Supplementary Material

Chapter 5: The Jacksonian Era – Federalism

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**The Passenger Cases (Smith v. Turner), 48 U.S. 283** (1849)

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*In the nineteenth century, immigration was lightly regulated. After independence, immigration to the United States slowed, but in the 1830s and 1840s the United States experienced a dramatic surge of immigration, primarily from the British Isles and Western Europe. Much of the new population flowed through the ports of northern states. The political response was varied. The often anti-Catholic nativist movement became an influential force, and several states with major ports imposed restrictions on ships carrying immigrants.*

*The "Passenger Cases" consolidated challenges to these restrictive state laws.. New York had adopted a statute imposing a tax on ship captains for every passenger on board for the support of the marine hospital and a juvenile reformatory. A Massachusetts law imposed a tax on ships carrying alien passengers and required captains to indemnify Boston for indigent passengers. Ship captains challenged the taxes as unconstitutional, but the state courts upheld them. They appealed to the U.S. Supreme Court. In a 5–4 decision, the Court struck down the statutes as violations of the commerce clause and the prohibition of taxes on imports. The passenger laws raised legal issues that were difficult for the justices to resolve and splintered a Court largely composed of Jacksonians. Each of the justices in the majority produced a separate opinion concurring in the majority decision to reverse the state supreme courts. Three separate dissenting opinions were produced by the other four justices. The states appealed to their police powers and their need to maintain social order in the face of a rapidly increasing population, but such laws directly affected international trade. Like some other cases of the period, such as the* License Cases *(1847), these laws tested the ability of the justices to disentangle federal authority over imports and state authority over the people and goods within their borders. In* New York v. Miln *(1837), the Court had allowed states to require ship captains to post security for indigent passengers, but the composition of the Court had changed since 1837 and the new laws went farther by imposing taxes.*

*Are passengers articles of commerce? May states treat passengers differently than they may treat goods and cargo? Would these laws have been evaluated differently if the taxes were paid directly by the passengers rather than by the ship captains? Can states treat recent immigrants differently than long-term residents (by, for example, imposing a special tax on them)? May states bar some people from entering their borders? May they bar some goods from entering their borders? How might the issues raised in this case relate to slavery?*

JUSTICE MCLEAN, joined by JUSTICE MCKINLEY, concurring.

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Before the adoption of the Constitution, the States, respectively, exercised sovereign power, under no other limitations than those contained in the Articles of Confederation. By the third section of the sixth article of that instrument, it was declared that "no State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled"; and this was the only commercial restriction on State power.

As might have been expected, this independent legislation, being influenced by local interests and policy, became conflicting and hostile, insomuch that a change of the system was necessary to preserve the fruits of the Revolution. This led to the adoption of the Federal Constitution.

It is admitted that, in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the Federal government and inhibited to the States, either expressly or by necessary implication. This implication may arise from the nature of the power.

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When the commercial power was under discussion in the convention which formed the Constitution, Mr. Madison observed, that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority." Mr. Sherman said, -- "The power of the United States to regulate trade, being supreme, can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." . . .

The adoption of the above provision in the Constitution . . . is a restriction, it is contended, upon the acknowledged power of the States.

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A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution. If such power exists, it may be exercised independently of the federal authority.

It does not follow, as is often said, with little accuracy, that, when a State law shall conflict with an act of Congress, the former must yield. On the contrary, except in certain cases named in the Federal Constitution, this is never correct when the act of the State is strictly within its powers.

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A concurrent power excludes the idea of a dependent power. The general government and a State exercise concurrent powers in taxing the people of the State. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. . . .

But the argument is, that a State acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until Congress shall act on the same subject; and that the State must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would impair the sovereignty of the States. But this argument degrades the States by making their legislation, to the extent stated, subject to the will of Congress. State powers do not rest upon this basis. . . .

It has been well remarked, that the regulation of commerce consists as much in negative as in positive action. There is not a Federal power which has been exerted in all its diversified means of operation. And yet it may have been exercised by Congress, influenced by a judicious policy and the instruction of the people. Is a commercial regulation open to State action because the Federal power has not been exhausted? . . .

. . . . When this power is exercised, how can it be known that the identical thing has not been duly considered by Congress? And how can Congress, by any legislation, prevent this interference? A practical enforcement of this system, if system it may be called, would overthrow the Federal commercial power.

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I come now to inquire . . . is the statute of New York a regulation of foreign commerce?

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In giving the commercial power to Congress the States did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals, or endanger the health or lives of their citizens.

Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare.

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To encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted. As a branch of commerce the transportation of passengers has always given a profitable employment to our ships, and within a few years past has required an amount of tonnage nearly equal to that of imported merchandise.

Is this great branch of our commerce left open to State regulation on the ground that the prohibition refers to an import, and a man is not an import?

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No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. . . .

A State cannot regulate foreign commerce, but it may do many things which more or less affect it. . . .

The act of New York now under consideration is called a health law. . . .

To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. On the same principle, it may be made to embrace all offenders, so as to pay the expenses incident to an administration of the criminal law. . . .

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The transportation of passengers is regulated by Congress. . . . If the transportation of passengers be a branch of commerce, of which there can be no doubt, if follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation, -- upon what may, in effect, be called an import. . . . When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the State, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the State, they become subject to its laws.

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Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers. The Slave States have the power, as this court held in *Groves v. Slaughter* (1841), to prohibit slaves from being brought into them as merchandise. But this was on the ground, that such a prohibition did not come within the power of Congress "to regulate commerce among the several States." It is suggested that, under this view of the commercial power, slaves may be introduced into the Free States. Does anyone suppose that Congress can ever revive the slave trade? And if this were possible, slaves thus introduced would be free.

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If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union. . . .

If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rivers, or on the Lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. And the same principle will sustain a right in every State to tax all persons who shall pass through its territory on railroad-cars, canal-boats, stages, or in any other manner. This would enable a State to establish and enforce a non-intercourse with every other State.

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The police power of the State cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent. In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means. If extraordinary expense be incurred, an equitable claim to an indemnity can give no power to a State to tax objects not subject to its jurisdiction.

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JUSTICE WAYNE, concurring.

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. . . . a majority of us do not think it necessary in these cases to reaffirm, with our brother McLean, what this court has long since decided, that the constitutional power to regulate "commerce with foreign nations, and among the several States, and with the Indian tribes," is exclusively vested in Congress, and that no part of it can be exercised by a State.

. . . . Some of the judges of [the Court] have, in several cases, expressed opinions that the power to regulate commerce is not exclusively vested in Congress. But they are individual opinions, without judicial authority to overrule the contrary conclusion, as it was given by this court in *Gibbons v. Ogden* (1824).

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. . . [W]hatever may be the motive for such enactments or their legislative denomination, if they practically operate as regulations of commerce, or as restraints upon navigation, they are unconstitutional. When they are considered in connection with the existing legislation of Congress in respect to trade and navigation, and with treaty stipulations, they are certainly found to be in conflict with the supreme law of the land.

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Police powers, then, and sovereign powers are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign. Certainly the States of this Union have not retained them to the extent of the preceding enumeration. How much of it have the States retained? I answer, unhesitatingly, all necessary to their internal government. . . .

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. . . . Paupers, vagabonds, and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or for punishment as convicts. They have no rights of national intercourse; no one has a right to transport them, without authority of law, from where they are to any other place, and their only rights where they may be are such as the law gives to all men who have not altogether forfeited its protection.

The States may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off. But can such a police power be rightfully exercised over those who are not paupers, vagabonds, or fugitives from justice? The international right of visitation forbids it. The freedom or liberty of commerce allowed by all European nations to the inhabitants of other nations does not permit it . . .

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JUSTICE CATRON, joined by JUSTICE GRIER and JUSTICE MCKINLEY, concurring.

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As the ship was regulated, and was free to land all the property on board, the question arises, whether these immigrant passengers were not also regulated, and entitled by law to accompany their goods and to land, exempt from State taxation.

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By the laws of nations, all commerce by personal intercourse is free until restricted; nor has our government at any time proposed to restrain by taxation such immigrants as the record describes.

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Keeping in view the spirit of the Declaration of Independence with respect to the importance of augmenting the population of the United States, and the early laws of naturalization, Congress, at divers subsequent periods, passed laws to facilitate and encourage more and more the immigration of Europeans into the United States for the purpose of settlement and residence.

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Now, is it possible to reconcile State laws, laying direct and heavy taxes on every immigrant passenger and every member of his family, with this careful, studied, and ever-increasing security of immigrants against every legal burden or charge of any kind? Could Congress have done more than it has done, unless it had adopted what would have been justly regarded as a strange act of legislation, the insertion of passengers themselves in the list of free articles?

The first and one of the principal acts to be performed on bringing ships and goods from foreign countries into the United States is the production of a manifest; and in such manifest, along with the specifications of the cargo, the names and description of the passengers, with a specification of their packages of property, are to be inserted. Then comes a direct exemption of all such property from duties. All agree, that, if Congress had included the owners, and declared that immigrants might come into the country free of tax, these State laws would be void; and can any man say, in the face of the legislation of Congress from 1799 to 1846, that the will of Congress is not as clearly manifested as if it had made such a direct declaration? It is evident that, by these repeated and well-considered acts of legislation, Congress has covered, and has intended to cover, the whole field of legislation over this branch of commerce. Certain conditions and restraints it has imposed; and subject to these only, and acting in the spirit of all our history and all our policy, it has opened the door widely and invited the subjects of other countries to leave the crowded population of Europe and come to the United States, and seek here new homes for themselves and their families. We cannot take into consideration what may or may not be the policy adopted or cherished by particular States; some States may be more desirous than others that immigrants from Europe should come and settle themselves within their limits; and in this respect no one State can rightfully claim the power of thwarting by its own authority the established policy of all the States united.

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Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation and forming the Constitution, -- more than all other causes it led to the result; and the provision prohibiting the States from laying any duty on imports or exports, and the one which declares that vessels bound to or from one State shall not be obliged to enter, clear, or pay duties in another, were especially intended to prevent the evil. . . . If it be the true meaning of the Constitution, that a State can evade them by declaring that the master may be taxed in regard to passengers, on the mere assertion that he shall have a remedy over against the passengers, citizens and aliens, and that the State may assess the amount of tax at discretion, then the old evil will be revived, as the States may tax at every town and village where a vessel of any kind lands. They may tax on the assumption of self-defense, or on any other assumption, and raise a revenue from others, and thereby exempt their own inhabitants from taxation.

. . . . Were this court once to hold that aliens belonging to foreign commerce, and passengers coming from other States, could have a poll-tax levied on them on entering any port of a State, on the assumption that the tax should be applied to maintain State police powers, and by this means the State treasury could be filled, the time is not distant when States holding the great inlets of commerce might raise all necessary revenues from foreign intercourse, and from intercourse among the States, and thereby exempt their own inhabitants from taxation altogether. The money once being in the treasury, the State legislature might apply it to any and every purpose, at discretion, as New York has done; and if more

was needed, the capitation tax might be increased at discretion, the power to tax having no other limitation.

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In short, when the tax in question was demandable by the State law, and demanded, the ship rode in the harbor of New York, with all persons and property on board, as a unit belonging to foreign commerce. She stood as single as when on the open ocean, and was as exempt from the State taxing power.

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JUSTICE MCKINLEY, joined by JUSTICE CATRON, concurring.

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. . . . [T]he whole power over the subject belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations. How far, then, are these immigrants protected, upon their arrival in the United States, against the power of State statutes? The ship, the cargo, the master, the crew, and the passengers are all under the protection of the laws of the United States, to the final termination of the voyage; and the passengers have a right to be landed and go on shore, under the protection and subject to these laws only, except so far as they may be subject to the quarantine laws of the place where they are landed; which laws are not drawn in question in this controversy. The great question here is, Where does the power of the United States over this subject end, and where does the State power begin? This is, perhaps, one of the most perplexing questions ever submitted to the consideration of this court.

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[The constitutional clause barring Congress from prohibiting migration prior to 1808], taken in connection with the provision which confers on Congress the power to pass all laws necessary and proper for carrying into effect the enumerated and all other powers granted by the Constitution, seems necessarily to include the whole power over this subject; and the Constitution and laws of the United States being the supreme law of the land, State power cannot be extended over the same subject. It therefore follows, that passengers can never be subject to State laws until they become a portion of the population of the State, temporarily or permanently . . . .

JUSTICE GRIER, joined by JUSTICE CATRON, concurring.

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In its letter and its spirit [the state law] is an exaction from the master, owner, or consignee of a vessel engaged in the transportation of passengers, graduated on the freight or passage-money earned by the vessel. It is, in fact, a duty on the vessel, not measured by her tonnage, it is true, but producing a like result, by merely changing the ratio. It is a taxation of the master, as representative of the vessel and her cargo.

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It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names. . . .

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The argument of those who challenge the right to exercise this power for the States of Massachusetts and New York, on the ground that it is a necessary appurtenant to the police power, seems

fallacious, also, in this respect. It assumes, that, because a State, in the exercise of her acknowledged right, may exclude paupers, lunatics, etc., therefore she may exclude all persons, whether they come within this category or not. But she may exclude putrid and pestilential goods from being landed on her shores; yet it does not follow that she may prescribe what sound goods may be landed, or prohibit their importation altogether. The powers used for self-defense and protection against harm cannot be perverted into weapons of offence and aggression upon the rights of others. A State is left free to impose such taxes as she pleases upon those who have elected to become residents or citizens; but it is not necessary to her safety or welfare that she should exact a transit duty on persons or property for permission to pass to other States.

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CHIEF JUSTICE TANEY, joined by JUSTICE NELSON, dissenting.

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This law is a part of the pauper laws of the State, and the provision in question is intended to create a fund for the support of alien paupers, and to prevent its own citizens from being burdened with their support.

. . . . If the alien chooses to remain on board, and to depart with the ship, or in any other vessel, the captain is not required to pay the money. Its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. He obtains this privilege from the State by the payment of the money. It is demanded of the captain, and not from every separate passenger, for the convenience of collection. But the burden evidently falls on the passenger . . . .

And the first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. . . .

I had supposed this question not now open to dispute [based on prior cases allowing extradition of fugitives and slaves] . . . .

. . . [I]t is equally clear, that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering. For it will hardly be said that the United States may permit them to enter, and compel the State to receive them, and that the State may immediately afterwards expel them. . . .



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Again: if the State has the right to exclude from its borders any person or persons whom it may regard as dangerous to the safety of its citizens, it must necessarily have the right to decide when and towards whom this power is to be exercised. It is in its nature a discretionary power, to be exercised according to the judgment of the party which possesses it. And it must, therefore, rest with the State to determine whether any particular class or description of persons are likely to produce discontents or insurrection in its territory, or to taint the morals of its citizens, or to bring among them contagious diseases, or the evils and burdens of a numerous pauper population.

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In a case where a party has a discretionary power to forbid or permit an act to be done, as he shall think best for his own interests, he is never bound absolutely and unconditionally to forbid or permit it. He may always permit it upon such terms and conditions as he supposes will make the act compatible with his own interests. I know no exception to the rule. . . .

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Undoubtedly, vessels engaged in the transportation of passengers from foreign countries may be regulated by Congress, and are a part of the commerce of the country. . . . If, however, the treaty or act of Congress above referred to had attempted to compel the State to receive them without any security, the question would not be on any conflicting regulations of commerce, but upon one far more important to the States, that is, the power of deciding who should or should not be permitted to reside among its citizens. . . . I cannot believe that it was ever intended to vest in Congress, by the general words in relation to the regulation of commerce, this overwhelming power over the States. . . .

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It would require very plain and unambiguous words to convince me that the States had consented thus to place themselves at the feet of the general government; and if this power is granted in regard to voluntary immigrants, it is equally granted in the case of slaves. . . .

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Undoubtedly the ship, although engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to the general government . . . .

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I may . . . safely assume, that, according to the true construction of the Constitution, the power granted to Congress to regulate commerce did not in any degree abridge the power of taxation in the States; and that they would at this day have the right to tax the merchandise brought into their ports and harbors by the authority and under the regulations of Congress, had they not been expressly prohibited.

They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far, their taxing power over commerce is restrained, but no farther. They retain all the rest; and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports or a tonnage duty, for these alone are forbidden.

. . . . Most clearly, in my opinion, [the passengers themselves] are not imports; and if they are not, then, according to the authorities referred to, the State has a right to tax them . . . .

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Upon every principle of reason and justice, the same rule must be applied to passengers that is applied to ships and cargoes. If, for example, while rumors were recently prevailing that the cholera had shown itself in the principal seaport towns of Europe, New York had been injudicious enough to embarrass her own trade by placing at quarantine all vessels and persons coming from those ports, and burdened them with the heavy expenses and ruinous delays incident to that measure, -- or if she were to do so now, when apprehensions are felt that it may again suddenly make its appearance in the great marts of European trade, -- this court certainly would not undertake to determine that these fears are groundless, and precautionary measures unnecessary, and the law therefore unconstitutional, and that every passenger might land at his own pleasure. Nobody, I am sure, will contend for such a power. And however groundless the apprehension, and however injurious and uncalled for such regulations may be, still, if adopted by the State, they must be obeyed, and the courts of the United States cannot treat them as nullities.

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Now, in the great commercial emporium of New York, hundreds are almost daily arriving from different parts of the world, and that multitude of strangers (among whom are always many of the indigent and infirm) inevitably produces a mass of pauperism which, if not otherwise provided for, must press heavily on the industry of its citizens; and which, moreover, constantly subjects them to the danger of infectious diseases. It is to guard them against these dangers that the law in question was passed. The apprehensions which appear to have given rise to it may be without foundation as to some of the foreign ports from which passengers have arrived, but that is not a subject of inquiry here; and it will hardly be denied that there are sufficient grounds for apprehension and for measures of precaution as to

many of the places from which passenger ships are frequently arriving. Indeed, it can hardly be said that there is any European port from which emigrants usually come which can be regarded as an exception.

The danger arising from passenger ships cannot be provided against, with a due regard to the interests and convenience of trade and to the calls of humanity, by precisely the same means that are usually employed in cases of ships with cargoes. In the latter case, you may act without difficulty upon the particular ship, and charge it with the expenses which are incident to the quarantine regulations. But how are you to provide for hundreds of sick and suffering passengers? For infancy and age? For those who have no means, -- who are not objects of taxation, but of charity? You must have an extensive hospital, suitable grounds about it, nurses and physicians, and provide food and medicine for them. And it is but just that these expenses should be borne by the class of persons who make them necessary; that is to say, the passengers from foreign ports. It is from them, as a class, that the danger is feared, and they occasion the expenditure. They are all entitled to share in the relief which is provided, and the State cannot foresee which of them will require it and which will not. It is provided for all that need it, and all should therefore contribute. You must deal with them as you do with ships with merchandise and crews arriving from ports where infectious diseases are supposed to exist; when, although the crew are in perfect health, and the ship and cargo free from infection, yet the ship-owner must bear the expense of the sanitary precautions which are supposed to be necessary on account of the place from which the vessel comes.

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It is admitted that they are not exempt from taxation after they are on shore. And the question is, When was the voyage or passage ended, and when did not captain and passengers pass from the jurisdiction and protection of the general government and enter into that of the State. The act of 1819 regulated and prescribed the duties of the ship-owner and captain during the voyage, and until the entry was made at the custom-house and the proper list delivered. It makes no further provision in relation to any of the parties. The voyage was evidently regarded as then completed, and the captain and passengers as passing from the protection and regulations of Congress, into the protection and exclusive jurisdiction of the State. . . . If a murder had been committed, there was no law of Congress to punish it. The personal safety of the passengers and the captain, and their rights of property, were exclusively under the jurisdiction and protection of the State. If the right of taxation did not exist in this case in return for the protection afforded, it is, I think, a new exception to the general rule upon that subject. For all the parties, the captain as well as the passengers, were as entirely dependent for the protection of their rights upon the State authorities, as if they were dwelling in a house in one of its cities; and I cannot see why they should not be equally liable to be taxed, when no clause can be found in the Constitution of the United States which prohibits it.

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JUSTICE DANIEL, dissenting.

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I now proceed to inquire whether the exaction of one dollar by New York from aliens arriving within her limits from abroad by sea, can be denominated a regulation of commerce, either according to the etymological meaning of the word commerce, or according to its application in common parlance. Commerce . . . critically signifies a mutual selling or traffic, and in ordinary and practical acceptation it means trade, bargain, sale, exchange, barter; embracing these both as its means and its objects. . . .

Does the law of New York operate either directly or necessarily upon any one of these ingredients of commerce? Does it look to them at all? With regard to the emigrant, this law institutes no inquiry either as to his pursuits, or his intentions, or his property. . . . So far, then, as the emigrant himself is considered, this imposition steers entirely clear of regulating commerce, in any conceivable sense; it is literally a tax upon a person placing himself within the sphere of the taxing power, and the nature and

character of the proceeding are in no wise changed where payment shall be made by the master of the vessel acting as the agent and on behalf of the emigrant. . . . I will not contend that the master, his vessel, and his mariners and passengers, are not all subject to proper regulations of commerce enacted by Congress; the proposition I maintain is this: that regulations of commerce do not embrace taxes on any or on all the subjects above named, exacted within the just sphere of the power imposing them. Thus, then, the assessment made by New York is purely a tax, not a regulation of commerce; but it is not a tax on imports, unless passengers can be brought within this denomination; if they cannot, it is a tax simply on persons coming within the jurisdiction of the taxing power. . . .

. . . . [A]lien passengers, rational beings, freemen carrying into execution their deliberate intentions, never can, without a singular perversion, be classed with the subjects of sale, barter, or traffic; or, in other words, with imports.

. . . .

Over aliens, qua aliens, no direct authority has been delegated to Congress by the Constitution. Congress have the right to declare war, and they are bound to the duty of repelling invasions. They have the power, too, to establish a uniform rule of naturalization. By an exercise of the former power, Congress can place in the condition of alien enemies all who are under allegiance to a nation in open war with the United States; by an exercise of the second, they can extend to alien friends the common privileges of citizens. Beyond these predicaments put by the Constitution, and arising out of the law of nations, where is the power in Congress to deal with aliens, as a class, at all? and much more the power, when falling within in neither of the aforegoing predicaments, to invite them to or to repel them from our shores, or to prescribe the terms on which, in the first instance, they shall have access to, and, if they choose, residence within, the several States, -- and this, too, regardless of the considerations either of interest or safety deemed important by the States themselves? The Constitution, confessedly, has delegated no such direct power to Congress, and it never can be claimed as auxiliary to that which, in a definite and tangible form, can nowhere be found within that instrument.

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JUSTICE WOODBURY, dissenting.

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In this view, as connected with her police over pauperism, and as a question of mere right, it may be fairly done by imposing terms which, though incidentally making it more expensive for aliens to come here, are designed to maintain such of them and of their class as are likely, in many instances, ere long to become paupers in a strange country, and usually without sufficient means for support in case either of sickness, or accident, or reverses in business. So it is not without justification that a class of passengers from whom much expense arises in supporting paupers should, though not at that moment chargeable, advance something for this purpose at a time when they are able to contribute, and when alone it can with certainty be collected. (See *New York v. Miln* [1837].) When this is done in a law providing against the increase of pauperism, and seems legitimately to be connected with the subject, and when the sum required of the master or passenger is not disproportionate to the ordinary charge, there appears no reason to regard it as any measure except what it professes to be, -- one connected with the State police as to alien passengers, one connected with the support of paupers, and one designed neither to regulate commerce nor be a source of revenue for general purposes.

. . . .

The last year, so fruitful in immigration and its contagious diseases of ship-fever and the terrific cholera, and the death of so many from the former, as well as the extraordinary expense consequent from these causes, furnish a strong illustration that the terms required are neither excessive nor inappropriate.

. . . .

The police of the ocean belongs to Congress and the admiralty powers of the general government; but not the police of the land or of harbors.

Nor is it any less a police measure because money, rather than a bond of indemnity, is required as a condition of admission to protection and privileges. The payment of money is sometimes imposed in the nature of a toll or license fee, but it is still a matter of police. It is sometimes demanded in the nature of charges to cover actual or anticipated expenses. Such is the case with all quarantine charges. . . .

Even to exclude paupers entirely has been held to be a police measure, justifiable in a State. *Prigg v. Pennsylvania* (1842). Why, then, is not the milder measure of a fee or tax justifiable in respect to those alien passengers considered likely to become paupers, and to be applied solely to the support of those who do become chargeable from that class? And why is not this as much a police measure as the other? If such measures must be admitted to be local, are of State cognizance, belong to State interests, they clearly are among State rights.

Viewed as a mere police regulation, then, this statute does not conflict with any constitutional provision. Measures which are legitimately of a police character are not pretended to be ceded anywhere in the Constitution to the general government . . . .

Thus viewed, the case also comes clearly within the principles settled in *New York v. Miln* (1837) and is fortified by the views in the *License Cases* (1849). . . .

But if this justification should fail, there is another favorable view of legislation . . . and [that] results from the power of every sovereign State to impose such terms as she pleases on the admission or continuance of foreigners within her borders. . . .

. . . .

And it is not a little remarkable, in proof that this power of exclusion still remains in the States rightfully, that while, as before stated, it has been exercised by various States in the Union, -- some as to paupers, some as to convicts, some as to refugees, some as to slaves, and some as to free blacks, -- it never has been exercised by the general government as to mere aliens, not enemies, except so far as included in what are called the Alien and Sedition Laws of 1798 . . . and that act . . . was generally denounced as unconstitutional . . . .

. . . .

It is well considered, also, that if the power to forbid or expel exists, the power to impose conditions of admission is included as an incident or subordinate. . . . The usage in several States supports this view. . . .

. . . .

The last ground of vindication of this power . . . is under its aspect as imposing a tax.

. . . .

It deserves remark, in the outset, that such a tax, under the name of a toll or passport fee, is not uncommon in foreign countries on alien travelers when passing their frontiers. In that view it would be vindicated under long usage and numerous precedents abroad, and several in this country . . . .

. . . .

States, generally, have the right also to impose poll-taxes, as well as those on property, though they should be proportionate and moderate in amount. This one is not much above the usual amount of poll-taxes in New England. Nor need they require any length of residence before a person is subject to such a tax; and sometimes none is required, though it is usual to have it imposed only on a fixed day.

. . . .

It seems conceded, that, if this tax, as a tax, had not been imposed till the passenger had reached the shore, the present objection must fail. But the power of the State is manifestly as great in a harbor within her limits to tax men and property as it is on shore, and can no more be abused there than on shore, and can no more conflict there than on shore with any authority of Congress as a taxing power not on imports as imports. Thus, after emigrants have landed, and are on the wharves, or on public roads, or in the public hotels, or in private dwelling-houses, they could all be taxed, though with less ease; and

they could all, if the State felt so disposed to abuse the power, be taxed out of their limits as quickly and effectually as have been the Jews in former times in several of the most enlightened nations of modern Europe.

. . . .

Now there is no pretense that mere passengers in vessels are of this character ["imports"], or are property; otherwise they must be valued, and pay the general ad valorem duty now imposed on non-enumerated articles. They are brought in by no owner, like property generally, or like slaves. They are not the subject of entry or sale. . . .

. . . .

To come within the scope of a tariff, and within the principle of retaliation by or towards foreign powers, which was the cause of the policy of making imposts on imports exclusive in Congress, the import must still be merchandise or produce, some rival fruit of industry, an article of trade, a subject, or at least an instrument, of commerce. Passengers, being neither, come not within the letter or spirit or object of this provision in the Constitution.

. . . .

But to see for a moment how dangerous it would be to consider a prohibitory power over all aliens as vested exclusively in Congress, look to some of the consequences. The States must be mute and powerless.

If Congress, without a coordinate or concurrent power in the States, can prohibit other persons as well as slaves from coming into States, they can of course allow it, and hence can permit and demand the admission of slaves, as well as any kind of free person, convicts or paupers, into any State . . . .

. . . .

. . . . The power of the State in prohibiting rests on a sovereign right to regulate who shall be her inhabitants, -- a right more vital than that to regulate commerce by the general government, and which, as independent or concurrent, the latter has not disturbed, and should not disturb.

. . . .

"To regulate" is to prescribe rules, to control. But the State by this statute prescribes no rules for the "commerce with foreign nations." It does not regulate the vessel or the voyage while in progress. On the contrary, it prescribes rules for a local matter, one in which she, as a State, has the deepest interest, and one arising after the voyage has ended, and not a matter of commerce or navigation, but rather of police, or municipal, or taxing supervision.

. . . .

So far from interfering at all here with the foreign voyage, the State power begins when that ends and the vessel has entered the jurisdictional limits of the State. Her laws reach the consequences and results of foreign commerce, rather than the commerce itself. They touch not the tonnage of the vessel, nor her merchandise, nor the baggage or tools of the aliens; nor do they forbid the vessels carrying passengers. . . . This has nothing to do with the regulation of commerce itself, -- the right to carry passengers to and fro over the Atlantic Ocean, -- but merely with their inhabitancy or residence within a State so as to be entitled to its charity, its privileges, and protection. Such laws do not conflict directly with any provision by the general government as to foreign commerce, because none has been made on this point, and they are not in clear collision with any made by that government on any other point. . . .

The measures of the general government amount to a regulation of the traffic, or trade, or business, of carrying passengers, and of the imposts on imports; but those of the States amount to neither, and merely affect the passengers or master of the vessel after their arrival within the limits of a State, and for State purposes, State security, and State policy.

. . . .

As a general rule of construction, then, the grants to Congress should never be considered as exclusive, unless so indicated expressly in the Constitution by the nature or place of the thing granted, or

by the positive prohibition usually resorted to when that end is contemplated, as that "no State shall enter into any treaty" . . . .

. . . .

It nowhere seems to have been settled that this power is exclusive in Congress, so that the States can enact no laws on any branch of the subject, whether conflicting or not with any acts of Congress. . . .

. . . . [T]he silence of Congress to legislate on any mere local or subordinate matter within the limits of a State, though connected in some respects with foreign commerce, is rather an invitation for the States to legislate upon it, -- is rather leaving it to them for the present, and assenting to their action in the matter, -- than a circumstance nullifying and destroying every useful and ameliorating provision made by them.

. . . .

A course of harshness towards the States by the general government, or by any of its great departments, -- a course of prohibitions and nullifications as to their domestic policies in doubtful cases, and this by mere implied power, -- is a violation of sound principle, will alienate and justly offend, and tend ultimately, no less than disastrously, to dissolve the bands of that Union so useful and glorious to all concerned.

. . . .