Chief Justice Marshall originated the concept of the "dormant commerce clause" in *Willson v. Black Bird Creek Marsh Co.*,[1010] although again in dicta. The case arose from a challenge to a state law authorizing the building of a dam across a navigable creek, where it was claimed the law was in conflict with the federal power to regulate interstate commerce. Rejecting the challenge, Marshall said that the state act could not be "considered as repugnant to the [federal] power to regulate commerce in its dormant state . . . ." Returning to the subject in *Cooley v. Board of Wardens of Port of Philadelphia*,[1011] the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of *partial* federal exclusivity. According to Justice Curtis' opinion, the state act was valid on the basis of a distinction between those subjects of commerce that "imperatively demand a single uniform rule" operating throughout the country and those that "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former, the Court held Congress' power to be "exclusive"; as to the latter, it held that the states enjoyed a power of "concurrent legislation."[1012] The Philadelphia pilotage requirement was of the latter kind.

Thus, the contention that the federal power to regulate interstate commerce was exclusive of state power yielded to a rule of partial exclusivity. Among the welter of such cases, the first actually to strike down a state law solely[1013] on Commerce Clause grounds was the *State Freight Tax Case*.[1014] The question before the Court was the validity of a nondiscriminatory statute that required every

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[1010] 27 U.S. (2 Pet.) 245, 252 (1829).

[1011] 53 U.S. (12 How.) 299 (1851). The issue of exclusive federal power and the separate issue of the dormant commerce clause were present in the *License Cases*, 46 U.S. (5 How.) 504 (1847), and the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), but, despite the fact that much ink was shed in multiple opinions discussing the questions, nothing definitive emerged. Chief Justice Taney, in contrast to Marshall, viewed the clause only as a grant of power to Congress, containing no constraint upon the states, and the Court's role was to void state laws in contravention of federal legislation. 46 U.S. (5 How.) at 573; 48 U.S. (7 How.) at 464.

[1012] 48 U.S. at 317–20. Although Chief Justice Taney had formerly taken the strong position that Congress' power over commerce was not exclusive, he acquiesced silently in the *Cooley* opinion. For a modern discussion of *Cooley*, *see* Goldstein v. California, 412 U.S. 546, 552–60 (1973), in which, in the context of the Copyright Clause, the Court, approving *Cooley* for Commerce Clause purposes, refused to find the Copyright Clause either fully or partially exclusive.

[1013] Just a few years earlier, the Court, in an opinion that merged Commerce Clause and Import-Export Clause analyses, had seemed to suggest that it was a discriminatory tax or law that violates the Commerce Clause and not simply a tax on interstate commerce. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

[1014] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873). For cases in which the Commerce Clause basis was intermixed with other express or implied powers, *see* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Steamship Co. v. Portwardens,