AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 5: The Jacksonian Era – Federalism

**Willson v. Black Bird Creek Marsh Company, 27 U.S. 245** (1829)

*Thompson Willson was the owner of a federally licensed sloop, the* Sally*. While sailing, Willson partially dismantled a dam built by the Black Bird Creek Marsh Company. The Company, which had been incorporated by Delaware to erect the dam and embank the surrounding marshland, sued Willson for damages. Willson responded that the dam unlawfully obstructed a navigable creek and that he had the right to restore the public way. The Delaware courts found against Willson, and a jury awarded the requested damages. Willson appealed that decision to the Supreme Court of the United States. He argued that he had a federal constitutional right to navigate coastal streams, that states had no power to close navigable streams, and that the state’s action in this case was motivated by private profits rather than by public health. The Company responded that clearing the marsh fell within the legitimate police powers of the state, that their action was consistent with existing federal law, and that Congress could not legitimately prevent a state from undertaking such public health measures.*

The Supreme Court declared that Delaware had acted constitutionally. Chief Justice John Marshall’s opinion found no conflict between federal and state power, even though he noted that the dam might interfere with interstate commerce. What reason did Marshall give for sustaining the Maryland law?

CHIEF JUSTICE MARSHALL, delivered the opinion of the Court.

. . . .

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States “to regulate commerce with foreign nations and among the several states.”

If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

*Affirmed*.