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License Cases

License Cases

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License Cases - 46 U.S. 504 (1847)
U.S. Supreme Court License Cases, 46 U.S. 5 How. 504 504 (1847)

License Cases

46 U.S. (5 How.) 504

ERROR TO VARIOUS COURTS

SYLLABUS

Laws of Massachusetts, providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that nothing in the law should be so construed as to require the county commissioners to grant any licenses when in their opinion the public good does not require them to be granted --

Of Rhode Island, forbidding the sale of rum, gin, brandy &c.;, in a less quantity than ten gallons, although in this case the brandy which was sold was duly imported from France into the United States, and purchased by the party indicted in the original importer --

Of New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston and carried coastwise to the landing at Piscataqua Bridge and there sold in the same barrel --

All adjudged to be not inconsistent with any of the provisions of the Constitution of the United States or acts of Congress under it.

These cases were all brought up from the respective state courts by writs of error issued under the twenty-fifty section of the Judiciary Act, and were commonly known by the name of the License Cases.

Involving the same question, they were argued together, but by different counsel. When the decision of the Court was pronounced, it was not accompanied by any opinion of the Court as such. But six of the Justices gave separate opinions, each for himself. Four of them treated the cases collectively in one opinion, whilst the remaining two expressed opinions in the cases separately. Hence it becomes necessary for the reporter to make a statement in each case, and to postpone the opinions until the completion of all the statements. The arguments of counsel in each case will of course follow immediately after the statement in that case [arguments omitted in digital version]. They are placed in the order in which they are put by THE CHIEF JUSTICE in his opinion, but where the Justices have given separate opinions in each case, the order is observed which they themselves have chosen.

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MR. CHIEF JUSTICE TANEY, one opinion, three cases, p. 46 U. S. 573 .

MR. JUSTICE Mc LEAN three opinions.

No. 1. *Thurlow v. Massachusetts,* p. 46 U. S. 586 .

No. 2. *Peirce v. New Hampshire,* p. 46 U. S. 593 .

No. 3. *Fletcher v. Rhode Island,* p. 46 U. S. 596 .

MR. JUSTICE CATRON, two opinions.

No. 1. *Peirce v. New Hampshire,* p. 46 U. S. 597 .

No. 2. *Thurlow v. Massachusetts,* p. 46 U. S. 609 .

MR. JUSTICE DANIEL, one opinion, three cases, p. 46 U. S. 611 .

MR. JUSTICE WOODBURY, one opinion, three cases, p. 46 U. S. 618 .

MR. JUSTICE GRIER, one opinion, three cases, p. 46 U. S. 631 .

To begin with the case of

Thurlow v. Commonwealth of Massachusetts

This case was brought up from the Supreme Judicial Court of Massachusetts. The plaintiff in error was indicted and convicted, under the Revised statutes of the state, for selling liquor without a license. The indictment contained several specifications, but they were all similar to the first, which was as follows:

"The jurors for the Commonwealth of Massachusetts, upon their oath present that Samuel Thurlow, of Georgetown, in said county, trader, on the first day of May in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the Revised statutes of said Commonwealth, and without any license therefor duly had according to law, did presume to be and was a retailer of wine, brandy, rum, and spirituous liquors to one Samuel Goodale in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said

Commonwealth and the form of the statute in such case made and provided."

It becomes necessary to insert the forty-seventh chapter of the Revised statutes, and also an act passed in 1837. They are as follows:

" *Revised statutes of Massachusetts, Chap. 47* "

" *The Regulation of Licensed Houses* "

"Section 1. No person shall presume to be an innholder, common victualler, or seller of wine, brandy, rum, or any other spirituous liquor to be used in or about his house or other buildings unless he is first licensed as an innholder or common victualler, according to the provisions of this chapter, on pain of forfeiting one hundred dollars."

"Sec. 2. If any person shall sell any wine or spirituous liquor

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or any mixed liquor, part of which is spirituous, to be used in or about his house or other buildings, without being duly licensed as an innholder or common victualler, he shall forfeit for each offense twenty dollars."

"Sec. 3. No person shall presume to be a retailer or seller of wine, brandy, rum or other spirituous liquors in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is [at] first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offense."

"Sec. 4. If any person licensed to be a retailer as aforesaid shall sell any of the above liquors, either mixed or unmixed, to be used in or about his house or shop, he shall forfeit for each offense twenty dollars."

"Sec. 5. Every innholder shall at all times be furnished with suitable provisions and lodging for strangers and travelers, and with stable room, hay, and provender for their horses and cattle, and if he shall not be at all times so provided, the county

commissioners may revoke his license."

"Sec. 6. Every common victualler shall have all the rights and privileges and be subject to all the duties and obligations of innholders excepting that he shall not be required to furnish lodgings for travelers, nor stable room, hay, and provender for horses and cattle."

"Sec. 7. Every innholder and common victualler shall at all times have a board or sign affixed to his house, shop, cellar, or store, or in some conspicuous place near the same, with his name at large thereon, and the employment for which he is licensed, on pain of forfeiting twenty dollars."

"Sec. 8. If any innholder shall, when requested, refuse to receive and make suitable provisions for strangers and travelers, and their horses and cattle, he shall, upon conviction thereof before the court of common pleas, be punished by a fine not exceeding fifty dollars, and shall also, by order of the said court, be deprived of his license, and the court shall order the sheriff or his deputy forthwith to cause his sign to be taken down."

"Sec. 9. No innholder or common victualler shall have or keep in or about his house, or other buildings, yards, and gardens, or dependencies, any dice, cards, bowls, billiards, quoits, or other implements used in gaming, nor shall suffer any person resorting thither to use or exercise any of said games, or any other unlawful game or sport within his said premises, on pain of forfeiting ten dollars for every such offense."

"Sec. 10. Every person convicted of using or exercising any of the games aforesaid in or about any such house or building of an innholder or common victualler shall forfeit ten dollars."

"Sec. 11. No innholder or common victualler shall suffer any

person to drink to drunkenness or excess in his premises, nor suffer any minor or servant, travelers excepted, to have any strong drink there, on pain of forfeiting

five dollars for each offense."

"Sec. 12. If any innholder or common victualler shall trust or give credit to any person for liquor, he shall lose and forfeit all the sums so trusted or credited, and all actions brought for such debt shall be utterly barred, and the defendant in such action may plead the matter specially, or may give it in evidence under the general issue."

"Sec. 13. If any common victualler shall keep open his house, cellar, shop, store, or place of business on any part of the Lord's day or evening, or at a later hour than ten of the o'clock in the evening of any other day of the week, and entertain any person therein by selling him any spirituous or strong liquor, he shall forfeit for each offense ten dollars."

"Sec. 14. When any person shall, by excessive drinking of spirituous liquors, so misspend, waste, or lessen his estate as thereby either to expose himself or his family to want or indigent circumstances or the town to which he belongs to expense for the maintenance of him or his family, or shall so habitually indulge himself in the use of spirituous liquors as thereby greatly to injure his health or endanger the loss thereof, the selectmen of the town in which such spendthrift lives shall, in writing under their hands, forbid all licensed innholders, common victuallers, and retailers of the same town to sell to him any spirituous or strong liquors aforesaid for the space of one year, and they may in like manner forbid the selling of any such liquors to the said spendthrift by the said licensed persons of any other town to which the spendthrift may resort for the same, and the city clerk of the City of Boston shall, under the direction of the mayor and aldermen thereof, issue a like prohibition as to any such spendthrift in the said city."

"Sec. 15. The said mayor and aldermen and said selectmen shall, in the same manner, from year to year, renew such prohibition as to all such persons as have not, in their opinion, reformed within the year, and if any innholder, common victualler, or retailer shall, during any such prohibition, sell to any such prohibited person any such spirituous liquor, he shall forfeit for each offense twenty dollars."

"Sec. 16. When the said mayor and aldermen, or selectmen, in execution of the foregoing provisions, shall have prohibited the sale of spirituous liquors to any such spendthrift, if any person shall, with a knowledge of said prohibition, give, sell, purchase, or procure for him in behalf of said prohibited person or for his use any such spirituous liquors, he shall forfeit for each offense twenty dollars."

"Sec. 17. The commissioners in the several counties may license, for the towns in their respective counties, as many persons to

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be innholders or retailers therein as they shall think the public good may require, and the mayor and aldermen of the City of Boston may in like manner license innholders and retailers in the said city; and the Court of Common Pleas in the County of Suffolk may in like manner license innholders and retailers in the Town of Chelsea, and every license, either to an innholder or retailer, shall contain a specification of the street, lane, alley, or other place, and the number of the building, or some other particular description thereof, where such licensed person shall exercise his employment, and the license shall not protect any such person from the penalties provided in this chapter for exercising his employment in any other place than that which is specified in the license."

"Sec. 18. The Mayor and Aldermen of the City of Boston may license, for the said city, as many persons to be common victuallers as they shall think the public good may require, and every such license shall contain such a specification or description, as is mentioned in the preceding section, of the street or other place, and of the building where the licensed person shall exercise his employment, and the license shall not protect him from the penalties provided in this chapter for exercising it in any other place."

"Sec. 19. All licenses to any innholder, retailer, or common victualler shall expire on the first day of April in each year, but any license may be granted or renewed at any time during the preceding month of March, to take effect from the said first day of April, and after that day they may be granted for the remainder of the year,

whenever the officers authorized to grant the same shall deem it expedient."

"Sec. 20. Every person, who shall be licensed as before provided in this chapter shall pay therefor to the Clerk of the City of Boston, the Clerk of the Court of Common Pleas for the County of Suffolk, or to the clerk of the commissioners of the respective counties so licensing said person, one dollar, which shall be paid by said clerks to the treasurers of their respective counties for the use of said counties, and such persons shall also pay twenty cents to the use of the said clerks respectively, and no other fee or excise whatever shall be taken from any person applying for or receiving a license under the provisions of this chapter."

"Sec. 21. Any license to an innholder, retailer, or common victualler may be so framed as to authorize the licensed person to sell wine, beer, ale, cider, or any other fermented liquors, and not to authorize him to sell brandy, rum, or any other spirituous liquor, and no excise or fee shall be required for such a license."

"Sec. 22. The clerk of the commissioners in the several counties shall seasonably, before the time for granting licenses in each year, transmit to the selectmen of every town within the county a list of the persons in such town who were licensed as innholders or retailers the preceding year. "

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"Sec. 23. No license shall be granted or renewed to any person, unless he shall produce a certificate from the selectmen of the town for which he applies to be licensed, in substance as follows, to-wit:"

" We, the subscribers, a majority of the selectmen of the town of _____, do hereby certify that _____ has applied to us to be recommended as [here expressing the employment, and a particular description of the place for which the license is applied for] in the said town, and that, after mature consideration had thereon, at a meeting held for that purpose, at which we were each of us present, we are of opinion that the petition of said _____ be granted, he being, to the best of our knowledge and behalf, a person of good moral character."

"Sec. 24. Any person, producing such certificate of the selectmen shall be heard and his application decided upon either on a motion made orally by himself or his counsel or upon a petition in writing, as he shall elect."

"Sec. 25. If the selectmen of any town shall unreasonably neglect or refuse to make and deliver such a certificate, either for the original granting or the renewal of a license, the person aggrieved thereby may apply for a license to the commissioners, first giving twenty-four hours' notice to a majority of the said selectmen of his intended application, so that they may appear, if they see fit, to object thereto, and if on such application it shall appear that the said selectmen did unreasonably neglect or refuse to give the said certificate, and that the public good requires that the license should be granted, the commissioners may grant the same."

"Sec. 26. All the fines imposed by this chapter may be recovered by indictment, to the use of the county where the offense is committed, and when the fine does not exceed twenty dollars, the offense may be prosecuted before a justice of the peace, subject to the right of appeal to the court of common pleas, as in other cases."

"Sec. 27. When any person shall be convicted under the provisions of this chapter and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a time not exceeding ninety days, at the discretion of the court or justice before whom the trial may be had."

"Sec. 28. All prosecutions under the provisions of this chapter for offenses committed in the City of Boston (excepting where the fine exceeds twenty dollars) may be heard and determined in the police court, subject to the right of appeal to the municipal court, but the said police court shall not have power in any such case to sentence any person to imprisonment except as provided in the preceding section."

"Sec. 29. Any person licensed under the provisions of this chapter who shall have been twice before convicted of a breach of any of the said provisions shall

thereupon, in addition to the

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penalties before provided, be liable to a further punishment by imprisonment in the common jail for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had."

" *Acts of 1837, Chapter 242* "

" *An act concerning Licensed Houses and the Sale of Intoxicating Liquors* "

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:"

"Section 1. No licensed innholder or other person shall sell any intoxication liquor on Sunday, on pain of forfeiting twenty dollars for each offense, to be recovered in the manner and for the use provided in the twenty-sixth section of the forty-seventh chapter of the Revised statutes."

"Sec. 2. Any license to an innholder or common victualler may be so framed as to authorize the licensed person to keep an inn or victualling house without authority to sell any intoxicating liquor, and no excise or fee shall be required for such license, provided that nothing contained in this act or in the forty-seventh chapter of the Revised Statutes shall be so construed as to require the county commissioners to grant any licenses when in their opinion the public good does not require them to be granted."

"Sec. 3. Any person who shall have been licensed according to the provisions of the forty-seventh chapter of the Revised statutes or of this act, and who shall have been twice convicted of a breach of this act or of that chapter, shall, on such second conviction, in addition to the penalties prescribed for such offense, be adjudged to have forfeited his license."

"Sec. 4. Any person who shall have been three times convicted of a breach of this act or of the forty-seventh chapter of the Revised statutes shall, upon such third

conviction, in addition to the penalties in this act and said chapter provided, be liable to be imprisoned in the common jail for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had."

"Sec. 5. The Secretary of this Commonwealth shall cause a condensed summary of all laws relating to innholders, retailers, and licensed houses to be printed for the use of this Commonwealth, and he shall supply the county commissioners for the several counties and such other officers as by law are authorized to grant licenses with the same, and the said commissioners or other officers, whenever they grant any license, shall furnish each person so licensed with one copy of said license laws, to the end that such person may know to what duties, restrictions, and liabilities he is subjected by law."

"[Approved by the governor, April 20, 1837.] "

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A conviction having taken place under the indictment upon these statutes, the defendant filed several exceptions, of which it is material to notice only the following:

"2. It appeared upon the trial that some of the sales charged in the indictment were of foreign liquors, and his Honor directed the jury that the license law of this Commonwealth applied as well to imported spirits as to domestic, and that this Commonwealth could constitutionally control the sale of foreign spirits by retail, and that said law is not inconsistent with Constitution or revenue laws of the United States. To this ruling also the defendant excepts."

The court below allowed this exception, together with all the others, upon which the case was removed to the Supreme Judicial Court. But that court overruled the exceptions and ordered judgment to be entered upon the verdict.

Mr. Hallett, the counsel for Thurlow, then applied for and obtained a writ of error to bring the case to the Supreme Court of the United States upon the following allegation of error, *viz.:*

"That the several acts of the Legislature of Massachusetts concerning licensed houses and the sale of intoxicating liquors, and especially the acts which are hereto appended and set out as part of the record in the said cause, upon which said judgment was founded, and also the opinion and judgment of said Supreme Judicial Court of Massachusetts, in the application and construction of said acts to the sales of imported foreign liquors and spirits by the said Thurlow, are repugnant to and inconsistent with the provisions of the Constitution, treaties, and laws of the United States insofar as the said acts, and the construction thereon by the said Supreme Judicial Court of Massachusetts, prohibit, restrain, control, or prevent the sale of imported wines and spirituous liquors by retail or otherwise in the said State of Massachusetts, and are therefore void."

Upon the writ of error thus issued, the case came up to this Court.

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" *Joel Fletcher, Plaintiff in error v. State of Rhode Island and Providence Plantations, Defendant in error* "

This case was very similar to the preceding one. The principal difference was in the admission of the fact, that the brandy, for the sale of which the plaintiff in error was indicted, was duly imported into the United States, the duty upon it paid, and that it was purchased by Fletcher from the original importer.

The following admission of facts was filed in the cause:

"It is admitted, in the above case that the liquors alleged in said indictment to have been sold by the defendant in violation of the act of this state entitled 'An act enabling town councils to grant licenses for the retailing strong liquors, and for other purposes' was brandy, the growth, produce, and manufacture of the Kingdom of France, which said brandy was duly imported into the United States at the port of Boston in the District of Massachusetts for the purpose of sale in the markets of the United States, and the duties levied thereon by virtue of the Act of Congress of the United States, approved 39 August, A.D., 1842, entitled, 'An act to

provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes' were duly paid to the collector of the said port of Boston; that said defendant bought said brandy of the importer thereof for the purpose of sale, and in pursuance of said purpose did, at the times alleged in said indictment, sell the same at said Cumberland without license first had and obtained from the Town Council of the Town of Cumberland."

"It is further agreed that the Town Council of said Town of Cumberland has refused to grant any license for the year ensuing the Thursday next following the first Wednesday in April, A.D., 1845, for retailing strong liquors in any quantities, having been instructed by the electors of said town, in town meeting assembled, not to grant any licenses for the purpose aforesaid."

It is not necessary to recite the whole of the laws of the state, as they were very similar to those of Massachusetts. The following one will be sufficient:

"An act in Addition to an act entitled 'An act enabling the Town Councils to grant Licenses, and for other Purposes.'"

"It is enacted by the general assembly as follows:"

"Section 1. No licenses shall be granted for the retailing of wines or strong liquors in any town or city in this state when the electors in such town or city, qualified to vote for general officers, shall, at the annual town or ward meetings held for the election of town or city officers, decide that no such licenses for retailing as aforesaid shall be granted for that year. "

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Fletcher was indicted upon two counts. The first was for selling strong liquor, to-wit, rum, gin, and brandy, by retail, in a less quantity than ten gallons without license, and the second for selling and suffering to be sold in his possessions ale, wine, and other strong liquors, by retail, &c.;

Upon this indictment he was convicted, and the case brought from the Supreme Court of Rhode Island to this Court. The assignment of errors by the counsel of

Fletcher was as follows:

" *Assignment of Errors* "

"United States of America, Supreme Court: Joel Fletcher, Plaintiff in error, v. State of Rhode Island and Providence Plantations, Defendant in error."

"On a judgment of the Supreme Court begun and holden at Providence, within and for the County of Providence and State of Rhode Island and Providence Plantations, on the third Monday of September in the year of our Lord one thousand eight hundred and forty-five, wherein the said State of Rhode Island and Providence Plantations, by Joseph M. Blake, Attorney General of said state, is prosecutor, and the said Joel Fletcher is defendant, the said Joel Fletcher, upon a writ of error upon said judgment, returnable to the next term of the Supreme Court for the United States, to be begun and holden at the City of Washington, in the District of Columbia, on the first Monday of December, in the year of our Lord one thousand eight hundred and forty-five, assigns for error in the records of process and judgment aforesaid, founded on certain statutes of the said State of Rhode Island and Providence Plantations, and the construction thereof by the said Supreme Court, the following, to-wit:"

"That the judgment rendered in the supreme court of said state in this case, it being the highest court of law and equity of the said state in which a decision could be had in said case, should be reversed, for the reasons following, *viz.:* "

"That the act of the General Assembly of said State of Rhode Island and Providence Plantations, entitled, 'An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and the act entitled 'An act in addition to an act, entitled, An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and appended hereto and set out as a part of the record in the said cause upon which said judgment was founded, and also the opinion and judgment of said Supreme Court of said State of Rhode Island and Providence Plantations, in the application and construction of said acts to the proof submitted in said cause, are void, the same being repugnant to that

clause of the eight section of the Constitution of the United States which provides"

" That the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general

welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States,"

"and are also repugnant to that clause of the said eighth section of said Constitution which provides as follows:"

" The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,"

"and are also repugnant to that clause of the tenth section of said Constitution of the United States which provides as follows:"

" No state shall, without the consent of Congress, lay any imposts or duties on imports and exports except what may be absolutely necessary for executing its inspection laws,"

"and the acts of Congress, in pursuance of the aforesaid several clauses of said Constitution of the United States now existing in full force, which objections were, at the trial of said cause before said court, taken by the said Fletcher in his defense, and were overruled by said court. There is error also in this, to-wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said State of Rhode Island and Providence Plantations against the said Joel Fletcher, whereas, by the law of the land, the said judgment ought to have been given for the said Fletcher against the said state, and the said Joel Fletcher prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment."

"JOEL FLETCHER"

"By JOHN WHIPPLE and"

"SAMUEL AMES"

" *His Attorneys* "

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"Andrew Peirce, Junior, and Thomas W. Peirce, Plaintiffs in error v. State of New Hampshire."

"This case originated in the Court of Common Pleas for the County of Strafford, and was carried to the Superior Court of Judicature for the First Judicial District of New Hampshire. The plaintiffs in error were indicted for that they did unlawfully, knowingly, willfully, and without license therefore from the selectmen of said Dover, the same being the town where the defendants then resided, sell to one Aaron Sias one barrel of gin, at and for the price of $11.85, contrary to the form of the statute &c.; "

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"The counsel for the state introduced evidence to prove the sale of the gin, as set forth in the indictment, and it was proved and admitted by the defendants that they sold to said Aaron Sias, on the day alleged in the indictment, one barrel of American gin for the price of $11.85, and took from said Sias his promissory note including that sum. It appeared that it was part of the regular business of the defendants to sell ardent spirits in large quantities."

"To sustain the prosecution, the counsel for the state relied on the Statute of July 4, 1838, which is in these words, *viz.:* "

" *An act regulating the Sale of Wine and Spirituous Liquors"*

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

" Sec. 2. And be it further enacted, that the third section of an act, passed July 7, 1827, entitled, 'An act regulating licensed houses,' and other acts or parts of acts inconsistent with the provisions of this act, be, and the same hereby are, repealed."

" Approved July 4, 1838."

"The counsel for the defendants moved the court to instruct the jury that if the law of 1838, under which the respondents were indicted, was constitutional, the sale here was contrary to law, and the note of Sias was void, and that such a payment by note was no payment, and therefore there was no sale. But the court refused so to instruct the jury, but directed them that, on the supposition the defendants could not recover the contents of the note, they might notwithstanding having violated the statute. The defendants' counsel then introduced evidence that the barrel of gin was purchased by the defendants in Boston, in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts. And the defendants' counsel contended that the aforesaid statute of July 4, 1838, was unconstitutional and void because the same is in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States, and because it is repugnant to the two following clauses in the Constitution of the United States, *viz.:* "

" No state shall, without the consent of the Congress, lay any

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imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. . . . The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

" And the defendants' counsel contended that the jury was the judge of the law as well as the fact in the case, that it was its duty to judge of the constitutionality of the Act of July 4, 1838, and to form its own opinion upon that question, and that the court was not to instruct the jury relative to questions of law, as in civil cases, but was merely to give advice to the jury in matters of law. The court instructed the jury that the position that the jury were judges of the law as well as of the fact, as contended for by the defendants' counsel, was not correct to the extent of the general terms in which it was stated; that the same rule existed in this respect in criminal cases which prevailed in civil cases; that it was the duty of the court to instruct the jury in relation to questions of law, and that the court was responsible for the correctness of the instructions give, and in case of conviction, if the instructions were wrong, the verdict might be set aside for that cause; but that the jury had the power to overrule the instructions of the court, and decide the law contrary to those instructions, through their power to give a general verdict of acquittal; and that if they did so, and acquitted the defendants, the court could not correct the matter if the jury had erred, because the defendants could not in such case be tried again; and that the circumstance that the jury had thus the power to overrule the instructions of the court in case of an acquittal did not show that they had a right to judge of the law. The court further instructed the jury that the statute of July 4, 1838, was not entirely void if it might have an operation constitutionally in any case, and that, as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin. The court further instructed the jury that this statute, as it regarded this case, was not repugnant to the clause in the

Constitution of the United States providing that no state shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article and was not imported into, but had been manufactured in, the United States. The court further instructed the jury that this state could not regulate commerce between this and other states; that this state could not prohibit the introduction of articles from another state with such a view, nor prohibit a sale of them with such a purpose, but that although the state could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other states; that she might tax them the same

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as other property, and might regulate the sale to some extent; that a state might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the states, and that this statute was a regulation of that character, and constitutional. And the court further said in conclusion (the sale being admitted, and the instructions of the court that the law, as applicable to this case, was constitutional, having been given) that nothing farther remained in this particular case unless the jury saw fit to exercise the power that they possessed of overruling the instructions of the court, and giving a verdict contrary to those instructions, and that if they did so and acquitted the defendants, the court could not set aside the verdict, even if an error had been committed."

"The jury having returned a verdict, that the defendants were guilty, the defendants excepted to the foregoing instructions, and to what is said in conclusion of the charge as aforesaid, and filed this bill; which was sealed and allowed."

"JOEL PARKER"

This judgment having been affirmed by the Superior court of Judicature, a writ of error brought the case up to this Court.

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MR. CHIEF JUSTICE TANEY.

In the cases of *Thurlow v. State of Massachusetts,* of *Fletcher v. Rhode Island,* and of *Peirce v. State of New Hampshire,* the judgments of the respective state courts are severally affirmed.

The Justices of this Court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles, and although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon state laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the state authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several states.

The cases have been separately and fully and ably argued, and the questions which they involve are undoubtedly of the highest importance. But the construction of this clause in the Constitution has been so fully discussed at the bar and in the opinions delivered by the court in former cases that scarcely anything can be suggested at this day calculated to throw much additional light upon the subject or any argument offered which has not heretofore been considered and commented on, and which may not be found in the reports of the decisions of this Court.

It is not my purpose to enter into a particular examination of the various passages in different opinions of the Court or of some of its members in former cases which have been referred to by counsel and relied upon as supporting the construction of the Constitution for which they are respectively contending. And I am the less inclined to do so because I think these controversies often arise from looking to

detached passages in the opinions, where general expressions are sometimes used which, taken by themselves, are susceptible of a construction that the Court never intended should be given to them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the Court.

The Constitution of the United States declares that that Constitution and the laws of the United States which shall be made in

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pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations or among the several states is the supreme law, and if the law of a state is in conflict with it, the law of Congress must prevail and the state law cease to operate so far as it is repugnant to the law of the United States.

It is equally clear that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several states, and that beyond these limits the states have never surrendered their power over trade and commerce, and may still exercise it free from any controlling power on the part of the general government. Every state, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and wellbeing of its citizens.

I am not aware that these principles have even been questioned. The difficulty has always arisen on their application, and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is how far a state may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by Congress. Is such a law a regulation of foreign commerce or of the internal traffic of the state?

It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce and to fix the precise point in relation to every important article where the paramount power of Congress terminates and that of the state begins. The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the states, as neither can by its own legislation enlarge its own powers or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision and depending altogether upon the words of the Constitution.

This question came directly before the court for the first time in the case of *Brown v. State of Maryland,* 12 Wheat. 419. And the Court there held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale in the original bale, package, or vessel in which it was imported, that the authority given to import necessarily carried with it the right to well the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose and burden upon him or the property imported beyond what the law of Congress had itself imposed, but that when the original package was broken up for use or for retail by the importer,

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and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property. This I understand to be substantially the decision in the case of *Brown v. State of Maryland,* drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the states and over which Congress can exercise no control.

I argued the case in behalf of the state, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the state, was valid and constitutional, and certainly I at that time persuaded myself that I was right, and thought the decision of the Court restricted the powers of the state more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the states on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and objected of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of the state government. The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the state in which they are imported. A great (perhaps the greater) part imported in some of the cities is not owned or brought in by citizens of the state, but by citizens of other states or foreigners. And while they are in the hands of the importer for sale in the form and shape in which they were introduced and in which they are intended to be sold, they may be regarded as merely *in transitu,* and on their way to the distant cities, villages, and country for which they are destined and where they are expected to be used and consumed and for the supply of which they were in truth imported. And a tax upon them while in this condition, for state purposes, whether by direct assessment or indirectly by requiring a license to sell, would be hardly more justifiable in principle

than a transit duty upon the merchandise when passing through a state. A tax in any shape upon imports is a tax on the consumer by enhancing the price of the commodity. And if a state is permitted to levy it in any form, it will put it in the power of a maritime importing state to raise a revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a state would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a state to accomplish precisely the same thing under another name and in a different form.

Undoubtedly a state may impose a tax upon its citizens in proportion to the amount they are respectively worth, and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported while it remains a part of foreign commerce and is not introduced into the general mass of property in the state. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other states, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in *Brown v. State of Maryland,* I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of Congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now if the state laws in question came in collision with those acts of Congress and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this Court to declare them void.

It has indeed been suggested that if a state deems the traffic in ardent spirits to be injurious to its citizens and calculated to introduce immorality, vice, and pauperism into the state, it may constitutionally refuse to permit its importation notwithstanding the laws of Congress, and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce,

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although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded, and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no state has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce and become a part of the general mass of property in the state. These laws may indeed discourage imports and diminish the price which ardent spirits would otherwise being. But although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen

the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether if it thinks proper. Of the wisdom of this policy it is not my province or my purpose to speak. Upon that subject each state must decide for itself. I speak only of the restrictions which the Constitution and laws of the United States have imposed upon the states. And as these laws of Massachusetts and Rhode Island are not repugnant to the Constitution of the United States, and do not come in conflict with any law of Congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several states, there is no ground upon which this Court can declare them to be void.

I come now to the New Hampshire case, in which a different principle is involved -- the question, however, arising under the same clause in the Constitution and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits

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in any quantity without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined under the law above mentioned.

The power to regulate commerce among the several states is granted to Congress in the same clause and by the same words as the power to regulate commerce with foreign nations, and is coextensive with it. And according to the doctrine in *Brown v. Maryland,* the article in question, at the time of the sale, was subject to the legislation of Congress.

The present case, however, differs from *Brown v. State of Maryland* in this -- that the former was one arising out of commerce with foreign nations, which Congress

had regulated by law, whereas the present is a case of commerce between two states, in relation to which Congress has not exercised its power. Some acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one state to another. This case differs also from the cases of Massachusetts and Rhode Island because in these two cases, the laws of the states operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one state to another while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government and subject to its control and regulation.

The question therefore brought up for decision is whether a state is prohibited by the Constitution of the United States from making any regulations of foreign commerce or of commerce with another state, although such regulation is confined to its own territory and made for its own convenience or interest and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the states and renders all state laws upon the subject null and void. This is the question upon which the case turns, and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in *Brown v. State of Maryland.* I proceed, therefore, to state my opinion upon it.

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this Court. But with every respect for the opinion of my brethren with whom I

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do not agree, it appears to me to be very clear that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject

by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet in my judgment, the state may nevertheless, for the safety or convenience of trade or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors and for its own territory, and such regulations are valid unless they come in conflict with a law of Congress. Such evidently I think was the construction which the Constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several states, and a careful examination of the decisions of this Court will show that so far from sanctioning the opposite doctrine, they recognize and maintain the power of the states.

The language in which the grant of power to the general government is made certainly furnishes no warrant for a different construction, and there is no prohibition to the states. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the Constitution to the general government. On the contrary, in many instances, after the grant is made, the Constitution proceeds to prohibit the exercise of the same power by the states in express terms -- in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the states from making any regulations of commerce, it is difficult to account for the omission to prohibit it when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the state over the same subject was intended to be entirely excluded. But if, as I think, the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the states, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with state laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate. For if the mere grant of power to the general government was in itself

a prohibition to the states, there would seem to be no necessity for providing for the supremacy of the laws of Congress, as all state laws upon the subject would be *ipso facto* void, and there could therefore be no such thing as conflicting laws, nor any question

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about the supremacy of conflicting legislation. It is only where both may legislate on the subject that the question can arise.

I have said that the legislation of Congress and the states has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws.

In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of Congress under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime states as fully and entirely since the adoption of the Constitution as they were before, and there is but one law of Congress making any specific regulation upon the subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true that the act of 1789 provides that pilots shall continue to be regulated by the laws of the respective states then in force or which may thereafter be passed until Congress shall make provision on the subject. And undoubtedly Congress had the power, by assenting to the state laws then in force, to make them its own and thus make the previous regulations of the states the regulations of the general government. But it is equally clear that as to all future laws by the states, if the Constitution deprived them of the power of making any regulations on the subject, an act of Congress could not restore it. For it will hardly be contended that an act of Congress can alter the Constitution and confer upon a state a power which the Constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the states to make any regulation upon the subject, Congress could no more restore to the states the power of which it was thus deprived than it

could authorize them to coin money, or make paper money a tender in the payment of debts, or to do any other act forbidden to them by the Constitution. Every pilot law in the commercial states has, it is believed, been either modified or passed since the act of 1789 adopted those then in force, and the provisions since made are all void if the restriction on the power of the states now contended for should be maintained, and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various state laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation, and commerce.

Up to this time, their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this Court, and it will be difficult to show how this can be done except upon the construction of the Constitution which I am now maintaining.

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So also in regard to health and quarantine laws. They have been continually passed by the states ever since the adoption of the Constitution, and the power to pass them recognized by acts of Congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the state. They subject the ship and cargo and crew to the inspection of a health officer appointed by the state; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time, the vessel is detained at the place selected for the quaranting ground by the state authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the state law, and not by Congress. Now so far as these laws interfere with shipping, navigation, or foreign commerce or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the states, has been continually recognized by

Congress ever since the adoption of the Constitution and constantly affirmed and supported by this Court whenever the subject came before it.

The decisions of this Court will also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and --

First, to *Gibbons v. Ogden,* because this is the case usually referred to and relied on to prove the exclusive power of Congress and the prohibition to the states. It is true that one or two passages in that opinion, taken by themselves and detached from the context, would seem to countenance this doctrine. And indeed it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one and was never seriously put forward in any case until after the decision of *Gibbons v. Ogden,* although it has been abundantly discussed since. Still it seems to me to be clear upon a careful examination of that case that the expressions referred do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject matter before the Court, establishes the doctrine that a state may, in the execution of its powers of internal police, make regulations of foreign commerce, and that such regulations are valid unless they come into collision with a law of Congress. Upon examining that opinion, it will be seen that the Court, when it uses the expressions

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which are supposed to countenance the doctrine of exclusive power in Congress, is commenting upon the argument of counsel in favor of equal powers on this subject in the states and the general government, where neither party is bound to yield to the other, and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the states as exercising their own

powers in laying taxes for state purposes, although the same thing is taxed by Congress, and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the state power is concurrent with that of the general government -- is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon Congress. And it is solely with reference to this distinction, and in the midst of this argument upon it, that the Court uses the expressions which are supposed to maintain an absolute prohibition to the states. But it certainly did not mean to press the doctrine to that extent. For it does not decide the case on that ground (although it would have been abundantly sufficient, if the Court had entertained the opinion imputed to it), but, after disposing of the argument which had been offered in favor of concurrent powers, it proceeds immediately, in a very full and elaborate argument, to show that there was a conflict between the law of New York and the act of Congress, and explicitly puts its decision upon that ground. Now the whole of this part of the opinion would have been unnecessary and out of place if the state law was of itself a violation of the Constitution of the United States and therefore utterly null and void, whether it did or did not come in conflict with the law of Congress.

Moreover, the Court distinctly admits, on pages 22 U. S. 205 -206, that a state may, in the execution of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear that, so far as these regulations are merely internal and do not operate on foreign commerce or commerce among the states, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the Court speaks of presupposes that they are regulations of foreign commerce or commerce among the states. And if a state, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the state is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress.

It has been said, indeed, that quarantine and health laws are passed by the states not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard

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the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers -- that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws except insofar as it has been restricted by the Constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease or to make regulations of commerce for the interests and convenience of trade.

Upon this question the object and motive of the state are of no importance, and cannot influence the decision. It is a question of power. Are the states absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the state, or whatever the real object of the law, and it requires no law of Congress to control or annul them. Yet the case of *Gibbons v. Ogden* unquestionably affirms that such regulations may be made by a state, subject to the controlling power of Congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the states, but merely confers upon Congress the superior and

controlling power. And to expound the particular passages herein before mentioned in the manner insisted upon by those who contend for the prohibition would be to make different parts of that opinion inconsistent with each other -- an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of *Gibbons v. Ogden* was such as I have insisted on is, I think, conclusively proved by the case of *Willson v. Blackbird Creek Marsh Company,* 2 Pet. 251, 27 U. S. 252 . In that case, a dam authorized by a state law had been erected across a navigable creek so as to obstruct the commerce above it. And the validity of the state law was objected to on the ground that it was repugnant to the Constitution of the United States, being a regulation of commerce. But the Court said

"The repugnancy of the law of Delaware to the

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Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect the question,"

and then proceeds to decide that the law of Delaware could not "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

The passages I have quoted show that the validity of the state law was maintained because it was not in conflict with a law of Congress, although it was confessedly within the limits of the power granted. And it is worthy of remark that the counsel for the plaintiff in error in that case relied upon *Gibbons v. Ogden* as conclusive authority to show the unconstitutionality of the state law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case therefore was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment show most clearly what was intended in *Gibbons v.*

Ogden, and that in that case, as well as in the case of *Willson v. Blackbird Creek Marsh Company,* the Court held that a state law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress passed in pursuance of the power granted. And it is worthy also of remark that the opinion in both of these cases was delivered by Chief Justice Marshall, and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of the *City of New York v. Miln,* 11 Pet. 130, the question as to the power of the states upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the Court, because the case did not necessarily involve it and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this Court.

For my own part, I have always regarded the cases of *Gibbons v. Ogden* and *Willson v. Blackbird Creek Marsh Company* as abundantly sufficient to sanction the construction of the Constitution which in my judgment is the true one. Their correctness has never been questioned, and I forbear therefore to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark that in analogous cases where by the Constitution of the United States power over a particular subject is conferred on Congress without any prohibition to the states, the same rule of construction has prevailed. Thus, in the case of *Houston v. Moore,* 5 Wheat. 1, it was held, that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the states from

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legislating on the same subject, provided the law of the state was not repugnant to the law of Congress. And every state in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed unless they came in conflict with the law of Congress.

The same doctrine was held in the case of *Sturges v. Crowninshield,* 4 Wheat. 196, under the clause in the Constitution which gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of *Chirac v. Chirac,* 2 Wheat. 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of Congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the Constitution, but insisted that the Maryland law was "virtually repealed by the Constitution of the United States, and the act of naturalization enacted by Congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not therefore by possibility be a state law which did not come in conflict with it. And indeed in this case it might well have been doubted whether the grant in the Constitution itself did not abrogate the power of the states, inasmuch as the Constitution also provided that the citizens of each state should be entitled to all the privileges and immunities of citizens in the several states, and it would seem to be hardly consistent with this provision to allow any one state, after the adoption of the Constitution, to exercise a power which, if it operated at all, must operate beyond the territory of the state and compel other states to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the Constitution of the United States, where, from the great public interests which must always be involved in such questions, this Court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the Court has spoken of the grant of power to the general

government as excluding all state power over the subject, unless it was deciding a case where the power had been exercised by Congress and a state law came in conflict with it. In cases of this kind, the power of Congress undoubtedly excludes

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and displaces that of the state, because wherever there is collision between them, the law of Congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the Court to which I have referred. The case last mentioned is a striking example, for there the language of the Court, affirming in the broadest terms the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For although the gin sold was an import from another state, and Congress has clearly the power to regulate such importations under the grant of power to regulate commerce among the several states, yet as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue.

The judgment of the state courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us.

MR. JUSTICE Mc LEAN.

Thurlow v. Commonwealth of Massachusetts -- Error from the state court

The plaintiff was indicted and convicted under the Revised statutes of Massachusetts, chapter 47, and the act of 1837, chapter 242, for selling foreign spirits, in 1841 and 1842, without a license.

The third section of the revised act provides that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time,

unless he is first licensed as a retailer of wine and spirits, "under the penalty of twenty dollars." The seventeenth section authorizes the county commissioners to grant licenses, and the second section of the act of 1837 provides that

"Nothing contained in that act or in the forty-seventh chapter of the Revised statutes shall be so construed as to require the county commissioners to grant any licenses when in their opinion the public good does not require them to be granted."

On the trial in the court of common pleas it was objected that a part of the spirits sold were foreign, but the court instructed the jury that such sale was in violation of the statute, which was not inconsistent with the Constitution or revenue laws of the United States. On this ruling of the court an exception was taken, and the cause was removed to the Supreme Court of the State of Massachusetts, which overruled the exception and entered a judgment on the verdict against the defendant.

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The acts of Congress authorize the importation of spirits in casks of fifteen gallons, and wine in bottles.

The great question in this case is whether the license laws of Massachusetts are repugnant to the Constitution of the United States, or the revenue laws which have been enacted under it.

And first it is insisted that they are unconstitutional as they prohibit the importer from selling an article that he is authorized to import without the payment of an additional duty, or impost, which the state cannot impose.

The case of *Brown v. State of Maryland,* 12 Wheat. 419, is supposed to be conclusive upon this point. This may be admitted and yet it does not rule the case before us.

Brown was charged with having imported and sold a package of dry goods without a license. An act of Maryland required all importers, before the sale of their imported articles, to take out a license. And the Court held

"that a tax on the sale of an article, imported only for sale, is a tax on the article itself -- that the importation gave a right to the importer to sell the package in question free from any charge by the state, and consequently that the act of Maryland was unconstitutional and void as being repugnant to that article of the Constitution which declares that no state shall lay an impost or duties on imports or exports."

The act was also held to be repugnant to that clause in the Constitution which "empowers Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In *Brown's Case,* the reasoning of the Court and its decision turned upon the fact that he, being the importer of the package, had a right to sell it; that this right continued so long as the package was unbroken and remained the property of the importer.

The plaintiff, Thurlow, asserts no right as an importer of the article sold. He purchased it in the home market; consequently neither the general reasoning nor the ruling of the Court in *Brown's Case* can control this one.

The Tenth Amendment of the Constitution declares, 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."

Before the adoption of the Constitution, the states possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modifications as the people of each state might sanction. The agencies established by the Articles of Confederation were not entitled to the dignified appellation of government.

Among the delegated functions it is declared, that

"Congress shall have power to regulate commerce with foreign nations, and

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among the several states, and with the Indian tribes."

This investiture of power is declared by this Court, in the case of *Gibbons v. Ogden,* 9 Wheat. 1, and also in *Brown v. State of Maryland,* "to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution."

There may be a limitation on the exercise of sovereign powers, but that state is not sovereign which is subject to the will of another. This remark applies equally to the federal and state governments. The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear that while these supreme functions are exercised by the federal and state governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government.

The power to tax is common to the federal and state governments, and it may be exercised by each in taxing the same property, but this produces no conflict of jurisdiction. The conflicts which have arisen are mainly attributable to the want of an accurate definition and a clear comprehension of the respective powers of the two governments. In a system of government so complex as ours, it may be difficult, perhaps impracticable, to prescribe the exact limit, in particular cases, to federal and state powers.

The powers expressly prohibited to the states are few in number, and are specified in the Constitution. Those which are exclusively delegated to the federal

government, and consequently, by implication, are prohibited to the states, are more numerous.

The states, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government.

The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the states. Since the adoption of its Constitution, they have existed in Massachusetts. A great

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moral reform, which enlisted the judgments and excited the sympathies of the public, has given notoriety to this course of legislation and extended it lately beyond its former limit. And the question is now raised whether the laws under consideration trench upon the power of Congress to regulate foreign commerce.

These laws do not in terms prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of *Brown v. Maryland,* it is admitted that the license acts cannot operate upon the right of the importer to sell. But after the import shall have passed out of the hands of the importer, whether it remain in the original package or cask or be broken up, it becomes mingled with other property in the state and is subject to its laws. This is the predicament of the spirits in question.

A license to sell an article, foreign or domestic, as a merchant or innkeeper or victualler is a matter of police and of revenue, within the power of a state. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. It is said to reduce the

amount of importation by lessening the profits of the thing imported. The license is a charge upon the business or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise or spirits at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But if this were the effect of the license, would that make the acts unconstitutional?

The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded, and in extreme cases it may be thrown into the sea. This comes in direct conflict with the regulation of commerce, and yet no one doubts the local power. It is a power essential to self-preservation, and exists necessarily in every organized community. It is indeed the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin or approached by poison. And it is the settled construction of every regulation of commerce that under the sanction of its general laws, no person can introduce into a community malignant diseases or anything which contaminates its morals or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others.

From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to carry infectious

disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an

undoubted power in the state.

The objection is strongly and confidently urged that a license may be refused under these laws, which would in effect prevent importation, as importation is only made to sell.

It is admitted that a state law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government and contrary to the act of Congress on that subject, would be void. The object of such a law would upon its face be a regulation of commerce, which is not within the powers of a state. But a state has a right to regulate the sale of this as of every other imported article out of the hands of the importer.

The license system as adopted in all the states restrains persons from selling by retail who have not taken a license, and a license to retail spirits is granted by the court, or some other body, at its discretion, and on certain conditions. This is the character of the law under consideration. The applicant to obtain a license must be recommended by a majority of the selectmen of the town as a person of good moral character. Should this recommendation be refused improperly or unjustly, an appeal is given to the commissioners of the county. But the commissioners are not required to grant any licenses "when, in their opinion, the public good does not require them to be granted."

There is no evidence in the record of a refusal to grant a license in this case. The plaintiff is charged with selling without a license, but it nowhere appears that he ever applied for one. This would seem to be conclusive. For if a state have a right to regulate the retail of foreign spirits, no one can retail them where a license is required without it. Now that a state may do this no one doubts. And it is equally clear if the plaintiff rests upon a prohibition to sell, it must be shown. This does not appear on the face of the law, and if, in the exercise of their discretion, the commissioners have refused all licenses, that is a matter of fact which must be established. On this ground alone, admitting the force of the arguments for the plaintiff, his case must fail.

But, not to rest the decision of so important a question on a defect of proof, we will consider the case as if the fact of refusal to grant the license were in the record.

The necessity of a license presupposes a prohibition of the right to sell as to those who have no license. For if a state may require a license to sell, it may, in the exercise of a proper discretion, limit the number of such licenses as the public good may seem to require.

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This is believed to have been done under every system of licenses to retail spirits which has been adopted in the different states. And this limitation may possibly lessen the sale of the article. This may be the result of any regulation on the subject. But it constitutes no objection to the law. An innkeeper is forbidden to allow drunkenness in his house, and if this prohibition be observed, a less quantity of rum is sold. Is this unconstitutional because it may reduce the importation of the article? Such an argument would be so absurd as to be at once rejected by every sound mind. No one could fail to see that the injunction was laid for the maintenance of good order and good morals. To reject this view would make the excess of the drunkard a constitutional duty, to encourage the importation of ardent spirits.

Such an argument would be advanced by no one, and no one would question either the constitutionality or expediency of the law which prohibits an innkeeper from encouraging drunkenness. And yet in this simple proposition is the argument answered against the constitutionality of the laws in question.

A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the state authority. The state may regulate the sale of foreign spirits, and such regulation is valid though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates exclusively to the internal police of the state.

It is said that the object of these laws is to prohibit the importation of foreign spirits. This is an inference which their language does not authorize. A license is only required to sell in less quantity than twenty-eight gallons. A greater quantity than this may be sold without restriction. But it is said, if the legislature may require a license for twenty-eight gallons, it may extend the limitation to three hundred gallons.

In answer to this, it is enough to say that the legislature has not done what is supposed by the plaintiff's counsel it might do. But if the legislature cannot extend the license to twenty-eight gallons, what shall be the constitutional limit? By what rule shall it be ascertained? Shall a gallon, a quart, or a pint be the limit? This is altogether arbitrary, and must depend upon the discretion of the lawmaking power -- the same discretion that imposes a tax, defines offenses and prescribes their punishment, and which controls the internal policy of the state. Will it be contended that the legislature cannot exercise the power, as it may be exercised beyond the proper limit? This logic is not good when applied to the practical operations of the government. The argument is power may be abused, therefore it cannot be exercised. What power dependent on human agency may not be abused?

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In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretense of a police regulation, a state cannot counteract the commercial power of Congress. And yet, as has been shown, to guard the health, morals, and safety of the community, the laws of a state may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. Still, it is clear that a law of a state is not rendered

unconstitutional by an incidental reduction of importation. And especially is this not the case when the state regulation has a salutary tendency on society, and is founded on the highest moral considerations.

The police power of a state and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a state. The former ceases when the foreign product becomes commingled with the other property in the state. At this point the local law attaches, and regulates it as it does other property. The state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a state may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

When in the appropriate exercise of these federal and state powers, contingently and incidentally their lines of action run into each other; if the state power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained.

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But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in

some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving as far as possible the health, the safety, and the moral energies of society, its prosperity is advanced.

In *McCullough v. State of Maryland,* 4 Wheat. 428, this Court said

"It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

"The people of a state therefore give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the Constitutions over their representatives to guard them against abuse."

Believing the laws of Massachusetts to regulate licenses for the sale of spirituous liquors to be constitutional, I affirm the judgment in this case.

Andrew Peirce, Jr., and Thomas W. Peirce v. State of New Hampshire

This is a writ of error to the Supreme Court of New Hampshire on a judgment given by that court sustaining the validity of the act of that state, "regulating the sale of wines and spirituous liquors," "approved 4 July, 1838," which is alleged to be in violation of the Constitution of the United States and the revenue acts of Congress made in pursuance thereof.

The first section provides

"That if any person shall, without license from the selectmen of the town &c.;, sell any wine, rum, gin, brandy, or other spirits, in any quantity &c.;, such person, so offending, for each and every such offense &c.;, shall pay a sum not exceeding fifty dollars,"

&c.; The indictment charged the defendants in the state court with having sold one barrel of gin without a license.

On the trial it was proved that the barrel of gin was purchased by the defendants in Boston, brought coastwise to the landing at Piscataqua Bridge, and thence to the defendants' store in Dover, and afterwards sold in the same barrel.

The views expressed by me in the case of *Thurlow v.*

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Massachusetts, at the present term, as regards the power of a state to require a license for the sale of spirituous liquors, apply equally to the present case. A state may require a license to sell ardent spirits of domestic manufacture, as well as foreign. And the only difference between this case and the one above cited is that the defendants imported this barrel of gin from the State of Massachusetts to that of New Hampshire, where they sold it, and they claim the right of importers to sell without a license.

In the case of *Brown v. State of Maryland,* 12 Wheat. 449, after sustaining the right of the importer to sell a package of foreign goods without a license, which an act of Maryland required, the court said -- "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state."

This remark of the Court was incidental to the question before it, and the point was not necessarily involved in the decision. Whilst the remark cannot fail to be considered with the greatest respect, coming as it did from a most learned and eminent Chief Justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case.

The power to regulate commerce among the several states is given to Congress in the same words as the power over foreign commerce. But in the same article it is declared that

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

And it is supposed that the declaration

"that no state, without the consent to Congress, shall lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"

refers to foreign commerce.

A revenue to the general government could never have been contemplated from any regulation of commerce among the several states. Countervailing duties, under the Confederation, were imposed by the different states to such an extent as to endanger the confederacy. But this cannot be done under the Constitution by Congress, in whom the power to regulate commerce among the states is vested.

The word "import," in a commercial sense, means the goods or other articles brought into this country from abroad -- from another country. In this sense, an importer is a person engaged in foreign commerce. And it appears that in the acts of Congress which regulate foreign commerce, he is spoken of in that light. In *Brown v. State of Maryland,* 12 Wheat. 443, the Court said the act of Maryland "denies to the importer the right of using the privilege which he has purchased from the United States until he has purchased it from the state." And it was upon the ground that the tax was an additional charge or impost upon the thing imported,

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which a state could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one state to another. In some cases, the transportation is only made a few feet or rods, and generally it is attended with little risk, and no duty is paid to the federal or state government. And why should property, when conveyed over a state line, be exempt from taxation which is common to all other property in the state?

There is no act of Congress to which the license law, as applied to this case, can be held repugnant. And the general "power in Congress to regulate commerce among the several states," under the restrictions in the Constitution, cannot affect the validity of the law. The Constitution prohibits impost duties on a commercial interchange of commodities among the states. The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the state. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgences and to advance the moral and physical welfare of society.

The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of *Brown v. State of Maryland.* And there is nothing in the general reasoning of that case or in the facts which can bring into doubt the constitutionality of the New Hampshire law.

If the mere conveyance of property from one state to another shall exempt it from taxation and from general state regulation, it will not be difficult to avoid the police laws of any state, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the state, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the states, which has been exclusively given to Congress. One of the objects in adopting the Constitution was to regulate this commerce, and to prevent the states from imposing a tax on the commerce of each other. If this power has not been delegated to Congress, it is still retained by the states, and may be exercised at their discretion, as before the adoption of the Constitution. For if it be

a reserved power, Congress can neither abridge nor abolish it.

But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the state. It comes under the general regulation, and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask without a license does not attach to the plaintiffs in error, on account

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of their having transported this property from Massachusetts to New Hampshire. I affirm the judgment of the state court.

Joel Fletcher v. State of Rhode Island

This is a writ of error to the Supreme Court of Rhode Island, under the 25th section of the Judiciary Act of 1789. Fletcher was indicted for selling strong liquor, to-wit, rum, gin, and brandy, in less quantity than ten gallons, in violation of the law of Rhode Island. From the evidence, it appeared that the brandy which he sold was purchased by him at Boston, in the State of Massachusetts, that it was imported into the United States from France for sale, and that the duties had been regularly paid at the port of Boston. The sale of the liquor was admitted by the defendant, as charged in the indictment.

In the defense it was insisted that the license act was void, it being repugnant to that clause of the 8th section of the Constitution of the United States which provides

"That the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay debts, and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States,"

and is also repugnant to that clause of the 8th section which provides

"That Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,"

and also repugnant to that clause which declares, that

"No state shall, without the consent of Congress, lay any imposts or duties on imports except what may be absolutely necessary for executing its inspection laws, and the acts of Congress in pursuance of the aforesaid several clauses of said Constitution,"

&c.;

The supreme court of the state maintained the validity of the state statute, and to reverse that judgment this writ of error is prosecuted.

The opinions given by me in the cases of *Thurlow v. State of Massachusetts,* and *Peirce v. State of New Hampshire,* decide, so far as I am concerned, this case. The first case related to the sale of spirits of foreign importation, not in the hands of the importer; the second to domestic spirits transported from one state to another. And the indictment now under consideration relates to the sale of foreign spirits purchased in Massachusetts and transported to Rhode Island. There is, however, one point made in this case which was not embraced by the facts contained in either of the others. It was

"agreed that the Town Council of Cumberland, in Rhode Island, refused to grant any license for retailing strong liquors for a year from April, 1845, having been instructed to that effect by a town meeting."

The effect of this proceeding was to prohibit the sale of spirituous liquors in the Town of Cumberland in less quantities than ten gallons.

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There is no constitutional objection to the exercise of this discretion under the authority of the state law. In the first place, no system of licenses to retail spirits has authorized the grant except upon certain conditions. No one, it is presumed, can claim a license to retail spirits as a matter of right. Under the law of the state, a discretion is to be exercised not only as regards the individuals who apply, but also

as to the number that shall be licensed in each town. And if it shall be determined that a certain town is not entitled to a license, it is not perceived how such a decision can be controlled. In the case of Fletcher, it seems that the town council, who have the power to make the grant, were influenced to refuse it by the popular vote of the town. A more satisfactory mode of instructing public officers, it would seem, could not be adopted.

This produces no restriction on the sale of spirits in any quantity exceeding ten gallons. And there is nothing in the record which shows that licenses are not granted in the adjacent towns within the state. But if this did appear, it would not avoid the force of the act. I think this regulation is clearly within the power of the State of Rhode Island, and, consequently, that the act is not repugnant to the Constitution of the United States or to any act of Congress passed in pursuance of it. I therefore affirm the judgment of the Supreme Court.

MR. JUSTICE CATRON.

Peirce and another v. New Hampshire

Andrew Peirce and two others were indicted for selling one barrel of gin, contrary to a statute of New Hampshire, passed in 1838, which provides that if any person shall, without license from the selectmen of the town where such person resides, sell any wine, rum, gin, brandy, or other spirits in any quantity, or shall sell any mixed liquors part of which are spirituous, such person so offending, for each offense, on conviction upon an indictment, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of the county.

The barrel of gin had been purchased by the defendants at Boston, in the Commonwealth of Massachusetts, and was brought coastwise by water near to Dover, in New Hampshire, where it was sold in the same barrel and condition that it had been purchased in Boston. Part of the regular business of the defendants was to sell ardent spirits in large quantities.

The defendants' counsel contended on the trial that the statute of 1838 was unconstitutional and void because the same is in violation of certain public treaties

of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States, and because it is repugnant

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to the two following clauses in the Constitution of the United States, *viz.:*

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

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

In answer to these objections, the court instructed the jury that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case, and that as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin.

The court further instructed the jury that this statute, as it regarded this case, was not repugnant to the clause in the Constitution of the United States providing that no state shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States.

The court further instructed the jury that this state could not regulate commerce between this and other states; that this state could not prohibit the introduction of articles from another state with such a view, nor prohibit a sale of them with such a purpose; but that although the state could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other states; that she might tax them the same as other property, and might regulate the sale to some extent; that

a state might pass health and police laws which would to a certain extent affect foreign commerce and commerce between the states, and that this statute was a regulation of that character, and constitutional.

The jury found the defendants guilty, and the court of common pleas fined them thirty dollars, from which they prosecuted their writ of error to the Superior Court of Judicature of New Hampshire, where the judgment was affirmed. The present writ of error is prosecuted, under the twenty-fifth section of the Judiciary Act of 1789, to reverse the judgment of the state court of New Hampshire on the grounds above stated. And the question and the case presented for our consideration are whether the state laws, and the judgment founded on them are repugnant to the Constitution of the United States. The court below having decided in favor of their validity, this is the only question that comes within our jurisdiction, although divers others were presented to and adjudged by the state court.

The importance of this case, as regards its bearing on the commerce

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among the states and on the relations and rights of their citizens and inhabitants is not to be disguised. To my mind it presents most delicate and difficult considerations.

The first objection, that the statute of New Hampshire violated certain treaties with Holland, France &c.;, providing for the admission of ardent spirits, has no application to the case, as the spirits sold were not foreign, but American gin.

The second objection relies on the first article and tenth section of the Constitution, which provides, that "no state shall lay any imposts or duties on imports or exports, nor any duty on tonnage," unless with the assent of Congress &c.; These are negative restrictions, where the Constitution operates by its own force; but as no duty or tax was imposed on the gin introduced into New Hampshire from Massachusetts, either directly or indirectly, these prohibitions on the state power do not apply.

The third objection proceeds on the clause that "the Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," to which it is insisted the state statute is opposed. The power given to Congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the states; and "among" means between two only, as well as among more than two; if it was otherwise, then an intermediate state might interdict and obstruct the transportation of imports over it to a third state, and thereby impair the general power. The article in question was introduced from one state directly into another, and the first question is was it a subject of lawful commerce among the states, that Congress can regulate? That ardent spirits have been for ages, and now are, subjects of sale and of lawful commerce, and that of a large class, throughout a great portion of the civilized world, is not open to controversy; so our commercial treaties with foreign powers declare them to be, and so the dealing in them among the states of this Union recognizes them to be. But this condition of the subject matter was met by the state decision on the ground, and on this only,

"that the state might pass health and police laws which would, to a certain extent, affect foreign commerce and commerce between the states; and that the statute [of New Hampshire] was a regulation of that character, and constitutional."

This was the charge to the jury, and on it the verdict and judgment are founded, and which the state court of last resort affirmed. The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is that the police power was not touched by the Constitution, but left to the states as the Constitution found it. This is admitted, and whenever a thing, from character or condition,

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is of a description to be regulated by that power in the state, then the regulation may be made by the state, and Congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have

redress. And the fact must find its support in this whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this Court in the cases of *Gibbons v. Ogden, Brown v. State of Maryland,* and *New York v. Miln.*

What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state, and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws and asserted as the state policy that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist.

If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation, for it takes from Congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated.

Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power, for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is in effect the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power,

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as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.

The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank or to food and clothing, and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. And in this connection it may be proper to say that the three states whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of state, under the belief that such a policy will best subserve the interests of society, and that to this end more than to any other has the sovereign power of these states been exerted, for it was admitted on the argument that no licenses are issued, and that exclusion exists, so far as the laws can produce the result -- at least, in some of the states -- and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the state to regulate its own police.

Had the gin imported been "an import" from a foreign country, then the license law prohibiting its sale by the importer would be void. The reasons for this conclusion are given in my opinion on the case of *Thurlow v. Commonwealth of Massachusetts,* and need not be repeated, and are founded on the case of

Brown v. State of Maryland. The next inquiry is did it stand on the foot of "an import," coming as it did from another state? If it be true, as the state courts held it was, that Congress has the exclusive power to regulate commerce among the states (the states having none), and the gin introduced being an article of commerce, and the state license law being a regulation of commerce (as it was held by this Court to be in the case of *Brown v. State of Maryland*), then the state law is void because the state had no power to act in the matter by way of regulation to any extent.

This narrows the controversy to the single point whether the states have power to regulate their own mode of commerce among the states during the time the power of Congress lies dormant and has not been exercised in regard to such commerce.

Although some regulations have been made by Congress affecting the coasting trade, requiring manifests of cargoes where they exceed a certain value, to prevent smuggling, and for other purposes, still no regulation exists affecting in any degree such an import as the one under consideration. It must find protection against the state law under the Constitution or it can have none. This is also

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true as respects similar articles of commerce passing from state to state by land. Congress has left the states to proceed in this regard as they were proceeding when the Constitution was adopted.

Is, then, the power of Congress exclusive? The advocates of this construction insist that it has been settled by this Court that the power to regulate commerce is exclusive, and can be exercised by Congress alone. And the inquiry in advance of further discussion is has the construction been thus settled? The principle case relied on is that of *Gibbons v. Ogden,* 9 Wheat. 1, in support of the assumption. In that case, a monopoly had been granted to the inventors of machinery propelled by steam which, when applied to vessels, forced them through the water. The law of monopoly of New York extended to the tidewaters, and for navigating these with

two steamboats belonging to Gibbons, a bill was filed against him, and he was enjoined by the state courts of New York, and in his answer he relied on licenses granted under the Act of 18 February, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade, and for regulating the same. This was the sole defense. The Court first held that the power to regulate commerce included the power to regulate navigation also, as an incident to and part of commerce.

After discussing many topics connected with or supposed to be connected with the subject, the power of taxation was considered by the Court, and the powers to tax in the states and the United States compared with the power to regulate commerce, and in this connection the Chief Justice, delivering the opinion of the Court, said

"But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power 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 Congress deemed 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?"

And then the Court proceeds to discuss the effect of the licenses set up in Gibbon's answer, and gives a decree of reversal, on that sole question, in his favor. The decree says

"This Court is of opinion that the several licenses to the steamboats the *Stoudinger* and the *Bellona* to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer, 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

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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 then the state law is declared void as repugnant to the Constitution and laws of the United States. 22 U. S. 9 Wheat. 240.

This case, then, decides that navigation was within the commercial power of the United States, and that a coasting license granted pursuant to an act of Congress, in the exercise of the power, was an authority under the supreme law to navigate the public waters of New York, notwithstanding the state law granting the monopoly. This decision was made in 1824. Three years after (1827), the case of *Brown v. State of Maryland* came before the Court. 12 Wheat. 419.

Brown, an importing merchant, had been indicted for selling packages of dry goods in the form they were imported without taking out a license to sell by wholesale. To this he demurred, and the demurrer was sustained, on the ground that "imports" could be sold by the importer regardless of the state law, on which the indictment was founded. Two propositions were stated by the Court, and the decision of the cause proceeded on them both, and was favorable to Brown -- first, the provision of the Constitution which declares, that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports," and second that which declares Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes.

The first proposition has no application to the controversy before us, as here no tax or duty was imposed.

2. The Court proceeds (p. 25 U. S. 446) to inquire of the extent of the power, and says -- "It is complete in itself, and acknowledges no limitations, and is coextensive with the subject on which it operates." And for this *Gibbons v. Ogden*

is referred to as having asserted the same postulates. The opinion then urges the necessity that Congress should have power over the whole subject, and the power to protect the imported article in the hands of the importer, and proceeds to say

"We think it cannot be denied what can be the meaning of an act of Congress which authorized importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser. . . . We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

Two points were decided on the second proposition:

1st. That a tax on the importer was a tax on the import.

2d. That "an import," which had paid a tax to the United States according to the regulations of commerce made by Congress, could not be taxed a second time in the hands of the importer.

Neither of these cases touch the question of exclusive power, nor

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do I suppose it was intended by the writer of the opinions to approach that question, as he studiously guarded the opinion in the leading case of *Gibbons v. Ogden* against such an inference, and professedly followed the doctrines there laid down in *Brown v. State of Maryland.*

The next case that came before the court was that of *Willson v. Blackbird Creek Marsh Company,* in 1829, 2 Pet. 245. The Chief Justice again delivered the opinion of the Court, as he had done in the two previous cases. The company was authorized to make a dam across the creek under a state charter. The creek was a navigable tidewater; the dam was constructed, and the licensed sloop of Willson not being enabled to pass, he broke the dam, and the company sued him for damages, to which he pleaded that the creek was a navigable highway where the tide ebbed and flowed, and that he only did so much damage as to allow his

vessel to pass. The plea was demurred to, and there was a judgment against Willson in the state court. It was insisted on his behalf in this Court that the power to regulate commerce included navigation, and that navigable streams are the waters of the United States, and subject to the power of Congress, and the case of *Gibbons v. Ogden* was relied on. The Chief Justice in the opinion said:

"The counsel for the plaintiff in error insists that it comes in conflict with the powers of the United States to regulate commerce with foreign nations, and among the several states."

"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states, a power which has not been so exercised as to affect the question."

"We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

Here the adjudications end. But judges who were of the Court when the three cases cited were determined differ as to the true meaning of the Chief Justice in the language employed in the case of *Gibbons v. Ogden,* in illustrating the Constitution in aspects supposed to bear more or less on the questions before the Court, such, for instance, as that the commercial power was a unit and covered the entire subject matter of commerce with foreign nations and

among the states, and that navigation was included in the power. In the case of *New York v. Miln,* 11 Pet. 102, Mr. Justice Thompson and Mr. Justice Story differed entirely as to what the language employed in the opinion in *Gibbons v. Ogden* meant in regard to the true exposition of the Constitution -- one contending that the language used had reference to the power of Congress and to a case where it had been fully exercised, the other insisting that the opinion maintained the exclusive power in Congress to regulate commerce, and that the states had no authority to legislate, but were altogether excluded from interfering. This was Mr. Justice Story's opinion. I think it must be admitted that Chief Justice Marshall understood himself as Mr. Justice Thompson understood him, otherwise he could not have held as he did in the last case, in 1829, of *Willson v. Blackbird Creek Marsh Company.* And as this case was an adjudication on the precise question whether the Constitution of the United States, in itself, extinguished the powers of the states to interfere with navigation on tidewater, and as it was adjudged, in the case of *Gibbons v. Ogden,* that the power to regulate commerce included navigation as fully as if the clause had expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of the states until Congress shall act on the same subject and suspend the state law in its operation. But, owing to the conflicting opinions of individual judges, it is deemed proper to treat the question as though it was an open one in the aspect that this case presents it, and then the consideration arises can a state, by its general laws, operating on all persons and property within its jurisdiction, regulate articles coming into the state from other states, and prohibit their sale unless a license is obtained by the person bringing them in, and where no tax or duty is demanded of the person, or imposed on the article?

In this proposition, it is not intended to involve the consideration that where Congress regulates a particular commerce by general laws, as where a tax is levied on some articles on being introduced from abroad and others permitted to come in free, that all are regulated; this I admit in the instance put and in all others of a like character. But as no General law of Congress has regulated commerce among the states, such a rule cannot apply here.

To a true understanding of the power conferred on Congress to regulate commerce among the states, it may be proper briefly to refer to their condition and acts before the Constitution was adopted, in this respect. The prominent evil was that they taxed the commerce of each other directly and indirectly, and to secure themselves from undue and opposing taxes, the Constitution first provides that Congress shall lay no tax on articles exported from any state; second, that no state shall lay any imposts or duties on imports or exports; nor, third, lay any duty or tonnage, without

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the consent of Congress except so much as may be necessary for executing its inspection laws. These are prohibitions to which the states have conformed.

But, as many general and all necessary local regulations existed when the Constitution was adopted, and this, in all the states, affecting the end of commerce within their respective limits, the local regulations were continued, so far as the Constitution left them in force. And they have been added to and accumulated to a great extent up to this time in the maritime states, not only as regards commerce among the states, but affecting foreign commerce also; the states, within their harbors and inland waters, have done almost everything, and Congress next to nothing. So minute and complicated are the wants of commerce when it reaches its port of destination that even the state legislatures have been incapable of providing suitable means for its regulation between ship and shore, and therefore charters, granted by the state legislatures, have conferred the power on city corporations. Owing to situation and climate, every port and place where commerce enters a state must have peculiarity in its regulations, and these it would be exceedingly difficult for Congress to make; nor could it depute the power to corporations, as the states do. The difficulties standing in the way of Congress are fast increasing with the increase of commerce and the places where it is carried on. And where it enters states through their inland borders, by land and water, the complication is not less, and especially on the large rivers. There too Congress has the undisputed power to regulate commerce coming from state to state, but as every village would require special legislation, and constant additions

as it grew and its commerce increased, to deal with the subject on the part of Congress would be next to impossible in practice. I admit that this condition of things does not settle the question of contested power, but it satisfactorily shows that Congress cannot do what the states have done, are doing, and must continue to do from a controlling necessity, even should the exclusive power in Congress be maintained by our decision. And this state of things was too prominently manifest for the convention to overlook it. Nor do I suppose they did so, for the following reasons.

The general rules of construction applicable to the negative and affirmative powers of grant in the Constitution are commented on in the 32d number of the Federalist, in these terms:

"That notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced, and

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refutes every hypothesis to the contrary."

That is, in favor of the state power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the Constitution, then before them for adoption by the state conventions. And it is an historical truth never, so far as I know, denied that these papers were received by the people of the states as the true exponents of the instrument submitted for their ratification. Proceeding on the principle of construction applicable to affirmative statutes -- that they stood together as a general rule, if there were no negative words -- and taking the doctrine laid down in the Federalist to be the true rule of interpretation -- that where the states were intended to be prohibited negative words had been used --

the states continued to do what they had previously done, and were not by negation prohibited from doing; that is to say, to exercise the powers conferred on Congress in arming, and organizing, and disciplining the militia, to pass bankrupt laws, and to regulate the details of commerce within their limits, coming from other states and foreign countries.

The exercise of the powers to regulate the militia, and to pass bankrupt laws has met the approval of this Court in the cases of *Houston v. Moore* and in *Ogden v. Saunders.*

As to the existence of the power in the states in these two instances, there is no further controversy here or elsewhere.

And in regard to the third, Congress has stood by for nearly sixty years, and seen the states regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection, and for this Court now to decide that the power did not exist in the states, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of state legislation on the particular subject. We would by our decision expunge more state laws and city corporate regulations than Congress is likely to make in a century on the same subject, and on no better assumption than that Congress and the state legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.

And as Congress and the courts have conceded that the states may pass laws regulating the militia, and on the subject of bankruptcies, and that the affirmative grants of power to Congress in these instances did not deprive the states from exercising the power until Congress acted, it is now too late, under existing circumstances, for this Court to say that the similar affirmative power to regulate commerce with foreign nations and among the states shall be held an exclusive power in Congress, as it could no more be done with consistency of interpretation than with safety to the existing state of the country.

In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty will be obviated in regard to the admission of property into the states; this the states may regulate, so they do not tax; and if the states (or anyone of them) abuse the power, Congress can interfere at pleasure, and remedy the evil; nor will the states have any right to complain. And so the courts can interfere if the states assume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, it is hardly possible for Congress to deal at all with the details of this complicated matter.

The case before us presents a fair illustration of the difficulty; all venders of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. To hold that the state license law was void as respects spirits coming in from other states as articles of commerce would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require, the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other states, and that the products of New Hampshire would find an unrestrained market in the neighboring states having similar license laws to those of New Hampshire.

For the sake of convenience, the views on which this opinion proceeds will be briefly restated.

1. It is maintained that spirits and wines are articles belonging to foreign commerce and commerce among the states, and that Congress can regulate their introduction and transmission into and through the states so long as they belong to either class of such commerce, but no further.

2. That any state law whose provisions are repugnant to the existing regulations of Congress (within the above limit) is void so far as it is opposed to the legislation of Congress.

3. That the police power of the states was reserved to the states, and that it is beyond the reach of Congress, but that such police power extends to articles only which do not belong to foreign commerce or to commerce among the states at the time the police power is exercised in regard to them, and that the fact of their condition is a subject proper for judicial ascertainment.

4. That the power to regulate commerce among the states may be exercised by Congress at pleasure, and that the states cut off from regulating the same commerce at the same time it stands regulated by Congress, but that until such regulation is made by Congress, the states may exercise the power within their respective limits.

5. That the law of New Hampshire was a regulation of commerce among the states in regard to the article for selling of which the defendants were indicted and convicted, but that the state law was constitutionally passed, because of the power of the state thus

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to regulate; there being no regulation of Congress, special or general, in existence to which the state law was repugnant.

And for these reasons I think the judgment of the state court should be affirmed.

Thurlow v. Massachusetts

The statute of Massachusetts provides that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offense.

The plaintiff, Thurlow, was found guilty by a jury for violating this law, on which verdict the Supreme Judicial Court of Massachusetts pronounced judgment, and from which a writ of error was prosecuted to this Court under the twenty-fifth section of the Judiciary Act of 1789. The bill of exceptions shows that some of the

sales charged in the indictment were of foreign liquors, in regard to which the court directed the jury that the license law applied as well to imported spirits as to domestic. It was proved that the defendant below had sold in quantities of gallons, quarts, and pints. And the question submitted for our consideration is whether the state law, and the judgment founded on it, are repugnant to the acts of Congress authorizing the importation of wines, brandies, and other foreign spirits, and it is proper to remark that our jurisdiction and power to interfere involve the question merely of repugnance or no repugnance; if repugnance is found to exist, we must reverse, and if not, we must affirm. It follows that the judicial ascertainment of the fact will end the controversy.

For the plaintiff in error it is insisted that the state law and the judgment founded on it are repugnant to the acts of Congress authorizing the importation of foreign wines and spirits and to their introduction into the United States on paying a prescribed tax. That the laws of the states cannot control the retail trade in such liquors; that if they can to any extent, they may prohibit their sale altogether, and by this means do that indirectly which cannot be done directly -- that is to say, prohibit their introduction; that the purposes of wholesale importation being retail distribution, the two must go together; if not, the first is of no value; that importations reach our country in large masses for the sole purposes of diffusion and consumption, and unless Congress has the control of distribution until the imported article reaches the consumer, the power to admit and to regulate commerce in regard to it will be worthless, and little better than a barren theory, leaving us where we began in 1789. That any law, therefore, that prohibits consumption necessarily destroys importation, and the retail process being the ordinary means

to consumption, and indispensable to it, to refuse this means would wholly defeat the end Congress has protected -- that is to say, consumption. On the soundness of this reasoning the result of the controversy depends.

To this argument we answer that under the power to regulate foreign commerce, Congress can protect every article belonging to foreign commerce, so long as it does belong to it, from the operation of a tax or a license, imposed by a state law, that obstructs or hinders the commerce. But the true inquiry here is how long does the imported article so continue? The acts of Congress protect "imports," and prescribe the quantity and measure in which they shall be made; the question of more or less is within the competency of Congress, but how long the imported article continues to be "an import" is a different question, for so soon as it ceases to be so, then it is beyond the power conferred on Congress "to regulate foreign commerce," and that power cannot afford it further protection. This is the line of jurisdiction where the powers of Congress end and where the powers of the states begin when dealing respectively with the imported article. And such is the limit established in the case of *Brown v. State of Maryland.* I do not mean to say that Congress may not protect an import for the purposes of transmission over land, in the form it was imported, from one state to another, for the purposes of distribution and sale by the importer, as this can be done under the power to regulate commerce among the states. The question under examination is not what Congress may do, but what it has done. It has not permitted spirituous liquors to be imported in the quantities that they were sold by the plaintiff in error. And when the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption, or is divided into smaller quantities by breaking up the casks, packages &c.;, by the importer, the article ceases to be a protected "import," according to the legislation of Congress as it now stands, and therefore the liquors sold in this instance did not belong to "foreign commerce," when sold at the retail house by single gallons, quarts &c.; When thus divided and sold in the body of the state, the foreign liquors became a part of its property and were subject to be taxed or to be regulated by licenses, like any other property owned within the state.

But while foreign liquors, imported according to the regulations of Congress, remain in the cask, bottle &c.;, in the original form, then the importer may sell them in that form at the port of entry, or in any other part of the United States, nor can any state law hinder the importer from doing so; nor does it make any difference

whether the imported article paid a tax on its introduction or was admitted as a free article; until it passes from the hands of the importer, it is "an import," and belongs to regulated "foreign commerce," and is protected.

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It follows from the principles stated that the spirituous liquors sold by the defendant stood on no higher ground than domestic spirits did, and that domestic spirits are subject to the state authority as objects of taxation, or of license in restraint of their sale, is not a matter of controversy, and certainly cannot be here, under the twenty-fifth section of the Judiciary Act.

I admit as inevitable that if the state has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether if such be her policy, and that if this Court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion except to protect imports belonging to foreign commerce, as already defined. The reasons are obvious. We have no power to inquire into abuses (if such there be) inflicted by state authority on the inhabitants of the state unless such abuses are repugnant to the Constitution, laws, or treaties of the United States.

For the reasons above set forth, I think the judgment of the state court should be affirmed.

And as the case of Joel Fletcher against the State of Rhode Island depends on the same principles, to every extent, I think it must be affirmed also.

MR. JUSTICE DANIEL.

In the decision of the Court, so far as it establishes the validity of the license laws of the States of Massachusetts, Rhode Island, and New Hampshire, I entirely concur, and had the opinions of judges in forming that decision been limited strictly to an inquiry into the compatibility of those laws with the Constitution of the United States, or with a just exercise of state power (the only inquiry, in my apprehension,

regularly before the Court), I should have been spared the painful duty of disagreement with my brethren. To this inquiry, however, those opinions, according to my apprehension, are by no means restricted. The majority of the judges, in fulfillment of their own convictions, have seemed to me to go beside the questions regularly before them, and in this departure have propounded principles propositions against which, whensoever they may be urged as motives for action on my part, I shall feel myself bound most earnestly to protest. It has been said that the principles here objected to have been already solemnly and fully adjudged and established, and should therefore be no longer assailed. The assertion as to the extent in which these principles have been ruled, or the solemnity with which they have been fixed and settled, may in the first place be justly questioned. It is believed that they have been directly adjudged in a single case only, and then under the qualification of an able dissent. *

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But should this assertion be conceded in its greatest latitude, my reply to it must be firmly and unhesitatingly this -- that in matters involving the meaning and integrity of the Constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great *lex legum.* I too have been sworn to observe and maintain the Constitution. I possess no sovereign prerogative by which I can put my conscience into commission. I must interpret exclusively as that conscience shall dictate. Could I, in cases of minor consequence, consent, in deference to others, to pursue a different course, I should, in instances like the present, be especially reluctant to place myself within the description of the poet -- *"Stat magni nominis umbra."*

The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulgated in the reasoning of this Court in the case of *Brown v. State of Maryland,* reported in 12 Wheat. 419 -- doctrines (and I speak it with all due respect) which I conceive cannot by correct induction be

derived from the Constitution nor even from the grounds assumed for their foundation in the reasoning of the Court in that case, but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these. That under the operation of that provision in the Constitution which confers on Congress the power of regulating commerce with foreign nations &c.;, and by the farther provision which prohibits to the states the power of levying imposts or duties on imports, merchandise, or property imported from abroad -- however completely its transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the federal government, and however absolutely, exclusively, and undeniably it shall have become the property, and passed into the possession, of the citizen resident within the state, and protected both in person and property by the laws of the state -- shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package, or form in which it shall have been imported, nor until (to use the language of the Court) it shall have been "broken up and mingled with the general mass of property."

With regard to this phrase, "broken up and mingled with the mass of property," so often appealed to with the view to illustration, it may be worthwhile to remark in passing how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity. With respect to the phrase above mentioned it may be retorted that a person may import a steam engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the

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general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property or purchased it at home.

By the 6th article and 2d clause of the Constitution, it is thus declared:

"That this Constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land."

This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument and its adaptation to the purposes for which it was created necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the states to all that they have not delegated in coincidence, too, with the possession of every power and right necessary for their existence and preservation, for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers, for there can be no "authority of the United States" save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state. In cases of alleged conflict between a law of the United States and the Constitution or between the law of a state and the Constitution or a statute of the United States, this Court must pronounce upon the validity of either law with reference to the Constitution; but whether the decision of the Court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the Constitution. It cannot be correctly held that a decision, merely because it be by the Supreme Court, is to override alike the Constitution and the laws both of the states and of the United States. Let us test by these principles -- believed to be irrefragable -- the power over foreign commerce vested in Congress by the Constitution, and also the positions sought to be deduced from that grant of power by the argument in *Brown v. State of Maryland.* By art. 1, 8, clause 4, of the Constitution it is declared "that Congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian tribes." It is with the first of the grants in this article that

we have now to deal. The commerce here

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spoken of is that traffic between the people of the United States and foreign nations, by which articles are procured by purchase or barter from abroad, or by which the like subjects of traffic are transmitted from the United States to foreign countries, keeping in view always the essential characteristic of this commerce as stamped upon it by the Constitution -- namely that it is commerce with foreign nations, or in other words that it is external commerce. By this, however, is not meant that it should be external in reference to geographical or territorial lines, but in reference to the parties and the nature of their transactions. The power to regulate this commerce may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may as foreign commerce be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone.

Independently of an express prohibition upon the states to lay duties on imports, this power of regulating foreign commerce may correctly imply a denial to the states of a right to interfere with existing regulations over subjects of foreign commerce; but they must be continuing, and still in reality, subjects of foreign commerce, and such they can no longer be after that commerce with regard to them has terminated, and they are completely vested as property in a citizen of a state, whether he be the first, second, or third proprietor; if this were otherwise, then, by the same reasoning, they would remain imports, or subject of foreign commerce, through every possible transmission of title, because they had been once imported.

Imports in a political or fiscal, as well as in common practical acceptation, are properly commodities brought in from abroad which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the state, or which still are subject to the power of the government for a fulfillment

of the conditions upon which they have been admitted to entrance -- as for instance goods on which duties are still unpaid, or which are bonded or in public warehouses. So soon as they are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political or fiscal or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee, or may have been purchased by cargo, package, bale, piece, or yard, or by hogsheads, casks, or bottles. I can perceive no rational distinction which can be taken upon the circumstance of mere quantity, shape, or bulk, or on that of the number of transmissions through which a commodity may have passed from the first proprietor or of its remaining still with the latter. The

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objection, that a tax upon an article in bulk (the property of a citizen) is forbidden because it is a burden on foreign commerce, whilst a similar burden is permissible on the very same bulk or on fragments of the same article in the hands of his vendee, it would appear difficult to reconcile with sound reasoning. Every tax is alike a burden, whether it be imposed on larger or smaller subjects, and in either mode must operate on price, and consequently on demand and consumption. If, then, there was any integrity in the objection urged, it should abolish all regulations of retail trade, all taxes on whatever may have been imported.

It cannot be correctly maintained that state laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the Constitution, and, I would add, with some regulation actually established by Congress in virtue of that power. In the case of *Brown v. State of Maryland* it is said by the Court that liberty to import implies unqualified liberty to sell at the place of importation. In the argument of this case, the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that liberty to import implies on the part of the states a duty to encourage, if not to enforce, the consumption of foreign

merchandise, arising, it is affirmed, from a farther duty incumbent on the states to regard *a priori* the acts of the federal government as wisest and best, and therefore imposing an obligation on the states for cooperation with them. These very exacting propositions, it is believed, can hardly be vindicated either by the legitimate meaning of words or any correct theory of the constitutional powers of Congress. It cannot be necessary here to institute a criticism upon the words "importation, sale, consumption" in order to show either their etymological or ordinary acceptation or in order to expose the fallacy of the aforegoing new and startling theory. Goods, moreover, may be imported into a country as into a commercial entrepot, for reshipment to other markets, and not for consumption at all.

But where importation may have been made with the direct view to sell, it does not follow by necessary induction that permission for the former implies permission for the latter, nor the power of granting the former the power of conferring the latter, much less that it implies the power or the obligation on the part of the government to command or insure a sale. Whatever might be the case under governments in which power is either absolute or single, it is wholly otherwise under our system of confederated sovereignties. Here, the power of the general government is emphatically delegated and limited, although it is paramount so far as it has been delegated, and when we look for this power of the government in relation to this matter in the Constitution, we find it the power to regulate commerce with foreign nations, it

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being the foreign character of that commerce alone which confers on Congress any power whatsoever with respect to it. It has been urged that the importer pays a duty to the government for permission to introduce and vend his merchandise; that it would be unjust, therefore, to deprive him of the power of vending, as he never would have imported except with the expectation of selling. To this it may, in the first place, be replied, as has been remarked in the argument at the bar, that the question here is one of constitutional power, and if the federal government shall have transcended its legitimate powers, I ask, can it be right in any view to

compensate those who may have suffered by the transgression by authorizing unlimited reprisals upon the states? But in truth no such right as the one supposed is purchased by the importer, and no injury in any accurate sense is inflicted on him by denying to him the power demanded. He has doubtless in view the profits resulting from the sale of his commodities, but he has not purchased and cannot purchase from the government that which it could not insure to him -- a sale independently of the laws and polity of the states. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import, or introduce his merchandise -- the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale.

The want of integrity in the argument under examination is farther exposed by showing that it will not cover the conclusion sought to be drawn from it. If the right of the importer to vend and his exemption from taxation are made to rest on the payment of duties to the federal government, on what foundation must be rested his right and his exemption, in reference to articles on which duties are neither paid nor exacted? Are these to be left exclusively the subjects of state regulation and state taxation? That they must be so left is a logical and inevitable conclusion from the proposition that the right to vend flows from the payment of duties. And then this argument involves the palpable absurdity that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely -- nay, whose introduction is in effect invited and solicited by the federal government -- may be burdened by the states at pleasure.

It has been insisted that, as by treaty stipulations articles of foreign merchandise have been admitted for consumption (and much stress is laid upon this expression) in certain specified

quantities, consequently by such stipulations, forming the supreme law of the land, the free sale of these articles must be an absolute right. In what instances a treaty is or is not the supreme law, or is no law at all, I have already endeavored to distinguish. Passing, therefore, that investigation, it seems very clear that the proposition just adverted to involves a great fallacy. The treaty stipulations here exemplified mean this, and nothing more -- namely that whereas certain enumerated commodities could heretofore be imported only in greater quantities, for the use of those who might choose to buy and consume them, they may hereafter be imported in lesser quantities. These stipulations no more signify that commodities shall be circulated and used free of all internal regulation than they convey a positive mandate for their being purchased and consumed, eaten and drunk, *nolens volens* or at all events. Every state that is in any sense sovereign and independent possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction and in virtue and under the protection of its own laws, whether that control be exerted in taxing it or in determining its tenure, or in directing the manner of its transmission, and this too irrespective of the quantities in which it is held or transferred or the sources whence it may have been derived. Such a power differs entirely from an authority essentially extraneous in its character -- an authority limited and specific, by the very terms which confer it, restricted to action upon the progress of property on its way to complete investment under the laws of the state.

The license laws of Massachusetts, Rhode Island, and New Hampshire now under review impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those states, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it either in appearance or reality; they do not prohibit sales either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority.

These laws are therefore in violation neither of the Constitution of the United States nor of any law nor treaty made in pursuance or under the authority of the Constitution. Viewing them in this character, my cooperation is given in maintaining them, whatever differences of opinion may exist in relation to their policy or necessity. But since, whilst extending to these laws their sanction and support, there have been advanced by others principles and opinions which to me appear to have their source not in the fountain of all legitimate power in this or any other department of the federal government, I cannot by silence seem to assent to those principles

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and opinions, nor put from me the obligation of declaring my dissent from them.

MR. JUSTICE NELSON concurred in the opinions delivered by THE CHIEF JUSTICE and MR. JUSTICE CATRON.

* *See* 25 U. S. 12 Wheat. 449, the opinion of Thompson, Justice.

MR. JUSTICE WOODBURY.

I concur in the conclusion of my brethren as to the judgment which ought to be pronounced in all of the three license cases.

But, differing in some of the reasons for that judgment, and in the limitations and extent of some of the principles involved, and knowing the cases to possess much interest in the circuit to which I belong and from which they all come, I do not feel at liberty to refrain from briefly expressing my views upon them.

The paramount question involved in all the cases is whether license laws by the states for selling spirituous liquors are constitutional. It is true that several other points are raised, as to evidence, the power of juries in criminal prosecutions to decide the law as well as the facts, and other questions not connected with the overruling of any clause in an act of Congress, or treaty, or the Constitution, which was interposed in the defense. But, confined as we are to these last considerations in writs of error to state courts, it would be traveling out of our

prescribed path to discuss at all either the other questions just alluded to or some which have been long and ardently agitated in connection with this subject -- such, for instance, as the expediency of the license laws or the power of a state to regulate in any way the food and drink or clothing of its inhabitants. Fortunately those questions belong to another and more appropriate forum -- the state tribunals.

But, looking to the relations which exist between the general government and the different state sovereignties, the question, whether the laws in these cases are within the power of the states to pass without an encroachment on the authority of the general government is one of those conflicts of laws between the two governments, involving the true extent of the powers in each as regards the other, which is very properly placed under our revision. In helping to discharged that duty on this occasion, I carry with me as a controlling principle the proposition that state powers, state rights, and state decisions are to be upheld when the objection to them is not clear, equally proper as it may be for them, when the objection is clear, to give way to the supremacy of the authorized measures of the general government. *See* Constitution, art. 3.

It is not enough to fancy some remote or indirect repugnance to acts of Congress -- a "potential inconvenience" -- in order to annul the laws of sovereign states and overturn the deliberate decisions of state tribunals. There must be an actual collision, a direct inconsistency, and that deprecated case of "clashing sovereignties,"

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in order to demand the judicial interference of this Court to reconcile them. *McCulloch v. Maryland,* 4 Wheat. 316, 17 U. S. 487 ; 1 Story Com. on Const. 432.

These cases present two leading facts in respect to the material points which ought first to be noticed. Neither of them is a prosecution against the importer of spirit or wine from a foreign country, and in neither has a duty been imposed, or a

tax collected by the state from the original defendant in connection with these articles. From this state of things it follows that however much has been said as to the collision between these license laws and some former decisions of this Court, no such direct issue is made up in either of them.

The case usually cited in support of such a proposition is very different. It is that of *Brown v. Maryland,* 12 Wheat. 419, which was a tax or license required before the sale of an article from the importer of it from a foreign country, and it was an importer alone who called the constitutionality of the law in question. What do these statutes, then, really seek to do? They merely attempt to regulate the sale of spirit or wine within the limits of states in regard to the quantity sold at any one time without a license from the state authorities -- as in the cases from Massachusetts and Rhode Island, and in regard to any sale whatever without such license -- as in the case from New Hampshire.

It is true also that the quantity allowed to be sold in Massachusetts at any one time without a license is not so small as that which is permitted by Congress to be imported in kegs, and in Rhode Island is greater than that which Congress permits to be imported in bottles, and in New Hampshire is no quantity whatever. Yet neither of the laws unconditionally prohibits importations. Indeed neither of them says anything on the subject of importations. The first inquiry then recurs whether they do not all stand on the same platform in respect to this, and without conflicting in this respect with any act of Congress. My opinion is that they do, as none of them, by prohibiting importations, opposes in terms any act of Congress which allows them, and none seems to me to conflict in substance more than form with entire freedom on that subject. Nor in either case do they, in point of fact, amount to a prohibition of importations in any quantity, however small. Under them and so far as regards them, importations still go on abundantly into each of those states. It is manifest also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce on the voyage. The latter affects only the internal business of the state after the foreign importation is completed and on shore. In the next place, in point of fact, neither of

the laws goes so far as to prohibit in terms the sales, any more than the imports, of spirits.

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On looking at the laws this will be conceded. But if such a prohibition existed as to sales, what act of Congress would it come in collision with? None has ever been passed which professes to regulate or permit sales within the states as a matter of commerce. A good reason exists for this, as the subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade as that to regulate foreign commerce is with the general government under the broadest construction of that power.

And what power or measure of the general government would a prohibition of sales within a state conflict with if it consisted merely in regulations of the police or internal commerce of the state itself? There is no contract, express or implied, in any act of Congress that the owners of property, whether importers or purchasers from them, shall sell their articles in such quantities or at such times as they please within the respective states. Nor can they expect to sell on any other or better terms than are allowed by each state to all its citizens, or in a manner different from what has comported with the policy of most of the old states, as well before as since the Constitution was adopted. Any other view would not accord with the usages of the country, or the fitness of things, or the unquestioned powers of all sovereign states, and, as is admitted, even of those in this Union, to regulate both their internal commerce and general police. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations, and also if a merchant extensively engaged in commerce often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another state or abroad. This was the paramount object in the law of Congress, so often cited, as to the importation of kegs of fifteen gallons of brandy -- to have them in proper shape to be re-exported and carried on mules in Mexico rather than to be sold for use here.

I should question the correctness of this objection even were it the doctrine in *Brown v. Maryland,* though I do not regard it as the point there settled or the substantial reason for it. *See* Chief Justice Parker's Opinion in *State of New Hampshire v. Peirce,* in Law Rep. for September, 1845. That point related rather to the want of power in a state to lay a duty on imports.

But it is earnestly urged that as these acts indirectly prohibit sales, such a prohibition of sales is indirectly a prohibition of importations, and importations are certainly regulated by Congress. It is necessary to scrutinize the grounds on which such circuitous reasoning and analogy rest. The sale of spirit being still permitted in all these states, as before remarked, it is first objected that it is

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permitted in certain quantities only, except under license, and that this restricts and lessens both the sales and imports. But the leading object of the license is to ensure the sale of spirit in quantities not likely to encourage intemperance, and at places and times and by persons conducive to the same end. This is the case in New Hampshire, where none can be sold without license, while in the two other states, if no license is granted, the owner may sell in ten or twenty-eight gallons at a time, and in all the three states the owner may without license consume what he imports or store and re-export it for a market elsewhere. So the laws of most of the states forbid sales of property on the Sabbath. But who ever regarded that as prohibiting there entirely either their imports or sales?

It is further argued, however, that the license laws accomplish indirectly what is hostile to the policy of Congress, and thus conflict with the spirit of its acts as much as if they prohibited absolutely both importations and sales. But, if effecting this at all, it must be because they tend to lessen and are designed to lessen the consumption of foreign spirits, and thus help to reduce the imports and sales of them.

The case from New Hampshire is in this respect less open to objection than the others, the spirit there having been domestic. But as it came in coastwise from

another state, it may involve a like principle in another view, and in its prohibitory character as to selling any liquor without license, the New Hampshire statute goes farther than either of the others.

Now can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article is unconstitutional or violates acts of Congress. For that is the essence of this point. So far from this, whatever promotes economy in the use or consumption of any articles is certainly desirable and to be encouraged by both the state and general governments. Improvements of that kind by new inventions and labor-saving machinery are encouraged by patents and rewards. More especially is it sound policy everywhere to lessen the consumption of luxuries, and in particular those dangerous to public morals. So in respect to foreign articles, the disuse of them is promoted by both the general and state governments in several other ways, rather than treating it as unconstitutional or against the acts of Congress, though the revenue as well as consumption be thereby diminished. Thus the former orders the purchase of only domestic hemp for the navy when it can be obtained of a suitable quality and price (Resolution, 18 February, 1843, 5 Stat. 648). And some of the states have often bestowed bounties on the growth of hemp and of wheat and other useful articles. An exception like this would cut so deep and wide into other usages and policy well established as to need no further refutation. But this objection is

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mixed up with another -- that the operation of these license laws is unconstitutional because they lessen the amount of revenue which the general government might otherwise derive from the importation of that which is made abroad. It may be a sufficient reply to this that Congress itself, by its own revenue system, has at times, by very high duties on some articles, meant to diminish their consumption and reduce the revenue which otherwise might be derived from them if allowed to be introduced more largely under a small duty. And in this very article of spirits it has confessedly, from the foundation of the government, made the duties high so as to discourage their use, and this in the very last tariff of 1846, though considered to be more emphatically a mere revenue measure. So its actual policy

for fifteen years has been to lessen the use of spirit in both the army and navy, and by the third section of the Act of Aug. 29, 1842, ch. 267, 5 Stat. 546, this policy is recognized and encouraged by law.

So when resorting to internal duties, for a like reason in part, stills and the manufacture of whiskey have been the first resorted to, and at last, in order to discourage the making of molasses into New England rum, the drawback on the former when manufactured into spirit and exported is allowed to stand now on a footing much less favorable than that on sugar when refined and exported.

Again, where states look to the most proper objects of domestic taxation, it is perfectly competent for them to assess a higher tax or excise, by way of license or direct assessment, on articles of foreign rather than domestic growth belonging to her citizens, and it ever has been done, however it may discourage the use of the former or lessen the revenue which might otherwise be derived from them by the general government or tend to reduce imports, as well as restrict the sale of them when considered of a dangerous character.

The ground is therefore untenable entirely that a course of legislation which serves to discourage what is foreign, whether it be by Congress or the states, is for that reason alone contrary to the Constitution, even if it tend at the same time to reduce the amount of revenue which would otherwise accrue from foreign imports or from those of that particular article.

Importations, then, being left unforbidden in all of these cases, and the right to sell with a license not being prohibited in any of them -- nor without one prohibited, except qualifiedly in two of them, and in the other absolutely, but not affecting foreign imports at all in that case, as the spirit sold there was of domestic manufacture -- I pass to the next constitutional objection.

It has been contended that the sum required to be paid for a license and the penalty imposed for selling without one are in the nature of a duty on imports, and thus come within the principle really settled in *Brown v. Maryland,* and thus conflict with the Constitution. It is conceded that a state is forbidden "to lay any

or duties on imports" without the assent of Congress. Art. 1, 10. But neither of these statutes purports to tax imports from abroad of foreign spirits or imports from another state, either coastwise or by land, of either foreign or domestic spirits. The last mode is not believed to be that referred to in the Constitution, and no regulation has ever been made by Congress concerning it when consisting of domestic spirits, as in the case of New Hampshire, except with a view to prevent smuggling. Act of Congress, Sept. 1, 1789, ch. 11, 25, and Feb. 18, 1793, ch. 8, 14; 1 Stat. 61, 309.

Nor does either of those statutes purport to tax the introduction of an article by the merchant importing it, much less to impose any duty on the article itself for revenue in addition to what Congress requires. Neither of them appears to be, in character or design, a fiscal measure. They do not touch the merchandise till it has become a part of the property and capital of the state, and then merely regulate the disposal of it under license, as an affair of police and internal commerce. They might then even tax it as a part of the commercial stock in trade, and thus subject it, like other property, to a property tax, without being exposed to be considered an impost on imports, so as to conflict with the Constitution. But the penalty and license in these cases are imposed *diverso intuitu,* and not as a tax of any kind. Hence they operate no more in substance than in form as an impost of the prohibited character.

There is no pretense that the penalty is for revenue, and if the small sum taken for a license should ever exceed the expense and trouble of supervising the matter and become a species of internal duty or excise, it would operate on spirit made in the state as well as that made elsewhere, and on others as well as importers, and, like any state tax on local property, or local trade, or local business, be free from any conflict with the Constitution or acts of Congress. And what seems decisive in these causes as to this aspect of the question is that neither of the persons here prosecuted was in fact an importer of foreign spirit or wines, or set up a defense of

that kind as to himself, on the trial, which was overruled in the state courts.

Nor can the proposition, sometimes advanced, be vindicated that this license, if a tax and falling at times on persons not citizens, whether they belong to other states or are aliens, is either unjust or unconstitutional. It falls on them only when within the limits of the state, under the protection of its laws and seeking the privileges of its trade, and only in common with their own citizens. Such taxes are justifiable on principles of international law (Vattel, B. 8, ch. 10, 132), and I can find no clause in the Constitution with which they come in collision.

Again it has been strenuously insisted on in these cases, and perhaps it is the leading position, that these license laws are virtually

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regulations of foreign commerce, and hence, when passed by a state, are exercising a power exclusively vested in the general government, and therefore void. This is maintained whether they actually conflict with any particular act of Congress or not. But, dissenting from any such definition of that power, as thus exclusive and thus abrogating every measure of a state which by construction may be deemed a regulation of foreign commerce, though not at all conflicting with any existing act of Congress or with anything ever likely to be done by Congress, I shall not, on this occasion, go at length into the reasons for my dissent to the exclusive character of this power, because these license laws are not, in my opinion, regulations of foreign commerce, and in a recent inquiry on the circuit I have gone very fully into the question. *United States v. New Bedford Bridge,* in Massachusetts District.

My reasons are in brief:

1. The grant is in the same article of the Constitution, and in like language, with others which this Court has pronounced not to be exclusive, *e.g.,* the regulation of weights and measures, of bankruptcy, and disciplining the militia.

2. There is nothing in its nature, in several respects, to render it more exclusive than the other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the states. But I admit that so far as regards the uniformity of a regulation reaching to all the states it must in these cases, of course, be exclusive, no state being able to prescribe rules for others as to bankruptcy, or weights and measures, or the militia, or for foreign commerce. A want of attention to this discrimination has caused most of the difficulty. But there is much in connection with foreign commerce which is local within each state, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it. Such are the deposit of ballast in harbors, the extension of wharves into tide- water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds.

This local, territorial, and detailed legislation should vary in different states, and is better understood by each than by the general government, and hence, as the colonies under an empire usually attend to all such local legislation within their limits, leaving only general outlines and rules to the parent country at home, as towns, cities, and corporations do it through bylaws for themselves, after the state legislature lays down general principles, and as the War and Navy Departments and courts of justice make detailed rules under general laws, so here the states, not conflicting with any uniform and general regulations by Congress as to foreign commerce,

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must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress. And to hold the power of Congress as to such topics exclusive in every respect and prohibitory to the states, though never exercised by Congress, as fully as when in active operation, which is the opposite theory, would create infinite inconvenience and detract much

from the cordial cooperation and consequent harmony between both governments in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial states in the Union.

If this view of the subject conflicts with opinions laid down *obiter* in some of the decisions made by this Court, 22 U. S. 9 Wheat. 209; 25 U. S. 12 Wheat. 438; 41 U. S. 16 Pet. 543, it corresponds with the conclusions of several judges on this point, and does not, in my understanding of the subject, contradict any adjudged case in point. 18 U. S. 5 Wheat. 49; *Willson v. Blackbird Creek Marsh Company,* 2 Pet. 245; 36 U. S. 11 Pet. 132; 39 U. S. 14 Pet. 579; 41 U. S. 16 Pet. 627, 41 U. S. 664 ; 17 U. S. 4 Wheat. 196.

But without going farther into this question, it is enough here to say that these license laws do not profess to be, nor do they operate as, regulations of foreign commerce. They neither direct how it shall be carried on nor where, nor under what duties or penalties. Nothing is touched by them which is on shipboard or between ship and shore; nothing till within the limits of a state and out of the possession and jurisdiction of the general government.

It is objected in another view that such licenses for selling domestic spirit may affect the commerce in it between the states which by the Constitution is placed under the regulation of Congress as much as foreign commerce.

But this license is a regulation neither of domestic commerce between the states nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the state and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles and bind all residents, citizens or not, by its regulations if they ask its protection and privileges, and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the states can interfere in regulation of foreign commerce. If the proposition was maintainable that without any legislation by Congress as to the trade between the states (except that in coasting, as before explained, to prevent smuggling), anything imported from another state, foreign or domestic, could be sold of right in

the package in which it was imported not subject to any license or internal regulation of a state, then it is obvious that the whole license system may be evaded and nullified either from abroad or from a neighboring state. And the more especially can it be done from the latter, as

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imports may be made in bottles of any size down to half a pint of spirits or wines, and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.

The apprehension that the states, by these license systems, are likely to impair the freedom of trade between each other is hardly verified by the experience of a half-century. Their conduct has been so liberal and just thus far on this matter as never to have called for the legislation of Congress, which it clearly has the power to make in respect to the commerce between the states whenever any occasion shall require its interposition to check imprudences or abuses on the part of anyone of them towards the citizens of another. Some have objected, next, that these laws violate our foreign treaties, such as those, for example, with Great Britain and Prussia, which stipulate for free ingress and egress as to our ports as well as for a participation in our interior trade. *See* 8 Stat. 116, 228, 378. But those arrangements do not profess to exempt their people from local taxation here, or local conformity to license systems, operating, as these state laws do, on their own citizens and their own domestic products in the same way, and to the same extent as on foreign ones. And neither of those laws in this case forbids access to our ports or importation into the several states by the inhabitants of any foreign countries.

In settling the question whether these laws impugn treaties or regulate either foreign commerce or that between the states or impose a duty on imports, ordinary justice to the states demands that they be presumed to have meant what they profess till the contrary is shown. Hence, as these laws were passed by states possessing experience, intelligence, and a high tone of morals, it is neither legal

nor liberal to attempt to nullify them by any forced construction, so as to make them regulations of foreign commerce, or measures to collect revenue by a duty on foreign imports, thus imparting to them a character different from that professed by their authors, or from that which, by their provisions and tendency, they appear designed for. These states are as incapable of duplicity or fraud in their laws, of meaning one thing and professing another, as the purest among their accusers, and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other designs and to construe their legislation as of a sinister character which they never contemplated. Thus, on the face of them, these laws relate exclusively to the regulation of licensed houses and the sales of an article which, especially where retailed in small quantities, is likely to attract together within the state unusual numbers and encourage idleness, wastefulness, and drunkenness. To mitigate if not prevent this last evil was undoubtedly their real design.

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From the first settlement of this country and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor. And without entering here into the question whether legislation may not, on this as other matters, become at times intemperate and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social, and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and cooperate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirit.

They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other or sinister or improper view can therefore, either with delicacy or truth, be imputed to them.

But I go further on this point than some of the Court, and wish to meet the case in front and in its worst bearings. If, as in the view of some, these license laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of a state, as being dangerous to public health and morals, or were virtual taxes on them as state property in a fair ratio with other taxation, it does not seem to me that their conflict with the Constitution would, by any means, be clear. Taking for granted, till the contrary appears, that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things, except where within the limits of state territory, they would appear entirely defensible as a matter of right, though prohibiting sales.

Whether such laws of the states as to licenses are to be classed as police measures or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if they are necessary to the wellbeing and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either proper or apparently embraced in the Constitution. So whether they conflict or not indirectly and slightly with some regulations of foreign commerce, after the subject matter of that commerce touches the soil or waters within the limits of a state, is not perhaps very material if they do not really relate to that commerce or any other topic within the jurisdiction of the general government.

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As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports, and harbors within her territory, *intra fauces terrae,* as on wharves and shores or interior soil. And there can be little check on such legislation beyond the discretion of each state if we consider the great conservative reserved powers of the states, in their quarantine or health systems,

in the regulation of their internal commerce, in their authority over taxation, and in short every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals.

It is conceded that the states may exclude pestilence, either to the body or mind, shut out the plague or cholera, and, no less, obscene paintings, lottery tickets, and convits. *Holmes v. Jennison,* 14 Pet. 568; 22 U. S. 9 Wheat. 203; 36 U. S. 11 Pet. 133. How can they be sovereign within their respective spheres without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals or public safety or the public prosperity? *See* Vattel, B. 1, ch. 18, 219, 231.

The list of interdicted articles and persons is a long one in most European governments, and, though in some cases not very judicious or liberal, is in others most commendable, and the exclusion of opium from China is an instance well known in Asia and kindred in its policy. The introduction and storage of gunpowder in large quantities is one of those articles long regulated and forbidden here. New York v. Miln, 11 Pet. 102. Lottery tickets and indecent prints are also a common subject of prohibition almost everywhere. 6 Greenl. 412; 4 Blackf. 107. *See* the tariff of 1842; 5 Stat. 566, 28. And why not cards, dice, and other instruments for gaming, when thought necessary to suppress that vice? In short, on what principle but this rests the justification of the states to prohibit gaming itself, wagers, champerty, forestalling -- not to speak of the debatable cases of usury, marriage brokerage bonds and many other matters deemed either impolitic or criminal?

It might not comport with the usages or laws of nations to impose mere transit duties on articles or men passing through a state, and however resorted to in some places and on some occasions, it is usually illiberal, as well as injudicious. Vattel, B. 8, ch. 10. And if resorted to here, in respect to the business or imports of citizens of other states, might clearly conflict with some provisions of the Constitution conferring on them equal rights, and be a regulation of the commerce between the states, the power over which they have expressly granted to the general government. But the present case is not of that character. Nor would it be

if prohibiting sales within the acknowledged limits of a state in cases affecting public morals or public health. Nor is there in this case

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any complaint, either by a foreign merchant or foreign nation, that treaties are broken, or by any of our own states or by Congress, that its acts or the Constitution have been violated.

There are additional illustrations of such powers, existing on general principles in all independent states, given in Puffendorf, B. 8, ch. 5, 30, as well as in various other writers on national law. And those exercised under what he terms "sovereign or transcendental property" (7th), and those which we class under the right of "eminent domain," are recognized in the Fifth Amendment to the Constitution itself, and go far beyond this.

Much more is there an authority to forbid sales where an authority exists both to seize and destroy the article itself, as is often the case at quarantine.

So the power to forbid the sale of things is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude persons. And yet who does not know that slaves have been prohibited admittance by many of our states, whether coming from their neighbors or abroad? And which of them cannot forbid their soil from being polluted by incendiaries and felons from any quarter?

Nor is there in my view any power conferred on the general government which has a right to control this matter of internal commerce or police, while it is fairly exercised so as to accomplish a legitimate object, and by means adapted legally and suitably to such end alone. New Hampshire has for many years made it penal to bring into her limits paupers even from other states, and this is believed to be a power exercised widely in Europe among independent nations, as well as in this country among the states. N.H. Rev.Stat. Paupers 140.

It is the undoubted and reserved power of every state here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government or its agents or navigators possess any right to make another state, against its consent, a penitentiary or hospital or poor house farm for its wretched outcasts or a receptacle for its poisons to health and instruments of gambling and debauchery. Indeed, this Court has deliberately said

"We entertain no doubt whatsoever that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves and remove them from their borders and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers."

Prigg v. Pennsylvania, 16 Pet. 625.

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There may be some doubt whether the general government or each state possesses the prohibitory power, as to persons or property of certain kinds, from coming into the limits of the state. But it must exist somewhere, and it seems to me rather a police power, belonging to the states, and to be exercised in the manner best suited to the tastes and institutions of each, than one anywhere granted or proper to the peculiar duties of the general government. Or, if vested in the latter at all, it is but concurrent. Hence, when the latter prohibited the import of obscene prints in the tariff of 1842, it was a novelty, and was considered by some more properly to be left to the states, as it opened the door to a prohibition, or to prohibitory duties, to many articles by the general government which some states might desire, but others not wish to come in as competitors to their own manufactures. But, as previously shown, to prohibit sales is not the same power,

nominally or in substance, as to prohibit imports.

It is possible that under our system of double governments over one and the same people, the states cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to the public peace or public morals or general health. This might perhaps trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the Constitution which forbids states to lay duties on imports. But after articles have come within the territorial limits of states, whether on land or water, the destruction itself of what contains disease and death, and the longer continuance of such articles within their limits or the terms and conditions of their continuance, when conflicting with their legitimate police, or with their power over internal commerce, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of state sovereignty, and indispensable to public safety. Such extraordinary powers, I concede, are to be exercised with caution, and only when necessary or clearly justifiable in emergencies on sound and constitutional principles, and, if used too often or indiscreetly, would open a door to much abuse. But the powers seem clearly to exist in the states, and ought to remain there, and though in this instance they are not used to this extent, but still, as respectable minorities within these three states believe not to be useful, and as some other states do not think deserving imitation, yet they are used as the competent and constitutional power within each has judged to be proper for its own welfare, and as does not appear to be repugnant to any part of the Constitution or a treaty or an act of Congress. They must therefore not be interfered with by this Court, and the more especially as one reason why these powers have been left with the states is that the subject matter of them is better understood by each state than by the Union, and the policy and opinions and usages of one

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state in relation to some of them may be very unlike those of others, and therefore require a different system of legislation. Where can such a power also be safer lodged than with those public bodies or states who are themselves to be the greatest sufferers in interest and character by an improper use of it? If is should

happen at any time to be exercised injudiciously, that circumstance would furnish a ground for an appeal rather to the intelligence and prudence of the state, in respect to its modification or repeal, than an authority for this Court by a writ of error to interfere with the well considered decision of a state court, and reverse it and pronounce a state law null and void merely on that account.

Many state laws are such that their expediency and justice may be doubted widely and by this tribunal, but this confers no authority on us to nullify them, nor is any such authority for such a cause conferred on Congress by any part of the Constitution.

The states stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws, and while they take care not to violate clearly any portion of the Constitution or statutes of the general government, our duty to that Constitution and laws, and our respect for states rights, must require us not to interfere.

MR. JUSTICE GRIER.

I concur with my brethren in affirming the judgment in this and the preceding cases on the same subject, but for reasons differing somewhat from those expressed by the other members of the Court, and as I concurred mainly with the opinion delivered by MR. JUSTICE Mc LEAN in the case of *Thurlow v. Massachusetts,* I had concluded to be silent, and therefore am not prepared to express my views at length. I take this occasion, however, to remark that the true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

It has been frequently decided by this Court

"that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the states, or restrained by the Constitution of the United States, and that consequently, in relation to these, the authority of a state is complete, unqualified, and conclusive."

Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of public peace, health, and morals, must come within this category.

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As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, *"salus populi suprema lex."*

If the right to control these subjects be "complete, unqualified, and exclusive" in the state legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done not from any power which the states assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the

public welfare must of necessity have full and free operation according to the exigency which requires their interference.

It is not necessary for the sake of justifying the state legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power or of legislation as between the states and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people.

ORDER

Samuel Thurlow v. Commonwealth of Massachusetts

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court, holden in and for the County of Essex in the Commonwealth of Massachusetts, and was argued by counsel. On consideration whereof it is now here ordered and adjudged

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by this Court that the judgment of the said Supreme Judicial Court in this cause be and the same is hereby affirmed with costs.

ORDER

Joel Fletcher v. State of Rhode Island and Providence Plantations

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the County of Providence and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

ORDER

Andrew Peirce, Junior, and Thomas W. Peirce v. State of New Hampshire.

This cause came on to be heard on the transcript of the record from the Superior Court of Judicature in and for the First Judicial District of the State of New Hampshire and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Superior Court of Judicature in this cause be and the same is hereby affirmed with costs.

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