premacy.[1006] But suppose, first, that Congress has passed no act, or second, that its legislation does not clearly cover the ground traversed by previously enacted state legislation. What rules then apply? Since *Gibbons v. Ogden*, both of these situations have confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first, determined that it has power to decide when state power is validly exercised, and, second, it has coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.[1007]

Thus, it has been judicially established that the Commerce Clause is not only a "positive" grant of power to Congress, but also a "negative" constraint upon the states. This aspect of the Commerce Clause, sometimes called the "dormant" commerce clause, means that the courts may measure state legislation against Commerce Clause values even in the absence of congressional regulation, *i.e.*, when Congress' exercise of its power is dormant.

Daniel Webster, in *Gibbons*, argued that a state grant of a monopoly to operate steamships between New York and New Jersey not only contravened federal navigation laws but violated the Commerce Clause as well, because that clause conferred an *exclusive* power upon Congress to make the rules for national commerce. He did concede that the grant to regulate interstate commerce was so broad as to reach much that the states had formerly had jurisdiction over, so the courts must be reasonable in interpretation.[1008] But Chief Justice Marshall, because he thought the state law was in conflict with the federal legislation, was not compelled to pass on Webster's arguments, although in dicta he indicated his considerable sympathy with them and suggested that the power to regulate commerce between the states might be an exclusively federal power.[1009]

[1006] 22 U.S. at 210–11.

[1007] The writings detailing the history are voluminous. *See*, *e.g.*, F. Frankfurter, The Commerce Clause Under Marshall, Taney, and White (1937); B. Gavit, The Commerce Clause of the United States Constitution (1932) (usefully containing appendices cataloguing every Commerce Clause decision of the Supreme Court to that time); Sholleys, *The Negative Implications of the Commerce Clause*, 3 U. Chi. L. Rev. 556 (1936). Among more recent writings, *see* Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 Wayne L. Rev. 885 (1985) (a disputed conceptualization arguing the Court followed a consistent line over the years), and articles cited, id. at 887 n.4.

[1008] 22 U.S. (9 Wheat.) at 13–14, 16.

[1009] 22 U.S. at 17–18, 209. In Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193–96 (1819), Chief Justice Marshall denied that the grant of the bankruptcy power to Congress was exclusive. *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (militia).