into the legal effect of the embargo acts, tariff laws, the constitutional restraint in Art. 1, § 9, cl. 1, (further than it is alluded in the Passenger Cases, infra), and similar subjects.

IV.

Commerce is a unit comprehending every species of commercial intercourse, as well as traffic.
The Regulation of Commerce is effected by prescribing rules for carrying on commercial intercourse.

The power to regulate Commerce, extends into the jurisdiction of the States, until each instance of commercial intercourse with foreign nations and among the States has terminated.

The power of Congress to regulate commerce includes the control of navigation.

A coasting license under the laws of the United States, nullifies a State law requiring a State license for the use of steam to propel a vessel within a harbor of the State.

Gibbons v. Ogden (1824), 9 Wheat. (22 U.S.) 1, came up from the Court of Errors of New York, where a decree had been made in January, 1820 (17 Johns. N. Y. 488, 510), unanimously affirming the decretal order of Chancellor Kent, made October 6, 1819 (4 Johns. Chan. 150), whereby the State courts affirmed the validity of grants made by the legislature of New York to Livingston and Fulton, for the exclusive right to navigate steamboats in the waters of that State, for a limited period, with penalty of forfeiture of any steamboat not run under license from these grantees of the supposed powers of the State. Ogden claimed under Livingston and Fulton, and on the filing of his bill, Chancellor Kent, October 21, 1818, granted an injunction. This injunction was continued, on a motion to dissolve, made after Gibbons, the defendant, had filed his answer, in which he set up, (1) that he had a license to carry on the coasting trade under the laws of the United States, and (2) that he had a license under the representatives of Livingston and Fulton. The second ground of defense was futile, in view of its averments, and fell out of the case. The case therefore progressed through all the courts with a speed no greater than at present, upon the one point of the conflict between the grant by the State and the license for coasting trade by the National government. The constitutionality of the grants was not raised, as that had already been settled in the Court of Errors of New York, in Livingston v. Van Ingen (1812), 9 Johns. 507, where Chancellor Lansing had refused an injunction sustaining the grant, on the ground of the doubts which troubled him in construing the Commerce clause (Art. I. sec. 8) and the
Equal Rights clause (Art. IV. sec. 2), of the Constitution of the United States. On appeal, the refusal of the injunction was reversed, upon the two grounds, (1) that neither the powers of Congress over patents was exclusive of the power of the State to encourage the introduction of novelties by exclusive grants, nor (2) that the regulation of commerce had been interfered with. As the second point eventually reached the Supreme Court of the United States, the first need not be considered here. Upon the second point, Yates, J., expressed himself thus:—

It never could have been intended that the navigable waters within the territory of the respective States, should not be subject to this municipal regulation. Such a construction might, with equal propriety, be applied to turnpike roads, ferries, bridges and various other local objects, and thus, in the vortex of this construction, almost all subjects of legislation would be swallowed up, and it might eventually lead to the total prostration of internal improvements. To all municipal regulations, therefore, in relation to the navigable waters of the State, according to the true construction of the Constitution, to which the citizens of this State are subject, the citizens of other States, when within the State territory, are equally subjected: and until a discrimination is made, no constitutional barrier does exist. The Constitution of the United States intends that the same immunities and privileges shall be extended to all citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce. As this Constitution, then, according to my view, does not prevent the operation of those laws granting this exclusive privilege to the appellants, they are entitled to the full benefit of them: (9 Johnson 561.)

Kent was also one of the judges and delivered a separate opinion upon the constitutionality of the acts of the legislature of New York. Some extracts will be interesting when read in connection with his explanations in 1827, three years after the Supreme Court of the United States had reversed all these decisions:—

The law concerning the coasting trade was passed on the 18th of February, 1793; and it never occurred to any one during the whole period that the State laws were under consideration before the legislature, and in the council of revision, and in the courts of justice, from 1798 down to and including the judicial investigations in 1812, that the Coasting Act of 1793 was a regulation of commerce among the States, prohibitory of any such grant. Such latent powers were never thought of, nor imputed to it: (1 Comm. 435.)

Returning to the opinion delivered in 1812, these sentiments were expressed by Kent—
There is no obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of the [State] government, when these acts were under consideration. The act [passed] in the year 1798 was particularly calculated to awaken attention, as it was the first act that was passed upon the subject, after the adoption of the Federal Constitution, and it would naturally lead to a consideration of the power of a State to make such a grant. ** There were members in that legislature, as well as in all the other departments of the [State] government, who had been deeply concerned in the study of the Constitution of the United States, and who were the masters of all the critical discussions which had attended the interesting progress of its adoption. Several of them had been members of the State convention, and this was particularly the case with the exalted character, who at that time was chief magistrate of the State (JOHN JAY; also Chief Justice of the United States from 1789 to 1794), and who was distinguished as well in the Council of Revision, as elsewhere, for the scrupulous care and profound attention with which he examined every question of a constitutional nature: (9 Johns. 573.)

We are not called upon to say affirmatively, what powers have been granted to the general government, or to what extent. These powers, whether express or implied, may be plenary and sovereign, in reference to the specified objects of them.

They may even be liberally construed in furtherance of the great and essential ends of the government. To this doctrine, I willingly accede. But the question here is, not what powers are granted to that government, but what powers are retained by this, and particularly, whether the States have absolutely parted with their original power of granting such an exclusive privilege as the one now before us. ** Our safe rule of construction, and of action, is this, that if any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we [the State government] may then go on in the exercise of this power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the State authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law. (Id. 574, 576).

Dismissing the equal rights clause of the Constitution (Art. IV. sec 2) as having nothing to do with the case, KENT proceeded to point out that the commerce clause (Art. I. sec. 8, cl. 3) was not, in terms, exclusive, and consequently suffered the States to exercise their sovereignty over internal commerce by land and water, while Congress regulated external commerce. While the exact limits of the power of Congress might be difficult to define, it seemed an inadmissible proposition that the exclusive grant in question had been placed beyond the power of the State, because Congress might enact a
conflicting law. As shown by the citation from his Commentaries, neither Kent nor any other lawyer or judge had thought at that time of the existing Act of 1793. And this is readily understood by another quotation from the same opinion:—

Congress, indeed, has not any direct jurisdiction over our interior commerce, or waters. [The] Hudson river is the property of the people of this State, and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways, or over the waters of any of our rivers or lakes. They may, in their sound discretion, regulate and control, enlarge or abridge, the use of its waters, and they are in the habitual exercise of that sovereign right. If the Constitution had given to Congress exclusive jurisdiction over our navigable waters, then the argument of the respondents would have applied; but the people never did, nor ever intended, to grant such a power; and Congress have concurrent jurisdiction over the navigable waters no further than may be incidental and requisite to the due regulation of commerce between the States, and with foreign nations: (9 Johns. N. Y. 579.)

Returning to the case as finally presented to Kent, after he became Chancellor, he dismissed the newly supposed conflict, between the legislature thus sustained and the National coasting license law, with the terse remark, that—

If the State laws were not absolutely null and void from the beginning, they require a greater power than a simple Coasting license, to disarm them: (4 Johns. Chan. 156, 158, 159.)

Before the injunction order in the last case had been affirmed on appeal, Gibbons undertook to set up a circuitous route between Elizabeth and New York, by way of the Quarantine; with the result of the defendant and his steamboat captain, Vanderbilt, almost suffering the penalties of an attachment.

It would seem that the appeal to the Court of Errors was merely a formal step towards the Supreme Court of the United States (17 Johns. N. Y. 505) though the right of the legislature to make such a grant was again questioned and briefly affirmed by the Court. The argument based upon the coasting license was briefly considered and also denied, Platt, J., saying—

The term "license" seems not to be used in the sense imputed to it by the counsel for the appellant; that is, a permit to trade; or as giving a right of transit. Because it is perfectly clear, that such a vessel, coasting from one State to another, would have exactly the same right to trade, and the same right of transit, whether she had a coasting license or not.
She does not, therefore, derive her right from the license; the only effect of which is, to determine her national character and the rate of duties which she is to pay. Whether Congress has the power to authorize the coasting trade to be carried on in vessels propelled by steam, so as to give a paramount right in opposition to the special license given by this State, is a question not yet presented to us. No such act of Congress yet exists, and it will be time enough to discuss that question when it arises: (17 Johns. 509.)

When Mr. Webster came to argue the case in the Supreme Court of the United States, he made a strong point of the conflict which had already arisen; in retaliation to the laws of New York, Connecticut had forbidden any steam vessel having a license under the laws of New York from entering her waters, while New Jersey gave to any one of her citizens who should be restrained by the laws of New York, an action for damages and treble costs against the party who invoked the law of New York. This was the serious danger before the Court, to be averted by reversing, or perpetuated by affirming, the injunction ordered by Chancellor Kent.

Again, he urged that the present government came into being only or chiefly at least, because of the necessity for a steady and uniform commercial system. This part of his argument was adorned with many historical references; and concluded by urging that the power of Congress was exclusive, so that what was not legislated upon, was thus regulated in the negative.

This is now the view of the Supreme Court (1 Kent Comm. *438). In those days Marshall preferred to decide no more than the cases before the Court called for, although the principles upon which his decisions proceeded furnished the foundation for the affirmation of Webster's contention long after both the Chief Justice and the great Lawyer had passed away.

On the other side, the counsel contended, as a result of many authorities, that the power contained in the Commerce clause, was at best, a concurrent one; the argument following the lines already indicated in the opinions of the New York Courts.

The Supreme Court of the United States was at this time (1824) composed of Chief Justice Marshall, who wrote the opinion of the Court, and Justices Washington, Todd, Duvall, Story, and Johnson (who also wrote a concurring opinion).
The Chief Justice began his opinion with words worthy of remembrance:

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 which 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 States expect from this department of the government.

Coming then to the question before the Court, the Chief Justice first laid down that the "Commerce," which Congress had power to regulate, was a unit, comprehending every species of commercial intercourse.

Justice JOHNSON wrote a separate opinion under the impression that his entire approbation of the judgment was founded on materially different views; yet his definition was substantially the same, and worthy of repetition as approaching the subject from the same direction as taken by TANEY and the other dissenting Justices in the Passenger Cases, infra.

Commerce, in its simplest signification, means an exchange of goods: but in the advancement of society, labor, transportation, intelligence, care, and various mediums, of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship-building, 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 the power to regulate commerce: JOHNSON, J. Gibbons v. Ogden (1824), 9 Wheat, (22 U. S.) 229-30.

The definition of "Commerce" contained in MARSHALL'S opinion, has been often referred to; thus STORY, dissenting in the Miln Case (11 Peters, 36 U. S. 154-5), cites these sentences:

Commerce undoubtedly is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse: (9 Wheat, 22 U. S. 189.)

No sort of trade can be carried on between this country and any other, to which this power does not extend. * * * * But, in regulating com-
merce 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. * * * If Congress has the power to regulate it, that power must be exercised wherever 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: (Id. 193, 195.)

The Chief Justice repeated and affirmed this definition in Brown v. Maryland, and would have done so in the Miln case (as Justice Story asserts in his dissenting opinion in that case), if he had lived until a decision upon the reargument could have been agreed to.

The special kind of commercial intercourse involved in the case of Gibbons v. Ogden, was navigation, and the Court was urged to exclude it, by limiting the definition of commerce so that it should include only what was understood by traffic; that is, buying and selling and the interchange of commodities. This was refused, the Chief Justice using this language—

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 another, 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: (9 Wheat. 22 U. S. 190.)

Not trusting entirely to so complete a common sense demonstration, the Chief Justice also found additional confirmation in that section of the Constitution (supra, page 424) which requires Congress to deal equally with the commerce of the different States.

The opinion in Gibbons v. Ogden, proceeded, second, that
the force of the word "Among," meaning interminglea with, was such that it could not stop at State lines, though not comprehending completely internal commerce of a single State, and this as—

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 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: (Id. 195.)

This distinction between the powers of the State and of the Nation, drew from Justice BALDWIN, in his opinion in the Miln case, the thought that nothing could be in more perfect conformity with the spirit and words of the Constitution: (Bald. Views, 188-9.) So also THOMPSON, J., dissenting in Brown v. Maryland (1827), 12 Wheat. (25 U. S.) 452.

The Chief Justice proceeded to the case in hand—

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 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: (Id. 196.)

Turning again to the principles decided by this great case, a consequence ensued from those already noticed, that, third, the power was one for regulation, without limit other than the Constitution prescribes; fourth, that the question of the power of a State to legislate in the absence of any Congressional action, was not decided, as Congress had already acted in pass—
ing the navigation laws, and this remained for further consider-
ervation; fifth, that the important question really was whether,
Congress and the States could regulate interstate commerce at
the same time.

Noticing and approving Mr. Webster's argument for the
exclusive power of Congress, the Chief Justice yet did not go
so far as to rest the opinion of the Court upon that ground,
but rather upon the practical side of the whole case, namely,
the conflict between the two laws.

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; the decision sustain-
ing the privilege they confer, against a right given by a law of the Union,
must be erroneous: (p. 210.)

After an examination of the license given to a coaster, the
Chief Justice had little difficulty in deciding that the license
really did what it purported to do; that is, give permission to
carry on a coasting trade; and this without regard to the
motive power of the vessel. Hence the State laws which in-
hibited the use of steam as a means of propulsion, came into
direct collision with both the general coasting license and that
granted to steamboats, and was void. The injunction was dis-
solved and the State Court directed to dismiss the bill filed for
relief.

In eliminating those elements of the opinion which do not
necessarily support the judgment entered, there is no inten-
tion to slight the points which occupy fully one-third of the
opinion, and which were discussed as affording light from the
context of the Constitution. In these pages they are taken
up in connection with their appropriate cases, and it is merely
necessary to anticipate here the statement of their natural re-
sult, that the power of Congress to refrain, as well as to act,
is exclusive of any State action. Justice Johnson dissented
solely because the judgment of the Court was not placed upon
this larger ground, so that there is here shown the curious,
though satisfactory result of a dissenting opinion becoming the
law of the land without overruling the principles of the judg-
ment actually entered.
Affirming this position as well as the similar sentiments of Justice Grier in the *Passenger Cases*, (1849) 7 How. (48 U. S.) 283, 462, Justice Bradley, in *Walling v. Michigan* (1886), 116 U. S. 446, 456, called attention to the modifications subsequently established in *Cooley v. Port Wardens*, infra, and other decisions, and pointed out that the complete doctrine, as stated above on page 420, was well summarized by Justice Field, in *Mobile v. Kimball*, infra.


All Judges agree in considering this a great and leading case on the subject of foreign and interstate commerce but not alone from the point decided. The principles, and even the *dicta* of the great Chief Justice have become parts of the constitutional principles of the country, quite as much as the written words of the Constitution itself; and in this aspect, the objections of advocates of the fullest local power possible, are worthy of more consideration than the approbation of men of like mind with MARSHALL and his associate Justices. What errors have been successfully pointed out?

Reversing the course of time, and taking the dissenting opinion in the *Original Package Case* first, Justice Gray there points out the restraint put upon the principles of this case by MARSHALL himself in *Willson v. Black Bird Creek Marsh Co.*, *infra*; similarly Justice CATRON, *License Cases* (1847), 5 How. (46 U. S.) 504, 605; Chief Justice Taney, Id. 583, and dissenting in *Pa. v. Wheeling Bridge Co.* (1851), 13 How. (54 U. S.) 518, 586-7.

The Granger cases (1877), 4 Otto (94 U. S.) 155, 183, do not notice Gibbons v. Ogden, and cannot be considered as affecting its principles; but the general subject of rates even for
interstate transportation forms so large a division of the law and one so separable that it is omitted here for want of space.

It has been supposed that *Gibbons v. Ogden* was distinguished in *Morgan v. Parham* (1872), 16 Wall. (83 U. S.) 471, 475, but the same fundamental principle was applied in each case, and the only countenance to such an idea arises from the difference in the facts; the great case denying that interstate commerce could be compelled to obtain a State license, and the later equally denying the right of a State to tax a coaster away from her home port.

So far as *The Genesee Chief* (1857), 12 How. (53 U. S.) 452, established the admiralty jurisdiction of the United States Courts upon the navigability of the water, and not the commerce borne upon the water, there is no conflict with *Gibbons v. Ogden*, for the cases relate to entirely distinct matters.

Chief Justice TANEY and Justice CATRON, in the *License Cases*, infra, attempted to limit the power of Congress, so that it should not prevent State action, by an exclusive construction, the former asserting (5 How. 581), that the doctrine of the exclusive power of Congress was not seriously put forward until after the decision in *Gibbons v. Ogden*. So far as this attempt entered into the law declared in the *License Cases*, it will appear in the review of those cases, to have failed long before Chief Justice FULLER came to write the opinion of the Court in the *Original Package Case*.

The *Miln case*, infra, was a serious attempt to undermine the authority of *Gibbons v. Ogden*, and the disagreement amongst the Justices is not nearly so apparent in the report, as in the opinions of Justice WAYNE and Chief Justice TANEY in the *Passenger Cases*, infra. It is unnecessary to anticipate further than that the attempt resulted in the principles first positively formulated in *Cooley v. Port Wardens*, infra, and now affirmed in the early part of the opinion in the *Original Package Case*, without any dissent; namely, that the power to regulate commerce among the States, is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs.
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V.

Congress has exclusive power over the importation of foreign merchandise, and no State can require the payment of a tax, or license, before the sale by the importer, in the original package.

Foreign goods are imported by merchants for sale and their sales cannot be restricted further than their importations may be.

Imported merchandise, upon which the duties have been paid, is not subject to State taxation while in the possession of the importer and in the original packages, though offered for sale.

When an original package has been used or exchanged by breaking up for use or retail sale, and also when it has been sold by the importer in its original condition, it loses its distinctive character of an import and becomes subject to the powers of the State.

A tax upon the dealer is, in effect, a tax upon the goods themselves.

Brown et al. v. The State of Maryland (1827), 12 Wheat. (25 U. S.) 419, came up from the Court of Appeals of Maryland, where a judgment of the City Court of Baltimore, upon a demurrer to an indictment, had been affirmed, and the present plaintiffs in error condemned for not taking out a license as importers of foreign articles. They denied that the State could require such a license as the right to collect fifty dollars was a right which would authorize any sum as the license fee; that is, the power to lay such a tax was a power to destroy or prohibit, which had been declared outside of the present powers of the States in McCulloch v. Maryland (1819), 4 Wheat. (17 U. S.) 316.

The indictment had been founded upon an Act of the legislature of Maryland, passed in 1821, entitled—

An Act supplementary to the Act laying Duties on Licenses to Retailers of Dry Goods, and for other purposes.

Section 2. And be it enacted, that all importers of foreign articles or commodities of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whisky and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale, or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a
license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement.

Under this Act, Chief Justice Marshall considered the question for solution was a single one with two aspects arising from two separate clauses of the Constitution, the Eighth and Tenth Sections of the First Article.

The cause depends entirely on the question, whether the legislature of a State can constitutionally require an importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported: (12 Wheat. 25 U. S. 436.)

That this was the precise point for decision was observed by Justice BARBOUR in delivering the opinion of the Court in The Mayor, etc., v. Miln (1837), 11 Peters (36 U. S.) 134; and by Chief Justice TANEY in the License Cases (1847), 5 How. (46 U. S.) 575, where he gave his adhesion to the doctrine denying such power to the State. He had been counsel for the State of Maryland in the Brown case, and he now thought the rule was a safe and just one, and most in harmony with the obvious intention of the Constitution.

Attention is called to this statement of the point decided, because there have been those who have considered this case to have been overruled by Woodruff v. Parham (1868), infra, where a tax upon all auction sales in the city of Mobile was sustained although some of the goods sold were from another State. The tax was sustained because there was no attempt to discriminate; it was imposed upon all sales and all persons making auction sales.

Under the Tenth Section of the First Article of the Constitution (ante, page 425), the Chief Justice coincided with the argument urged against the State——

Whether the prohibition to "lay imports, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them, which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer, the instant it was landed, as
by a power to tax it while entering port. There is no difference between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend upon the degree to which it may be exercised: (12 Wheat. 25 U. S. 439–)

This position did not command entire assent, though it was strong enough to induce the Supreme Court of New Hampshire to avoid it with the remark—

If the sale be prohibited, it may, notwithstanding, be introduced for use by the person importing, for export to another country, or for the purpose of being sent to another State and sold there, if a sale there be lawful: PARKER, C. J., Pierce v. The State (1843), 17 N. H. 586.

Of course, the law is now declared otherwise, in conformity with the sentiments of MARSHALL. See the decisions and citations in the opinion in The Original Package Case, infra.

Coming nearer to the precise case before the Court, it was argued that the tax demanded was upon the person, and not on the traffic. To this MARSHALL answered—

It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution: (Id. 444–)

In the other aspect of the case, under the Eighth Section of the Commerce clause of the First Article of the Constitution, there was an affirmance of the general principle laid down in
The law governing “Gibbons v. Ogden (supra, page 432), where the extent of the power to regulate commerce among the several States, was declared to be without limitations other than those placed upon it by the Constitution. In the language of MARSHALL—

The power is co-extensive with the subject upon which it acts and cannot be stopped at the external boundary of the State, but must enter its interior. If this power reaches the interior of the State, and, may there be exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as the importation itself. It must be considered a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised, does not enter into the enquiry concerning its existence. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and the principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation: (12 Wheat. 25 U. S. 446-8.)

In this case, the rule in Gibbons v. Ogden, ante, page 426, received a necessary limitation, to prevent the abridgment of the power of taxation by the State—

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition: (12 Wheat. 25 U. S. 441.)

Realizing that this prohibition upon State taxation might be so construed as to deprive the State of its rightful powers, the language already quoted on page 440 supra, was followed by a definition which embraced the now well-known term used as a part of the title of these pages.
The power [of the State to tax] and the [Constitutional] restriction upon it, though quite distinguishable when they do not approach each other, may yet, like intervening colors between black and white, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution: (id. 441-2.)

The precise case here supposed arose in California (Low v. Austin, 1872, 13 Wall. 80 U. S. 29), where an attempt to assess imported wines for local taxation was sustained by the State Supreme Court, but that judgment was reversed by the Supreme Court of the United States, Justice Field delivering the opinion. The duty had been paid on these wines, and the importer then stored them in the original packages awaiting a sale. The California Judges (Temple, Wallace, Crockett and Sprague), thought this case did not rest upon the same principle as Brown v. Maryland,—

In this case, no tax is levied upon imports; as such, they are not subjected to any burden as a class, and we did not understand the case of Brown v. Maryland as going to the extent of establishing that an ad valorem tax by the State, upon the property of its citizens, would be in conflict with this provision, even though a portion of such values were invested in imported goods still in the original packages and unsold. We see no reason why imported goods exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the State, as much as domestic goods similarly situated. A tax which is imposed upon all the property of the State cannot in any sense be considered a tax upon commerce. It has no tendency to discourage importations. * * The tax prohibited must be a tax upon the character of the goods as importations, rather than upon the goods themselves as property.

The Attorney General of the State illustrated the argument that the State could tax, by asserting that this wine was placed where thieves might break through and steal, but for the local police force.

But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall,
and TANEY, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer, or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition: FIELD, J., Low v. Austin (1872), 13 Wall. (80 U. S.) 29, 34.

This idea seems to have had some local prevalence, as it is combatted, though without reference to this denial, by DEADY, D. J., in U. S. v. Bridelman (1881), U. S. Dist. Ct., Dist. Ore., 7 Fed. Repr. 894, 901.

Afterwards, the case of an export arose by an attempt to tax logs purchased for export and at the place of export, waiting shipment to a foreign country. The tax was declared invalid, on the authority of Brown v. Maryland and Low v. Austin, by WOODS, Circ. J., Clarke & Co. v. Clarke (1877), U. S. Circ. Ct., S. Dist. Ga., 3 Woods 408.

The same judges concurred in Brown v. Maryland as in Gibbons v. Ogden, page 432, but Justice THOMPSON dissented, on the ground that nothing more was required by the Maryland law than that retail and wholesale dealers in foreign merchandise must take out a license for authority to sell; that this license in the case of retail dealers was thought to be no violation of the Constitution; that the wholesale dealer was such in the internal commerce of the State only; that he had been indicted for selling without a license and not for importing; and that there would be no doubt a violation of the Constitution if the State law had required a license to import. The Court was thus unanimous on the subject of importation and the great majority thought importation included the right to sell in the original package. The dissenting judge thought that the imports were not even protected by stopping at the line of the original package, as the moment it was broken, the State laws would apply and effectually serve to restrain imports; not being willing to go to that extreme, Justice THOMPSON dissented.

The Miln case (infra) necessarily involved the principles of this case, when it raised the question of the correctness of the principles of Gibbons v. Ogden; it is not necessary to anticipate, as the final result has been a complete affirmance.
State laws affecting commerce are valid in the absence of Congressional legislation, and in the case of a subject not requiring a general regulation.

Such a subject is a dam or bridge interfering with commerce in a stream wholly within a State though flowing into an interstate body of water.

Such laws are the exercise of the reserved police powers of the State.

The case of Thompson Wilson, et al., v. The Black Bird Creek Marsh Company (1829), 2 Peters (27 U.S.) 245, arose from the erection of a dam across a small salt water creek in the State of Delaware, under the authority of the State law passed in February 1822. The owners of a sloop called the Sally, broke down the dam which had been erected, and defended their action under the Commerce clause of the Constitution. This was denied by Chief Justice MARSHALL in delivering the opinion, on the ground that Congress had not acted, and in the absence of such action, the neighboring meadows might be kept dry and the health of the community improved by such schemes, even though the tide had flowed above where the dam was erected; the language of the opinion on this point was:

If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small, navigable creeks into which the tide flows and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such act, would be void. The repugnancy of the law of Delaware to the Constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question: (2 Peters, 27 U.S. 252.)

This case was distinctly affirmed in the Chestnut Street Bridge Case, (Gilman v. Phila. 1866, 3 Wall. 70 U.S. 713, 727-9) on an opinion by Justice SWAYNE, with the concurrence of Justice CHASE, and Justices GRIER, NELSON, MILLER and FIELD, the dissent being by Justices CLIFFORD, WAYNE and DAVID DAVIS; and again affirmed in Pound
v. Turck (1878), 5 Otto (95 U. S.) 459, in an opinion by Justice Miller, with the concurrence of Chief Justice Waite and Justices Strong, Hunt, Swayne, Field, Bradley and Harlan, Justice Clifford also concurring, though still adhering to the principles of his dissenting opinion in Gilman v. Phila. It is used by Justice Strong, in Transportation Co. v. Chicago (1879), 99 U. S. 635, 643, with the assent of all the last mentioned Justices, except Hunt (who was absent); by Justice Field, in Cardwell v. Bridge Co. (1884), 113 U. S. 205, 209, with the assent of Justices Miller, Bradley, Harlan, Woods, Matthews, Gray and Blatchford, Chief Justice Waite being absent; and by Justices Gray, Harlan and Brewer, in their dissent in the Original Package Case, infra. It is therefore important to observe that this quotation from Marshall's opinion has been supposed to demonstrate that he did not hold to the exclusive view of the power of Congress which has subsequently been deduced from his language in the preceding cases. If such inference should be correct, then the Chief Justice should be classed with Kent and those who hold that the State may legislate until Congress acts. See pages 421, 430, 431, supra.

This understanding of Marshall's views was held by Chief Justice Taney and Justices Woodbury and Catron, in the License Cases, 5 How. (46 U. S.) 583, 605, 625, although the latter recognized the conflicting statements of two contemporaneous Justices, Thompson and Story, in the Miln Case, infra. Taney repeated this sentiment in his dissent in the Wheeling Bridge Case, 13 How. (54 U. S.) 518, 585.

Justice Daniel was on the bench when the License Cases were decided, but made no allusion to this case until the Passenger Cases came before the court, when he, too, joined in holding that—

The case of Wilson v. The Blackbird Creek Marsh Company affirms, in language too explicit for misapprehension, that the States may, by their legislation, create what may be obstructions of the means of commercial intercourse, subject to the controlling and paramount authority of Congress:” (7 How. 48 U. S. 500.)

And similarly, when dissenting in the Wheeling Bridge Case, 13 How. (54 U. S.) 518, 599. And the dissent of Chief Jus—
tice Waite and Justices Harlan and Gray, in *Bowman v. Chicago & N. W. RR. Co.* (1888), 125 U. S. 521–2. Naturally, therefore, the survivors (Gray and Harlan) dissent in the *Original Package Case, infra*, where their views are stated at length. Still, Chief Justice Waite, eleven years previous, had explained that—

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it: *Hall v. DeCuir* (1877), 5 Otto (95 U. S.) 485, 488.

Chief Justice Waite also argued with Justice Bradley (one of the majority of the Court in the *Original Package Case, infra*), and with Justice Gray in dissenting from the opinion of the Court in *Wabash, St. L. & P. RR. Co. v. Illinois* (1886), 118 U. S. 557, where the State was denied the power to regulate interstate freight and passenger rates.

At the turning point in the line of decisions, which now fix the exclusive power of Congress, Justice Curtis thought this case authority that the States might legislate in the absence of Congressional legislation: *Cooley v. Port Wardens* (1851), 12 How. (53 U. S.) 299, 319.

Though the Justices of the Court which had decided *Gibbons v. Ogden*, and *Wilson v. Marsh Co.*, passed away, there were immediately those among their successors who combatted the inference drawn by Taney and the Justices of his school of political thought. Thus, Justice McLean, in the *Passenger Cases*, (1849) 7 How. (48 U. S.) 283, 397, pointed out that the language used, while less guarded than usual, should be construed in reference with the question before the Court, especially as *Gibbons v. Ogden* was cited and not even distinguished, much less overruled; and in *Cooley v. Port Wardens* (1851), 12 How. (53 U. S.) 299, 324, again alluded to this case as an illustration of the difficulty of restraining to the facts of the case, so important a principle as that supposed to lie in this opinion. In the *Wheeling Bridge Case*, the same Justice distinguished this case as different in principle, adding, in his understanding of the opinion, that—
The Chief Justice [Marshall had virtually] said it was a matter of doubt whether the small creeks, which the tide makes navigable a short distance, are within the general commercial regulation, and that in such cases of doubt, it would be better for the Court to follow the lead of Congress: (13 How. 54 U. S. 566.)

In Gilman v. Philadelphia (1866), 3 Wall. (70 U. S.) 713, 743, Justices Clifford, Wayne and David Davis thought that no man living had any reason to suppose that the views of Marshall and his associates had changed, between Gibbons v. Ogden and Wilson v. Marsh Co. As these dissenting Justices held this case second in point of importance to no one delivered by Marshall, they considered that it decided the dam in question to have been erected under the reserved police powers of the State. Justice Clifford repeated these sentiments in his concurring opinion in Hall v. De Cuir (1877) 5 Otto. (95 U. S.) 485, 514, 516, with approving mention of Justice McLean's statement, supra.

In Cardwell v. American River Bridge Co. (1884), 113 U. S. 205, Justice Field cited this case and those following it, with the explanation that—

These cases illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted, are national in their character, and admit and require uniformity of regulations affecting alike all the States, and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action: (Id.)

To the same effect, per Bradley, J. Williamette Iron Bridge Co. v. Hatch (1887), 125 U. S. 1, 8; Lamar, J. Kidd v. Pearson (1888), 128 Id., 1, 23.

VII.

A state may legislate for the safety, happiness and prosperity of its inhabitants, except when it is restrained by the Constitution of the United States.

A state may require the commander of a vessel arriving at a port within its jurisdiction, to report his passenger list.

The Mayor, etc., of New York v. Miln (1837), 11 Peters (36 U. S.) 102, raised the question of the constitutionality of
another statute of New York (that of February 11, 1824), under which an action was begun in the Superior Court of that city against the consignee of the ship Emily for not reporting the passenger list. The consignee being an alien, removed the case into the Circuit Court of the United States and demurred to the declaration: on a division of opinion between the judges, the question of the constitutionality of the section requiring the certificate by the captain of such passenger list, was certified into the Supreme Court: See page 145 of the report, and per Justice Wayne, in the Passenger Cases (1849), 7 Howard (48 U.S.) 430. That section was thus summarized by Justice Barbour:

The statute, among other things, enacts that every master or commander of any ship or other vessel arriving at the port of New York from any country out of the United States, or from any other of the United States than the State of New York, shall, within twenty-four hours after the arrival of such ship or vessel in the said port, make a report in writing, on oath or affirmation to the Mayor of the City of New York, or, in case of his sickness or absence, to the Recorder of the said City, of the name, place of birth and last legal settlement, age and occupation of every person who shall have been brought as a passenger in such ship or vessel, on her last voyage from any country out of the United States into the port of New York, or any of the United States, and from any of the United States other than the State of New York to the City of New York, and of all passengers who shall have landed, or been suffered or permitted to land from such ship or vessel, at any place, during such her last voyage, or have been put on board, or suffered, or permitted to go on board of any other ship or vessel, with the intention of proceeding to the said City, under the penalty on such master or commander, and the owner or owners, consignee or consignees of such ship or vessel, severally and respectively of seventy-five dollars for every person neglected to be reported as aforesaid and for every person, whose name, place of birth, and last legal settlement, age, and occupation, or either or any of such particulars shall be falsely reported as aforesaid, to be sued for and recovered as therein provided.

Justice Story, in his dissenting opinion, made a fuller statement (page 153) though disclosing no other matters to influence the decision.

The case was first reached during the lifetime of Marshall, in January term, 1835, but the Court declined to consider it until a vacancy in the bench occasioned by the resignation of Justice Duval should be filled: 9 Peters (34 U. S.) 85. Chief Justice Marshall died at Philadelphia, July 6, 1835, and one of the counsel for the State of Maryland in the Brown case, Vol. XXXVIII,—29.
Roger Brooke Taney, was appointed to the vacancy and confirmed December 26, 1835. The case was then argued without result, as the Justices were equally divided in opinion, and before the case was again reached, President Jackson appointed Philip Pendleton Barbour, March 15, 1836, to the vacant Justiceship. Upon the final disposition of the case, the Chief Justice and Justice McLean, agreed with Justice Barbour in the opinion read by the latter; Justice Story dissented; Justice Thompson wrote the opinion which a majority of the other Justices could not agree to; he then read it as his individual opinion; Justice Baldwin afterwards wrote a separate opinion: about his assent to the opinion read by Justice Barbour there seems to be doubt: See the remarks of Justice Wayne and Chief Justice Taney in the Passenger Cases (1849), 7 How. (48 U. S.) 283, 429, 487; and Justice Wayne, assented to the opinion of the Court only so far as to agree that the law of New York was valid as a police regulation. For this reason Justice Barbour could only express his own opinion, that passengers were not the subject of commerce, and declare—

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered, or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conclusive to these ends; when the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers, which relate to merely municipal legislation or what may, perhaps, more properly be called internal police are not thus surrendered or restrained, and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive: (ii Peters, 36 U. S. 139.)

A consequence grew out of this language which was repudiated in the Passenger Cases by Justices McLean and Wayne with the other Justices composing the majority of the Court; that is, that the State could exercise its authority from the first instant of the termination of a voyage, in direct opposition to the principles of Brown v. Maryland.
The dissenting opinion of Story was placed upon the broad ground that a State could not legislate in such a manner as to act upon subjects either within or beyond its territorial limits, if such action trenched upon an exclusive authority of Congress to regulate commerce, including passenger traffic: (11 Peters, 36 U. S. 156, 158.) This is, of course, open to the criticism of Justice Thompson, that the Court had not defined the bounds of Congressional authority, and to that of Kent, (ante, page 430) that it is not a question of State power, but how far may the State go on legislating until there is a collision with the power confided to Congress; but it was, in effect, adopted in the Passenger Cases, infra.

This opinion of Story, he tells us himself, at the close of this dissenting opinion, was concurred in by the then late Chief Justice Marshall.

Justice Baldwin's concurring opinion should be read in connection with the prefatory remarks to his General View of the Origin and Nature of the Constitution and Government of the United States:

As my opinions on constitutional questions are founded on a course of investigation different from that which is usually taken, I cannot, in justice to myself, submit them to the profession without a full explanation of what may be deemed my peculiar views of the Constitution. By taking it as the grant of people of the several States, I find an easy solution of all questions arising under it; whereas, in taking it as the grant of the people of the United States in the aggregate, I am wholly unable to make its various provisions consistent with each other, or to find any safe rule of interpreting them separately: (Id. 1.)

This method of viewing the Constitution is worthy of this passing notice because Baldwin agreed with the judgment of the Court in Brown v. Maryland and Gibbons v. Ogden. Those judgments were entered upon opinions by Chief Justice Marshall, whose view of the Constitution was directly opposite:—

The powers of the General government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might “be sub-
mitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification.” This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is “ordained and established” in the name of the people; and is declared to be ordained, “in order to form a more perfect Union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.” The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties: _McCulloch v. The State of Maryland_ (1819), 4 Wheat. (17 U. S.) 402—404.

The substance of this concurring opinion is still and is likely to remain, the interpretation, in this direction, of the commerce clause; it is as follows:

It may therefore be taken as an established rule of constitutional law, that whenever anything which is the subject of foreign commerce, is brought within the jurisdiction of a State, it becomes subject to taxation and regulation by the laws of a State so far as is necessary for enforcing the inspection and all analogous laws, which are a part of its internal police. And as these laws are passed in virtue of an original inherent right in the people of each State to an exclusive and absolute jurisdiction and legislative power, which the Constitution has neither granted to the general government, nor prohibited to the States the authority of these laws is supreme and incapable of any limitation or control by Congress: _Bald. Views_, 188.

The construction of this clause of the Constitution would therefore seem to be more uniform than the diverse political views of the Judges might imply.

The judgment in this case decides nothing more than that a State may require the name and quality of every foreigner landing within its borders: _WAYNE, J., Passenger Cases_ (1849),
7 How. (48 U. S.) 283, 423, 425. And in this respect, has been recognized as good law by Justice Miller in the Slaughter House Cases (1873), 16 Wall. (83 U. S.) 36, 63, and in Henderson v. The Mayor (1876), 92 U. S. 259, 269, and infra; and by Justice Swayne in Machine Co. v. Gage (1880), 100 U. S. 676, 678.

The precise point decided must always be regarded in the use of this case, as the principles of Marshall were there seriously impugned, and remained so during a period of fourteen years, during which the divided Court agreed upon the judgment in the License Cases and with more unanimity of reason decided the Passenger Cases. With Cooley v. Port Wardens, the principles of Marshall began again to prevail in the Court, though the Justices have not yet been able to reach one opinion. This is probably because they have not been able to settle in their own minds, a reasonable definition of the police power of the States.

VIII.

The power to regulate commerce among the several States is granted in the same clause, and by the same words, as that with foreign nations, and is co-extensive with it.

Congress has the exclusive power to regulate commerce among the States, though it has been supposed that the States might act until Congress interfered.

State laws requiring a license to sell liquors brought from a foreign nation, or another State, were considered to be valid, but now they are declared to be void so far as respects their sale by the importer in the original package.

Pierce et. al. v. The State of New Hampshire (1847), 5 Howard (46 U. S.) 505, was one of three cases heard and decided together and commonly known as the License Cases. This case came before the highest court, the Supreme Court of Judicature, in July Term, 1843, on a writ of error to a judgment entered in the Court of Common Pleas at the preceding January Term, upon an indictment for selling a barrel of gin, in violation of the State Act of July 4, 1838, which was—
An Act regulating the sale of wine and spirituous liquors.

Section 1. Be it enacted by the Senate and House of Representatives, in General Court convened, That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy or other spirits in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person so offending, for each and every such offence, on conviction thereof, upon an indictment in the county wherein the offence may be committed, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of such county.

The object of this Act, as well as of the laws questioned in the other two License Cases, was to discourage the use of ardent spirits, just as in the Original Package Case of 1890.

The defendants had purchased this barrel of gin in Boston, Massachusetts, had brought it to their store in Dover, New Hampshire, and had there sold and delivered it in its original condition. The gin was of American manufacture and the commerce clause of the Constitution was unsuccessfully invoked as a sufficient excuse for the sale without a license. Thus the law remained until 1890, while its downfall was being prepared by a line of cases commencing in 1851, though indicated as early as the Passenger Cases, in 1849.

The contention in this case raged over the effect of the decisions in Brown v. Maryland and Miln v. New York, with such violence that the Justices of the Supreme Court of the United States could not agree upon the principles by which they severally thought the State license laws were constitutional. The divergences of opinion are summarized by Justice Gray in his dissenting opinion, in the Original Package Case, infra, where he points out that Chief Justice Taney (page 578,) and Justices Catron and Nelson agreed in regarding the New Hampshire statute as a regulation of interstate commerce, but still valid for the reason that Congress has not yet regulated that particular kind of traffic; while Justices McLean, Daniel, Woodbury and Grier, were of one mind in holding the statute a police regulation, for the preservation of public health and order; otherwise the Justices did not agree. The effect of this judgment of a divided Court was far more extensive than any student of jurisprudence would have been justified in predicting, for it became the basis for prohibition
Constitutions and laws, and generally passed into the popular knowledge as an affirmance of the police power of the States.

The great difficulty among the Justices of the Supreme Court, was the effect of a grant of power to Congress; did it amount to a prohibition to the States, so as to render all State laws on the subject, null and void? To those who answered in the negative, the case of *Brown v. Maryland*, was easily distinguishable. As already pointed out with some care, that was a case of a foreign import. In these *License Cases*, the case related to commerce among the States, and upon a subject upon which Congress had not legislated. Still the decision in *Brown v. Maryland*, could have easily extended to forbidding State regulation of the sale of Original Packages in the hands of those who brought them from a neighboring State; and now that such extension has been made, in the *Original Package Case*, infra, these decisions in the *License Cases* are valuable only for the precise points involved in the several judgments of the Court.

The other two License Cases were *Thurlow v. The Commonwealth of Massachusetts* and *Fletcher v. The State of Rhode Island*. In the former case, the State laws allowed the county commissioners to refuse to grant any licenses for the sale of liquor, being in effect a local option act. The defendant had been convicted, under these laws, of retailing without a license, liquors purchased from an importer, and Webster once more raised the plea of the exclusive jurisdiction of Congress (as he had done in *Gibbons v. Ogden*), by putting the question, whether such a State law, founded upon moral, medicinal, economical or other reasons for promoting the public good, could prevent the importer from selling to one who would only buy to sell again. The Court, for various reasons, affirmed the validity of the Massachusetts laws.

In the Rhode Island case, there was a local option law and a refusal to license. The defendant bought French brandy from the importer and sold it again at retail, so that this case differed from the Massachusetts case only in the fact that the liquor was undoubtedly of foreign make. The argument here assumed the form that no article was an import or an export, but that the importation was merely an event in the his-
tory of the article: from this the argument concluded that any tax upon the thing, even after the original package had been broken, would be void. This was also denied by the Court for various reasons.

These cases are worthy of some examination here, in addition to the review given them in the Original Package Case, (infra) as the judgments rendered sustained the constitutionality of laws passed, according to Justice Catron, (5 How. 46 U. S. 601) with a view to the entire prohibition of the liquor traffic. The State Courts in the prohibition States, naturally followed this judgment; thus, in Iowa, the now so-called Original Package Case, (infra) was decided expressly in the State Court (October 4, 1889) upon the authority of the previous case of Collins v. Hills, decided February 7, 1889, where an injunction to prevent a nuisance was sustained. The nuisance was the selling of original packages or cases of beer brought from an adjoining State; and in sustaining the injunction, Reed, C. J., made this reference:

The Statutes called in question in the License Cases, 5 How. 504, were not essentially different in their object, from those of this State. They were enacted for the purpose of mitigating, and to some extent, suppressing, the evils of intemperance. * * The same claim of right was urged in these cases, that is here alleged by the defendant, viz.: that as the liquors were transported into the States under the authority of the Federal Constitution and statutes, it was not competent for the States to prohibit their sale, or regulate the manner in which it should be conducted. But the Court held that the statutes were not in their operation in conflict with the commercial provisions of the Federal Constitution. And it appears to us that this is necessarily so. * * * When property purchased in another State, is transported to this State, and there delivered to the purchaser, to be used or consumed within the State, the transaction, in so far as it is governed by the provisions for the regulation of commerce among States, is at an end.

The denial of the proposition contained in this last sentence, is the substance of such cases as the Original Package Case of 1890.

As already noticed on page 421, there was an effort in this case to secure the assent of the Court to the proposition that a State might declare the liquor traffic injurious and calculated to introduce immorality, vice and pauperism, and consequently might forbid the sale of liquor. This proposition was denied by the Chief Justice—
But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight and human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists: (5 How. 46 U. S. 576-7.)

This statement is repeated by Chief Justice Fuller, in the opinion of the court in the Original Package Case, infra.

Justice Catron took the other and equally unfavorable view of the same assumption of power by a State, over interstate commerce, already alluded to. This was cited by Justice Field, (concurring opinion in Bowman v. RR. Co.) in support of his own statement, that—

What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any State: (125 U. S. 50.)

In the dissenting opinion of Justice Gray, infra, the judgment in these License Cases, is said to have been treated as beyond question in a long series of cases reaching from Veazie v. Moore to Mugler v. Kansas. The first of these cases was decided in 1852 (14 How. 55 U. S. 568), by nearly the same Justices as the License Cases, and the utmost that can be said of this recognition is that the new Justice (Curtis) concurred though he had written the opinion in Cooley v. Port Wardens in 1851, without noticing the License Cases.

The next case mentioned, was Sinnott v. Davenport (1859), 22 How. 63 U. S. 227, a majority of the Court being composed of the same Justices, the two new Justices (Campbell and Clifford) concurring. But Clifford and Wayne dissented in the Chestnut Street Bridge Case (supra, page 445), which is the next cited.

None of these cases were decided upon the authority of the License Cases, and none of them do more than cite the principle of State action in the absence of Congressional regulation. But Pervear v. The Comm. (1866), 5 Wall. (72 U. S.) 475, 479, was a direct affirmation of the proposition, that the State had exclusive control of the sale of home made liquors, or those imported but in second hands; which always has been good law.
Another case cited by Justice Gray, is Woodruff v. Parham (1868), 8 Wall. (75 U. S.) 123; but the License Cases were alluded to there only to aver a doubt if any material proposition was decided: Miller, J., p. 139. And the same Justice barely mentioned the name in Henderson v. The Mayor (1875), 2 Otto (92 U. S.) 259, 274.

Still another citation is Beer Co. v. Mass. (1877), 7 Otto (97 U. S.) 25, 33, where Justice Bradley distinguished these and some other cases with the general concluding remark—

Of course, we do not mean to lay down any rule at variance with what this Court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States or otherwise: (Id. 33)

To the same effect is the citation of the coal case, Brown v. Houston (1885), 114 U. S. 622, 631, where the opinion was also written by Justice Bradley, who also wrote the opinion in another citation, that is, the modern License Case of Walling v. Michigan (1886), 116 U. S. 446, 461. But in this latter case, the License Cases were mentioned because the State Court thought the tax on the business of selling liquors to be shipped from another State, was justified by these and other cases. To this Justice Bradley replied—

None of these cases, however, sustain the doctrine that an occupation can be taxed, if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State: (116 U. S. 461.)

The opinion in United States v. De Witt (1870), 9 Wall. 76 U. S. 41, is also cited and it is supported by the citation of the License Cases, but only upon the point that Congress cannot exercise in the States police powers in the usual and restricted sense of the term (see page 413). There is no doubt of this.

Justice Gray also cites Mobile v. Kimball (1880), 12 Otto (102 U. S.) 601, 701; but there Justice Field did not treat the License Cases as beyond question, for he first speaks of the difficulty of ascertaining what principle was here established, and then passed on to speak of the present rule of exclusion in national subjects (see pages 420 and 437, supra). And this was deliberate, for Justice Field, in his separate opinion in
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*Mugler v. Kansas* (1887), 123 U. S. 623, 676 (which is another citation by Justice Gray), said—

The construction of the commercial clause of the Constitution, upon which the *License Cases*, in the 7th of Howard, were decided, appears to me to have been substantially abandoned in later decisions. *Hall v. DeCuir* (1878), 95 U. S. 485; *Welton v. State of Missouri* (1876), 91 Id. 275; *County of Mobile v. Kimball* (1880), 102 Id. 691; *Transportation Co. v. Parkersburg* (1882), 107 Id. 691; *Gloucester Ferry Co. v. Pennsylvania* (1884), 114 Id. 196; *Wabash, St. Louis & Pacific Railway Co. v. Illinois* (1886), 118 Id. 557. I make this reservation that I may not hereafter be deemed included by a general concurrence in the opinion of the majority: (123 U. S. 676.)

The majority of the Court composed of Chief Justice Waite, and Justices Miller, Bradley, Harlan, Matthews and Gray, speaking by Justice Harlan simply cited the *License Cases*, as sanctioning the power of the State to forbid the manufacture of liquor, in a case coming into the Court under the Fourteenth Amendment of the Constitution; that is, on the allegation that the privileges of a citizen had been abridged, and his property destroyed without due process of law.

Justice Field substantially repeated his sentiments in *Bowman v. RR. Co.* (1888), 125 U. S. 465, 507, where also Justice Matthews analyzed the *License Cases* and concluded that the judgment was strictly confined to the right of a State to prohibit the sale of intoxicating liquor, after it had been brought within the territorial limits of the State: this was not the case in hand and no further reference was required or made in the opinion: (Id. 479.)

IX.

Commerce includes navigation and the transportation of passengers, both upon the high seas and in the bays, harbors, lakes and navigable waters within the United States.

A voyage is not ended until the passengers and merchandise have been landed and disbursed in the State.

A common carrier cannot be required by a State, to pay a capitation tax, or to be responsible for immigrants and interstate passengers.

Except to guard against disease or pauperism, a State cannot regulate immigration.
A State cannot collect the expense of maintaining paupers, or of executing its police laws, by a tax on immigrants.

Smith v. Turner and Norris v. The City of Boston, decided together in January Term, 1849, and reported in 7 How. (48 U. S.) 283–573, are also known as the Passenger Cases, from both of them declaring invalid a tax on aliens arriving at ports of the United States.

The case first named arose from certain sections of a law of the State relating to the marine hospital in the City of New York. Justice McLean explained that, by the seventh section—

"The Health Commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay, shall sue for and recover in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz:

1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

2. From the master of each coasting vessel, for each person on board, twenty-five cents; but no coasting vessel from the States of New Jersey, Connecticut and Rhode Island, shall pay for more than one voyage in each month, computing from the first voyage in each year."

The eighth section provides that the moneys so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital moneys, a right to demand and recover from each person, the sum paid on his account." The tenth section declares any master who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of one hundred dollars.

By the eleventh section, the Commissioners of Health are required to account annually to the Comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such moneys shall, in any one year exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne, and paid as part of the contingent charges of the City of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the City of New York, for the use of the Society:"

Under this statute, Smith, the master of the British ship Henry Bliss, was sued in the Supreme Court of New York, for one dollar each for two hundred and ninety-five steerage passengers. A demurrer was filed on the ground that the statute was a regulation of commerce and void. The Court
overruled the demurrer and the Court of Errors affirmed the action of the Supreme Court. Smith then removed the cause to the Supreme Court of the United States, where the judgment was reversed, with costs, on the ground laid in the demurrer. This judgment was agreed to by Justices McLean, Wayne, Catron, Grier and McKinley, and dissented from by Chief-Justice Taney and Justices Daniel, Nelson and Woodbury. All the Justices except Nelson, write separate opinions, Justices McLean and Wayne going further in upholding the exclusiveness of the power of Congress than the other Justices composing the majority of the Court. As, however, it was a bare majority, the Court, twenty-six years later, in Henderson v. The Mayor, infra, considered the question afresh, though with the same result: Miller, J., 92 U. S. 269-70, and in the Head Money Cases (1884), 112 U. S. 580, 592.

The importance of the decision appeared to Justice McLean to lie in the possibility of the tax imposed, operating to enforce non-intercourse between the States: (page 407.) As Mississippi had been allowed (Groves v. Slaughter, 1841, 15 Peters, 40 U. S. 504) to prevent citizens of other States from bringing in slaves as merchandise; as the State of Georgia had imprisoned a missionary (Worcester v. Ga., 1832, 6 Peters, 31 U. S. 515) for preaching the gospel to the Cherokee Indians without a license from the Governor of the State; as the same State had attempted to prevent individual Indians from emigrating from the State (Cherokee Nation v. Ga., 1831, 5 Peters, 30 U. S. 1, 8); as this case had followed the Miln case, and was followed by those of Crandall, Henderson and the Compagnie Generale Transatlantique, not to mention others; there was good cause for fearing non-intercourse State laws. If there would be any doubt, it is removed by Justice Woodbury distinctly dissenting from fear that the laws of Mississippi, Ohio, and other States against the entrance of negroes, would be overthrown: page 567. The principle of the judgments, therefore, closely related to interstate traffic. Still, of course, the actual point decided was the invalidity of a tax on alien immigrants: Daniel, J., page 495.

The second case, Norris v. Boston, was begun in the Boston Court of Common Pleas, by Norris, to recover two dollars.
exacted for each alien passenger landed by him in the City of Boston, under an act of April 20, 1837, relating to alien passengers, and providing amongst other things—

SEC. 3. No alien passenger, other than those spoken of in the preceding section [i.e. lunatics, idiots, maimed, aged or infirm, etc.] shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer, the sum of two dollars for each passenger so landed, and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers.

The judgment was the same as in the New York case, and the law was accordingly declared void as a regulation of commerce, without passing upon the other sections relating to lunatics and the like: per GRIER, J., page 457, who also differed from the other Justices of the majority in thinking (page 463) this law a tonnage tax, and so void; see page 425, supra.

All of the cases considered in this connection, depended upon MARSHALL'S definition of commerce as the intercourse of persons as well as traffic: Henderson v. The Mayor (1876), 2 Otto (92 U. S.) 259, 270, where Justice MILLER acknowledged this to be the accepted canon of construction on all subjects of commerce: STRONG, J., R. R. Co. v. Husen, (1878) 5 Otto (95 U. S.) 465, 470.

A determination was also called for, of the period of time when the commerce power ceased and the police or State power began. Upon this point, the result of the decision in these cases, when taken with that in Brown v. Maryland (supra, page 442), is to commit this determination to Congress and the Supreme Court. Justice McKinley thought it one of the most perplexing questions, and Congress not acting, the Court finally, in these Passenger Cases, and those to be presently noticed in this connection, laid down the rules stated above on pages 459, 460. They were affirmed by the opinion of Justice FIELD in Gloucester Ferry Co. v. Pa. (1885), 114 U. S. 196, 213.

The opposite view made the passenger liable as soon as he attempted to land: WOODBURY, J., Passenger Cases, page 537; of which the consequences must have been the same as those repudiated in Brown v. Maryland, respecting merchandise.
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The State's right of taxation was also involved, as in *Brown v. Maryland*, but was denied on the different ground, that the law was not a quarantine regulation, because operating upon all passengers; otherwise, the law could not operate as the voyage had not yet been terminated: per McLean, J., page 400, sqq; Wayne, J., page 411; Catron, J., page 447.


The supremacy of treaties was also considered, but not necessarily; see above, page 416.

The power of a State to exclude immigrants, was denied with full cognizance of the decision in *Groves v. Slaughter* (1841), 15 Peters (40 U. S.) 449, which was distinguished as relating to Slaves, over whom the commerce power did not extend. Justice McKinley would have decided these *Passenger Cases* upon this point (page 453); Chief-Justice Taney held the same view, though with the opposite opinion of the law (page 465). And yet *Groves v. Slaughter* actually decided nothing more than that the Constitution of Mississippi did not apply to the promissory notes in suit: if it had applied, then the right of a State to exclude persons, even if slaves, would have been decided, and the *dicta* of the different Justices worthy of consideration in this article.

The principle of this New York law was repeated by an act of Nevada, passed March 9, 1865, requiring passenger transporters for hire to pay a tax of one dollar upon every person leaving the State. The State Supreme Court (*Ex parte Cran- dall*, 1865, 1 Nev. 294.) sustained the law chiefly by the principles of the dissenting opinion of Chief Justice Taney in the *Passenger Cases*. This State Court was unanimous in holding that the mere grant of power to Congress, could not imply a prohibition upon the State, but was a mere concurrent power, as laid down by Kent, *supra*, page 430: and concluded that—
The better rule, and that sustained by the preponderance of authority, seems to be that subject and subordinate to the power of Congress, a State may regulate commerce within its own jurisdiction, and its laws enacted for that purpose are unconstitutional only when they conflict with, or are repugnant to some act or regulation of the General Government. This rule removes all possible difficulties * * * In other words, the States are enabled to protect themselves, not from the laws or constitutional authority of Congress, but from its inaction: Lewis, C. J., i Nev. 313.

Crandall did not appear in the Supreme Court of the United States, but counsel for the State did, and curiously presented a brief containing not a word on the Passenger Cases, though the opinion of the Nevada Court, printed in the record, did admit the opinions and reasonings of Justices McLean, Wayne and Grier, to be unmistakably in conflict with their position. They pointed out that Justice Catron had agreed to the judgment only on account of certain laws of Congress, and therefore concluded that the Passenger Cases were not authority for the exclusive power of Congress.

The Supreme Court declared the Nevada law to be unconstitutional: Crandall v. Nevada (1868), 6 Wall. (73 U. S.) 35, by a Court divided upon the particular Constitutional power, which has been transgressed in taxing passengers. Chief Justice Chase and Justice Clifford holding it to be a regulation of commerce, and Justice Miller, in the opinion of the Court, with assent of Justices Swayne, David Davis, Nelson, Grier, Miller and Field, thought otherwise and declared the invalidity of the law on the other ground of a conflict with these implied powers which prevent a State from affecting the functions of the government. This seems an extension of the principles of McCulloch v. Maryland (1819), 4 Wheat. (17 U. S.) 316, to hold that the travelling of citizens and aliens on private business was a function of the government; and subsequently Justice Miller cited this Crandall case as avoiding a tax on commerce, in Woodruff v. Parham (1869), 8 Wall. (75 U. S.) 123, 138, and in Fargo v. Stevens (1887), 121 U. S. 230, 241; though still recognizing his original ground in Hinson v. Lott (1869), Id. 148, 152, in the Slaughter House Cases (1873), 16 Wall. (83 U. S.) 36, 79, and, justly, when dissenting, in B. & O. RR. Co. v. Md. (1875), 21 Wall. (88 U. S.) 456, 475; as was pointed out by Strong, J., in State Freight
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Tax Case (1873) 15 Wall. (82 U. S.) 232, 280; and by Matthews, J., with approval, in Moran v. N. O. (1884), 112 U. S. 69, 73.


As in the Miln case, a portion of the State Statute not considered by the Court for technical reasons, required a bond from the master for every passenger, conditioned for the maintenance of the passenger and his children, if they became paupers within two years; so in these Passenger Cases, substantially that provision came to be considered and found void. Immediately, the State modified the statute so as to require a report similar to that in the Miln case (ante, page 449), and to further require the Mayor of the City to endorse on this report a demand for a bond for four years indemnity, or the sum of one dollar and fifty cents, per passenger, under a penalty of five hundred dollars for each passenger: per Miller, J., Henderson v. The Mayor (1876), 2 Otto (92 U. S.) 259, 266. This attempt of the State was also a failure, as was also the next one, attempted by Act of May 31, 1881, to require one dollar for each alien passenger, for the execution of the State inspection laws: N. Y. v. Compagnie (1882), U. S. Cir. Ct., S. Dist., N. Y. 10 Fed. 357, 360, 365; affirmed, 107 U. S. 59; and a similar law in Louisiana was also declared unconstitutional, for the same reason of interfering with commerce: Commissioners of Immigration v. North German Lloyd (1876), 2 Otto (92 U. S.) 259. So, also, "a most extraordinary statute" of California, requiring similar bonds from the vessel master, owner or consignee, whenever the State Commissioner of Immigration has satisfied himself of the arrival (in this case) of lewd and debauched women; with a commutation fee to be fixed by the Commissioner himself, whose perquisite was twenty per centum of the commutation moneys: Shy Lung v. Freeman (1876), 2 Otto (92 U. S.) 275, 277, 278.

As the States could not exact a tax upon commerce, some of Vol XXXVIII.—30.
the consignees of foreign vessels also thought that there was no power to tax in the government of the United States, and brought suit to recover the sums required to be paid for each immigrant by Act of Congress of August 3, 1882 (23 Stat. at Large 214). The suit failed, as both the Circuit Court (in an opinion by Justice Blatchford, Edye v. Robertson, 1883, U. S. Circ. Ct. E. Dist. N. Y. 18 Fed. Repr. 135), and the Supreme Court in an opinion by Justice Miller, Head Money Cases, 1884, 112 U. S. 580, 596), held this Act to be a valid exercise of the commerce power.

X.

Whatever subjects of the Constitutional power to regulate commerce, are, in their nature, national, or admit only of one uniform system or plan of regulation, they are exclusively in the power of Congress to regulate or not.

A State law regulating pilots is valid until it comes into collision with an Act of Congress.

Cooley v. The Board of Wardens of the Port of Philadelphia (1851), 12 How. (53 U. S.) 299, originated (April 3, 1847) in a proceeding before Alderman Thomas D. Smith of the City of Philadelphia, for the recovery of eight dollars and forty-four cents, claimed of A. B. Cooley, consignee of the schooner Emily, as half pilotage incurred under the Twenty-ninth section of the act of March 29, 1803, P. L. 542, 560, in consequence of the refusal of the master to take a pilot on an outward voyage to a port not within the River Delaware. The Section of the statute proceeded under, provided:—

SEC. 29. And be it further enacted by the authority aforesaid, That every ship or vessel arriving from, or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot; and it shall be the duty of the master of every such ship or vessel during thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port, and where any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time;
and it shall be the duty of the wardens to enter every such vessel in a book, to be kept by them for that purpose, without fee or reward; and if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of sixty dollars, and if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel, shall forfeit and pay to the wardens aforesaid, a sum equal to the half pilotage of such ship or vessel, to the use of the society for the relief of distressed and decayed pilots, their widows and children, to be recovered as pilotage in the manner hereinafter directed: (P. L. 1802-3, pp. 560-1.)

Judgment was duly rendered against Cooley who appealed to the Court of Common Pleas, where the judgment was affirmed, November 22, 1847; as also happened on appeal in the State Supreme Court, January 31, 1850, and, on final appeal in the Supreme Court of the United States, December Term, 1851. The law of Pennsylvania and similar statutes were thus declared to be valid, and not in contravention of those clauses of the Constitution, which require uniformity in duties, imposts and excises, and which grant Congress the power to regulate commerce: (supra, pages 420, 424, 425; and also Packet Co. v. Keokuk, 1877, 5 Otto, 95 U. S. 80, 88; Wilson v. McNamee 1881, 12 Otto, 102 U. S. 572, 575; Justice Blatchford in Turner v. Maryland 1883, 17 Otto, 107 U. S. 38, 56; and Justice Bradley, in Transportation Co. v. Parkersburg 1883, Id. 691, 702, 703; and Ouachita Packet Co. v. Aiken 1887, 121 U. S. 444, 447); nor of a coasting license, as in Gibbons v. Ogden; nor of the United States Statutes, except where they collide (similarly, Steamship Co. Joliffe, 1864, 2 Wall. 69 U. S. 450, per Field, Nelson, Grier, and Swayne, JJ., against Miller, Wayne and Clifford, JJ., dissenting).

This precise question was again before the Court in 1872 (Ex parte McNiel, 13 Wall. 80 U. S. 236, 242), and the Court unanimously reaffirmed the decision in Cooley v. Port Wardens, Justice Swayne saying that they were entirely satisfied with that adjudication. The other concurring members of the Court were Chief Justice Chase, and Justices David Davis, Strong, Clifford, Miller, Field, and Bradley; Justice Nelson not sitting through illness.

The opinion of the Court in Cooley v. Port Wardens, was written by Justice Curtis, who had been appointed September
22, 1851, from the bar of Boston, Massachusetts. The concurring Justices were Taney, Chief Justice, and Catron, McKINLEY, NELSON and GRIER, Associate Justices. Justice MCLEAN dissented, because State pilot laws could have no force as regulations of commerce, until adopted by Congress (pages 322–3); Justice WAYNE also dissented, and Justice DANIEL agreed only to the judgment, because the Constitutional power over commerce did not appropriately and necessarily extend to such local subjects as the means of precaution and safety, adopted within the waters or limits of a State, for the preservation of vessels, cargoes, navigators and passengers (page 326).

The subject of pilotage lies outside the bounds of this article, except so far as determining the exclusiveness of the Constitutional power over commerce and the authority of Congress to adopt local regulations.

The dissenting opinion of Justice DANIEL is not far removed in principle from that of the Court, for Justice CURTIS denied that there was any conflict between this Pennsylvania statute and the Tenth Section of the Constitution, (supra, page 425) because—

Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself, to prove that they could not have been intended to be embraced within this clause of the Constitution: for it cannot be supposed uniformity was required, when it must have been known to be impracticable: (12 How. 53 U. S. 314.)

The Passenger Cases, supra, really called for a decision upon the exclusiveness of the constitutional power, but the four Justices, who, with Justice MCLEAN, composed the majority of the Court, differed from him in believing that a decision could be rendered without going to that extreme: WAYNE, J., page 411; CATRON, J., page 446; GRIER, J., page 462, who also thought that Congress had acted in confirming treaties which provided for the free admission of aliens. The position of Justice MCLEAN has, however, since been adopted, with an important exception, in such cases, under the rule first formulated in Cooley v. Port Wardens, as a subject of national,

Chief Justice Taney continued in the Passenger Cases, to hold the same opinion as in the License Cases, supra, page 454, gracefully dissenting in these words referring to the judgment in the latter Cases:

I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this Court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported: (Page 470.)

The rule for testing the exclusiveness of the commerce power, as stated on page 466 was formulated by Justice Curtis, while carefully deciding no more than the validity of the pilot laws before the Court (12 How. 53 U. S. 320); but this conclusion was reached through an affirmance of the national control of navigation (supra, page 428), an acknowledgment that pilot laws do constitute regulations of commerce and that Congress had already been compelled to intervene (12 How. 53 U. S. 316), and a statement that the law of Pennsylvania had not been interfered with by Congress (Id. 318); whereby the decision necessarily defined the powers remaining in the States.

This question has never been decided by this Court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this Court.

The grant of commercial power to Congress, does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded, it must be because the
nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States.

If it were conceded on one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them.

And, on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution, (Federalist No. 32, infra), and with the judicial construction, given from time to time by this Court after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations: (Sturgis v. Crowninshield 1819, 4 Wheat. 47 U. S. 193; Moore v. Houston, 1820, 5 Wheat. 46 U. S. 1; Wilson v. Black Bird Creek Marsh Co. supra, page 445.)

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. * * *

Either absolutely to affirm or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable, but to a part. Whatever subjects of this power are, in their nature, national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress: CURTIS, J., Cooley v. Port Wardens (1851), 12 How. (53 U. S.) 318-20.

This statement of the exclusiveness of the Constitutional power has been recognized as correct by Justice GRAY, dissenting in the Original Package Case, infra; Justice MATTHEWS, in Bowman v. Chicago & N. W. RR. Co. (1888), 125 U. S. 465, 481; Justice FIELD, Id. 508; Justice BRADLEY, in Phila. Steamship Co. v. Pennsylvania (1887), 122 U. S. 326, 339; in Robins v. Taxing District (1887), 120 Id. 489, 492; in Brown v. Houston (1885), 114 Id. 622, 630, and

The line which separates the powers of the States from this exclusive power of Congress, is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case, upon a view of the particular rights involved.

In addition to what has been already explained (pages 421, 422), a difficulty must be observed. Five years before *Gibbons v. Ogden* was decided, the same Justices held that the power conferred in the same section of the Constitution, to establish an uniform rule of naturalization and an uniform bankrupt law, were not exclusive. But such decision was rendered because these powers were said to be of a difficult description from those which require Congress to exercise exclusive powers; in the latter case, the rule was also plainly declared—

Whenever the terms in which a power is granted by the Constitution, to Congress, or wherever the nature of the power itself requires that it shall be exclusively exercised by Congress, the subject is as completely taken away from State Legislatures as if they had been forbidden to act upon it: *Marshall*, C. J. (1819), 4 Wheat. (17 U. S.) 122, 193.

The opposite view was believed by Taney and Woodbury to be the same as the construction given to the Constitution by the eminent men who were concerned in framing it, and active in supporting it: that is—
The necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find, that notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses, prohibiting the exercise of them by the States. The Tenth Section of the First Article consists altogether of such provisions: The Federalist, No. 32.

All of which was, however, subject to the Sixth Article (supra, page 425), and consequently amounted in practice to no more than the position of Kent, to be again noticed presently.

Still there was no mere arbitrary division of the powers of Congress, and Justice McLean, in these Passenger Cases, considered the test to be the same as subsequently laid down in the line of cases beginning ten years latter with Cooley v. Port Wardens; namely, the local action of the State in bankruptcies, as well as in governing the militia (see Houston v. Moore (1820), 5 Wheat. 18 U. S. 1), and this is probably what Marshall, meant—

If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease: Sturgis v. Crowninshield (1819), 4 Wheat. (17 U. S.) 196.

At least, this seems to be the understanding of Justice Bradley, in Robins v. Taxing District (1887), 120 U. S. 489, 492, and the concurring Justices, Miller, Harlan, Matthews, and Blatchford. As Justice Matthews did not sit, and Chief Justice Waite dissented with Justices Gray and Field, in the uniformity of the license, this understanding may be regarded as approved.

Against the exclusiveness of the Constitutional power, the practical position of Kent, supra, pages 421, 430, was frequently opposed, and as often denied: in the Passenger Cases, the judgment of the Court was the first to be placed upon the ground of exclusiveness, in denial of ungranted right in the
States to legislate until Congress might choose to act. The right not recognized as remaining in the State, would have compelled Congress to legislate in the negative. This was thought by Justice McLean in *Groves v. Slaughter* (1841), 15 Peters 40 U. S. 449, 504, to be as fatal to the spirit of the Constitution as it was opposed to its letter. Under the prevailing interpretation, there are some, like Justice Woodbury in *Passenger Cases* 7. How. (48 U. S.) 560, who will regard the silence of Congress more formidable than its action; but all such persons do not wish to admit the full extent of the Constitutional powers.

In the course of his concurring opinion in *Gibbons v. Ogden*, Justice Johnson digressed to criticise the arguments advanced to establish the concurrent power of the State government, under the Tenth Section of the Constitution, supra, page 425; while merely dicta, the language is worthy of remark here:—

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 when frankly exercised, they can produce no serious collision: (9 Wheat. 22 U. S. 235.)

Chief Justice Marshall, upon a view which appeared to him to be narrow, would have construed this Section with equal advantage to interstate commerce—

If it be a rule of interpretation to which all assent that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exception not been made, we know of no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited: *Brown v. Maryland*, 12 Wheat. 25 U. S. 438.

This rule of interpretation, was approved by Justice Baldwin, in *Rhode Island v. Mass.* (1838), 12 Peters (37 U. S.) 657, 717; and a particular result, as applied to State taxation, was thought to be vital to the existence of the Constitutional

The dissent of Justice McLEAN being placed upon the action of Congress towards the State pilot laws, this would be an appropriate place to consider the effect of such Congressional action, but for the recent statute (infra), carrying out the suggestion of Chief Justice FULLER, in the Original Package Case. The subject will, therefore, be deferred until that statute is reached in the course of this article.

XI.

There is no State sovereignty which is exclusive of the Constitutional regulation of commerce.

An act of Congress admitting a State into the Union, or ratifying a compact between two or more States, is not a regulation of commerce, and the Constitutional power cannot be restricted in this manner.

A State may regulate its internal commerce, notwithstanding a condition of its admission into the Union, requiring freedom of the particular commerce afterwards regulated. Such condition operates only to prevent discrimination against the citizens of other States.

An injunction bill will lie in the Courts of the United States, to restrain an interference with commercial intercourse, which amounts to a nuisance, or creates irreparable damage, notwithstanding the absence of Congressional action, either upon the particular subject or generally, prohibiting and punishing nuisances.

A State may proceed in the Courts of the United States, to prevent or abate an obstruction to commercial intercourse growing out of State improvements.

Congress may legalize an interference with commercial intercourse.

A bridge over an interstate water-way, is not necessarily incompatible with navigation.
Congress can authorize the construction of bridges, dykes and other structures for the assistance of commerce.

The case of *The State of Pennsylvania v. The Wheeling & Belmont Bridge Co.*, began on the sixteenth of August, 1849, by the presentation of an injunction bill to Justice GRIER, sitting at Philadelphia, whereby the interference with navigation in the river Ohio was made the foundation for the complaint against a bridge, then in course of erection across the channel of the river at Wheeling. The cause was adjourned to the Supreme Court in banc, where in January Term, 1850, it was referred to ex-Chancellor Walworth, of New York, as commissioner, to report upon the facts: (9 How. 50 U. S. 657), Justice DANIEL dissenting here and always throughout the case, because he considered the Court without jurisdiction: (9 How. 50 U. S. 659; 13 How. 54 U. S. 594; 18 How. 59 U. S. 451); a question which cannot be pursued in this article for want of space.

The testimony having been taken (11 How. 52 U. S. 528), and counsel having cited the repeated refusal of Congress to authorize this bridge for the reason avowed in the bill, the Court proceeded to declare this suspension bridge a nuisance, to be abated by changing the elevation of the floor: (13 How. 54 U. S. 518, 578, 625). The opinion was written by Justice McLEAN, with the assent of Justices WAYNE, CATRON, MCKINLEY, NELSON, GRIER and CURTIS; Chief Justice Taney and Justice DANIEL dissented, the latter, among other reasons, upon the matter of fact ground that the testimony did not disclose a nuisance: (Id. 602.)

The Chief Justice strenuously objected to the assertion of the power to abate a nuisance without an Act of Congress; and this not only upon his general principle that the State might act until Congress legislated, but, also, that there was no common law of the United States: (13 How. 54 U. S. 580.) Justice McLEAN, speaking for the majority of the Court upon the latter ground, claimed only the chancery jurisdiction conferred by the Judiciary Act, and now incorporated in the Revised Statutes as—

Sec. 723. Suits in equity shall not be sustained in either of the Courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law.
The power to enjoin is now firmly settled, as to questions of taxation and interference with commerce, by a long line of cases of which only a few need be mentioned here: Transportation Co. v. Parkersburg (1883), 17 Otto (107 U. S.) 691; the Virginia Coupon Cases (1885), 114 U. S. 311, 314, 315, 336, and citations, whose controlling principle was declared also by Chief Justice Marshall, in Osborn v. The Bank (1824), 9 Wheat. (22 U. S.) 738, 858-9; Starin v. N. Y. (1885), 115 U. S. 248, 257; also, Irwin v. Dixion (1850), 9 How. (50 U. S.) 10, 27, a case of an obstruction of ancient lights; Davis v. Gray (1873), 16 Wall. (83 U. S.) 203, 220, where a receiver appointed by a United States Circuit Court was aided against a State Governor; Tennessee v. Davis (1880), 10 Otto (100 U. S.) 257, 264, where a deputy collector of internal revenue was released from a charge of murder; Cunningham v. Macon & B. RR. Co. (1883), 109 U. S. 446, 455, where an injunction was refused because a State was a necessary party; In re Ayers (1887), 123 Id. 443, where a State officer was released from imprisonment for disobeying an injunction.

Upon the general subject of an interference with commerce, the decree was made because Congress had legislated in respect to the river, and the law of Virginia, authorizing the bridge, must give way to the paramount authority. The Congressional action consisted in approving the compact between the States of Virginia and Kentucky (vide infra), and per Bradley, J., Transportation Co. v. Parkersburg (1883), 17 Otto, (107 U. S.) 691, 705, and Williamette Iron Bridge Co. v. Hatch (1888), 125 U. S. 1, 16, but that does not affect the principle of the case, which was thus declared by Justice McLean (13 How. 54 U. S. 566), and recognized by Justice Nelson (18 How. 59 U. S. 430), and subsequently by Justice Swayne, in the Chestnut Street Bridge Case of Gilman v. Phila. (1866), 3 Wall. (70 U. S.) 713, 727. The distinction between this last case and the Wheeling Bridge Case is pointed out infra, page 482.

But for this effect of the approval, by Congress, of the compact, undoubtedly attention would have been given to the interference with the steamboat licenses, as in Gibbons v. Ogden, supra, as was actually the case in Sinnott v. Davenport (infra).
The entry of the final decree was deferred until the first Monday of February, 1853, to permit a voluntary abatement of the nuisance. Then, in 1854, the bridge was blown down by a violent storm, and while its reconstruction was under way, the complainant filed a new bill and obtained a preliminary injunction, June 26, 1854. This injunction was disregarded by the bridge company, and the bridge was reconstructed by November of the same year, under the authorization of two sections tacked on to the Post-office Appropriation bill, approved August 31, 1852:

SEC. 6. And be it further enacted, That the bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding.

SEC. 7. And be it further enacted, That the said bridges are declared to be and are established post-roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation; and the officers and crews of all vessels and boats navigating said river, are required to regulate the use of their said vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges: (10 Stat. at Large 112.)

The bridge being legalized, all proceedings fell, including the punishment impending for disregarding the injunction. Justice Nelson wrote the opinion of the Court sustaining the constitutionality of the legalizing Act under the commerce powers, without entering at all upon the question of the power "to establish post-offices and post-roads," as to which Justice McLean came to an unfavorable conclusion, in his dissenting opinion (18 How. 59 U. S. 431, 441); but the subject cannot be considered here, at all.

Under the commerce powers, the Act was allowed to annul the decree of the Court, with explicit recognition of the general proposition that no act of Congress could ordinarily do so, and, in this case, could not do so as respects the costs, which the Bridge Company was compelled to pay (page 459); though as to this Justice Daniel dissented.
But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction, depends upon the question, whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced: Nelson, J., in How. (59 U. S.) 431-2.


There was another objection to this Act of Congress, founded upon the preference clause of the Ninth Section of the Constitution (supra, page 424); this was denied by the majority of the Court, though advocated by Justice McLean, in his dissenting opinion. Want of space forbids further consideration than will be given in connection with Munn v. Illinois, infra.

In the last stage of the case Justice Wayne agreed generally with Justice McLean in his dissent, and Justice Grier to the extent of objecting to the Act of Congress.
AN ORIGINAL PACKAGE.

The complainants insisted, in all stages of the case, that the compact between Virginia and Kentucky, must rule, for it provided—

SEC. II. Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which will remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed State on the river, as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river: (Act of Virginia, passed December 18, 1789; 13 Hening's Stat. 17, 20; made part of Art. VIII. Const. 1792 of Kentucky and Art. VI. § 9, Const. 1799, and Art. VIII. § 9, Const. 1850.)

In their dissenting opinions, Chief Justice TANEY and Justice DANIEL both called attention (13 How. 54 U. S. 583, 601) to the peculiarly general terms upon which Kentucky had been admitted into the Union. This peculiarity also extended to the declaration of the equality of the State in the Union:—

CHAP. IV. An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the Commonwealth of Virginia, and admitted into this Union by the name of the State of Kentucky.

WHEREAS, the legislature of the Commonwealth of Virginia, by an Act, entitled "An Act concerning the erection of the District of Kentucky into one independent State," passed the eighteenth day of December, one thousand, seven hundred and eighty-nine, have consented that the District of Kentucky, within the jurisdiction of the said Commonwealth, and according to its actual boundaries at the time of passing the Act aforesaid, should be formed into a new State:

AND, WHEREAS, a convention of delegates, chosen by the people of the said District of Kentucky, have petitioned Congress to consent that, on the first day of June, one thousand, seven hundred and ninety-two, the said District should be formed into a new State, and received into the Union, by the name of "The State of Kentucky."

SECTION I. Be it enacted, etc., That the Congress doth consent, that the said District of Kentucky, within the jurisdiction of the Commonwealth of Virginia, and according to its actual boundaries on the eighteenth day of December, one thousand, seven hundred and eighty-nine, shall, upon the first day of June, one thousand, seven hundred and ninety-two, be formed into a new State, separate from and independent of the said Commonwealth of Virginia.

SECTION 2. And be it further enacted and declared, That upon the aforesaid first day of June, one thousand, seven hundred and ninety-two, the said new State, by the name and style of the State of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

APPROVED, February 4, 1791: 1 Stat. at Large 189.
This is the whole of the Act of Congress: still, Justice McLean (13 How. 54 U. S. 565), and especially Justice Nelson (18 How. 59 U. S. 433) treated this as an assent of Congress to the compact, following Green v. Biddle (1823), 8 Wheat. (21 U. S.) 1, 85. As this latter case remains unreversed, the opinion rendered by Justice Nelson is doubly interesting for the breadth of its scope:—

The question here is, whether or not the compact can operate as a restriction upon the power of Congress, under the Constitution, to regulate commerce among the several States? Clearly not. Otherwise Congress and two States would possess the power to modify and alter the Constitution itself.

This is so plain that it is unnecessary to pursue the argument further. But we may refer to the case of Wilson v. Mason (1801), 1 Cranch (5 U. S.) 88, 92, where it was held that this compact, which stipulated that rights acquired under the Commonwealth of Virginia shall be decided according to the then existing laws, could not deprive Congress of the power to regulate the appellate jurisdiction of this Court, and prevent a review where none was given in the State law existing at the time of the compact: Nelson, J., Pa. v. Bridge Co. (1855), 18 How. 59 U. S. 433.

Justice Daniel did not proceed so fundamentally, as he was content to find in the compact no Congressional regulation: (13 How. 54 U. S. 601.) Others, as Chief Justice Taney (Id. 584, citing Pollard v. Hagan) have been content to declare that all States, after the admission to the Union, are on an equal footing. This case and this principle have been repeatedly affirmed in commerce cases, in a line of decisions at present ending with Williamette Bridge Co. v. Hatch, mentioned in the next paragraph.

So far as the principles of Wilson v. Marsh Co., and the Wheeling Bridge Case, could be affected by any compact between the States, or on their admission into the Union, a series of cases, beginning in 1845, and extending to March, 1888, not only confirm the opinion of Justice Nelson, just quoted, that the Constitutional power cannot be thus fettered; but also establish that the power of the States over commercial matters is equally unfettered. The whole subject was elaborately considered and the principal cases cited by Justice Bradley in the Williamette Iron Bridge Co. v. Hatch (1888), 125 U. S. 1, with the assent of Chief Justice Waite and Justices
MILLER, FIELD, HARLAN, MATTHEWS, GRAY, BLATCHFORD and LAMAR. The general principle there laid down, declared that the freedom secured upon the navigable waters in and around the States subject to such compacts, was a political freedom, whereby discrimination against citizens of other States was prevented; but it was not any result of such Congressional regulation and care of those waters as might be assumed at any time.

The case originated in the United States Circuit Court for the District of Oregon, in an injunction proceeding for the abatement of a bridge over the Willamette River in the State of Oregon, erected by the authority of that State alone. The Circuit Judge, SAWYER, granted a preliminary injunction (April 21, 1881: 6 Fed. Repr. 780), and, after the testimony was taken, a final injunction (October 22, 1881; See 19 Fed. Repr. 349), because the Act of February 14, 1859, (11 Stat. at Large 383) admitting Oregon into the Union, required freedom in the navigable waters of the State. An appeal was taken but not prosecuted. After the decision in Escanaba Co. v. Chicago, in 1883, a bill of review was filed, but dismissed, upon demurrer, by the District Judge DEADY, with the concurrence of the Circuit Judge (March 3, 1884; 19 Fed. Repr. 347). This last decree was then taken to the Supreme Court and there reversed, with instructions to dismiss the original bill.

THE LAW GOVERNING

(1887), 123 Id. 288; and the judgment in each case was the same: that is, the legality of the bridge was sustained upon the principles mentioned on page 474, supra.

In the direction of Congressional action, this denial by Justice Nelson (supra, page 480), was broadly followed by Justice Strong, with the assent of Chief Justice Waite and all the other Associate Justices—Clifford, Swayne, Miller, David Davis, Field, Bradley and Hunt, in South Carolina v. Georgia (1876), 3 Otto (93 U. S.) 4, 12, where a compact between those States was made the foundation of a bill in equity to restrain the obstruction of one of the channels of the Savannah river. Those States had agreed, April 24, 1787, that "the navigation of the river Savannah" in certain reaches, should "be henceforth equally free to the citizens of both States:" and in 1874, Congress had directed the erection of a crib for the improvement of the harbor of Savannah, which would prevent the free use of one channel. This compact was held to be of no strength against the commerce powers of the United States, conferred by the Constitution of 1789, and this Wheeling Bridge Case was distinctly made the foundation of the opinion.

The Wheeling Bridge Case has been already noticed in connection with Wilson v. Marsh Co., supra, pages 446, 447, as differing in principle; though Chief Justice Taney and Justice Daniel thought otherwise, and dissentened: (13 How. 54 U. S. 580, 585, 599.)

That difference of principle can be readily seen by applying to the dam and to the bridge, the modified rule of Cooley v. Port Wardens, supra, page 466. Both affected navigable water, under State legislation, in the absence of particular Congressional action prohibiting the obstruction, though there were general laws of the United States regulating vessels. While a bridge might not, and this particular bridge, when sufficiently elevated would not be incompatible with the free navigation of the river; still the difference between the two cases lies in the geographical position of the water. If within a State, and purely internal, the State has entire control: McLean, J., 13 How. 54 U. S. 566 and 18 How. 59 U. S. 432; Veazie v. Moor (1852), 14 How. (55 U. S.) 568; and the Chestnut Street Bridge