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## The *Gibbons* Fallacy

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## ARTICLES

### THE *GIBBONS* FALLACY

*Richard Primus*\*

#### ABSTRACT

*In Gibbons v. Ogden, Chief Justice John Marshall famously wrote that “the enumeration presupposes something not enumerated.” Modern courts use that phrase to mean that the Constitution’s enumeration of congressional powers indicates that those powers are, as a whole, less than a grant of general legislative authority. But Marshall wasn’t saying that. He wasn’t talking about the Constitution’s overall enumeration of congressional powers at all. He was writing about a different enumeration—the enumeration of three classes of commerce within the Commerce Clause. And Marshall’s analysis of the Commerce Clause in Gibbons does not imply that the enumerated powers of Congress must in practice authorize less legislation than a grant of general legislative authority would.*

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“The enumeration presupposes something not enumerated[.]”

—Chief Justice John Marshall, *Gibbons v. Ogden*<sup>1</sup>

“I do not think it means what you think it means.”

—Inigo Montoya, *The Princess Bride*<sup>2</sup>

## INTRODUCTION

The federal government is a government of enumerated powers. That axiom, which we can call the *enumeration principle*, is a fundamental creed of American constitutional law. The enumeration principle is generally taken to imply a further proposition, the *internal-limits canon*, which holds that the powers of Congress are limited even without reference to affirmative prohibitions like those in the Bill of Rights.<sup>3</sup> Congress can legislate only on the basis of its enumerated powers, and the fact that the powers of Congress are enumerated, the theory runs, indicates that the sum total of Congress’s powers is less than plenary legislative authority.<sup>4</sup>

When twenty-first century writers want to make the point that the enumeration of Congress’s powers indicates that those powers have limited

<sup>1</sup> 22 U.S. (9 Wheat.) 1, 195 (1824).

<sup>2</sup> THE PRINCESS BRIDE (Act III Communications 1987).

<sup>3</sup> An *internal limit* on a governmental power is one that inheres in the grant of the power itself. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 297 (2d ed. 1988) (explaining that internal limits are those which are “inherent in the grants of power themselves.”). The relevant contrast is with *external limits*, which block the exercise of power on the basis of some other source of authority. See *id.* (describing external limits on congressional power as limits rooted, not in the affirmative grants of particular powers to Congress, but in the general structure of the Constitution or in particular prohibitory texts in the Constitution, such as those in the Bill of Rights). Questions about the internal limits of congressional powers thus include: “Is this law a regulation of commerce?” and “Is this law a tax?” Questions about the external limits of congressional powers include: “Does this law abridge the freedom of speech?” and “Is this law a bill of attainder?” The internal-limits canon insists that the powers of Congress are, collectively, subject to meaningful internal limits—that is, that there are things that Congress cannot do before one even begins to ask questions about free speech or bills of attainder.

<sup>4</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (striking down the Gun-Free School Zones Act of 1990 on the theory that upholding the Act would fail to respect the principle that the enumerated powers of Congress are less than a general police power).

scope, they cite a famous dictum from Chief Justice John Marshall's opinion in *Gibbons v. Ogden*: "The enumeration presupposes something not enumerated . . ."<sup>5</sup> In *United States v. Lopez*, a case that turned largely on the idea that the powers of Congress must not be construed as the equivalent of a general police power, the Court's seventeen-page majority opinion quoted Marshall's language three separate times.<sup>6</sup> In the twenty years since *Lopez*, the dictum has been used that same way in a series of leading Supreme Court opinions addressing the outer bounds of Congress's enumerated powers.<sup>7</sup> Academic writers across the jurisprudential spectrum use Marshall's dictum in the same way.<sup>8</sup>

Because John Marshall lived at the dawn of the Republic, and because the *Gibbons* dictum is taken to state a fundamental principle of constitutional interpretation, it is easy to imagine that constitutional lawyers have always quoted Marshall's formula as they do today—that is, as if it meant that the powers of Congress must add up to less than a general police power. But they haven't. On the contrary, this use of *Gibbons* was new in the 1990s. Before the *Lopez* litigation, no reported decision of any American court, state or federal, ever used the *Gibbons* dictum to mean that the powers of Congress are, collectively, less than a grant of general legislative jurisdiction.<sup>9</sup> In short, the present use of Marshall's dictum to support the internal-limits canon is not a long-traditional practice in constitutional law. It is a relatively new departure.

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<sup>5</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 195.

<sup>6</sup> See *Lopez*, 514 U.S. at 553, 566–67 (quoting Chief Justice Marshall's language in *Gibbons* regarding the implication of Congress' enumerated powers three separate times).

<sup>7</sup> See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2099 (2014) (construing the limits of the treaty power); *United States v. Kebedeaux*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring) (construing the limits of the Necessary and Proper Clause); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577, 2591 (2012) (Roberts, C.J.) (construing the limits of the Commerce Clause).

<sup>8</sup> See, e.g., David A. Strauss, *Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 45 (2015) (reading the *Gibbons* dictum as expressing the idea that the powers of Congress cannot reach all possible objects of legislation); Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1064, 1064 n.35 (2015) (using the *Gibbons* dictum to summarize the idea that the enumeration limits Congress); *id.* at 1066 (referring to the *Gibbons* dictum as a statement by Marshall about the limits of "national powers"); Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 YALE L.J.F. 180, 182 (2014), <http://www.yalelawjournal.org/forum/the-sum-of-all-delegated-power> (treating the *Gibbons* dictum as if it articulated the idea that the Constitution's enumeration of Congressional powers is limiting).

<sup>9</sup> No reported case cited the relevant language at all between *St. Louis Sw. Ry. Co. v. Allen*, 187 F. 290, 301–02 (E.D. Ark. 1911) and *Lopez v. United States*, 2 F.3d 1342, 1361 (5th Cir. 1993). When *Lopez* reached the Supreme Court, that Court picked up the Fifth Circuit's use. See *Lopez*, 514 U.S. at 553, 566, 567 (incorporating relevant *Gibbons* language that "enumeration presupposes something not enumerated" three separate times in the majority opinion).

It is also a mistake. Courts before *Lopez* did not quote Marshall's dictum to make the point that the powers of Congress cannot collectively be tantamount to general legislative jurisdiction because, to put it baldly, that isn't what Marshall was saying. Indeed, Marshall was not articulating a limit on federal regulation at all.

Marshall in *Gibbons* was making a different point—one that went not to federal but to *state* regulatory power. He was saying that so long as no federal law applied, states were free to regulate their own internal commercial affairs. That states can regulate their internal commercial affairs in the absence of federal law seems obvious today, so much so that it might seem odd that Marshall would have thought it a necessary to say so. But in 1824, the idea that states could regulate their internal commerce in the absence of federal law was a point that needed making.

Nineteenth-century courts understood perfectly well which point Marshall meant to make. Every judicial opinion to cite Marshall's *Gibbons* dictum during the nineteenth century cited the language as justification for state regulation in the absence of federal law, not as a reason why some federal law might be invalid.<sup>10</sup> Today, of course, courts and commentators adduce the *Gibbons* dictum as if it stated a limit on federal legislation and in particular as if it articulated the idea that the enumeration of congressional powers necessarily limits what Congress can do. In so doing, modern writers miss what Marshall was saying and use him to say something he did not mean.

This misreading matters, and not only because as a general matter one should not present people as saying things they did not say. It matters because, within American legal discourse, the fact that Marshall held a view in a famous case counts as a reason for taking that view seriously—perhaps even for regarding it as a presumptively correct statement of constitutional law. The internal-limits canon—that is, the idea that the powers of Congress must, collectively, be construed as limited even before one considers external limits like those in the Bill of Rights—should not be afforded that kind of authority. The internal-limits canon is, to be sure, a traditional idea in constitutional law, and it is widely taken to be correct. But for all its orthodoxy, the canon is unsound.

Yes, the federal government is a government of enumerated powers. But as I have explained elsewhere, the fact that the powers of Congress are enumerated does not mean that those powers authorize less legislation than

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<sup>10</sup> See, e.g., *Geer v. Connecticut*, 161 U.S. 519 (1896) (upholding a Connecticut law regulating the killing of game); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (upholding a Maryland law requiring a license for the selling of imported goods).

a grant of general legislative authority would.<sup>11</sup> On a proper understanding of constitutional text, history, and structure, the powers of Congress might in practice be sufficient to let Congress enact any legislation not affirmatively blocked by some constitutional prohibition, like those in the Bill of Rights. In the end, whether the powers of Congress are collectively sufficient to warrant any particular legislation is a question that can only be answered by examining the powers Congress has, interpreting them sensibly, and applying them to the social world that exists at any given time. Maybe, as applied to that world, the powers of Congress taken collectively are not as broad as a general police power would be. But maybe they are.

My complete argument for this view is complex, and I will not try to repeat it here in compressed form. Readers who are interested should simply confront that argument where I have offered it.<sup>12</sup> For present purposes, suffice it to say that neither the text of Article I nor that of the Tenth Amendment establishes the internal-limits canon, unless those texts are read in light of a theory of federalism on which a limiting enumeration is necessary to preserve the federal structure, or a theory of originalist fidelity on which the Founding design requires the enumeration to be limiting, or some combination of the two. And neither of those theories is correct. Federalism neither requires, nor is even particularly assisted by, a limiting enumeration. It is better protected by more effective constitutional mechanisms, some of which are external limits on Congressional power (like the anticommandeering rule<sup>13</sup>) and some of which are built into the structure and practical mechanics of government (like the broad range of practices and relationships that fall under the headings of process federalism and cooperative federalism<sup>14</sup>). Neither the text of the Constitution nor fidelity to the Founding design requires us to accomplish through the enumeration of congressional powers what is much better accomplished with these other mechanisms. The Constitution clearly imposes process limits (like bicameralism) and external limits (like those associated with the Bill of Rights) on Congress. Whether it also imposes internal limits is a matter of contingency: it depends on the best constructions of the various powers delegated to Congress and then upon how those powers actually apply to the social

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11 See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 580-81 (2014) (arguing that the “internal-limits canon” is unsound).

12 *Id.*

13 See, e.g., *New York v. United States*, 505 U.S. 144, 161 (1992) (rejecting a congressional power that would allow Congress to “commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

14 See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 584-88 (2011) (describing varying forms of process and cooperative federalism).

world. Maybe that analysis would reveal a gap between what Congress can do and what it could do with a grant of general legislative authority, and maybe not, and the answer could vary over time. But nothing in a proper understanding of constitutional text, history, and structure requires that the sum total of Congress's powers authorizes less legislation than a grant of general jurisdiction would.<sup>15</sup>

If I am right that the internal-limits canon is not a necessary principle of constitutional interpretation, then the idea that the enumeration principle implies the internal-limits canon is not just a fallacy but a dangerous fallacy. The idea that the powers of Congress must have internal limits prompts courts to strike down legislation that should properly be considered valid. *Lopez* itself offers an example of a court striking down federal legislation largely on the theory that the powers of Congress must be subject to internal limits, as does *United States v. Morrison*.<sup>16</sup> The same dynamic nearly repeated itself in *NFIB v. Sebelius*, with massively greater consequences.<sup>17</sup> To be sure, if the internal-limits canon were a sound rule of constitutional law, these cases might illustrate appropriate judicial implementation of that canon. But if the internal-limits canon is unsound, then it is seriously problematic for courts to invalidate the duly enacted policy choices of the electorate's democratically chosen representatives for no better reason than the claim that the powers of Congress must have meaningful internal limits. To avoid that danger, constitutional lawyers must rethink the orthodox view that the internal-limits canon is correct. And as part of the effort to prompt constitutional lawyers to rethink a settled idea, it is important to show that key sources of authority that people think support that idea—like Marshall's dictum in *Gibbons*—actually do nothing of the kind.

To be sure, the idea that the Congress lacks a police power does not rest on Marshall's dictum alone. It rests also on a traditional set of textual, structural, and originalist arguments. But the authority of the great Chief Justice matters in the shaping of constitutional intuitions. When lawyers hear the traditional arguments in favor of the internal-limits canon, the sense that Marshall articulated that canon as a plain proposition of constitutional law makes it easier for them to assume that the conclusion is correct

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15 Again, my perspective on this point departs from settled orthodoxy, and I do not pretend to have established it in the preceding paragraphs. Readers who want to decide whether I might be right should read the full argument where I have offered it. See Primus, *supra* note 11.

16 See *United States v. Morrison*, 529 U.S. 598, 613, 617–19 (2000) (reasoning that the Commerce Clause must not be construed in a way that would permit Congress to exercise a police power); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (reasoning that upholding the Gun-Free School Zones Act would be tantamount to recognizing a general police power in Congress).

17 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (upholding the Patient Protection and Affordable Care Act of 2010 as being within Congress's power to tax but not an appropriate exercise of power under the Commerce Clause).

and perhaps accordingly to overlook the weaknesses of the arguments that supposedly make the canon correct. That is why the Supreme Court from *Lopez* to *Bond* has quoted the *Gibbons* dictum, after all: to mobilize Marshall's authority in support of the internal-limits canon.<sup>18</sup> So to dislodge the prevailing conviction that the powers of Congress cannot be tantamount to general legislative authority, it is important to show that Marshall said nothing of the kind.

The first important way in which modern courts and scholars misread Marshall's dictum is shockingly basic: they mistake which enumeration Marshall was discussing. When modern courts quote Marshall as saying that the enumeration presupposes something unenumerated, they proceed as if the enumeration Marshall had in mind is the enumeration of congressional powers in the eighteen clauses of Article I, Section 8—or, more broadly, the enumeration in that Section combined with the many other constitutional clauses specifying powers of Congress. On that understanding, to say that the enumeration presupposes something not enumerated is to say that the Constitution's overall catalog of particular congressional powers indicates a constitutional purpose to deny Congress the ability to pass some laws it could pass if it enjoyed a general police power.<sup>19</sup> But Marshall was not saying that. Indeed, he could not possibly have been saying that, because Marshall was not talking about the Constitution's overall enumeration of congressional powers at all. He was talking only about a more limited enumeration, one that occurs inside of one particular clause: Article I, Section 8, clause iii, which deals with congressional power over commerce.

The Commerce Clause states that Congress has power to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>20</sup> Marshall read that language as an enumeration—that is, a list<sup>21</sup>—of three kinds of commerce to which federal power extends. That enumeration, Marshall wrote, "presupposes something not enumerat-

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18 See *supra* notes 6–7 and accompanying text (identifying language in contemporary Supreme Court decisions which quote the dictum in *Gibbons* to address the outer limit of Congress's enumerated powers).

19 See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (construing the Constitution as conferring upon Congress less than a general police power); *United States v. Kebodeaux*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring) (emphasizing that Congress does not have a federal police power); *Sebelius*, 132 S. Ct. at 2577 (insisting that Congress's enumerated powers are not a general authority to perform all the conceivable functions of government).

20 U.S. CONST. art. I, § 8, cl. 3.

21 Strictly speaking, an "enumeration" assigns numbers to things on a list. In that sense, neither the Commerce Clause nor Section 8 overall actually "enumerates" the powers of Congress. But constitutional discourse uses the term "enumerate" in this context to refer to a list of separately specified powers, whether or not the items on the list are given numbers.



ed.”<sup>22</sup> To be more specific, Marshall read the Commerce Clause to presuppose a fourth kind of commerce, namely intrastate commerce, that was not within the power conferred.<sup>23</sup> But Marshall did not say that *every* enumeration presupposes something not enumerated. In particular, he did not say that the enumeration of Congress’s powers in the eighteen clauses of Section 8 (or in those eighteen clauses plus the clauses outside Section 8 in which the Constitution specifies powers of Congress<sup>24</sup>) presupposes something not enumerated. He said only that the enumeration in Clause iii had such a presupposition.

It is, moreover, a good thing that Marshall did not make the broader statement that every enumeration presupposes something not enumerated. Had he done so, he would have professed a clear falsehood. Different enumerations are different from one another: some enumerations presuppose things not enumerated, and some enumerations are exhaustive. When I enumerate the days of the week, I name all seven. When I offer my kids chocolate, vanilla, or strawberry ice cream, I might or might not have named all the flavors in the freezer. And when a priest blesses his congregation in the name of the Father, the Son, and the Holy Spirit, he does not imply the existence of some fourth branch of the deity whose blessing is withheld. In short, it is not the case that enumerations generally presuppose things not enumerated. Some do, and some do not.<sup>25</sup>

One might think that Marshall’s exclusion of intrastate commerce from the commerce power does mean that Congress’s powers are, collectively, less than a general police power, not because all enumerations presuppose things not enumerated but simply because Marshall’s dictum identified something that Congress’s enumerated powers do not reach: intrastate commerce. But that thought would be mistaken, in part because Marshall’s *Gibbons* dictum did not purport to exempt intrastate commerce from congressional regulation. Marshall wrote that Congress could not regulate purely intrastate commerce *with its commerce power*. Nothing in his analysis, however, suggested that Congress could not regulate intrastate com-

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22 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

23 *See id.* at 197–98 (stating that the states have the power to regulate commerce within their respective jurisdictions).

24 *See Primus, supra* note 11, at 581 n.14 (describing the Constitution as containing forty-three clauses conferring power on Congress, only eighteen of which are in Article I, Section 8).

25 For other illustrations of enumerations that do not exclude anything, see Primus, *supra* note 11, at 637–38 (giving further illustrations). For a discussion of the reasons for which an authoritative body might write an enumeration of powers that does not exclude anything, see Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 27–29 (2016).

merce with several of its other enumerated powers.<sup>26</sup> On the contrary, Congress could regulate intrastate commerce with its taxing power, its patent power, its bankruptcy power, its money power—even with its power to do all things necessary and proper for carrying into execution the various powers vested in the federal government.<sup>27</sup> In short, Marshall’s articulated limitation on the commerce power may not really have been a limit on the overall powers of Congress at all.<sup>28</sup>

That fact should not be surprising if one thinks about Marshall’s more general attitude in *Gibbons* toward the project of interpreting the Constitution’s grants of power to Congress. After all, to read the *Gibbons* dictum as keenly interested in placing a limit on federal legislative power is to place that passage in significant tension with the overall attitude toward Congress that Marshall articulated in *Gibbons*. Shortly before embarking on his explication of the Commerce Clause in *Gibbons*, Marshall affirmatively rejected the idea that Congress’s enumerated powers should be construed “strictly.”<sup>29</sup> To be sure, Marshall wrote, Congress should not be deemed to have powers that could not fairly be read into the language of the Constitution. But in cases where the Constitution’s language does not make clear whether something is within the scope of congressional power, Marshall warned against artificially constrained readings that, he warned, could “cripple the government.”<sup>30</sup> In his opinion’s last paragraph, Marshall argued against—ridiculed, really—the very premise that Congress’s enumerated powers should be narrowly construed. It was surely true, he wrote, that “[p]owerful and ingenious minds” bent on limiting the federal government could manufacture “refined and metaphysical” arguments to support narrow readings of Congress’s enumerated powers.<sup>31</sup> But to do so, he continued, would badly mistake the American constitutional enterprise and leave the Constitution itself “totally unfit for use.”<sup>32</sup> In light of that attitude, to give Marshall’s construction of the Commerce Clause in *Gibbons* a significantly more restrictive interpretation than anything he meant by it would be particularly dissonant. And to read his construction of that Clause in a way that need not limit the regulatory projects Congress might

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26 See *infra* Part I.C.3 (explaining that Marshall’s conclusion that the Commerce Clause did not authorize Congress to regulate purely intrastate commerce did not foreclose Congress from using some other congressional power to regulate that commerce).

27 See *infra* Part I.C.3.

28 See *infra* Part I.C.3 (arguing that the *Gibbons* dictum takes no position on the limits of Congress’s powers taken as a whole).

29 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–88 (1824).

30 *Id.* at 188.

31 *Id.* at 222.

32 *Id.*

pursue simply brings that piece of his opinion in line with his more general approach.

But if Marshall's dictum meant little as a limitation on what regulatory projects Congress could pursue, it meant a great deal for the permissible scope of state and local regulation. Then as now, Congress might care little whether a given federal law is an exercise of the commerce power or an exercise of power under the Necessary and Proper Clause. But in 1824, *states* cared a lot about the difference. The reason why went to an issue of constitutional preemption. According to many leading lawyers early in the nineteenth century—Marshall probably among them—Congress's power to regulate commerce was exclusive of any parallel power in the state governments.<sup>33</sup> If some subject matter fell within the scope of Clause iii, states were absolutely barred from regulating it, whether or not Congress had acted in that area.<sup>34</sup> An overly broad construction of the commerce power might accordingly wreck a lot of necessary local regulation.

Suppose, for example, that the town butcher or the local roads were regulated by state and local authorities—as they indeed were.<sup>35</sup> Even in 1824, constitutional lawyers understood that the local butcher and the local roads had connections to interstate commerce.<sup>36</sup> If the federal commerce power were construed to reach them, and if the federal commerce power were exclusive, then local authorities would be unable to regulate the butcher or the roads. That would leave the butcher and the roads completely unregulated. Congress was not in the business of regulating local butchers, after all. So if the Commerce Clause was a grant of exclusive power to Congress, it was essential that the commerce power be interpreted as not reaching matters in need of local regulation.

But this rubric supplied no reason to prevent Congress from regulating local commerce with tools that wouldn't preempt broad swaths of local regulation in areas for which Congress was not going to assume responsibility. The preemption problem was associated with the commerce power,

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33 See *Id.* at 209 (describing the exclusive-power contention as having "great force").

34 See, e.g., *Passenger Cases*, 48 U.S. (7 How.) 283, 391–92 (1849) (plurality opinion) (striking down state laws taxing alien passenger landings as unconstitutional encroachments on the federal power to regulate commerce); *Gibbons*, 22 U.S. (9 Wheat.) at 9–10 (summarizing Representative Daniel Webster's argument that the commerce power lay exclusively with Congress).

35 See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 95–100, 115–31 (1996) (describing early state and local laws regulating butchers and local roads).

36 In *Gibbons* itself, even the lawyers defending the position hostile to federal power acknowledged this point. See *Gibbons*, 22 U.S. (9 Wheat.) at 65 (describing "a vast range of State legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers," and admitting that such laws "must necessarily affect, to a great extent, the foreign trade, and . . . trade and commerce with other States").

not with all federal powers.<sup>37</sup> If Congress regulated local commerce through the exercise of powers other than the commerce power, the preemption problem need not arise. Given that understanding, it made all the sense in the world for Marshall to articulate a limit on the commerce power in particular, even if there were no similar limit on the powers of Congress taken as a whole.

*Gibbons* was a sensible case for articulating that limit. It was the Supreme Court's first Commerce Clause case, and the big issue it presented was whether the commerce power lay exclusively with Congress. Not for the first time in his career, the Chief Justice got where he wanted to go by manipulating the meaning of a statute.<sup>38</sup> Instead of deciding whether the power to regulate commerce was exclusive in Congress or held concurrently by Congress and state governments, Marshall pretended that a federal statute had already spoken to the specific matter in contention between the parties.<sup>39</sup> Modern readers of *Gibbons* tend to focus on the part of the case that deals with the federal statute, because we are accustomed to thinking of Commerce Clause cases as primarily about the validity of Acts of Congress. But in 1824, the pressing issue was what to make of the possibility of exclusive federal power over commerce in a world where everyone already understood that the local road connected eventually to the highway and the sea. Marshall's statement that the enumeration presupposed something not enumerated was a response to that concern. It tempered the potential impact of exclusive federal power under the Commerce Clause by declaring that local commercial regulation would not be automatically preempted. And it did so without imposing impediments to federal regulations of local commerce that Congress might enact under powers other than those in Clause iii.

Modern constitutional law misunderstands the *Gibbons* dictum partly because it does not have the problem to which Marshall's interpretation of the Commerce Clause was a solution. For more than a hundred years, prevailing doctrine has rejected the idea that federal power over commerce is exclusive. Instead, constitutional law regards the states and Congress as

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37 This is not to say that the commerce power was the only power that might be preemptive. See, e.g., *Livingston v. Van Ingen*, 9 Johns. 507, 560 (N.Y. 1812) (Yates, J.) (raising the possibility that the patent power was preemptive).

38 See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803) (reading Section 13 of the Judiciary Act of 1789 as purporting to enlarge the original jurisdiction of the Supreme Court).

39 See *Gibbons*, 22 U.S. (9 Wheat.) at 2 (reading the Act of February 18, 1793, entitled “An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,” as decisive (quoting 1 Stat. 305 (1793))). For the analysis indicating that Marshall's statutory rationale was a pretense, see *infra* Part II.C, which explains that the federal license issue was used to avoid ruling on the deep and divisive issue of the Commerce Clause.

exercising their regulatory power over commercial affairs concurrently, with Congress prevailing in cases of conflict.<sup>40</sup> That model has freed the courts to abandon the always-artificial rules distinguishing interstate from intrastate commerce. Without the fear that a broad commerce power will preempt necessary local regulation, Congress can be given greater latitude to regulate the national economy as it sees fit.<sup>41</sup> To be sure, that development has brought a different set of concerns to the forefront of commerce doctrine. In our era, the leading question about the commerce power is not whether state law will be preempted even in the absence of federal regulation. It is whether federal regulation is limited by anything other than affirmative constitutional prohibitions like those in the Bill of Rights.<sup>42</sup> With that question in mind, and having forgotten that Marshall was worried about something else, courts have misappropriated the *Gibbons* dictum and used it to mean something Marshall did not mean: that the Constitution's overall enumeration of congressional powers indicates that those powers, as a whole, are less than a general police power.

In Part I of this Article, I explain why the *Gibbons* dictum did not mean what modern courts use it to mean. When Marshall wrote that the enumeration presupposes something not enumerated, he was not making a statement about the overall set of congressional powers, and we cannot infer anything about that overall set from the narrower statement that he was in fact making. In Part II, I explain what the *Gibbons* dictum really did mean. Marshall's formulation was significant not as a limitation on Congress but as reassurance about the prima facie regulatory power of states. That reassurance was important because many lawyers at the time saw the commerce power as divesting states of local regulatory authority. Once constitutional doctrine established the authority of states to regulate concurrently with federal commerce legislation, however, preserving local regulation no

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40 See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 159–66 (charting the rise of this concurrent-jurisdiction model).

41 See *id.* at 166–67 (describing the link between the acceptance of concurrent jurisdiction and the rise of expansive modern commerce doctrine).

42 See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2647 (2012) (criticizing the Government for being unable to provide any limiting principle to Congress's commerce power); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (insisting that congressional power must be internally limited). Another important question in our times—one that is perhaps more practically consequential if less symbolically salient—is how expansively federal legislation under the Commerce Clause will be construed to preempt state law with which it does not directly conflict. See Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrence and Its Implications for Popular Lawmaking*, 81 CHI.-KENT L. REV. 1029 (2006) (pointing out that the degree to which federal legislation narrows state policymaking autonomy depends heavily on how courts approach issues of field-preemption). That second question has an obvious similarity to the leading question at the time of *Gibbons*, but it is also crucially different, because it concerns preemption when Congress has in fact legislated, rather than preemption even in the absence of federal legislation.

longer required a distinction between local commerce and the commerce regulable under Clause iii. So the *Gibbons* dictum disappeared from American law—until *Lopez* brought it back to mean something else.

## I. GIBBONS AND THE POWER OF CONGRESS

### A. *The Rivalry*

The case that became *Gibbons v. Ogden* arose at the intersection of two rivalries, one between men and one among states. More was at stake for the early Republic in the state rivalry than in the personal one. But within its own sphere, the personal rivalry between Thomas Gibbons and Aaron Ogden was plenty big enough.

Ogden was born in Elizabeth, New Jersey, in 1756.<sup>43</sup> He served with distinction in the Revolutionary War, entered the practice of law, and became a leading member of the Federalist Party in his home state.<sup>44</sup> From 1801 to 1803, he served as a United States Senator and, from 1812 to 1813, as Governor of New Jersey.<sup>45</sup>

Among his other pursuits, Ogden was in the steamboat business. In particular, he was interested in operating steamboats on the portion of the Hudson River that lies near New York City.<sup>46</sup> But under the law of New York, a man named John Livingston enjoyed an exclusive right to operate steamboats on the relevant part of the Hudson.<sup>47</sup> So in 1815, Ogden bought

<sup>43</sup> *Ogden, Aaron*, 2 NEW JERSEY BIOGRAPHICAL DICTIONARY 525–26 (Caryn Hannan et al. eds., 2008–2009 ed. 2008).

<sup>44</sup> *See id.*; see also MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: *GIBBONS V. OGDEN*, 1824 at 25 (1972) (describing Ogden as a “veteran of the Revolution, and a Federalist lawyer-politician”).

<sup>45</sup> *See* NEW JERSEY BIOGRAPHICAL DICTIONARY, *supra* note 43, at 525–26; see also *Ogden, Aaron (1756-1839)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=o000041>, (last visited Mar. 8, 2017).

<sup>46</sup> *See* sources cited *supra* note 45.

<sup>47</sup> Livingston enjoyed that right as the assignee of a franchise—in later terms, a monopoly—that the State of New York had originally awarded to the business partnership of Robert Fulton and Robert Livingston, John Livingston’s elder brother. *See infra* notes 163–166 and accompanying text (recounting the factual background of *Livingston v. Van Ingen*, 9 Johns. 507, 560 (N.Y. 1812)). Under the original grant, Fulton and the elder Livingston had the exclusive right to operate steamboats at all places within the territorial waters of New York. They subsequently assigned the portion of their exclusive right that applied to the waters between New York City and New Jersey to the younger Livingston, who granted a license to Ogden. *See Livingston v. Ogden*, 4 Johns. Ch. 48, 48–49 (N.Y. Ch. 1819).

The connection between Fulton and Ogden would have at least two unfortunate consequences for Fulton. First, Ogden’s interests in his litigation against Thomas Gibbons would prompt him to deny, vigorously, that Fulton was the inventor of the steamboat. *See BAXTER, supra* note 44, at 30 (describing how Ogden’s attorney attacked Fulton’s claims that he invented the steamboat). If Fulton had been the inventor, then a plausible claim would have arisen that New York had no authority to grant him an exclusive right to operate steamboats, because the Constitution assigns

from Livingston a license to operate a ferry between Elizabethtown Point, on the New Jersey side of the Hudson, and New York City.<sup>48</sup>

The land in Elizabethtown where Ogden's ferry docked was owned by a wealthy businessman named Thomas Gibbons.<sup>49</sup> For a time, Gibbons and Ogden operated their businesses to mutual advantage.<sup>50</sup> But friction eventually arose. And unfortunately, matters got personal.

Gibbons was the scion of a wealthy Georgia family.<sup>51</sup> He had served as Mayor of Savannah before resettling in New Jersey, and he retained substantial landholdings in Georgia and elsewhere in the South.<sup>52</sup> The ferry landing in Elizabethtown was a small part of his total wealth. He had placed that property in trust for his daughter.<sup>53</sup> But Gibbons's detested son-in-law, John M. Trumbull, wanted the land for himself, and without delay.<sup>54</sup> Being the sort of character who gets described as a detested son-in-law, Trumbull made common cause with Gibbons's estranged wife Ann and encouraged her to sue Gibbons for divorce, something that would have opened up Gibbons's wealth for division on terms more favorable to Trumbull than would have been the case if his father-in-law were able to dispose of his assets freely.<sup>55</sup> No divorce was ultimately recorded, but Ann Gib-

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the power to give inventors exclusive rights to their inventions to Congress rather than to state legislatures. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries"). As a result, the official law reporters of both New York and the United States contain passages roundly declaring that Fulton was certainly not the inventor but merely an appropriator of technology invented by others. See, e.g., *Livingston v. Van Ingen*, 9 Johns. 507, 558–59 (N.Y. 1812) (Yates, J.) (finding that John Fitch had previously been deemed the inventor of the steamboat, and that Livingston and, subsequently, Fulton were merely "possessor[s] of a mode of applying the steam engine"). But this public diminishment of Fulton might not have been the worst thing for him to flow from the affair. The worst thing, it would seem, was his death. In February 1815, Fulton crossed the frozen Hudson on foot with Thomas Addis Emmet, one of Ogden's lawyers. Emmet fell through the ice, and Fulton pulled him out. Emmet recovered; Fulton, for his good deed, fell ill and died. See BAXTER, *supra* note 44, at 31; HERBERT A. JOHNSON, *GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE 86–87* (2010).

48 BAXTER, *supra* note 44, at 30–31.

49 Letter from Joseph Trumbull to D.W. Coit (Nov. 8, 1813) (on file with author).

50 BAXTER, *supra* note 44, at 30–31; see also THOMAS H. COX, *GIBBONS V. OGDEN, LAW, AND SOCIETY IN THE EARLY REPUBLIC 72* (2009) (describing Gibbons and Ogden's relationship as "cordial"). At one point before Ogden purchased the license from John Livingston, Livingston sued both Gibbons and Ogden for violating his exclusive right collusively. See *Ogden*, 4 Johns. Ch. at 48–50.

51 See BAXTER, *supra* note 44, at 31 (describing the successful businesses Gibbons owned).

52 See *id.*; see also EDWARD T. PRICE, *DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC 180–81* (1995).

53 See COX, *supra* note 50, at 73.

54 *Id.* at 73–74.

55 *Id.* at 93–94.

bons considered the option seriously enough to seek legal advice. And one of the attorneys she consulted was Aaron Ogden.<sup>56</sup>

Nobody knows why Ogden agreed to counsel Ann Gibbons. Perhaps he figured that a Gibbons divorce was in his interests, because it might pry the ferry-landing property out of the hands of a difficult business associate. But whatever his motives, Ogden's decision to become involved in the Gibbons family drama had seriously adverse consequences for his steamboat business. As Ogden probably should have foreseen, Thomas Gibbons did not take kindly to Ogden's counseling Ann Gibbons about the possibility of divorce. Gibbons became incensed, and he expressed his ire in at least two different ways, each one appropriate to a different aspect of Thomas Gibbons. Being, as noted earlier, the scion of a wealthy Georgia family, Gibbons challenged Ogden to a duel.<sup>57</sup> Being also a New Jersey businessman, Gibbons decided to crush Ogden commercially. He began to operate a rival steamboat line between Elizabethtown and New York.<sup>58</sup>

Gibbons knew that New York law prohibited operating such a rival line. Nobody was permitted to use a steamboat between Elizabethtown and New York City without permission from Livingston, and Livingston had given a license to Ogden and not to Gibbons.<sup>59</sup> But Gibbons had a legal theory. His steamboats were licensed under federal authority to participate in what was then called the coasting trade—that is, trade by water between points within the United States.<sup>60</sup> Federal authority, he reasoned, is superior to state authority. So if the federal government had authorized the operation of Gibbons's steamboats, New York would be powerless to stop him, and Gibbons could crush Ogden's business as he liked.<sup>61</sup>

Ogden didn't like it much. He sued to enforce his exclusive permission under New York law, and the New York courts decided in his favor.<sup>62</sup> But Gibbons took the case to the Supreme Court of the United States, which reversed the decision below.<sup>63</sup> In a famous opinion, Chief Justice John Marshall agreed with Gibbons that his vessels, being licensed under federal authority to participate in the coasting trade, could not be barred by mere state

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56 See *id.* at 94 (describing steps taken by Ann Gibbons to secure a divorce from her husband).

57 The duel was not actually fought, but the challenge became the subject of libel litigation between the two men, litigation in which Gibbons reportedly ranted at the jury for several hours about Ogden's despicable behavior. The jury ultimately returned a verdict for Ogden, which probably only heightened Gibbons's antipathy for his rival. See COX, *supra* note 50, at 122–23 (reporting that the \$5,000 jury verdict against Gibbons was not a surprise).

58 See BAXTER, *supra* note 44, at 32.

59 See *id.* at 31 (noting that Ogden held the license).

60 See COX, *supra* note 50, at 112.

61 See *Ogden v. Gibbons*, 4 Johns. Ch. 150, 156–57 (N.Y. Ch. 1819) (explaining the federal licensing scheme that Gibbons claimed created his right to operate his steamboat along the Hudson).

62 See *Gibbons v. Ogden*, 17 Johns. 488, 509 (N.Y. 1820).

63 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239 (1824).



law from navigating the waters of New York.<sup>64</sup> Congress could make rules for the coasting trade under its power to regulate commerce among the several states; Gibbons's steamboats operated under the authority of those rules; the authority of those rules was superior to any law that New York could make.<sup>65</sup>

In Part II, I will explain that the coasting-trade rationale was a ruse.<sup>66</sup> But for now, we can accept the decision at face value, because what is important for present purposes is not the Court's ruling about the coasting trade but the more general analysis that Marshall offered about the scope of Article I's Commerce Clause. That analysis was the first systematic treatment of the commerce power in any Supreme Court opinion.<sup>67</sup> And as the next two sections demonstrate, one of the central features of that analysis—Marshall's pithy observation that the enumeration presupposes something not enumerated—has been systematically misunderstood.

### B. *The Dictum*

When *Gibbons* was argued at the Supreme Court, the relationship of the federal commerce power to commerce occurring within the boundaries of a single state was a matter of first impression. Ogden's attorneys argued that the commerce power did not reach intrastate commerce.<sup>68</sup> But they did not make their case on the ground that commercial regulation in one state had nothing to do with commerce more broadly. On the contrary, Ogden's attorneys acknowledged that the regulation of commerce within a given state greatly affected commerce with other states and with foreign nations. That was a basic economic fact, even in 1824. Indeed, the Court reporter sum-

<sup>64</sup> *Id.* at 211–13.

<sup>65</sup> *Id.*

<sup>66</sup> The basic infirmity in the coasting-trade rationale, as several of the participants in the litigation well understood, was that federal coasting licenses did not purport to authorize their bearers to operate vessels in contravention of local law. They purported only to exempt their bearers from a specified set of burdens—principally taxes and user-fees for ports—that federal law imposed on vessels not so licensed. See *infra* Part II.C.3. Marshall surely understood the weakness in the argument; not for the first time, the great Chief Justice read a technical legal authority tendentiously in the service of what he understood to be a larger constitutional cause. See *infra* Part II.C.3; see also, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803) (reading Section 13 of the Judiciary Act of 1789 as purporting to enlarge the original jurisdiction of the Supreme Court).

<sup>67</sup> Opinions in a few prior cases had made reference to the commerce power. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382 (1821) (describing commerce as one of the powers confided in the federal government); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (recounting commerce as one of the enumerated powers of government). But no decision prior to *Gibbons* had turned on a Commerce Clause issue, and no opinion had offered a systematic investigation of the Clause.

<sup>68</sup> See, e.g., *Gibbons*, 22 U.S. (9 Wheat.) at 64–65 (recounting argument by counsel that commerce “among the several states” did not include commerce carried on within the limits of one State).

marized Ogden's statement of this point in terms that might have been perfectly at home in a post-1937 Supreme Court opinion, describing

a vast range of State legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers, and to hawkers and ped[d]lers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State . . . . [T]hese laws do thus affect trade and commerce with other States . . . .<sup>69</sup>

In short, Ogden's counsel frankly admitted that local commerce and interstate commerce were intertwined as a matter of fact. Of course navigation on the Hudson River had economic effects on other states, and of course New York's rules about who could operate steamboats would affect commerce beyond New York. But as a matter of law, Ogden maintained, it would be a mistake to treat these facts of economic interconnectedness as sufficient reason for construing the federal commerce power as reaching a state's internal commercial affairs.<sup>70</sup>

Representing Gibbons, no less a lawyer than Daniel Webster<sup>71</sup> staked out a more nationalist position. The Framers, he argued, went to Philadelphia to do away with the state-versus-state economic squabbling that existed under the Articles of Confederation.<sup>72</sup> They saw the Balkanization of commerce by protectionist states as a major vice of government under that system, and they sought to solve the problem by centralizing commercial regulation.<sup>73</sup> The Constitution that the Framers drafted accordingly regarded domestic commerce as one integrated system to be regulated by Con-

<sup>69</sup> *Id.* at 65.

<sup>70</sup> *See id.* ("But, although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the States.").

<sup>71</sup> Webster was of course one of the leading political orators of his time; the nineteenth-century Senate's reputation as a forum for great debates was founded substantially on his participation, along with that of contemporaries like John Calhoun and Henry Clay. *See, e.g.,* ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 209, 221–40 (1984) (describing the senatorial culture of debate that was at the time central to American constitutional discourse). When *Gibbons* was argued, Webster was playing a key role in congressional debate on a leading constitutional issue of the day within the legislative branch, which concerned the extent of Congress's authority to build roads, dams, canals, and other "internal improvements" within the territorial limits of nonconsenting states. *See* Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 *STAN. L. REV.* 397, 409–39 (2015) (describing the internal improvements debate).

<sup>72</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 14 (arguing that the commerce of the states was to henceforth be conducted as a unit).

<sup>73</sup> *See, e.g.,* JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (1787), *reprinted in* 9 *THE PAPERS OF JAMES MADISON* 346 (Robert A. Rutland & William M.E. Rachal eds., 1975) (describing a calamitous "want of concert in matters where common interest requires it . . . [as] strongly illustrated in the state of our commercial affairs").

gress.<sup>74</sup> On this vision, the statement “Congress shall have power to . . . regulate commerce with foreign nations, and among the several states”<sup>75</sup> was a way of saying “Congress shall have power to regulate both foreign and domestic commerce.”

In his opinion for the Court, Chief Justice Marshall leaned toward the nationalist position. He rejected as nonsensical the idea that Congress could not regulate commerce occurring within particular states. After all, he wrote, commerce among the states must occur within their borders.<sup>76</sup> A power to regulate commerce among the several states must therefore be a power to regulate commerce occurring within particular states.<sup>77</sup> But Mar-

<sup>74</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 14.

<sup>75</sup> U.S. CONST. art. I, § 8, cl. 1, 3.

<sup>76</sup> *See Gibbons*, 22 U.S. (9 Wheat.) at 194 (“Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”).

<sup>77</sup> *See id.* On this point, Marshall’s argument seems unassailable. So much so, in fact, that it is worth wondering whether the other side can really have been arguing the proposition that Marshall refutes. Was Ogden really asking the Supreme Court of the United States to rule that the commerce power had no force anywhere in New York, or New Jersey, or Virginia, or within any other state? That it operates only in, say, the District of Columbia, and other federal territories, and beyond the international boundary of the United States? It hardly seems plausible, and certainly not if one remembers that giving the federal government power to regulate commerce was one of the principal objectives of the movement to replace the Articles of Confederation with a new Constitution. *See supra* notes 72–74 and accompanying text (describing the Founders’ project of empowering the national government to regulate commerce).

There is a temptation to shake one’s head and say, “Yes, it seems odd that anyone could have construed the Commerce Clause so narrowly—but I guess some people did. After all, we do know that our modern construction of that Clause is much broader than the original construction. So maybe what seems like a bizarrely narrow reading wasn’t really so strange given the understanding of the time.” It is of course prudent to remember that our own assumptions may differ from those of a different generation. But in this case, there is something else that helps explain why Ogden’s attorneys thought it reasonable to argue that their client’s exclusive privilege was a matter of internal commerce that could not be reached by Congress.

Today, the state boundary between New York and New Jersey runs down the middle of the Hudson River. When we imagine a ferry trip from Elizabethtown to New York City, we imagine a core case of interstate travel, half in one state and half in another. Within that framing, New York’s grant of an exclusive right to operate steamboats within its borders presents itself as a right applicable over half of the journey, and the claim that a license granted by Congress cannot override that right is comprehensible only as a claim that, as soon as the ferry crosses beyond the state line and into New York’s waters, the force of the commerce power ceases—even though the trip is an interstate trip, even though one moment earlier the boat had straddled a state line. That makes Ogden’s claim seem extravagant and unworkable. But when *Gibbons v. Ogden* arose, New York claimed the entirety of the Hudson River as its own territory, all the way to the New Jersey shore. *See* Act of Apr. 6, 1808, ch. 135, 1808 N.Y. Laws 313 (declaring that the “river Hudson . . . and the bay between it and Long-Island” is New York’s “rightful territory”). From New York’s perspective, therefore, there was nothing interstate about ferry traffic on the Hudson. The passengers moved interstate in leaving the New Jersey shore and boarding the ferry, but the ferry itself moved only within the territorial limits of New York. On that framing, Ogden’s claim that Livingston’s exclusive grant was a regulation of New York’s internal commerce only is con-

shall did not endorse the Gibbons-Webster view in unqualified terms. Having asserted that the commerce power was operative within the territorial limits of states, Marshall also acknowledged a limit. Clause iii did not bear, he wrote, on commerce that was entirely contained within a single state.<sup>78</sup> To support this conclusion, Marshall pointed to the text of the Commerce Clause, which specifies that Congress has power to regulate commerce “with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>79</sup> Marshall parsed that language as follows:

[T]he enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. *The enumeration presupposes something not enumerated*; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.<sup>80</sup>

In other words, the Clause enumerates three “particular classes of commerce.”<sup>81</sup> They are (1) commerce with foreign nations, (2) commerce among the several states, and (3) commerce with the Indian tribes.<sup>82</sup> By separately listing those three, Marshall argued, the Clause indicates the existence of some other kind of commerce not included in any of the three classes listed.<sup>83</sup> That is the thought that Marshall pithily captured with the

siderably less bizarre. (Marshall’s opinion in *Gibbons* took no side on and indeed did not mention this question, so the boundary dispute is invisible to modern readers of the decision).

78 *Gibbons*, 22 U.S. (9 Wheat.) at 194.

79 U.S. CONST. art. I, § 8, cl. 3.

80 *Gibbons*, 22 U.S. (9 Wheat.) at 194–95 (emphasis added).

81 *Id.* at 194.

82 *Id.* at 193. It is here worth repeating a point made earlier, *supra* note 21, about the meaning of the word “enumeration.” Strictly speaking, the Commerce Clause does not *enumerate* three classes of commerce. On a literal understanding, “enumeration” involves counting, or the assignment of numbers to things. My sentence preceding this footnote enumerates the three classes of commerce—that is, it assigns them numbers. The Commerce Clause does not. But we need not detain ourselves long here on what might seem a trifling point. Marshall used “enumeration” to mean something like “separate listing, in a way conducive to numbering,” and for present purposes it will suffice to proceed on the understanding that that is what the word is being used to mean. Note, too, that in constitutional law more broadly the term “enumerated powers” is often used as a synonym for “delegated powers,” whether the powers in question are expressly listed or not. See Primus, *supra* note 11, at 588–90; see also Evan H. Caminker, “Appropriate” Means—Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1135 (2001) (analyzing the gap between the expressly listed powers of Congress and the full set of congressional powers under the Constitution).

83 It bears emphasis that this reading was one for which Marshall argued, and which his opinion in *Gibbons* established as orthodox, rather than its having been the only available reading of the text. After all, competent lawyers up until *Gibbons* also saw another available reading, one on which the language authorizing Congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes” meant in essence “Congress has the power to regulate commerce, both foreign and domestic.” See *supra* note 72 (noting that Webster’s argument in *Gibbons* read the Commerce Clause this way). But as often happens, the judicially endorsed reading, once orthodox, came to seem to many constitutional lawyers as if it were explicitly required by the text itself. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295

italicized words above: “The enumeration presupposes something not enumerated . . . .”<sup>84</sup>

That expression was referenced three times in *Lopez*<sup>85</sup> and has since become a standard way of asserting the internal-limits canon.<sup>86</sup> For ease of reference, I refer to that expression as the *Gibbons* dictum.

### C. *The Mistake*

Ever since *United States v. Lopez*, courts and commentators have quoted the *Gibbons* dictum as support for the internal-limits canon—that is, as support for the proposition that the sum total of the powers of Congress must be less than general legislative authority. And we are now in a position to see why that use of the dictum is mistaken. First, when Marshall wrote the *Gibbons* dictum, he was not saying anything about the sum total of the powers of Congress. He was addressing only the commerce power. Second, the *Gibbons* dictum identified no actual limits on the regulatory power of Congress. The dictum said something about a limit on the commerce power, but it left Congress perfectly free to use its other powers to regulate matters that the commerce power could not reach. And indeed, it is clear under prevailing doctrine today—doctrine confirmed, rather than questioned, by *Lopez* and *Sebelius*—that everything the *Gibbons* dictum placed beyond the Commerce Clause is regulable by Congress.

#### 1. *The Gibbons Dictum and the Two Enumerations*

It may be useful here to belabor what should be obvious. The enumeration that Marshall addressed in the *Gibbons* dictum is the naming of three kinds of commerce in the Commerce Clause: commerce with foreign nations, commerce among the states, and commerce with Indian tribes. It is *not* the enumeration of congressional powers—the taxing power,<sup>87</sup> the spending power,<sup>88</sup> the money-borrowing power,<sup>89</sup> the commerce power,<sup>90</sup>

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U.S. 495, 550 (1935) (speaking of “the distinction, which the commerce clause itself establishes, between commerce ‘among the several States’ and the internal concerns of a state.”). The text of the Commerce Clause does establish that distinction if one reads that text as Marshall read it in *Gibbons*, of course. But as Webster’s argument before the Court indicates, that was not the only way that the clause could be read.

<sup>84</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 195.

<sup>85</sup> *United States v. Lopez*, 514 U.S. 549, 553, 566–67 (1995).

<sup>86</sup> See *supra* notes 6–8 (collecting post-*Lopez* citations of the *Gibbons* dictum).

<sup>87</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* art. I, § 8, cl. 2.

<sup>90</sup> *Id.* art. I, § 8, cl. 3.

the naturalization power,<sup>91</sup> the bankruptcy power,<sup>92</sup> and so on—across the eighteen clauses of Article I, Section 8. That is a different enumeration.

So when Marshall said that the enumeration presupposes something not enumerated, he was saying, “the fact that the Commerce Clause lists three categories of commerce presupposes some commerce not falling within those three categories.” He was not saying “The fact that the Constitution lists many powers of Congress, in many different clauses of which the Commerce Clause is only one, presupposes possible subjects of regulation not reachable with any of the powers named in those many clauses.” In other words, he was not endorsing the internal-limits canon.<sup>93</sup>

Whether the internal-limits canon is sound does not depend on whether Marshall announced it in *Gibbons*. But it is worth being clear about what Marshall did and did not say. Marshall’s *Gibbons* dictum makes no claim about what the enumeration of Congress’s powers across many different clauses of Constitution might presuppose. It makes no such claim because it does not address that enumeration at all. It addresses something else.

This point is not subtle. But as it happens, Marshall’s *Gibbons* dictum is used today to mean precisely what this simple point indicates it does not mean. In *Lopez*,<sup>94</sup> and in *Sebelius*,<sup>95</sup> and in *Bond*,<sup>96</sup> the invocations of the phrase “the enumeration presupposes something not enumerated” do not mean “the listing of three categories of commerce presupposes some other kind of commerce.” They mean “The powers of Congress are enumerated, so there must be regulatory subjects that no power of Congress can reach.” Or, put more broadly, “The enumeration of Congress’s powers indicates that Congress has no general police power.” But Marshall was not saying those things, and could not have been saying those things, because he was not even talking about the enumeration that is said to contain those implications.<sup>97</sup>

91 *Id.* art. I, § 8, cl. 4.

92 *Id.*

93 See *supra* note 3 and accompanying text (discussing the internal-limits canon).

94 *United States v. Lopez*, 514 U.S. 549, 553, 566–67 (1995).

95 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

96 *Bond v. United States*, 134 S. Ct. 2077, 2099 (2014).

97 In an earlier article on the subject of Congress’s enumerated powers, I argued that in principle an enumeration of powers might or might not be limiting, depending on contingent facts about that particular enumeration and the circumstances in which it is applied. *Primus*, *supra* note 11, at 581. In a commissioned response to my article, Kurt Lash agreed with that point as a general matter, acknowledging that an enumerated list might in practice be exhaustive rather than limiting. Lash, *supra* note 8, at 182. But whether that is true of enumerations in general, Lash continued, is not the real issue when we are dealing with the enumeration of Congress’ powers. The critical issue, Lash wrote, “is whether it is possible that the *particular* list of enumerated authorities in the Constitution delegates all possible power. Chief Justice John Marshall’s famous dictum in *Gibbons v. Ogden* that ‘the enumeration presupposes something not enumerated’ was not about every possible enumeration, but about one particular enumeration.” *Id.* I agree, of course,

## 2. *The Gibbons Dictum and Expressio Unius*

Some readers may be tempted to argue that Marshall's dictum supports the internal-limits canon even though Marshall was making a different point when he penned the words. Yes, the intuition would run, it's true: when Marshall wrote that the enumeration presupposed something not enumerated, he was talking about a different enumeration. But perhaps Marshall was making a conceptual point, not a local one. In saying that a certain enumeration presupposed something not enumerated, perhaps Marshall was applying a more general truth about enumerations: that they presuppose things not enumerated. And if enumerations generally presuppose things not enumerated, then it really doesn't matter which enumeration Marshall happened to be speaking about. The powers of Congress are written as an enumeration of specific authorizations, and that enumeration, too, presupposes something not enumerated, because enumerations do that.

This train of thought treats the *Gibbons* dictum as if Marshall had said "It is a rule in legal interpretation that enumerations always presuppose things not enumerated," rather than saying, "this enumeration, in particular, presupposes something not enumerated." But Marshall was not making the broader statement, and it would disserve him to imagine that he had. After all, the broader statement is not accurate.

The canon *expressio unius est exclusio alterius*—that the expression (or specification) of one thing is the exclusion of another thing—is a staple of legal interpretation.<sup>98</sup> And reasonably so. But *expressio unius* is not an iron rule to be given force in every case where a legal text gives a list of particulars.<sup>99</sup> It is a rule of thumb that should be treated as defeasible when the circumstances make it inapposite, because not every list of particular items is written to exclude something not on the list.<sup>100</sup> Put differently, dif-

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that an argument about the extent of Congress's powers must confront not just enumerations in general but the Constitution's enumeration of Congress's powers in particular. But it is noteworthy, for present purposes, that when Lash wanted to make the point that we are really interested in one particular enumeration rather than in enumerations in general, he cited Marshall's *Gibbons* dictum—the subject of which is *not* the one particular enumeration with which we ought to be concerned. I take Lash's use of the *Gibbons* dictum in this instance to typify the common slip-page that I am here highlighting—that is, the tendency to treat Marshall's statement as a statement about the enumeration of *all* of Congress's powers, even though Marshall was actually making a statement about an enumeration within just one power-conferring clause.

98 See, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (explaining that the canon "has force" when interpreting listed items "of an 'associated group or series'" because it may be inferred that other items were deliberately omitted).

99 See *id.* ("As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory list or grouping . . . .")

100 It is of course possible that a given canon of legal interpretation is applied less often or less forcefully today than it might have been in a previous century. But even if *expressio unius* was more robust in the 1780s than it is today, it would still have been a canon, and defeasible, rather

ferent enumerations have different presuppositions. Some presuppose things not enumerated, and some do not.

Suppose that I am leaving instructions for a friend who will stay in my house while I am on vacation. I might write as follows: “You may use my shower, or you may use the kids’ shower, or you may use the guest shower.” If my house has three showers, then this enumeration does not limit my friend’s choices at all. If my friend has a certain sort of analytic mind, he might read the list, notice that the house has only three showers, and wonder why I bothered to write a longer sentence than “You may use any shower in the house.” But if he also has basic common sense, he will not long be bothered by the question, because he will generate adequate explanations. Maybe I wrote the list that way to make sure he knows what all of his options are. Or maybe I thought that giving permission to use the showers in general might still leave him wondering whether I preferred that he use a particular one, so it made sense to emphasize his equal privilege to use any of the three.<sup>101</sup>

The preceding example shows that “enumeration presupposes something not enumerated” is not a rule true in all circumstances. Some enumerations—even many enumerations—do presuppose things not enumerated. But whether a particular enumeration presupposes something not enumerated is not a question that can be answered based solely on the fact that it is an enumeration. The answer depends on facts about the particular enumeration: its words, its author, its audience, its function, the circumstances in which it is applied. So we cannot simply say that Marshall’s characterization of one enumeration as presupposing something not enumerated is tantamount to a statement that some other enumeration also presupposes something not enumerated. To know whether the enumeration of Congress’s powers across the eighteen clauses of Section 8 and the twenty-five or so other constitutional clauses conferring power on Congress<sup>102</sup> is an enumeration presupposing something not enumerated, we would need to examine *that* enumeration.<sup>103</sup>

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than an inexorable rule. Put differently, the thumb may be larger or smaller, but a rule of thumb is still a rule of thumb.

101 See also Primus, *supra* note 25, at 27–29 (discussing some of the reasons for which an authoritative body might write an enumeration of powers that does not exclude anything).

102 See *supra*, Primus, *supra* note 11, at 581 n.14 (concluding that on a plausible reading there are twenty-five such clauses outside of Section 8).

103 My reasons for concluding that the broader enumeration also does not support the internal-limits canon are given in Primus, *supra* note 11.



### 3. *The Gibbons Dictum and Federal Power over Intrastate Commerce*

Some readers may be similarly tempted by the thought that even though Marshall was not writing about the full enumeration of Congress's powers, his construction of the Commerce Clause in *Gibbons* still shows that the powers of Congress add up to less than a general police power, because it specifies a subject of potential regulation that Congress's enumerated powers do not reach. According to the *Gibbons* dictum, purely intrastate commerce is not within the scope of the Commerce Clause. If Congress cannot regulate certain intrastate commercial activities, the logic would run, then Congress lacks some authority that a government with general legislative jurisdiction would enjoy.

But this analysis makes some basic mistakes. For one, Marshall did not say that Congress may not regulate purely intrastate commerce. His dictum placed that commerce beyond Congress's authority *under the Commerce Clause*. But as every constitutional lawyer should remember, the fact that *one* congressional power cannot underwrite a particular federal law does not mean that *no* congressional power could underwrite that law.<sup>104</sup> Even if purely intrastate commerce is beyond the scope of the Commerce Clause, Congress can regulate many aspects of intrastate commerce with its power to tax, to make bankruptcy law, to regulate the value of money, or to grant patents and copyrights. This point was clear and uncontested in the *Gibbons* litigation itself.<sup>105</sup> Indeed, Marshall specifically indicated that commerce too local to be regulated under the Commerce Clause *simpliciter* might be federally regulated "for the purpose of executing some of the general powers of the government"<sup>106</sup>—that is, under the Necessary and Proper Clause.

Some commentators have missed this point. They read Marshall in *Gibbons* as if he had articulated not a limit on the commerce power in par-

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104 See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (Roberts, C.J.) (analyzing the Affordable Care Act's individual mandate under the taxing power after determining that the mandate was not a valid exercise of the commerce power).

105 In addition to their arguments about the commerce power, Ogden's attorneys argued at length that New York's steamboat monopoly had not been preempted by federal power under the Patent Clause, thus acknowledging that their client needed to address a problem rooted in another Congressional power even if they carried their point about intrastate commerce. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 45 (1824) (arguing that the Patent Clause was limited to "invention" and did not govern the monopoly at issue). Similarly, when the New York Court for the Correction of Errors implemented the *Gibbons* decision, it construed federal regulation of the coasting trade as in part regulation under the Commerce Clause but in part as an exercise of the federal taxing power and, on the strength of the taxing power, deemed the federal regulatory scheme operative even in purely intrastate settings, because the taxing power is not limited by the internal limits of the commerce power. See *N. River Steamboat Co. v. Livingston*, 3 Cow. 713, 754-55 (N.Y. 1825).

106 *Gibbons*, 22 U.S. (9 Wheat.) at 195.

ticular but a limit on Congress's powers as a whole.<sup>107</sup> The error in this interpretation may arise in part from a misunderstanding of Marshall's statement, a few sentences after the *Gibbons* dictum, that "[t]he completely internal commerce of a State . . . may be considered as reserved for the State itself."<sup>108</sup> It is not hard to see why a modern reader might read this language and think that Marshall meant that Congress simply may not regulate purely intrastate commerce. In some other constitutional contexts, a "reserved" state power is one with which Congress may not interfere.<sup>109</sup> So when some constitutional lawyers see Marshall's characterization of intrastate commerce as "reserved" for the states, they take him to mean that Congress is categorically forbidden to regulate that subject matter.<sup>110</sup>

But Marshall was not summarily rejecting the basic idea that Congress can routinely do under one power something that it cannot do under another. He was simply saying that a state had the authority to regulate local commerce in the first instance, until and unless Congress enacted a conflicting law under some appropriate power.<sup>111</sup> Modern lawyers take for granted that states can regulate in the absence of federal law, so it may not occur to them (us) that Marshall felt it necessary to make this point. But in 1824, many leading constitutional lawyers believed that the power specified in Clause iii lay in Congress exclusively, such that states were categorically disabled from regulating whatever commerce lay within the Commerce Clause.<sup>112</sup> Against that background assumption, characterizing intrastate commerce as "reserved" to the states was a way of saying that state laws regulating such commerce would not automatically be preempted as trenching on exclusive federal authority. In other words, Marshall's statement that the regulation of purely intrastate commerce was "reserved

<sup>107</sup> See, e.g., Randy Barnett, *Is the Rehnquist Court an "Activist" Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1283 (2002) (reading Marshall in *Gibbons* to have articulated, as "a constitutional imperative," that wholly intrastate commerce must be protected "from the reach of Congress").

<sup>108</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 195.

<sup>109</sup> See, e.g., *United States v. Butler*, 297 U.S. 1, 68 (1936) (invalidating a portion of the Agricultural Adjustment Act on the grounds that the provision in question "invades the reserved rights of the states" by functioning as a regulation of agricultural production). On the now-dominant reading of the Tenth Amendment, the word "reserved" in that provision also functions in this way. See U.S. CONST. amend. X (describing the powers not delegated to the United States as "reserved to the States respectively, or to the people.").

<sup>110</sup> See, e.g., Barnett, *supra* note 107, at 1283 (reading the *Gibbons* dictum as placing wholly intrastate commerce fully beyond of the reach of Congress).

<sup>111</sup> Congress could not enact a conflicting law under its commerce power, of course; Marshall had already explained that the Commerce Clause did not cover purely intrastate commerce. See *Gibbons*, 22 U.S. (9 Wheat.) at 195. But Congress might enact a conflicting law as a taxing measure, or to enforce patents, or even as a law necessary and proper for carrying into execution some regulation passed under the Commerce Clause itself.

<sup>112</sup> See, e.g., *id.* at 13–14 (summarizing argument of Daniel Webster for *Gibbons*).

for the State” meant “the state has not lost its power to regulate intrastate commerce,” not “the power to regulate intrastate commerce belongs exclusively to the state.” Congressional regulation could still operate within the intrastate commercial realm, so long as it was justified by some power other than the commerce power standing alone.

Marshall was never required to decide whether those other powers of Congress might be sufficient to regulate intrastate commerce *pervasively*, as opposed to simply here and there. Maybe he imagined that some local commerce would be beyond any of Congress’s powers. Maybe he thought that Congress could probably identify some power sufficient for regulating any aspect of commerce that the federal government was genuinely interested in regulating. Or maybe he had no firm view one way or the other on this issue, which was in any case not presented for his decision.<sup>113</sup> But modern constitutional law has confronted the question and resolved it decisively in favor of plenary congressional power over commerce in general. It is a basic principle of twentieth and twenty-first century constitutional law—one confirmed, rather than threatened, by *United States v. Lopez*—that Congress can regulate all commerce, no matter how local, because all commerce can affect interstate commerce sufficiently to be brought within the regulatory power of Congress under Clause iii.

A review of some basic doctrine should make the point. Under the *Shreveport Rate* cases, which are not controversial today, Congress may regulate intrastate commerce when the effective regulation of interstate commerce so requires.<sup>114</sup> Under *Wickard v. Filburn*, Congress can regulate local economic activity so long as that activity, considered in the aggregate, has substantial effects on interstate commerce.<sup>115</sup> And it is notorious that any economic activity has such effects when considered in the aggregate. There are differences of opinion as to whether Congress’s authority to regulate intrastate commerce under cases like *Shreveport* and *Wickard* is best understood as the commerce power *simpliciter* or, as Justice Scalia

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<sup>113</sup> Marshall never wrote an opinion striking down a federal regulation of intrastate commerce, nor even an opinion suggesting that some regulation of that sort raised a difficult constitutional question. And he did sometimes make statements that, if read for all they might be worth, would suggest comfort with federal power to regulate all commercial affairs. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 413–14 (1821) (“[T]he United States form, for many, and for most important purposes, a single nation . . . In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one, and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union.”). But it would overread the sources to claim that Marshall clearly endorsed the view that, for any imaginable aspect of local commerce, some enumerated power of Congress would always authorize regulation.

<sup>114</sup> *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport)*, 234 U.S. 342, 351–52 (1914).

<sup>115</sup> *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

would have it, as the combined authority of the Commerce Clause and the Necessary and Proper Clause.<sup>116</sup> But either way, modern doctrine indicates that pretty much any commercial activity can be federally regulated on the ground that its regulation is necessary and proper for carrying into execution the power to regulate interstate commerce.

To be sure, it is orthodox that neither the Commerce Clause nor the Commerce Clause in conjunction with the Necessary and Proper Clause can be construed as the equivalent of a federal police power. *Lopez* holds that even in conjunction with the Necessary and Proper Clause, the commerce power does not authorize Congress to regulate non-economic activities, even if in the aggregate such activities substantially affect interstate commerce.<sup>117</sup> Moreover, five Justices opined in *Sebelius* that even in conjunction with the Necessary and Proper Clause, the commerce power does not entitle Congress to regulate inactivity as opposed to activity.<sup>118</sup> But if some potential subject of regulation is concededly activity and concededly economic, Congress may regulate it through some combination of its commerce power and its necessary and proper power, provided of course that the federal law falls foul of no external constitutional limit. The contention that such a potential subject of regulation is “local” or “intrastate” is of no doctrinal consequence.

*Lopez* itself confirms the point. The Supreme Court in that case did not determine that 18 U.S.C. § 922(q)—the Gun-Free School Zones Act—lay beyond Congress’s commerce power because that section regulated purely intrastate commerce. Instead, the Court held that § 922(q) did not regulate commerce at all—indeed, that it did not regulate any economic activity.<sup>119</sup> Had the Court deemed the possession of firearms to be a form of commerce, even of a very local sort, its analysis would have required that § 922(q) be upheld. *Lopez* declares that the *Wickard* inquiry, which asks whether an activity considered in the aggregate has substantial effects on interstate commerce, is appropriate for economic activities but not for non-economic activities.<sup>120</sup> Even the most local commerce is economic activity. It is *commerce*, after all. So if the possession of firearms were a form of local commerce, the Court would have had to ask whether in the aggregate that commerce substantially affected commerce among the several states. The answer would have been yes, just as it is for any activity whose effects are eligible for aggregation under *Wickard*. That is why the government

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116 See *Gonzales v. Raich*, 545 U.S. 1, 33–35 (2005) (Scalia, J., concurring).

117 *United States v. Lopez*, 514 U.S. 549, 561 (1995).

118 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.).

119 *Lopez*, 514 U.S. at 561.

120 *Id.*

urged the Court in *Lopez* to undertake the *Wickard* analysis, as well as why the Court declined. But the Court did not decline on the theory that the possession of a firearm is too local a form of commerce to be eligible for aggregation. The Court declined on the theory that the possession of a firearm is not economic activity at all and hence not commercial activity in the first place.<sup>121</sup> So to be sure, *Lopez* holds that the Commerce Clause does not confer general regulatory power. But *Lopez* neither presumes nor implies the existence of commercial activity that lies beyond federal regulatory power because it is “purely intrastate.” On the contrary, it reaffirms the modern view that if some potential subject of regulation is concededly commercial activity, it is sure to have effects on interstate commerce and to be regulable under Congress’s commerce power accordingly.

This modern position might or might not be strictly reconcilable with Marshall’s analysis. It depends on whether the modern warrant for congressional regulation of even the most local commercial activity lies in the Commerce Clause itself (which would conflict with Marshall’s analysis in *Gibbons*) or in the combination of that Clause and the Necessary and Proper Clause (which might not). But either way, modern doctrine does authorize Congress to regulate all commercial activity, no matter how local. And if there is no commerce too local to come within the compass of congressional regulation, then the *Gibbons* dictum’s articulated limitation on the scope of the Commerce Clause in no way limits what Congress can do. To the extent that the dictum ever stated a limit on Congress, it is a limit that is no longer a part of constitutional law, even in the age of *Lopez* and *Sebelius*. Under prevailing doctrine, Congress can regulate commerce without regard to its status as intrastate or interstate. This federal regulatory authority is accepted by everyone who accepts *Shreveport* and *Wickard*—or *Gonzales v. Raich*<sup>122</sup>—which is to say by a broad consensus of constitutional interpreters. It therefore makes little sense to think that Marshall’s *Gibbons* dictum reflects the immunity of local commercial matters from congressional regulation.

To be sure, plenary congressional power over commerce does not mean that Congress has the equivalent of a police power, because plenary power over commerce is not the same thing as plenary power in general. But if congressional power is not in practice as broad as a police power, it is not because the Commerce Clause leaves Congress unable to regulate intrastate commerce. In reality, Congress can regulate commerce from top to bottom, so the *Gibbons* dictum’s distinction between purely local commerce

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121 *Id.*

122 *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (upholding the application of the Controlled Substances Act to home-grown marijuana intended for individual use).

and other commerce identifies no limit on federal power. On the question of whether the sum total of Congress's powers leaves Congress unable to do anything that it could do with a general police power, the *Gibbons* dictum should have no bearing at all.

## II. *GIBBONS* AND THE POWER OF STATES

The post-*Lopez* misreading of the *Gibbons* dictum is rooted in a failure to remember an important difference between modern constitutional law and the constitutional law of the early nineteenth century. Today, we think of the Commerce Clause chiefly as an authorization for federal legislation, and the greatest question regarding the commerce power is whether the commerce power has meaningful internal limits. What may Congress not do under its commerce power, every law student learns to ask, short of external limits like those in the Bill of Rights? When we read Marshall saying that the enumeration presupposes something not enumerated, we naturally do so through our own pressing concerns, and that framing makes the dictum seem like a statement of the internal-limits canon. But when *Gibbons* was litigated, Marshall's audience was not chiefly worried about whether Congress might have the functional equivalent of a police power. It was much more worried about whether the police powers of *states* would be held subject to far-reaching constitutional preemption, even in situations where Congress had not legislated.

As briefly noted above, many leading lawyers early in the nineteenth century took the view that the power specified in the Commerce Clause was vested in Congress *exclusively*.<sup>123</sup> State laws regulating commerce "with foreign Nations, and among the several States, and with the Indian Tribes" were, on that view, unconstitutional encroachments on a federal preserve.<sup>124</sup> Depending on how broadly the federal commerce power was construed, the body of state law that might be preempted could be moderate, large, or catastrophically huge. By reading the Commerce Clause as not reaching intrastate commerce, Marshall tempered the threat of preemption, reassuring states that a broad swath of traditional local regulation was not under threat. State laws regulating commerce within the federal commerce power might all be invalid, but state laws regulating local commerce could stand.<sup>125</sup> In other words, Marshall's statement that the enumeration presupposes something not enumerated was not primarily significant as a statement about the limits of the power of *Congress* at all. To the extent

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123 See *supra* note 112 and accompanying text.

124 U.S. CONST. art. I, § 8, cl. 3.

125 Assuming, of course, that Congress did not affirmatively displace them with laws passed under other powers.

that the *Gibbons* dictum said something significant, it was significant as a statement about the regulatory power of *states*.

Marshall's opinion positively entraps modern readers into missing this point. Our natural tendency is to think of Commerce Clause cases as presenting issues about what Congress may do and only secondarily, in the particular context of dormant commerce doctrine, as issues about what states may do. Because Marshall officially decided *Gibbons* on the basis of the federal statutes giving licenses to participate in the coasting trade, *Gibbons* appears to fit the paradigm that modern readers expect of a Commerce Clause case. It seems to be a case about the validity of a federal law. In reality, however, the coasting-trade issue was a bit of misdirection in *Gibbons*, one that Marshall seized upon to avoid ruling on the real issue: whether the commerce power was exclusive in Congress. Much of Marshall's contemporary audience saw through his tendentious reading of the coasting license, and Marshall probably expected them to.<sup>126</sup> But audiences in the twentieth and twenty-first centuries have been easier to fool, because they (we) are primed to be receptive to the idea that the issue in a commerce case is about the validity of a federal law.

This Part explains that Marshall's dictum about the enumeration presupposing something not enumerated is better understood as a statement about the *prima facie* powers of states than as a statement about the limits of congressional authority. In Part II.A, I present *Gibbons v. Ogden* as it appeared to its contemporaries: not as a case about the federal laws regulating the coasting trade, but as a case about the rivalry between the powerful state of New York and its less-powerful neighbors. In Part II.B, I lay out the central constitutional question that the case presented. Was New York's bid to dominate its neighbors automatically blocked by the preemptive force of the Commerce Clause, deemed to vest the power to regulate commerce exclusively in the federal government? Or did the states enjoy concurrent authority to regulate commercial affairs, in which case the conflict among rival states would continue unless Congress actively intervened? In Part II.C, I trace that central question through the *Gibbons* litigation from its origins in New York through its resolution at the Supreme Court and then back to New York again. As that analysis shows, the coasting-license rationale on which Marshall officially disposed of the case was not the real driver of the decision. The animating issues were whether the federal power over commerce was exclusive of state regulatory authority over the same domain and, if so, how broadly existing state laws on a whole variety of subjects would be held unconstitutional. Marshall's statement that the enumeration of three classes of commerce presupposed

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<sup>126</sup> See *infra* notes 233, 240 and accompanying text.

an excluded sphere of intrastate commerce was more significant in that context—as a way of permitting states continued regulatory authority, rather than as a limitation on Congress.

### A. *The Bigger Rivalry*

To see the big issue in *Gibbons* in the way that it appeared to the legal world at the time, it is important to recognize that the personal rivalry between Ogden and Gibbons played out in the middle of a much larger rivalry among states. Even more so than the personal rivalry, the state rivalry was an uneven one. New York had been a middle-of-the-pack state when the Constitution was adopted,<sup>127</sup> but it enjoyed explosive growth in the decades following. By 1810, New York was the largest state by population.<sup>128</sup> Its economic power grew as well. By the time construction of the Erie Canal began in 1817, New York was a colossus. The canal seemed, and was, only destined to increase its predominance.

As New York grew in power, it failed to assure its less-powerful neighbors that it would play with them nicely. Consider, for example, the question of who owned the Hudson River waters on which Gibbons's and Ogden's ferries operated. One might think that the boundary between New York and New Jersey would lie at the river's halfway point, and indeed that was New Jersey's position. But New York claimed title to the whole river, all the way to the New Jersey side.<sup>129</sup> In New York's view, therefore, many Hudson River shipping routes between one New Jersey port and another New Jersey port ran, on the water, entirely within the jurisdiction of New York. New Yorkers were not shy about asserting that jurisdiction. In one case litigated before Gibbons and Ogden were at each other's throats, John Livingston sued them both on the theory that their Hudson River ferry routes operating solely between points in New Jersey violated his exclusive

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127 At the Constitutional Convention, the interest bloc that we think of as the “large states” had essentially three members: Virginia, Massachusetts, and Pennsylvania. North Carolina was the fourth-largest state by population, and New York was fifth. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 24–37 (1975), <http://www.census.gov/history/pdf/histstats-colonial-1970.pdf> (reporting state-by-state population information, starting in 1790).

128 See *id.* (counting the total resident population of the states from 1790–1970); MEDIA PROJECTS INC., GROWTH OF U.S. POPULATION, 1790–1840, [http://www.granburyisd.org/cms/lib/TX01000552/Centricity/Domain/287/Fact\\_Sheet\\_US\\_Growth\\_in\\_Population.pdf](http://www.granburyisd.org/cms/lib/TX01000552/Centricity/Domain/287/Fact_Sheet_US_Growth_in_Population.pdf) (“In the 1810 census, New York edged out Virginia as the nation’s most populous state for the first time . . .”).

129 See *supra* note 77.



right to use steamboats in New York waters.<sup>130</sup> And in the courts of New York, Livingston won.<sup>131</sup>

In this context, neighboring states naturally saw New York's prohibition on steamboat navigation by anyone not licensed by the state of New York as part of an economic power play. New York was encroaching on the commerce of other states, even commerce that other states thought of as internal to themselves. (The nickname "Empire State," which was in use by the 1820s,<sup>132</sup> might have been pronounced with pride by New Yorkers. But one imagines that beyond the state line, it had a more sinister ring.) More broadly, shipping to and from ports in New York claimed a large and increasing share of commercial activity along the Eastern Seaboard. If New York limited which ships could ply its waters, it could put businesses in many states at the mercy of well-connected New Yorkers like Livingston.<sup>133</sup>

New York's neighbors lacked the economic heft to compete on equal terms. But they retaliated as best they could. New Jersey passed a statute providing that anyone who enforced New York's exclusive steamboat franchise against a New Jersey operator would be liable, in New Jersey, to the amount of treble damages, and that New York steamboats could be seized if they came to rest on the New Jersey shore.<sup>134</sup> Connecticut simply passed a law barring entry into its waters to any steamboat operating under a license from the holder of New York's exclusive steamboat privilege.<sup>135</sup> As a result, there could be no steamboat traffic at all between New York and Connecticut, nor from New York to the other New England states through Connecticut's waters in the Long Island Sound. In short, New York and its

130 See *Livingston v. Ogden*, 4 Johns. Ch. 48, 48–49 (N.Y. Ch. 1819) (explaining Defendant's alleged violations of Livingston's rights).

131 See *id.* at 52–53 (enjoining Defendant Gibbons from "navigating the waters" of New York).

132 Milton M. Klein, *Introduction to THE EMPIRE STATE: A HISTORY OF NEW YORK* xvii, at xix (Milton M. Klein ed. 2001).

133 Formally, of course, New York did not exclude Gibbons or anyone else from its waters by virtue of the exclusive grant to Fulton and Livingston and their later assignees. As counsel pointed out, people not holding the franchise were perfectly free to navigate in New York waters under sail, or by rowing, or by any other technology not within the terms of the grant to Fulton and Livingston. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 124 ("Every steam boat . . . may, without objection . . . come, by means of steam, to the verge of our waters; there is no difficulty opposed to its coming up . . . provided that, for the short space of time while it may be in our waters, it employs the only things that any other vessel can employ for entering and departing . . . sails and oars."). Given the superiority of steamboat travel, however, this point offered little practical comfort. In an age when the issue of Net Neutrality focuses attention on the serious economic consequences of delaying a transmission by even the smallest amount of time, it is easy to understand why making shippers other than the one holding New York's exclusive franchise navigate the Hudson under sail would be completely unable to compete with steamboat traffic.

134 See *Gibbons*, 22 U.S. (9 Wheat.) at 4–5 (describing New Jersey's statute as an "act of *retortion* against the illegal and oppressive legislation of New-York").

135 *Id.* at 4.

neighbors were locked in a war over navigation rights that looked like it would have been perfectly at home in 1786, when James Madison and others decried the interstate protectionism that they believed made a stronger central government essential.<sup>136</sup> The Constitution was now in force, but the problem persisted.

One might well ask why Congress didn't step in. Madison's vision, of course, had been that a national legislature would nullify the states' mutually destructive protectionist tendencies.<sup>137</sup> Even in 1824, no serious body of opinion doubted that Congress's power to regulate interstate commerce included the power to open interstate waterways to free traffic on some prescribed set of terms. The argument that the case could be decided by reference to Gibbons's federally granted license to pursue the coasting trade was, in essence, a claim that Congress had already done just that. But given the serious weakness of that argument,<sup>138</sup> as well as the fact that the existence of coasting licenses had not in fact prevented New York, New Jersey, and Connecticut from wreaking havoc, it is probably unsound to think that Congress refrained from further intervention in the tri-state imbroglio because it thought it had already solved the problem. In the end, there may be no single answer to the question, "Why didn't Congress pass a real statute straightening out the mess in New York?" Partial answers may range from the blocking power of New York's congressional delegation to the general background fact that Congress didn't regulate much in the early nineteenth century. But whatever the reasons for Congress's not having done more, more it did not do. If the constitutional system was going to have a solution for the steamboat war, it would have to come from a different quarter.

### B. *The Bigger Question*

Chief Justice John Marshall's solution was to break the New York monopoly on the strength of Gibbons's argument about his federal coasting license.<sup>139</sup> But to think of the case as presenting the question of whether federal authority could supersede New York law is to miss the real issue at stake. That an applicable congressional statute would overcome state law was obvious. The contentious question was whether and to what extent

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136 See, e.g., MADISON, *supra* note 73, at 346 (describing a calamitous "want of concert in matters where common interest requires it . . . [as] strongly illustrated in the state of our commercial affairs").

137 See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 149–50 (2010) (describing Madison's vision as articulated on this point in the Virginia Plan).

138 See *infra* Part II.C.3.

139 *Gibbons*, 22 U.S. (9 Wheat.) at 212–13.

New York could enact commercial regulations at all, even in the absence of superseding federal law.<sup>140</sup>

That question is not one that modern lawyers ask. For more than a century now, it has been clear that states are free to enforce nondiscriminatory commercial regulations unless Congress has enacted some statutory policy preempting them. States exercise a general police power, and that power includes the power to regulate garden-variety economic matters. But things were different in 1820. Whether the states' police power included the authority to regulate commerce was at that time a seriously contested question, as well as a greatly consequential one.

Since the turn of the twentieth century, the dominant Commerce Clause narrative has been the expansion of congressional regulation. The story runs from *Champion v. Ames*<sup>141</sup> and *Shreveport*<sup>142</sup> through *Hammer v. Dagenhart*<sup>143</sup> and *Schechter Poultry*<sup>144</sup> to *Darby*,<sup>145</sup> *Wickard*,<sup>146</sup> and *Heart of Atlanta Motel*,<sup>147</sup> and then to *Lopez*,<sup>148</sup> *Morrison*,<sup>149</sup> *Raich*,<sup>150</sup> and *Sebelius*.<sup>151</sup> Every living American lawyer learned in law school to confront Commerce Clause issues first and foremost as issues about the extent of Congress's power to regulate.

The nineteenth century was different. For the first hundred years of life under the Constitution, Congress enacted little legislation under its commerce power, and constitutional law did not centrally feature the question of whether this or that federal law was within Congress's power to regulate commerce. No federal statute faced a serious constitutional challenge on Commerce Clause grounds until after the Civil War—indeed, until the moment when the narrative described in the paragraph above begins.<sup>152</sup> To

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140 See, e.g., *id.* at 8–17, 24–25 (summarizing argument of Webster, for Gibbons, against New York's authority to legislate); *id.* at 60–64 (summarizing argument of Oakley, for Ogden, in favor of New York's authority to legislate).

141 188 U.S. 321, 362–64 (1903).

142 *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport)*, 234 U.S. 342, 351–52 (1914).

143 247 U.S. 251, 268, 276 (1918).

144 *A.L.A. Schechter Poultry Corp. v. United States (Schechter Poultry)*, 295 U.S. 495, 549–51 (1935).

145 *United States v. Darby*, 312 U.S. 100, 125–26 (1941).

146 *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942).

147 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964).

148 *United States v. Lopez*, 514 U.S. 549 (1995).

149 *United States v. Morrison*, 529 U.S. 598, 627 (2000).

150 *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005).

151 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2589, 2600 (2012).

152 The Supreme Court's first serious discussion of whether a federal statute *sub judice* might be invalid because it exceeded Congress's power under the Commerce Clause came in *Trade-Mark Cases*, 100 U.S. 82 (1879). The Court's view in the *Trade-Mark Cases* that the legislation before it was not sustainable as an exercise of the commerce power seems reasonably clear from the majority opinion. Technically, however, the Court declined to reach that constitutional question, concluding instead that Congress had not meant to exercise its commerce authority. See *id.* at

be sure, the Commerce Clause played an important role in nineteenth-century constitutional law, and courts frequently asked whether particular statutes were compatible with the commerce power. But the cases raising that question were not cases testing the constitutionality of federal laws. They were cases testing the constitutionality of state laws. In *Brown v. Maryland*,<sup>153</sup> *Willson v. Black Bird Creek Marsh Co.*,<sup>154</sup> *Mayor of New York v. Miln*,<sup>155</sup> the *License Cases*,<sup>156</sup> and the *Passenger Cases*,<sup>157</sup> judges in the early Republic took the measure of the commerce power not to determine whether Congress had regulated *ultra vires* but to determine whether some state had regulated in an area where states were affirmatively divested of regulatory authority by a grant of exclusive power to Congress. And the first of those cases was *Gibbons v. Ogden*.

These early commerce cases resemble modern dormant commerce cases in one way: they raised the possibility that state laws regulating commerce were invalid even in the absence of conflict with some federal statute. But the older cases were also importantly different from modern dormant commerce cases. Today, the critical question in most dormant commerce cases is whether state law discriminates against other states in some inappropriate way<sup>158</sup> or, on a different theory of the doctrine, whether state law exercises an inordinate burden on the flow of commerce in an interstate market.<sup>159</sup> States are presumed to have the power to enact economic legislation, and the respect due to other states in the Union and perhaps to the national free market as such imposes limits on that power—limits that the judiciary polices in the absence of congressional intervention. In the nineteenth century, the critical question was often whether a state had the power to regulate in the relevant domain at all. If the power to regulate commerce among the states was not just vested in Congress but *exclusively* vested in Congress, a state law regulating interstate commerce would be invalid

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95–98 (leaving the Commerce Clause issue formally undecided). In *United States v. E.C. Knight*, 156 U.S. 1, 16–17 (1895), the Court read the Sherman Act narrowly so as to avoid giving it a meaning that would exceed Congress's commerce power. The first Supreme Court case squarely holding a federal statute or an application of a federal statute void because it exceeded Congress's power under the Commerce Clause was *Howard v. Ill. Cent. R. Co.*, 207 U.S. 463, 502–04 (1908).

153 25 U.S. (12 Wheat.) 419, 445–49 (1827).

154 27 U.S. (2 Pet.) 245, 251–52 (1829).

155 36 U.S. (11 Pet.) 102, 143 (1837).

156 *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (5 How.) 504, 582–83 (1847) (opinion of Taney, C.J.).

157 *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 283, 408–10 (1849) (plurality opinion).

158 See, e.g., *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 350–53 (2008) (upholding state income tax exemption for income earned on in-state municipal bonds).

159 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (striking down a state law on the ground that the burden it imposed on interstate commerce was excessive in comparison to the local benefits it secured).

whether or not it discriminated against the commercial interests of other states and whether or not it created an outsized burden on interstate commerce.

Whether the power to regulate commerce among the states lay exclusively with Congress or concurrently in Congress and the state governments was an issue that fundamentally divided leading constitutional lawyers. John Marshall favored the first answer,<sup>160</sup> and Chief Justice Roger Taney decisively endorsed the second.<sup>161</sup> The concurrent-power position eventually prevailed, tempered by rules prohibiting some state legislation that discriminates against the interests of fellow states and perhaps also some state legislation that creates outsized burdens on interstate commerce—that is, by dormant commerce doctrine. But until that settlement emerged, the question of whether the federal commerce power was exclusive was among the most contentious in constitutional law.

### C. *The Steamboat War and the Exclusive-Power Problem*

*Gibbons* was the first commerce-power case that the Supreme Court ever decided, and it directly raised the contested issue of whether the commerce power was exclusive or concurrent. As the case was seen both prior to argument and in the arguments themselves, the big question was whether New York's law granting a legal monopoly on steamboat traffic, and perhaps the rival states' retaliatory laws as well, should be struck down as unconstitutionally encroaching on Congress's exclusive power to regulate commerce.<sup>162</sup> The matter of a federal license under the coasting trade was a sideshow—one that came on the scene late and that Marshall used, deftly if tendentiously, to avoid ruling on the deep and divisive issue.

#### 1. *Livingston v. Van Ingen*

To see how the problem in *Gibbons* appeared to the participants at the time, start by going back to an important piece of predecessor litigation:

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<sup>160</sup> See *infra* Part II.C.

<sup>161</sup> See, e.g., *License Cases*, 46 U.S. (5 How.) at 579 (opinion of Taney, C.J.) (“[T]he 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 harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.”).

<sup>162</sup> See *supra* note 140 and accompanying text (noting that Webster argued in *Gibbons* that New York could not enact commercial regulations at all, even in the absence of superseding federal law).

*Livingston v. Van Ingen*.<sup>163</sup> When the State of New York initially granted an exclusive franchise for the operation of steamboats within its waters, the grant was not to John Livingston but jointly to a two-man team: Robert Fulton, the engineer known (if inaccurately) to generations of American schoolchildren as the inventor of the steamboat,<sup>164</sup> and John Livingston's elder brother Robert Livingston, briefly encountered (and promptly forgotten) by the same schoolchildren as the least memorable member of the five-man committee that drafted the Declaration of Independence.<sup>165</sup> But the fact that Robert Livingston's fame has not equaled that of his fellow 1776 committeemen says more about the extraordinary roles of Thomas Jefferson, Benjamin Franklin, John Adams, and Roger Sherman than about any lack of heft on Livingston's part. In addition to having served on the Declaration Committee, Robert Livingston was Chancellor of New York, United States Secretary of Foreign Affairs under the Articles of Confederation, and Minister to France in the Jefferson Administration—a position in which he negotiated the Louisiana Purchase.<sup>166</sup> As this resume suggests, Livingston was both a sophisticated lawyer and a well-connected politician. Robert Fulton was the engineering end of the steamboat partnership; Robert Livingston was the business end, and the legal end, and the political end—and formidably so.

Sometime after Livingston and Fulton obtained their exclusive franchise from the state to operate steamboats in New York waters, a group of would-be steamboat operators from Albany challenged or simply flouted the grant. (Livingston took to calling the challengers “the Albanians.”)<sup>167</sup> Livingston and Fulton sued in New York's Chancery Court to enforce their monopoly.<sup>168</sup> The Albanians defended not on the ground that some federal

<sup>163</sup> 9 Johns. 507 (N.Y. 1812).

<sup>164</sup> In the litigation over the monopoly, it was important to Fulton and Livingston that Fulton had merely appropriated and repurposed an invention of others, rather than invented the steamboat himself, because if he were the inventor, New York might be disabled from conferring exclusive privileges on him, because the grant of such a monopoly might infringe on Congress's enumerated power to secure time-limited monopolies to inventors. See U.S. CONST. art. I, § 8, cl. 8 (specifying that Congress has the right to give inventors exclusive rights to the use of their inventions for limited times); *Van Ingen*, 9 Johns. at 520, 558–60 (Yates, J.) (specifying that Fulton disclaimed the status of inventor for this reason).

<sup>165</sup> *Van Ingen*, 9 Johns. at 511–12.

<sup>166</sup> See 1 CUYLER REYNOLDS, GENEALOGICAL AND FAMILY HISTORY OF SOUTHERN NEW YORK AND THE HUDSON RIVER VALLEY: A RECORD OF THE ACHIEVEMENTS OF HER PEOPLE IN THE MAKING OF A COMMONWEALTH AND THE BUILDING OF A NATION 176, 280 (1913) (listing the accomplishments of Robert Livingston).

<sup>167</sup> See BAXTER, *supra* note 44, at 21 (describing a number of Livingston's references to the “Albanians,” meaning the group of rival businessmen including James Van Ingen). I am advised that residents of twenty-first century Albany sometimes use this term to describe themselves but that the term is not in common use.

<sup>168</sup> See *Van Ingen*, 9 Johns. at 514–25.

statute displaced New York's law but on the theory that New York had no power to regulate steamboat commerce in the first place.<sup>169</sup> The power to regulate commerce, argued the Albanians, lay exclusively with Congress.<sup>170</sup> If it didn't, New York (and other states) could effectively destroy all sorts of interstate and even international navigation. Imagine, they said, a steamboat merely passing through New York's waters while traveling from New Jersey to Connecticut.<sup>171</sup> Could New York really interdict its passage? Worse yet, could New York block a vessel steaming south from Canada?<sup>172</sup> Nor was the threat limited to steamboats. If New York could restrict or prohibit steamboat traffic, the argument ran, it could also prohibit navigation by sailing vessels.<sup>173</sup> In short, to afford New York a power to regulate commerce was to invite the kind of Balkanized regime for navigation and trade that made the federal commerce power necessary in the first place. For that federal power to do its job, it must be exclusively federal.<sup>174</sup>

In *Livingston v. Van Ingen*, the highest court in New York rejected this contention, siding unanimously with Livingston and Fulton.<sup>175</sup> Being an arm of the State of New York, the court might not have been disposed to worry that New York was a threat to the United States of America. And as a court whose membership included the membership of the State Senate,<sup>176</sup> the New York Court for the Correction of Errors was surely attuned to the costs of deciding that every regulation of commerce in the New York statute book must be regarded as invalid. Construing the commerce power as exclusive in Congress, the Justices wrote, would disable the state from enforcing scads of garden-variety laws that concerned commerce to one degree or another—regulations involving roads, bridges, canals, and ferries, not to mention Sunday laws, pauper laws, health and inspection laws, liquor laws, and laws prohibiting the importation of slaves.<sup>177</sup> Surely the Constitution did not require such an extensive disabling of local regulatory power. And so, they concluded, the power to regulate commerce must be vested in the states and the federal government concurrently, rather than in Congress to the exclusion of the states.<sup>178</sup>

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169 See *id.* at 537-43.

170 See *id.*

171 See *id.* at 542-43.

172 See *id.*

173 See *id.*

174 See *id.*

175 *Id.* at 507-08.

176 Irving Browne, *The New York Court of Errors*, 19 AM. L. REV. 21, 21 (1985).

177 See *Van Ingen*, 9 Johns. at 561, 568-69, 580 (including references in the opinions of Yates, Thompson, JJ., and Kent, C.J.).

178 See *id.* at 577-80 (Kent, C.J.).

Note, however, that the New York court's expressed concern was not that Congress might imperiously countermand local laws by invoking its authority to regulate commerce. The reach of actual federal laws was not at issue.<sup>179</sup> The concern was that a doctrine of exclusive congressional power to regulate commerce would preempt huge swaths of extant local law, leaving the regulation of relevant spheres of life disastrously unaddressed by any lawmaking authority.

The clearest treatment of the issues in *Van Ingen* came from Chief Justice James Kent, one of the leading legal thinkers of the early Republic. Like his fellow Justices, Kent wrote that all sorts of necessary local regulations would be preempted if the power to regulate commerce were held to be vested in Congress exclusively.<sup>180</sup> It would therefore be sensible to construe the commerce power as vested in Congress and the states concurrently, unless the Commerce Clause expressly required the exclusive-power approach.<sup>181</sup> Fortunately, the text of Clause iii did not so require.<sup>182</sup> As Kent explained, the words could be read as creating in Congress only a concurrent power of regulation, albeit one that would supersede state law when it was used. So the power should be construed as concurrent.<sup>183</sup> It would be deeply unsound, Kent continued, to imagine that a state was divested of the authority to enact internal regulations

merely because we can imagine that congress, in the plenary exercise of its power to regulate commerce, may make some regulation inconsistent with the exercise of this privilege. When such a case arises, it will provide for itself; and there is, fortunately, a paramount power in the supreme court of the *United States* to guard against the mischiefs of collision.<sup>184</sup>

In other words, if a federal statute contradicted some New York law regulating New York's internal commerce, New York would have to give way. But in the absence of conflict, it made little sense to bar New York from acting.<sup>185</sup>

*Livingston v. Van Ingen* thus held, on the authority of New York's highest court, that the power to regulate commerce lay in Congress and the states concurrently. The New York law granting Livingston and Fulton a legal monopoly over steamboat traffic within the waters of New York was

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179 See *id.* at 579 (arguing that Congress's power to regulate commerce does not imply that the States do not have the power to regulate commerce to the extent that regulation is not inconsistent with acts of Congress).

180 See *id.* at 580.

181 See *id.* at 578.

182 See *id.* at 577.

183 See *id.* at 578.

184 *Id.* at 579.

185 Kent expressed doubt that such conflicts would in fact arise. But he was also clear that if such a conflict did arise, the courts would uphold federal authority. See *id.*



valid. And with that legal issue resolved, the parties proceeded to the practical business of settlement. Livingston and Fulton offered to license the Albanians to operate steamboats on the Hudson river, for appropriate fees, and on the condition that the Albanians would not seek further review from the United States Supreme Court. Figuring it was a deal good enough to take, the Albanians agreed.<sup>186</sup> And there matters rested, at least for a little while.

## 2. Ogden v. Gibbons

When Thomas Gibbons set out to destroy the business associate who had counseled Gibbons's wife about the possibility of divorce, *Livingston v. Van Ingen* was the law of New York. Ogden held a license to operate his steamboat from John Livingston, brother and assignee of the original franchise holder, and any competing line that Gibbons might open would be illegal. Gibbons accordingly knew that once he started operating his ferry, Ogden would sue in New York on the strength of *Van Ingen*. So Gibbons had only two possibilities for a successful defense. Either he would need a way to distinguish *Van Ingen*, or he would have to take his case to the United States Supreme Court and hope for a decision overruling the courts of New York.

Gibbons knew that to succeed by distinguishing *Van Ingen*, he would have to persuade none other than James Kent, who had written a detailed opinion in the earlier litigation. Like the *Van Ingen* litigation before it, Ogden's suit would lie initially in the Court of Chancery. And shortly after *Van Ingen* was decided, Kent had left the position of Chief Justice to assume the role of Chancellor.<sup>187</sup> So Gibbons and his lawyers did what good lawyers do.<sup>188</sup> They read Kent's opinion in *Van Ingen*, looking for a way to distinguish the next case. And indeed, the Kent opinion seemed to draw a map for a future litigant in Gibbons's position. In ruling for Livingston back in 1812, Kent had explained that *Van Ingen* raised no question involving any federal law.<sup>189</sup> His ruling had been that in the absence of federal law, the mere possibility of conflict with a future federal law could not bar

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186 See *Gibbons v. Ogden*, 17 Johns. 488, 508 (N.Y. 1820) (describing the decision of many challengers in the *Van Ingen* litigation to accept licenses from Livingston rather than continue their legal battle).

187 See *James Kent*, ENCYC. BRITANNICA, <http://www.britannica.com/biography/James-Kent> (providing that Kent was chancellor of the New York Court of Chancery from 1814–1823).

188 Gibbons was himself a lawyer, but he was also well represented, including of course by Webster. See *supra* note 71 and accompanying text.

189 See *Livingston v. Van Ingen*, 9 Johns. 507, 579 (N.Y. 1812) (opinion of Kent, C.J.) (stating that *Van Ingen* did not raise a question involving federal law).

New York from regulating.<sup>190</sup> Only if some actual federal statute conflicted with New York's law would the federal commerce power be relevant. So Gibbons sought to present his case as the different one that Kent had imagined. In *Van Ingen*, Gibbons argued, there was no issue of conflict with federal authority. But in his own case, he continued, there was indeed a conflicting federal authority in his case, because his vessels were licensed to pursue the coasting trade under federal statute.<sup>191</sup>

One should give Gibbons credit for trying. The judge who would decide his case had laid down doctrine explaining what it would take to distinguish the prior authority, and Gibbons duly characterized his case as qualifying for the distinction. That said, the coasting-license argument may have been hard to make with a straight face. Modern audiences may not intuit that fact, because the rubric of the coasting trade and its licenses is not familiar to us. But a lawyer or a merchant shipper in 1820—and Gibbons was both—would have understood that a federal coasting license was not a warrant to navigate at will. It was simply an authorization to participate in the coasting trade—that is, trade by water among points within the United States—on the favorable terms accorded to American vessels, rather than the less favorable terms applicable to foreign ships.<sup>192</sup>

In an effort to give American shippers an advantage relative to their European competitors, Congress had required foreign ships arriving at or departing from American ports to pay tonnage fees and comply with various other regulations from which American ships were exempt.<sup>193</sup> A coasting license identified a vessel as entitled to the preferential treatment given to the home team.<sup>194</sup> But such a license did not confer a general immunity from local regulation. It simply exempted the vessel from burdens imposed by the particular federal statutory scheme under which the license was given.<sup>195</sup> So consider, by analogy, the modern regime under which federal law

<sup>190</sup> See *id.*

<sup>191</sup> The idea that a coasting license created a federally guaranteed right to navigate did not originate with Gibbons. In earlier efforts to resist New York's monopoly, other steamboat operators had considered the same tactic. They did not meet with success, but neither was the issue ever fully litigated in court prior to the Gibbons litigation. See, e.g., COX, *supra* note 50, at 35, 75 (describing prior attempts to use the coasting-license argument).

<sup>192</sup> For example, the Act of Feb. 18, 1793, ch. 8, 1 Stat. 305 indicates that vessels engaging in the coasting trade and carrying only U.S. products without coasting licenses would be taxed as if they powered foreign vessels. See generally Act of Sept. 1, 1789, ch. 11, 1 Stat. 55; Act of July 20, 1790, ch. 30, 1 Stat. 135 (providing for a registration scheme and imposing duties on the tonnage of ships or vessels at different rates based on origin).

<sup>193</sup> Act of July 20, 1790, ch. 30, 1 Stat. 135.

<sup>194</sup> Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. The 1793 Act and its original predecessor, the Act of Sept. 1, 1789, ch. 11, 1 Stat. 55, both make clear that coasting licenses were only available to ships of the United States.

<sup>195</sup> See *supra* note 192–194 and accompanying text.

favors domestic air carriers over their foreign competition by permitting only the domestic carriers to transport passengers within the United States. Nobody believes that the domestic carriers' right to conduct that business is tantamount to a right to operate its aircraft however and wherever it pleases, regardless of local law—say, by taxiing off of an airport tarmac and along city streets.<sup>196</sup> Nor do we think that commercial trucks registered with the United States Department of Transportation are thereby exempted from local speed limits or empowered to drive on roads that local officials designate as off-limits to large commercial vehicles.<sup>197</sup> There is a federal regulatory scheme, and there is a local scheme, but the former does not supersede the latter, because they cover different ground.

Given the weakness of Gibbons's argument about the coasting trade, it seems unlikely that competent counsel would have expected the contention to fool Chancellor Kent. But competent counsel might also have known that judges sometimes credit weak and slippery arguments when doing so helps them reach results that they believe to be justified on the merits, and Gibbons may have thought that Kent would welcome a semi-plausible pretext for ruling against the steamboat monopoly. In at least one earlier chancery suit, Kent had read the terms of the steamboat monopoly narrowly, pronouncing himself duty-bound to uphold the letter of the law but disinclined to stretch the monopoly's reach any farther than he was required to.<sup>198</sup> Gibbons may therefore have hoped that the Chancellor would look favorably on an invitation to undermine the monopoly if presented with a case that differed from *Van Ingen* in precisely the way that Kent had suggested could make the difference. So into Chancery Gibbons went, brandishing his coasting license.<sup>199</sup>

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196 Federal statutes regulating common carriers do preempt a fair amount of state law, of course—but not everything. They preempt only what is held to be within the intended scope of the relevant statutory scheme. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (analyzing the extent of a federal statute's preemptive reach by reference to Congress's express or implied intention for the scope of the statutory policy).

197 I thank Jennifer Fischell for suggesting this example.

198 See *Livingston v. Ogden*, 4 Johns. Ch. 48, 52 (N.Y. Ch. 1819) (refusing to extend the privilege of navigating boats by steam beyond the clear directive of the law). I do not mean to suggest that Kent was unequivocally critical of the monopoly. In *Van Ingen*, seven years before, Kent had expressed the view that the state's original grant of an exclusive franchise had been a salutary thing. *Livingston v. Van Ingen*, 9 Johns. 507, 578–79 (N.Y. 1812) (opinion of Kent, C.J.). But Kent's later expression of diffidence was likely salient to Gibbons, coming as it did in a more recent case and one to which Gibbons was a party. And at any rate it would not be surprising for a party in interest to read such a statement as a ray of hope about what the decisionmaker might do if given a future opportunity; interested parties have a way of reading ambiguous signals in ways that comport with their own desires.

199 See COX, *supra* note 50, at 112 (describing Gibbons' increasingly contentious attitude toward the legal status quo).

It didn't work. Perhaps Kent was less diffident about the monopoly than Gibbons hoped. Perhaps he was simply too scrupulous about the meaning of a coasting license. Or perhaps it was some of each. But for whatever reasons, Gibbons's coasting-license argument flopped. Yes, Kent wrote, a valid federal statute providing that all steamboats were entitled to navigate the waters of the several states notwithstanding any local regulation would resolve the case in favor of Gibbons.<sup>200</sup> He had indicated as much seven years earlier in *Van Ingen*.<sup>201</sup> But the statute under which the federal government gave licenses to participate in the coasting trade was nothing like such a law.<sup>202</sup> Indeed, Kent wrote, if Gibbons's argument were correct, there would have been no point in New York's granting the exclusive privilege in the first place, because the coasting-license system predated that grant, and licenses were easy to get.<sup>203</sup> Surely the legally sophisticated Robert Livingston—one of Kent's own predecessors as Chancellor of New York—had not been so obtuse as to expend much capital and great energy only to procure monopoly privileges that could be defeated “with as much facility as the flag of the United States could be procured and hoisted . . . . If the state laws were not absolutely null and void from the beginning, they require a greater power than a simple coasting license, to disarm them.”<sup>204</sup> It was a pretty good rejoinder.

The highest court in New York affirmed Chancellor Kent in a brief opinion indicating, essentially, that Gibbons was wasting everyone's time.<sup>205</sup> *Van Ingen* was the law, and the coasting license did absolutely nothing to distinguish the present case.<sup>206</sup> Notably, however, the New York court's unanimous opinion did not deny that Congress had the authority to make laws overriding Ogden's license. It said rather that the statutes regulating the coasting trade did not purport to have that effect.<sup>207</sup>

But the aftermath of a decision in New York's highest court would be different this time. Eight years earlier, the challengers in *Van Ingen* declined to pursue an appeal to the United States Supreme Court after losing in state court. Robert Livingston had offered to license their ferries (for an appropriate price, of course) if they would acquiesce in his right to the exclusive franchise, and, as the parties were essentially motivated by their

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200 *Ogden v. Gibbons*, 4 Johns. Ch. 150, 158 (N.Y. Ch. 1819).

201 *Van Ingen*, 9 Johns. at 578-79 (opinion of Kent, C.J.).

202 *Ogden*, 4 Johns. Ch. at 156-158.

203 *Id.* at 158-59.

204 *Id.*

205 *Gibbons v. Ogden*, 17 Johns. 488, 508-10 (N.Y. 1820).

206 *Id.* at 508-09.

207 *Id.*

economic interests, they were able to strike a bargain.<sup>208</sup> This time, the challenger was Gibbons, and his interests were not primarily economic. They were personal. He wanted to crush Ogden, not to negotiate an arrangement acceptable to both sides. He had the financial resources to keep litigating and to retain the fanciest legal counsel in the land.<sup>209</sup> There would be no settlement; *Gibbons v. Ogden* was headed to the United States Supreme Court.

### 3. Gibbons v. Ogden

As we all know, the Supreme Court ruled that Gibbons's federal license to pursue the coasting trade prevailed over New York's law limiting the right to operate steamboats. But the coasting license argument was no stronger in Washington, D.C. than it had been before the courts of New York. Marshall decided to accept that argument in spite of its weakness, using the coasting license as a way out of having to resolve the big constitutional issue that the case might otherwise demand be resolved. (It would not be the first time, nor the last, that the Great Chief Justice would read statutory authority tendentiously in order to answer,<sup>210</sup> or to avoid answering,<sup>211</sup> a large constitutional question.) That big issue was whether the commerce power was exclusive in Congress, such that New York could not grant a monopoly over steamboat travel in its waters regardless of whether Congress had acted.

#### a. Avoidance: John Marshall and the Coasting License

Over the three days of oral argument, attorneys for both sides repeatedly argued about whether the commerce power was exclusive in Congress or enjoyed concurrently by Congress and the states.<sup>212</sup> Daniel Webster, then serving as a Congressman from Massachusetts, opened the arguments for Gibbons by describing the acute state of legal conflict among New York and its neighboring states.<sup>213</sup> New York permitted steamboat navigation

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208 See *supra* note 186 and accompanying text (describing the decision of many challengers to accept licenses from Livingston rather than continue their legal battle).

209 For an accounting of Gibbons's personal motivations, see *supra* Part I.A.

210 See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 148, 175–76 (1803) (reading Section 13 of the Judiciary Act of 1789 as purporting to enlarge the original jurisdiction of the Supreme Court).

211 See *infra* notes 225–226 and accompanying text (describing *The Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820), in which Marshall read Virginia law narrowly to avoid a constitutional question).

212 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 8–17, 24–25, 60–64 (discussing the arguments of both parties regarding New York's right to legislate).

213 See JOHNSON, *supra* note 47, at 75–76 (discussing Webster's strategy and his opening statements).

only by a favored party; Connecticut retaliated by prohibiting steamboat navigation within its waters by anyone licensed to operate steamboats under the law of New York; New Jersey made anyone enforcing New York's monopoly liable to the amount of treble damages.<sup>214</sup> This mess, said Webster, was exactly the sort of pernicious interstate rivalry that the Constitution had been adopted to eliminate; the Constitution was to solve the problem by divesting the states of the power to do such things and instead placing the power to regulate commerce exclusively in one central government.<sup>215</sup> To think that the Founders would have imagined the Constitution they were creating would permit states to carry on squabbling as New York and its neighbors were, Webster maintained, would be little short of crazy.<sup>216</sup>

One Associate Justice agreed with Webster squarely. In an opinion concurring in the Court's judgment, Justice William Johnson wrote that the power to regulate commerce lay exclusively in Congress.<sup>217</sup> Coasting license or no coasting license, Justice Johnson explained, New York could not create an exclusive right to operate steamboats and thus restrain "free intercourse among the states."<sup>218</sup> But the rest of the Court did not go that far. Marshall's majority opinion did express sympathy with the view that Congress had exclusive power over commerce: that construction of the commerce power, he wrote, had "great force."<sup>219</sup> But it was not necessary, he reasoned, to decide the big issue, because a statutory ground of decision was available—that is, the coasting license.<sup>220</sup> Congress had acted to regulate the coasting trade, Marshall wrote, and those actions gave Gibbons a right to navigate within the waters of the United States, including the waters of New York.<sup>221</sup> Regardless of whether Congress's commerce power preempted New York's regulation even in the absence of conflict between state and federal statutes, it was clear that in the presence of a conflict New York's law must give way.<sup>222</sup>

Now, as noted before, it would be a mistake to take Marshall at face value here. He knew everything that Chancellor Kent knew about the coasting trade laws, and if he hadn't, Kent's opinion would have explained it clearly enough. But Marshall's inclinations about the real issue in the case were different from Kent's. Unlike the New Yorker, who argued for

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214 *Gibbons*, 22 U.S. (9 Wheat.) at 1-2, 4-5, 8 (1824).

215 *Id.* at 11-14.

216 *Id.* at 17.

217 *Id.* at 226-29 (Johnson, J., concurring in the judgment).

218 *Id.* at 231, 239.

219 *Id.* at 209.

220 *Id.* at 209-13.

221 *Id.* at 211-13.

222 *Id.*

concurrent authority to regulate commerce, Chief Justice Marshall seems to have favored the view that Clause iii described a power lying exclusively with Congress.<sup>223</sup> But he preferred not to base his decision on that ground. Indeed, *Gibbons* was just one of a series of cases in which Marshall praised the exclusive-power theory but stopped short of writing it into law, always reaching the result that the exclusive-power theory would dictate but on statutory rather than constitutional authority.<sup>224</sup> Four years before *Gibbons*, in a case that Marshall decided while riding circuit, the Chief Justice by the force of aggressive statutory construction avoided deciding whether a Virginia law barring the entry of free black sailors was void for trenching on Congress's exclusive commerce power.<sup>225</sup> To be clear, the characterization of Marshall's statutory construction in that case as aggressive is consistent with Marshall's self-understanding. In a letter to his colleague Justice Joseph Story about his resolution of that case, Marshall wrote that the constitutional issue had been presented, but that he had "escaped on the construction of the act."<sup>226</sup> Three years after *Gibbons*, in the next Supreme Court case presenting the question of whether Congress's commerce power was exclusive, Marshall would once again hold a state law preempted on the strength of a strained argument about conflict with a federal statute<sup>227</sup> rather than by holding—as counsel challenging the law again urged—that the commerce power was exclusive.<sup>228</sup> He had a *modus operandi*: praise the

223 See *id.* at 209 (deeming the argument for concurrent authority unconvincing and recognizing "great force" in the argument for exclusive authority).

224 See, e.g., cases described *infra*, notes 225 and 227 (regarding two other occasions where Marshall favored the exclusive-power argument but used statutory interpretation to avoid the constitutional question).

225 See *The Wilson v. United States*, 30 F. Cas. 239, 245 (Marshall, Circuit Justice, C.C.D. Va. 1820) (No. 17,846) (invalidating the forfeiture of the brig *Wilson*). The brig *Wilson* had been declared forfeit to the United States in consequence of having violated federal law upon docking in Norfolk, and one of the alleged violations was of a federal statute barring the entry of nonwhite persons into states forbidding their entry. *Id.* at 240, 243. The federal statute was thus parasitic on state statutes; it imposed penalties only in cases where a state law regulating entry was violated. *Id.* at 243 n.3. A relevant Virginia law prohibited the entry of "free negroes and mulattoes," *id.* at 245, and the *Wilson's* crew included several free nonwhite sailors who had gone ashore in Norfolk. *Id.* at 240. Among his other interpretive moves, Marshall noted that the record below identified the sailors in question as "persons of colour" but contained no indication that they were "negroes or mulattoes," rather than other sorts of colored persons. *Id.* at 245. According to Marshall, that meant that no statutory violation had been shown. *Id.* And in the absence of a statutory violation, the case against the *Wilson* could be dismissed without having to ask whether the Virginia law was unconstitutional. *Id.*

226 Letter from John Marshall to Joseph Story (Sept. 26, 1823), in 9 THE PAPERS OF JOHN MARSHALL 338 (Charles F. Hobson ed., 1998) [hereinafter Letter].

227 See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 44-48 (1827) (holding that a state law taxing the sale of imported goods was preempted by existing federal law authorizing importation without specifying which federal law created the conflict or what the nature of the conflict might be).

228 See *id.* at 420, 424 (summarizing Mr. Meredith's argument that the statute was unconstitutional). The Attorney General of the United States, William Wirt, seems to have caught on to Marshall's

exclusive power idea, hold back from actually declaring that idea law, and resolve the case by reading a statute to direct the same result that exclusive congressional power would, whether it was easy to read the statute that way or not.

Just why Marshall preferred to avoid ruling on the big issue is a question about which we can only speculate. Perhaps Marshall figured that, as long as he was the one construing federal statutes, he could find conflicts between federal and state laws whenever it was necessary, so he could get the same results in practice that he would get from a doctrine of complete preemption—and he could achieve them without a bold declaration of constitutional law that might provoke retaliation from the powerful people favoring the concurrent-power theory.<sup>229</sup> More particularly, Marshall worried that a doctrine preempting all state laws regulating commerce would carry explosive implications for state laws related to race and slavery, as in the free-black-sailors case he decided while riding circuit in 1820.<sup>230</sup> Many states in both the North and the South would have had powerfully negative reactions to the loss of their abilities to enable, prohibit, or regulate the sale of slaves.<sup>231</sup> And some southern critics had already voiced the view that a constitutional rule barring states from prohibiting the entry of free blacks would be sufficient reason to abolish the Constitution.<sup>232</sup>

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predilection. Having argued in *Gibbons* that the commerce power was exclusive in Congress, Wirt in *Brown* argued instead that Congress's general statutory regulation of the field of imports was meant to embody a general policy with which Maryland's law conflicted, even if there was no direct collision between the requirements of state and federal law. *Id.* at 433–35. In modern parlance, we might say that Wirt argued a theory of field preemption, albeit without specifying the particulars of the law preempting the field, and that Marshall was happy to use Wirt's theory on the same terms.

229 See generally LACROIX, *supra* note 137 (expounding upon some of the bitter political divisions related to this conflict).

230 See *The Wilson v. United States*, 30 F. Cas. 239, 245 (C.C.D. Va. 1820) (No. 17,846) (holding that there was no violation of the Virginia statute “prevent[ing] the migration of free negroes and mulattoes.”).

231 See *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 506–08 (1841) (emphasizing the value that states placed on local control over the slave trade).

232 In his letter to Story about *The Wilson*, see Letter, *supra* note 226, at 338, Marshall drew a contrast between his avoidance of the constitutional issue and Justice Johnson's choice to reach the constitutional issue in a parallel South Carolina case in which Johnson had been the circuit justice. As in *Gibbons*, Johnson was of the view that the federal commerce power was exclusive, so he ruled that South Carolina had no authority to block free black sailors from disembarking at the ports of that state. See *id.* at 338, 339 n.2 (recounting a recent case in which Johnson read the Commerce Clause expansively to find South Carolina's Negro Seamen Act unconstitutional). As Marshall related the events to Story, the reaction in South Carolina had been intensely negative, with South Carolinians protesting that, if the Constitution required this result, they would favor abolishing the Constitution. See *id.* at 338 (saying that South Carolina regarded Johnson's decision as an act of judicial usurpation, such that if this was the course the Constitution took, it would be “better to break that instrument”).



Whatever his precise mix of motives, it seems clear that Marshall preferred to reach the results in these cases on narrow grounds. Given that preference, the coasting-license rationale in *Gibbons* suited Marshall nicely. A decision on that basis would end the steamboat standoff, enabling freer traffic in and around New York and staving off the threat of similar interstate rivalries in other parts of the country. Crediting the coasting-license argument thus gave Marshall all he needed to vindicate the national interest that vesting the commerce power exclusively in Congress was supposed to serve, at least as to the problem before him. And it let him avoid ruling definitively that the commerce power was exclusive in Congress—something that he repeatedly declined to do, despite his obvious sympathies in that direction. In short, *Gibbons*'s offer of a coasting-license fig leaf worked before the second great jurist to whom he presented it, even though it hadn't worked before the first one.

*b. Assurance: Limiting the Threat of Preemption*

Marshall also knew, however, that his officially ducking the big question would neither make the issue disappear nor hide which way he and his Court were leaning.<sup>233</sup> Knowing that his audience would probably understand him to favor the exclusive-power approach, and perhaps foreseeing that lower courts would act upon it, it made sense for Marshall to present that view in its best light. After all, the standard arguments against the exclusive-power view raised some serious concerns. If Marshall could satisfy or at least mitigate those concerns, his preferred approach would seem considerably more attractive.

One of the biggest criticisms of the exclusive-power position was that it would direct the preemption of an unreasonably large swath of state laws. *Wickard* lay more than a century in the future, but as noted above, even in the 1820s American lawyers understood that there were real-world economic connections between local regulation and the larger commercial universe.<sup>234</sup> If all state laws falling within the sphere that Congress could regulate under its commerce power were invalid, an awful lot of law was going to disappear. The threat of judicially imposed deregulation on this

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233 Some lower courts treated *Gibbons* as authority for the exclusive-power position, even though technically Marshall had avoided such a holding. See, e.g., *N. River Steamboat Co. v. Livingston*, 3 Cow. 713, 743 (N.Y. 1825) (interpreting earlier United States Supreme Court decisions as holding “[t]hat the power to regulate commerce among the states is exclusive”).

234 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 65 (1824) (recounting Ogden's counsel describing “a vast range of State legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers,” and admitting that such laws “must necessarily affect, to a great extent, the foreign trade, and . . . trade and commerce with other States”).

remarkably broad scale figured as a prominent argument in favor of the concurrent-power view. So throughout the *Gibbons* litigation, the defenders of New York's prerogative to regulate without preemption—including Chancellor Kent, to whom Marshall was careful to refer respectfully even while reversing his judgment<sup>235</sup>—had pointed to various kinds of garden-variety state laws that would, on an exclusive-power view, be rendered invalid on the theory that they were regulations of, or affecting, commerce.<sup>236</sup>

Marshall in *Gibbons* accordingly made sure to articulate limits on the preemptive force of the exclusive-power view. To be precise, he articulated two kinds of limits. One limit distinguished state regulations of commerce from state regulations *affecting* commerce.<sup>237</sup> Health laws and inspection laws, for example, surely affected commerce, but they were not regulations of commerce per se. So even if the regulation of commerce were exclusively vested in Congress, states would be able to enforce health laws, inspection laws, and the like.<sup>238</sup> The other limit distinguished two subcategories within the realm of regulations of commerce: those falling within the federal commerce power, because they regulated the three classes of commerce enumerated in Clause iii, and those not falling within the federal commerce power, because they regulated only commerce internal to a single state.<sup>239</sup> Because commerce wholly internal to a single state lay beyond the scope of the Clause, state laws regulating that commerce would not be preempted.

In other words, Marshall's statement that the enumeration in Clause iii presupposes something not enumerated was significant primarily as a limitation on the preemptive scope of an exclusive federal commerce power. Deeming the power to regulate commerce exclusive in Congress would indeed preempt a fair amount of state law. To be specific, it would preempt state regulations of (1) commerce with foreign nations, (2) commerce among the several states, and (3) commerce with the Indian tribes. But readers should not worry, Marshall wished to say, that an exclusive federal commerce power would also preempt all sorts of state regulation that was properly regarded as local. His articulation of a fourth class of commerce not included within the Commerce Clause—the purely internal commerce of a state—created a zone in which states could legislate, even on commercial issues, without fear of judicial preemption.

235 *Id.* at 186–187.

236 *See, e.g.,* *Livingston v. Van Ingen*, 9 Johns. 507, 568 (N.Y. 1812) (opinion of Thompson, J.) (enumerating various state regulations of commerce); *id.* at 580 (opinion of Kent, C.J.) (pointing to state Sunday laws, auction-licensing laws, and laws regulating roads and toll-bridges and as reasons why Congress' commerce power should not be read as exclusive).

237 *Gibbons*, 22 U.S. (9 Wheat.) at 203–05.

238 *Id.*

239 *Id.* at 194–95.

Between the two limitations Marshall offered—one distinguishing regulations of commerce from regulations merely affecting commerce, and one carving off local commerce—most if not all of the laws that advocates of concurrent power warned would be preempted by an exclusive-power view would be saved. Sunday laws, pauper laws, laws for building local bridges and turnpikes and even for the operation of ferries on intrastate routes—all these would remain valid exercises of state authority, because they would fall outside the domain of Congress's exclusive Clause iii powers. Specifying that the enumeration presupposed something not enumerated was an important part of Marshall's reassurance on this point. Lower courts seem to have gotten the message. When the New York judiciary handled successor litigation to *Gibbons*, the Court for the Correction of Errors proceeded as if the power to regulate commerce among the several states was exclusive in Congress.<sup>240</sup> But it also explained that the Commerce Clause did not preempt all of the local laws that earlier lawyers had worried must fall if the commerce power were exclusive in Congress.<sup>241</sup> After all, the New York court wrote, Marshall had pointed out that the enumeration presupposed something unenumerated; not all commerce was within the Commerce Clause, so not all state commercial regulation was preempted.<sup>242</sup>

But could Congress displace the local laws that Marshall's reading protected from automatic preemption? On that question, the *Gibbons* dictum had considerably less significance. By limiting the reach of the Commerce Clause, Marshall promised areas of regulation in which state law would not be automatically preempted by an exclusive federal commerce power. But Marshall did not say that Congress could never enter those areas. On the contrary, it was clear that Congress *could* enter those areas, albeit not always on the strength of the Commerce Clause alone.

Suppose, for example, that a state made a health law providing for the inspection of imported goods. Under Marshall's vision of an exclusive commerce power, that law would be a law affecting commerce, rather than a regulation of commerce as such, and therefore not automatically preempted. A state law merely *affecting* commerce could easily conflict in practice with a valid federal law regulating commerce itself, or with federal regulations necessary and proper for carrying federal commerce legislation

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240 *N. River Steamboat Co. v. Livingston*, 3 Cow. 713, 743 (N.Y. 1825).

241 *Id.* at 754-756.

242 *Id.* at 749-50. To be comprehensive, it is worth repeating that Marshall's distinction between intrastate commerce and other commerce was one of two ways in which he assured his audience that an expansive commerce power would not be catastrophically preemptive. The other was his distinction between regulations of commerce as such, which could be preempted even in the absence of conflicting federal enactments, and regulations merely affecting commerce, which would be preempted only in case of actual conflict with federal law. See *supra*, text at footnotes 238-239.

into execution. In such a case, federal law would displace state law to the extent of the conflict between them.<sup>243</sup> Similarly, states could make laws for the regulation of commerce falling outside the commerce power—that is, intrastate commerce—and although Congress could not displace those state laws by regulating intrastate commerce per se, it could displace those laws with regulations necessary and proper for carrying into execution federal laws regulating commerce among the several states—or with laws passed in the exercise of its patent power, or its taxing power, or its power to make bankruptcy laws.<sup>244</sup> So on Marshall’s reading of the Commerce Clause, the enumeration of three classes of commerce limited the preemptive scope of the commerce power, but it did not limit Congress’s ability to regulate matters affecting commerce. After all, Congress’s ability to regulate is not given by the Commerce Clause alone. It includes the power specified in that Clause and also many other powers specified in many other clauses.<sup>245</sup>

#### D. Letting Go

As described above, modern constitutional law enables Congress to regulate *all* commerce, even though the Commerce Clause enumerates three kinds of commerce in particular.<sup>246</sup> Justice Scalia maintained a view of this modern reality that is fully reconcilable with Marshall’s reading of the commerce power in *Gibbons*. In Justice Scalia’s version of the doctrine, Congress may not regulate purely intrastate commerce with its commerce power, but it may do so under the Necessary and Proper Clause.<sup>247</sup> The dominant doctrinal rendering is less scrupulous about this difference:

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243 See, e.g., *N. River Steamboat Co.*, 3 Cow. at 751 (stating that “[i]f the several states may still regulate commerce, within the limits of their states, to the exclusion of congress, there is nothing left for congress to act upon”); *id.* at 753 (“[Congress having] power to regulate commerce among the states, that power must necessarily reach the subject where it exists; and so far as navigation is concerned, it exists where the coasting trade exists, and is therefore subject to the regulation of congress.”).

244 See, e.g., *id.* at 754 (recognizing the authority of Congress to exercise its taxing power on intrastate ferries even when those ferries were beyond the reach of the commerce power).

245 As discussed earlier, this basic fact should make clear that Marshall’s description of wholly intrastate commerce as “reserved for the State” under the Commerce Clause, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824), cannot mean that such commerce is immune from federal regulation. It means that states retain the power to regulate intrastate commerce, rather than having lost that power to the Clause’s automatic preemptive force. But federal legislation under any of several powers might supersede such state regulation. See *supra* Part I.C.3. (finding the *Gibbons*’ dictum states that purely intrastate commerce is not within the scope of the Commerce Clause).

246 See *supra* Part I.C.3. (explaining why *Shreveport*, *Wickard*, *Lopez*, and *Raich* confirm this position).

247 See *Gonzales v. Raich*, 545 U.S. 1, 33–35 (2005) (Scalia, J., concurring) (stating that “[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce”).

in several modern cases, the Court simply treats the Commerce Clause itself as authorizing the regulation of all commerce with substantial effects on interstate commerce, which as a practical matter means all commerce, period.<sup>248</sup> That modern view of the Commerce Clause abandons the line that Marshall drew in *Gibbons*.

But modern doctrine also eliminates the problem to which Marshall's *Gibbons* dictum was a solution. Marshall needed to limit the scope of the Commerce Clause—not the scope of Congress's regulatory power over all things affecting commerce, but the scope of the Commerce Clause in particular—because his view that the Commerce Clause created an exclusively federal sphere would have otherwise ousted the states of necessary regulatory powers. But the exclusive-power view of Clause iii has not prevailed. Marshall's successor as Chief Justice, Roger B. Taney, was a strong proponent of the concurrent-power alternative.<sup>249</sup> By the 1850s, the Court declared that at least some forms of commerce were fit objects of state regulation, even if those forms of commerce had interstate effects.<sup>250</sup> And by the end of the nineteenth century, the dominant view was that states could regulate their internal commerce as a default matter, so long as their internal regulations did not unduly burden interstate commerce or, in an alternative formulation, so long as they did not regulate interstate commerce "directly."<sup>251</sup> The modern view is at least as solicitous of state regulation: today, constitutional doctrine draws no particular line between state regulations of "commerce" and other kinds of police-power regulation, all of which is valid unless it affirmatively conflicts with federal regulations or constitutional prohibitions.

To be sure, one subset of the constitutional prohibitions facing states is that of dormant commerce doctrine, which preempts some state laws even when the federal government has laid down no conflicting rules. But as noted above, modern dormant commerce preemption does not block state laws on the theory that the state has usurped a power that belongs exclusively to Congress. It is concerned instead, mostly and imperfectly, with problems of interstate protectionism and perhaps also with regulatory choices that without being protectionist as such create burdens on interstate commerce that seem inordinate in comparison to the local benefits they se-

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248 See, e.g., *id.* at 32–33 (majority opinion) (describing the activities at issue as within the commerce power because such activities in the aggregate affect interstate commerce). Justice Scalia's concurrence in *Raich* was necessary, in Justice Scalia's view, precisely because of this difference between his own approach and that of the majority. *Id.* at 33 (Scalia, J., concurring).

249 See *supra* note 161 and accompanying text (describing Taney's position).

250 See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1851) (finding a specific form of state regulation of commerce "not repugnant" to the Constitution).

251 See Lessig, *supra* note 40, at 160–62 (describing this late-nineteenth-century view).

cure.<sup>252</sup> A state law that regulates commerce without posing one of those particular problems is not subject to preemption.

If the power to regulate commerce is essentially concurrent in Congress and the states, then it does not matter much whether the Commerce Clause's enumeration of three classes of commerce presumes a fourth and unenumerated class. Whether it does or not, that enumeration does not limit the commerce that can be regulated by states, because the states are entitled to regulate until and unless Congress does. Nor does the enumeration limit the commerce that Congress can regulate. Any commercial activity, if aggregated, can sufficiently affect interstate commerce so as to be a valid subject of federal regulation.<sup>253</sup> The reality of economic interconnectedness was apparent even in Marshall's time, but the threat of widespread preemption under an exclusive-power view created a reason for refusing to make that fact the foundation of a general federal power over commerce. The end of the exclusive-power theory brought the end of that threat of preemption and, accordingly, the end of the reason for insisting that some commerce lay beyond the classes of commerce specified in Clause iii. In short, Marshall's *Gibbons* dictum was the solution to a problem that constitutional law had ceased to face by the end of the nineteenth century. Which might be why that dictum did not appear in twentieth-century caselaw—until the *Lopez* Court used it to mean something that Marshall did not intend.

#### CONCLUSION

Marshall's *Gibbons* dictum is one of the leading formulas that modern courts and commentators use as support for the internal-limits canon. As I have shown, that use of the dictum strays from what Marshall meant. To be sure, the internal-limits canon might be sound even if Marshall did not endorse it. But as it happens, the canon is unsound, for reasons I have explained at length elsewhere.<sup>254</sup> To persuade the profession to change its thinking about the internal-limits canon, it is helpful not just to give the reasons why the canon is unsound but also to show that various authorities that are supposed to support the canon actually do not. If courts and commentators would stop misusing the *Gibbons* dictum, the profession would be one important step closer to seeing that the internal-limits canon is not a necessary principle of constitutional interpretation.

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252 See *supra* note 158 and accompanying text (describing this modern view).

253 See *supra* Part I.C.3 (reviewing settled doctrine to show that all commerce is regulable under Congress's commerce power).

254 See Primus, *supra* note 11, at 581–82 (arguing that the “internal-limits canon” is unsound).

Sometimes lawyers say things because they make sense. And sometimes we say things because they made sense once upon a time and we have become accustomed to saying them, and we do not notice that the conditions that made the statements sensible in the past are no longer the relevant conditions. The repetition of outmoded axioms is a particular hazard of a common-law legal culture. Perhaps it is impossible to solve that problem completely. The invocation of old and canonical cases to shape our sense of the system is a hard-wired feature of American constitutional thought, and even intelligent lawyers acting in good faith will not always know the historical context that explains why an inherited formula might have outlived its applicability. The use and adaptation of traditional authority is always a process of both reading and misreading; a long-lived constitutional system without the misinterpretation of one generation by another is, in a word, inconceivable.

But some mistakes are both patent and potentially damaging, and they should be avoided. Marshall wrote that the enumeration of three classes of commerce in the Commerce Clause presupposed a fourth class of commerce that lies beyond the commerce power. He did not say that the Constitution's overall enumeration of congressional powers indicates that the sum total of those powers must in practice be less than a general grant of regulatory authority. That is, he did not say that the enumeration principle requires the internal limits canon. Neither should we—and certainly not on the premise that he told us so.