Please try to picture the times in which Chief Justice John Marshall presided over the High Court. This first case to interpret the Commerce Clause was decided in 1824, early on in the experiment of America. The States had relatively recently given up a good deal of their sovereignty to become one Nation. Here we have a classic case pitting the power of States against the power of the Federal Government, all to be decided by the Supreme Court. This is the essence of high drama. The words of Marshall in 1824 will become more important for today than you may realize. Enjoy!

GIBBONS v. OGDEN

SUPREME COURT OF THE UNITED STATES
22 US 1
March 2, 1824

[The New York legislature awarded Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within its jurisdiction for boats moved by fire or steam for a term of years. The law authorized the courts to restrain any other person from navigating those waters with boats of that description. Livingston and Fulton assigned their rights to John R. Livingston who then assigned his rights to Aaron Ogden to navigate the waters between Elizabethtown (and other places in New Jersey) and New York City. As one Thomas Gibbons was in possession of two steam boats (the "Stoudinger" and the "Bellona") which were running between New York and Elizabethtown in violation of the exclusive privilege conferred on Ogden, Ogden sought an injunction to restrain Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. Ogden prevailed. Gibbons contends that the boats employed by

him were duly enrolled and licensed in carrying on the coasting trade by an act of Congress and that the New York laws are unconstitutional.]

...**By the law of New York**, no one can navigate...[its] waters...by steam vessels, without a license from the grantees of New York, under penalty of forfeiture of the vessel.

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

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

A study of the Constitution the ELL way is, hopefully, as much fun for its lessons in the broader aspects of history as for its lessons in the law. Can you believe this scenario? If it were not so hotly contested (and the outcome were not of such great importance), it would be laughable.

OPINION: Mr. Chief Justice MARSHALL...[The New York laws which purport to give exclusive privilege to the use of its waters are said by Gibbons] to be repugnant –

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

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

The State of New York maintains the constitutionality of these laws...Reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

Justice Marshall certainly did have the added burden of deciding, for the first time, many of our most fundamental issues. And, "ya gotta luv" the language of the times. In today's rhetoric, Marshall said, "Let's compare the role of the States before and after ratification."

This instrument contains an enumeration of powers expressly granted by the people to their government...The words are, **"Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."**

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

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

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

> As you might expect, Justices on both sides of commerce clause issues cite this case (and Marshall, in particular); however, they cite him in support of positions that clash. We will dissect *Gibbons v. Ogden* very carefully while we are here. Then, you can judge for yourself as to which side of the fence Marshall would have set up housekeeping in today's world. Of course, the outcome of this case on these facts is admittedly far more predictable than the outcome of the complex situations of today.

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

It has, we believe, been universally admitted, that these words comprehend every species of

commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend...

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

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

> You see, the problem or question has to do with "how far the power of Congress extends" in the area of "commerce." Congress has the power to regulate commerce "among" the several states. This is one of the "enumerated" powers. That means that the power of Congress to act has limits. The Tenth Amendment even says that the powers not delegated to the United States (Congress) nor prohibited by the Constitution to the States, are reserved to the States. I am not sure what Justice Marshall means when he says that a power to regulate commerce that is completely internal to a State would be "inconvenient and certainly unnecessary." If you are in Congress and you like power, I would think that every pound of it you could get would be far from "inconvenient" or "unnecessary." Perhaps we will see this phrase in the future. For now, I am more interested in the phrase "does not **extend to** or **affect** other States." Stay tuned!

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

> In other words, if Congress had been granted unlimited power, there would be no need to list the granted powers. This area of the law defines who we are as a Nation. It defines federalism. That is, we basically have two governments — State government and National government. We will be trying to determine where the power of one stops and the other picks up. Repeating...

The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; **but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some**

of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Yes, but what is "completely internal commerce"? I find the phrase "with which it is not necessary to interfere" to be of great interest.

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

This principle is...more clear when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States...The power of Congress, then, **whatever it may be**, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry -- **What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power...is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, <u>other than prescribed in the constitution</u>...**

Oh, my! Let's remember this definition. The "power to regulate" is the "power to prescribe the rule by which commerce is to be governed.”

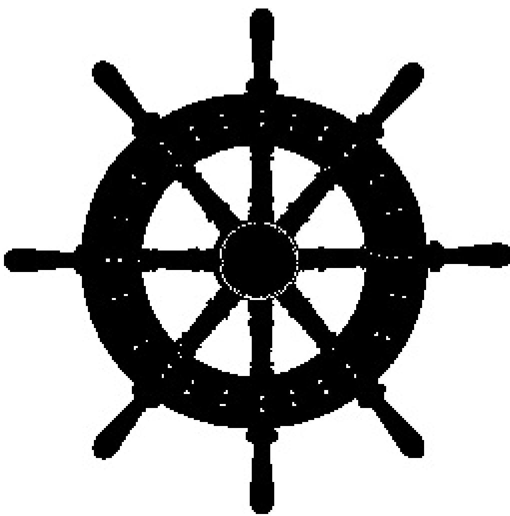
"The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be...connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. But it has been urged with great earnestness...that...the States may...exercise the same power within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an

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

Ogden contends that the power of Congress to regulate "commerce" (inclusive of "navigation") is not necessarily exclusive; i.e., that the States also have such power "within their jurisdictions."

[Gibbons contends that the power granted to Congress is exclusive and not to be shared by the States.]

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



[C]an a State regulate commerce with foreign nations and among the States, while Congress is regulating it?

[Counsel for Ogden] answer this question in the affirmative, and rely very much on the restrictions in the 10th [Amendment], as supporting their opinion...

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

So, a State's inspection laws "act upon the subject **before** it becomes an article of commerce **among** the States." Perhaps we should remember this concept, as well.

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

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

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

[T]he framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is

the supreme law...In every such case, the act of Congress...is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar,...Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for [Ogden] contend, that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise...

It would be contrary to all reason...to say that...the State of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

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

The first section declares that vessels...[who have a license required by the act] "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships of vessels employed in the coasting trade." This section seems to the Court to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade...[T]he operative words of [Gibbon's license] are, "license is hereby granted for the said steam-boat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

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

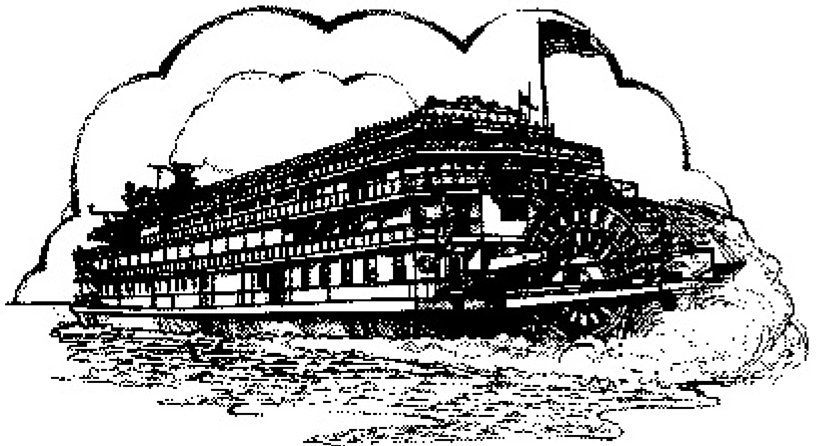
But, if the license be a permit to carry on the **coasting trade**, [Ogden] denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of [Gibbons] were, we are told, employed in the transportation of **passengers**; and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

Man, this Ogden guy just will not give up!

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire...**A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally...**

Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them...

If, then, it were even true, that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license...But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the Court. **The laws of New York, which grant the exclusive privilege set up by [Ogden], take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind...**The [lawsuit] does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief...[The injunction restrains] these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever. The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.



In considering this question, the first idea which presents itself, is, that the laws of Congress for the

regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces every thing that the Legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steam boats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown, upon him who would introduce a distinction to which the words of the law give no countenance...But all inquiry into this subject seems to the Court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steam boats."

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

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

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

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

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To my way of thinking, this paragraph could be the most important in the case and one of the most important in any case. Even it is subject to differing views, but here is my take on it. [First Sentence.] **Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.** [My interpretation.] If we let our thinking get too far afield (into the metaphysical) and we believe that in close cases State power should be preferred over National power, the human mind can always come up with "close questions" in support of State power. So much so that we might as well not have an enumerated grant of power in Article I. I would add that metaphysical thinking can work the other way, as well, into a position that we might as well grant all power to Congress under the umbrella of all commerce.

[Second and Third Sentence.] **They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.**

[My interpretation.] Isn't Marshall saying that, when you get down to it, ingenious minds can stretch simple truths so far that no one would have ever predicted some of the arguments men raise. I get the feeling he is saying, "Keep it simple. Determining what belongs to the States and what belongs to Congress wasn't meant to be all that difficult."

CONCURRENCE: Mr. Justice JOHNSON. [Not Provided.]

DECREE...[T]his Court is of opinion, that the several licenses to the steam boats the Stoudinger and the Bellona, to carry on the coasting trade...gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, **any law of the State of New York to the contrary notwithstanding**; and that so much of the several laws of the State of New York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York, by means of fire or steam, **is repugnant to the said constitution, and void.** This Court is, therefore, of opinion, that the decree of the Court of New York...which perpetually enjoins...Gibbons...from navigating the waters of the State of New York with the steam boats the Stoudinger and the Bellona, by steam or fire, is erroneous, and...is hereby reversed and annulled...