SUPREME COURT OF UNITED STATES

Gibbons

Vs.

Ogden

March 2, 1824

The acts of the Legislature of the State of New-York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce, so far as the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam.

APPEAL from the Court for the Trial of Impeachments and Correction of Errors of the State of New-York. Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton, the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired; and authorizing the Chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New-Jersey, and the city of New-York; and that Gibbons, the defendant below, was in possession of two steam boats, called the Stoudinger and the Bellona, which were actually employed in running between New-York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New-York. The injunction having been awarded, the answer of Gibbons was filed; in which he stated, that the boats employed by him were duly enrolled and licensed, to be employed in carrying on the coasting trade, under the act of Congress, passed the 18th of February, 1793, c. 3. entitled, 'An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same.' And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New-York, the said acts of the Legislature of the State of New-York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion, that the said acts were not repugnant to the constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal.

Principles of interpretation.

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

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

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

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

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

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

The laws of N. Y. granting to R.R.L. and R. F. the exclusive right of navigating the waters of that State with steam boarts, are in collision with the acts of Congress regulating the coasting trade, which being made in pursuance of the constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

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

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

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

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

Feb. 4*th*, 5*th, and* 6*th.*

Mr. *Webster*, for the appellant, admitted, that there was a very respectable weight of authority in favour of the decision, which was sought to be reversed. The laws in question, he knew, had been deliberately re-enacted by the Legislature of New-York; and they had also received the sanction, at different times, of all her judicial tribunals, than which there were few, if any, in the country, more justly entitled to respect and deference. The disposition of the Court would be, undoubtedly, to support, if it could, laws so passed and so sanctioned. He admitted, therefore, that it was justly expected of him that he should make out a clear case; and unless he did so, he did not hope for a reversal. It should be remembered, however, that the whole of this branch of power, as exercised by this Court, was a power of revision. The question must be decided by the State Courts, and decided in a particular manner, before it could be brought here at all. Such decisions alone gave the Court jurisdiction; and therefore, while they are to be respected as the judgments of learned Judges, they are yet in the condition of all decisions from which the law allows an appeal.

It would not be a waste of time to advert to the existing state of the *facts* connected with the subject of this litigation. The use of steam boats, on the coasts, and in the bays and rivers of the country, had become very general. The intercourse of its different parts essentially depended upon this mode of conveyance and transportation. Rivers and bays, in many cases, form the divisions between States; and thence it was obvious, that if the States should make regulations for the navigation of these waters, and such regulations should be repugnant and hostile, embarrassment would necessarily happen to the general intercourse of the community. Such events had actually occurred, and had created the existing state of things.

By the law of New-York, no one can navigate the bay of New-York, the North River, the Sound, the lakes, or any of the waters of that State, by steam vessels, *without a license from the grantees of New-York*, under penalty of forfeiture of the vessel.

By the law of the neighbouring State of Connecticut, no one can enter her waters with a steam vessel *having such license*.

By the law of New-Jersey, if any citizen of that State shall be *restrained*, under the New-York law, from using steam boats between the ancient shores of New-Jersey and New-York, he shall be entitled to an action for damages, *in New-Jersey*, with treble costs against the party who thus restrains or impedes him *under the law of New-York!* This act of New-Jersey is called an act of *retortion* against the illegal and oppressive legislation of New-York; and seems to be defended on those grounds of public law which justify *reprisals* between independent States.

It would hardly be contended, that *all* these acts were consistent with the laws and constitution of the United States. If there were no power in the general government, to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient, in a most important and interesting particular. The present controversy respected the earliest of these State laws, those of New-York. On those, this Court was now to pronounce; and if they should be declared to be valid and operative, he hoped somebody would point out *where* the State right stopped, and on what grounds the acts of other States were to be held inoperative and void.

It would be necessary to advert more particularly to the laws of New-York, as they were stated in the record. The first was passed March 19th, 1787. By this act, a sale and exclusive right was granted to *John Fitch*, of making and using every kind of boat or vessel impelled by steam, in all creeks, rivers, bays, and waters, within the territory and jurisdiction of New-York, for fourteen years.

On the 27th of March, 1798, an act was passed, on the suggestion that Fitch was dead, or had withdrawn from the State, without having made any attempt to use his privilege, repealing the grant to him, and conferring similar privileges on *Robert R. Liringston*, for the term of twenty years, on a suggestion, made by him, *that he was possessor of a mode of applying the steam engine to propel a boat, on new and advantageous principles*. On the 5th of April, 1803, another act was passed, by which it was declared, that the rights and privileges granted to *R. R. Livingston*, by the last act, should be extended to him and *Robert Fulton, for twenty years, from the passing of this act*. Then there is the act of April 11, 1808 purporting to extend the monopoly, in point of time, five years for every additional boat, the whole duration, however, not to exceed thirty years; and forbidding any and all persons to navigate the waters of the State, with any steam boat or 11, 1808, purporting of *Livingston and Fulton*, under penalty of forfeiture of the boat or vessel. And, lastly, comes the act of

April 9, 1811, for enforcing the provisions of the last mentioned act, and declaring, that the forfeiture of the boat or vessel, found navigating against the provisions of the previous acts, shall be deemed to accrue on the day on which such boat or vessel should navigate the waters of the State; and that *Livingston and Fulton* might immediately have an action for such boat or vessel, in like manner as if they themselves had been dispossessed thereof by force; and that on bringing any such suit, the defendant therein should be prohibited, by injunction, from removing the boat or vessel out of the State, or using it within the State. There were one or two other acts mentioned in the pleadings, which principally respected the time allowed for complying with the condition of the grant, and were not material to the discussion of the case.

By these acts, then, an exclusive right is given to *Livingston and Fulton*, to use *steam navigation* on all the waters of New-York, for thirty years from 1808.

It is not necessary to recite the several conveyances and agreements, stated in the record, by which *Ogden*, the plaintiff below, derives title under *Livingston and Fulton*, to the exclusive use of part of these waters.

The appellant being owner of a steam-boat, and being found navigating the waters between New-Jersey and the city of New-York, over which waters *Ogden*, the plaintiff below, claimed an exclusive right, under *Livingston and Fulton*, this bill was filed against him by *Ogden*, in October, 1818, and an injunction granted, restraining him from such use of his boat. This injunction was made perpetual, on the final hearing of the cause, in the Court of Chancery; and the decree of the Chancellor has been duly affirmed in the Court of Errors. The right, therefore, which the plaintiff below asserts to have and maintain his injunction, depends obviously on the general validity of the New-York laws, and, especially, on their force and operation as against the right set up by the defendant. This right he states, in his answer, to be, that he is a citizen of New-Jersey, and owner of the steam-boat in question; that the boat was a *vessel* of more than twenty tons burden, *duly enrolled and licensed for carrying on the coasting trade*, and intended to be employed by him, in that trade, between Elizabethtown, in New-Jersey, and the city of New-York; and was actually employed in navigating between those places, at the time of, and until notice of the injunction from the Court of Chancery was served on him.

On these pleadings the substantial question is raised: Are these laws such as the Legislature of New-York had a right to pass? If so, do they, secondly, in their operation, interfere with any right enjoyed under the constitution and laws of the United States, and are they, therefore, void, as far as such interference extends?

It may be well to state again their general purport and effect, and the purport and effect of the other State laws, which have been enacted by way of retaliation.

A steam vessel, of any description, going to New-York, is forefeited to the representatives of *Livingston and Fulton, unless she have their license*.

Going from New-York, or elsewhere, to Connecticut, she is prohibited from entering the waters of the State, *if she have such license*.

If the representatives of *Livingston and Fulton, in New-York*, carry into effect, by judicial process, the provision of the New-York laws, against any citizen of New-Jersey, they expose themselves to a

statute action, *in New-Jersey*, for all damages, and treble costs.

The New-York laws extend to all steam vessels; to steam frigates, steam ferry-boats, and all intermediate classes.

They extend to public as well as private ships; and to vessels employed in foreign commerce, as well as to those employed in the coasting trade.

The remedy is as summary as the grant itself is ample; for immediate confiscation, without seizure, trial, or judgment, is the penalty of infringement.

In regard to these acts, he should contend, in the first place, that they exceeded the power of the Legislature; and, secondly, that if they could be considered valid, for any purpose, they were void, still, as against any right enjoyed under the laws of the United States, with which they came in collision; and that, in this case, they were found interfering with such rights.

He should contend, that the power of Congress to regulate commerce, was complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question were regulations of commerce, in a most important particular; and affecting it in those respects, in which it was under the exclusive authority of Congress. He stated this first proposition guardedly. He did not mean to say that *all* regulations which might, in their operation, affect commerce, were exclusively in the power of Congress; but that *suck power* as had been exercised in this case, did not remain with the States. Nothing was more complex than commerce; and in such an age as this, no words embraced a wider field than *commercial regulation*. Almost all the business and intercourse of life may be connected, incidentally, more or less, with *commercial regulations*. But it was only necessary to apply to this part of the constitution the well settled rules of construction. Some powers are holden to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the States to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the Court has adjudicated on many important questions; and the same mode is proper here. And, as some powers have been holden exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so, where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction would be, to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New-York, is a *monopoly*. Now, he thought it very reasonable to say, that the constitution never intended to leave with the States the power of granting monopolies, either of trade or of navigation; and, therefore, that as to this, the commercial power was exclusive in Congress.

It was in vain to look for a precise and exact *definition* of the powers of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In confering powers, it proceeded in the way of *enumeration*, stating the powers conferred, one after another, in few words; and, where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.

Few things were better known, than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer, than that the prevailing motive was *to regulate commerce;* to rescue it from the embarrassing and destructive consequences, resulting from the

legislation of so many different States, and to place it under the protection of a uniform law. The great objects were commerce and revenue; and they were objects indissolubly connected. By the confederation, divers restrictions had been imposed on the States; but these had not been found sufficient. No State, it was true, could send or receive an embassy; nor make any treaty; nor enter into any compact with another State, or with a foreign power; nor lay duties, interfering with treaties which had been entered into by Congress. But all these were found to be far short of what the actual condition of the country regulate The States could still, each for itself, regulate commerce, and the consequence was, a perpetual jarring and hostility of commercial regulation.

In the history of the times, it was accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To. benefit and improve these, was a great object in itself: and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually laboured for its independence. The leading state papers of the time are full of this topic. The New-Jersey resolutions1 complain, that the regulation of trade was in the power of the several States, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that *the sole and exclusive power* of regulating trade with foreign States, ought to be in Congress. Mr. Witherspoon's motion in Congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the *sole and exclusive* power of regulating trade, as well with foreign nations, as between the States.2 The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the *only* object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a *uniform* and steady system. It would be easy to show, by reference to the discussions in the several State conventions, the prevalence of the same general topics; and if any one would look to the proceedings of several of the States, especially to those of Massachusetts and New-York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends. In the New-York convention, the argument arising from this consideration was strongly pressed, by the distinguished person whose name is connected with the present question.

We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general *concurrent power*, in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power. If it had not so provided, the constitution would not have been worth accepting.

He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several States to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be *exclusive;* that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of

the States was to be an *unit;* and the system by which it was to exist and be governed, must necessarily be complete, entire, and uniform. Its character was to be described in the flag which waved over it, EPLURIBUS UNUM. Now, how could individual States assert a right of concurrent legislation, in a case of this sort, without manifest encroachment and confusion? It should be repeated, that the words used in the constitution, 'to regulate commerce,' are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by State laws; and, therefore, the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires. And he insisted, that the nature of the case, and of the power, did imperiously require, that such important authority as that of granting monopolies of trade and navigation, should not be considered as still retained by the States.

It is apparent, from the prohibitions on the power of the States, that the *general* concurrent power was not supposed to be left with them. And the exception, out of these prohibitions, of the *inspection laws*, proves this still more clearly. Which most concerns the commerce of this country, that New-York and Virginia should have an uncontrolled power to establish their inspection for flour and tobacco, or that they should have an uncontrolled power of granting either a monopoly of trade in their own ports, or a monopoly of navigation over all the waters leading to those ports? Yet, the argument on the other side must be, that, although the constitution has sedulously guarded and limited the first of these powers, it has left the last wholly unlimited and uncontrolled.

But, although much had been said, in the discussion on former occasions, about this supposed *concurrent* power in the States, he found great difficulty in understanding what was meant by it. It was generally qualified, by saying, that it was a power, by which the States could pass laws on the subjects of commercial regulation, which would be valid, until Congress should pass other laws controlling them, or inconsistent with them, and that *then* the State laws must yield. What sort of *concurrent* powers were these, which could not exist together? Indeed, the very reading of the clause in the constitution must put to flight this notion of a general concurrent power. The constitution was formed for all the States; and Congress was to have power to regulate commerce. Now, what is the import of this, but that Congress is to give the rule to establish the system�to exercise the control over the subject? And, can more than one power, in cases of this sort, give the rule, establish the system, or exercise the control? As it is not contended that the power of Congress is to be exercised by a *supervision* of State legislation; and, as it is clear, that Congress is to give the general rule, he contended, that this power of giving the general rule was transferred, by the constitution, from the States to Congress, to be exercised as that body might see fit. And, consequently, that all those high exercises of power, which might be considered as giving the rule, or establishing the system, in regard to great commercial interests, were necessarily left with Congress alone. Of this character he considered monopolies of trade or navigation; embargoes; the system of navigation laws; the countervailing laws, as against foreign states; and other important enactments respecting our connexion with such states. It appeared to him a most reasonable construction, to say, that in these respects, the power of Congress is exclusive, from the nature of the power. If it be not so, where is the limit, or who shall fix a boundary for the exercise of the power of the States? Can a State grant a monopoly of trade? Can New-York shut her ports to all but her own citizens? Can she refuse admission to ships of particular nations? The argument on the other side is, and must be, that she might do all these things, until Congress should revoke her enactments. And this is called *concurrent* legislation. What confusion such notions lead to, is obvious enough. A power in the States to do anything, and every thing, in regard to commerce, till Congress shall undo it, would suppose a state of of things, at least as bad as that which existed before the present constitution. It is

the true wisdom of these governments to keep their action as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress.

If the present state of things�these laws of New-York, the laws of Connecticut, and the laws of New-Jersey, had been all presented, in the convention of New-York, to the eminent person whose name is on this record, and who acted, on that occasion, so important a part; if he had been told, that, after all he had said in favour of the new government, and of its salutary effects on commercial regulations, the time should yet come, when the North River would be shut up by a monopoly from New York; the Sound interdicted by a penal law of Connecticut; *reprisals* authorized by New-Jersey, against citizens of New-York; and when one could not cross a ferry, without transhipment; does any one suppose he would have admitted all this, as compatible with the government which he was recommending?

This doctrine of a *general* concurrent power in the States, is insidious and dangerous. If it be admitted, no one can say where it will stop. The States may legislate, it is said, wherever Congress has not made a *plenary* exercise of its power. But who is to judge whether Congress has made this *plenary* exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the States now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the *system*.

All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.

He thought the practice under the constitution sufficiently evinced, that this portion of the commercial power was exclusive in Congress. When, before this instance, have the States granted monopolies? When, until now, have they interfered with the navigation of the country? The pilot laws, the health laws, or quarantine laws; and various regulations of that class, which have been recognised by Congress, are no arguments to prove, even if they are to be called commercial regulations, (which they are not,) that other regulations, more directly and strictly commercial, are not solely within the power of Congress. There was a singular fallacy, as he humbly ventured to think, in the argument of very learned and most respectable persons, on this subject. That argument alleges, that the States have a concurrent power with Congress, of regulating commerce; and its proof of this position is, that the States have, without any question of their right, passed acts respecting turnpike roads, toll bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the State itself, but also commerce between different States. Therefore, as all these are *commercial regulations*, and are yet acknowledged to be rightfully established by the States, it follows, as is supposed, that the States must have a concurrent power to regulate commerce.

Now, what was the inevitable consequence of this mode of reasoning? Does it not admit the power of Congress, at once, upon all these minor objects of legislation? If all these be regulations of commerce, within the meaning of the constitution, then, certainly, Congress having a concurrent power to regulate commerce, may establish ferries, turnpikes, bridges, &c. and provide for all this detail of interior legislation. To sustain the interference of the State, in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress, over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. But this

is not all; for it is admitted, that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and, therefore, the consequence would seem to follow, from the argument, that all State legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; a consequence, which no one would admit for a moment. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term. A road, indeed, might be a matter of great commercial concern. In many cases it is so; and when it is so, he thought there was no doubt of the power of Congress to make it. But, generally speaking, roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed *commercial regulations*. A reasonable construction must be given to the constitution; and such construction is as necessary to the just power of the States, as to the authority of Congress. Quarantine laws, for example, may be considered as affecting commerce; yet they are, in their nature, *health laws*. In England, we speak of the power of regulating commerce, as in Parliament, or the King, as arbiter of commerce; yet the city of London enacts health laws. Would any one infer from that circumstance, that the city of London had concurrent power with Parliament or the Crown to *regulate commerce?* or, that it might grant a monopoly of the navigation of the Thames? While a health law is reasonable, it is a health law; but if, under colour of it, enactments should be made for other purposes, such enactments might be void.

In the discussion in the New-York Courts, no small reliance was placed on the law of that State Prohibiting the importation of slaves, as an example of a commercial regulation, enacted by State authority. That law may or may not be constitutional and valid. It has been referred to generally, but its particular provisions have not been stated. When they are more clearly seen, its character may be better determined.

It might further be argued, that the power of Congress over these high branches of commerce was exclusive, from the consideration that Congress possessed an exclusive admiralty jurisdiction. That it did possess such exclusive jurisdiction, would hardly be contested. No State pretended to exercise any jurisdiction of that kind. The States had abolished their Courts of Admiralty, when the constitution went into operation. Over these waters, therefore, or, at least, some of them, which are the subject of this monopoly, New-York has no jurisdiction whatever. They are a part of the high sea, and not within the body of any county. The authorities of that State could not punish for a murder, committed on board one of these boats, in some places within the range of this exclusive grant. This restraining of the States from all jurisdiction, out of the bodies of their own counties, shows plainly enough, that navigation on the high seas, was understood to be a matter to be regulated only by Congress. It is not unreasonable to say, that what are called the waters of New-York, are, to purposes of navigation and commercial regulation, the waters of the United States. There is no cession, indeed, of the waters themselves, but their *use*, for those purposes, seemed to be entrusted to the exclusive power of Congress. Several States have enacted laws, which would appear to imply their conviction of the power of Congress, over navigable waters, to a greater extent.

If there be a concurrent power of regulating commerce on the high seas, there must be a concurrent admiralty jurisdiction, and a concurrent control of the waters. It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, *so far as navigation is concerned*. Their *use* is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters. If it be admitted, that *for purposes of trade and navigation*, the North River, and its bay, are the river and bay of New-York, and the Chesapeake

the bay of Virginia, very great inconveniences and much confusion might be the result.

It might now be well to take a nearer view of these laws, to see more exactly what their provisions were, what consequences have followed from them, and what would and might follow from other similar laws.

The first grant to *John Fitch*, gave him the sole and exclusive right of making, employing, and navigating, all boats impelled by fire or steam, '*in all creeks, rivers, bays, and waters, within the territory and jurisdiction of the State*.' Any other person, navigating such boat, was to forfeit it, and to pay a penalty of a hundred pounds. The subsequent acts repeal this, and grant similar privileges to *Livingston and Fulton:* and the act of 1811 provides the extraordinary and summary *remedy*, which has been already stated. The river, the bay, and the marine league along the shore, are all within the scope of this grant. Any vessel, therefore, of this description, coming into any of those waters, without a license, whether from another State, or from abroad, whether it be a public or private vessel, is instantly forfeited to the grantees of the monopoly.

Now, it must be remembered, that this grant is made as an exercise of *sovereign political power*. It is not an inspection law, nor a health law, nor passed by any derivative authority; it is professedly an act of sovereign power. Of course, there is no limit to the power, to be derived from the *purpose* for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the *motives* which influence sovereign authority. It is enough, that such power manifests its will. The motive alleged in this case is, to remunerate the grantees for a benefit conferred by them on the public. But there is no necessary connexion between that benefit and this mode of rewarding it; and if the State could grant this monopoly for that purpose, it could also grant it for any other purpose. It could make the grant for money; and so make the monopoly of navigation over those waters a direct source of revenue. When this monopoly shall expire, in 1838, the State may continue it, for any pecuniary consideration which the holders may see fit to offer, and the State to receive.

If the State may grant this monopoly, it may also grant another, for other descriptions of vessels; for instance, for all *sloops*.

If it can grant these exclusive privileges to a few, it may grant them to many; that is, it may grant them to all its own citizens, to the exclusion of every body else.

But the waters of New-York are no more the subject of exclusive grants by that State, than the waters of other States are subjects of such grants by those other States. Virginia may well exercise, over the entrance of the Chesapeake, all the power that New-York can exercise over the bay of New-York, and the waters on the shore. The Chesapeake, therefore, upon the principle of these laws, may be the subject of State monopoly; and so may the bay of Massachusetts. But this is not all. It requires no greater power, to grant a monopoly of *trade*, than a monopoly of navigation. Of course, New-York, if these acts can be maintained, may give an exclusive right of entry of vessels into her ports. And the other States may do the same. These are not extreme cases. We have only to suppose that other States should do what New-York has already done, and that the power should be carried to its full extent.

To all this, there is no answer to be given except this, that the *concurrent* power of the States, concurrent though it be, is yet *subordinate* to the legislation of Congress; and that, therefore, Congress may, when it pleases, annul the State legislation; but, until it does so annul it, the State

legislation is valid and effectual. What is there to recommend a construction which leads to a result like this? Here would be a perpetual hostility; one Legislature enacting laws, till another Legislature should repeal them; one sovereign power giving the rule, till another sovereign power should abrogate it; and all this under the idea of *concurrent* legislation!

But further; under this *concurrent power*, the State does that which Congress cannot do; that is, it gives preferences to the citizens of some States over those of others. I do not mean here the advantages conferred by the grant on the grantees; but the *disadvantages* to which it subjects all the other citizens of New-York. To impose an extraordinary tax on steam navigation visiting the ports of New-York, and leaving it free every where else, is giving a preference to the citizens of other States over those of New-York. This Congress could not do; and yet the State does it: so that this power, at first subordinate, then concurrent, now becomes paramount.

The people of New-York have a right to be protected against this monopoly. It is one of the objects for which they agreed to this constitution, that they should stand on an equality in commercial regulations; and if the government should not insure them that, the promises made to them, in its behalf, would not be performed.

He contended, therefore, in conclusion on this point, that the power of Congress over these high branches of commercial regulation, was shown to be exclusive, by considering what was wished and intended to be done, when the convention, for forming the constitution, was called; by what was understood, in the State conventions, to have been accomplished by the instrument; by the prohibitions on the States, and the express exception relative to inspection laws; by the nature of the power itself; by the terms used, as connected with the nature of the power; by the subsequent understanding and practice, both of Congress and the States; by the grant of exclusive admiralty jurisdiction to the federal government; by the manifest danger of the opposite doctrine, and the ruinous consequences to which it directly leads.

It required little now to be said, to prove that this exclusive grant is a law regulating commerce; although, in some of the discussions elsewhere, it had been called a law of *police*. If it be not a *regulation of commerce*, then it follows, against the constant admission on the other side, that Congress, even by an express act, could not annul or control it. For if it be not a regulation of commerce, Congress has no concern with it. But the granting of monopolies of this kind is always referred to the power over commerce. It was as arbiter of commerce that the King formerly granted such monopolies.3 This is a law regulating commerce, inasmuch as it imposes new conditions and terms on the coasting trade, on foreign trade generally, and on foreign trade as regulated by treaties; and inasmuch as it interferes with the free navigation of navigable waters.

If, then, the power of commercial regulation, possessed by Congress, be, in regard to the great branches of it, exclusive; and if this grant of New-York be a commercial regulation, effecting commerce, in respect to these great branches, then the grant is void, whether any case of actual collision had happened or not.

But, he contended, in the second place, that whether the grant were to be regarded as wholly void or not, it must, at least, be inoperative, when the rights claimed under it came in collision with other rights, enjoyed and secured under the laws of the United States; and such collision, he maintained, clearly existed in this case. It would not be denied that the law of Congress was paramount. The

constitution has expressly provided for that. So that the only question in this part of the case is, whether the two rights be inconsistent with each other. The appellant had a *right* to go from New-Jersey to New-York, in a vessel, owned by himself, of the proper legal description, and enrolled and licensed according to law. This *right* belonged to him as a citizen of the United States. It was derived under the laws of the United States, and no act of the Legislature of New-York can deprive him of it, any more than such act could deprive him of the right of holding lands in that State, or of suing in its Courts. It appears from the record, that the boat in question was regularly enrolled, at Perth Amboy, and properly licensed for carrying on the coasting trade. Under this enrolment, and with this license, she was proceeding to New-York, when she was stopped by the injunction of the Chancellor, on the application of the New-York grantees. There can be no doubt that here is a collision, in fact; that which the appellant claimed as a right, the respondent resisted; and there remains nothing now but to determine, whether the appellant had, as he contends, a *right* to navigate these waters; because, if he had such *right*, it must prevail. Now, this right was expressly conferred by the laws of the United States. The first section of the act of February, 1793, c. 8. regulating the coasting trade and fisheries, declares, that all ships and vessels, enrolled and licensed as that act provides, 'and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.' The fourth section of the same declares, 'that in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries,' bond shall be given &c. according to the provisions of the act. And the same section declares, that the owner having complied with the requisites of the law, 'it shall be the duty of the Collector to grant a license for carrying on the coasting trade;' and the act proceeds to give the form and words of the license, which is, therefore, of course, to be received as a part of the act; and the words of the license, after the necessary recitals, are, 'license is hereby granted for the said vessel to be employed in carrying on the coasting trade.'

Words could not make this authority more express.

The Court below seemed to him, with great deference, to have mistaken the object and nature of the *license*. It seemed to have been of opinion that the *license* had no other intent or effect than to ascertain the ownership and character of the vessel. But this was the peculiar office and object of the *enrolment*. That document ascertains that the regular proof of ownership and character has been given; and the *license* is given, to confer the *right*, to which the party has shown himself entitled. It is the authority which the master carries with him, to prove his right to navigate freely the waters of the United States, and to carry on the coasting trade.

In some of the discussions which had been had on this question, it had been said, that Congress had only provided for ascertaining the ownership and property of vessels, but had not prescribed to what *use* they might be applied. But this he thought an obvious error; the whole object of the act regulating the coasting trade, was to declare what vessels shall enjoy the benefit *of being used* in the coasting trade. To secure this *use* to certain vessels, and to deny it to others, was precisely the purpose for which the act was passed. The error, or what he humbly supposed to be the error, in the judgment of the Court below, consisted in that Court's having thought, that although Congress *might act*, it had *not yet acted*, in such a way as to confer a *right* on the appellant: whereas, if a right was not given by this law, it never could be given; no law could be more express. It had been admitted, that supposing there was a provision in the act of Congress, that all vessels duly licensed should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable harbours, bays, rivers and lakes, within the several States, any law of the States, creating particular privileges as to any particular class of vessels, to the contrary notwithstanding, the only question that could arise, in

such a case, would be, whether the law was constitutional; and that if that was to be granted or decided, it would certainly, in all Courts and places, overrule and set aside the State grant.

Now, he did not see that such supposed case could be distinguished from the present. We show a provision in an act of Congress, that all vessels, duly licensed, may carry on the coasting trade; nobody doubts the constitutional validity of that law; and we show that this vessel was duly licensed according to its provisions. This is all that is *essential* in the case supposed. The presence or absence of a *non obstante* clause, cannot affect the extent or operation of the act of Congress. Congress has no power of revoking State laws, as a distinct power. It legislates over *subjects;* and over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation. If Congress were to pass an act expressly revoking or annulling, in whole or in part, this New-York grant, such an act would be wholly useless and inoperative. If the New-York grant be opposed to, or inconsistent with, any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the grant is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. But if the grant be not inconsistent with any exercise of the powers of Congress, then, certainly, Congress has no authority to revoke or annul it. Such an act of Congress, therefore, would be either unconstitutional or supererogatory. The laws of Congress need no *non obstante* clause. The constitution makes them supreme, when State laws come into opposition to them; so that in these cases there is no question except this, whether there be, or be not, a repugnancy or hostility between the law of Congress and the law of the State. Nor is it at all material, in this view, whether the law of the State be a law regulating commerce, or a law of police, or by whatever other name or character it may be designated. If its provisions be inconsistent with an act of Congress, they are void, so far as that inconsistency extends. The whole argument, therefore, is substantially and effectually given up, when it is admitted, that Congress might, by express terms, abrogate the State grant, or declare that it should not stand in the way of its own legislation; because, such express terms would add nothing to the effect and operation of an act of Congress.

He contended, therefore, upon the whole of this point, that a case of actual collision had been made out, in this case, between the State grant and the act of Congress; and as the act of Congress was entirely unexceptionable, and clearly in pursuance of its constitutional powers, the State grant must yield.

There were other provisions of the constitution of the United States, which had more or less bearing on this question: 'No State shall, without the consent of Congress, lay any duty of tonnage.' Under colour of grants like this, that prohibition might be wholly evaded. This grant authorizes Messrs. Livingston and Fulton *to license* navigation in the waters of New-York. They, of course, license it on their own terms. They may require a pecuniary consideration, ascertained by the tonnage of the vessel, or in any other manner. Probably, in fact, they govern themselves, in this respect, by the size or tonnage of the vessels, to which they grant licenses. Now, what is this but substantially a *tonnage* duty, under the law of the State? Or does it make any difference, whether the receipts go directly to her own treasury, or to the hands of those to whom she has made the grant?

There was, lastly, that provision of the constitution which gives Congress power to promote the progress of science and the useful arts, by securing to authors and inventors, for a limited time, an exclusive right to their own writings and discoveries. Congress had exercised this power, and made all the provisions which it deemed useful or necessary. The States might, indeed, like munificent individuals, exercise their own bounty towards authors and inventors, at their own discretion. But to

confer reward by exclusive grants, even if it were but a part of the use of the writing or invention, was not supposed to be a power properly to be exercised by the States. Much less could they, under the notion of conferring rewards in such cases, grant monopolies, the enjoyment of which should be essentially incompatible with the exercise of rights holden under the laws of the United States. He should insist, however, the less on these points, as they were open to counsel, who would come after him, on the same side, and as he had said so much upon what appeared to him the more important and interesting part of the argument.

Mr. *Oakley*, for the respondent, stated, that there were some general principles applicable to this subject, which might be assumed, or which had been settled by the decisions of this Court, and which had acquired the force of maxims of political law. Among these was the principle, that the States do not derive their independence and sovereignty from the grant or concession of the British crown, but from their own act in the declaration of independence. By this act, they became 'free and independent States,' and as such, 'have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.' The State of New-York, having thus become sovereign and independent, formed a constitution, by which the 'supreme legislative power' was vested in its Legislature: and there are no restrictions on that power, which in any manner relate to the present controversy. On the other hand, the constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated.4 This principle, which distinguishes the national from the State governments, is derived from the nature of the constitution itself, as being a delegation of power, and not a restriction of power previously possessed; and from the express stipulation in the 10th amendment, 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 national constitution must, therefore, be construed strictly, as regards the powers *expressly granted*, and the objects to which those powers are to be applied. As it is a grant of power in derogation of State sovereignty, every portion of power, not granted, must remain in the State Legislature.

These principles are all founded on the doctrine, that a strict rule of construction must be applied, in ascertaining the extent and object of those powers which are *expressly* delegated. The powers delegated are of two classes: such as are *expressly granted*, and such as are *implied*, as 'necessary and proper' to carry into execution the powers expressly enumerated. As to these implied powers, the constitution must be construed liberally, as respects their nature and extent: because the constitution implies that rule, by not undertaking to enumerate these powers, and because the grant of these powers is general and unlimited. But this rule has one exception: When the means of executing any expressly granted power are particularly enumerated, then no other mode of executing that power can be implied or used by Congress, since the constitution itself determines what powers are 'necessary and proper' in that given case.

These delegated powers, whether express or implied, are, (1.) those which are *exclusively* vested in the United States; and, (2.) those which are *concurrent* in the United States and the respective States.

It is perfectly settled, that an affirmative grant of power to the United States does not, of itself, devest the States of a like power.6 The authorities cited settle this question, and it is no longer open for discussion in this Court.

The powers vested exclusively in Congress are, (1.) Those which are granted in express terms. (2.) Those which are granted to the United States, and expressly prohibited to the States. (3.) Those which are exclusive in their nature.

All powers, *exclusive in their nature*, may be included under two heads: (1.) Those which have their origin in the constitution, and where the object of them did not exist previous to the Union. These may be called strictly *national* powers. (2.) Those powers which, by other provisions in the constitution, have an effect and operation, when exercised by a State, without or beyond the territorial limits of the State.

As examples of the first class, may be mentioned, the 'power to borrow money on the credit of the United States.' Here the object of the power, (to borrow money for the use of the United States,) and the means of executing it, (by pledging their credit,) have their origin in the Union, and did not previously exist. So as to the power 'to establish tribunals inferior to the Supreme Court,' the same remark will apply.

Of the second class, the power 'to establish an uniform rule of naturalization,' is an instance. This power was originally in the States, and was extensively exercised by them, and would now be concurrent, except for another provision in the constitution, that 'citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'7 It is not held to be exclusive, from the use of the term '*uniform* rule.' This Court has held, that the use of an analogous term, 'uniform laws,' in respect to the associated subject of bankruptcy, does not imply an exclusive power in Congress over that subject.8 The true reason why the power of establishing an uniform rule of naturalization is exclusive, must be, that a person becoming a citizen in one State, would thereby become a citizen of another, perhaps even contrary to its laws, and the power thus exercised would operate beyond the limits of the State.

As to *concurrent* powers: it is highly important to hold all powers concurrent, where it can be done without violating the plain letter of the constitution. All these powers are essential to State sovereignty, and are constantly exercised for the good of the State. These powers can be best exercised by the State, in relation to all its internal concerns, connected with the objects of the power. All powers, therefore, not expressly exclusive, or clearly exclusive in their nature, ought to be deemed concurrent. All *implied* powers are, of course, concurrent. It has never yet been contended, that powers implied as necessary and proper to carry into effect an exclusive power, are themselves exclusive. Such a doctrine would deprive the States almost entirely of sovereignty, as these implied powers must inevitably be very numerous, and must embrace a wide field of legislation. So also, all *enumerated* powers are to be considered *concurrent*, unless they clearly fall under the head of *exclusive:* either as being granted, in terms, exclusively to the United States, or as

expressly prohibited to the States, or as being exclusive in their nature, as before explained.

A power exclusive in its nature, is said to be *repugnant* and contradictory to a like power in the States. This repugnancy exists only in cases where a State cannot legislate, in any manner, or under any circumstances, under a given power, without conflicting with some existing act of Congress, or with some provision of the constitution. Thus, it is laid down by the commentators on the constitution, that 'the power granted to the Union is exclusive, when the existence of a similar power in the States would be *absolutely and totally contradictory and repugnant*.'9 'Or where an authority is granted to the Union, with which a similar authority in the State would be *utterly incompatible*.'10 And again: 'It is not a mere possibility of *inconvenience* in the exercise of powers, but an *immediate constitutional repugnancy*, that can, by implication, alienate and extinguish a pre-existing right of sovereignty.'11 These strong expressions show that the repugnancy of power to power must be such, as to produce actual interference and conflict, under all circumstances, and in all cases, in which the power is exercised by the two governments: or, in other words, must be such that the States can pass no law on the subject matter of the power, without contravening the express provisions of the constitution; or without actually interfering with the operation of some statute of Congress. These terms are used by the author of the papers from which they are quoted, to distinguish those cases of *absolute* repugnancy from others, 'where the exercise of a concurrent jurisdiction might be productive of *occasional* interference in the polioy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.' The same principle has been adopted by this Court on several occasions.

It appears, then, that the repugnancy which makes a power exclusive, must be clear, direct, positive, and entire. It cannot be a matter of speculation or theory, but must be practical: not a repugnancy that *may* arise in some exercise of the power by both governments; but one that *must* arise, in any exercise of such power, which is attempted by the States. To ascertain, then, whether any given power be concurrent, we must inquire, (1.) Whether it was possessed by the States, previous to the constitution, as appertaining to their sovereignty? (2.) Whether it is granted, in exclusive terms, to the Union? (3.) Whether it is granted to the Union, and prohibited in express terms to the States? (4.) Whether it is exclusive in its nature, either as operating, when exercised by the States, without their territorial limits, and upon other parts of the Union; *or* as having its origin and creation in the Union itself; *or* as being so entirely repugnant, that no exercise of it can take place by the States, without actual conflict with the constitution of the Union, in its practical operation and effects.

All concurrent powers may be divided into two classes: (1.) Those where, from their nature, when Congress has acted on the subject matter, the States cannot legislate at all in any degree. (2.) Those where the States may legislate, though Congress has previously legislated on the same subject matter.

The *first* class includes those instances where any act of Congress covers the whole ground of legislation, and exhausts the subjects on which it acts. Such is the power to fix the standard of weights and measures. Here, when the standard of any particular weight or measure is fixed by Congress, the whole power is executed as to that particular; and so far the power of the States is at an end. But, until Congress does this, it cannot be doubted that a State may act on the subject; and if the laws of Congress apply only to some weights and measures, all others are subject to State regulation. Thus, New-York has long had a law to regulate weights and measures, which establishes

the English standard for that State, 'until Congress shall establish the standard for the United States.'14 So, also, the power to regulate the value of foreign coin. An act fixing the value of any species of coin, necessarily disposes of the whole power as to that species. They are both instances in which, when Congress has acted at all, there immediately arises that entire and absolute repugnancy, and that utter incompatibility, which exclude the States from all power over the subject.

The *second* class of concurrent powers contains those in which, from their nature, various regulations may be made, without any actual collision in practice. These are, those where the power may be exercised on different subjects; *or* on the same subject, in different modes; *or* where the object of the power admits of various independent regulations, which may operate together. In all these cases, the State may legislate, though Congress has legislated under the same power. This results from the very nature of concurrent power. Each party possessing the power, may of course use it. Each being sovereign as to the power, may use it in any form, and in relation to any subject; and to guard against a conflict in practice, the law of Congress is made supreme.

The provision, that the law of Congress shall be the supreme law in such cases, is the ground of a conclusive inference, not only that there are concurrent powers, but that those powers may be exercised by both governments at the same time. One law cannot be said to be superior to another, and to control it, unless it acts in a manner inconsistent with and repugnant to that other. The question of supremacy, therefore, can never arise, unless in cases of actual conflict or interference. If the mere exercise of a power by Congress takes away all right from the State to act under that power, then any State law, under such a power, would be void; not as conflicting with the supreme law of Congress, but as being repugnant to the provisions of the constitution itself, and as being passed by the State, in the first instance, without authority. If this doctrine were true, then the provision that the laws of Congress should be supreme, was entirely idle. It would have been sufficient to have said merely, that the constitution should be supreme.15 These positions are all supported by the judgments of this Court, and of other Courts whose authority deserves to be respected.

From this mass of authority, and the reasons on which it is founded, it results, (1.) That a State may legislate in all cases of concurrent power, though Congress has acted under the same power and upon the same subject matter. (2.) That the question of supremacy cannot arise, except in the case of actual and practical collision. (3.) That such collision must be direct and positive, and the State law must operate to limit, restrict, or defeat, the effect of a statute of Congress. (4.) That in such case, the State law yields in those particulars, in which such actual collision arises, but remains valid in all other respects.

The States have, accordingly, acted upon this construction to a great extent. Thus, the power to lay and collect *taxes*, is admitted on all hands to be concurrent. It is constantly exercised by the States, in every form, and both real and personal estate have frequently been taxed by the national and local governments, at the same time. So, under the power to lay and collect *excises*, the same article has frequently been taxed by both governments. And the power to lay imposts, or duties on exports, and imports, and tonnage, is also concurrent, except that no State can lay any duty on imports and exports, or duty of tonnage, unless such as are absolutely necessary for executing its inspection laws. So, also, the power to provide for the punishment of counterfeiting the securities and current coin of the United States, is a power which may be exercised by the States. A State may make it an offence to counterfeit the coin of any foreign country within its territory. Thus, New-York has provided for the punishment of counterfeiting 'any of the species of gold or silver coins, now

current, or hereafter to be current in this State.'16 And Congress has provided for the punishment of counterfeiting 'any gold or silver coin of the United States,' or of any 'foreign gold or silver coins, which, by law, now are, or hereafter shall be made current, or be in actual use and circulation as money, within the United States.'17 New-York has punished the counterfeiting of 'any promissory note, for the payment of money,' including notes made by any body corporate;18 and under this the counterfeiting of the notes of the bank of the United States is punished. Congress has punished the same offence in the law incorporating the bank of the United States.19 In all these acts of Congress, relating to coins and bank notes, it is provided, 'that nothing in them contained shall be so construed as to deprive the Courts of the individual States of jurisdiction, under the laws of the several States, over any offence made punishable by these acts.' This shows that Congress considered the power to punish these offences as concurrent, and that it could be exercised by the States on the ground of their own inherent authority, as it is held that Congress cannot delegate any part of the criminal jurisdiction of the United States to the State tribunals.20 Again: the power to provide for organizing, arming, and disciplining the militia, is a concurrent power, according to the same principles.21 But the States have been in the constant habit of superadding to the regulations of Congress, additional provisions, suited to their own views and local circumstances.22 These instances, which might be greatly multiplied, show the practical construction put, both by Congress and the State Legislatures, upon these concurrent powers.

The learned counsel here recapitulated the principles laid down, and proceeded to apply them to the discussion of the cause, which he divided into two branches. (1.) The supposed repugnancy of the laws of New-York to the power of Congress on the subject of patents and copy-rights. (2.) Their supposed conflict with the power of Congress to regulate commerce.

As to the first, the words of the constitution are, 'Congress shall have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' This power is *concurrent*, according to all the principles before laid down. It is clearly a power appertaining to sovereignty, and, as such, vested in the Legislature of New-York, before the formation of the United States' constitution. A power to promote science and the useful arts, is highly important to every civilized society. It embraces all the means of education, and all kinds of mechanical labour and improvements. It is constantly exercised by all governments, as a sovereign authority, by laws for the promotion of education in all its branches, by bounties for the encouragement of discoveries and new methods of business, and by the grant of exclusive rights and privileges for the same end. It has frequently been exercised by the State of New-York, and by other States, before the adoption of the constitution. It is not granted exclusively to Congress. No exclusive terms are used. The grant is affirmative and general, like all the other powers. There is no express prohibition upon the States against the exercise of it. Nor is it exclusive in its nature. It does not owe its existence or creation to the Union. When exercised by a State, it does not operate in any manner beyond the territorial jurisdiction of that State. From its nature, it admits of a great variety of regulations, both by local and general laws, which may exist harmoniously together. Being thus a concurrent power, it follows, according to the principles already established, that the State may exercise it at all times, and in every mode, until an actual and practical conflict arises between a right exercised under a statute of Congress, and the same right claimed to be exercised under the State.

The power, as granted in the constitution, is a limited power. It is a clear principle, that when the means of executing any given power are specified in the grant, Congress cannot take, by implication, any other means, as being necessary and proper to carry that power into execution. This power, then, is limited: (1.) As to the persons and the objects in regard to which it may be exercised: these are, 'authors and inventors, writings and discoveries.' This enumeration excludes all right in Congress to legislate on the subject of any *improvement*, which is not an 'invention,' either domestic or foreign. It excludes also all right to legislate for the benefit of any person who is not himself the 'inventor.' (2.) As to the means of executing the power, and the time during which those means may be exercised. They are by '*securing* the exclusive right for *limited times*.'

The power, considered in itself, is supreme, unlimited, and plenary. No part of any sovereign power can be annihilated. Whatever portion, then, of this power, was not granted to Congress, remains in the States. Consequently, the States have exclusive authority to promote science and the arts, by all other modes than those specified in the constitution, without limitation as to time, person, or object; and the Legislature is the sole judge of the expediency of any law on the subject.

But this power, though limited in Congress, is still (as has been seen) concurrent in the States. It follows, then, from all the principles before laid down relative to the exercise of concurrent powers, that a State may exercise it by the same means, and towards the same persons and objects with Congress. A State may, therefore, grant patents and copy-rights, which would secure to the inventors and authors, the benefit of their discoveries and writings, within the limits of the State. In such cases, the citizens of other States might use the invention, or publish the book at pleasure. But if a patent or copy-right should be obtained under the law of Congress, the right under the State grant would cease as against that of the United States. Suppose the author or inventor does not apply for a patent or copy-right from the United States, or is willing to secure the exclusive right within any one State only, and leave the invention common in every other part of the Union; may not that one State secure the right within its own territory? This question may be answered by seeing how far Congress has exercised the power. An examination of the different patent laws will show, that Congress has, in various particulars, omitted to exercise the entire power given to them by the constitution. Thus, by several of these laws, the right of obtaining a patent is confined to *citizens*, and, consequently, the power of granting patents to *aliens*, is left to the States. The whole power is inoperative, until Congress acts under it by legislating: and the a patent. In every case, therefore, the power is unexecuted until a patent is actually granted. The State may consequently act in all cases.

But Congress has confined its statutes to cases of invention, as the constitution directs. Where then is the power to reward or encourage the introduction of useful machines or inventions from abroad? or, the establishment of any art, when invented at home, and the discoverer does not apply for a patent? or, where the invention is given to the public, and great expense must be incurred to put it into use? All these things appertain to sovereignty. Congress has no power over them. The power, being sovereign, must exist somewhere, and is, therefore, exclusively in the States. If the nature of the power which is given to Congress be examined, it will be found that it confers no authority to

create or grant any right or property. It is clearly founded on the presumption, that the right or property may exist, independent of the power. Thus, one of the commentators on the constitution says, 'The copy-right of authors has been solemnly adjudged, in Great Britain, to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventor.'23 The adjudication here referred to, is that of *Millar v. Taylor*,24 where it was held, that the author of any book has the sole right of first printing and publishing it, but that the right was controlled by the provisions of the stat. 8 Ann, relative to copy-rights. But, the common law of England was the law of New-York, at the adoption of the national constitution. There was no statute of New-York similar to that of Ann, and, of course, the right existed there, without the security for its enjoyment, provided by that statute. The right, also, was local, and confined to the territorial jurisdiction of the State. The policy and object of the constitution was, to secure the right co-extensively with the Union. Its exercise in any one State, might be affected in its operation by the pirating of books and inventions in the adjoining States, and that evil could only be corrected by the national Legislature. The right, therefore, in any one State, was imperfect only as to the security and the means of enjoyment.

It appears, then, that the power is founded on the basis of a pre-existing right of property, from the nature and origin of the right, as before stated, and from the terms in which the power itself is granted. The word 'secure,' implies the existence of something *to be secured*. It does not purport to create or give any new right, but only to secure and provide remedies to enforce a preexisting right throughout the Union. This power differs essentially from the sovereign power to create and grant an exclusive right. It has been adjudged, under the English stat. 21 Jac. I. c. 3. that a grant may be made for any invention which is new in England, though known abroad.25 That statute, therefore, authorizes the creation of a right of property in a thing imported, in which no right of property, under the laws of England, before existed. But the patent laws of the United States merely extend to inventions actually made in the United States, and not to any imported invention. The whole extent of the sovereign power, exercised by the British Parliament, on this subject, was vested in the Legislature of New-York. A part only was given to Congress, and all the residue remains in the State exclusively.

What then is the effect of a patent? It creates no new right. In secures the patentee, for a limited time, the exclusive right to his invention; so that he has the same exclusive right in it, that he has in any other kind of property. His right, however, is secured more extensively than any State law could secure it. But, within the limits of the State, a patent under the local law would be just as effectual. What is the situation of the right, after the expiration of a patent? The right under the common law of the State, may be considered as perpetual. It was so ruled by the Judges in *Millar v. Taylor;* but it was determined in the House of Lords, that the perpetuity of the right was controlled and limited by the statute of Ann. There is no such statute in New-York, and, therefore, the right remains as at common law. The act of Congress cannot destroy the perpetuity of a right held under the law of New-York, and which the act of Congress has only secured for a certain time, to a greater extent, and by means of more, effectual remedies. The right, then, remains, at the expiration of the patent, in the same condition as at its commencement, so far as regards the laws of New-York, and within the territorial limits of that State, but cannot be asserted in other States. Even if this were not so, and it should be considered that the right becomes common, at the expiration of the patent, then it is like all other common rights, subject to the control of the municipal laws of the State. It is of the essence

of sovereignty to control and regulate all common rights. The Legislature, possessing 'supreme legislative power,' may destroy a common right, either by abolishing it, and prohibiting the use of it altogether, or by convering it into an exclusive right. Thus, a right of way may be common, either by land or water, and it may be shut up by law, and the use of it prohibited. So, a right of fishery, in navigable waters, is common, and it may be prohibited altogether, or converted into a several fishery. In the same manner, as to patent rights and literary productions: if, after a patent or copy-right has expired, the right to use or publish becomes common, it may be controlled by law, and turned into a private right. So that a State law may continue or extend a patent-right at pleasure.

Thus, it follows, that whether the right of the patentee remains in him, after the expiration of his patent, at common law, or whether its use becomes common to all, it is subject to the State law, in the same manner, and to the same extent, as all other rights, and may, consequently, be controlled, limited, extended, or prohibited, at the pleasure of the Legislature.

But the State may control or prohibit the use of any patented thing, during the existence of the patent. If an inventor do not apply for a patent for the invention, no other man can. The right of the inventor, in such a case, remains as at common law. Every right or kind of property, created by the laws of the State, is subject to be controlled and regulated by the supreme legislative power of the State. It cannot then be doubted, that before a patent is obtained, the State may prohibit the use of the thing invented; either on the ground that it is mischievous in itself, or from motives of general policy, that it is inexpedient to permit it. As, if it interferes with any general interest, as a labour saving machine, which might deprive great numbers of their ordinary means of subsistence: or, if it should effect any great change in the course of business, which the Legislature might deem injurious, as it relates to the community. Of these questions of general policy, and of the expediency of any such prohibition, the Legislature must, of course, be the sole judge. Thus, in the act of New-York, to incorporate the North River Steam-boat Company, the corporation is prohibited from using any of its boats for the purpose of carrying freight. This was done to protect the great shipping interest employed in the navigation of the Hudson River. Would this exercise of power be affected by the obtaining of a patent? The object and effect of a patent is, (as we have seen,) to secure a pre-existing right, imperfect as to its means of enjoyment and its extent. The patentee obtains nothing by his grant, except an exclusive right, as it relates to the Union, instead of a right limited to the State, together with more complete and certain remedies to protect and enforce that right. If, therefore, he could not use the thing invented, against the State law, before it is patented, neither can he thus use it after it is patented, for his grant conveys no greater right than before existed. It is the undoubted attribute of all sovereignty, to regulate and control the use of all property. A thing patented, when made and put in use, is nothing more than property; and, like all other property, is subject to the control of the sovereign power, as to the right to use it. There can be no doubt that it may sometimes become important or necessary to the welfare of society, to regulate or prohibit the use of a thing patented. Congress cannot do this, or, at least, it has not done it. After the patent is granted, the power of Congress over the subject matter is exhausted. Patented things may be dangerous or noxious, either universally so in every part of the country, or locally; or, they may be useful at one time, and mischievous and noxious at another. Patented manufactures may be injurious to the public health, though highly useful as manufactures; or they may be nuisances to private individuals and neighbourhoods, though extremely useful to the public. Can Congress provide by its laws for the abatement of a public nuisance? or give a right of action to an individual for a private nuisance? If not, these powers must reside in the States. The right to use all property, must be subject to modification by municipal law. *Sic utere tuo ut alienum non loedas*, is a fundamental maxim. It belongs exclusively to the local State Legislatures, to determine how a man may use his own,

without injuring his neighbour. Can a patent give rights, by which a patentee may infringe the vested rights of others? Can a patented boat be used on a ferry, the exclusive use of which has been granted by a State law?

This argument may be illustrated by the power to secure to authors the exclusive right to their works. This power is founded on the same reasons with the other, and gives the author the same rights as the inventor. Can the author, by virtue of his copy-right, publish against the prohibition of State law? A book may be libellous, or blasphemous, or obscene. Cannot the author be indicted and punished for it? May not a citizen maintain an action for the libel? If so, it cannot be lawful by virtue of the copy-right. If the State can punish the act of publishing, it may entirely prohibit the publication. It may regulate and restrain the press, so far as it is not prohibited by its own constitution.

The laws of Congress are framed on the supposition that the power to prohibit remains in the States. By the existing statute, they have not provided that any inquiry shall be made as to the *utility* of the supposed invention, when the patent is applied for. There is no authority to refuse a patent, on the ground of the inutility of the invention, and in practice, no inquiry is ever made, and patents issue, of course, on making the oaths and paying the fees, even for things the most trifling, absurd, and injurious. There is no provision for the repeal of a patent, on the ground of its noxious or useless character. The law does not purport, in its terms, to give a right to use the thing patented, against the provisions of any State law. The act provides, (s. 1.) that if any person shall present a petition, 'signifying a desire of *obtaining an exclusive property*,' &c. then a patent shall issue, granting to the petitioner 'the full and exclusive right and liberty of making, constructing, using, and vending to others to be used,' the thing patented. The 'exclusive property' spoken of, is only the same property that exists in any thing else, and, of itself, gives no right to use the thing against the State law, any more than in the case of any other property. The words 'using, and vending to others to be used,' are inserted to make the description of that 'exclusive property' complete. The words 'making, constructing, and vending,' would not have constituted entire property in the thing, as one might make and vend, and all the world might use. The patentee's right of property might thus be greatly invaded, and he would be left without remedy, except against the 'maker.' The word 'using,' in the act, must receive this limited construction, or the law of Congress goes beyond the power in the constitution. That was only to 'secure' a right, and meant nothing more than that a patentee should enjoy it alone, if any body was permitted to enjoy it. But it was never intended that the patentee should set the State laws at defiance. The acts relative to copy-rights, strongly support this position. These acts contain no provision to ascertain the character of the books or engravings to be published, and whether they be such as may be safely permitted, consistently with the good order of society and public morals. They grant the same right to the author, as the patent grants to the inventor. In both cases, they depend on the same constitutional right, and only convey a right to prevent others from using or publishing without his consent, but not to enable him to use or publish without restraint.

If a State can thus control a right to use a thing patented, directly, it may do it indirectly. If by a positive law, then, through the agency of the Courts, by injunction or otherwise. Or, the right to prohibit the use of it may be delegated to individuals, either acting as public agents, or in their own behalf, to protect some other right vested in them; and may forbid the use of the thing patented, or the publication of the book, the copy-right of which has been secured, without their license. So that if an exclusive grant be made by a State law to an individual, with a provision that the thing granted shall not be used in the State, without license of the grantee, and there be a patent under the act of

Congress for the same thing, the consequence would be, that the State grantee could not use it, because it would be a violation of the patent, and the patentee could not, without the license of the State grante, because the State law prohibited him. Thus, the State law would be inoperative, so far as it granted the exclusive right; but valid, so far as it prohibited the use of the thing patented. These principles may be applied to the law now in question, which gives an exclusive right, and forbids any person to use the thing which is the subject of the right, without the license of the persons in whom it is vested. It contains a granting clause, and a prohibiting clause. The injunction is founded on the prohibition, and may be enforced, though the grantees might not use their right. Let it be supposed that, from reasons of public policy, the laws of New-York had prohibited the use of steam boats entirely, and had directed the Court of Chancery to restrain them by injunction, would not the prohibition have been a valid one? and if so, may not the State determine that it is against the public interest, that steam boats should be built or navigated, unless under the direction, or with the license, of an individual, who may be thought particularly skilful in that business? It might, therefore, be contended, that this injunction is to be sustained, whatever might become of the respondent's exclusive right.

A State may prohibit the use of a thing patented, by virtue of its power over the public domain. A patented thing cannot be used on the private property of an individual, without his consent. The power of the State over the public property, is, at least, equal to that of an individual over his own; and particularly so, as to the navigable rivers in the State, which are, emphatically, the property of the people of the State, and subject to their authority, acting through the local Legislature.

The question has hitherto been discussed, as if the exclusive right claimed by the respondents, was the right to an invention, for which a patent may have been, or may yet be obtained. But in truth, his right is not to the use of any invention, or of any thing for which a patent can be granted. Livingston and Fulton do not, on the face of the acts granting or securing the right, claim to be the inventors of any thing. In the act of 1798, c. 55. s. 21. it is recited, that R. R. L. 'is the *possessor* of a mode of applying the steam engine to the propelling of vessels, on new and advantageous principles.' It is not alleged or pretended, that he was the discoverer of that mode, or of the principles of its application; or that the mode, or the principles, were secret or unknown to the rest of the world. His right, therefore, is to the use of an improvement, introduced (perhaps) from a foreign country, and, consequently, not the subject of a patent, and in respect to which Congress has no power to legislate at all. On the other hand, it does not appear, that the appellant has a patent for any thing connected with the subject of steam boats, or for any thing belonging to the steam engine, which can be used in navigation by steam. He can, therefore, claim no right, in this case, under the patent laws; and there is no question as to any actual conflict between the State right and a patent right. He is, consequently, compelled to rely upon the broad ground, that the State has no power to legislate at all, for the encouragement of any art or science, or for any improvement connected therewith, because Congress has legislated under a power which is partial in its extent, both as to objects and time.

The result of all that has been said, tends to establish, that the power in the constitution is strictly a concurrent power. That it is also a limited power in Congress to promote science and the arts, by particular means, and in regard to particular objects, and for limited times. That all the residue of the power, to promote science and the arts, by all other means, and towards all persons and objects, and for unlimited times, remains exclusively in the States. That the States may legislate, in pursuance of this concurrent power, in all cases, and can grant exclusive rights to any thing which may be the subject of a patent, which will be valid within their own territory until a patent is

actually issued under the authority of the Union. That when a patent issues, the State has full power to prohibit or control the use of it within its territory, though it cannot grant the right to use the patented thing to others. That it may exercise the power of prohibition, partially or totally, by direct legislative acts, or through the medium of its Courts, and may delegate the right to prohibit to any of its citizens. That in the present case, the right of prohibition has been delegated to Livingston and Fulton; and the mode of exercising that right, is by injunction out of Chancery. That this right of prohibition may be valid, even though the grant of the exclusive right to use, &c., might be invalid. That the State laws are, therefore, valid, even on the supposition that the right granted by them, was to an invention which might be patented; and that they would be valid, as to their prohibitions, even were a patent issued for the same object. But that, in truth, the right in question, has no connection with any thing that can be the subject of a patent; and if it has, that no patent has, in fact, issued to the appellant, nor does he, in any mode, claim a right under a patent. That the question, therefore, on this branch of the cause, is reduced to the inquiry, whether the State may legislate under a power, confessedly concurrent, when Congress has not acted at all, or when no person sets up a right under any act of Congress.

But the laws of New-York, now in question, are supposed to be in conflict with the constitutional power of Congress, 'to regulate commerce with foreign nations, among the several States, and with the Indian tribes.'

That is a concurrent power, according to all the principles before laid down. It was fully possessed by the States, after the declaration of independence, and constantly exercised. It is one of the attributes of sovereignty, specially designated in that instrument, 'to establish commerce.' It is not granted, in exclusive terms, to Congress. It is not prohibited, generally, to the States. The only express restraints upon the power of the States, in this respect, are against laying any impost or duty on imports or exports, (except for the execution of their own inspection laws,) or of tonnage; against making any agreement or compact with a foreign power; and against entering into any treaty. All these prohibitions, being partial, are founded on the supposition, that the whole power resided in the States. They are, accordingly, all in restraint of State power. It is a clear principle of interpretation, that where a general power is given, but not in exclusive terms, and the States are restrained, in express terms, from exercising that power in particular cases, that in all other cases, the power remains in the States as a concurrent power. Thus, the commentators on the constitution, speaking of the taxing power, say, 'this restriction implies an admission that, if it were not inserted, the States would possess the power it excludes. And it implies a further admission, that, as to all other taxes, the authority of the States remains undiminished.'26 And, again: 'In all cases in which the restriction does not apply, the States would have a concurrent power with the Union.' This doctrine applies precisely to the power to regulate commerce. Laying imposts or duties of tonnage, is a part of the power to regulate commerce; and the making of a compact or agreement with other States or nations, is the only method by which a State could make any commercial regulation, which, as it regards its own citizens, would operate boyond its territorial limits. These restrictions imply, that the general power to regulate commerce, is concurrently in the States, and that it may be exercised by the States in all cases to which these prohibitions do not extend. But, the same implication is still stronger from the nature and terms of those prohibitory clauses. The State may lay duties on imports and exports, to execute its *inspection laws*. That class of laws are, or may be, essential regulations of commerce, and they derive their authority altogether from State power. The existence of a power to pass them, is, therefore, expressly recognised by the constitution. So, also, a State may lay any duty upon imports or exports, or of tonnage, with the consent of Congress. This provision implies, that

the power to lay all duties remains essentially in the States; that the exercise of the power is suspended, until Congress consent; and that, when the consent is given, the State law acts of itself, and by State authority alone. The States no where derive any powers from the constitution. All its provisions are in restraint of their authority, and the consent of Congress, in this instance only removes the restraint. A State may not enter into any treaty; but, with the consent of Congress, may enter into an agreement or compact with another State, or with a foreign power. A treaty is made with a view to the public welfare, either in perpetuity, or for a considerable length of time, and binds the whole Union. A compact or agreement is generally temporary in its nature and operation, and is executed by a single act, and binds only the State that makes it. In this sense the constitution must be understood, when it speaks of *trcaties* as distinguished from *compacts*. It follows, that general and permanent commercial regulations with foreign powers, must be made by treaty, but that particular and temporary regulations of commerce may be made by an agreement of a State with another, or with a foreign power, by the consent of Congress. But, in this case, the compact would derive all its efficacy from the original inherent power of the State, not from the act of consent by Congress, which would merely remove an existing restraint.

There is nothing in the nature of this power, which renders it exclusive in Congress. The power itself does not grow out of the Union, like the power 'to borrow money on the credit of the United States.' It does not operate, when exercised by a State beyond its territorial limits, like the power of naturalization. There is no necessary repugnancy between the acts of the two governments under this power, since it clearly admits of a great variety of regulations, which may operate together, without direct interference. The restraints specially imposed on the power of the State, relating to commerce, would have been unnecessary, if it were not considered as a concurrent power.

The practice of the States shows that the power has always been considered as concurrent. Thus, the State of New-York has passed numerous laws, which are regulations of commerce with foreign nations, with other States, and with the Indian tribes.1 As to that part of the power which relates to trade with the Indian tribes, the people here referred to may be within the limits of a State. Thus, the commentators on the constitution consider it in that light, and contrast the power with that relating to the same subject in the old confederation, which was qualified so as 'not to infringe the legislative rights of any State within its own limits.'2 Thus, Congress has legislated on that basis. By the act to regulate trade and intercourse with the Indian tribes, it is provided, s. 19, 'that nothing contained in the act shall be so construed as to prevent any trade with Indians, on lands surrounded by settlements of citizens, and being within the ordinary jurisdiction of any of the individual States.' But the State of New-York has also legislated on the same subject, and by the 'act relative to the different tribes and nations of Indians within this State,' prohibits the purchase of land from any Indian, without the authority of the Legislature; prohibits the sale of various articles to any Indian or tribe; makes numerous other regulations, as to trade and intercourse with them, by the citizens who surround them, so as to cover the whole ground over which Congress has declared its act should not extend. An examinatien of the laws of other States, will show that many of them have legislated, under every part of this power, to the same extent, and, in some cases, to a greater extent than New-York; and will show the havoc which must be made in the State laws, if this power is not to be considered concurrent.

This power is not only concurrent, but is *limited* in Congress. It does not extend to the regulation of the internal commerce of any State. This results from the terms used in the grant of power, 'among the several States.' It results also from the effects of a contrary doctrine, on the whole mass of State power. Internal commerce must be that which is wholly carried on within the limits of a State: as

where the commencement, progress, and termination of the voyage, are wholly confined to the territory of the State. This branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers, and to hawkers and pedlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State. But, although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the States.

It has thus been seen, that this power is concurrent; and as such, may be exercised by the States, subject, like all other concurrent powers, to the power of Congress, when actually exercised; and that it is limited, not extending to the internal trade of a State. We contend, that the exclusive right claimed by the respondent is valid, considered either as a regulation of intercourse and trade among the several States, or as a regulation of the internal navigation of the State.

Considering it then, as a regulation of trade among the States, it becomes necessary to inquire into the foundation of the right of intercourse among the States, either for the purposes of commerce, or residence and travelling. From the declaration of independence, in 1776, until the establishment of the confederation, in 1781, the States were entirely and absolutely sovereign, and foreign to each other, as regarded their respective rights and powers are separate societies of men. During that period, the right of intercourse among them rested solely on the *jus commune* of nations. By the law of nations, the right of commerce has its foundation in the obligation resting upon all men, mutually to assist each other, and to contribute to the happiness of their fellow creatures. Right on one side, springs from obligation on the other. The right to purchase, springs from the obligation to sell. 'One nation has, therefore, a natural right to purchase of another the things which it wants, and which the other does not need.' The law of nations being only the application of the law of nature, as regulating the rights and obligations of individuals, to nations and sovereign States, this is the foundation of the right of buying. But the right of selling does not impose any obligation on another nation to buy, as that other may not want, and must be the sole judge of its own necessities.3 It follows, then, that any State has a natural right to purchase of any other the articles which it needs, and to open a commercial intercourse for that purpose; but that every State, being under no obligation to purchase of another, may, at its pleasure, prohibit the introduction of any foreign merchandise. These rights of purchasing are not perfect rights, and of course connot be enforced by one nation against another; and, being thus imperfect, it depends upon the will of each nation, whether it will carry on any commerce with another, or upon what terms and under what regulations. These imperfect rights, like all other imperfect rights between nations, can become perfect only by treaty; the effect of which, is to *secure* to a nation rights of commerce or intercourse, which it before enjoyed at the will of another. The right of travelling, or of entering into and residing in one nation by the citizens or subjects of another, depends on the same principles of international law. But the sovereign may forbid the entrance into his territory, either to foreigners in general, or in particular cases, and under particular circumstances, or as to particular individuals, and for particular purposes.4 And as he may prohibit the entrance altogether, he may annex what conditions he pleases to the permission to enter. In the absence of any treaty stipulation, and of any prohibitory regulations, the natural right would exist, and might be exercised and enjoyed.

This being the relation subsisting between sovereign States, it follows, that before the confederation, each State enjoyed the right of intercourse with all the others, at the will of those others, both as

respects the transit and residence of persons, and the introduction and sale of property. The confederation was a *treaty* between sovereign States, and 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States,' stipulated, that the free inhabitants of each State should have 'free ingress and egress to and from any other State,' and should enjoy in each State '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.' This article, then, *secured* the right of passing from one State to another, but gave no new right of commerce as to the introduction of any goods, and not even the right of removing from the State any property purchased in it. The rights of commerce, therefore, as between the States, remained as before, subject to all the municipal laws of the State, except that those laws must be general and impartial in their application. Under the confederation, then, the States retained the whole power of regulating foreign commerce, and that between the States, except as stipulated in the treaty of confederation itself. Under it, all the trade and intercourse between any State and any foreign nation, was carried on by the law of nature and nations alone. All trade between any State and another State, as to the right of importation, &c., was carried on in the same manner. No State could make any freaty of commence with a foreign power, or with another State.

The inconveniences resulting from these powers of the States, gave rise to the new constitution. These inconveniences consisted principally in the impositions and taxes levied on property imported and exported by one State through another. There was no inconvenience as to the right of passing from State to State, as that was secured by the articles of confederation. The constitution applied the remedy to these evils in two ways: (1.) By express prohibitions on the States, in those particulars in which the evils had been most sensibly felt, preventing them from levying any impost or duty of tonnage, without the consent of Congress. (2.) By vesting Congress with a general power to regulate commerce with foreign nations and among the States. The constitution does not profess to give, in terms, the right of ingress and regress for commercial or any other purposes, or the right of transporting articles for trade from one State to another. It only protects the personal rights of the citizens of one State, when within the jurisdiction of another, by securing to them ' all the privileges and immunities of a citizen' of that other, which they hold subject to the laws of the State as its own citizens; and it protects their property against any duty to be imposed on its introduction. The right, then, of intercourse with a State, by the subjects of a foreign power, or by the citizens of another State, still rests on the original right, as derived from the law of nations. Suppose there was no treaty with a foreign power, and no act of Congress regulating intercourse with that power, but barely a state of peace; that power would enjoy the right of trade and intercourse with New-York, by the law of nations alone. But that right might be restrained, or regulated, or abolished by the law of New-York alone. Such was the situation of New-York before the adoption of the constitution, both as to foreign nations and the other States. The constitution has not abridged the power of the State in this respect. It has only subjected it to the superior power of Congress when actually exercised.

An examination of the acts of Congress on this subject will show, that, as the constitution has not given the right of intercourse and trade, so neither has Congress, in the exercise of its constitutional powers, by any law, given that right. Here the learned counsel entered into an elaborate examition of the statutes, for the purpose of establishing this position.

It would seem to follow, from this view of the constitution and the acts of Congress, that the right of transit from State to State, by land or water, for commercial or other purposes, is founded on the *jus*

commune of nations; that the constitution does not affect that right, except in specified cases; and as to all others, leaves the right as before, with a general power in Congress to regulate and control it, so far as it may be connected with commerce; that the State has the concurrent power also, to regulate and control it, so far as it may be connected with commerce; that the State has the concurrent power also, to regulate and control it, in all cases where its regulations do not actually conflict with those of Congress; that Congress has made no regulations, which alter or affect the right at all, by giving any other right than was before enjoyed; that all the regulations of the State, therefore, which operate within its own limits, are binding upon all who come within its jurisdiction; and that if Congress deems such regulations to be injurious, it may control them by express provisions, operating directly upon the case.

The case has, heretofore, been considered as if the steam boat laws were regulations of commerce among the States, in the ordinary acceptation of those terms. But is the law in question any thing more than a regulation of the internal navigation of the waters of the State? In terms, it applies only to the waters within the State. It does not deny the right of entry into its waters to any vessel navigated by steam: it only forbids such vessel, when within its waters and jurisdiction, to be moved by steam; but that vessel may still navigate by all other means; and it leaves the people of other States, or of New-York, in the full possession of the right of navigation, by all the means known or used at the time of the passage of the law. It is, therefore, strictly a regulation of internal trade and navigation, which belongs to the State. This may, indeed, indirectly affect the right of commercial intercourse between the States. But so do all other laws regulating internal trade, or the right of transit from one part to another of the same State; such as quarantine laws, inspection laws, duties on auctions, licenses to sell goods, &c. All these laws are acknowledged to be valid. They are passed, not with a view or design to regulate commerce, but to promote some great object of public interest, within the acknowledged scope of State legislation: such as the public health, agriculture, revenue, or the encouragement of some public improvement. Being passed for these legitimate objects, they are valid as internal regulations, though they may incidentally restrict or regulate foreign trade, or that between the States. So of the laws now in question; they were passed to introduce and promote a great public improvement, clearly within the power of the State to encourage. They operate entirely within the limits of the State. They put no restraint on the right of entry into the State; but they exclude from the right of navigation on its waters in a particular mode, because they deem that mode injurious to the public interest, unless used by particular persons. How can they be distinguished in principle, from all the other laws which have been referred to? If steam boats had been pernicious in themselves, or had been deemed so as affecting injuriously other great public interests, could Congress have prohibited them on the waters of New-York, by any exercise of the power to regulate commerce? Could not the State have done it, by virtue of its general power, on its navigable waters? Suppose that steam boats were found to be unsafe, and destructive to property or lives, unless built or navigated by persons particularly skilful, could not the State prohibit the use of them, unless thus built and navigated? If, under any circumstances, the State may restrict the use of them to particular persons, it may do so in its own discretion, for reasons of which it alone is the judge.

All this shows that the restraint imposed by these laws, on the navigation of the waters of the State, is merely an internal regulation of the right of transit, or passage from one part of the State to another; that it is a regulation which, if even indispensable to the public safety, Congress could not make; and that the power to make it must, therefore, be in the State.

The right of a State to regulate its internal trade, applies as well to its navigable waters, as to its

other territory. Its rivers are its territory and domain, as much as the land, and equally subject to its laws in all respects. The power of Congress to regulate commerce applies as well to the land as to the water. Commerce between the States, and with foreign powers, is very extensively carried on by land. Congress has accordingly adapted its revenue laws to the land, by imposing duties on goods imported in carriages, &c. When goods are brought into the State in a carriage or wagon, cannot the State prohibit the transportation of those goods from one part of the State to another, except in a particular manner, or by a particular road, or in vehicles of a particular description? Where is the difference between an exclusive right to navigate vessels by steam on the water, and an exclusive right to move carriages by steam on the land? Cannot a State grant an exclusive privilege to carry goods as well as passengers, in carriages or vessels, by water or by land? May it not convert all its roads leading into other States, into turnpikes, levy tolls upon them, and alter and abolish them at pleasure? All these are regulations of the internal trade of the State, but they may, and, indeed, must affect, to a great degree, the trade between the States. By virtue of the right of a State over its navigable waters, it establishes *ferries*, which are exclusive rights to use parts of navigable waters for particular purposes and in a particular manner; and *bridges*, which interrupt, and sometimes destroy the navigation of rivers: It grants the land under the water at pleasure, builds public piers, erects dams and other obstructions, and diverts the course of the waters for any purpose whatsoever. By its power over its land territory, a State establishes roads and canals, regulates the carrying of goods, and the amount of tolls upon them, grants exclusive privileges to stage wagons and others, for the carriage of goods and passengers, and performs all other acts of sovereignty in regard to these public highways.

It appears, then, that a State may exercise the same control in these respects, over both land and water, within its own jurisdiction; that the right, as to both, rests on the same foundation, that of a sovereign over his domain; and that it has uniformly been exercised over both in the same manner. What, then, is the right under which the respondent claims? It is only an internal regulation of the use of the waters of the State. This is clearly the case, when it applies to the case of the conveyance of passengers or goods, on the waters of the State, where the whole journey or transit is within the State, as from New-York to Albany. Is it in truth any thing more than an exclusive right of ferry over the waters of Hudson's river? It is, in substance and effect, an exclusive right to carry pasengers in boats navigated in a particular mode, on the navigable waters of the State. These waters are a public highway, like any other public road on land, and, as such, are completely subject to the control of the State laws. There are various acts of Congress which recognise the power of the States to control their navigable waters. Thus, in the act enabling the people of Louisiana to form a constitution, there is a provision, that the State convention *shall 'pass an ordinance providing* that the river Mississippi, and the navigable rivers and waters leading into the same, or into the gulf of Mexico, *shall be common highways*, and for ever free, as well to the inhabitants of the said State, as to other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State.'5 And in the act for the admission of that State, the above provisions, as to the navigation of the Mississippi, are made one of the fundamental conditions of the admission.6 Similar conditions were also imposed upon the admission of the States of Mississippi, Missouri, and Alabama;7 which strongly imply, that the new States would have had a right to control the navigation of their waters, if these provisions had not been inserted; that there is nothing in the constitution which could prevent them from doing so, when they should once have been admitted as equal members of the Union; and that Congress could pass no law, under the constitution, to prevent them from doing it.

But the power of Congress is 'to regulate *commerce*.' The correct definition of *commerce* is, the transportation and sale of commodities. It is so considered in all the regulations made by the laws of Congress. They speak generally of vessels and their cargoes, and whatever rights are given by the laws of Congress, apply to commerce strictly and properly speaking. Any person claiming to navigate the waters of the State of New-York against the State laws, under any right derived from the laws of Congress relative to commerce, must show himself qualified according to these laws, and actually exercising that right under their provisions. Now, if the license here set up gives any right it is to carry on the coasting trade, which consists in transporting goods from one State to another. It is not pretended that the appellant was engaged in this trade, when stopped by the injunction. It appears by the pleadings, that his boat was employed in the transportation of persons or passengers for hire, and it is notorious that this is a distinct business. It is often entirely disconnected from any commercial object, though sometimes indirectly connected with trade. So it has been considered by some of the States. New-York once laid a tax upon passengers travelling in the steam boats; and Delaware taxed passengers travelling through that State in carriages. But these States could have laid no tax on *property* thus transported. If, then, the appellant's boat was engaged, *bona fide*, in the coasting trade, the question might arise as to its rights and privileges under the enrolment and license. But, when no trade is carried on, or intended to be carried on, under the license, it is clear that the license is a fraud upon the State law, if that law is in other respects valid. An examination of the provisions of the statutes relating to the coasting trade will show, that they all relate exclusively to the coasting trade as before defined, and do not contemplate the carrying of passengers as distinguished from commerce. Every vessel engaged in it, must not only have a license, but must comply with various regulations, at every departure she takes from one district to another; and, unless it is shown that such regulations have been complied with, the vessel can claim no right (in any case) to navigate under the laws of the United States. It does not appear that the appellant's boat has ever done this, or pretended to do it, or, in fact, to be engaged in trade at all.

It has thus been attempted to be shown, that our exclusive right is valid, even if the law granting it is to be considered as a regulation or restriction of the right of commercial intercourse between the States, on the ground, (1.) That the power to regulate commerce is strictly a concurrent power. (2.) That the State may act in any manner, in the exercise of that power, so long as its laws do not interfere with any right exercised under the constitution or laws of the United States. (3.) That the appellant, in this case, has shown no right under that constitution or these laws, and, therefore, cannot contest the validity of the exclusive grant. (4.) That even if the enrolment and license relied on, give a right, it is not the right of intercourse for any other purpose than for the coasting trade; and the appellant does not show that he was carrying on, or intended to carry on, that trade. But that the State law, in fact, is only a regulation of the internal trade and right of navigation, within the territorial limits of the State: that the power to regulate this, is exclusively in the State; that the State has exercised it, in the same manner, both by land and water; and that the law is valid, although incidentally it may affect the right of intercourse between the States.

To which it may be added, that the State law may be valid in part, or as enforced under particular circumstances, though it may be void under other circumstances. Thus, the law may be held void, so far as it restrains the right of navigation between State and State, either for commercial purposes, strictly speaking, or for all purposes, including the transportation of passengers. And it may, at the same time, be valid, so far as it restrains the right of internal navigation, strictly speaking, either in the whole extent of the right, or as a mere exclusive right to carry passengers in steam boats. Thus, the State law may be suffered to operate, in whole or in part, so far as it may, without actual conflict with the constitution or laws of the United States.

Mr. *Emmett*, on the same side, stated, that the question sought to be presented, was the complete invalidity of these laws of New-York, as being repugnant to the constitution of the United States. If the invalidity be not total and absolute, (and that might well be the case with statutes, which are often void in part, and good for the residue,) the appellant must further show, that *he himself* stands in that situation, which entitles him to allege their partial invalidity; that *his* case is such, as that the part of the law which is void, is calculated, if enforced, to affect or injure his rights.

In addition to the general *prima facie* presumption in favour of the constitutionality of every act of a State Legislature, this series of laws derives a peculiar claim to that presumption, from the history of the circumstances attendant on their enactment. On the 19th of March, 1787, a short time before the meeting of the federal convention, the Legislature of the State of New-York made its grant to John Fitch, for 14 years. From motives, of the correctness of which this Court can take no cognizance, the Legislature, on the 27th of March, 1798, thought fit to repeal that law, on the suggestion that Fitch was either dead, or had withdrawn himself, and that Robert R. Livingston was possessed of a mode of applying the steam engine to propel boats, &c. At this time, all the laws of Congress regulating commerce and patents, had been for above five years in operation, and their provisions familiarly known. The Council of Revision, consisting of Mr. Jay, as Governor, Chief Justice Lansing, Judge Lewis, and Judge Benson, notwithstanding the personal regard they might well be supposed to have entertained for Chancellor Livingston, (who was also a member, but did not sit,) thought it their duty to object to this bill, on the ground that the facts from which Fitch's forfeiture was to arise, had not been found by some due course of law. The act, however, passed the Legislature by a constitutional majority. But he would here ask, *who* made this objection, and what were the inferences it afforded, as to the constitutionality of the law? Mr. Jay's is a name of peculiar authority; Chief Justice Lansing had been a member of the federal convention; and both the Judges were perfectly conversant with the political proceedings of the day. They were adverse to this act on principle, and must be presumed to have presented all the objections against it which they thought well founded. They not only did not think that the adoption of the constitution, and the enacting by Congress of her revenue and patent laws, had made Fitch's privileges cease, but neither the constitution nor those laws appeared to furnish any objection against a similar grant to Robert R. Livingston. On the 29th of March, 1799, an act was passed, extending the former act for twenty years from its date, and giving two years for making the experiment. That passed the Council of Revision without any objection, none of the judges having dreamt that it was unconstitutional. The time for making the experiment having run out, without a boat having been made, and Mr. Fulton having associated himself to Mr. Livingston in the investigation, on the 5th of April, 1803, the Legislature made the grant anew to Messrs. Livingston and Fulton. And that law was again approved of by the Council of Revision, consisting almost entirely of new members, and differing from the first. The time granted by this law for constructing a boat, again ran out; and on the 6th of April, 1807, it was again extended for two years, and that act also approved of by the Council of Revision. In the course of that year, the experiment was successfully made; and on the 11th of April, 1808, the Legislature, by an act, which also passed the Council of Revision, *made a contract* with Messrs. Livingston and Fulton, by which they hoped to gain, and did gain, unequalled accommodations for persoss travelling in the State.

The success of those gentlemen awoke the cupidity of others, and doubts of the constitutionality of those laws were, for the first time, raised. But, after these questions were first broached, and while opposition boats were actually building, on the 9th of April, 1811, the Legislature passed another act, which also received the sanction of the Council of Revision. These were not judicial decisions;

but they were six consecutive and deliberative acts of Judges, equally bound, by their duty and oath of office, to examine, decide, and act upon this objection, if it had sufficient force; they so nearly resembled judicial decisions, that they might well be cited as authorities. They also showed, that the laws now objected to had not grown out of any temporary effervescence, or excitement, or party intrigues. The grant began in 1798, and had been universally ratified down to 1811.

But the constitutionality of those laws had been the subject of a judicial decision of the most respectable character. The act of 1811 had a proviso, that nothing therein contained should extend to the three opposition boats actually built and launched. With regard to two of them, Livingston and Fulton filed a bill for an injunction to prevent their navigating. The then Chancellor thought the question too important to grant an injunction, in the first instance, and refused it; from that decision an appeal was made to the Court of Errors of that State; there the constitutionality of those laws was very ably disputed, but supported by the unanimous decree of that Court, and the very elaborate opinions of the Judges, which, for sound constitutional reasoning, can scarcely be surpassed.

New-York is not the only State which has passed such laws. Massachusetts, February 7, 1815, granted to J. L. Sullivan, a similar grant for steam tow-boats, on Connecticut river, for twenty-eight years, after the expiration of his patent, which, on February 11, 1819, was enlarged for two years. New-Hampshire, in June, 1816, gave him a similar privilege on the Merrimack. Pennsylvania, on the 26th of March, 1813, gave a similar right to James Barnes, from Wilksbarre to Tioga Point, the borders of our State. Georgia, on the 14th November, 1814, gave a similar right to S. Howard, for all the waters of the State, with steam tow-boats; and by another act, 19th December, 1817, granted to a company, (probably deriving under Howard,) a similar right for steam boats for twenty years. Tennessee has lately given a similar right on the Tennessee river.

What are the provisions of the constitution alleged against the validity of those laws? They are to be found in the powers given to Congress, art. 1. s. 8. to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; and, also, to promote the progress of science and of the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

If the constitution had not contained either of the provisions referred to, the right of the States to grant exclusive privileges would be unquestionable. At any rate, no point could be presented to this Court, by which it could have jurisdiction to consider the validity of their grants. In free countries, which reject the pretensions of prerogative, it is (unless constitutionally forbidden) a part of the right of legislation; and whether wisely exercised or not, is a question between the government and the people, with which this Court have nothing to do.9 Those are the only provisions on the subject; for it is clear, that the 2d sec. of the 4th art. (which, however, has sometimes been mentioned,) would not have prevented the exercise of this right: That is only intended to secure to all citizens of the United States, when coming into any State, the same immunities and privileges that are enjoyed by the citizens of that State, and subject to the same laws and regulations; and, unquestionably, those laws do not place the citizens of other States on a different footing than the citizens of the State of New-York.

Those provisions, before specified, cannot apply to interfere with the State laws, unless where a case is presented, the facts of which bring it within one or other of those provisions.10 Now, the case presented contains nothing to make either of the provisions of the constitution applicable to it. Certainly *no patent* is here presented touching the same subject matter, and with which the State grants are pretended to interfere. On this point the appellant has no right to ask for the decision of this Court, or to claim the benefit of its jurisdiction.

Neither does the case present any ground on which the application of the clause respecting commerce can be made; the vessels not having been engaged in trade or commerce, but in carrying passengers for hire. But if either of those provisions can be applicable, what is the general rule for their construction, as to the extent and conclusiveness of the powers they confer? In the delegation of authority to Congress itself by the constitution, the phraseology does not imply exclusive power. It is remarkable, that even the definite article *the* is omitted, and it is only provided that Congress shall *have power*, &c. And this omission was not accidental, but studiously made. By referring to the journals of the Federal Convention,11 it will be found, that the sixth article of Mr. Charles Pinkney's draft has the words 'shall have *the* power,' &c. In the draft reported by the committee of five, (art. 7th,) the definite article is still preserved.12 In the draft as reported by Mr. Brearly, the word 'the' is left out, clearly by design.13 Notwithstanding that, Mr. Patrick Henry and Mr. George Mason, and, indeed, the opposers of the constitution generally, thought, that by that instrument, as originally presented to the people, all the powers given to Congress would be considered as given to them exclusively of the States.14 Mr. Henry said, 'the right interpretation of the delegation of those powers was, that when power was given, it was exclusively given.' And Mr. George Mason15 asks, 'will powers remain to the States, which are not expressly guarded and reserved?' This construction, which was the general foundation of the opposition to the constitution, was strenously disavowed and reasoned against in the *Federalist*,16 and actually produced the 10th article of the amendment. The same doctrine was, nevertheless, maintained by one of the counsel in the case of *Sturges v. Crowninshield*.17 He says, 'every power given to the constitution, unless limited, is entire, exclusive and supreme.' But the Court held differently; that the grant of a power to Congress does not imply a prohibition on a State to exercise the same right.18 And the doctrine is very fully enlarged upon by Mr. Justice Story, in *Houston v. Moore*.19 It is also very clearly laid down in the case already cited, by Thompson, J. and by Kent, Ch. J.20 But the rule is more strongly, and perhaps not less justly, laid down by Judge Tucker, in his edition of *Blackstone's Commentaries;*21 after alluding to the clauses restraining the powers given, he says, 'the sum of all which appears to be, that the powers delegated to the federal government are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a State, or of the people, either collectively or individually, may be drawn in question.' This rule of construction must be correct; for *the constitution gives nothing to the States or to the people*. Their rights existed before it was formed, and are derived from the nature of sovereignty and the principles of freedom. The constitution *gives* only to the general government, and so far as it operates on State or popular rights, it takes away a portion, which it gives to the general government. In respect to *extent and range*, this delegation of powers ought, perhaps, to be liberally construed; but the States or the people must not be thereby excluded from the exercise of any part of the sovereign or popular rights held by them before the adoption of the constitution, except where that instrument has given it exclusively to the general government. The 10th amendment of the constitution was adopted to secure that construction, and it is conformable to the rules of reason and law, in construing every similar instrument. The truth of this rule has, however, been sometimes controverted, by referring to the power of naturalization as exclusive, and reasoning from that to the others. Naturalization is decided by this Court to be an

exclusive power; but it must be so considered, not from the grant of it in the 7th article, but from the force and necessary effect of the 2d sec. of the 4th article. It is, therefore, an exception, and does not shake the general rule.

It is of very little importance, whether the power to regulate commerce be *exclusive* or *concurrent* since this State grant does not, in fact, interfere with any congressional regulation of commerce. But as the exclusive nature of that power has been always insisted on, and used as an argument against this grant, it may be right to consider the solidity of the assertion.

The expression, *concurrent powers*, is objected to, as if it implied equality in the rights vested in Congress and the States. It is only a verbal criticism, that it would be more correct if the term used was *co-ordinate*. The term, concurrent, is adopted by the *Federalist*, and has constantly been used to express those powers. It is always understood, when so applied, that the exercise by the States must be subordinate, and never can be in collision with that by Congress. It has been said, *commerce is an unit;* the meaning of that expression does not very clearly appear, nor its force and application to the argument. If it be an unit, the constitution has broken it into fractions, and given to the States the exclusive control of one of the fractions. But further, the *regulations* relating to that unit, are many and various: some acting on one part, and some on another, and operating on it in different ways. It is with these regulations, that this discussion has to do; and the question still remains, whether some of those regulations may not, subordinately, emanate from the States.

As Congress has no power to regulate the internal commerce of any State, none of its regulations can affect so much of the exclusive grant, as restrains vessels which are only used within the States; nor can it give to any man a permission to carry on any steam boat navigation, which, in its beginning, and ending, and course, is entirely confined within the waters of the State: for instance, between New-York and Albany; on Cayuga lake; on lake Ontario, and the St. Lawrence, from Niagara to Ogdensburg. The only questions can be, as to navigation between foreign countries, or another State and New-York; and even there, the power of Congress could only be extended to fair cases of *trading*, within the purview of the constitution, and not to the mere transportation of passengers; nor to any colourable pretence of trading, as a cover for carrying passengers, and defeating the grant. This distinction is, in itself, of great consequence, and peculiarly applicable to the case before the Court, in which the complainant states, and the defendant admits, the vessels to have been employed in the transportation of passengers. The power given to Congress to regulate commerce with foreign nations, and between the several States, relates to commerce, in the proper acceptation of the term; 'the exchange of one thing for another; the interchange of commodities; trade or traffic.' This is the direct subject of the power; and by force of the auxiliary power, 'to make all laws which shall be necessary for carrying into execution the foregoing powers,' Congress has passed laws for erecting ports of entry and delivery, for the collection of duties, regulation of seamen and ships employed in foreign commerce, or that between the States. Ports, duties, seamen and ships, afford the means of regulating commerce, and therefore, so far as they are used in such commerce, they come within the powers of Congress. It has an incidental power, indeed, to regulate *navigation*, but only so far as that navigation is, or may be, subservient to the commerce it has a direct power to regulate. It has no right to interfere with the navigation of the navigable waters of any State, or even where they are common to two States, except so far as that navigation is used for, or applicable to, the purposes of the commerce it has the power to regulate; and it is a proposition unequivocally false, when asserted generally, that Congress has power to interfere with or regulate the navigation of the navigable waters of any State or States. The proposition can only be made true,

by adding the qualification, 'in so far as that navigation is used in foreign commerce, or commerce between the States.' It is contended, that the navigable waters belong peculiarly to the Federal government, and not to the States within which they are. This position, combined with some others, made by the appellant's counsel, leads to alarming results. We have canals of which we are proud, and from their tolls the State anticipates large profits; one is laying out from Sharon, in Connecticut, to the Hudson; and another contemplated through New-Jersey, from the Delaware to the Hudson. Those already in operation, run from navigable waters to navigable waters; from lake Erie or Champlain to the Hudson: those projected, are to be from one State to another. Their utility and profits must result from transporting the produce of Canada, or other States, to New-York, principally for exportation and foreign trade; and bearing back, in return, the products of foreign commerce to those places. They are, then, instruments of foreign commerce, and of that among the States; and mere channels of communication between navigable waters, or different States. Now, where a power is given to Congress, all the means which are appropriate and plainly adapted to the execution of that power, are also given.22 It is contended, that it belongs exclusively to Congress to regulate the navigation and vessels that are the medium of foreign trade, and that between the States; this commerce is an unit, and cannot be divided; the navigable waters belong to the general government, and not to the States; no State has a right to collect revenue from foreign trade, or that between the States. If these positions be considered together, what becomes of the State control over our canals, the craft on them, or the tolls from them? the pier at Black Rock, or the basin at Albany? If the power of Congress over commerce be exclusive, it must also have exclusive control over the means of carrying it on. No State, then, should be mad enough to make another canal, susceptible of being used for intercourse between the States, or foreign commerce.

But there is no grant in the constitution giving the navigable waters peculiarly to the Federal government, and not to the States within which they may be; nor is it traced to any grant, but to some mystical consequence of the Union itself. The position is entirely denied, and met by another, of which the strictest examination is solicited. It is this: *the Federal government can do no act on the navigable waters within the limits of the United States, which, or a corresponding act to which, it cannot do on the land, within the same limits*. If it can, let the act be named. Then the navigable waters belong no more to the Federal government, and are no otherwise affected by the Union, than the land itself. Both are equally subject to the jurisdiction of the general government, for the exercise of all powers delegated to it by the constitution, and both equally subject to State jurisdiction, for the exercise of all powers connected with State sovereignty. It is said, that admiralty and maritime jurisdiction belong exclusively to the Federal government; but this Court has decided, that the grant to the United States in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same; and that the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion not yet given away; and that the residuary powers of legislation still remain in the State.23 Besides, admiralty and maritime jurisdiction depends either on the place where the act is done, or the nature of the act itself. The place gives no jurisdiction, where the navigable waters in which the tide ebbs and flows are within the body of a county or a State, or of two States.24 Accordingly, the laws giving jurisdiction of crimes to the District and Circuit Courts, confine it to 'places out of the jurisdiction of any particular State.' If the Admiralty Court has cognisance of any matter done on navigable waters within a State, it is derived, not from the *locus*, but from the *causa litis*, which gives jurisdiction, though it should arise on land: for instance, seamen's wages, founded on shipping articles made on land, have always, and charter parties and policies of insurance, have lately, been held to be of admiralty jurisdiction.

But, it is further said, to prove the exclusive control of the general government over those navigable waters, that they are regarded and treated as the high seas, since this admiralty and maritime jurisdiction includes 'all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas.' The seizures alluded to, are for breaches of commercial laws, coming under the constitutional powers of Congress, and the authority of the United States over the place, on that account, is equal, whether the offence be committed on land or water; and the very next sentence gives to the same District Court 'exclusive original cognisance of all seizures on land, or other waters, than as aforesaid made.' In fact, analogous provisions for regulating foreign commerce by land, are made by the act of the 2d of March, 1821, 'further to regulate the entry of merchandise imported into the United States from any adjacent territory.' It directs every conductor of any carriage or sleigh, and every other person coming from any adjacent foreign territory into the United States, with merchandise subject to duty, immediately on arrival within the United States, to deliver a manifest, &c. at the office of the nearest Collector, or Deputy Collector, to be verified on oath; for noncompliance, the carriage or sleigh shall be forfeited. The duties to be paid or secured by bonds; and all penalties and forfeitures to be sued for and recovered in the manner prescribed by the general collection law. Clearly, then, Congress has no more power over the navigable waters, than over the land; nor over the ships, than it has over the carriages and sleights engaged in the same kind of commerce. It might register, enrol and license the latter, if it thought fit, as well as ships. Nor is there any greater control acquired by the general government, in virtue of the existence of the Union, over navigable waters or shipping, than over land and land carriages. The power it possesses as to ships or vessels, is only in so far as they are instruments of foreign commerce, or of that between the different States; but in so far as the employment of a ship or vessel in navigating the waters of any State or States, has no connexion with the commerce which Congress has power to regulate; neither that employment, nor its regulation or prohibition, falls within the purview of the federal constitution. It could not, I think, be seriously contended, that Congress can regulate the carrying of passengers from any part of the Union, who are travelling to Balston, Saratoga, or any other place, for health or pleasure; and even if the object of their passing were to trade, that would not legalize the interference of Congress as to the mode of their conveyance from place to place. That naturally falls within the sphere of State legislation; and we must keep in memory the rule of construction laid down by Judge Tucker, and already cited, 'that the powers delegated to the federal government are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a State or of the people, either collectively or individually, may be drawn in question.' Those who contend, that navigating by steam boats between different States, falls within the powers of Congress, must admit that it would have the power to prohibit the carrying of goods, wares or merchandise in a steam boat from any foreign place, or different State, to another. Now, would Congress have the power to prohibit the carrying of passengers in steam boats from Norfolk or Elizabethtown Point to New-York? Certainly such a power could not be contended for; and why not? only because the powers of Congress have nothing to say to the carrying of passengers.

It may be urged against this train of reasoning, that Congress has actually legislated on the subject of passengers. By the act of the 2d of March, 1819, regulating passenger ships and vessels, the fact is admitted; but, though the humane motives which suggested the law; and its provisions, are laudable, its constitutionality may well be doubted. If Congress has the power to regulate the

conveyance of mere passengers, coming by water from foreign countries, it has an equal power to regulate those coming by land, or passing from one State to another. If that law be constitutional, or if a steam boat, only employed in carrying passengers between New-Jersey and New-York, can come within the jurisdiction of Congress, it must necessarily follow, that Congress has a right (and, indeed, according to the doctrine of our adversaries, is exclusively authorized,) to regulate the number of passengers to be received into every ordinary stage coach, though it does not carry the mail, and the size, shape, description, and kind of diligence, and the kind and number of horses, to be employed in conveying passengers between New-Brunswick and Maine, Vermont and New-York, and through the State of New-Jersey, between New-York and Philadelphia! If this legislation falls under the power to regulate commerce, and that power is exclusive, it must be contended, that none of the States in which these diligences may travel, have a right to pass any law respecting them! Neither this Court, nor the people of the United States, are, probably, prepared for the assertion of that claim. The States have always legislated on a different principle, whether the conveyance of passengers was to be by land or water. Every State has, probably, made numerous provisions on this subject; but, want of time and opportunity has confined research to the statutes of New-York and Georgia.

It is, however, contended, that the power of regulating commerce is *concurrent*. This position, indeed, is by no means universally acceded to. Judge Tucker, in his edition of *Blackstone*,27 ranks among the powers exclusively granted to the federal government, the power to regulate commerce, &c. the commerce between the individuals of the same State being reserved to the State governments. And he repeats the doctrine,28 on the very untenable ground, that the regulation of commerce is not susceptible of a concurrent exercise: a doctrine which a review of State laws will show to be contrary to fact and experience. The opposite doctrine is strongly supported by Kent, Ch. J. in Livingston v. Van Ingen,29 as the only safe and practicable rule of conduct, and the true constitutional rule, arising from the federal system. And it is the only safe and practicable rule; it is one which the extent of our territory would indicate, even if the government were despotic. In China, the Mandarins of provinces must be intrusted with some subordinate authority, to make commercial regulations adapted to local circumstances. With us, the peculiar nature and principles of our free and federative government, make the existence of such subordinate legislation more prudent and politic. There must be, even in respect to foreign commerce, local interests and details, which cannot well be presented to the view of Congress, and can be, at least, better provided for by the State Legislatures, emanating from the very people to whom they relate. This must have been perceived by the framers of the constitution, and they must have felt the difficulty of designating the limits of what ought to be permitted to State authority. They did not, therefore, attempt the limitation, except in some plain cases, which they marked by restrictions and prohibitions; but they guarded against any practical abuse of the permission, by securing to Congress the paramount and controlling power over the whole matter. This view of the subject is exceedingly strengthened, when we contemplate the probable future increase and extent of this confederacy. The thirteen original States were a band of brothers, who suffered, fought, bled, and triumphed together; they might, perhaps, have safely confided each his separate interest to the general will; but if ever the day should come, when representatives from beyond the Rocky Mountains shall sit in this capitol; if ever a numerous and inland delegation shall wield the exclusive power of making regulations for our foreign commerce, without community of interest or knowledge of our local circumstances, the Union will not stand; it cannot stand; it cannot be the ordinance of God or nature, that it should stand. It has been said by very high authority, that the power of Congress to regulate commerce, 'sweeps away the whole subject matter.' If so, it makes a wreck of State legislation, leaving only a

few standing ruins, that mark the extent of the desolation. The position, however, is not correct. A power of regulating commerce is impliedly acknowledged to be in the States, by the 10th section of the 1st article; for that section makes specific limitations on its exercise by them, which would be unnecessary, if the power were not possessed by them; and tacitly admits (what is true as to all the State powers) that it is possessed in all other matters not expressly restrained. Congress can lay no tax or duty on any articles exported from any State. If the word *exports* were not in the 10th section, what would be the consequence? that the States, and they only, could lay duties on exports; and as it is, what is the construction? that, although Congress can, under no circumstances, impose a duty on exports, any State can, with the consent of Congress, to any amount; and without asking the consent of Congress, to an amount and extent necessary for executing its inspection laws; possessing, in that respect, a power of regulating external commerce, which is directly withheld from Congress. And from whence is derived the power *to make* inspection laws, but from the existing and more extensive right of making laws to regulate commerce? It seems, also, that the 9th section of the same article, paragraph 1, in like manner, admits the power to be in the States. The *importation* of slaves is, and has always been, considered as a branch of commerce; and it is in that point of view only, that Congress has authority to legislate on the subject. When, then, that paragraph speaks of any of the States thinking proper to allow that importation, it surely admits in them a right to permit or prohibit; and thus to legislate on what is undoubtedly a branch of commerce with foreign nations, or among the several States.

Indeed, it seems susceptible of demonstration, that Congress did not intend to ask, nor the States to give to that body, the exclusive power of regulating foreign commerce, or that between the States. In Colvin's edition of the Laws of the United States,30 we find the proceedings, which led to the formation of the General Convention. The appellant's counsel has selected, as one of these, the representation from New-Jersey, to be found in pages 22, 23. art. 2d. But that can scarcely be said to have led to the convention. It was made in 1778, during the revolutionary war, and to meet objectionable parts of the old articles of confederation. At any rate, it appears from page 25, that the proposed alterations were rejected in Congress. In 1781,31 Mr. Witherspoon proposed in Congress a modified change of the power of regulating commerce, which was also negatived. None of the other States made any proposition similar to that from New-Jersey, in 1778. The following, more nearly approaching the time of the convention, better shows the extent of what Congress asked, and the States appeared willing to concede.32 'In Congress, Wednesday, July 13th, 1785. The committee, consisting of Mr. Monroe, Mr. Spaight, Mr. Houston, Mr. Johnson, and Mr. King, to whom was referred the motion of Mr. Monroe, submit the following report: 'That the 1st paragraph of the 9th of the articles of confederation, be altered, so as to read thus, viz. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in cases mentioned in the 6th article; of sending and receiving ambassadors; entering into treaties and alliances; of regulating the trade of the States, as well with foreign nations as with each other; and of laying such imposts and duties upon imports and exports, as may be necessary for the purpose. *Provided*, that the citizens of the States shall, in no instance, be subjected to pay higher imposts or duties than those imposed on the subjects of foreign powers. *Provided* also, *that the legislature power of the several States, shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever*." This is what the Congress itself asked for and required. The State of Virginia was among the first to meet its views; and Mr. Madison, in the Legislature of that State, proposed a resolution, which will be found in the same book,33 as follows:

'Virginia, to wit: In the House of Delegates, Wednesday, November 30th, 1785.'

[Mr. Madison's resolution for empowering Congress to regulate trade.]

'Mr. Alexander White reported, according to order, a resolution agreed to by the committee of the whole house, on Monday last, respecting commerce,' &c.

'Whereas the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations; and whereas such uniformity can be best concerted and carried into effect by the federal councils, which, having been instituted for the purpose of managing the interests of the States, in cases which cannot so well be provided for by measures individually pursued, ought to be invested with authority in this case, as being within the reason and policy of their institution: 'Resolved, That it is the opinion of this committee, that the delegates representing this Commonwealth in Congress, be instructed to propose in Congress a recommendation to the States in the Union, to authorize that assembly to regulate their trade on the following principles, and under the following qualifications: 1st. Giving power to Congress to prohibit foreign vessels from entering any port, or to impose duties on them and their cargoes; such duties to be uniform, and carried into the treasury of the State. 2d. That no State be at liberty to impose duties on any goods, wares, or merchandise imported, by land or by water, *from any other State; but may altogether prohibit the importation from any State, of any particular species or description of goods, wares or merchandise, of which the importation is, at the same time, prohibited from all other places whatsoever*.' In each of those proceedings, it was clearly contemplated, that the individual States should at least retain the power of *absolutely prohibiting* the importation of any article they thought fit, within their own respective limits. How far was this intention subsequently departed from? Where is the power of prohibiting the exportation or importation of any article taken from the States by the constitution? They are indeed qualifiedly restrained from laying imposts or duties on exports or imports, but not from entirely prohibiting their exportation or importation; and they are also restrained from laying any duty on tonnage; and it is, perhaps, the fair construction of the instrument, that even their prohibitory legislation, is under the control of Congress, as having the paramount authority to regulate commerce; but valid until Congress shall have made regulations inconsistent with their laws. A review of some of the laws of different States, will show that they have always exercised the power of making very material regulations respecting commerce. This review must be abridged; but it is of extreme importance, and if it were possible to spread out in detail the immense mass of State laws, regulating and affecting foreign commerce, and that among the States, it would be conclusively seen, that they have always considered themselves as possessing, and have, accordingly, exercised a *concurrent* power over both those branches of trade; and that the power of Congress cannot be decided to be exclusive, without declaring to be unconstitutional, an appalling body of State legislation.

To begin with the laws respecting slaves. The appellant's counsel has questioned their constitutionality, and called them of doubtful authority. That expression showed he felt their application and important bearing, if their constitationality be admitted; and it has never before been called in question. The constitution most clearly admits the right of the States to legislate on this subject, not merely till 1808, but always, unless Congress should prohibit the trade; and yet, as has

been already suggested, slaves are treated in that they paragraph itself, as an article of commerce or trade. Congress, renouncing for a time the paramount right to prohibit their importation, claims the right to lay a tax or duty on it. So also, they are treated as an article of commerce in the *laws* of Congress; for it is only under the power to regulate foreign commerce, that, before 1808, *they* could forbid and make penal, the trade by our citizens to foreign nations, and since 1808, prohibit it entirely. In this point of view it was also considered, and the right of the States to prohibit it asserted, in the debates of the Virginia convention. On this article Mr. George Mason observed, 'should the government be amended, still this detestable *kind of commerce* cannot be discontinued till after the expiration of twenty years.'34 To which Mr. Madison, in reply, says,35 '*We* are not in a worse situation than before. *That traffic is prohibited by our laws, and we may continue the prohibition. The Union*, in general, is not in a worse situation. Under the articles of the confederation, it might be continued for ever.' And again,36 'as to the restriction in the clause under consideration, it was a restraint on the exercise of a power expressly delegated to Congress, *namely, that of regulating commerce with foreign nations*.' Mr. George Nicholas also, alluding to both objections, says,37 'Virginia might continue the prohibition of such importation during the intermediate period.' And to obviate the objection, that the restriction of Congress was a proof that they would have power not given to them, he remarked, 'that they would only have had a general superintendency *of trade*, if the restriction had not been inserted. But the southern States insisted on this exception to that general superintendency for twenty years. It could not, therefore, have been a power by implication, as the restriction was an exception to a delegated power.' And, finally, Governor Randolph says,38 '*the power respecting the importation of negroes, is an exception from the power given to Congress to regulate commerce*.' The same doctrine is also maintained in the *Federalist*.39 Let us then see the laws that have been made by some of the different States respecting this branch of trade.

Indeed, Congress itself has recognised and acted on the power of the States to prohibit this trade. The constitution restrained Congress (as has been already seen) from prohibiting the importation of negroes, &c., before 1808. But in 1803, it passed 'an act to prevent the importation of certain persons into certain States, where, by the laws thereof, their importation is prohibited.41 Proceeding upon the right of the several States to prohibit, and acting under its general power to regulate commerce, it imposes additional penalties on the importing or landing of any negro, mulatto, or person of colour, &c., in any State which, by law, has prohibited, or shall prohibit, their admission or importation. And it makes it the duty of the officers of the customs, to notice and be governed by the provisions of the laws of the several States prohibiting their importation or admission; and enjoins it on them vigilantly to carry into effect the said laws of such States, any law of the United States to the contrary notwithstanding. How could Congress do this, if the power of *prohibiting* the trade were not unquestionably possessed by the States, in their sovereign capacity?

The quarantine laws further illustrate our position. The appellant's counsel says, these are to be considered merely as laws of police; they are laws of police, but they are also laws of commerce; for such is the nature of that commerce, which we are told must be regulated exclusively by Congress, that it enters into, and mixes itself with, almost all the concerns of life. But surely that furnishes an argument, showing the necessity that the States should have a *concurrent* power over it. Judge Tucker considers them as laws of commerce, when he says,42 'another consequence of the right of regulating foreign commerce, seems to be, the power of compelling vessels infected with any contagious disease, or arriving from places usually infected with them, to perform their quarantine.

The laws of the respective States upon this subject, were, by some persons, supposed to have been virtually repealed by the constitution of the United States:' (and why must not that be the case, if the power of Congress regulating commerce be exclusive?) 'but Congress have manifested a different interpretation of that instrument, and have passed several acts for giving aid and effect to the execution of the laws of the several States respecting quarantine.' It will be recollected, that the first recognition by Congress of the quarantine laws, was in 1796; and that only directs *the officers of the government* to obey them; but does not pretend, or attempt, to legalize them. And, indeed, it could not do so, if the States had no concurrent power, and the regulation of commerce was *exclusively* delegated to Congress; for the power which is *exclusively* delegated to Congress, can only be exercised by Congress itself, and cannot be sub-delegated by it. It is, therefore, no reply to the force of the argument drawn from those laws, to say, that they have been ratified by Congress. Another answer to that observation is, that the supposed ratification by Congress did not take place until 1796; and that many of those laws were in active operation several years before. For instance, as few out of many: *New Hampshire* passed her quarantine laws first, February 3d, 1789,43 and again on the 25th of September, 1792.44 *Connecticut* passed hers in May, 1795.45 The laws of *Maryland*46 show the temporary continucation of those laws in that State, from 1784 to 1785, from 1785 to 1792, from 1792 to 1799, and so down to 1810; and the 2d vol.47 contains a law passed in November, 1793, giving to the Governor the strongest powers on the subject. The State of *Virginia* passed, 26th of December, 1792,48 'an act reducing into one the several acts to oblige vessels coming from foreign parts, to perform quarantine;' which act was amended on the 5th of December, 1793;49 and further amended on the 19th of December, 1795.50 *Georgia* passed her quarantine law December 17th, 1793.51 Undoubtedly those laws derive their efficacy from the sovereign authority of the States; and they expressly restrain, and indeed prohibit, the entry of vessels into part of the waters and ports of the States. They are all so similar, that one or two may suffice as examples. The quarantine law of *Georgia*, s. 1. prohibits the landing of persons or goods coming in any vessel from an infected place, without permission from the proper authority; and enacts, that the said vessels or boats, and the persons and goods coming and imported in, or going on board during the time of quarantine; and all ships, vessels, boats, and persons, receiving any persons or goods under quarantine, shall be subject to such orders, rules and directions, touching quarantine, as shall be made by the authority directing the same. The law of *Delaware*, passed the 24th of January, 1797,52 s. 1. provides, that 'no master of a ship bound to any part of that State, having on board any greater number of passengers than forty, or any person with an infectious disease, or coming from a sickly port, shall bring his ship, or suffer it to be brought, nearer than one mile to any port or place of landing; nor land such persons, or their goods, till he shall have obtained a permit.' The law of *Massachusetts*, passed June 22d, 1797, s. 6.53 enacts, that 'vessels passing the castle, in Boston harbour, may be questioned and detained; s. 12. that vessels at any other port than Boston, may be prevented from coming up, and brought to anchor where the select men shall direct; s. 4. empowers the select men of any town, bordering on either of the neighbouring States, to appoint persons to attend at ferries and other proper places, by or over which passengers may pass from such infected places, which persons have power to examine, stop and restrain such passengers from travelling, until licensed by a Justice of the peace, or the select men; and a fine of 100 pounds is enacted on the passenger presuming to travel onward; s. 5. gives power to seize and detain suspected goods coming from any other State,' &c. By an act of June 20th, 1799, s. 10.54 'any master, &c. who shall enter the harbour of Boston after notice of a quarantine, for all vessels coming from the same place, &c., or who shall land, or suffer to be landed, any passenger or goods, without permission of the board of health, is subject to fine and imprisonment.' These are all obviously direct regulations of trade, and so is the whole of every quarantine system.

The regulation of pilots in sea ports, flows from the power of regulating external commerce. This power, like that of making quarantine regulations, has hitherto been exclusively exercised by the several States; Congress having only made one law on the subject, and that seems explicitly to recognise the concurrent power of the States, and to place over it the true constitutional control. By the 4th sec. of the act of August 7th, 1789, c. 9.55 it is enacted, that 'all pilots in the bays, inlets, rivers, harbours and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be; or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.' Now, it is a principle which cannot be too often brought into view or enforced, that Congress cannot delegate to State Legislatures, the exercise of powers which are given to it exclusively; and the very act of referring to those laws, is a recognition that the power to legislate on the subject is concurrent.

In like manner, the laws regulating light houses, buoys, &c. are all exercises of the implied powers derived from that of regulating commerce. They have hitherto been generally left to Congress; but it does not follow from thence, that they are exclusive. Can it be doubted, that any State has a right to establish a light house or buoys at its own expense, in one of its harbours? That a State has such a power cannot be questioned, if it be shown that individuals have. Some time in 1798, a number of the inhabitants of New-Bedford, Massachusetts, raised a fund by subscription, for building and maintaining a light house at Clark's Point, at the entrance of the harbour of New-Bedford. They maintained it, and kept it regularly lighted for about a year; and the act of Congress admits their right to do so. On the 29th of April, 1800, Congress enacted, that the light house lately erected at Clark's Point, &c., shall and may be supported at the expen of the United States, &c. *Provided*, that the property and jurisdiction of the said light house, and sufficient territory for the accommodation thereof, shall be fully ceded and legally vested in the United States.

The laws of Congress on this subject, recognise, the right of the States to maintain light houses, if they please. The first act, passed August 7th, 1789,57 directs, that their expenses, after the 15th of August, 1789, shall be defrayed out of the treasury of the United States: *Provided*, nevertheless, that none of the said expenses shall continue to be so defrayed by the United States, after the expiration of one year, unless such light houses shall, in the mean time, be ceded, &c. Few States did make the requisite cession; and by the act of July, 1790,58 the time was extended to the 1st of July, 1791, and so, from time to time, for five or six years, till all the States came in; during which the light houses in several of the States were kept up by their authority, without the control of Congress.

The inspection laws are very important regulations of trade. Tucker says, 'there seems to be one class of laws, which respects foreign commerce, over which the States still retain an absolute authority; those I mean which relate to the inspection of their own produce, for the execution of which, they may even lay an impost or duty, as far as may be absolutely necessary for that purpose. Of this necessity, it seems presumable, they are to be regarded as the sole judges.' The extent and importance of this system of regulations does not strike the mind at the first view; nor do the powerful inferences it affords, to show the concurrent right in the States to regulate commerce. Judge Tucker has very imperfectly stated their extent. They do, indeed, regulate, in almost every

State, the foreign trade, so far as it is connected with our produce to be exported; but they do not confine themselves to produce to be exported, they relate to *imports* also. They act by restraining, and sometimes prohibiting, the exportation and importation of certain articles. Before examining those laws, it may be asked, from whence is the right of *restraining* derived, but from the more extended right of *prohibiting?* The difference between *regulation or restraining* and *interdiction*, is only a difference of degree in the exercise of the same right, and not a difference of right. The article in the constitution, art. 1. sec. 10. impliedly allows that right to be in the several States, and the right to enforce their laws by any other means than imposts and duties, and, therefore, by *prohibitions* of exports or imports. The right does not depend on the idea, that the thing prohibited or restrained from being exported or imported, is *dangerous or noxious;* even if that could, *ex necessitate*, create a right, and give it to the State, instead of the congressional jurisdiction; on the contrary, the rules and enactments seem arbitrary.

As to trade with the Indian tribes, without stopping to enter into details, it is sufficient to say, it must stand on the same footing as foreign commerce and that among the States, as they are all given in the same sentence. If the power of regulating the two latter be exclusive, so must it be with the former. And yet every State, whose situation places it in communication or contiguity with Indian tribes, has thought fit, and, indeed, found it necessary, by acts of their own Legislatures, to regulate their trade with the Indians, the laws of Congress not only not exhausting, but not even adequately reaching the subject.

It now seems incontrovertibly established, that the States have a *concurrent* right to legislate on matters of foreign trade, or of that between the States; and a concurrent right to *prohibit* the exportation or importation of articles of merchandise. If they can do that, even as to the articles themselves, to which the power of Congress expressly relates, and if the right to regulate shipping be only impliedly given to Congress, by the general power to regulate commerce, and only so far as they are instruments of that commerce, why cannot a State, that has a concurrent right, within its own sphere, (and that not by implication, but directly, and as the result of its sovereign power, unabridged and unaltered by the constitution,) over all ships or vessels within, or coming within, its jurisdiction, prohibit the entry of any particular kind of vessels within its waters, subject always to be controlled by the contradictory and paramount regulations of Congress, made within the sphere of its powers.

This leads to the consideration of an argument that has been frequently urged on this subject. It is said, that if a State has a right to prohibit the navigation of its waters to steam boats, it has an equal right to prohibit the same navigation to row boats or sailing vessels; and the extravagance of this position, it is supposed, sufficiently refutes the assertion of a more limited right. First, there is an error in the statement of our claim. We do not prohibit the navigation of our waters to steam boats; we only prohibit them, while in our waters, from using steam as the means of their propulsion. Every steam boat which ventures on the ocean, carries and uses sails; and they can, without difficulty, be adapted to every steam boat. Such a vessel, therefore, may, without objection, load in a different State, or foreign port, and come, by means of steam, to the verge of our waters; there is no difficulty opposed to its coming up, with its full cargo, to our custom house, entering, discharging, reloading, and departing, provided that, for the short space of time while it may be in our waters, it employs the only things that any other vessel can employ for entering and departing, and with which it is or may be amply provided�sails and oars. That is the extent of what is very inconsiderately called our extravagant claim. Let us now examine the argument itself, and to test its soundness, let us apply it to other cases. A State has no right to prohibit the use of narrow wheeled wagons for the

transportation of merchandise on any of its roads; for if it can do that, it can prohibit the use of any kind of wagons, and, indeed, all transportation of merchandise on any of its roads, and thus affect the commerce between different States. A State has no right to regulate the assize of bread; for if it can do that, it can prohibit all baking of bread, and thus starve the community. Is there any one act of legislation against which the same reasoning, drawn from an excessive and tyrannical exercise of legislative authority, may not be urged? And if the argument be unsound, when applied to all those instances, what makes it sound in its application to the present question? The answer to it is found in the rights of a free people, which make every act of tyranny void. But, either the right entirely to prohibit the use of row boats, sailing vessels, and steam boats, belongs to some of the constituted authorities that govern those States, or it does not. If it does not belong to any of them, then, clearly, this boasted argument falls to the ground. If it does belong to some of them, to whom does it belong? Has Congress the power to make such a prohibition of all modes of commercial intercourse, by virtue of its limited authority to regulate commerce with foreign powers, and between the different States? In answering no, the embargo laws are fully remembered, and their constitutionality admitted; but it is not derived from the power to regulate commerce. The embargo was a measure of State policy, nearly approaching to war: it may sometimes be of such a character as to derive a legitimate origin from the war making power; but the embargo of 1807 rests for its constitutionality on the power in Congress of providing for the common defence and general welfare of the United States. If, then, the power of entirely prohibiting trade, as a commercial measure, exists in some of the governing powers of those States, and does not exist in Congress, where does it exist? Assuredly in the State Legislatures. If its exercise should ever become void, it will not be because it is contrary to the constitution of the United States, but because it is oppressive to the people it affects to bind; not because it is *unconstitutional*, but because it is *tyrannical*.

Congress itself seems to acknowledge that the constitution does not deprive the States of this prohibitory power; for, if it did, as it binds all the citizens of the United States, it would necessarily bind the territorial governments, and all States admitted into the Union subsequent to its adoption. Yet, in the ordinance of the 13th of July, 1787, for the government of the territory of the United States north west of the river Ohio,60 by art. 4th, for the government of the said territory, and the States which may be formed therein, it is provided, among other matters, that 'the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and for ever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty thereon.' It is made a fundamental provision of the different acts erecting portions of this territory into States, that their constitutions shall not be repugnant to this ordinance. In the act also for erecting the State of Louisiana, sec. 3. it is enacted, that the convention for making the constitution, shall provide by an ordinance, irrevocable without the consent of the United States, among other things, 'that the river Mississippi, and the navigable waters leading into the same, or into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said State, as to the other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State.' The same was also done with regard to the States of Mississippi and Missouri. Now, this provision, so studiously introduced into all those new compacts, which Congress had a right to make with new States, as the condition of their admittance into the Union, would be very singular, and very useless, if, by an effect of the Union itself, all navigable waters belonged exclusively to the general government; or if the federal constitution, which each State adopted, contained in itself an equivalent restraint on the States. The appellant's counsel has alluded to and denied a position, stated to have been used by counsel in arguing the case of *Livingston v. Van Ingen*, before the Court of Errors, that the Legislature might, if it thought fit,

stop up the mouth of the Hudson. It is of very little importance to defend what fell, on that occasion from counsel, and has not been adopted by the Court; still, the learned counsel may be asked, by what authority the State of Rhode Island has erected a bridge over the Seakonnet branch of Taunton river, essentially impairing, if not destroying, its navigation from the sea, and far below where the tide ebbs and flows? By what authority his native State of New-Hampshire has erected a bridge from Portsmouth over the Piscataqua river? By what authority his adopted State of Massachusetts has built two bridges over Charles river, on its tide waters, one near Boston, and the other higher up? and, by what authority the State of Pennsylvania has built a dam over the Schuylkill, near Philadelphia, and three miles below where the tide used previously to ebb and flow?

There, however, is, in fact, no regulation of commerce, made by Congress, with which this exclusive right does or can interfere. What is that degree or kind of interference, which is sufficient to invalidate a State law?

The *Federalist*,61 discussing the cases where powers are exclusively delegated to the United States, makes one of the classes, (and, perhaps, unnecessarily, if not incorrectly,) where the constitution granted an authority to the Union, to which a similar authority in the States would be, absolutely and totally, *contradictory* and *repugnant;* and then goes on: 'I use these terms to distinguish this last case from another, which might appear to resemble it; but which would, in fact, he 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.' And again: 'It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty.' That the third class of cases, as arranged by the *Federalist*, is unnecessary in its application to any of the powers, and that it is derived from an erroneous notion, as to the possibility of repugnancy and its consequences, seems to follow, from the principles laid down by Thompson, J. in *Livingston v. Van Ingen*.62 'There are subjects upon which the United States and the individual States must, of necessity, have concurrent jurisdiction; and all fears and apprehensions of collision in the exercise of these powers, which have been urged in argument, are unfounded. *The constitution has guarded against such an event, by providing that the laws of the United States shall be the supreme law of the land, any thing in the constitution of any State of the contrary notwithstanding. In case of collision, therefore, the State laws must yield to the superior authority of the United States*.' The same doctrine is very ably maintained by Kent, Ch. J.63 who gives, as a safe rule of construction and of action, '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 may then go on in the exercise of the 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.'

The same doctrine is very briefly, but very clearly laid down, by Mr. Ch. J. Marshall, in the case of Sturges v. Crowninshield:64 'It is not the mere existence of the power, *but its exercise*, which is incompatible with the exercise of the same power by the States.' In Houston v. Moore,65 Mr. J. Story, however, adopts the arrangement of the *Federalist*, and goes on: 'In all other cases, not falling within the classes already mentioned, it seems unquestionable, that the States retain concurrent authority with Congress, not only upon the letter and spirit of the 11th amendment of the

constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority; and the State laws, so far, and *so far only* as such incompatibility exists, must necessarily yield.'

Although those authorities show, that nothing but a direct and absolute collision can produce such an interference as will render the State grants invalid, yet a license is relied on by our adversaries, as creating this interference. There is a leading and fundamental error growing out of the nature and form of that instrument, and one which has induced the supposition, that a license *gives a right to trade*, or a *right to enter*, or a *right to navigate* the waters of the United States, to any vessel possessing it. It, indeed, uses the words, 'license is hereby granted for the said vessel to be employed in carrying on the coasting trade for one year, from the date hereof, and no longer;' but those words must necessarily be understood in reference to the extent of the authority granting the permission. Equivalent words are to be found in every license to *distil* or to *sell*, or to do any act, the right to do which existed prior to and independent of the authority by which it may be regulated; and they only mean, license is granted to do the act, notwithstanding the regulations made on that subject by the licensing authority, and which, without this instrument, would restrain the act. So far as those rights to *trade*, to *enter*, or to *navigate*, exist unmodified, they rest on the common law, independent of any *gift* from or *right conferred* by Congress; which, in truth, has no power whereby it might be enabled to make such gift, its authority being only to *regulate* commerce. These rights are, all three, portions of the *jus commune*, and so far as the competent Legislatures have thought fit to let them remain, the right to them, and their efficacy, depend on that *jus commune* and the common law. The right *to trade* is regulated by the State Legislatures and laws of Congress; the right *to enter* is modified principally by the laws of Congress; and the right *to navigate the waters*, almost exclusively by the State Legislatures. *The license has nothing to do with any of those rights;* it only gives some privileges as to payment of tonnage duties, and less frequent entries at the custom houses; and it exempts the licensed vessel from being included within a restriction of the *jus commune* as to trading, by which Congress prohibits certain vessels from carrying foreign articles and distilled spirits from State to State: even there, not *giving* to the licensed vessel *the right* of doing so, but *only* exempting them from the prohibition. A review of the acts of Congress on the subject, will show the truth of these positions.

By the now repealed act of July 20th, 1789,66 imposing duties on tonnage, different rates were fixed: 1st. six cents per ton on vessels built in the United States, &c., and *belonging to a citizen or citizens of the United States;* 2d. thirty cents on vessels built in the United States, and *belonging to foreigners;* 3d. forty cents on all other ships and vessels. But it was provided, that no United States built vessel, owned by a citizen, or citizens, while employed in the *coasting trade*, or on the fisheries, should pay tonnage more than once a year; and that every ship employed in transporting the produce and manutactures of the United States, unless United States built, and owned by a citizen or citizens, should, on every entry, pay 50 cents per ton. The *only* advantages, then, to American built and owned ships, were, a less tonnage duty; and, if on the coasting trade, paying it only once a year; *but let it be well remembered, that they had no exclusive or peculiar right to trade any where*. By the collection law of July 31, 1789,67 which established ports of entry and delivery, it was enacted, that no ship or vessel from a foreign port, not wholly belonging to a citizen or citizens, should be permitted to unload at any port or place, except those there specified.

Neither this, nor any other act, GIVES the *right of entering* into the designated ports. It proceeds on

the supposition and the truth, that by some other code, distinct from the laws of Congress, the entry into all places had been antecedently lawful, and then *restrains it* as to all other places but those named.

The registering, recording, and enrolling of vessels, were enacted by the act on that subject, passed September 1st, 1789.68 They were for the purpose of describing the vessel, her built, tonnage, and ownership; and neither they, nor their certificates, *give*, nor purport to give, any *right to trade*. The enrolment, and certificate of enrolement, is to entitle unregistered vessels of twenty tons and upwards, American built and property, and destined from district to district, or to the fisheries, to the privileges of a ship belonging to the United States, employed in the coasting trade or fisheries. These I have already mentioned, to be a less tonnage duty, and paying it only once a year; but no exclusive or peculiar right to trade any where.69 Registered or enrolled vessels, on application to the collector where they belonged, were entitled to receive *a license to trade between the different districts in the United States*, or carry on the bank or whale fishery for one year.70 The meaning of that license, notwithstanding the generality of its language, was only to certify that the proper tonnage duty for that year had been paid; and that the vessel was *licensed*, for that year, *to trade without paying any tonnage duty*. That such is its object, appears from the 22d sec.71 enacting, that the master, &c. 'shall annually procure a license from the collector of the district to which such vessel belongs, who is hereby authorized to give the same, *purporting that such vessel is exempt from clearing and entering for the term of one year from the date thereof*.' Every vessel had a right to carry on the trade (between district and district) without a license, on paying the prescribed tonnage duties, suited to the case. That further appears, by a provision in the same section, (s. 23.) that if any vessel of twenty tons or upwards, not having *certificate of registry*, or *enrolment*, and *a license*, should be found trading between different districts, or be employed in the bank or whale fisheries, *it should be subject to the same tonnage and fees as foreign ships or vessels*.

The act, already cited, for tonnage and duties, was repealed by the act of July 20th, 1790;72 but the substituted clauses do not affect this argument. A ship *having a license* to trade between different districts, or to carry on the fisheries, while employed therein, is only to pay the six cents per ton once a year, (i. e. on getting the license,) and 'upon every ship, &c. *not of the United States*, which shall be entered in one district from another, having on board goods, &c. taken in one district, to be delivered in another, *there shall be paid at the rate of fifty cents per ton;*'73 a duty which clearly recognises their right to carry on that trade on those terms.

The former act for registering and clearing vessels, was repealed by that passed the 18th of February, 1793. This enacted, that none but *enrolled and licensed* ships, &c. (or, if under twenty tons, simply licensed,) should be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. These privileges, it will be again remembered, are only the paying of a less tonnage duty, and paying it but once a year; and they do not comprehend any exclusive or peculiar right to trade any where. It enacts, that before getting the license, the tonnage for the year must be paid; and the effect and object of the license was to certify that the proper tonnage duty for that year had been paid, and that the vessel was, therefore, *licensed* for that year to trade without paying tonnage. But every other vessel had still a right to trade. By sec. 6.74 vessels of twenty tons and upwards, *except registered*, found trading between district and district, or different places in the same district or fishery, *not enrolled and licensed*, &c. If laden with domestic produce or manufacture, *shall pay the same duties as foreign*

ships; or, if laden with foreign produce or manufacture, or distilled spirits, shall be forfeited. This shows that *foreign* ships had a right to carry on the coasting trade without a license, (a thing which they could not possible obtain,) on paying the extra tonnage duties, and making entry at every port. This further and most fully appears by the 24th section of the same act,75 prescribing the duties of masters of foreign ships, bound from one district to another, whether with a cargo or in ballast; and by sec. 34.76 establishing the rates of fees under that act, in which are found, 'For granting a permit for a vessel *not belonging to a citizen or citizens of the United States*, to proceed from district to district, and receiving the manifest, 200 cents. For receiving a manifest, and granting a permit to unload, for such last mentioned vessel, on her arriving in one district from another district, 200 cents.' Indeed, until the year 1817, there was no kind of prohibition on foreign vessels carrying on the coasting trade. On the 1st of March, 1817, 'an act concerning the navigation of the United States' was passed; and by sec. 4. it was enacted, 'that no goods, wares, or merchandise, shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging, wholly or in part, to a subject of any foreign power.' This, however, does not affect *American* ships not having a license, and *they* have still a right to trade coastwise, subject only to the increased tonnage duty, and the necessity of making entry at every port. How, then, can it be said, that the license *gives* the right to carry on the coasting trade, which exists as part of the *jus commune*, and existed, and was exercised, before the constitution, or any law on the subject, was formed; and when, until March, 1817, every foreign vessel had a right to carry it on; and when, to this hour, every American vessel has a right to carry it on, without a license or register, and only becomes subject to an increase of tonnage duty, and the necessity of making entry at the custom-house on every voyage? It is only a license to carry on the coasting trade, *without making entry or paying tonnage duties, conformably to the laws of Congress in other cases*. It *gives* no *right* to enter, nor to trade, nor to navigate the waters of the United States: it only enables the licensed vessel to do those things, in certain cases, on cheaper and easier terms then other vessels could, who, nevertheless, had equal rights to carry on the same trade, though with less advantages; and now, in the event of having foreign produce or manufacture, or distilled spirits, on board, a license protects from a forfeiture, which was not enacted for some years after licenses were devised and used in their present shape. It is not, then, a license to trade, to enter, or to navigate, but *to be exempt from paying tonnage duty for a year*. If, then, the position is correct, (and it undoubtedly is,) that a license gives no right to trade, to enter a port, or to navigate its waters, no argument can be drawn from the act of March 12, 1812, 'respecting the enrolling and licensing of steam boats.'77 The only object of that law is, to enable aliens to be part owners of such vessels, and to modify, as to them, the oath that the boat belongs to a citizen or citizens of the United States.

But, even if the *right of entry*, or *to trade* or *navigate*, were *given* by the acts of Congress, and not by the common law, as originally existing or subsequently modified, this exclusive right does not prevent the entry of any vessels into our waters, nor their navigating or trading there; nor does it materially impede them. The only part of this exclusive grant that can come under the cognizance of this Court, in this case, is that on which the injunction is grounded. That, and the prohibition of the injunction, can only be fairly considered as extending to prevent the navigation of the waters by the force or agency of steam or fire; not to prevent vessels from navigating those waters, because they have a steam engine on board, and wheels at the side, if the engine and the wheels be not used on our waters for propelling the vessel, contrary to our State laws. Before the vessel comes into those waters, and after it leaves them, it is out of the State jurisdiction, and not liable to any State penalty for using the agency of steam. What, then, is the amount of the prohibition of entry? That the same vessel, with the same cargo and crew, may come up and pass through our waters, if, while in our

waters, she will come up and navigate *under sail*, as all commercial vessels have hitherto done. In the argument of this case before the Court of Errors,78 one of the appellant's counsel couched his reasoning in the form of a remonstrance by an English ship master against those State laws. The reply can, perhaps, be best given by turning the discussion into a dialogue. An English steam vessel is boarded by a pilot, outside of Sandy-Hook. 'Captain,' says the pilot, 'you will have to stop those wheels at your sides, when you get within our waters.' 'Why so?' asks the captain. 'Because the State of New-York have granted to Livingston and Fulton an exclusive right of navigating in its waters by steam.' 'Sir,' resumes the captain, 'I care nothing for the laws of New-York. I know of no laws or regulations of a particular State, in regard to trade and commerce. I claim the privilege of entering the harbour of New-York, under the laws of the United States, and the treaty of amity and commerce subsisting between them and my sovereign. I insist upon my right of entering your waters as I please; and if your State authorities, or any one acting under them, should prevent me, the King, my master, will know how to enforce the rights of his subjects.' 'Patience, good captain, patience,' replies the pilot; 'let your head and your boiler cool; no one means to prevent your entering into our waters. Only stop your machinery, and hoist those sails you have carried twenty times between this and Liverpool, and, I'll answer for it, we shall be alongside the wharf as soon as you vessel, that you see bound inwards, with all her canvass spread.' This is the extent of the prohibition�the *Deo dignus vindice nodus!* When the case occurs of a vessel navigating across the Atlantic, without sails, the question may be discussed, whether it be a violation of the laws of Congress, that she should be required to fit herself to the harbour, by providing herself with a sail. The same may be said as to coasting vessels from more distant States. As to those from contiguous States, and whose trade can just as well be carried on by sails as by steam engines, it is ridiculous to say, that such a regulation prohibits or interferes with their commerce. Is it any part of the power intended to be delegated to Congress, to regulate as to those matters? The utmost that can be said is, that the passage may be a little longer, and may be somewhat retarded. The doctrine of the *Federalist*79 applies here, that it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty. Regulations for a toll-bridge may delay the mail carrier, and so far interfere with the execution of the power delegated to Congress, of regulating the post office and post roads; but, could he *gallop* over a bridge, that a State law directed should always be crossed on a walk?

But the clause in the constitution, authorizing Congress to make laws respecting patents, is supposed to present another argument against the constitutionality of those State laws. This point, having been but very slightly mentioned, and in some measure abandoned, by the appellant's opening counsel, would not be dwelt on now, if the Attorney General had not intimated an intention of insisting and relying on it. If the appellant had a patent of any kind, on which he could rest, it might fairly be urged by us that a patent cannot give to any unpatented thing even though connected with one that is patented, the right to violate the State law. But how does or can that question come up in this case? There is here no allegation of a patent, nor a claim of any thing entitled to be protected by the patent law, and the use or enjoyment of which has been interfered with by the exclusive grant. As the appellant claims no patent, if this power in Congress can furnish to him any objection against the State laws, it must be on the ground, that inasmuch as Congress is authorized to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, every State law, calculated or purporting to promote the progress of science and useful arts, is utterly void, merely because that is its purport and object, even though it should not relate to any invention or discovery; though the privileges it may confer should not be given on the score of invention or discovery, but of public policy and

convenience; and further, although there is no discovery or invention of any other person in existence, the right to which Congress could secure, and which has any relation to the State grant. That, in short, the appellant, or any other person, has a right to treat the State law as a nullity, and, in violation of it, to use unpatented articles, and incapable of being the subject of a patent or protection; and, that no Court or process of law has authority to restrain him from the use of what never can come within the power of Congress; because, peradventure, something may hereafter be discovered, having some relation to the subject of the State grant, and some person may, hereafter, be entitled to claim the benefit of the constitutional protection, as an inventor. The extraordinary boldness of this position must surprise and astonish. If the passing of the patent law is *per se* competent to prevent a State granting this exclusive right, for a thing (so far as the pleadings show) not the subject of a patent, it is equally so to prevent a State granting every other exclusive right, and particularly if connected with science and the useful arts. If the *law alone* will not produce that effect, until a patent is granted, at variance with the exclusive right, the patent should appear, to let us see if it be really at variance, and have that effect.

If the last steam boat laws, enacted since the North River boats were in operation, had, instead of using a general phraseology, forbid any person to use, on the waters of the State, steam boats constructed or made *in the same manner* as those then used by Livingston and Fulton, or *in any manner before known or used*, or *in any manner invented by a non-resident alien*, would there be any thing for the patent laws or power of Congress to operate on in collision thereto? If not, then those State laws are *so far good;* and any one, to impeach their operation, must claim and show that he has a boat constructed in a different manner, and which is patented as an invention, or, at least, is a subject for the laws of Congress to operate upon, and which he is restrained from using.

Has it ever been disputed that each State has a right to grant exclusive privileges, where not forbidden to the Legislature by its constitution? The wisdom and the motives of the grant, are points for which it is responsible to the people of the State only; they can never be drawn into discussion in this Court, nor come under the control of Congress. It is a right inherent in the sovereignty of every country, not delegated to Congress, but allowed to, and constantly exercised by, the State governments. It is a legislative instrument of great power, and may, therefore, be used to evil purposes; but it may be, and often has been, as in the present instance, productive of splendid benefits. It must reside somewhere; it does not reside in Congress; where, then, does it reside?

Whether the power delegated to Congress be exclusive or concurrent, the power of promoting science and useful arts, by the introduction of *imported* improvements, and encouraging the employment of things not susceptible of being patented, is *exclusively* in the State Legislatures. It is of great importance, and exercised by every wise government; by England, France, &c. It domesticates the sciences and useful arts, the talents and genius of the civilized world. The States, in the exercise of this their *exclusive power*, which has been employed in making those laws, are not to be interfered with from any apprehension of collision in the exercise of a *concurrent* power, only relating to another branch of the same subject, *which the State has not used*, and which Congress may never have an opportunity of using.

I say, a *concurrent* power; for such is that delegated to Congress. One of the counsel now opposed to us, in his argument in the case of *Sturges v. Crowninshield*,80 places in his third class, that is, among the concurrent powers, that to promote the progress of science and useful arts; and says, very truly, 'from the exercise of any of these powers, the States are neither expressly, nor by any fair rule of construction, excluded.' Judge Tucker, in his Appendix D. p. 182. 265. among the cases in which the

States have *unquestionably* concurrent, though, perhaps, subordinate powers, with the federal government, ranks the power to promote the progress of science and the useful arts, by securing to the authors and inventors the exclusive right, *within the State*, to their respective writings and discoveries. In the case of *Livingston v. Van Ingen*,[81] Thompson, J. takes for granted, that it is so, and it is expressly asserted by *Kent*, C. J.; and in the same case, an instance is given of its exercise, by an act of the Legislature of New-York, in favour of Mr. Rumsey, passed on the 23d of February, 1789, after the adoption of the federal constitution, and shortly before the first meeting of Congress. It was entitled, 'for securing to James Rumsey the sole right and advantage of making and employing, for a limited time, the several mechanical improvements by him lately invented.'[82] I do not speak from research, but I understand that he obtained a similar patent from several other States. This law is a cotemporaneous exposition of the constitution, and shows that the State considered itself as still retaining a concurrent right of legislation on the subject of inventions in science and the useful arts, notwithstanding the new constitution, and the recent transfer of similar powers to Congress.

What is the power delegated to Congress, and on what principle is it founded? A confined and partial mode of promoting the progress of science and useful arts, viz. by *securing*, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. The *Federalist*, No. 43,[83] says, 'the utility of this power will scarcely be questioned. The *copyright* of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventors.' This commentary, and the words of the constitution, show that the power is only founded on the principle of literary property extended to inventions. It proceeds upon assuming a pre-existent common law right, which, however, requires to be properly *secured* by adequate remedies. Its principle is entirely different from that on which patents rest in England. *They* are exclusive rights, *not merely secured*, but *created and granted; they* are monopolies for things invented or imported, and do not suppose or act on any *pre-existent right;* but grant a right, the origin and efficacy of which is derived from its being a gift from the crown, permitted and legalized by act of Parliament. It is contended, because the English Judges have construed their statute of monopolies so as to include imported improvements, under the term *inventions*, that our constitution should receive the same construction; but there is no foundation for the position. The English Judges strained the words of their statute, contrary to all fair construction, because they felt the importance of a power to encourage imported improvements, and saw no other way by which it could be done; and, besides, their interpretation went to strengthen and increase the royal prerogative. But, with us, imported improvements can be perfectly encouraged by the States; and the power delegated to Congress, is founded on the common law pre-existent right of inventors to their own discoveries, which can have no application to the mere possessors of imported improvements. The constitution itself does not use the word *patent*, and it is to be regretted that the act of Congress does; for, the use of the word implying a resemblance to the English patent, has led to a false view of the powers of Congress.

But, in truth, according to the English acceptation of the term, Congress has no power to grant them. It has no authority to make exclusive *grants* of any kind; that power remains solely in the States, as a part of their original sovereignty, which has never come within the purview of the federal constitution. A patent, in England, and every country but this, implies, the creation and gift of a right, by force of the sovereign power, conferring upon an individual a monopoly, in which he had no pre-existent right. This can be done by the States, and only by the States. The power delegated to Congress, does not authorize it to *create* any *right*, or to *give* any *right;* it only enables that body to

secure a pre-existent common law right, and for that purpose it may *create and give a remedy*. Where there is no pre-existent right to be secured, the power of Congress cannot operate. To these positions, the attention of the Court is directed, as they may be found important in the sequel.

Although the article in the constitution is expressed with accuracy, yet it also has employed a word, sometimes taken in different senses, and which has likewise contributed to a false view of the power of Congress: the expression is, 'an *exclusive* right.' The word 'exclusive' may well mean, as it does here, *individual, sole*, or *separate*, in which sense, every man's private property, to which no other man has any claim, is his *exclusive property*. In that sense, Judge Chase says, in the case of Calder et ux. v. Bull et ux.84 'If any one has a right to property, such right is a *perfect and exclusive right*.' But, that word, *exclusive*, is more frequently applied to express, that others have been excluded or shut out from the participation of what they were previously entitled, or would, but for that exclusion, be entitled to enjoy and use. In this sense, the phrase, *exclusive rights or privileges*, is ordinarily understood. But, it never was intended to give Congress any power to grant exclusive privileges; and in the article of the constitution, that meaning of the word would be inconsistent with the idea of securing a pre-existing right. All error would have been avoided, if the adjective had been entirely omitted, or the word *individual* substituted.

At the time of making the State grant in question, no man had, and, indeed, no man yet has, any pre-existing right to an invention, connected with the subject matter of the grant. Suppose any man, however, now to make an invention, and seek to use it without procuring for himself a patent, or availing himself of the power delegated to Congress, surely the law of the State would be competent to prevent his using it within its waters and jurisdiction. The statute law would, in that instance, operate on the common law, and prevent the common law right, *pro tanto*, from ever arising, in the same way as in a fishery. The right of fishing, in a public navigable river, is a common right; but, suppose that before the birth of any given individual, a part of that navigable river had, by statute, been turned into a several fishery, surely his common right would not entitle him to fish in that part of the navigable river which a statute had, before the commencement of his common right, turned into a separate fishery. His right to fish *there* never had a commencement or origin�So with this supposed inventor. A statute, prior to the commencement of his common law right, so acted on that common law itself, that a right in him to use his invention, in the waters of the State, never had a commencement or origin. Now, suppose the inventor to procure a patent; would that enable him to use his patented invention within the jurisdiction and waters of a State, contrary to its statutes? If it did, what would be its operation? The delegated power is only *to secure* a pre-existent right; it can only do that, so far as there is a pre-existent right; where there is not, there is nothing to be secured. So far, then, as relates to any use or exercise of the invention within the State, there would be no right to be secured, and nothing for the power of Congress to operate upon. But further, if the inventor, before obtaining his patent, could not legally use his invention, but, after obtaining his patent, could use it in despite of the State laws, the patent would then *create and give* a right that did not exist before, and thus transcend the power delegated to Congress, which does not enable that body *to create or give any right*, but only to *create and give a remedy*, for the purpose of *securing* an existing right, which derives its origin and force from some other law or laws than those made by congress.

So far, then, as relates to those State laws, it is impossible that their validity can be affected by the patenting of any invention or discovery made subsequent to their enactment. But it may still be advisable to pursue the same course of reasoning, and inquire how far even the existence of a patent,

previous to the passing of such acts, would enable the patentee to use his invention in despite of them.

The object of a patent, granted in pursuance of the delegated power, is to perfect an imperfect right, by exactly ascertaining, if I may say so, its means, and boundaries, and identity, and by affording an adequate remedy for its violation. The precise nature of the remedy is within the discretion of Congress; but the nature of the evil it purports to remedy, is entirely illustrative of the extent of the power delegated to Congress. The patent law itself shows that its object is, to turn the imperfect right into *property*, for it directs, that the applicant's petition shall signify a desire of obtaining an *exclusive property* in his improvement. And the clause giving the remedy, shows the injury against which Congress intended to guard, and against which alone it had any power, under the constitution, to provide a guard: where any person 'shall *make, devise, use*, or *sell*' the thing, whereof the exclusive right is secured to the patentee by such patent, &c.85 But, no remedy is provided against *preventing* the patentee from *making, devising, using* or *selling* the thing so patented. *That*, if any grievance at all, is one not within the purview of the act, nor within the powers of Congress, and against which, therefore, no remedy is there provided.

The object of this power, and of the law made under it, is to give to the pre-existent but imperfect right, the security and attributes of *actual* property. When the law of Congress has done that, it is *functus officio;* and it leaves that right, which it has placed in the class of *actual* property, to be used and enjoyed like every other kind of actual property, conformably to the laws of the place where it is to be enjoyed. That which is thus the object of the power and law of Congress, is the *patent-right*, which it has, as it were, converted into a chattel. But the difference between the patent-right and the thing patented, is great and palpable, equal to the difference between a copy-right and a book. If a State attempted to authorize a violation of these rights, to enable another to make use of or vend the thing patented, or to print the book, or to throw open and in common, the patent-right or the copy-right, then its law would be unconstitutional. But the *rights*, and *only the rights*, are the object of the power and laws of Congress; the things themselves are personal property or chattels of the ordinary kind, to be enjoyed, like all other property, subject to laws over which Congress has no control.

If so, why has not a State a right to prohibit the use of the *thing patented* within its jurisdiction? It can do so, as to all other kinds of property. It is no argument to say, that if one State can do it, every State can do it. If every State wished to do it, how could they, or why should they, be prevented? But, is not that the case with every kind of property? And if they should extend that power over any species of unpatented property, could Congress interfere? The individual States having that power over every kind of originally perfect property, can it be supposed, that because Congress was empowered to turn imperfect into perfect property, this newly secured species should occupy a superior class, and possess privileges and exemptions that were never attached to any other kind of property? The power of regulating and prohibiting the use of every kind of property must be somewhere; it is a necessary part of legislative sovereignty, and must be intrusted to some constituted authority. As to all other kinds of property, it is undoubtedly in the State Legislatures. Things patented may be dangerous or noxious; they may be generally useful, and locally injurious; such, for instance, might be torpedoes in a peaceful and commercial port; fire balloons and squibs in a populous city; though, in some places and on some occasions, they may well be useful and advantageous, or, at least, harmless. Among the curiosities in the patent office, there probably are some patented velocipedes. The Corporation of New-York, in 1819, by an ordinance, prohibited the use of any velocipede in the streets of that city. Had it not a right to do so; and could the owner of any of those patent velocipedes use them in the streets, in despite of that ordinance? The Legislature

of New-York has, for many years, prohibited the drawing of any lotteries there, except what it has granted to certain public institutions, such as Union College, and the College of Physicians. By virtue of the prohibition to others, and the grant to those institutions, they have obtained an exclusive right of drawing lotteries. similar to that, the constitutionality of which is now in controversy. Joseph Vanini has patented a new mode of drawing lotteries, which is, unquestionably, a great improvement, simplifying the operation, and, by completing it in less than five minutes, preventing all insurances, and many of the evils attendant on the old mode. But, could he, because his invention is an improvement and patented, insist on a right to use it, and draw lotteries in the State of New-York, contrary to its laws, and indeed, now, to the express provisions of its constitution? No. The power to prohibit the use of patented things, either generally or locally, must reside somewhere. Can Congress prohibit the use of locally injurious, but patented, things, in the waters, or the cities, or the populous towns of New-York? If not, because it has no power of regulation or prohibition, where does that power reside? If it reside, as it must, *exclusively* in the State Legislatures, or subordinate authorities, who but their constituents can inquire into the motives or propriety of their exercise of that power, or the extent to which it should be carried? If the States have not that regulating and controlling power, as Congress assuredly has it not, what is the consequence? A patent can be got for any thing, and with no previous competent authority to decide upon its utility or fitness. If it once issues from the patent office, as full of evils as Pandora's box, if they be as new as those that issued from thence, it is above the restraint and control of the State Legislatures�of the Legislature of the United States�of every human authority! I put the case of their being noxious or dangerous; but there may be a multitude of other reasons for regulating, restraining, or even prohibiting their use; of these Congress can take no cognizance. If the State governments can take no cognizance of them, no institution can; if they *can* take cognizance, their power is exclusive, and their exercise of it cannot be reviewed. Could Congress (incapable as it is, of itself, prohibiting the use of patented things,) pass a law, *in words*, that a patentee shall have a right to use his patented machine in any State, notwithstanding any prohibitory laws of that State? Would that be within the power of Congress? How, then, can implication give to the patentee the same right? If a patent can give a right to use the thing patented, in contravention of this exclusive right, it would have the same effect in contravention of any other exclusive right granted by a State. Ferries, stage-coaches, &c. all the grants respecting them, would be broken down by some patented vehicle, for, they are all, *in pari materia*, exclusive grants, from motives of public policy; and, having no connexion with the principle of literary property, which is the origin and the object of patent-rights, they cannot be affected by any power given to Congress. A State has the same jurisdiction and authority over its rivers and lakes, that it has over its canals. Now, if the Legislature of New-York judged it advisable so to do, could it not prohibit any boat, using some patented machinery, from navigating its western canal? If it could, why could it not make the same prohibition as to its rivers and lakes; and if the act here should be an excess or abuse of legislation, would not its responsibility be *exclusively* to the people of the State?

The State of New-York, from motives not examinable here, made a *contract*, which is the foundation of our right; it could only do so by a law. The State had a right to contract, and, so far, it stands on the same footing as if *one individual* contracted, for a valuable consideration, with another, to receive his supplies of any article from him only. In the case of individuals, could a man, having a patented improvement of the same article, insist on annulling that contract, as interfering with his exclusive right and patent? If not, why should not a State, capable of contracting, have the same right to make that bargain, and, consequently, exclude the use of the patented article in its jurisdiction and domain, as an individual has in his own house and farm? The waters of the State are the domain and property of the State, subject only to the commercial regulations of Congress. Why

should not the contract of a State, in regard to its domain and property, be as sacred as that of an individual? Such a contract was in this, and may in many cases, be very useful and advantageous. Who is to judge of that but the State Legislatures? Could Congress have made this contract, or acquired this benefit for the State? Certainly not. If the State cannot, what power or authority can? And is it come to this, that a contract, such as every individual in the land may wisely and lawfully make, for his own benefit, and to be enforced in his own premises, no State, and no authority for any State, can make for its benefit, and to be enforced in its jurisdiction?

There are circumstances connected with those laws, sufficient to make any tribunal require the strongest arguments before it adjudged them invalid. The State of New-York, by a patient and forbearing patronage of ten years, to Livingston and Fulton, by the tempting inducement of its proferred reward, and by the subsequent liberality of its contract, has called into existence the noblest and most useful improvement of the present day. Genius had contended with its inherent difficulties, for generations before; and if some had nearly reached, or some even touched, the goal, they sunk exhausted, and the result of their efforts perished in reality, and almost in name. Such would, probably, have been the end of Fulton's labours; and, neither the wealth and talents of his associate, nor the resources of his own great mind, would have saved him from the fate of others, if he had not been sustained, for years, by the wise and considerate encouragement of the State of New-York. She has brought into noonday splendour, an invaluable improvement to the intercourse and consequent happiness of man, which, without her aid, would, perhaps, have scarcely dawned upon our grandchildren. She has not only rendered this service to her own citizens, but the benefits of her policy have spread themselves over the whole Union. Where can you turn your eyes, and where can you travel, without having your eyes delighted, and some part of the fatigues of your journey relieved, by the presence of a steam boat? The Ohio and Mississippi, she has converted into rapid channels for communicating wealth, comforts and enjoyments, from their mouths to their head waters. And the happy and reflecting inhabitants of the States they wash, may well ask themselves, whether, next to the constitutions under which they live, there be a single blessing they enjoy from the art and labour of man, greater than what they have derived from the patronage of the State of New-York to Robert Fulton. But the mighty benefits that have resulted from those laws, are not circumscribed, even by the vast extent of our Union. New-York may raise her head, she may proudly raise her head, and cast her eyes over the whole civilized world; she there may see its countless waters bearing on their surface countless offsprings of her munificence and wisdom. She may fondly calculate on their speedy extension in every direction and through every region, from Archangel to Calcutta; and justly arrogating to herself the labours of the man she cherished, and, conscious of the value of her own good works, she may turn the mournful exclamation of AEneas into an expression of triumph, and exultingly ask,

Quae regio in terrris, nostri non plena laboris?

And it is, after all those advantages have beer acquired and realized to the world�after numerous individuals have embarked their fortunes, or the faith of those grants, and a ten years acquiescence in the decision by which they were sanctioned�after the property they have created has been diffused among a multitude of possessors after it has become the sole support of the widow and the orphan after it has received and exhausted the accumulated savings of the laborious and industrious heads of families, that a decision is required, which cannot, indeed, undo the lasting benefits already procured to the world, but would, assuredly, undo many of those who have confided their wealth and means to the stability and observance of those laws!

The *Attorney-General*, for the appellant, in reply, insisted, that the laws of New-York were unconstitutional and void:

1. Because they are in conflict with powers exclusively vested in Congress, which powers Congress has fully exercised, by laws now subsisting and in full force.

2. Because, if the powers be concurrent, the legislation of the State is in conflict with that of Congress, and is, therefore, void.

He stated, that the powers with which the laws of New-York conflict, are the power 'to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions,' and the power 'to regulate commerce with foreign nations, and among the several States.' If these powers were exclusive in Congress, and it had exercised them by subsisting laws; and if the laws of New-York interfere with the laws of Congress, by obstructing, impeding, retarding, burdening, or in any other manner controlling their operation, the laws of New-York are void, and the judgment of the State Court, founded on the assumption of their validity, must be reversed.

In discussing this question, the general principles assumed, as postulates, on the other side, might be, for the most part, admitted. Thus, it might be admitted, that by force of the declaration of independence, each State became sovereign; that they were, then, independent of each other, and foreign to each other; that by virtue of their separate sovereignty, they had, each, full power to levy war, to make peace, to establish and regulate commerce, to encourage the arts, and generally to perform all other acts of sovereignty. It was also conceded, that the government of the United States is one of delegated powers; and the counsel for the respondent added, that it is one of enumerated powers. Yet they admitted that there were implied powers, and had given a different rule for the construction of the two classes of powers, which was, that 'the express powers are to be construed *strictly*, the implied powers *liberally*.' But the implied powers, he presumed, were only those which are necessary and proper to carry the powers, expressly given, into effect�the means to an end. This clause had not been generally regarded as, in fact, giving any new powers. Congress would have had them without the express declaration. The clause was inserted only *ex abundanti cautela*. With this explanation, it might be conceded, that the constitution of the United States is one of delegated and enumerated powers; and that all powers, not delegated by the constitution to the national government, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The peculiar rule of construction demanded for those powers, might also be conceded: that the express powers are to be strictly construed, the implied liberally. By which was understood to be meant, that Congress can do no more than they are *expressly* authorized to do; though the means of doing it are left to their discretion, under no other limit than that they shall be necessary and proper to the end.

On the other hand, the counsel for the respondent themselves admitted, that Congress, nevertheless, has some exclusive powers; and, in conformity with the decisions of the Court, they admit that those exclusive powers exist under three heads. (1.) When the power is given to Congress in express terms of exclusion. (2.) When a power is given to Congress, and a like power is expressly prhibited to the States. (3.) Where a power given to Congress, is of such a nature, that the exercise of the same power by the States would be repugnant.

With regard to the degree of repugnancy, it was insisted, that the repugnancy must be manifest,

necessary, unavoidable, total, and direct. Certainly if the powers be repugnant at all, they must be so with all these qualifications. If Congress, in the lawful exercise of its power, says that a thing shall be done, and the State says it shall not; or, which is the same thing, if Congress says that a thing shall be done, on certain terms, and the State says it shall not be done, except on certain other terms, the repugnancy has all the epithets which can be lavished upon it, and the State law must be void for this repugnancy.

A new test for the application of this third head of exclusive power, had been proposed. It was said, that 'no power can be exclusive from its own nature, except where it formed no part of State authority previous to the constitution, but was first created by the constitution itself.' But why were these national powers thus created by the constitution? Because they look to the whole United States as their theatre of action. And are not all the powers given to Congress of the same character? Under the power to regulate commerce, the commerce to be regulated is that *of the United States* with foreign nations, among the several States, and with the Indian tribes. No State had any previous power of regulating these. The same thing might be affirmed of all the other powers enumerated in the constitution. They were all created by the constitution, because they are to be wielded by the whole Union over the whole Union, which no State could previously do. If any one power, created by the constitution, may be exclusive for that reason, then all may be exclusive, because all are originally created. If, on the other hand, we are to consider the powers enumerated in the constitution, not with reference to the greater arm that wields them, and the more extended territory over which they operate, but merely in reference to the nature of the particular power in itself considered; then, according to this new test, all the powers given to Congress are *concurrent;* because there is no one power given to it, which, considered in this light, might not have been previously exercised by the States within their respective sovereignties. But this argument proved too much: for, it has been conceded, that some of the powers are exclusive from their nature; whereas, if the argument were true, none of them could be exclusive. On this argument, the entire class or head of exclusive powers, arising from the nature of the power, must be abolished. But this Court had repeatedly determined, that there is such a class of exclusive powers. The power of establishing a uniform rule of naturalization, is one of the instances. Its exclusive character is rested on the constitutional requisition, that the rule established under it should be uniform.

It had been objected, that this would have been a concurrent power, but for the auxiliary provision in the constitution, that a citizen of one State shall be entitled to all the privileges of a citizen in every other State. The answer was, that it is not so determined by the Court in the case cited, and that the commentators on the constitution place it exclusively on the nature of the power as described in the grant.

So also, the power of establishing *uniform* laws on the subject of bankruptcies, is clearly an exclusive power from its nature. The Court has, indeed, determined, that until Congress thought fit to exercise the power, the States might pass local bankrupt laws, provided they did not impair the obligation of contracts; but, that as soon as Congress legislate on the subject, the power of the States is at an end.

But it had been said, that this doctrine takes away State power, by implication, which is contrary to the principles of interpretation laid down by the commentators on the constitution. It was not the

opinion of the authors of the *Federalist*, that a State power could not be alienated by implication. Their doctrine was, that it might be alienated by implication, provided the implication be inevitable; and that it is inevitable wherever a direct and palpable repugnancy exists. The distinction between repugnancy and occasional interference, is manifest. The occasional interference, alluded to in the *Federalist*, and admitted by this Court, in its adjudications, is not a repugnancy between the powers themselves: it is a mere incidental interference in the operation of powers harmonious in themselves. The case put, was of a tax laid by Congress, and a tax laid by the State, upon the same subject, *e. g.* on a tract of land. The taxes operate upon, and are to be satisfied out of the same subject. It might be inconvenient to the proprietor to pay both taxes. In an extreme case, the subject might be inadequate to the satisfaction of both. Then the tax laid by the paramount authority must be first satisfied. Still, this incidental interference in their operation, is not an inherent repugnance in the nature of the powers themselves.

It was also said, that to constitute the power an exclusive one in Congress; the repugnance must be such, that the State can pass no law on the subject, which will not be repugnant to the power given to Congress.

This required qualification before it could be admitted. Some subjects are, in their nature, extremely multifarious and complex. The same subject may consist of a great variety of branches, each extending itself into remote, minute, and infinite ramifications. One branch alone, of such a subject, might be given exclusively to Congress, (and the power is exclusive only so far as it is granted,) yet, on other branches of the same subject, the States might act, without interfering with the power exclusively granted to Congress. Commerce is such a subject. It is so complex, multifarious and indefinite, that it would be extremely difficult, if not impracticable, to make a digest of all the operations which belong to it. One or more branches of this subject might be given exclusively to Congress; the others may be left open to the States. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress.

So Congress has the power to promote the progress of science and the useful arts; but only in one mode, viz. by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. This might be an exclusive power, and was contended to be so. Yet, there are a thousand other modes in which the progress of science and the useful arts may be promoted, as, by establishing and endowing literary and philosophical societies, and many others which might be mentioned. Hence, notwithstanding this particular exclusive grant to Congress, of one mode of promoting the progress of science and the useful arts, the States may rightfully make many enactments on the general subject, without any repugnance with the peculiar grant to Congress.

But, to come now to the question, whether these State laws be repugnant to this grant of power, we must first inquire, why it was conferred on Congress? Why was it thought a matter of sufficient importance to confer this power upon the national government? The answer to this question would be found in the history of the country, in the nature of our institutions, and the great national objects which the constitution had in view. The country was in its infancy; its population was small; its territory immense: it had recently thrown off its bondage by the war of the revolution, and was left exhausted and poor�poor in every thing but virtue and the love of country. It was still dependent on the arts of Europe, for all the comforts, and almost all the necessaries of life. We had hardly any manufactures, science, or literature of our own. Our statesmen saw the great destiny which was before the nation, but they saw also the necessity of exciting the energies of the people, of invoking

the genius of invention, and of creating and diffusing the lights of science. These were objects, in which the whole nation was concerned, and were, therefore, naturally and properly confided to the national government. The States, indeed, might have exercised their inherent power of legislating on this subject; but their sphere of action was comparatively small; their regulations would naturally have been various and conflicting. Discouragement and discontent would have arisen in some States, from the superior privileges conferred on the works of genius in others; contests would have ensued among them on the point of the originality of inventions; and laws of retortion and reprisal would have followed. All these difficulties would be avoided by giving the power to Congress, and giving it exclusively of the States. If it were wisely exerted by Congress, there could be no necessity for a concurrent exercise of the power by the States.

The terms of the grant are, 'Congress shall have power to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the *exclusive* right to their respective writings and discoveries.' This exclusive right is to be co-extensive with the territory of the Union. The laws to be made for securing it, must be uniform, and must extend throughout the country. The exclusive nature of every power is to be tested by the character of the acts which Congress is to pass. This is the case with the naturalization laws. The exclusiveness of the power to establish them, resulted from their character of uniformity. So here, the exclusiveness results from the character of the right which they are to confer. It is to be exclusive. It is not, indeed, said, that Congress shall have the exclusive power, but it is said that they shall have power to do a certain act, which, when done, shall be exclusive in its operation. The power to do such an act, must be an exclusive power. It can, in the nature of things, be performed only by a single hand. Is not the power of one sovereign to confer *exclusive* rights, on a given subject, within a certain territory, inconsistent with a power in another independent sovereign, to confer *exclusive* rights on the same subject, in the same territory? Do not the powers clash? The right to be conferred by Congress, is to exclude all other rights on the subject in the United States; New-York being one of those States. The right to be conferred by New-York, is to exclude all other rights on the subject within the State of New-York. That one right may exclude another, is perfectly intelligible; but that two rights should reciprocally exclude each other, and yet both continue to subsist in perfect harmony, is inconceivable. Can a concurrent power exist, if, from the very nature of its action, it must take away, or render nugatory, the power given to Congress? Supposing the power to be concurrent, Congress may secure the right for one period of time, and the respective States for another. Congress may secure it for the whole Union, and each State may secure it to a different claimant, for its own territory. Congress possesses the power of granting an exclusive right to authors and inventors, within the United States. New-York claims the power to grant such exclusive right within that State. An author or inventor in that State, may take a grant for a period of time far longer than that allowed by the act of Congress. He may take a similar grant from every other State in the Union; and thus this pretended concurrent power supersedes, abrogates, and annuls the power of Congress. What would become of the power of Congress after the whole sphere of its action was taken away by this concurrent power of the States? Who would apply to the power of Congress for a patent or a copy-right, while the States held up higher privileges? This concurrent legislation would degenerate into advertisements for custom. These powers would be in the market, and the highest bidder would take all. Are not powers repugnant, when one may take from the other the whole territory on which alone it can act? Is not the repugnance such as to annihilate the power of Congress, as completely as if the whole Union was itself annihilated?

Something had been said of Congress repealing the laws of the State, wherever they should conflict with those of the Union. But where is this power of repeal? There is no such head of power in the

constitution. Congress can act only by positive legislation on any subject, and this it has done in the present instance. But this action would be in vain, if another authority can act on the same subject. If this concurrent power would defeat the power of Congress, by withdrawing from it the whole territory on which it is to act, it would also defeat it by giving a monopoly of all the elements with which invention is to work. This has been done by these laws, as to fire and steam. Why should it not be done equally with all the other elements, such as gravitation, magnetism, galvanism, electricity, and others? What is to consecrate these agents of nature, and secure them from State monopoly, more than fire or steam? If not, then is the power of Congress subject to be defeated by this concurrent power, first by a monopoly of all the territory on which it can act, and then by a monopoly of all the elements and natural agents on which invention can be exerted. Still it would be said, that there is no direct repugnance between these powers, and that the power of Congress may still act. But on what can it act? The territory is gone, and all the powers of invention are appropriated. There is no difference whatever between a direct enactment, that the law of Congress shall have no operation in New-York, and enactments which render that operation impossible. If, then, this process of reasoning be correct, the inevitable conclusion from it is, that a power in the States to grant *exclusive* patents, is utterly inconsistent with the power given to the national government to grant such exclusive patents: and hence, that the power given to Congress is one which is exclusive from its nature.

But suppose, for the sake of the argument, that the States have this concurrent power, yet it cannot be denied, that if the legislation of the State be repugnant to the laws of Congress, that of the State is void, so far as the repugnance exists. In the present case the repugnance is manifest. The law of Congress declares, that all inventors of useful improvements throughout the United States, shall be entitled to the exclusive right in their discoveries for fourteen years *only*. The law of New-York declares, that this inventor shall be entitled to the exclusive use of his discovery for thirty years, and as much longer as the State shall permit. The law of Congress, by limiting the exclusive right to fourteen years, in effect declares, that after the expiration of that time, the discovery shall be the common right of the whole people of the United States. The law of New-York declares that it shall not, after fourteen years, be the exclusive right of the people of the United States, but that it shall be the exclusive right of this inventor for thirty years, and for so much longer as she, in her sovereign will and pleasure, may permit. If this be not repugnance, direct and palpable, we must have a new vocabulary for the definition of the word.

But it was said, that the appellant had no patent under the United States, and therefore, could not raise the question. To this it was answered, that it was not necessary that he should have a patent. The question as to the validity of the law of New-York, is raised, whenever a right is asserted under that law, and is resisted by the party against whom it is asserted; and that validity is to be tested, not by comparing the law of New-York with a patent, but by comparing it with the constitution and laws of the United States.

It was also said, that there could be no repugnance, because it was admitted, that wherever a patent from the United States appears, the patent obtained under the State law must yield to it; that the patent under the State is valid only until the patent from the paramount power appears; and that the rights derived from the different sovereigns must be found practically to clash, before the law of New-York was to give way for repugnancy. This is an insidious argument, and fraught with all the dangers which have been enumerated. For if the New-York patentee be the inventor, the law of New-York is absolute, and however unconstitutional it may be, there is no power of resistance. Besides, the argument is incorrect. To illustrate this, suppose a grant from Virginia, within the

military reservation in Ohio, after she had ceded the whole territory to the United States; would the party in possession, even if a mere intruder, be bound to show a grant from the United States, before he could resist the unlawful grant of Virginia? But there the plaintiff would be claiming under a State which had previously ceded away the power to make such grants, which is precisely the case here, so that there need be no repugnance arising from patents. If a repugnance exist between the laws of New-York and the constitution and laws of the United States, any citizen of the United States has a right to act as if the law of New-York were a nullity; and the question of its nullity and validity arises, wherever an attempt is made to enforce it.

But it was argued that the power of Congress is limited to inventors, and that the power to encourage by patents the introduction of foreign discoveries, stands clear of this constitutional grant. If it were necessary, this doctrine might be questioned. The statute of the 21st James I. c. 3. uses the same word with the constitution, 'inventors;' and the decisions upon the construction of this statute might be referred to, in order to show that it has been considered as embracing discoveries imported from abroad.89 But, even acceding to this doctrine, it might be asked whether the question now before the Court had any thing to do with an art, machine, or improvement, imported from abroad? The privilege here granted by the State, is to an American citizen, who claims to be the inventor. The privilege is the reward of invention, not of importation, and this it is which brings it in conflict with the act of Congress. It is true, the law does not call him the inventor; it calls him merely the 'possessor.' But, can the constitution and laws of the United States be evaded in this manner? If he was not the inventor, why this unjust tax which has been levied upon our admiration and gratitude? When the validity of a law is challenged for a fraudulent evasion of the rights of others, you are not bound by its own averments, but may resort to proof *aliunde* to establish the facts. The word *possessor* is a new and unusual word to apply to such a case, and marks a studious effort to conceal the truth. He was, of necessity, either the inventor or the importer. If he was the *importer*, there is no conceivable reason why he should be called by any other than that name. The Legislature of New-York, in its act in behalf of Fitch, passed before the adoption of the constitution, had no difficulty in applying the natural and appropriate name to him. But when the final law was passed in favour of Livingston and Fulton, in 1798, the constitution of the United States, which cedes this power to Congress, had been adopted, and the laws by which that power is executed had been passed. This constitution and these laws used the term *inventors*. But the privilege was too short. The State of New-York offered better terms. The only difficulty was, to give them effect without encroaching upon that power which had been constitutionally exercised by Congress. It would not do to call them *inventors*, and the device was adopted of calling him merely the *possessor*, which was a manifest evasion of the law of Congress.

But it was contended, that the patent laws of the United States give no right; they only secure a pre-existing right at common law. What then do these statutes accomplish? If they do nothing more than give the inventor a chattel interest in his invention, and a remedy for its violation, he had these at common law. And if they only give him a mere right to use his invention in the States, with their permission, he had that before. The case of *Millar v. Taylor* proves the right to have been perfect at common law. The time of enjoyment was far greater. Thompson's Seasons had been published forty years when that action was brought. If the patent and copy-right laws were merely intended to secure an exclusive right throughout the United States, and are, in fact, a limitation on the common law right, (as was contended by the respondent's counsel,) when this right has been thus secured throughout the United States, and a limitation constitutionally put upon it by Congress, can a State interfere with this regulation? The limitation is not for the advantage of the inventor, but of society at large, which is to take the benefit of the invention after the period of limitation has expired. The

patentee pays a duty on his patent, which is an effective source of revenue to the United States. It is virtually a contract between each patentee and the people of the United States, by which the time of exclusive and secure enjoyment is limited, and then the benefit of the discovery results to the public. A State cannot, by its local laws, dereat this resulting interest of the whole Union.

But it was said that a State might prohibit the use of a patented machine, if it be noxious to the health of its citizens, or of an immoral or impious book, the copy-right of which had been secured. The answer to all such arguments was, that it would be time enough to consider such questions when they arise. The constitutional power of Congress is to patent *useful* discoveries. The patent authorizes the patentee to *use* his invention, and it is the use which is secured. When a discovery is deemed *useful* by the national government, and a patent shall issue authorizing the patentee to use it throughout the United States, and the patentee shall be obstructed by a State in the exercise of this right, on the ground that the discovery is useless and dangerous, it will be time enough to consider the power of the States to defeat the exercise of the right on this ground. But this is not the question before the Court. It might be admitted, that the State had authority to prohibit the use of a patented machine on that ground, or of a book, the copy-right of which had been secured, on the ground of its impiety or immorality. But the laws which are now in judgment were not passed upon any such ground. The question raised by them is, can the States obstruct the operation of an act of Congress, by taking the power from the National Legislature into their own hands? Can they prohibit the publication of an immoral book, licensed by Congress, on the pretext of its immorality, and then give an exclusive right to publish the same book themselves? Can they prohibit the use of an invention on the ground of its noxiousness, and then authorize the exclusive use of the same invention by their own law?

But there is no pretext of noxiousness here. The authority to enact these laws is taken up under a totally distinct head of State power. It is the sovereign power to grant exclusive privileges and create monopolies, the constitution and laws of the United States to the contrary notwithstanding. This is the real power under which these laws are defended; and it may perplex, although it cannot enlighten the discussion, to confound it with another and a distinct head of State power. If then the power of securing to authors and inventors the use of their writings and discoveries, be exclusively vested in Congress, the acts of New-York are void, because they are founded on the exercise of the same power by the State. And if the power be concurrent, these acts are still void, because they interfere with the legislation of Congress on the same subject.

These laws were also void, because they interfere with the power given to Congress, to regulate commerce with foreign nations and among the several States. This nullity of the State laws would be supported, first, upon the ground of the power being exclusive in Congress; and, secondly, that if concurrent, these laws directly interfered with those of Congress on the same subject.

That this power was exclusive, would be manifest from the fact, that the commerce to be regulated, was that of the United States; that the government by which it was to be regulated, was also that of the United States; and that the subject itself was one undivided subject. It was an entire, regular, and uniform system, which was to be carried into effect, and would not admit of the participation and interference of another hand. Does not regulation, *ex vi termini*, imply harmony and uniformity of action? If this must be admitted to be the natural and proper force of the term, let us suppose that the additional term, *uniform*, had been introduced into the constitution, so as to provide that Congress should have power to make uniform regulations of commerce throughout the United States. Then, according to the adjudications on the power of establishing a uniform rule of naturalization, and

uniform laws of bankruptcy, throughout the United States, this power would unquestionably have been exclusive in Congress. But *regulation* of that commerce which pervades the Union, necessarily implies *uniformity*, and the same result, therefore, follows as if the word had been inserted.

With regard to the quarantine laws, and other regulations of police, respecting the public health in the several States, they do not partake of the character of regulations of the commerce of the United States. It had been said, that these local regulations were recognised by Congress, which had made them a part of its own system of commerce. But this recognition would have been superfluous, if they could have stood without it on the basis of State sovereignty; and so far as their adoption by Congress could be considered as affeeting the question, the manner and purpose of the recognition operated the other way. It would be found that, by the commercial regulations which Congress had made, a general system was adopted, which, if executed in every instance, would have carried ships and vessels into all the ports of the several States, their local quarantine laws to the contrary notwithstanding. An express regulation is, therefore, introduced, requiring the collectors of the customs to conform the execution of their official duties, under the navigation and revenue laws, with the quarantine laws of the respective States. Without such a provision, the local health laws must have given way to the supremacy of the navigation and revenue laws of the Union.

A serious objection to the exclusive nature of this power of regulating commerce, was supposed to arise from the express prohibitions on the States, contained in the 10th sec. of the 1st art. of the constitution. It has been considered, that these prohibitions imply that, as to every thing not prohibited, the power of the State was meant to be reserved; and the authority of the authors of the *Fedcralist*, was cited in support of this interpretation. But another commentator, of hardly less imposing authority, and writing, not as a polemic, for the purpose of vindicating the constitution against popular objections, but for the mere purpose of didactic instruction as a professor, with this section before him, and with a strong leaning towards State pretensions, considers the power to regulate commerce as an exclusive power.90 But the difference between them is rather in appearance, than in reality. It does not appear that the author of that number of the *Federalist*, did himself consider these police regulations as, properly speaking, regulations of the commerce of the Union. But the objectors to the constitution had presented them as such, and his argument in substance is, that if they are, the constitution does not affect them. The other commentator did not consider them as regulations of the commerce of the United States; for if he did, he could not admit them, as he did, to be left in the States, and yet hold the opinion that the power to regulate commerce was exclusively vested in Congress. But might not a reason for these prohibitions be found, in the recent experience of the country, very different from that which had heretofore been assigned for them. The acts prohibited, were precisely those which the States had been passing, and which mainly led to the adoption of the constitution. The section might have been inserted *ex abundanti cautela*. Or the convention might have regarded the previous clause, which grants the power to regulate commerce, as exclusive throughout the whole subject; and this section might have been inserted to qualify its exclusive character, so far as to permit the States to do the things mentioned, under the superintendance and with the consent of Congress. If either or both of these motives combined for inserting the clause, the inference which had been drawn from it against the exclusive power of Congress to regulate commerce, would appear to be wholly unwarranted.

But if these police regulations of the States are to be considered as a part of the immense mass of commercial powers, is not the subject susceptible of division, and may not some portions of it be exclusively vested in Congress? It was viewing the subject in this light, that induced his learned

associate91 to assume the position which had been misconceived on the other side. This proposition was, not that all the commercial powers are exclusive, but that those powers being separated, there are some which are exclusive in their nature; and among them, is that power which concerns navigation, and which prescribes the vehicles in which commerce shall be carried on. It was, however, immaterial, so far as this case was concerned, whether the power of Congress to regulate commerce be exclusive or concurrent. Supposing it to be concurrent, it could not be denied, that where Congress has legislated concerning a subject, on which it is authorized to act, all State legislation which interferes with it, is absolutely void. It was not denied, that Congress has power to regulate the coasting trade. It was not denied that Congress had regulated it. If the vessel now in question, was sailing under the authority of these regulations, and has been arrested by a law of New-York forbidding her sailing, the State law must, of necessity, be void. The coasting trade did, indeed, exist before the constitution was adopted; it might safely be admitted, that it existed by the *jus commune* of nations; that it existed by an imperfect right; and that the States might prohibit or permit it at their pleasure, imposing upon it any regulations they thought fit, within the limits of their respective territorial jurisdictions. But those regulations were as various as the States; continually conflicting, and the source of perpetual discord and confusion. In this condition, the constitution found the coasting trade. It was not a thing which required to be created, for it already existed. But it was a thing which demanded regulation, and the power of regulating it was given to Congress. They acted upon it as an existing subject, and regulated it in a uniform manner throughout the Union. After this regulation, it was no longer an imperfect right, subject to the future control of the States. It became a perfect right, protected by the laws of Congress, with which the States had no authority to interfere. It was for the very purpose of putting an end to this interference, that the power was given to Congress; and if they still have a right to act upon the subject, the power was given in vain. To say that Congress shall regulate it, and et to say that the States shall alter these regulations at pleasure, or disregard them altogether, would be to say, in the same breath, that Congress shall regulate it, and shall not regulate it; to give the power with one hand, and to take it back with the other. By the acts for regulating the coasting trade, Congress had defined what should be required to authorize a vessel to trade from port to port; and in this definition, not one word is said as to whether it is moved by sails or by fire; whether it carries passengers or merchandise. The license gives the authority to sail, without any of those qualifications. That the regulation of commerce and navigation, includes the authority of regulating passenger vessels as well as others, would appear from the most approved definitions of the term *commerce*. It always implies intercommunication and intercourse. This is the sense in which the constitution uses it; and the great national object was, to regulate the terms on which intercourse between foreigners and this country, and between the different States of the Union, should be carried on. If freight be the test of commerce, this vessel was earning freight; for what is freight, but the compensation paid for the use of a ship? The compensation for the carrying of passengers may be insured as freight. The whole subject is regulated by the general commercial law; and Congress has superadded special regulations applicable to vessels employed in transporting passengers from Europe. In none of the acts regulating the navigation of the country, whether employed in the foreign or coasting trade, had any allusion been made to the kind of vehicles employed, further than the general description of ships or vessels, nor to the means or agents by which they were propelled.

In conclusion, the *Attorney-General* obscrved, that his learned friend (Mr. Emmett) had eloquently personified the State of New-York, casting her eyes over the ocean, witnessing every where this triumph of her genius, and exclaiming, in the language of AEneas,

'Quae regio in terris, nostri non plena laboris?'

Sir, it was not in the moment of triumph, nor with feelings of triumph, that AEneas uttered that exclamation. It was when, with his faithful Achates by his side, he was surveying the works of art with which the palace of Carthage was adorned, and his attention had been caught by a representation of the battles of Troy. There he saw the sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes�the loss and desolation of his friends�the fall of his beloved country, rush upon his recollection.

'Constitit, et *lachrymans;* Quis jam locus, inquit, Achate, Quae regio in terris nostri non plena laboris?'

Sir, the passage may, hereafter, have a closer application to the cause than my eloquent and classical friend intended. For, if the state of things which has already commenced is to go on; if the spirit of hostility, which already exists in three of our States, is to catch by contagion, and spread among the rest, as, from the progress of the human passions, and the unavoidable conflict of interests, it will too surely do, what are we to expect? Civil wars have often arisen from far inferior causes, and have desolated some of the fairest provinces of the earth. History is full of the afflicting narratives of such wars, from causes far inferior; and it will continue to be her mournful office to record them, till time shall be no more. It is a momentous decision which this Court is called on to make. Here are three States almost on the eve of war. It is the high province of this Court to interpose its benign and mediatorial influence. The framers of our admirable constitution would have deserved the wreath of immortality which they have acquired, had they done nothing else than to establish this guardian tribunal, to harmonize the jarring elements in our system. But, sir, if you do not interpose your friendly hand, and extirpate the seeds of anarchy which New-York has sown, you *will* have civil war. The war of legislation, which has already commenced, will, according to its usual course, become a war of blows. Your country will be shaken with civil strife. Your republican institutions will perish in the conflict. Your constitution will fall. The last hope of nations will be gone. And, what will be the effect upon the rest of the world? Look abroad at the scenes which are now passing on our globe, and judge of that effect. The friends of free government throughout the earth, who have been heretofore animated by our example, and have held it up before them as their polar star, to guide them through the stormy seas of revolution, will witness our fall *with dismay and despair*. The arm that is every where lifted in the cause of liberty, will drop, unnerved, by the warrior's side. Despotism will have its day of triumph, and will accomplish the purpose at which it too certainly aims. It will cover the earth with the mantle of mourning. Then, sir, when New-York shall look upon this scene of ruin, if she have the generous feelings which I believe her to have, it will not be with her head aloft, in the pride of conscious triumph�'her rapt soul sitting in her eyes;' no, sir, no: dejected, with shame and confusion�drooping under the weight of her sorrow, with a voice suffocated with despair, *well* may *she then* exclaim,

'Quis jam locus, Quae regio in terris nostri non plena laboris!'
March 2.

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

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

They are said to be repugnant��

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

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

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

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

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support or some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for

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

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

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

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

If the opinion that 'commerce,' as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

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

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

The universally acknowledged power of the government to impose embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was, the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep rooted hostility, will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and an extent of excitement, calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

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

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

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

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

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

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

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

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

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

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

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

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often they solely, in all representative governments.

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

But it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

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

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

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the State; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

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

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

That this restriction shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted.

We must first determine whether the act of laying 'duties or imposts on imports or exports,' is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: 'Congress shall have power to lay and collect taxes, duties, imposts, and excises;' and, before commerce is mentioned, the rule by which the exercise of

this power must be governed, is declared. It is, that all duties, imposts, and excises, shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce.

'A duty of tonnage' is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also. This tax may be imposed by a State, with the consent of Congress; and it may be admitted, that Congress cannot give a right to a State, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution, to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

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

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

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

national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

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

The acts of Congress, passed in 1796 and 1799,92 empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and concilitation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803,93 prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred, that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious, that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a limited period. The words are, 'the migration or importation of such persons as any of the States, now existing, *shall* think proper to admit, shall not be prohibited by the Congress prior to the year 1808. The whole object of the exception is, to preserve the power to those States which might be disposed to exercise it; and its language seems to the Court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

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

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

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

A State, it is said, or even a private citizen, may construct light houses. But gentlemen must be aware, that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress, that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with

foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion, that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

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

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

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

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

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, law. The appropriate inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme preme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and agve to Congress the power to regulate it. In the exercise of this power, Congress has passed 'an act for enrolling or licensing ships or vessels to be employed in the coasting trade and

fisheries, and for regulating the same.' The counsel for the respondent contend, that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

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

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

The first section declares, that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having alicense in force, as is by the act required, 'and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade.'

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

The fourth section directs the proper officer to grant to a vessel qualified to receive it, 'a license for carrying on the coasting trade;' and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, 'license is hereby granted for the said steam-boat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.'

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

The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

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

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

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

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

The answer given to this argument, that the American character is conferred by the enrolment, and not by the license, is, we think, founded too clearly in the words of the law, to require the support of any additional observations. The enrolment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burthen of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, Cannot be to ascertain the character of the vessel, but to do what it professes to do�that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade.

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

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men, as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar, rests on the foundation, that the power of Congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinetion.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The

section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

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

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

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally; and, on the 2d of March, 1819, passed 'an act regulating passenger ships and vessels.' This wise and humane law provides for the safety and comfort of passengers, and for the communication of every thing concerning them which may interest the government, to the Department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress, (if, indeed, any evidence to that point could be required,) that the pre-existing regulations comprehended passenger ships among others; and, in prescribing the same duties, the Legislature must have considered them as possessing the same rights.

If, then, it were even true, that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New-York and New-Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the Court. The laws of New-York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New-York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New-York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the State Court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says,

generally, that they were employed 'in the transportation of passengers, or otherwise.' The answer avers, only, that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New-York by steam, for any purpose whatever.

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

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

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

But all inquiry into this subject seems to the Court to be put completely at rest, by the act already mentioned, entitled, 'An act for the enrolling and licensing of steam boats.'

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

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

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

The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavour to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly selfevident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

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

Mr. Justice JOHNSON.

The judgment entered by the Court in this cause, has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way.

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

The strong sympathies, rather than the feeble government, which bound the States together during a common war, dissolved on the return of peace; and the very principles which gave rise to the war of the revolution, began to threaten the confederacy with anarchy and ruin. The States had resisted a tax imposed by the parent State, and now reluctantly submitted to, or altogether rejected, the moderate demands of the confederation. Every one recollects the painful and threatening discussions, which arose on the subject of the five per cent. duty. Some States rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and at length, some repealed the laws by which they had signified their acquiescence.

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

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

As early as 1778, the subject had been pressed upon the attention of Congress, by a memorial from the State of New-Jersey; and in 1781, we find a resolution presented to that body, by one of the most enlightened men of his day,94 affirming, that 'it is indispensably necessary, that the United States, in Congress assembled, should bevested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interests.' The resolution of Virginia,95 appointing her commissioners, to meet commissioners from other States, expresses their purpose to be, 'to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations, may be necessary to their common interests and their permanent harmony.' And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point: 'Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations,' &c. 'therefore, resolved,' &c.

The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made.

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

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

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

It is not material, in my view of the subject, to inquire whether the article *a* or *the* should be

prefixed to the word 'power.' Either, or neither, will produce the same result: if either, it is clear that the article *the* would be the proper one, since the next preceding grant of power is certainly exclusive, to wit: 'to borrow money on the credit of the United States.' But mere verbal criticism I reject.

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

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

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

I speak not here of the treaty making power, for that is not exercised under the grant now under consideration. I confine my observation to *laws* properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction; or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate *foreign commerce*, is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate *foreign* commerce is necessarily exclusive. The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

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

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

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

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

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

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

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

The first clause of the 9th section, not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledges it as a legitimate subject of revenue. And, although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognise in Congress a power to prohibit, where the States permit, although they cannot permit when the States prohibit. The treaty making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the Convention as to the power of Congress over navigation: 'nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.'

But, it is almost labouring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence, have so clearly established the right of Congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steam boat, I consider it as having been solemnly recognised by the State of New-York, as a subject both of commercial regulation and of revenue. She has imposed a transit duty upon steam boat passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steam boat itself, appears to be but a commutation, and operates as an indirect instead of a direct tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertain of the principle on which the commercial

privileges of the people of of United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license. One half the doubts in life arise from the defects of language, and if this instrument had been called an *exemption* instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts; as, for example, acts licensing gaming houses, retailers of spiritous liquors, &c. The act, in this instance, is distinctly of that character, and forms part of an extensive system, the object of which is to encourage American shipping, and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade; and a countervailing privilege in favour of American shipping is contemplated, in the whole legislation of the United States on this subject. It is not to give the vessel an American character, that the license is granted; that effect has been correctly attributed to the act of her enrolment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce, which would be burdensome in the active coasting trade of the States, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it, to those exemptions, but to nothing more. A common register, equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce, or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise, upon complying with the requisitions of the 24th section. I consider the license, therefore, as nothing more than what it purports to be, according to the 1st section of this act, conferring on the licensed vessel certain privileges in that trade, not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

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

It has been contended, that the grants of power to the United States over any subject, do not, necessarily, paralyze the arm of the States, or deprive them of the capacity to act on the same subject. The this can be the effect only of prohibitory provisions in their own constitutions, or in that of the general government. The *vis vitae* of power is still existing in the States, if not extinguished by the constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the government, brought into existence by the constitution, they, of course, are out of the reach of State power; yet, as to all concessions of powers which previously existed in the States, it was otherwise. The practice of our government certainly has been, on many subjects, to occupy so much only of the field opened to them, as they think the public interests require. Witness the jurisdiction of the Circuit Courts, limited both as to cases and as to amount; and various other instances that might to cited. But the license furnishes a full answer to this objection; for, although one grant of power over commerce, should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the States must be at an end, so far as the United States have, by their legislative act, taken the

subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted, contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade, are made the subject of regulation by that act. And this license proves, that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

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

The 12th section of the act of 1793, has these words: 'That when the master of any ship or vessel, *ferry boats* excepted, shall be changed,' &c. And the act which exempts licensed steam boats from the provisions against alien interests, shows such boats to be both objects of the licensing act, and objects of that act, when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise, 1st. From the unavoidable action of some of the municipal powers of the States, upon commercial subjects.

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

It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce, than the laws which permit their importation, are intended to innoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious, that the constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favour of the power of the States over commerce, I cannot but think that the guarded provisions of the 10th section, on this subject, furnish a strong argument against that inference. It was obvious, that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences, to be correctly drawn, from this whole article, appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

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

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

But instances have been insisted on, with much confidence, in argument, in which, by municipal laws, particular regulations respecting their cargoes have been imposed upon shipping in the ports of the United States; and one, in which forfeiture was made the penalty of disobedience.

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

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of; that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the States, and to aid in enforcing their health laws; that which surrenders to the States the superintendence of pilotage, and the many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited, abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers.

I have not touched upon the right of the States to grant patents for inventions or improvements,

generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision, if they cannot exercise it so as to restrain a free intercourse among the States.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New-York, and was argued by counsel. On consideration whereof, this Court is of opinion, that the several licenses to the steam boats the Stoudinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New-York, which were granted under an act of Congress, passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New-York to the contrary notwithstanding; and that so much of the several laws of the State of New-York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New-York, by means of fire or steam, is repugnant to the said constitution, and void. This Court is, therefore, of opinion, that the decree of the Court of New-York for the Trial of Impeachments and the Correction of Errors, affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New-York with the steam boats the Stoudinger and the Bellona, by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled: and this Court doth further DIRECT, ORDER, and DECREE, that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly.