AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 4: The Early National Era – Powers of the National Government/Power to Regulate Commerce

*Josiah Quincy*, **Speech on Foreign Relations (1808)[[1]](#footnote-1)**

Josiah Quincy was a Massachusetts Federalist from Boston, the center of the opposition to the Jeffersonian embargo. Bills and resolutions relating to the embargo came before Congress repeatedly. Congress repeatedly reconsidered such details of the embargo policy as whether it should be extended for a limited duration or whether the president should be authorized to suspend it as circumstances permit. Congress also revisited the basic wisdom and constitutionality of the embargo policy. When resolutions were introduced to bolster the Jefferson administration in its defense of “the rights, honor, and independence” of the nation against England and France, Quincy used the occasion to denounce the embargo. He pointed to its effects on the merchants and shippers of New England and, in his eyes, its dubious constitutionality.

As you read this excerpt, you might consider how consistent Quincy’s argument seems with Federalist arguments on behalf of the Bank of the United States nearly twenty years before. Consider, too, the relationship between political circumstances and constitutional commitments. What distinguishes Representative Quincy from Judge Davis in the case of The William? During the Philadelphia Convention, New Englanders pushed to give national majorities a power to regulate commerce. Quincy now complained that the Constitution never would have been ratified had New England foreseen the adoption of the Embargo Act. Is this a reasonable approach to trying to understand what powers had been given to the federal government? Does the Embargo Act simply illustrate how hard it is to anticipate future needs when making constitutional agreements?

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But there is another obstacle to a long and effectual continuance of this law—the doubt which hangs over its constitutionality, I know I shall be told that the sanction of the Judiciary has been added to this act of the Legislature. Sir, I honor that tribunal. I revere the individual whose opinion declared in this instance the constitutionality of the law. But it is one thing to venerate our courts of justice; it is one thing to deem this law obligatory upon the citizen, while it has all these sanctions; it is another, on this floor, in the high court of the people’s privileges, to advocate its repeal on the ground that it is an invasion of their rights. The embargo laws have unquestioned sanction—they are laws of this land. Yet, who shall deny to a representative of the people the right, in their own favorite tribunal, of bringing your laws to the test of the principles of the Constitution?

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I ask, in what page of the Constitution you find the power of laying an embargo? Directly given, it is nowhere. You have it, then, by construction or precedent. By construction, of the power to regulate. I lay out the question the common place argument, that regulation cannot mean annihilation, and that what is annihilated cannot be regulated. I ask this question, Can a power be ever obtained by construction, which had never been exercised at the time of the authority given, the like of which had never entered into human imagination, I will not say in this country but in the world? Yet such is the power which, by construction, you assume to exercise. Never before did society witness a total prohibition, like this, in a commercial nation. Did the people of the United States invest this House with a power of which at the time of investment, that people had not and could not have had any idea? . . . I appeal to the history of the times when this national compact was formed. This Constitution grew out of our necessities, and it was, in every stage of its formation, obstructed by the jealousies and diverse interests of the different States. . . . In this state of things, would the people of New England consent to convey to a Legislature, constituted as this in time must be, a power not only to regulate commerce, but to annihilate it, for a time unlimited, or altogether? Suppose, in 1788, in the convention of Massachusetts, while debating upon the adoption of this Constitution, some hoary sage had arisen, and with an eye looking deep into futurity, with a prophet’s ken, had thus addressed the Assembly: “Fellow-citizens of Massachusetts: To what ruin are you hastening? Twenty years shall not elapse, before, under a strict and dubious construction of the instrument now proposed for your adoption, your commerce shall be annihilated. The whole of your vast trade prohibited. Not a boat shall cross your harbors, not a coaster shall be permitted to go out of your ports, unless under permission of the distant head of your nation, and after a grievous visitation of a custom-house officer.”

Sir, does any man believe that, with such a prospect into futurity, the people of that State would have for one moment listened to its adoption? Rather, would they not have rejected it with indignation?

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1. Excerpt taken from *Annals of Congress*, 10th Cong., 2nd sess. (November 28, 1808), 541-542. [↑](#footnote-ref-1)