care that the laws of the union are duly supported. I must confess, however, that I can hardly conceive of such a case, because I do not, at present, perceive any power which congress can lawfully carry to that extent. But when there is no existing regulation which interferes with the grant, nor any pretence of a constitutional interdict, it would be most extraordinary for us to adjudge it void, on the mere contingency of a collision with some future exercise of congressional power. Such a doctrine is a monstrous heresy. It would go, in a great degree, to annihilate the legislative power of the states. May not the legislature declare that no bank paper shall circulate, or be given or received in payment, but what originates from some incorporated bank of our own, or that none shall circulate under the nominal value of one dollar? But suppose congress should institute a national bank, with authority to issue and circulate throughout the union, bank notes, as well below as above that nominal value: This would so far control the state law, but it would remain valid and binding, except as to the paper of the national bank. The state law would be absolute, until the appearance of the national bank, and then it would have a qualified effect, and be good pro tanto. So, again, the legislature may declare that it shall be unlawful to vend lottery tickets, unless they be tickets of lotteries authorized by a law of this state, and who will question the validity of the provision? But suppose congress should deem it expedient to establish a national lottery, and should authorize persons in each state to vend the tickets, this would so far control the state prohibition, and leave it in full force as to all other lotteries. The possibility that a national bank, or a national lottery, might be instituted, would be a very strange reason for holding the state laws to be absolutely null and void. It strikes me to be an equally inadmissible proposition, that the state is devested of a capacity to grant an exclusive privilege of navigating a steam-boat, within its own waters, merely because we can imagine that congress, in the plenary exercise of its power to regulate commerce, may make some regulation inconsistent with the exercise of this privilege. When such a case arises, it will provide for itself; and there is, fortunately, a paramount power in the supreme court of the United States to guard against the mischiefs of collision. . . .

GIBBONS v. OGDEN

9 Wheat. 1, 6 L. Ed. 23 (1824)

[Ogden received an assignment of the right of Livingston and Fulton granted by acts of the New York legislature (considered in Livingston v. Van Ingen, page 129 supra) for the exclusive navigation of the waters of New York with boats moved by fire or steam, for a term of years which had not expired. Gibbons operated two steamboats between New York and Elizabethtown, New Jersey, in violation of the terms of the New York legislative acts; these boats were enrolled and licensed to be employed in the coasting trade under an Act of Congress of 1793. The New York chancery court granted an injunction on behalf of Ogden against Gibbons, which was affirmed on appeal, Chancellor Kent writing the opinion holding the New York acts constitutional. 4 Johns. Ch. 150 (1819).]

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 privileges 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. . . .

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. . . .

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

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. . . .

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. . . .

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 re-

main 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 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. . . .

. . . 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. . . .

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 election, 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 rely solely, in all representative governments. . . .

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 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 states; 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, etc., to pay the debts, and provide for the common defense 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 tenth section, as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor 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 is 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 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. . . .

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 recognized 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 labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, etc., are component parts of this mass.

. . . 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 establishh their individuality. . . .

The acts of Congress, passed in 1796 and 1799, 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 conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions, the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce. . . .

It has been said that the act of August 7th, 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, harbors, 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. . . .

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. . . .

. . . The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are 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. . . .

But we will proceed briefly to notice those sections [of the Act of Congress] which bear more directly on the subject.

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

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

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade"; and prescribes

its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer." . . .

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. . . .

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

The answer given to this argument, that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels 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 burden of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

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

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

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. . . .

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 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.

[The decree of the New York court was reversed and the bill for an injunction ordered to be dismissed.]

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. [A discussion of commercial rivalries of the states prior to the adoption of the Constitution is omitted.]

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. . . .

It is impossible, with the views which I entertained of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed 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 spirituous liquors, etc. 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 favor 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 in granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce, which would be burdensome in the active coasting trade of the states, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it, to those exemptions, but to nothing more. . . . 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 the trade, not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all. . . .

But the principal objections to these opinions arise, 1st. From the unavoidable action of some of the municipal powers of the states, upon commercial subjects. 2d. From passages in the constitution which are supposed to imply a concurrent power in the states in regulating commerce.

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

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. . . .[a]

NOTE

May Congress prohibit the following activities: the carrying of intoxicating liquor on the person, from one state to another, for personal consumption, United States v. Hill, 248 U.S. 420 (1919); interfering with federal officials who, pursuant to statutory duty, are engaged in the disinfecting of cattle which range across a state line, Thornton v. United States, 271 U.S. 414 (1926); the counterfeiting of bills of lading purporting to represent interstate shipments by rail, United States v. Ferger, 250 U.S. 199 (1919); the "seeding" of clouds to produce rain? What relevance, if any, does the

[a] See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432 (1941); compare Crosskey, Politics and the Constitution, cc. 4-5 (1953).

The New York licensees had been given exclusive rights of steam navigation by Louisiana, while in New Jersey, Connecticut, and Ohio retaliatory statutes had been passed forbidding vessels under the New York license to navigate the waters of those states. Other persons were given exclusive rights in Massachusetts, New Hampshire, Vermont, and Georgia. See 1 Warren, The Supreme Court in United States History 598 (1926). For a report of the huzzas which greeted the decision, and the prompt increase in the number of steamboats plying from New York, see id. at 615. — Ed.