AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era – Special Case Study

"The Colored Seamen's Acts": A Case Study

After the discovery of the planned Denmark Vesey slave revolt of 1822, South Carolina adopted draconian new laws that imposed restrictions on both slaves and free persons. The first "colored seamen's act" was passed by the state in December 1822 and required that any "free negroes or persons of color" arriving in state ports on merchant vessels be held, at the captain's expense, in the custody of the local sheriff until the ship departed. Failure to comply subjected the ship's captain to heavy fines and the sailors to enslavement.

The British government quickly complained to Secretary of State John Quincy Adams that British ships and sailors were being impeded by South Carolina's actions. Adams assured the British government that if South Carolina continued to enforce the law "it would then remain for the Supreme Government to attack them with the arms of authority."[1]

Supreme Court Justice William Johnson, a Jefferson appointee to the Court and a native of South Carolina, sat in circuit in the state.[2] *He initially tried to direct cases involving sailors held under the act to the state courts. Although the state courts found technical reasons for freeing some individual sailors, they avoided ruling on the constitutionality of the act itself. The state legislature did not immediately repeal the act, but local officials in Charleston took no action to enforce it. A private association formed in Charleston to monitor compliance with the act, however, and ensure that ship captains did in fact confine their black sailors in the local jail while in port. When a new motion to free jailed sailors was brought to Justice Johnson, members of the "South Carolina Association" defended the law in court and questioned the authority of a federal circuit court to interfere in a local matter that had not yet generated any official state action (since the state had not yet taken any legal action against the captain or sailors under the law).*[3]

As the Supreme Court had done in Marbury, *Johnson issued an opinion in which he concluded that the state law was unconstitutional but that he was not empowered to issue the writ of habeas corpus to free the sailors (at least not in this case). The sailors at issue in the case were back at sea before further legal action could be taken. The opinion was reprinted in newspapers throughout the country (though suppressed in South Carolina itself), helping to convert what had been a diplomatic embarrassment into a more public political controversy, with "fire-eaters" in the South denouncing attempted federal intervention in local affairs and abolitionists in the North using it to show the lawlessness of the slaveocracy. The controversy set up by South Carolina and ignited by Johnson burned for twenty years without clear resolution. In the course of that dispute, it pulled in judges, legislators, cabinet officials, and private activists. The central arguments turned on the meaning of the commerce clauses of the Constitution and the police power of the state, but it did not take long before the implications for the privileges and immunities of citizens under the Constitution of a dispute that began with British sailors was made explicit.*

Following this extended case study allows you to see how a constitutional issue evolves and the complex politics involved in trying to resolve that issue. The debate over the seamen's acts extended far beyond a single presidential administration, and even beyond the demise of the first party system. An issue that first came to the

[1] Quoted in Philip M. Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822–1848," *Journal of Southern History*, 1 (1935): 8.
[2] See also Donald G. Morgan, *Justice William Johnson, the First Dissenter* (Columbia: University of South Carolina Press, 1954).
[3] Alan F. January, "The South Carolina Association: An Agency for Race Control in Antebellum Charleston," *South Carolina Historical Magazine* 78 (1977): 191.

attention of federal officials during the Jeffersonian era continued to be debated well into the Jacksonian era. At the end of this section, you will find a set of questions to help think about the issues raised in this case study.

Elkison v. Deliesseline, 8 F. Cas. 493 (So. Car. Cir. Ct., 1823)

JUSTICE JOHNSON delivered the opinion of the Court.

The motion submitted . . . in behalf of the prisoner is for the writ of habeas corpus . . . with a view to try the question of the validity of the law under which he is held in confinement.. . .

In support of this demand on the protection of the United States, the British consul has also presented the claim of this individual as a British subject, and with it a copy of a letter from [U.S. Secretary of State] Adams to [British foreign secretary] Canning . . . [which] contains these words: "With reference to your letter of the 15th February last, and its enclosure, I have the honor of informing you that immediately after its reception measures were taken by the government of the United States for effecting the removal of the cause of complaint set forth in it, which, it is not doubted, have been successful, and will prevent the recurrence of it in future." This communication is considered by the consul as a pledge, which this court is supposed bound to redeem. It has its origin thus: Certain seizures under this act were made in January last, some on board of American vessels and others in British vessels; and among the latter one very remarkable for not having left a single man on board the vessel to guard her in the captain's absence.

Applications were immediately made to me in both classes of cases for the protection of the United States authority, in consequence of which I called upon the district attorney for his official services. Several reasons concurred to induce me to instruct him to bring the subject before the state judiciary. I felt confident that the act had been passed hastily, and without due consideration, and knowing the unfavorable feeling that it was calculated to excite abroad, it was obviously best that relief should come from the quarter from which proceeded the act complained of. Whether I possessed the power or not to issue the writ of habeas corpus, it was unquestionable that the state judges could give this summary relief. . . . In the meantime I prevailed on the British consul . . . and the northern captains to suppress their complaints, fully confident that when the subject came to be investigated they would be no more molested. The application was made to the state authority, and the men were relieved; but the ground of relief not being in its nature general or permanent . . . . [F]rom that time the prosecutions under this act were discontinued, until lately revised by a voluntary association of gentleman, who have organized themselves into a society to see the laws carried into effect. . . . I think it due to the state officers to remark that from the time that they have understood that this law has been complained of on the ground of its unconstitutionality and injurious effects upon our commerce and foreign relations, they have shown every disposition to let it sleep. On the present occasion the [state] attorney-general has not appeared in its defense. . . . [P]ressing the execution of the law at this time is rather a private than a state act. . . . I cannot officially take notice of Mr. Adams' letter. However sufficient for Mr. Canning to rely on, it is not legally sufficient to regulate my conduct, or vest in me any judicial powers. The facts which I have communicated will, I hope, be sufficient to show that our administration has acted in good faith with that of Great Britain.

Two questions have now been made in argument; the first on the law of the case, the second on the remedy. On the unconstitutionality of the law under which this man is confined, it is not too much to say, that it will not bear argument; and I feel myself sanctioned in using this strong language, from considering the course of reasoning by which it has been defended. Neither of the gentlemen has attempted to prove that the power therein assumed by the state can be exercised without clashing with the general powers of the United States to regulate commerce; but they have both strenuously contended, that *ex necessitate* it was a power which the state must and would exercise, and, indeed, [one lawyer of the association] concluded his argument with the declaration, that, if a dissolution of the Union must be the alternative, he was ready to meet it. . . . But it was not necessary to give this candid expose of the grounds which this law assumes; for it is a subject of positive proof, that it is altogether irreconcilable with the powers of the general government; that it necessarily compromises the public peace, and tends to embroil

us with, if not separate us from, our sister states; in short, and it leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States.

. . . .The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port employing colored seamen, whether citizens or subjects of their own government or not. But if this state can prohibit Great Britain from employing her colored subjects . . . why not prohibit her from using those of Irish or of Scottish nativity? If the color of his skin is to preclude the Lascar or the Sierra Leone seaman, why not the color of his eye or his hair exclude from our ports the inhabitants of her other territories? In fact it amounts to the assertion of the power to exclude the seamen of the territories of Great Britain, or any other nation, altogether. . . . If this law were enforced upon such vessels, retaliation would follow; and the commerce of this city, feeble and sickly, comparatively, as it already is, might be fatally injured. . . . I am far from thinking that this power would ever be wantonly exercised, but these considerations show its utter incompatibility with the power delegated to congress to regulate commerce with foreign nations and our sister states.

. . . .

And here it is proper to notice that part of the argument against the motion, in which it was insisted on that this law was passed by the state in exercise of a concurrent right. "Concurrent" does not mean "paramount," and yet, in order to divest a right conferred by the general government, it is very clear that the state right must be more than concurrent. But the right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right; and this conclusion we arrive at, whether we examine it with reference to the words of the constitution, or the nature of the grant. That this has been the received and universal construction from the first day of the organization of the general government is unquestionable; and the right admits not of a question any more than the fact. . . .

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But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand. But I deny that the state surrendered a single power necessary to its security, against this species of property. What is to prevent their being confined to their ships, if it is dangerous for them to go abroad? This power may be lawfully exercised. To land their cargoes, take in others, and depart, is all that is necessary to ordinary commerce . . .

. . . .

Upon the whole, I am decidedly of the opinion that the third section of the state act now under consideration is unconstitutional and void, and that every arrest made under it subjects the parties making it to an action of trespass.

Whether I possess the power to administer a more speedy and efficacious remedy comes next to be considered. That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery; but it is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom. . . . The opposition to issuing the writ of habeas corpus is founded altogether on the ground that he is in custody under state authority, and the proviso to the fourteenth section of the judiciary act of 1789 is relied on. That proviso is in these words: "Provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into some court to testify." . . . [W]hat are the courts of the United States to do? . . . It can, then, only be left to congress to give a uniform and national operation to this provision of the constitution [granting the writ of habeas corpus]. In legislating on this subject they have confined us to those cases in which the party is confined under United States authority, or is necessary to be introduced into its courts as a witness. . . . [O]ur power to issue this writ does not extend [to the case of someone being held by state officials under an unconstitutional state law]. As far as congress can extend and shall extend the power to afford relief by this writ, I trust I shall never be found backward to grant it. At present I am satisfied that I am not vested with that power in this case.

. . . .

Upon the whole I am led to the conclusion that the third clause of the act under consideration is unconstitutional and void, and the party petitioner, as well as the shipmaster, is entitled to actions as in ordinary cases. That I possess no power to issue the writ of habeas corpus; but for that remedy he must have recourse to the state authorities. . . .

Johnson and his opinion were bitterly denounced in his native South Carolina, much to Johnson's chagrin and anger. When local papers refused to publish his opinion, the justice arranged for its publication as an independent pamphlet. Newspapers and competing pamphlets were filled in turn by criticisms of the opinion. The essays of "Zeno" were among the most elaborate critiques of the opinion. Zeno in particular expanded the stakes of the debate—what was at issue was the ability of South Carolina to regulate not only sailors passing through its ports but also free blacks from the North who might come into the state for an extended period. Johnson's decision had indirectly raised the difficult problem of whether free blacks had national rights that could trump state laws. The Supreme Court infamously struggled with the same issue in Dred Scott v. Sandford *(1857) on the eve of the Civil War. Zeno pointed out the issue, and Johnson backed away. Johnson responded to some of the attacks with letters under his own name, but like Chief Justice Marshall in Virginia on the* McCulloch *case (1819), Johnson soon wrote under a pen name, "Philonimus," several series of newspaper essays defending the opinion and his actions in the case.*

Zeno, "Municipal Laws," *Charleston Courier* (1823)[4]

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. . . . To infer from the words of the Constitution, giving to Congress the power to regulate Commerce, that any portion of the people shall be restrained from preventing the implements of commerce from being employed to their destruction, is to abandon the first rights resulting from the law of nature. To say that the people of our slave holding community, whose slaves have lately been on the verge of a general insurrection, to which they have been proved to have been mainly excited by colored persons form abroad, shall not have the power to prevent such colored foreigners from roaming at large in the midst of those slaves, because, Congress have the power to regulate commerce, is to fritter away the first protecting principle of national and constitutional law, by narrow technical construction.

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. . . . They deny to a State Legislature, the right of exercising its discretion as to the persons who may with safety to its citizens, be permitted to come within its territory; deny the right of precluding from our port, of repelling from our wharves, colored officers and mariners. Upon what pretence? Because Congress have the power to regulate commerce. And as commerce cannot be carried on without mariners, therefore mariners of all colors and all descriptions, have a right to admission in defiance of our State Law. This right, to the extent claimed, surely rests upon a doubtful inference. But if that inference be sufficient to support it, it follows that a right founded on the express words of the Constitution, stands upon stronger grounds. Now the right of colored *citizens* of the Northern States, to come here, and here to reside, without any other control than that which applies to our white population, rests upon the express words of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. It makes no distinction of color. Let me not be told that the wire-drawn arguments by which it is pretended that the black man of the North is less than a citizen, because his rights are in some particulars restricted. In Pennsylvania, he shares in the government. . . . By the new Constitution of New York, I believe he is to all intents and purposes a citizen. But be that as it may—there can be no doubt that he may be vested with the unimpaired character of a citizen hereafter. He may therefore claim, under the Constitution of the United States, the right to come here, and to enjoy all the privileges and immunities of a white man, *if your State Legislature is divested of its right to control him by its police laws*. This appears to me the necessary consequence of the Judge's opinion. And that consequence must be my justification for the strong language which I have used in denouncing

[4] Excerpt taken from the *Charleston Courier*, September and October 1823.

it. I affect neither modification nor disguise. Whenever it shall be attempted to enforce that consequence, it is our duty to resist it, even should the Constitution of the United States perish in the conflict.

. . . .

I entreat my fellow-citizens to go back with me in imagination to the year 1797, when the Federal Convention met in Philadelphia, and to bear in mind that with the experience, wisdom and moderation which characterized that body, some local prejudices were also to be expected. . . . Let us now imagine that old Roger Sherman, the pride of free and happy Connecticut . . . proposed [a restriction on the state police power regarding slavery]. . . . I hesitate not in declaring my convictions, that every member from the south . . . would have abandoned the Convention . . . .

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Philonimus [William Johnson], "Philonimus on Zeno," *Charleston Courier* (1823)

. . . .

I hold the correct construction of this [privileges and immunities] clause of the constitution to extend the rights of citizens mutually, *to those only who can by any possibility become citizens of the State*, to which they emigrate. I acknowledge the idea is a borrowed one, and one of recent adoption; but I have heard such reasons for it as satisfy me, and banish many an anxious thought from my mind. Therefore, I hold that if a man with one arm or one eye cannot become a citizen of the State A, under its own constitution, neither can he become such because admitted a citizen of the State B.

I reason thus; the constitution cannot be construed literally. Its words are "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." This cannot mean, that because A. is entitled to vote or to fill offices in Pennsylvania, he shall therefore be entitled to vote or to fill offices in South Carolina. This might in all cases nullify the qualifications of residence, property, age, etc., and put it in the power of one State to make a constitution for another. Nothing but clashing could arise from this, and the very end of the article, the great purpose of harmony, be defeated. . . . We must then find some means of harmonizing, not setting in array against each other, the privileges conferred by State laws upon their own citizens.

. . . . Any other rule of construction would give to the citizens of another State, not the same privileges and immunities only, but greater than those born among us are entitled to; these remain forever under the disability [of color]. Color is to be sure, on general principles, no essential subject of discrimination; but this is immaterial in the actual organization of civil societies. Call it caprice, or what you will, they have a right to make what laws they please. Positive institutions have no dependence at all upon abstract principle; and color, age, height, form, or anything, may be made a principle of exclusion.

Take this rule and there can be no clashing; take any other and there can be no harmony. *It is enough for all the purposes of the constitution, if citizenship of a particular State is never made the ground of exclusion, or subject of capricious, hostile legislation.*

. . . .

. . . I have no doubt that in surrendering the commerce and the Treaty-making power of the country to the care of Congress, we have given up the right of deciding who shall have access to our ports for the purposes of trade.

But, after yielding so much to the general government, and founding on our concessions, such important claims upon their prudence and power as we have a right to do, shall we suffer ourselves to be persuaded that they will abandon us to ruin?

It would be unreasonable . . . .

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. . . . I yield not to [Zeno], or any one, in my anxiety for the honor and welfare of the state; but while he was viewing danger on one side, I was contemplating it on another. I maintain that the greatest possible evil that can happen to us, would be to cast off our union, or to be brought into serious collision with the United States. It is the greatest evil, because in addition to many others, it is the high road to the very evil which Zeno is so anxious to avert. . . .

Like Marshall after McCulloch*, Johnson soon became convinced that the integrity of the federal judiciary and the preservation of the union were at stake in the public response to the case. The same issues, and in some instances the same types of laws, existed in other states besides South Carolina. Chief Justice John Marshall avoided taking on this particular political battle when he had the chance while conducting his own circuit duties in Virginia, as he explained in a letter to Justice Joseph Story.*

Chief Justice John Marshall to Justice Joseph Story (1823)[5]

Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny State-Rights in South Carolina, and will find some difficulty, I fear, in getting off into smooth, open ground. . . . The subject is one of much feeling in the South. . . . The decision has been considered as another act of judicial usurpation; but the sentiment has been avowed that, if this be the Constitution, it is better to break that instrument than submit to the principle. . . . You have, it is said, some laws in Massachusetts [quarantine laws], not very unlike in principles to that which our brother has declared unconstitutional. We have its twin brother in Virginia [a seamen law]; a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act.

Justice Johnson subsequently wrote to Secretary of State Adams, "I am daily made sensible that the eyes of the community are turned most particularly to the Judges of the Supreme Court for protection of their constitutional rights, while I feel myself destitute of the power necessary to realize that expectation. . . . I feel it my duty to call the attention of the President to the subject as one which may not be unworthy of an official remonstrance of the Executive of the States."[6] *President James Monroe responded by asking his attorney general, William Wirt, to evaluate the constitutionality of the South Carolina statute. Agreeing with Johnson's circuit court opinion, Wirt concluded that the act was unconstitutional, and he added that it was contrary to commercial treaties between the United States and Britain. The president then sent Wirt's opinion to the governor of South Carolina, encouraging the state government to take the appropriate action on its own. At the same time, the secretary of state sent word to the United States district attorney in Charleston that the president wanted the seamen's act tested before the U.S. Supreme Court, but the British sailors at issue were once again freed and sailed away before the matter could come to a head.*

William Wirt, Opinion on the Validity of the South Carolina Police Bill (1824)[7]

. . .

The question which you propound for my opinion . . . is, "Whether it is compatible with the rights of nations in amity with the United States, or with the national constitution?"

By the national constitution, the power of regulating commerce with foreign nations and among the States is given to Congress; and this power is, from its nature, exclusive. . . . Congress has exercised this power, and among those terms there is no requirement that the vessels which are permitted to enter the ports of the several States shall be navigated wholly by white men. All foreign and domestic vessels complying with the requirements prescribed by Congress have a right to enter any port of the United States, and a right to remain there, unmolested in vessel or crew, for the peaceful purposes of commerce. . . . For the regulations of Congress on this subject being both supreme and exclusive, no State can add to them, vary them, obstruct them, or touch the subject in any shape whatever, without the concurrence and sanction of Congress. . . . Here is a regulation of commerce, of a highly penal character, by a State, superadding new restrictions to those which have been imposed by Congress; and declaring, in effect,

[5] Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, 1922), 86.
[6] Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, 1923), 85.
[7] 1 Op. Att'y Gen. 659 (1852).

that what Congress has ordained may be freely and safely done, shall not be done but under heavy penalties.

It seems very clear to me that this section of the law of South Carolina is incompatible with the national constitution and the laws passed under it, and is, therefore void. . . . [I]nasmuch as this section of the law of South Carolina is a restriction upon [foreign] commerce, it is incompatible with the rights of all nations which are in amity with the United States. . . .

South Carolina responded to the president's request with defiance rather than conciliation. South Carolina Governor John Wilson laid the matter before the state legislature but made his own position clear. The two chambers of the state legislature could not agree before the end of the session on a common set of resolutions responding to the federal government. The Senate preferred a hard-line approach: "Resolved, Therefore, that the legislature of South Carolina protests against any claims of right, of the United States, to interfere, in any manner whatever, with the domestic regulations and preservatory measures in respect to that part of her property which forms the colored population of the state, and which property they will not permit to be meddled with, or tampered with, or in and manner ordered, regulated, or controlled by any other power, foreign or domestic, than this legislature." The House of Representatives was more conciliatory, resolving merely that the law was a matter of "domestic police absolutely necessary to insure the safety of the citizen."

Governor John L. Wilson, Message of the Governor (1824)[8]

. . . .

There should be a spirit of concert and of action among the slave-holding states, and a determined resistance to any violation of their local institutions. The crisis seems to have arrived when we are called upon to protect ourselves. The president of the United States, and his law adviser, so far from resisting the efforts of a foreign ministry, appear to be disposed, by an argument drawn from the overwhelming powers of the general government, to make us the passive instruments of a policy, at war, not only with our interests, but destructive also of our national existence. The evils of slavery have been visited upon us by the cupidity of those who are now the champions of universal emancipation. A firm determination to resist, at the threshold, every invasion of our domestic tranquility, and to preserve our sovereignty and independence as a state, is earnestly recommended; and, if an appeal to the first principles of the right of self-government be disregarded, and reason be successfully combated by sophistry and error, there would be more glory in forming a rampart with our bodies on the confines of our territory, than to be the victims of a successful rebellion, or the slaves of a great consolidated government.

John Quincy Adams agreed, of course, with the conclusion of Justice Johnson, Attorney General Wirt, and President Monroe that the South Carolina law was unconstitutional, but during his own presidency he was able to do little more than attempt to reassure the British government, which in turn largely held its tongue.

When Andrew Jackson assumed the presidency, however, the position of the United States government on this matter was reconsidered. The enforcement of the seamen's laws increased in South Carolina and elsewhere, and the British reminded the new administration of the promises that had been made by Adams. Slave interests were more vocal and more demanding in the Jacksonian coalition than they had been in the Jeffersonian coalition. The problem of South Carolina's defiance on the seamen's acts was also less pressing to the administration than the emerging problem of Georgia's defiance of the Supreme Court and the federal government in regard to the Cherokees and growing agitation in South Carolina over federal tariffs. When the British continued to complain to the Jackson administration about these state laws, the matter was referred once again to the attorney general for a fresh opinion. Jackson's Attorney General John Macpherson Berrien took a different view than that of Attorney General Wirt.

[8] Excerpt taken from *Charleston Courier*, December 1824.

John Berrien, Opinion on the Validity of the South Carolina Police Bill (1831)[9]

. . . . Heretofore, the only question considered by this government seems to have been, whether a law of South Carolina, conflicting with the provisions of the convention with Great Britain, and with the commercial laws of the United States, is constitutionally valid. The fact of such a conflict has been assumed, as it appears to me, without a sufficient attention to the terms of the convention or the laws of the Union. My belief is, that no such conflict exists in fact; that on the contrary, there is a perfect harmony between the legislation of South Carolina and the United States. . . .

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Apart from the supposed liability of the act of South Carolina to conflict with the laws of the United States, and the convention with Great Britain, the right of the legislature of that State to pass such a law cannot, I apprehend, be doubted. In the general distribution of powers between the federal and State governments, the power to regulate its own internal police was clearly reserved to each State. . . . The general right of a State to regulate persons of color within its own limits is one too clearly recognized by the tenth amendment to the constitution to be drawn into controversy. . . .

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The power to regulate commerce with foreign nations is vested in Congress by the constitution; and the President, by and with the advice and consent of the Senate, has authority to make treaties. Are these powers unlimited? Does the constitution impose no restrictions upon their exercise? If in terms it does not, is no restriction imposed, and necessarily so, by the nature of our political association, by those great and fundamental principles which are at all times, and equally, obligatory upon communities and individuals? If the enforcement of a law passed by the legislature of a State, in the clear and undisputed exercise of its reserved rights of sovereignty, be vitally essential to the safety of its people, may Congress, in the exercise of its granted powers, capriciously, and at will, so extend its legislation as that it shall in its operation incidentally conflict with such State law, and thereby annul it *pro tanto*, whether such extension is or is not indispensable to the execution of the granted power? And is the National Legislature to be the sole judge of this necessity? There is a presumption, perhaps, in the mere suggestion of those inquiries. I am not unmindful of what was said by the court in the case of Gibbons and Ogden (1824), and am entirely sensible of the respectful consideration to which even the *dicta* of that high tribunal are justly entitled. But the proposition there announced was not essential to the decision of the pending controversy, and it ceased to be authoritative as soon as it had passed that limit. . . .

It was sufficient for all the purposes of that decision to affirm . . . that the acts of the legislature of New York were laws affecting commerce. . . . It was not indispensable to decide how far a law passed by a State legislature, in the exercise of an undisputed power to regulate its own internal police, and plainly limited to that object, must yield to an act of Congress, enacted under the authority to regulate commerce, in the event of an incidental conflict, which might have been avoided without restraining the full exercise of the constitutional power of the federal government. That question, therefore, is still open to inquiry. . . .

. . . . [T]he powers granted to Congress are supreme. Whatever is *indispensable* to their plenary exercise, the legislature of the Union has the power to enact, and State legislation must bend beneath its sway. But if the means by which such granted power may be carried into effect are various, and alike efficient; if its exercise in one mode will consist with the unfettered exertion of the reserved powers of the States, while the use of a different means will, by producing a conflict with State legislation, paralyze the reserved rights of those sovereignties – the selection of the former mode becomes, I apprehend, a duty of constitutional obligation. In the view I have of this subject, the right of Congress, even in the exercise of its expressly granted powers, to control the legislation of the States, results, and results only, from the *necessity* of such control to the efficient exercise of the granted power. . . .

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If, now, we inquire how far, in relation to the subject immediately under consideration, the power of Congress may be exercised without paralyzing the legislation of South Carolina – the answer seems to be, that the admission of colored seamen indiscriminately into all the ports of the United States is a matter rather of convenience than of necessity. . . .

[9] 2 Op. Att'y Gen. 427 (1852).

I am not, therefore, prepared to affirm that an act of the legislature of South Carolina, which inhibits the entrance of free persons of color into that State, is necessarily invalid . . .

Upon what other principle than this can we explain the operation of the quarantine laws of the several States? They act directly upon the commerce of the Union; and yet they emanate exclusively from the States. They restrain that commerce, and control the enactments of the national legislature made for its regulation; and yet they are permitted to operate. . . . Is the right of self-protection limited to defense against physical pestilence? . . .

. . . .

The federal government now took the position that the seamen's laws were well within the rights of the states to pass and enforce. When a British vice-consul unsuccessfully attempted to obstruct the enforcement of a similar North Carolina statute against two British sailors, the British ambassador to the United States demanded the repeal of the "obnoxious enactments." The U.S. secretary of state again went to the attorney general for clarification of the government's stance. By then, future chief justice Roger Taney sat in that office, and his draft opinion (apparently never delivered) was more blunt than his predecessor's had been and foreshadowed his judicial opinion in the case of Dred Scott. "Our constitutions were not formed by the assistance of that unfortunate race nor for their benefit," Taney explained. The states might have adopted milder measures, but that was up to them. Regardless of what the justices of the U.S. Supreme Court might say about the seamen's laws, this was a matter of (state) legislative discretion, and "no tribunal can be formed so likely to come to just conclusions on all questions of legislative discretion as the great body of the people themselves."[10] It was up to the voters of South Carolina and the other slaveholding states to alter those laws, if they so desired. The federal executive and judiciary should not interfere. They did not attempt to do so again.

The issue was not quite settled, however. The seamen's laws remained politically touchy subjects in both the North and the South. In the North, the laws were the subject of frequent complaint and protest, not least because the seafaring citizens of northern states were sometimes personally affected by them (Massachusetts Chief Justice Lemuel Shaw commented on them in his opinion in Commonwealth v. Aves, *35 Mass. 193 [1836]). In the South, the laws were a symbol of the threat of slave insurrection and an example of the necessity of state autonomy in making policy on locally sensitive matters. Boston was both a shipping hub and an abolitionist stronghold, and a petition by a group of Bostonians created the opportunity for a final exchange on the laws. A series of antislavery petitions on the seamen laws and other issues relating to slavery were presented to Congress by former president John Quincy Adams, who now held a seat in the House of Representatives. These petitions were unceremoniously tabled. On December 27, 1842, however, Whig Representative Robert Winthrop managed to have such a petition, from "owners and masters of vessels" in Boston asking for congressional relief from the unconstitutional seamen's laws, referred to the Committee on Commerce for further deliberation. Winthrop was himself a member of the Committee on Commerce, on which the Whigs held a six-three advantage and the North a five-four advantage. This committee reference gave Winthrop the excuse to produce a committee report on the laws. The committee report included a copy of Justice Johnson's circuit opinion, the government's diplomatic correspondence with Britain, and Attorney General Wirt's opinion on the laws, and proposed a set of resolutions denouncing the laws as unconstitutional. It was countered by a minority report authored by North Carolina Representative Kenneth Rayner, who appended Attorney General Berrien's opinion to his. Unlike the earlier official discussions of the law, the committee report was issued in the context of American, not British, sailors and thus focused on a different issue than what had previously dominated federal discussions of the laws. As the newspaper exchange in South Carolina immediately after the* Elkison *decision had revealed, these laws implicated the privileges and immunities of citizens entering into the various states of the Union as well as the supremacy of federal laws on commerce. As a result, the dueling committee reports directly anticipate Chief Justice Roger Taney's opinion in* Dred Scott, *which also grappled with the tension between black citizenship and slavery in a federal republic and ultimately with the Fourteenth Amendment's protection of privileges or immunities against the states.*

[10] Quoted in Carl B. Swisher, *Roger B. Taney* (New York: Macmillan, 1935), 156.

On January 20, 1843, the report was presented on the floor of the House of Representatives. Two months later, and over the objections of the northern Whigs, it was officially tabled without further action by a lopsided vote on the floor.

House Committee on Commerce, Free Colored Seamen—Majority and Minority Reports (1843)[11]

Mr. WINTHROP, from the Committee on Commerce, made the following REPORT:

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The committee have no hesitation in agreeing with the memorialists, that the acts of which they complain, are violations of the privileges of citizenship guaranteed by the Constitution of the United States. The Constitution of the United States expressly provides . . . that "citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." Now, it is well understood that some of the States of this Union recognize no distinction of color in relationship to citizenship. Their citizens are all free; their freemen all citizens. In Massachusetts, certainly . . . the colored man has enjoyed the full and equal privileges of citizenship since the last remnant of slavery was abolished within her borders by the constitution of 1780. . . . The Constitution of the United States, therefore, at its adoption, found the colored man of Massachusetts a citizen of Massachusetts, and entitled him, as such, to all the privileges and immunities of a citizen of the several States. And of these privileges and immunities, the acts set forth in the memorial constitute a plain and palpable violation.

It matters not to this argument, in the opinion of the committee, what may be the precise interpretation given to this clause of the Constitution. However extended or however limited may be the privileges and immunities which it secures, the citizens of each State are entitled to them equally, without discrimination of color or condition; and unless it is maintained that the citizens of Massachusetts generally, may be made subject to seizure and imprisonment for entering these Southern ports in the prosecution of their rightful business . . . it is impossible to perceive upon what principle the acts in question can be reconciled with this constitutional provision.

The State laws under which these acts are committed are also, in the judgment of the committee, in direct contravention of another provision of the Constitution of the United States. The Constitution of the United States gives the power to Congress "to regulate commerce with foreign nations and among the several States." This power is, from its very nature, a paramount and exclusive power, and has always been so considered and so construed. There is no analogy between this power of regulating commerce and most of the other powers which have been granted to the General Government. The power to *regulate* admits of no partition. It excludes the idea of all concurrent, as well as of all conflicting, action. . . . The grant necessarily carries with it the control of the whole subject, leaving nothing in reference to it for the States to act upon. . . .

. . . .

The committee are aware that the laws in question have sometimes been vindicated upon considerations of domestic police; and they have no disposition to deny, that the general police power belonging to the States . . . .

But the committee utterly deny that provisions like these can be brought within the legitimate purview of the police power. That American or foreign seamen, charged with no crime, and infected with no contagion, should be searched for on board the vessels to which they belong; should be seized while in the discharge of their duties; . . . should be dragged on shore and incarcerated, without any other examination than an examination of their skins . . . is an idea too monstrous to be entertained for a moment. . . .

. . . . The police power of the States can never be permitted to abrogate the constitutional privileges of a whole class of citizens, upon grounds, not of any temporary, moral or physical condition, but of distinctions which originate in their birth, and which are as permanent as their being. Or, to use still more general terms, the police power of the States can never justify enactments or regulations, which

[11] H. Rep. No. 80, 27th Cong., 3rd sess. (1843).

are in direct, positive, and permanent conflict with express provisions of fundamental principles of the national compact.

. . . .

The committee are of the opinion, that the memorialists are entitled to the relief for which they pray, and that important commercial interests, as well as the highest constitutional principles, call for the repeal of the laws in question. Congress, however, seem to have no means of affording such relief, or of effecting such a repeal. The Judiciary alone can give relief from the oppression of these laws while they exist, and the States which enacted them are alone competent to strike them from their statute books. . . .

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Mr. RAYNER submitted the following minority report:

. . . .

The undersigned cannot agree with the majority of the committee on the points of constitutional construction set forth in their report. . . . Even admitting that free negroes are citizens in the sense referred to in the Constitution, still the undersigned cannot agree with the construction which, the majority has placed on this provision. The object of inserting this clause most unquestionably was to prevent the citizens of one State being considered as aliens in another; to extend to the citizens of every State the same privileges and immunities that might belong to the citizens of the State in which, for the time being, he might be – as, for instance, that a citizen of Massachusetts when in South Carolina, shall be entitled to all the privileges of citizenship enjoyed by the citizens of the latter State, and *vice versa*. . . . The "privileges and immunities" of citizenship mentioned in the Constitution must refer to those of the States *in* which, and not the State *from* which, the citizens happens to be. . . . Many of the State laws differ in regard to the exemptions from taxation on account of age or public station; in their exemption for bearing arms, serving on juries, working on roads, and various other kinds of public duty; and in their extension of the privileges of the right of suffrage, release under their insolvent laws, etc. . . . The meaning of the Constitution must be, that South Carolina, and every other State, is bound to extend to the citizens of each and every State, the same privileges and immunities she extends to her own "under the like circumstances."

. . . . The memorialists ask Congress to enforce the same relations, in regard to the white and colored man in South Carolina, which prevail in Massachusetts. Do not the memorialists see how this request might be converted into an argument against themselves? . . . If Congress has the power to enforce, in the slaveholding States, the same relations between the white and colored man, that exist in the non-slaveholding States, it must have the right to enforce in the non-slaveholding the same which exist in the slaveholding. One of the "privileges and immunities" of a citizen in South Carolina is to seize his runaway slave wherever he finds him, and reduce him to subjection, by force if necessary. The supreme court of Massachusetts has decided [in *Commonwealth v. Ames*] that, if a master from the South carries his slave voluntarily into that State, the slave is, ipso facto, a free man, and the master cannot restrain him. Suppose the citizens of South Carolina were to petition Congress . . . complaining that the master could not enjoy the same privileges in Massachusetts as he did in South Carolina . . . would the majority of the committee consider that Congress had the power to interfere [under the privileges and immunities clause]? The undersigned does not wish to be understood as questioning the power of Congress to interfere in enforcing the rights of the slaveholder. That power is fully granted; but, in another paragraph [the fugitive slave clause]. . . .

The Constitution never designed to define the "privileges and immunities" of citizenship within the respective States. That is a question that rests entirely with State regulations, subject, of course, to the general restraints and provisions of the Constitution. And it was in consideration of this very fact, in view of the variant regulations the several States might adopt, that [the fugitive slave clause] was incorporated in the Constitution. . . .

. . . .

Neither can the undersigned agree with the opinion of the majority of the committee, that these State regulations are "in contravention of another provision of the Constitution," viz: the power of Congress "to regulate commerce with foreign nations, and among the several States," . . . . The powers

granted to Congress were never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power was prohibited to the States, or there was a direct repugnancy or incompatibility in the exercise of it by the States.

. . . . Congress has "*the power* to regulate commerce;" but till it shall have passed a conflicting regulations, how can the laws of the States, passed for purposes of police, be considered unconstitutional, contravening, as they do, no law of the General Government? The undersigned would ask, whether these State laws, complained of, are expressly in conflict with any law of Congress, passed for the regulation of commerce. . . . The undersigned does not, however insist on the right of the States to legislate with a view to the regulation of commerce, except so far as it may be incidental to the exercise of the other powers of sovereignty, which must necessarily reside in the States, to enable them to protect their own citizens. The laws of the States complained of were not passed for the purpose of regulating commerce, but as mere regulations of domestic police, which those States believe to be essential to their most vital interests. The right of the States to establish their own police and municipal regulations for their own internal government, to extend the shield of protection over all their citizens, and to take precautionary as well as remedial measures towards preserving their own domestic peace and tranquility, never was, and never could have been intended to be, divested, by the adoption of the Federal Constitution. The doctrine was held by the Supreme Court, in the case of *Gibbon v. Ogden*, that the power of Congress to regulate commerce, "like all other powers of Congress, was plenary and absolute *within its acknowledged limits*. But it was admitted that inspection laws relative to the quality of articles to be exported, and quarantine laws, and health laws of every description . . . were component parts of an immense mass of legislation not surrendered to the General Government." . . .

. . . .

. . . . The undersigned readily admits that these State regulations complained of operate very frequently as a hardship upon Northern vessels, and, in fact, upon all vessels having on board colored hands. He also regrets that these measures of safety may tend to widen the differences already existing between the North and the South. . . . The causes, however, which originally led to these difficulties did not commence in the slaveholding States. As long as their institutions were left undisturbed by fanatics, no restrictions were imposed on colored seamen. But, when they received satisfactory evidence that these colored seamen were the agents which incendiaries were employing for their own wicked designs, the Southern States, in discharge of a high and solemn duty, felt bound to extend their protection to their own citizens, by passing the regulations complained of.

Queries

1. Who were all the players involved in this twenty-year controversy, and what were their interests in the issue?

2. Why did Justice Johnson raise constitutional issues in *Elkison*? Could they have been avoided? What does Johnson believe South Carolina can constitutionally do? What is the outcome of the *Elkison* case? What does Johnson see as the available remedy to the constitutional violation that he finds?

3. What is the argument for the constitutionality of the state laws? What is the basis for that (those) constitutional claim(s)?

4. How does the case of British sailors differ from the case of American sailors affected by the seamen's laws? How would it be possible for one to be subject to the laws and not the other?

5. How are the constitutional arguments connected to an assessment of how political power operates? Is interpretation of the constitutional text alone sufficient to resolve the constitutional arguments raised in these debates? What are the alternative views of who should interpret the Constitution in this case?

6. How does Berrien attempt to minimize his conflict with the earlier opinion of Wirt?

7. What are the differences between viewing the power to regulate commerce as concurrent or exclusive? How might the seamen's acts be constitutional under either view? How might they be unconstitutional?

8. Why did the controversy last for twenty years? What were the obstacles to remedying claimed constitutional violations? Why were remedies not applied earlier? Why did the existence of the laws not lead to a bigger political crisis?