

NAVIGATING THE DANGEROUS ATLANTIC: RACIAL QUARANTINES, BLACK
SAILORS AND UNITED STATES CONSTITUTIONALISM

By

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To MAS and RMM

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This project is a history of the Negro Seamen Acts, a series of laws prohibiting the ingress black sailors into particular jurisdictions during the antebellum period. Beginning in South Carolina in 1822, these laws implemented race as a mode of quarantine, hoping to prevent the “moral contagion of freedom” from infiltrating domestic slave populations. North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas eventually passed similar laws, varying in severity. For a short time, Cuba and Puerto Rico also closed their ports to sojourning black sailors. For white lawmakers in slave societies during the Era of Emancipation, these laws were essential in preserving the racial status quo in their own jurisdictions from the nefarious effects of the Dangerous Atlantic.

The enforcement of the Seamen Acts initiated fierce debates in a number of political and legal forums, and this dissertation attempts to reconstruct these debates. Pulling from international consular and diplomatic correspondence, state and federal legislative documents in the United States, court decisions, abolitionist publications, and popular periodicals, this dissertation argues that the commentary on the Negro Seamen Acts played a formative part in specific legal and political developments in the United States. In particular, this dissertation

argues the interstate and international conversations regarding the Seamen Acts shaped the contours of federal commercial regulatory authority, the limits of state policing powers, and, most importantly, conceptualization of U.S. citizenship.

International politics are instrumental in the stories that follow. The uneven emancipations of the Atlantic World created a definitional incongruence of rights and citizenship among nations wrestling with the political and legal status of people with black skin. And the interconnected Atlantic World meant that a change in status in one jurisdiction opened the discursive floodgates across the littorals and had the potential to influence racial policies and conceptions of citizenship in other polities. Thus, when sailors of color entered jurisdictions with Seamen laws in place, their treatment forced commentators across the Atlantic to ruminate about the exact process by which people of color became formally integrated into the constitutional bodies politic of the nineteenth-century Atlantic World.

CHAPTER 1 PREFACE

The Atlantic Ocean of the early nineteenth century represented both an avenue of opportunity and a potential for catastrophe. For free African Americans, the sea afforded a respite from the brutality of segregation, disfranchisement, and economic marginality. The decent wages, the rugged equality of tar life, the ability to see worlds beyond – and better than – the ones they left behind motivated many African-American men to choose a life at sea. But the wider Atlantic World also contained places far worse than the ones the sailors called home. Mariners often visited the sugar islands, cotton plantations, and other slave-societies where the small modicum of liberty they enjoyed were completely absent for people of color. Worse yet, very little protected the colored deck hand from a life in chains. An unscrupulous, greedy captain and a local slave marketer, if they were not intimidated by laws outlawing the slave trade, could quite easily transform a free man into a slave. For black sailors, the line that separated freedom and slavery was magnificent, but it could be erased with ease while on the open sea.

For white Southerners, the Atlantic was also a dangerous but lucrative entity. Distant markets, the lands where plantation staples metamorphosed into money and credit, could only be reached via the Atlantic. But that same boulevard to wealth could also bring havoc. The Age of Revolution unleashed powerful ideas of equality and liberty that undermined the racial and social orthodoxies of Southern plantation life. These ideas, if unleashed upon and adopted by otherwise ignorant slaves, could precipitate cataclysmic changes in Southern society. To protect the racial status quo, various slave jurisdictions adopted peculiar forms of quarantine hoping to sequester domestic slaves from Atlantic ideologies – or “infections” – of liberty and freedom. Believing black sailors to be natural conduits of dangerous ideologies, slave states outlawed their

entry on pain of imprisonment, or in some places, enslavement. Commonly referred to as the Seamen Acts, these laws against black sailors sought to continue the profitable aspects of Atlantic exchange while simultaneously averting racial insubordination. Perceptions of the Atlantic, both as benefactor and malefactor, lured free black sailors to slave jurisdictions and inspired laws restricting their movements once they arrived.

When the first of these quarantines went into effect in South Carolina in 1822, it precipitated a host of vexing questions, the most pressing of which centered on the U.S. Constitution. What was the exact relationship between state and federal power in the United States? Was race akin to cholera or yellow fever in terms of its eligibility as a subject of quarantine? What rights did people of color carry with them from their home jurisdictions? These questions plagued jurists and politicians for nearly forty years. This project seeks to illuminate the various answers that emerged over the course of the Seamen Acts' history. It looks to the courts, legislatures, diplomats, and the sailors and their representatives. It hopes to show that the Seamen Acts played a critical role in the articulation of important constitutional ideas.

Taken together, the chapters that follow have three primary objectives. First, they seek to situate the Seamen Acts into the larger narrative of antebellum United States history. This aim is mostly implicit, and with the exception of this paragraph, it will remain in the background of the pages that follow. Some historians who have looked at the Seamen Acts debates have considered them tempests in teapots, inconsequential laws reflecting over-reactive Southern slaveholders in near hysterics over the perceived threat to the slave system. In large part, this project attempts to alter that perception. Granted, the Seamen Laws were typically the manifestation of unfounded paranoia, but the results of this codified fear were real. There were

dramatic consequences. At the most obvious level, these laws caused thousands of sailors to languish in Southern jailhouses, some for days, other for weeks and months, and for a few, years. Some faced the lash in addition to imprisonment, even though state-sanctioned corporeal punishment was usually reserved to those in bondage. Still others faced an incipient form of convict labor. Though scattered and sparse, letters from incarcerated seamen illustrate the draconian effects of the law, especially for those unfortunate mariners who were under the employ of an unscrupulous captain. If for no other reason, the stories of these incarcerated seamen demands that attention be paid to the Seamen Laws.

In hopes of connecting the personal experiences of incarcerated sailors to larger political issues, my second goal is to illustrate the vital importance of the Seamen Acts controversies to constitutional developments in the United States, and in two areas in particular. First, the Seamen Laws had a tangible impact on the contested boundary between state police powers and federal authority to regulate interstate and international commerce. By couching the Seamen Acts in terms of quarantine, Southern legislatures attempted to circumvent federal intervention on Commerce Clause grounds. Since the federal government had long since honored the power of the states to restrict the entrance of paupers, the infirm, and the diseased, Southern lawmakers argued that free blacks were infected with a “moral contagion,” and were therefore susceptible to quarantine. Just like a person infected with cholera, a free black from Atlantic waters threatened the health and welfare of the (white) citizens within the state. The same logic, codifiers of racial quarantines professed, that allowed New York to isolate a traveler infected with yellow fever permitted Georgia to incarcerate a black sailor with a “moral infection.” This position proved powerful to counteract, so powerful indeed, that the Supreme Court never denied the constitutionality of racial quarantines, even as it sought, at times, to enhance federal power over

commerce and streamline interstate and international trade. The hullabaloo over racial quarantines – and throughout the pages that follow, I treat racial quarantines and the Seamen Acts as synonyms – contributed to the vague boundary between federal commercial power and state police authority during the antebellum period. In several places in the succeeding pages, I examine the Court’s developing doctrine, if you can even call it that, of federal commercial power to illustrate the potential impact a change in doctrine might have for those with a stake in the continuation or destruction of the Seamen Acts.

Even more directly, the implementation of seamen restrictions led directly to an alternative way for antebellum jurists to formulate citizenship. During the early- and mid-nineteenth century (and perhaps ever since), the term “citizen” was in constant flux, both in its theoretical construction and in its application on the ground. The individual states were in the process of answering provocative questions about the nature of sovereignty and liberty in a federated republic. Who were citizens, and why? What rights were reserved specifically to citizens, and what rights were extended to all people? Of course, race was the fulcrum on which many of these questions turned. But the Seamen Acts took race beyond the individual states and forced antebellum jurists to consider both the contours of federal citizenship and the nature of interstate comity. What the Seamen Acts did, in short, was force the federal government to investigate the intersection of race and citizenship on a grand scale, and the results altered the very conception of citizenship and prefaced the most notorious Supreme Court decision in American history.

My third and final aim in this project is to illustrate the necessity of a transnational perspective in charting the preceding changes in constitutional history. The Seamen Acts made no mention of nationality or citizenship; they specifically aimed to prevent Atlantic-savvy sailors from entering the South and jeopardizing the slave system and racial hierarchies. In their very

language, the laws downplayed national borders and questioned the primacy of national affiliation in the identification of individuals. As a result mariners from Britain, Portugal, Spain, France, the Caribbean, South America, New York, Massachusetts and other Atlantic places all faced incarceration for violating racial quarantines. This set off a series of diplomatic problems with Spain, France, and especially Great Britain. For British diplomats in particular, the end of colonial slavery inspired rigid resistance to the Seamen Acts, and British sailors, diplomats, and consuls were the primary culprits in forcing the U.S. federal government to engage the relationship between citizenship, race and rights. The story of the Seamen Acts' impact on constitutional development is impossible to tell without a transatlantic perspective. The uneven emancipations of the Atlantic World created a definitional incongruence of citizenship among nations wrestling with the political and legal status of people with dark skin. And the interconnected Atlantic World meant that a change of status in one jurisdiction opened the discursive floodgates and caused new theories of citizenship and subjecthood to emerge. In most instances, the implementation, modification, and repeal of the various Seamen Laws can be directly attributed to the interplay between political regimes in Great Britain and the United States.

My aims have led me to an unlikely array of sources. As in any constitutional study, this one pays close attention to the official actions of courts and legislatures, both at the state and federal level. It also refers to other, unofficial or nonbinding legal sources, like independently published legal treatises and the opinions of state and federal attorneys general. It references newspapers and other periodicals, including those published by abolitionists. In fact, abolitionist literature is largely responsible for sensationalizing the plight of free black sailors and pressuring federal officials to continue to consider the Seamen Laws, usually against their better political

judgment. This study also examines diplomatic correspondence, especially the conversations of British diplomats and consuls with each other and with state and federal officials in the United States. In these sources, competing ideas about the nature of citizenship and subjecthood played out and profoundly influenced U.S. constitutional history.

This study is not the first to look at the Seamen Acts to understand the antebellum period. To date, two studies have situated the Seamen Acts at the center of their analyses. Back in 1930s, Philip Hamer published two articles in the inaugural volume of *The Journal of Southern History*. Relying primarily on British correspondence – the same series of letters that form a large portion of the primary materials in this study – Hamer constructed a narrative to show how “the federal character...of the United States” forced British officials to shift their diplomatic focus from Washington to the various state assemblies, especially after 1848. Hamer’s story was one of British success, with British Consuls securing liberalization of the Seamen Laws in Georgia, Louisiana, and South Carolina through their “quasi-diplomatic” posturing. Hamer’s work is impressive; and every subsequent historian who mentions the Seamen Acts cites Hamer and draws conclusions from his perceptive analysis.¹

Yet, Hamer’s analysis has holes. The rupture of 1848 – the point Hamer identifies as the turning point in British diplomacy – obscures the often haphazard policies of British officials in London and Washington. Both before and after 1848, British officials protested to federal officials and state authorities; individual Consuls often acted independently before contacting their superiors, so metropolitan directives did not translate into an airtight policy on the ground. In some cases, individual Consuls determined metropolitan policy. However, and Hamer is

¹ Philip Hamer, “Great Britain, the United States, and the Negro Seamen Acts, 1822-1848,” *The Journal of Southern History* 1 (February 1935): 3-28; Philip Hamer, “British Consuls and the Negro Seamen Acts, 1850-1860,” *The Journal of Southern History* 1 (May 1935): 138-168.

elliptical in this regard, changes at the highest levels of British government directly determined the mode of diplomatic attack. For the most part, Tory and Conservative Ministries preferred quiet engagement with local officials, while reform-oriented Whig Ministries opted for direct engagement and overt gestures.

In terms of domestic politics, Hamer's study has problems as well. "The federal character" of the United States Constitution was not an independent variable over the course of the Seamen Acts' history, but Hamer rarely engages the highly contentious, ever-evolving debates over federal-state relations. Nullification, for example, is not even mentioned. The political worlds in Great Britain and the United States were not fixed, and the massive changes occurring in both arenas dictated the historical trajectory of the Seamen Acts. The 1830s are a case in point. That decade is well known to American scholars of race and law as an unfortunate time for free African Americans, a time when their role in the political and civic sphere changed for the worse under the weight of Jacksonian democratization. Yet, scholars of the British Empire would summarize the 1830s quite differently, as a time when colonial slavery capsized and "free coloureds" saw an increase in their political rights and privileges. At the intersection of these diverging trajectories were black sailors and the Seamen Acts. And during this decade, some of the most important (and contentious) constitutional ideas were first formulated.

The other scholar to tackle the Seamen Acts was Alan January, whose 1976 dissertation examined "The First Nullification." Filling in a massive hole in Hamer's analysis, January situated the Seamen Acts concretely within South Carolina's political economy. In particular, January considered the ways in which the Seamen Acts' debates informed, even prefaced, Nullification of the Tariff of Abominations. January's microscopic analysis of South Carolinian politicians and their evolving political philosophies provides a powerful counterweight to Hamer

static presentation of American federalism. But January rarely ventured beyond the borders of the Palmetto State, nonetheless the United States. Moreover, his singular focus on federal relations in South Carolina restricts the geography – these laws were in force across the South, even where Nullification was reviled – and the scope of the debates. Utterly lacking is the interrelated issues of African-American citizenship and Afro-British subjecthood.²

Though January and Hamer are the only historians to make the Seamen Acts their analytical centerpiece, historians from a host of subfields have found useful the stories of black sailors and the laws incarcerating them. Social and cultural historians have stressed the experiences of the black sailor, both on the ocean and within the port cities where they often resided. Whether essential in the development of race or class, these historians note the influence of black seamen in the construction of a particular culture or social structure, and the Seamen Laws' contribution to that development.³ Similarly, scholars examining free people of color in the antebellum United States have found the Seamen Acts useful. Most often, these historians deploy racial quarantines as passing pieces of evidence proving that Southern free blacks were little more than “slaves without masters” or that Northern African Americans would not be protected in Southern jurisdictions.⁴ Historians of the American South have also found

² Alan January, “The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860” (Ph.D. Diss. University of Iowa, 1976).

³ For example, see W. Jeffrey Bolster, *Black Jacks: African-American Seamen in the Age of Sail* (Cambridge, Mass., 1997); Peter Linebaugh & Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston, 2000); Paul Gilroy, *Black Atlantic: Modernity and Double Consciousness* (Cambridge, Mass., 1993).

⁴ Leon Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago, 1961): 50-55; Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (New York: 1978): 216; John H. Franklin, *The Free Negro in North Carolina* (Chapel Hill: 1943). See also H.E. Sterkx, *The Free Negro in Antebellum Louisiana* (Rutherford, N.J., 1972). Sterkx describes the multiple acts against free black sailors, foreign and domestic, but his primary aim in that discussion is to show how many law enforcement officers did not summarily follow the harsh letter of the law. The gap between the law and its enforcement provides evidence for Sterkx that, quite often, free blacks in New Orleans fared much better than their free counterparts across the rest of the South and tremendously better than the enslaved of Louisiana.

the Seamen Acts important, especially concerning the friction between state and national officials over the contours of federal power. Along these lines, studies underscoring the emerging philosophy of states' rights and nullification have found the debates over the Negro Seamen Acts useful. Considering this approach, it is little wonder that South Carolina in particular receives most of the attention. William Freehling is paradigmatic in this regard.⁵ Like January, he places the controversies over the enforcement of the Acts in a general chronology culminating in Nullification in 1832, but sees the Seamen Acts controversy as a South Carolina issue.

Legal scholars, too, have found the Negro Seamen Acts to be illuminating, with two distinct themes predominating. The first involves the increasing power of the federal government in foreign relations and in interstate commerce during the first half of the nineteenth century. The first federal intervention in the Seamen Acts occurred in an 1823 federal court opinion. That opinion foreshadowed parts of the landmark case of *Gibbons v. Ogden* and suggested a push towards the "nationalization of the treaty-making power." In works on the growth of the Commerce Clause or on the federal treaty-making power, the entire Seamen Acts debate is reduced to the arguments in the 1823 court case.⁶ The second and more prevalent use of the Negro Seamen Acts by legal scholars is to illustrate the legal handicaps facing free people of color. As the legal counterparts to more mainstream histories by Leon Litwack and Ira Berlin, these works seek to explore the many ways that people of color were denied equal protection,

⁵ William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965).

⁶ Most mainstream constitutional histories employ the Seamen Acts in this way. See Paul Finkelman and Melvin Urofsky, *March of Liberty: A Constitutional History of the United States* (London, 2002); R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (New York, 1968); Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, La., 2001). See also David M. Golove, "Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power," *Michigan Law Review* 98 (Spring 2000); William Wiecek, "Slavery and Abolition Before the United States Supreme Court, 1820-1860," *Journal of American History* 65 (June 1978): 34-59.

and many of these studies culminate in *Dred Scott*.⁷ This study, too, culminates in *Dred Scott*, but it views citizenship – federal citizenship – as an evolving concept, with competing visions about its origins and limits. Citizenship was a pliable term, and the Seamen Acts debates provided a unique forum for people to test their theories about the connection between race and rights.

Historians have cited the Negro Seamen Acts as evidence for the development of race and class-consciousness, the intricacies of US-Great Britain relations, the contentious issue of nullification, and the limitations forced on free blacks in the Old South. The vast majority deals entirely with the initial Seamen Act of South Carolina and the immediately ensuing fracas over the law's constitutionality. Considering both the limited timeframe of most legal histories and the circumscribed geographical and conceptual boundaries of January and Hamer, it seems appropriate that racial quarantines be reexamined in a transnational context as a primary locus of study. It is the purpose of this study to do just that.

⁷ A.L. Higginbotham, *In the Matter of Color: Race and the American Legal Process* (London, 1978); Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn., 1997); Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, N.J., 1996); Donald Senese, "The Free Negro and the South Carolina Courts, 1790-1860," *The South Carolina Historical Magazine* 68 (July 1967): 140-153. For the relationship of the Seamen Acts to *Dred Scott*, see Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (London, 1978); Carl Swisher, *Roger B. Taney* (New York, 1935); Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857* (Athens, Ga., 2006). A third theme might also apply. One scholar integrates the Seamen Acts into the issue of antebellum immigration regulation. In the first century of U.S. history, this "lost century," immigration regulation remained a power of the states, where restrictive legislation usually applied to international as well as interstate travelers. See Gerald Neuman, "The Lost Century of American Immigration Law (1776-1875):" *Columbia Law Review* 93 (December 1993) 1833-1901.

CHAPTER 2
THE RE-EMERGENCE OF THE DANGEROUS ATLANTIC: THE TRIALS OF DENMARK
VESEY AND THE FIRST SEAMEN ACT

For white South Carolinians, the 1790s first highlighted with glaring focus the ambiguity of the imagined Atlantic. The great sea offered promises of wealth and material comfort. It brought short staple cotton and Whitney's machine which made it so valuable. The Atlantic also deposited in Charleston saltwater slaves from West Africa and the West Indies, who quickly supplied the labor source so vital for the expansion of cotton production. Slave merchants in Charleston found their human merchandise in great demand as the cotton revolution swept the Carolina lowcountry and beyond. The Atlantic also brought traders and merchants from around the littorals, and these men carried with them the latest wares and news, and exchanged the prior for the cotton that drove the textile industries in Britain and the Northern United States. The economic explosion of cotton was entirely attributable to the Atlantic Ocean, which brought the seeds, the innovation, the labor, the investors, and the consumers to the Palmetto State. The Atlantic crowned King Cotton.¹

But the 1790s also unleashed, for a moment, a disturbing undercurrent in the Atlantic. The French and Haitian Revolutions upset religious, economic, political and racial hierarchies, and exposed some of the questions still lingering from the United States' War for Independence. In the 1790s, the South Carolina elite wanted nothing to do with the political, economic, and racial leveling that came to be associated with the Jacobins in France and St. Domingue. Those revolutionaries inverted the natural order and sought to export their doctrines to the rest of the world. The same Atlantic that brought South Carolina increasing wealth also harbored dangerous ideas and people capable of destroying the very society the South Carolina elite so

¹ Angela Lakwete, *Inventing the Cotton Gin: Machine and Myth in Antebellum America* (Baltimore, 2003); Walter Fraser, *Charleston! Charleston! The History of a Southern City* (Columbia, S.C., 1989).

closely maintained and cultivated. One event in particular illustrates these dual, often competing perceptions of the Atlantic, and prefaces the Seamen Act controversy. In 1793, when the vessel *Maria* arrived from Cap-Française, St. Domingue, it was quarantined for fear that French and Haitian Revolutionaries, especially a Republican officer on board, were “apostle[s] of liberty for the blacks.” French anti-revolutionaries in Charleston sought the support of local Federalists in order to maintain the quarantine and prevent the disembarkation of the dangerous ideologies of Jacobinism and racial equality. French Royalists and moderates in Charleston employed cataclysmic language in describing the potential bloodshed in South Carolina if the contents of the *Maria* were unloaded on Charleston. South Carolina Federalists, already in firm support of Britain in its war against the anarchistic, murderous, and atheistic leaders of the French Republic, responded swiftly, and led a “meeting of citizens” in which they declared that the *Maria* and its “crews, passengers, free negroes and people of color, do quit the harbour and state immediately.”²

The powerful visual effect of the *Maria* sitting off port dovetailed with the rhetorical maneuvering of the Federalists to produce a general state of apprehension in Charleston. The sensationalism was difficult to contain or combat. A week after these resolutions, the Governor of South Carolina, a Republican, yielded to his adversaries’ position and issued a proclamation in which he called for the eviction of all recently immigrated free blacks from St. Domingue, as “there are many characters amongst them, which are dangerous to [the] welfare and peace of the state.” While *Maria* continued to sit in port, but at a safe distance, rumors circulated that slaves and free blacks were in revolutionary motion, inspired by the Revolutionaries and pressed to action by Moultrie’s proclamation. Though investigations unearthed no conspiracy, the

² Robert Alderson, “Charleston’s Rumored Slave Revolt of 1793,” in David Geggus, ed., *The Impact of the Haitian Revolution in the Atlantic World* (Columbia, S.C., 2001): 93-111.

excitement surrounding the *Maria* and the anxiety of an impending slave revolt forced Francophile Jeffersonians to concede to the pro-British Federalists and send off the *Maria*, even though the Sage of Monticello himself thought the rumors of invasion and upheaval were incredibly exaggerated, if not totally fabricated.³

But the fear of insurrection in 1793 quickly vanished. The quarantining of the *Maria* was an aberration, a hiccup in the otherwise peaceful and promising history of South Carolina's growth. Charleston remained firmly linked to the Atlantic and continued to be, as it had been in the preceding century, a quintessential Atlantic port city. German and Swiss servants, English planters, West African slaves, West Indian free blacks and several other cultures littered the streets around the Charleston ports. Black and white, rich and poor, native and immigrant lived and worked in close proximity. Some of the wealthiest planters in the South made Charleston their home, choosing the eclectic atmosphere of the port city over their disease-ridden plantations in the interior. The attractiveness of Charleston's sea breeze to wealthy plantation owners, however, could not compete with the lure that Charleston's booming economy had on the lower classes. In the early 1800s, Charleston's population continued to swell. Taverns and shops lined city streets, and visitors were quick to note the "sinful" and "avaricious" atmosphere of Charleston's business districts in the midst of the cotton explosion.⁴ Watering holes and scores of working poor offset the more charming and aristocratic portions of the city, areas that "surpass in luxury...those of the other capitals of the United States" and on par with the "polished cities of other countries."⁵ Charleston was a city that contained something for everyone, a modern

³ Robert Alderson, "Charleston's Rumored Slave Revolt of 1793," 93-111.

⁴ Walter Fraser, *Charleston! Charleston!*, chapters 2-3, especially 48-50.

⁵ Quotes from Louis Castiglioni and John Drayton, taken from Edward Pearson, *Designs against Charleston: The Trial Record of the Denmark Vesey Slave Conspiracy of 1822* (Chapel Hill, N.C., 1999): 40.

Babel of sorts. The diversity in the social spectrum mirrored the diversity in material culture available within the Charleston market as merchants hawked wares from around the Atlantic. The local *Gazette* advertised Bristol beer, cheese from Rhode Island, Portuguese wines, Dutch cloth, Virginian tobacco, and, of course, slaves. Charleston tavern keepers and merchants accepted a host of international currencies, from Spanish doubloons to Portuguese moidores and German johannes. Ships leaving 1822 Charleston headed for Cuba, South America, Barbados, and London carrying cotton, rice, and indigo. The people of Charleston understood well the cosmopolitanism of their city. The *Charleston Mercury* proclaimed with earnest contentment and a touch of pride that in its city, “you may see in miniature all the nations of the world” as “the sounds of many languages meet your ear.”⁶

Despite the occasional barroom brawl and tiffs among drunken sailors, Charleston was remarkably a city of relative peace for the first two decades of the nineteenth century. The 1793 scare had vanished from the collective memory of the state. The soaring profits generated by the plantations and trading industries resulted in general peace in the midst of rapid growth, the epitome of the ‘Era of Good Feelings.’ Hired-out slaves and free blacks were a constant sight in the city, but most Charlestonians considered their presence a boon, evidence that Charleston’s economy was doing well. The bustling economy of the 1810s had placed money in the pockets not only of plantation owners, merchants, and skilled white laborers, but in those of free blacks and hired-out slaves as well. And while the laws of the city and South Carolina alike showed no real changes regarding slaves and free blacks, *de facto* enforcement of existing regulations indicated a general relaxation of the typically rigid racial codes. Slave patrols around the city often overlooked the congregation of slaves and free blacks in many of the taverns near the

⁶ *Charleston Mercury*, May 23, 1822. Pearson, *Designs against Charleston*, 41.

wharves. Turning a blind eye to the existing curfew laws, patrolmen - often having a stake in businesses near the wharves, including the lounges and saloons open to people of color - refused to break up evening meetings of working men who were spending their hard-earned wages.

Unfortunately, Charleston's economic prosperity was puttering as the 1810s came to a close. The closing of the slave trade proved to be dramatic, as Charleston had been the premier corridor through which saltwater slaves were distributed to the rest of the slaveholding states. The loss of this market combined with increasingly volatile cotton prices to slow the pace of economic growth, with the cotton market hitting rock bottom in 1825. The once high prices that Charleston's exports once demanded had leveled out, and the Panic of 1819 slowed investment. With job growth stunted, the population increases among urban slaves, free blacks, and unskilled whites translated into a tightening labor market. These groups increasingly realized that they were in competition with one another for scarce and coveted jobs, and this competition bred skepticism and distrust. Whites complained of free blacks, hired-out slaves, and recent immigrants who often undercut them and caused a general decline in wages. The once celebrated cosmopolitanism of Charleston was beginning to show signs of fracture; the rich ethnic mix was starting to rub certain workers the wrong way. What the Atlantic wrought was celebrated in times of feast but regrettable in times of famine.⁷

But in 1822, the pervasive optimism of white Charlestonians had not yet evaporated completely. The decades of racial quiet convinced Mayor James Hamilton that a report regarding a possible slave conspiracy should be dismissed as mere conjecture. But when a close friend informed Hamilton that his own slave confirmed the news regarding an imminent insurrection, the young mayor contacted the city council and the governor to decide the proper

⁷ Pearson, *Designs against Charleston*, Introduction.

course. Hamilton's plan was to call out the militia covertly under dark of night so that the insurrection would not only be foiled, but the perpetrators caught in the act. Governor Thomas Bennett's grudgingly acquiesced to Hamilton's request. When no signs of disquiet surfaced on the suspected night, Mayor Hamilton was convinced that the rebels had been tipped off, proving the extensiveness of the plot and the effectiveness of the conspirators' communication network. Eager to save face (according to his detractors) or to ferret out the insurgents, but most likely both, Hamilton convened a special court to investigate the matter.⁸

When this botched conspiracy occurred, James Hamilton was just beginning a long political career that would include stints as a federal Congressman, state governor, the central political tactician of Nullification, a leading voice pushing for the annexation of Texas, and a rabid secessionist in 1850 and 1860. Before taking the job as Charleston mayor, Hamilton was a partner in a local law firm with James L. Petigru, an upcountry academic turned lowcountry gentleman. The two men ran the former law office of the esteemed William Drayton, Jr., county judge and son of a Revolutionary hero and Continental Congressman. Though Hamilton and Petigru would prove to be avid adversaries in every major political event in antebellum South Carolina, the two men remained close friends, indicating the personal affability of both men. Back in 1822, Hamilton's political acumen had combined with this family's reputation and his impeccable marriage to garner the attention of many important lowcountry politicians.⁹ His future seemed bright, but this "rebellion" was a double-edged sword. If it could be shown that Hamilton acted rashly, imprudently calling in the militia and unnecessarily exciting the public

⁸ Robert Tinkler, *James Hamilton of South Carolina* (Baton Rouge, La., 2004): 43-44; James Hamilton, *Negro Plot. An Account of the Late Intended Insurrection among a Portion of the Blacks of the City of Charleston, South Carolina* (Charleston, S.C., 1822).

⁹ Tinkler, *James Hamilton*, 40-55; William H. Pease & Jane H. Pease, *James Louis Petigru: Southern Conservative, Southern Dissenter* (Athens, Ga., 1995): 24-27.

and expending public monies over the manic claims of a couple of ne'er do well slaves, then his budding political stature would be jeopardized amongst a largely unforgiving South Carolina elite. However, if the failed rebellion proved to be a narrowly averted race war, then Hamilton's decision to call out the militia may have saved Charleston from utter ruin.

Luckily for Hamilton's political future, the special court he convened had incredible legal leeway in investigating and prosecuting the alleged conspirators. Because South Carolina did not require courts to extend most due process protections to either slaves or free blacks, the investigators were able to arrest suspects without much of an evidentiary standard. Uncorroborated testimony and secret witnesses were often enough not only to press charges, but to convict as well. As a result, arrests quickly mounted with well over a hundred slaves and free blacks facing the three municipal tribunals. One hundred, twenty-six arrests yielded sixty-seven guilty verdicts, with nearly half of the convicts receiving the death penalty. In all, thirty-five hanged, including one free black, the apparent ringleader, Denmark Vesey. The rest were either confined to the workhouse or banished from the state. One of the more intriguing cases was that of the free black Quash Harleston, who, though found not guilty, was still transported out of the country.¹⁰ Alarming, the main conspirators were disproportionately well off compared to nearly all other slaves and free blacks in the state. Skilled artisans, affluent free blacks, and respected house servants of the most influential personalities in the state had been the apparent masterminds behind the revolt. Those with the most to lose were prepared to sacrifice it, at least according to the findings of the court.¹¹

¹⁰ Edward Pearson, *Designs against Charleston*, Appendix 2.

¹¹ Considering present aims, the debate in the historiography concerning the actual presence of a conspiracy and the veracity of the official sources is immaterial. For more thorough accounts of the conspiracy, see Douglas Egerton, *He Shall Go Out Free: The Lives of Denmark Vesey*, 2nd ed. (Lanham, Md., 2004); Michael P. Johnson, "Denmark Vesey and his Co-Conspirators," *William and Mary Quarterly* 58 (October 2001): 915-976; Robert Paquette, "From Rebellion to Revisionism: The Continuing Debate About the Denmark Vesey Affair," *Journal of the Historical*

The responses to the conspiracy and trials were far from unanimous, even among the rather homogenous white elite of the city. Before many of the trials even began, William Johnson, Associate Justice of the Supreme Court of the United States and U.S. Circuit Court Judge for South Carolina, objected to the interrogations and believed overreacting city officials hastily jumped to unwarranted conclusions regarding the plot. Johnson chose a subtle form of protest; he anonymously penned a letter turned *Charleston Courier* article in which he recounted a similar botched “revolt” from the previous decade. In this satiric anecdote, an obstinate governor and a drunken bugler led to the incarceration and execution of an innocent slave. In that tragedy, Johnson explained, the conviction of the slave rested on the evidence of a dusty horn. Johnson’s allegory warned of the perils of overreaction and foreshadowed the convictions that the Charleston trial courts were about to hand down. Written as a thinly veiled critique of Hamilton - whom Johnson believed to be too arrogant to accept the fact that the conspiracy was nothing more than hot air - and the slave tribunals, the *Courier* article earned the scorn of city officials who were not amused by the Justice’s criticisms.¹² The city council and Hamilton responded with an extended diatribe against the theretofore anonymous writer of the article, to which Johnson replied, taking responsibility for the effrontery and offering a half-hearted apology.¹³

Johnson’s brother-in-law, Governor Thomas Bennett objected as well. Despite his approval to use the militia, Bennett interpreted the quiet night as proof that no conspiracy was in the works. But Bennett may have not commented on the trials at all, choosing to distance himself from the whole fiasco if not for the fact that four of his own house servants were being

Society 4 (Fall 2004): 291-334; Richard C. Wade, “The Vesey Plot: A Reconsideration,” *Journal of Southern History* 30 (May 1964):143-161.

¹² William Johnson, “Communication: Melancholy Effect of Popular Excitement,” *Charleston Courier*, June, 21 1822.

¹³ Johnson, “Melancholy Effect.”

investigated for participation in the conspiracy. Apparently curious as to the best defense for his property, Bennett appealed to his Attorney General for an explanation regarding the exact legal protections afforded to slaves and free blacks in criminal trials. Bennett's legal advisor had only bad news; slaves and free blacks in South Carolina only received due process protections in those instances where the court felt obliged to extend them. Considering the political ramifications and public sensationalism surrounding these trials, those protections were not forthcoming. Statutorily, they could not demand procedural safeguards. Though immaterial for Governor Bennett but interesting nonetheless, the State Attorney General concluded his note to Bennett with a quick summary of the procedural due process rights of South Carolina free blacks, declaring, "I have not separately considered the case of *free persons of color* because in relation to the questions submitted to me, they are treated by the Laws in all respects in the like manner of slaves." South Carolina's highest legal officer equated slaves to free blacks, and surmised that neither were citizens. If a persons of color "could possess these privileges, he would change his condition and becoming a freeman, could not be 'deprived of life, liberty or property...'"¹⁴

¹⁴ See Bennett to Hayle, July 1, 1822 and Hayle to Bennett, July 3, 1822, *Governor's Messages to the General Assembly*, Document 1328, South Carolina Department of Archives and History, Columbia South Carolina (hereafter referred to as SCDAH), 267-269. Emphasis found in original. Hayle's letter to Governor Bennett regarding the rights of accused slaves and free blacks is quite illuminating. "If I had been asked," Hayle explained, "whether a free white man could be lawfully tried by a court with closed doors and without being confronted with his witnesses I should have had little difficulty in giving the answer." Had Bennett only narrowed his inquiry to citizens, then Hayle "would have referred the Great Charter of our liberties and the established principle of the common law" to deduce the unconstitutionality of such criminal court procedures. "But nothing can be clearer," Hayle then informed the Governor, "that slaves are not entitled to these rights [of a public trial and the confrontation of witnesses]...[as] all of the provisions of our Constitution in favour of liberty, are intended for freemen only." Hayle, merging race and citizenship by equating "freemen" to "citizen" to "free white men," ignored the obvious quagmire of free black rights and status. Apparently, Hayle saw status as emanating from rights enjoyed, as did the Missouri Compromise combatants the year before the Vesey Conspiracy. Of Hayle's five pages, over four dealt with slaves' procedural rights, or, more accurately, the absence of such rights. Hayle used elaborate hypothetical situations that closely mirrored the events of the Vesey trial to show how, in certain instances, it would be prudent for the court to close its doors and leave particular witnesses anonymous. Predictably, the Attorney General avoided any mention of the rights of free blacks. Hayle offered no other opinion of free blacks, and considered their legal status in criminal courts to be identical to that of the enslaved. Ironically, this deduction would mean that free

Undeterred by the letter of the law, Bennett penned a letter to the public in which he harangued the trial court for operating behind closed doors and outside the public eye. The court's "secrecy and seclusion" during the "incipient stages of inquiry" when "few of the circumstances were known to the community" only fostered anxiety throughout Charleston. The large number of arrests, the rumors of a conspiracy on par with the Stono Rebellion and St. Domingue, and the closed courtroom doors had produced a hysterical environment that would make the impartial administration of justice impossible.¹⁵ It also re-invigorated the fear of outside, Atlantic influences on South Carolina society.

Thomas Bennett and William Johnson held considerable sway in the Charleston community, but their popularity could not compete with the sensationalism surrounding the news of a massive slave uprising, especially as the Vesey tribunals churned out conviction after conviction. In the immediate aftermath of the executions, numerous accounts of the Vesey Rebellion came off the Charleston presses, and collectively, they drowned out the cries for calm and moderation. One of the most popular and authoritative narratives of the trials and rebellion came from none other than Mayor James Hamilton, the man with the most to gain by refuting the claims of Johnson and Bennett. Hamilton prefaced his book on the conspiracy by declaring it to be "a full publication of the prominent circumstances of the late commotion." For the most part, it was just that, as it recreated the investigation and trials, careful to keep the names of confidential witnesses unrecorded. Perhaps reacting to Johnson's allegory and Bennett's accusations, Hamilton celebrated the investigation as well as the judicious conclusions of the court. The conspiracy was real, the plan was nearly executed, and Charleston barely escaped

persons of color were legally in a worse position vis-à-vis the courts than their enslaved counterparts because slaves could rely on their masters to protect their property while free persons of color had no such luxury.

¹⁵ Printed circular of Thomas Bennett, August 10, 1822. Robert Starobin, ed., *Denmark Vesey: The Slave Conspiracy of 1822* (Englewood Cliffs, NJ: 1970): 92.

ruin.¹⁶ Hamilton reaffirmed the findings of the court, declaring each guilty verdict as absolutely appropriate and every acquittal soundly decided.

One portion of Hamilton's text is especially intriguing. Hamilton inserted a half-page length footnote at the bottom of the page on which the summary of Denmark Vesey's trial appeared. In it, Hamilton explained how Vesey ended up in Charleston. "During the revolutionary war, captain Vesey, now an old resident of our city, commanded a ship that traded between St. Thomas and Cape François [Saint Domingue]." The captain was in the business of transporting slaves, and on one of his voyages, he and his mates were "struck with the beauty, alertness, and intelligence" of a young, 14-year old boy. "They made [him] a pet," Hamilton wrote, "[but] having no use for the boy, sold him among his other slaves." The captain was amazed upon his return the following year to the future Black Republic as the boy, named Denmark, was returned to him because of his "epileptick fits [sic]." The law of the island stipulated that a slave trader was bound to exchange a previously sold slave for a new one if the original could be shown to be defective. According to Hamilton, Denmark once again became the human property of the captain, to whom he remained a faithful slave for upwards of twenty years before a stroke of luck, a winning lottery ticket, allowed him to purchase his freedom. Since that day, Hamilton stated, Vesey had worked as a carpenter "distinguished for great strength and activity." However, Hamilton carefully explained that despite his work ethic, Denmark Vesey was "impetuous and domineering in the extreme, qualifying him for despotick

¹⁶James Hamilton, *Negro Plot. An Account of the Late Intended Insurrection among a Portion of the Blacks of the City of Charleston, South Carolina* (Charleston, S.C., 1822) in Paul Finkelman, ed., *Slavery, Race, and the American Legal System, 1700-1872*, Series 4, Volume 1 (New York, 1988); 113-162. Quote from 114. Emphasis in original.

rule [sic]....All his passions were ungovernable and savage; and to his numerous wives and children, he displayed the haughty and capricious cruelty of an eastern bashaw.”¹⁷

When the “official” court record was published by two of the presiding magistrates, Hamilton’s summary of Vesey received extensive corroboration. According to these “transcripts,” witnesses had attested to the fact that Vesey was to receive “a large army from Santo Domingo and Africa” to reinforce his position once the conspirators had cut off the Charleston Neck from the rest of the city. Though searches produced no documentary evidence, witnesses swore that Vesey maintained extensive correspondence with Haitians and West Africans, and used free black sailors to conduct his clandestine, treacherous communication. One witness recalled a key conspirator mentioning, “Santo Domingo and Africa would come over and cut up the white people if we only made the motion...first.” Furthermore, Vesey was not shy about utilizing the events in Haiti as a model for the conspirators to follow in exacting their race war in South Carolina. He supposedly uttered, “it was for our safety not to spare one white skin alive, for this was the plan they pursued in Santo Domingo.”¹⁸ Together, Hamilton and the trial magistrates had uncovered, or rather re-discovered, the dangerous undercurrents of the Atlantic World.

What is striking about these two accounts of the uprising, and a fact overlooked in the historiography, is the purchase both placed on Vesey’s foreignness. His supposed African birth, his stint on San Domingue, and his travels around the Atlantic threatened to undermine Charleston’s racial peace. His revolutionary ideas were imported from without, and his designs were thrust upon otherwise faithful slaves and unsuspecting free blacks. Vesey maintained

¹⁷ Hamilton, *Negro Plot*, 129-130.

¹⁸ L.H. Kennedy & T. Parker, *An Official Report of the Trials of Sundry Negroes Charged with an Attempt to Raise an Insurrection in the State of South Carolina* (Charleston, S.C., 1822): SCDAH, 62, 42, 59.

contact with Haitian rebels, and he spread stories of Haiti's successful race war with an African-American community supposedly at peace with the racial hierarchy of urban South Carolina. And as Robin Blackburn so aptly described, "Haiti was a symbol of black power and authority, not of desperate rebellion, and that is why it could inspire or terrify."¹⁹ The fact that slaves with the most freedoms and free blacks were among the ringleaders only reinforced this interpretation of Vesey's alien ideas. Before the infestation of Vesey's poisonous contagion, Charleston's racial system operated without major incident. Only by crafting narratives of black agency, black equality, and servile insurrection and anchoring them in his Atlantic experiences could Vesey successfully cajole otherwise pacifistic and doting slaves into insubordination. In short, Vesey's alien notions of racial equality and the susceptible ears of Charleston's free blacks precipitated the conspiracy. The benign Atlantic of the 1800s and 1810s had grown stormy once again. Fantastic stories of Haitian and West African soldiers descending on Charleston proved the immediate danger posed by Atlantic-savvy free people of color.

In the midst of these reports, the primary question facing white South Carolinians was simple: how do we effectively prevent another conspiracy? Edwin C. Holland, the editor of the *Charleston Times*, believed legislative attention was absolutely warranted. Using his press as a vehicle for his ideas, Holland penned a widely circulated pamphlet. Seeing as the ringleaders of the recent fiasco were indeed free persons of color, Holland's publication deduced of all free blacks, "They are, generally speaking, an idle, lazy, insolent set of vagabonds, who live by theft or gambling, or other means equally vicious and demoralizing." Holland continued, "Their repugnant behavior are [sic] a perpetual source of irritation to ourselves, and a fruitful cause of dissatisfaction to our slaves." Holland's resolution to the "irritation" caused by this "detestable

¹⁹ Robin Blackburn, "The Power of Example," in David Geggus, ed., *The Impact of the Haitian Revolution in the Atlantic World* (Columbia, S.C., 2001): 17.

caste” was simple: “A law banishing them, male and female, from the State, under the penalty of death, or of perpetual servitude, upon their return.”²⁰

Holland’s prescriptions may have gone over well with Hamilton and the more reactionary voices in South Carolina, but his definition of free black conflicted sharply with South Carolina slave law and popular conceptions of race. Instead of lumping together all those people with significant African blood, Holland proposed to legally divide free blacks from free mulattoes, the prior being “the common enemy of civilized society” but the latter being “industrious, sober, and hard-working mechanics.” Holland based this division not on the antiquated codes of his state, but on the customs of other slave societies of the Caribbean. Holland’s proposal would embrace free mulattoes, as their whitening social habits and cultural practices would cause them to be “a barrier between our color and that of the black...” The *Times* editor believed that this middle group’s large families and considerable property (including slaves) would “induce them to disclose any plans that may be injurious to our peace...” As evidence of free mulatto propriety, Holland pointed to the fact that the recent Vesey conspiracy was foiled by the fastidious and honorable actions of free mulattoes.²¹

Holland, then, was under the impression that the economic rise of some free people of color was not necessarily undesirable. As their dress, habits, and demeanor more closely resembled those the whites, then their allegiance to South Carolina would strengthen commensurately. Holland called for the legal recognition of a class of persons that already existed in Charleston society. By granting mulattoes privileges *de jure* that many of them had enjoyed *de facto* and by recognizing them as a distinct group unrelated to the slave population,

²⁰ Edwin Holland, “A Refutation of the Calumnies Circulated Against the Southern and Western States...” (Charleston, S.C., 1822); in Starobin, *Denmark Vesey*, 133-137.

²¹ Holland, “A Refutation of the Calumnies,” 133-137.

Holland believed that Charleston could guarantee racial peace, economic prosperity, and social tranquility. The city could maintain its cosmopolitanism by bisecting its free black population and evicting the objectionable subset. After all, parts of the British Caribbean offered extensive privileges to free mulattoes, and South Carolina's close association to the British Caribbean, both culturally and historically, proved to Holland that the three caste system - slave, mulatto, free white - could work for South Carolina.²²

Holland's prescriptions may have had a more forceful impact if not for the more radical demands for legislative interference coming from other members of the Charleston upper crust. Thomas Pinckney, for example, believed the pernicious Atlantic tides could not be stemmed. "Nothing effectual can be done by us to obviate the influence of the example of St. Domingo," for even if Charleston cut all contact with the island, "the circuitous intercourse through the Northern States" would still leave South Carolina susceptible to Haiti's dangerous example. For Pinckney, the only surefire method for avoiding insurrection would be to evict all black mechanics and urbanites from the state and replace them with white workers, leaving only illiterate and insulated plantation slaves in South Carolina. Pinckney admitted his proposal was immodest and ripe with extravagant costs, but those costs could not rival "the value of [security, which] cannot easily be made the subject of calculation."²³

Similar ideas emerged from Mayor Hamilton, who spearheaded a Memorial to the South Carolina legislature. In it, the "Citizens of Charleston" outlined their own recommendations for legislative change to correct the structural flaws in the existing statutes. The first suggestion

²² Holland, "A Refutation of the Calumnies," 133-137. Of course, after the Christmas Revolt, Southerners would be far less likely to endorse Holland's prescriptions, as West Indian planters partially blamed the Toleration Laws as a catalyst for slave insurrection.

²³ See Achates [Thomas Pinckney], *Reflections, Occasioned by the late Disturbances in Charleston* (Charleston, S.C., 1822), in Paul Finkelman, ed., *Slave Rebels, Abolitionists and Southern Courts: The Pamphlet Literature*, Volume 1 (New York, 1988): 163-190.

mirrored Pinckney's conclusion and urged the legislature to "send out of our State, never again to return, all free persons of color." Free blacks "form[ed] a third class in our society, enjoying more privileges than the slaves, yet possessing few of the rights of the master." In this regard, the Memorialists reiterated the mandate of Governor Moultrie three decades earlier, in the early stages of the Haitian Revolution, when the *Maria* sat in Charleston's port. The Memorialists stressed the economic freedoms exercised by this middle tier of society, including "the power of moving unrestrained...acquiring property, amassing wealth to an unlimited extent...procuring information on every subject, and of uniting themselves in associations or societies." Though political and civic rights, including due process protections and the franchise, still remained out of reach of free blacks, the Memorialists were convinced that free persons of color, if left unchecked, "will expect and claim all the privileges, rights and immunities of citizens, which if denied them, as they must be, they will be driven by despair to obtain by force what cannot be effected in any other way [sic]."²⁴

Unlike Pinckney, the Memorialists acknowledged that a law evicting all free blacks was not a realistic course for the Assembly to follow. Natural increase and manumission laws had produced a significant free black population, and practicality would prevent a wholesale deportation. If the physical removal of free blacks was not pragmatic, then the legal eradication of their status would be the next best thing. The Memorialists urged the legislature to "prescribe the mode in which our persons of color shall dress" because "every distinction should be created between the whites and the negroes, calculated to make the latter feel the superiority of the

²⁴ *Memorial of the Citizens of Charleston to the Senate and House of Representatives of the State of South Carolina* (Charleston, 1822) in John R. Commons, et al., eds., *A Documentary History of American Industrial Society*, Volume 2, (Cleveland, Oh., 1910): 104-106. Again, the presumption is that citizenship follows rights. If one enjoys or exercises rights, then one is a citizen.

former.”²⁵ The Memorialists also pleaded with the legislature to pass laws “preventing persons of color from holding real property [since] many of them are becoming rich.” Rich free persons of color with land would presumably “harbour any number of runaway blacks” and could easily use their property rights to foment rebellion. In the eyes of white Charlestonians, “There is an identity of interest between the slave and the free person of color...they are associated by color, connected by marriages, and by friendships.” They assumed free blacks saw themselves first and foremost in racial terms, aligning themselves with slaves possessing no rights rather than with poor whites of the same economic and political situation and possessing nearly the same rights. Unlike Holland, the Memorialists viewed African blood as the great unifier; apparently, the connective force of white blood was not as strong as the connective force of black blood. Mulattoes were bound to feel a stronger racial alliance with black slaves rather than white masters.²⁶

Though primarily pursuing the eradication of the most susceptible audience to insurrection, namely free blacks, the Memorialists, like previous commentators, framed their arguments in Atlantic terms. By limiting the force and numbers of skilled slaves and free blacks, South Carolina could realize the positive aspects of the Atlantic community. Like Pinckney, the Memorialists believed that the circumscription of the upper strata of the African-American community would mean immigration of laborers from “Europe and Northern States...whose feelings will be our feelings, and whose interests our interests.” Such migrants would fill the urban labor vacuum and secure white hegemony. Some white laborers, a “considerable number

²⁵ *Memorial of the Citizens of Charleston*, 112-113.

²⁶ *Memorial of the Citizens of Charleston*, 112-113. To further eradicate the legal dilemma of the free black and recalibrate the relationship between black and slave, the Memorialists highlighted the relationship they believed existed between the two groups. “The Superior condition of the free persons of color, excites discontent among our slaves, who continually have before their eyes, persons of the same color, many of whom they have known in slavery...[and] the slave seeing this, finds his labor irksome...becomes dissatisfied with his state...[and] pants after liberty!”

of German, Swiss, and Scotch,” were already immigrating, but tended to head for the frontier because of the near monopoly black artisans maintained within the city. If such white flight continued due to legislative apathy, then nothing would prevent another “plot, which in origin, extent, and design, may well bear comparison with the most atrocious of the West Indian insurrectionary schemes.”²⁷

Considering all the demands for intervention, the state legislature had to take serious action at its next session. In accord with the general aims of Holland, Pinckney, and the “citizens of Charleston,” the Assembly adopted *An Act of for the better regulation and government of free negroes and persons of color*. According to the new restrictions, no free black residing in South Carolina would be allowed to leave the state and return. Transgressors would face penalties ranging from fine and imprisonment to enslavement for chronic repeat offenders. Further, the law stipulated, “every male negro, mulatto, or mestizo, in this State, above the age of fifteen years, shall be compelled to have a guardian, who shall be a respectable freeholder” responsible for testifying before the clerk of court that his ward was “of good character and correct habits.” Additionally, all free black males between fifteen and fifty now had to pay a fifty dollar tax per annum to defray the costs inherent in executing the new legislation. Those free persons of color not conforming to these new requirements would be sold into slavery.²⁸ The obvious aim was to financially force out all free people of color without assuming the costs of Pinckney’s exportation scheme.

²⁷ *Memorial of the Citizens of Charleston*, 104-112.

²⁸ *Acts...of the State of South Carolina...1822* (Columbia, S.C., 1823): 11-14. Other sections derived directly from the Memorial, as the former forbade slaveowners from hiring-out their slaves. Any violation could result in the seizure and forfeiture of the slave who would then be sold at auction. Section eight declared it illegal for anyone to be in concert with free blacks or slaves for the purposes of inciting rebellion. Those convicted would be condemned to death without clergy, regardless of the realization of rebellion.

However, these new regulations would not completely diffuse the situation. Free blacks from around the Atlantic could still disseminate dangerous ideologies to slaves and the few South Carolina free blacks who remained. To preclude this interaction and sever the Atlantic umbilical cord to revolutionary ideologies in Charleston, the law criminalized both free black immigration and restricted the ingress of free black sailors. South Carolina's decision to ban free black immigration was hardly novel in 1822; several states enacted such measures, with Missouri being the most well known.²⁹ But the restriction against sojourning free people of color was new. According to the statute, county sheriffs henceforth were obliged to arrest all "colored" sailors, regardless of nationality, until their ship was ready to leave harbor.³⁰ The captain of the vessel was monetarily responsible for a bond to cover the expenses of their incarceration. If the captain refused to pay, he was "liable to be indicted, and, on conviction... be fined in a sum not less than one thousand dollars, and imprisoned not less than two months." If this penance seemed a touch harsh, it paled in comparison to the one doled out to the sailors of the recalcitrant captain, as "such negroes or persons of color shall be deemed and taken as absolute slaves, and sold."³¹ This quasi-quarantine of insurrectionary ideology through the imprisonment of black sailors sought to insulate the stubborn remainder of free blacks and the multitude of slaves from the same pernicious Atlantic influences that corrupted Vesey. Without new free blacks entering the state and with each domestic free black male under the watchful eye of a white guardian, South Carolina attempted to codify racial peace.

²⁹ Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (New York, 1974) ; Leon Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago, 1961); Don Fehrenbacher, *Origins of the Dred Scott Decision: Its Significance in American Law and Politics* (New York, 1978); Gerald Neuman, "The Lost Century of American Immigration Law (1776-1875)," *Columbia Law Review*, 93 (December 1993): 1833-1901.

³⁰ In this instance, I mean colored to mean legal nonwhites. The ambiguity of this term was not lost on contemporaries, who wondered if Native Americans or other "colored" sailors were susceptible to incarceration.

³¹ *Acts...of the State of South Carolina...1822* (Columbia, S.C., 1823): 11-14.

The author of the seamen section of the new statute was apparently Robert Turnbull, a prominent freeholder who sat on one of the Vesey tribunals. Turnbull was born in Spanish Florida, and would soon gain notoriety around the South and beyond for his 1827 authorship of *The Crisis*, an elaborate series of essays in which Turnbull explicitly linked the emerging abolition movement to slave unrest while simultaneously celebrating states' rights constitutionalism. In fact, *The Crisis* served as one of the primary philosophical foundations for the Nullification movement that began the year after the controversial book went into print.³² Turnbull's initial ideas of state power that became the mantra of Nullifiers were first publicly developed in response to the controversies erupting over the enforcement of his Negro Seamen law.³³

In 1822, not even the most erstwhile opponent of slavery or the most strident nationalist would have presumed that the individual states were limited in the construction and enforcement of domestic racial policies. Thanks to the *McCulloch* decision and the Missouri debacle, which will be described shortly, individual state governments became much more cognizant of the potential manifestations attached to enlargements of federal power, especially regarding slavery and racial policy. Besides, states across the Union had laws on the books regarding legal handicaps for numerous segments of society, and South Carolina's 1822 law did not deviate from the general pattern of race-specific legislation, with one exception. The restrictions against sojourning black sailors stretched beyond the usual scope of domestic racial policy. South Carolina officials were now required by law to board ships, remove mariners, and place them in

³² Edward B. Rugemer, *The Problem with Emancipation: The Caribbean Roots of the American Civil War* (Baton Rouge, La., 2008): 81-92; William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965): 126.

³³ Alan F. January, "The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860" (Ph.D. diss., University of Iowa, 1976).

jail. Under the new regulation, state racial policy was affecting people conventionally understood to be beyond the state's jurisdiction. Because the statute avoided the term quarantine in its initial 1822 language, the Seamen Act appeared on its face to be a simple extension of South Carolina's criminal code, and not a public health measure. In its 1822 form, the statute only appeared to criminalize black, non-slaves who entered South Carolina waters and, on its face, did not approximate a typical health or quarantine regulation. Seen in this light, Northern ship captains and British merchants accused South Carolina of undermining interstate comity and violating existing treaty obligations, which in their esteem, protected sailors engaged in legitimate commercial activities from arbitrary interference by state officials.

This apparent extension of South Carolina's criminal code to the decks of foreign vessels did not earn universal acceptance even in South Carolina. Robert Y. Hayne, future champion of Nullification and Daniel Webster's rhetorical punching bag, thought the new law was "certainly not very acceptable" and wished "more moderation" had accompanied the legislature's deliberations.³⁴ William Johnson, writing to his confidant Thomas Jefferson, lamented the reactionary and irrational measures of the state assembly.

I have lived to see what I really never believed it possible to see,- courts held with closed doors, and men dying by scores who had never seen the faces nor heard the voices of their accusers...But you know the best way in the world to make them tractable is to frighten them to death; and to magnify danger is to magnify the claims of those who arrest it. Incalculable are the evils which have resulted from the exaggerated accounts circulated respecting that affair. Our property is reduced to nothing- strangers are alarmed at coming near us; our slaves rendered uneasy; the confidence between us and our domestics destroyed- and all this because of a trifling cabal of a few ignorant penniless unarmed uncombined fanatics, and which certainly would have blown over without an explosion had it never come to light.³⁵

³⁴ See Robert Hayne to C.C. Pinckney, Jr., December 21, 1824, in Theodore D. Jervay, *Robert Y. Hayne and His Times* (New York, 1909): 180-182.

³⁵ William Johnson to Thomas Jefferson, December 10, 1822. *Jefferson Papers*, Library of Congress, Washington, DC. Quoted from Donald Grant Morgan, *Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia, S.C., 1971).

Only in this frenzied atmosphere, Johnson surmised, could the Assembly “without due consideration” pass such an obnoxious law. The disquiet felt by Johnson and Hayne was soon about to spill over into the national and international arenas.

The Denmark Vesey Conspiracy revitalized the old fears of the Atlantic that first emerged in the wake of the Haitian Revolution. Much like the botched 1793 revolt, the 1822 conspiracy linked the ideologies of race war with servile insubordination. In the aftermath of 1793, the bustling cotton market, the collapse of the Federalist Party, and the taming of Jacobinism in France allowed South Carolinians to privilege their aspirations for Atlantic interaction over their anxiety of the potentially dangerous Atlantic import of colorblind liberty, equality, and fraternity. As one historian summarized the Atlantic World in 1814, “If one wishes to describe the situation...as a balance sheet between greed and fear, greed had won hands down.”³⁶ The fear of a Haiti recital in South Carolina had all but evaporated by 1820. But in 1822, this balance sheet was in flux, largely as a result of the altered political, economic and demographic world of Charleston. The stark divisions of the First Party System had disappeared. The cotton market was in a freefall. Charleston was no longer the hub of the international slave market for the United States. The overall proportion of free blacks to the white population doubled between 1790 and 1820, and their visible presence in Charleston highlighted this demographic trend.³⁷ If white Charlestonians were already beginning to reassess the baleful influence of the black Atlantic against the diminishing return of the Atlantic market, then the Vesey Conspiracy made safety the paramount concern. But with the new statute in place sequestering domestic slaves

³⁶ Seymour Drescher, “The Limits of Example,” in David Geggus, ed., *The Impact of the Haitian Revolution in the Atlantic World* (Columbia, S.C., 2001): 11.

³⁷ John Barnwell, *Love of Order: South Carolina's First Secession Crisis* (Chapel Hill, N.C., 1982): 10. Incidentally, the law did succeed in stemming the relative growth of South Carolina's free black population. For the rest of the antebellum period, the free black population never grew more than .05% of the total proportion of the state's population, whereas in the thirty years before 1822, the proportion of free blacks doubled.

from the dangerous Atlantic, the threat could be averted and Charlestonians could remain engaged in the Atlantic economy. For the South Carolina legislators who saw the new law as a panacea for this Atlantic dilemma, they hardly imagined that the law's enforcement would provoke such immediate, powerful, and contrasting responses. The constitutional and diplomatic debates over the 1822 law would remain unresolved for over thirty-five years.

CHAPTER 3
THE FIRST YEAR OF ENFORCEMENT: CALDER, ELKISON, AND THE SOUTH
CAROLINA ASSOCIATION

In passing the 1822 Seamen Act, South Carolina legislators sought to create a statutory wedge between their slaves and Atlantic-savvy free blacks. That wedge was not meant to be a sophisticated or invasive device. By placing all free black sailors into confinement, segregation would be perfect, and with the exception of a short confinement and a small fee, the law, presumably, would not impact very many people at all. In fact, South Carolina lawmakers hoped that the law would obviate the need for restriction. As more and more captains and companies learned of the Seamen Statute, they would chose to employ white sailors. Certainly, the South Carolina Assembly did not foresee its new measure as a diplomatic and constitutional volcano, the eruption of which would cast a cloud far and wide around the Atlantic.

This chapter explores the context of that initial eruption, as well as its early trajectory, when British diplomats, federal and state officials first contemplated the far-reaching implications of the Seamen Statute. Domestic politics and Atlantic events combined to frame the emerging debates and dictated the forums in which those debates would occur. Federal officials in the United States were reluctant to engage the Seamen Act, remembering the polarizing impact of the Missouri Crises and the conflicting notions of African-American citizenship. The vexatious questions of federal authority and black citizenship may have been averted entirely if it were not for British sailors pressing the subject and a federal court judge undaunted by the gravity of the situation. In the rhetorical fracas that ensued after the decision, the Atlantic loomed large.

The epitome of national euphoria following the War of 1812 came from the pen of John Marshall in his tour de force of federal power, *McCulloch v. Maryland*.¹ In defending Congressional authority to charter the Second Bank of the United States, Marshall relied on an expansive reading of the Necessary and Proper Clause, extending to federal lawmakers a latitude of discretion rivaled in breadth only by the grand visions of Alexander Hamilton. “Let the end be legitimate, let it be within the scope of the Constitution,” Marshall pontificated, “and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional.” Marshall’s emphatic language and sweeping conclusions professed a faith in federal government and the unrivaled supremacy of national laws and institutions. In accord, Marshall described the nation as a construction of the national citizenry, “The government of the Union is a government of the people; it emanates from them; its powers are granted by them, and are to be exercised directly on them, and for their benefit.” The people of the United States had created the Constitution and granted the federal government wide, albeit specific, responsibilities, and empowered it with unrivaled authority to fulfill those responsibilities. State officers who stood in the way did so in contravention of the Constitution and in direct violation of the will of the American people. Most conspicuously, *McCulloch* professed two central pillars of Marshallian constitutionalism: the inability of the individual states to interpose in the operations of the federal government, and the unilateral power of Congress – even beyond the power of the Supreme Court - to choose the means with which to accomplish its constitutional responsibilities. In the particular case before

¹ 17 U.S. 316 (1819).

the Court, Marshall denied the power of Maryland to meddle with the Bank of the United States, but also denied the power of his own Court to rule on the constitutionality of the Bank.²

“Pride goeth before destruction, and a haughty spirit before a fall,” the author of Proverbs might have warned the mighty Chief Justice. The robust nationalism so pervasive after the Battle of New Orleans and emblematic of *McCulloch* did not endure the Panic of 1819 and Missouri Crisis of early 1820, as Marshall was soon to discover. Sophisticated resistance to *McCulloch* radiated from Marshall’s own hometown, and by no less an author than the highest judicial officer of the State of Virginia, Spencer Roane. Roane was every bit the Virginia aristocrat as his ideological counterpart, John Marshall. Roane was married to Patrick Henry’s daughter and studied law under the grand patriarch and first American law professor, George Wythe, at the College of William & Mary. Roane long questioned the constitutional theories underlying the nationalistic Marshall Court decisions. In a series of newspaper articles, Roane systematically attacked the *McCulloch* decision, placing Marshall on the defensive and eliciting commentary from other notable Virginians. Roane’s most forceful argument concerned his interpretation of the Necessary and Proper Clause and the Tenth Amendment, citing *The Federalist Papers*, notes from various ratifying conventions, and the Kentucky and Virginia Resolves. In a nutshell, Roane read the contested clause as a restriction of Congressional power, as a reminder that Congress could not act through any Constitutional implication, but only in regards to expressly granted powers. Jefferson sided with Roane (and against his old nemesis, Marshall, to no surprise), telling him, “The constitution, on [Marshall’s] hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they

² In general, see R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, La., 2001).

please.”³ Even the more moderate Madison was forced to admit, “But it was anticipated, I believe, by few if any of the friends of the Constitution, that a rule of construction would be introduced as a broad and as pliant as what has occurred [in *McCulloch*].”⁴

Roane’s public denunciation of the Marshall Court was not simply a manifestation of the Virginian jurist’s disapproval of *McCulloch*. Roane had been engaging in a jurisdictional sparring match with the Supreme Court for the better part of a decade, particularly in relation to the meandering course of cases culminating in *Martin v. Hunter’s Lessee*.⁵ In fact, the *Hampden* articles in which Roane attacked *McCulloch* are best understood as a culmination of escalating friction between the Virginian and the federal courts. For Roane, the interrogation of the boundary between federal and state judicial powers was hardly an academic exercise, and the letters to him from Madison and Jefferson suggest that he was not alone in his concern over the mechanics of federalism. However, the somewhat esoteric inquiry assumed a new sense of urgency - and publicity - when relatively unknown New York Congressman James Tallmadge, Jr. proposed an amendment to Missouri’s application for statehood that would phase out slavery over the course of a generation. When the House passed the Tallmadge Amendment, the dangers of Congressional power embedded in *McCulloch* became linked with the future of slavery in the western territories, and *ipso facto*, the nation. Though Roane knew of the Tallmadge

³ The Spencer Roane essays first appeared in the *Richmond Enquirer*, June 11-22, 1819. See also Samuel Olken, “John Marshall and Spencer Roane: An Historical Analysis of Their Conflict over U.S. Supreme Court Appellate Jurisdiction,” *Journal of Supreme Court History* (1990): 125-141; Thornton Miller, “John Marshall Versus Spencer Roane: A Reevaluation of *Martin v. Hunter’s Lessee*,” *The Virginia Magazine of History and Biography* 96 (1988): 297-314; Thomas Jefferson to Spencer Roane, 6 September 1819, in Paul L. Ford, ed., *The Works of Thomas Jefferson*, Volume 12 (New York, 1904-5), , 135-138.

⁴ James Madison to Spencer Roane, September 2, 1819, *The James Madison Papers*, Library of Congress, Washington, DC.

⁵ 14 U.S. 304 (1816).

Amendment, he did not link the Missouri question to his ruminations over Marshall Court nationalism.⁶

“But this momentous question,” Thomas Jefferson famously wrote concerning the tortuous admission of Missouri into the Union, “like a fire bell in the night, awakened and filled me with terror.”⁷ The question of westward expansion beyond the Mississippi River and the extension of slavery combined like nitrogen and glycerin in the early months of 1820 as Congress debated the polarizing Missouri question. The federal consensus – to leave the issue of slavery off the national political agenda – threatened to unravel, and the Union with it. The political sophistication of Henry Clay and others prevented the early death of the United States, and the ad hoc Compromise helped keep the consensus and the nation intact. That Compromise, which balanced the admittance of slaveholding Missouri with the introduction of slave-free Maine and drew the famous 36°30′ line across the rest of the Louisiana Territory, attempted to remove slavery once again from federal consideration and leave it where the Founders wanted, tucked away nicely in the governments of the states.⁸

No sooner had the ink of the Missouri Compromise dried and Clay finished patting himself on the back when debates over Missouri statehood erupted once again, and the regional fault line threatened to re-emerge and sever the Union. This time slavery was not the provocateur, but rather African-American citizenship. Now that Missouri was congressionally cleared to enter the

⁶ Though Roane did not connect Missouri to the Marshall Court agenda, another man did. Sharing Roane’s concern over the expanding competency of the federal government, John Taylor of Caroline extended Roane’s states’ rights ideology. See John Taylor, *Construction Construed and Constitutions Vindicated* (Richmond, Va., 1820).

⁷ From Thomas Jefferson to John Holmes, April 22, 1820, in Paul Ford, ed., *The Writings of Thomas Jefferson*, Volume 10 (New York, 1898): 157.

⁸ The term “federal consensus” is William Wiecek’s, and he refers to the common understanding that only the individual “states could abolish or in any way regulate slavery within their jurisdictions” and that “the federal government had no power over slavery in the states” and its only proper posture towards slavery was “strict laissez-faire.” See William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Cornell, 1977): 16. For Wiecek’s view of the Missouri Compromise, see 106-122.

Union, a state convention had to construct a constitution and mail it to Washington before admission was complete. However, the proposed Missouri Constitution included a clause that nearly re-rang Jefferson's fire bell. The new state legislature in Missouri was required by the pending state constitution to "pass such laws...to prevent free negroes and mulattoes from entering this State, under any pretext whatsoever."⁹ When the proposed Missouri Constitution hit the floor of the Capitol, the clause barring African-American admission ruffled the feathers of several Senators. However, the all-out war over slavery in Missouri motivated many in the upper house to avert another fiasco and summarily approve the Missouri Constitution without debate. Senator Philip Barbour proposed a resolution to prevent discussion and won some support, but the debate on the Missouri Constitution commenced nonetheless.¹⁰

In tracing the debates over the Second Missouri Crisis, two important points need to be made. First, the virulent disagreements over the role of African Americans in the body politic provide abundant evidence as to why the Seamen Act remained off the Congressional radar for so long. Second, and equally important, the Senate debate revealed the uneven and conflicting conceptions of citizenship in the Early Republic. Senator David Morrill of New Hampshire complained that the Missouri constitutional clause barring African-American immigration blatantly violated the Full Faith and Credit Clause as well as the Privileges and Immunities Clause of the federal Constitution. "Take from the inhabitants slaves and aliens," Morrill summarized the common understanding of his constituents, "and the remainder are citizens. Color does not come into consideration, and it has no share in characterizing an inhabitant or a citizen." What did matter for Morrill was the fact that "persons of color...have fought your

⁹ *Constitution of Missouri* (1820), Article III, §26.

¹⁰ Philip Barbour, as a Supreme Court Justice, would have a future role in legitimating state regulations against free black sailors when he penned the majority opinion in *New York v. Miln*, 36 U.S. 102 (1837).

battles; they have defended your country; they have preserved your privileges.” In blending notions of birthright citizenship and citizenship earned in battle, Morrill advocated a powerful, if theoretically jumbled, justification for recognizing citizenship for free African Americans, or at least those residing in New Hampshire.¹¹

Senator James Burrill, Jr. of Rhode Island echoed many of these same themes, alternating between conceptions of birthright citizenship and rights earned through military service in renouncing the objectionable clause in the proposed constitution. As he rose to address the Senate on this issue, Burrill’s coat snagged on his desk and he couldn’t dislodge it. As his face presumably blushed in embarrassment while he struggled to free his garment, Senator Philip Barbour of Virginia jocularly barbed that his “equipment malfunction” ought to be regarded as an omen of defeat. Burrill finally freed his jacket, but in his analysis of American citizenship, the Rhode Islander would become tangled up once again. Since “We, the people” ordained the Federal Constitution, no state could infringe on the rights of American citizens to move freely around the nation. “All the distinctions among citizens which arise from color,” Burrill explained as he gained his composure, “rested...on State laws alone – there was nothing in the Constitution of the United States which recognised [sic] distinctions.” From this premise, Burrill reasoned, the Senate was obligated to reject the Missouri Constitution on the basis of its incompatibility with the Federal Constitution’s definition of citizenship. Consequently, no new states ought to be able to enter the Union if their constitutions distinguished between citizens because the Federal Constitution did not countenance such divisions.¹²

¹¹ *Annals of Congress*, 16th Congress, 2nd Session of the Senate, 31-48.

¹² *Annals of Congress*, 16 Cong., 2 sess., 31-48.

However, the holes in Burrill's analysis were glaring, and his inconsistency (albeit unknowingly) exposed the two central paradoxes of citizenship in the American federal republic. First, a massive gulf separated the grand ideology of an undifferentiated citizenry – one that eschewed gradations of rank, titles of nobility and other badges of a legalized hierarchy of status – and the social reality that different groups of people in the United States possessed different sets of rights. Burrill acknowledged this, asserting that the Federal Constitution did not “recognise distinctions” and his observation that existing states in the Union maintained laws that distributed unevenly various rights based on race. Burrill never extended his logic to the laws in existing states; he merely noted their presence. Along his argument, existing state constitutions and laws that differentiated between citizens would not withstand judicial scrutiny, if so scrutinized, as they would be repugnant to the Constitution. Burrill only applied his argument to new states in an attempt to goad his fellow Senators into upholding their pledge to “obey and defend the Constitution” and summarily reject the proposed state constitution.¹³

Burrill's observations also exposed the other dilemma in defining citizenship in early America. Burrill himself held a dual citizenship of sorts, being both a citizen of Rhode Island and a citizen of the United States. But he, as a citizen, was guaranteed citizenship rights in every other state of the Union. If uniformity reigned, this multivalent character of American citizenship would only denote distinctions without differences. However, as Senator Burrill illustrated, various “State laws” recognized “distinctions among citizens.” The result was an unstable understanding of who could be citizens, both state and national, and what rights corresponded to each particular status. This uneven conception of citizenship, one that depended on one's current location as much as who someone was, exposed the potential problems that

¹³ On this paradox in general, see James Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, N.N., 1978).

could (and did) arise when competing definitions clashed. Again, the context of Missouri's proposed constitution highlighted the incongruence between states in the northeast, where, despite legal deficiencies, some African Americans were nominally considered citizens, and other states, where free blacks, often with similar legal handicaps, occupied a legal netherworld between slave and citizen.¹⁴

As the debate on the pending Missouri Constitution continued, Senator William Smith of South Carolina denied the existence of black citizens in the Northern States. Citing the various state constitutions and statute books, Smith concluded, “[if] the whole of the white population of the whole nation denying positively all the precious and valuable privileges of citizenship to free negroes and mulattoes, would not demonstrate that they were not citizens, he knew of no human proof which could comprehend it.” For Smith, citizens ought to be identified by the rights they possessed. The absence of rights meant the absence of citizenship. Since every state in the Union maintained some legal restrictions against free blacks, whether it was the franchise, militia duty, marriage or some other fundamental right, no state could claim them to be citizens, because those very legal handicaps could not exist against the citizenry. Free blacks were not citizens. Of course, Smith never contemplated what status they did occupy, and neither did he consider (at least publicly on the Senate floor) the conundrum of citizenship for white women or children, considering the legal handicaps these two groups experienced.¹⁵

¹⁴ See, Leon Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago, 1961); Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (New York: 1978): 216; A. Leon Higginbotham, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (New York, 1996).

¹⁵ *Annals of Congress*, 16 Cong., 2 sess., 51-72. Though Smith never explicitly considered female citizenship, his brief example of state laws limiting interracial marriage and domicile is interesting if not noteworthy for current purposes. “Who will deny the right of every *man*, according to this constitution, to remain within the State, if *he* is a citizen, as long as he pleases?...To grant this right [to marriage] to one citizen and take it from another, would be giving to one and taking from another the means of happiness, which the constitution secures *to him* so emphatically.” Quote at 66. Emphasis in original.

Other Senators came down in between the two poles constructed by Burrill and Smith, but they all considered local and state law to be the cognizant authority to determine the status of citizen and, thus, the applicability of the Privileges and Immunities Clause. And this deference is in part attributed to the fallout after *McCulloch*. “The same power which makes a slave can make him free, and advance him to the highest privileges of a citizen,” Senator John Holmes from Maine contended. “If this power does not exist in the States,” Holmes continued, “it exists nowhere.” But Senator Holmes took this starting proposition in a novel direction. “It would seem, then, inevitable that, inasmuch as the privileges of citizens are conferred or withheld by each State at its will, they may be and almost unavoidably must be different in different States.” Thus, both Burrill and Smith were right to examine local and state laws, but they were wrong to assume a general, uniform recognition or rejection of African-American citizenship. Some states would have them be citizens, like Holmes’s native Maine, and others would deny that designation. In Holmes’s world of perfect state sovereignty, it appeared as though no person in the United States could point to a universal set of rights that attached to all persons traveling between states. For Holmes, “A person, then, going from one State to another, takes all the privileges and immunities, and is subject to all of the restraints and disabilities as to residence, property, age, and color, of the people of the State where he goes.” Perhaps sensing the problems with his logic, Holmes attempted to boil down his ideas into a few basic propositions

The “privileges and immunities” of citizens are nowhere extended to free blacks or mulattoes, by the Constitution of the United States nor laws of Congress. The constitution and laws of the States are alone capable of conferring them. The State of Missouri has not conferred them on this class of her population. Black citizens of other States acquire no other privileges and immunities there than her [Missouri’s] own black population.¹⁶

¹⁶ *Annals of Congress*, 16th Cong., 2 sess., 85-89.

In Holmes's scenario, States could create federal citizens, but the other States would not be obliged to honor the rights of a particular segment of the federal citizenry so long as they discriminated against their own members in the same manner as those entering their jurisdiction. Apparently for this Maine Senator, the Constitution conferred rights automatically on the white (presumably male) population, but since no specific clause in that instrument extended citizenship to other, nonwhite groups, then the states could decide if and when such groups deserved or earned that status.

Several other Senators and Congressmen joined in the chorus, or rather the cacophony, over the suspect clause, but a complete rehearsal of the drama is not necessary for current concerns.¹⁷ Ultimately, ambiguity resolved the Second Missouri Crisis, as Congress agreed to approve the Missouri Constitution, objectionable clause intact, under the provision that it not be so construed so as to conflict with the Privileges and Immunities Clause in the Constitution. Those who believed free blacks to be citizens would read the provision as a limitation on Missouri's power to restrict them. Those who denied the existence of black citizens saw the provision as an empty one, having no real bearing on the administration of the law. Most importantly, it settled the issue of Missouri's admission without reinvigorating the vitriolic derisions from the previous session concerning the Tallmadge Amendment. Moreover, Congress had learned an important lesson from *McCulloch* and Missouri statehood: when it comes to slavery and the issue of race and citizenship, ambiguity and silence proved to be the best courses for the federal government.

The ambiguity of the "Second Missouri Compromise" is most noteworthy for the stillbirth of the debate about race, citizenship, and rights in the expanding Republic. Much like the federal

¹⁷ The debate in the House resembled the Senate debate described above.

consensus that insulated Capitol Hill from discussions of slavery, federal lawmakers acknowledged the wisdom in officially avoiding the intersection of race and citizenship. In much the same way that slavery could expose threadbare the large and increasing disparity between North and South, so, too, could the volatile concept of black citizenship. Luckily for adherents to this creed of silence, the exact contours of federal citizenship rarely graced the pages of early American law books, and even more rarely demanded public commentary. Citizenship was mostly a local construction, as the preceding comments illustrate, and individuals largely understood their relationship to government, including their individual rights, in the context of state and local law.¹⁸ Only when citizens of one state entered another (or attempted to enter, in the case of Missouri), and they perceived an infringement of their rights, did the incongruence exemplified by Senator Holmes in 1820 come to the forefront and demand explicit commentary. And the commentators were cognizant of their post-*McCulloch* world, where tumult would certainly ensue if federal pronouncements conflicted with the presumed powers of the states.

Fortunately, the movement of white citizens rarely sparked controversy, as the various state governments shared a common ideology concerning the rights of sojourning white citizens. In 1823, Supreme Court Justice Bushrod Washington, while riding circuit, explained the common understanding of federal citizenship and the rights of (white) citizens from one state who entered another. In the case of *Corfield v. Coryell* Justice Washington spoke for the court, “we feel no hesitation in confining these expressions [in the Constitution] to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all

¹⁸ Kettner, *Development of American Citizenship*; Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn., 1997); Morton Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass., 1977).

free governments.” Washington reinforced the supposition that the rights of citizens, though nowhere enumerated, were common knowledge to most Americans. “What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate...”

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of the citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised... These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by citizens of each state, in every other state, was manifestly calculated “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.

While the enunciation of “fundamental rights” would become increasingly important and contentious in the jurisprudence of the Fourteenth Amendment during the twentieth century, Washington’s brief catalog was meant to describe the status quo, not to create actionable rights for individuals seeking protection from state legislation. After all, in the case from which the lengthy preceding quote was taken, Washington ruled against the shipmasters seeking redress from property taken under the authority of a New Jersey law.¹⁹ The most vital aspect of the decision, however, rests on Washington’s presumption of common knowledge. It was self-evident, and apparently self-executing, that (white) citizens traveling to another state would not be molested in their lawful endeavors. As such, the theoretical murkiness undergirding conceptions of federal citizenship in the United States posed no problem, and federal officials

¹⁹ *Corfield v. Coryell*, 8 F. Cas. 546, quote at 551-552.

could remain aloof regarding federal citizenship rights and thereby avoid perturbing dedicated opponents of federal power and black citizenship.

But thanks to the new South Carolina Seamen Law, problems did arise, problems that threatened to reopen recently healed political wounds. The Seamen Law appeared poised to resuscitate the issues that Congress so killed with ambiguity in the winter of 1820-1821 and in the wake of *McCulloch*. The law's enforcement could potentially reveal questions best left unasked. How can the uneven possession of rights and the sweeping ideals of an undifferentiated citizenship coexist? To what extent does interstate comity provide enforceable rights vis-à-vis the Privileges and Immunities Clause? Which rights belonged to the federal citizenry as opposed to state citizenry? As if this were not threatening enough, the South Carolina Seamen Law also sat at the opaque crossroads of federal commercial power and state policing authority. This particular constitutional location only exacerbated the combustibility of an already explosive topic, and no less in the midst of a rapidly expanding, increasingly cohesive states' rights ideology.

Within the first month of enforcement, the Seamen Act ruffled the feathers of Northern and British merchants. In early January, 1823, an American captain appealed to the South Carolina courts for the release of two of his sailors. Not only was the captain unsuccessful, but the State Court of Appeals upheld the constitutionality of the Act and the State Constitutional Court, divided on the issue, refused to hear the case. With no remedy available from the state court system, the captain, along with forty other Northern shipmasters who also suffered under the new law petitioned Congress for redress.²⁰

²⁰ "Memorial of sundry masters of American vessels lying in the port of Charleston, S.C.," *Niles' Register*, March 15, 1823. I have been unable to find official court records for this case, or any appeals cases, for 1823.

The petitioners argued against the constitutionality of the Act on three distinct grounds, though the brevity of the petition prevents extensive analysis. First, the petitioners claimed the Seamen Law interfered with the rights guaranteed to imprisoned sailors as “native citizens of the United States.” The Constitution guaranteed liberty to its citizens, and “the act in question does destroy the liberty of freemen...” In this short sentence, the petitioners equated freemen with citizens, as Senator Morrill did during the debate on Missouri’s Constitution. But this sentence is vague about the rights of citizens. It seems to imply the presence of federal citizenship rights, acquired through birth and enforceable against the states. It is also possible that the petitioners deployed “citizens of the United States” as a way to invoke the Privileges and Immunities Clause. Along this line, the sailors’ federal citizenship demanded interstate comity; since the seamen in question exercised certain citizenship rights – the freedom of movement and to engage in commerce – in their native Northern states, they were also entitled to those same freedoms in South Carolina. Second, the petitioners claimed the law not “only deprives us of the services of our colored mariners, but subjects our vessels to a considerable expense and detention.” In this sentence, the shipmasters seem to make two distinct claims: the State of South Carolina allegedly impeded the merchants’ right to contract with their employees when they arrested the mariners, and the statute unconstitutionally restricted interstate commerce. While the Constitution explicitly denied the power of the individual states to abridge contracts, it nowhere explicitly denied the power of the states to pass commercial legislation. The unilateral power of Congress to regulate interstate and international commerce had not been definitively decided and was hotly debated in 1823.²¹ Because of these specific violations, the petitioners hoped the federal

²¹ The case of *Gibbons v. Ogden* was escalating up the judicial ladder, and would reach the U.S. Supreme Court in 1824.

government would “interpose...[and] adopt such energetic measures as will relieve them from the situation they are laboring under...”²²

One might wonder why the petitioners looked to Congress for remedy. If the Seamen statute violated the Commerce Clause or the Contract Clause of the Constitution, then federal court would be the likely venue for the shipmasters to air their complaints. The only measure Congress could undertake would be to pass a commercial law that explicitly granted free black sailors the right to enter the individual states. If Congress enacted such a measure, then the petitioners could (again) turn to the courts in hopes of having the Seamen Statute struck down as a violation of the Supremacy Clause, as it would blatantly contradict a constitutionally enacted federal law. Unsurprisingly, Congress was in no mood to create a set of rights for black mariners which would allow them unfettered access to all the ports of the nation. As discussed at length above, the imbroglio surrounding the Missouri Constitution charted the course. Commentary and debate on the rights of sojourning African Americans was politically impractical. If Congress passed a law to explicitly combat an existing state regulation (i.e. a law guaranteeing the ingress of African-American sailors), then it would invite the same retaliation that emerged in the wake of *McCulloch*. To respond to the petition would be to fly in the face of experience. Missouri and *McCulloch* warned of the twin perils of federal expansion and the recognition of African-American citizenship, and Congress heeded the warning of recent history. It tabled the petition without comment.

The first wave of British protests also began in January, 1823 when the British sloop *Bob* from Nassau arrived in Charleston with an entirely black crew employed under shipmaster John McRee. McRee, as was his custom, was in town while the crew finished unloading the cargo

²² “Memorial of sundry masters,” *Niles’ Register*, March 15, 1823.

and prepared to leave harbor. Just as they completed the hauling, a deputy sheriff seized the entire crew under the provisions of the recently enacted law, arresting both the free black mate and the four enslaved crewmen. Apparently, the crewmen all claimed initially to be British subjects, believing that the rights afforded that status would protect them from any problems with local law enforcement. The sailors were mistaken; their claims to free status precipitated their arrests. The deputy carried them off to the local jail, leaving *Bob* unmanned until the wharfinger arrived to await the master's return. Shocked upon reboarding, McRee immediately sought the advice of his business partner, James Calder, who suggested that they consult an attorney and protest the law to the local British Consul. The lawyer assured McRee and Calder "that the arrest was illegal in different respects, it being done after the vessel was cleared [and] the four seamen being also slaves."²³ Since the Seamen Statute only applied to free people of color, then the slaves should have been exempt. It is unclear if Calder and McRee were aware that the crewmen attempted to pass as freemen to circumvent Charleston's slave codes. In any event, Calder appealed to Sheriff Francis Deliesseline for the release of the crew, but he refused to set them free because the trial court had already deemed the men guilty. Calder and McRee were required to pay the court-mandated gaol fees.

Already behind schedule, Calder paid the fines, but appealed the judgment of the trial court. His first appeal failed, but before the State Constitutional Court, the Court recognized the fact that his mariners, first mate excepted, were not free subjects of Great Britain as they had specified during the arrests. Rather, they were slaves choosing to feign subjecthood. Since the state of South Carolina assumed all blacks to be slaves unless proven otherwise, the sheriff had

²³ Calder to Consul Moodie, January 15, 1823, in *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Series 5, Volume 579, *Foreign Office Papers*, Public Records Office, Kew, England (hereafter referred to as *Correspondence*): 2-3. Philip Hamer, "Great Britain, the United States and the Negro Seamen Acts, 1822-1848," *Journal of Southern History* 1 (February 1935): 4.

to produce further evidence that the men were, in fact, free.²⁴ With the sheriff unable to do so, the high court ordered a retrial and specified that, henceforth, slaves were specifically exempt as objects of the Seamen Act.²⁵ In the wake of the *Calder* case, seafaring slaves could legally exercise greater liberty than free persons of color in the ports of South Carolina. Despite the obvious perils in making such a declaration, free black mariners could expand their legal protections if they claimed to be slaves. Of course, ships sailing from countries without slaves would find this option impossible, even though the list of Atlantic nations without slaves in 1823 was quite short.

Calder won his case, but the state's highest court had validated the Seamen Act as an appropriate exercise of state power. Based on the precedent set by *Calder v. Deliesseline*, the South Carolina courts would dismiss quickly any more suits brought by free black sailors. In effect, the *Calder* decision closed the judicial doors of South Carolina on opponents of the Seamen Law. For a short time, however, the state courts were not needed, as the early summer of 1823 witnessed a relaxation in enforcement, and the arrests of black sailors diminished. Some accused William Johnson, Supreme Court Justice and Charleston native, of persuading the District Attorney to slow prosecution.²⁶ Johnson had longed despised the extreme measures passed in the aftermath of the Vesey rebellion, and he made no efforts to conceal his displeasure. Other rumors suggested that a dispute between the harbormaster and the sheriff over jail fees led to the reduction in arrests. Supposedly, the harbormaster stopped reporting the presence of free

²⁴ It is unknown whether the four men deemed slaves were actually enslaved or if Calder only claimed they were in order to receive a refund of the jail fees. On the presumption of slave status, see Robert Olwell, *Masters, Slaves, & Subjects: The Culture of Power in the South Carolina Lowcountry, 1740-1790* (Ithaca, N.Y., 1998): 69-70.

²⁵ *Calder v. Deliesseline*, Harper 186 (South Carolina Constitutional Court, 1824).

²⁶ See *Charleston Mercury*, August 20, 1823. William Johnson himself acknowledged speaking to local officials in hopes of removing the cause of the sailors' complaints. He insisted that he requested the District Attorney to bring the law's attention before the judiciary in hopes of procuring a decision against the acts. See *Elkison v. Deliesseline* 8 F. Cas. 493 (1823), at 495.

blacks on merchant vessels because the State had not provided the means by which his filing fees would be paid. The sheriff, without the harbormaster reports, had no obligation to board the vessels and arrest violators of the Seamen Act. Apparently these municipal officials appeared content to let the law sleep.

While Calder's case against Sheriff Delieesseline meandered up the South Carolina courts, his protest to the local British Consul matriculated up the chain of the British Foreign Office. Upon hearing the news from his Charleston subordinate, British Consul-General Stratford Canning immediately sent word to U.S. Secretary of State John Quincy Adams. "One vessel under the British flag," Canning complained, "has experienced a most reprehensible act of authority under the operation of the law." Rather than going into details and thereby implying his desire for individual redress, Canning instead suggested that the federal government do whatever necessary "to prevent the recurrence of any such outrage in the future."²⁷ Most importantly, Canning made no mention of the rights of the sailors who faced incarceration. Rather, his objections concerned the costs to the captain and owners of the vessels, who lost the labor of their crew and had to pay the jail fees.

However, Canning's invocation of the British flag was strategic. Most students of international law in the 1820s would agree that vessels were jurisdictionally a part of the nation whose flag it hoisted. The ability of local law enforcement officials to board a foreign ship, seize members of the crew, and haul them off to jail was suspect. If a crewman of a foreign vessel committed a crime while ashore and fled to his vessel, local law enforcement could demand his extradition. But the South Carolina law criminalized the very act of being on board the vessel. And certainly, in the shadow of the long impressment controversy, British diplomats would have

²⁷ Hamer, "Great Britain," 4-5; Stratford Canning to John Adams, February 15, 1823, in *Correspondence*, 1-2.

noticed the irony in American officials boarding British vessels and removing unsuspecting crewmen.

Canning, however, did not insert such accusations of hypocrisy in his note to Secretary Adams. Despite the nicety, Adams was very slow to respond, taking four months to “inform you [Canning] that immediately after its [Canning’s letter] reception measures were taken by this government of the United States for effecting the removal of the cause of complaint...and will prevent the recurrence of it hereafter.”²⁸ Elated, Canning sent word to London that the federal government had pledged to eradicate South Carolina’s Seamen Act.²⁹ Just as Adams promised, the number of arrests and the complaints accompanying them did decline precipitously in March, either as a result of Johnson’s pressure on the District Attorney, Adams’s discussion with South Carolina Congressmen or the dispute between the Charleston sheriff and the harbormaster.³⁰ Regardless of the cause of cessation, Adams took credit for the relaxation in enforcement.

The Seamen Laws’ protestors - in Charleston, the federal government, and the British Foreign Office - would have been greatly relieved had the break in arrests proved permanent. Despite the popularity of sweeping calls for legislative action following Vesey’s execution, neither the state nor municipal government attempted to press the sheriff into executing the Seaman Act; rather, a group of concerned Charlestonians came together specifically for the

²⁸ John Adams to Stratford Canning, June 17, 1823 in *Correspondence*, 4; Hamer, “Great Britain,” 4-5.

²⁹ Stratford Canning to George Canning, June 18, 1823, in *Correspondence* 4; Hamer, “Great Britain,” 4-5.

³⁰ Adams knew of the issue between the harbormaster and Sheriff, though no evidence suggests that Adams, or any other federal official, had any direct influence on this apparently homegrown dispute. See J.Q. Adams to Stratford Canning, 17 June 1823 in *Correspondence*, 4. Some evidence suggests that Adams spoke with Congressmen from South Carolina in seeking to suspend the Seamen Act, though Congressmen Hamilton, former Mayor of Charleston during the Vesey Conspiracy, declared that he refused to cooperate with the Secretary. See B.F. Hunt, *The Argument of Benj. Faneuil Hunt, in the case of the arrest of the Person claiming to be a British Seaman, under the 3d section of the State Act of Dec. 1822, in relation to Negroes, &c before the Hon. Judge Johnson, Circuit Judge of the United States, for 6th Circuit* (Charleston, S.C., 1823) in Paul Finkelman, ed., *Slavery, Race, and the American Legal System, 1700-1872*, Volume 2 (New York, 1988): 2-3.

purpose of reinvigorating enforcement of the law. Appalled that two civil servants could summarily ignore a state law and thereby jeopardize the safety of Charleston, these concerned citizens formed an extralegal organization to assist law enforcement officials in fulfilling their duties. In the July 24 edition of the *Courier*, “A Member” addressed Charleston outlining the purpose and scope of the newly formed South Carolina Association. With “ample means and permanent funds,” the Association “with reverence to the supremacy of the laws” was to aid law enforcement “giving to the Civil Magistrate...the earliest possible information of [the law’s] infringement.” Some of the most prominent Charlestonians were intimately involved in the Association: Thomas Pinckney and John Prioleau, Revolutionary heroes, were among the officers as were Henry Deas and Robert Turnbull, two of the freeholders that sat in judgment on the Vesey Conspirators.³¹ Not coincidentally, Pinckney led the charge in seeking the deportation of all free blacks in Charleston and Robert Turnbull had authored the Seamen Act in the last session of the state legislature. The officers obviously wanted to get the ball rolling, pressing immediately for the arrest of free black sailors. When the Association petitioned the state legislature three months later, over three hundred names appeared on it.³² With this type of pressure emanating from the most respected names in the state’s most vital city, Charleston officials began arresting unsuspecting seamen once again.

Soon after enforcement resumed, a British ship from Liverpool arrived in Charleston’s harbor unaware that the Seaman Act was again operational. While *Homer* was in port, Henry Elkison, a free black sailor, found himself incarcerated despite the pleadings of the British Consul on his behalf. According to his own affidavit, Elkison, a native of Jamaica, claimed to be

³¹ *Charleston Courier*, July 26 and 28, 1823.

³² Alan January, “The South Carolina Association: An Agency for Race Control in Antebellum Charleston,” *The South Carolina Historical Magazine* 78 (July, 1977): 191-201.

a British subject and deserving of all rights afforded to one with that status. Probably aware of the state courts' approbation of the Seamen Law, Elkison (with the help of the British Consul) sued Charleston's sheriff for a writ of habeas corpus in federal court. The State Constitutional Court had already ruled, in *dicta*, that the Seamen Act was constitutional when it emphatically denied its applicability to slaves in *Calder*. Elkison and his attorney probably felt they had a better chance of securing a favorable ruling if they filed in federal court. After all, the federal judge to hear the case would be William Johnson, and he was sure to be more responsive, having already expressed his belief that the law had "been passed hastily and without due consideration."³³ Since the Seamen Statute's inception, Johnson had been one of its leading opponents. But, did Elkison's petition for habeas corpus afford Johnson the opportunity to offer a binding decision?

Elkison's argument was fairly simple. Because the statute against black seamen was unconstitutional, his incarceration was illegal. Unlike *Calder*, this argument sought a ruling on the constitutionality of the seamen statute, rather than a legal loophole. If Johnson could rule on the merits of Elkison's claims, then he could strike down the law on constitutional grounds. However, Elkison's attorney and Johnson would have known the jurisdictional problems with the case. Federal courts were not allowed to issue writs of habeas corpus to prisoners in state custody, unless the prisoner's presence was required in some federal capacity. This narrow exception was meant to prevent state officials from undermining federal authority by arresting federal officials or litigants in federal court. Elkison was not needed in federal court or in any other federal capacity, so his decision to sue for habeas corpus in federal court had no chance of succeeding. Jurisdictionally, Johnson could not issue the writ and free Elkison. Most likely,

³³ *Elkison v. Deliesseline*, 6. F. Cas. 493 (1823), at 493.

Johnson suggested the suit to provide him an opportunity to opine on the obnoxious law despite his inability to free the Jamaican sailor.³⁴

Typically, this sort of case would demand the attention of the State Attorney General, since the sheriff was acting in his official capacity and a state law was being brought before a federal tribunal. Curiously, State Attorney General James L. Petigru did not argue the case for Sheriff Deliesseline. At first glance, this might seem odd because Petigru was a dear friend and business partner of James Hamilton, one of the men most responsible for the law's initial passage. While no mandate forced Petigru to plead the case, his absence did draw questions from curious onlookers in the courtroom.³⁵ The motivation behind Petigru's absence is unknown, but it is likely that the young attorney detested the statute. Unlike most other young attorneys in Charleston, Petigru was from the upcountry, and only made his way into the circles of the lowcountry gentry through hard work and the benevolence of his mentor (and stringent Unionist) Daniel Huger. He graduated from South Carolina College while it was still a Federalist stronghold before the ascension of the rabid state-rights' demigod, Thomas Cooper, in 1819. Later in life, Petigru would oppose Nullification in 1832 as well as secession in 1850 and 1860. In 1853, some thirty years after *Elkison*, Petigru would file a suit in federal court on behalf of a foreign-born sailor against the Seamen Act. Furthermore, Petigru's early education disposed him to New England Calvinism, and the combination of this early education and his Federalist training in college probably predisposed him to doubt the efficacy, if not the constitutionality, of

³⁴ Johnson's decision to hear the case and rule on the Seamen Law despite the jurisdictional problem was unusual, though not unprecedented. Typically, judges would dismiss claims with such obvious jurisdictional issues, and Johnson was berated in the press for ignoring judicial propriety.

³⁵ William Johnson himself noted Petigru's absence and suggested that his refusal to argue the case was evidence of the state's displeasure with the law. *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 494. Because the Association was behind enforcement of the law and provided legal counsel for the sheriff in *Elkison*, Johnson considered the law to be "emphatically their [the Association's] law." See Johnson to John Q. Adams, 3 July 1824, reprinted in *House Report 80*, 27 Cong., 3 sess., (1843): 14-15.

the Seamen Law. Additionally, Petigru did not participate in any aspect of Vesey trials, which occurred before his appointment as Attorney General and while the young lawyer yearned for business in Charleston. So, while no direct evidence explains why the Charleston parvenu skirted *Elkison v. Deliesseline*, circumstantial evidence suggests his disapproval of the law.³⁶

The South Carolina Association obviously learned of the case and Petigru's decision to avoid it, for it provided counsel to the Sheriff in the Attorney General's absence. Two young attorneys, Isaac E. Holmes and Benjamin F. Hunt defended Elkison's incarceration and the constitutionality of the seamen statute. Holmes was from a well-to-do Charleston family, attended Yale, and began practicing law in his home city in 1818 before ultimately representing South Carolina in the House of Representatives from 1839 until 1851. In 1823, he was a private attorney but was the sitting Solicitor for the Association.³⁷ Holmes's co-counsel, Benjamin F. Hunt, was originally from Massachusetts, where he graduated from Harvard before moving to Charleston for health reasons. While in Charleston, he studied law and was admitted to the state bar. Throughout the antebellum period, Hunt remained a dedicated Unionist, renouncing Nullification in 1832 and pressing against secession in 1850. It was the case against Hunt that eventually ended the Test Oath controversy in 1834, which effectively allowed the Union party to survive in South Carolina. In 1843, Hunt actually sought to moderate the Seamen Law and won the confidence of the British Consul.³⁸ But back in 1823, Hunt espoused a virulent form of states' rights ideology in defending Sheriff Deliesseline, and his rhetoric and grandstanding are somewhat enigmatic. As we shall soon see, Hunt's argument in *Elkison* resembled the

³⁶ See William H. Pease & Jane H. Pease, *James Louis Petigru: Southern Conservative, Southern Dissenter* (Athens, Ga., 1995): Chapter 2. The biographers come to a similar conclusion regarding Petigru's motives for dodging the case. The 1853 case in which Petigru argued against the Seamen Act was *Roberts v. Yates*, 20 F. Cas. 937 (1853).

³⁷ January, "The South Carolina Association," 193.

³⁸ See Consul Ogilby to Earl of Aberdeen, December, 26 1843, in *Correspondence*, 74-75.

constitutionalism of a John C. Calhoun or a Robert Rhett, not a railroad investor and Unionist, as Hunt was about to become. Even more curious, Hunt published his opinion and had it circulated around Charleston (and beyond), making it unlikely that he so valiantly defended the sheriff as a matter of professionalism. According to contemporaries, Hunt was masterful in front of an audience, and his rhetorical flourishes and quick wit made him one of the most talented, though inexperienced, attorneys in Charleston. But why take the case and why publish in pamphlet form his argument?

It is quite possible that Hunt had not yet developed a coherent ideology on the nature of the Union or the various states' rights theories. By 1828, two distinct political groups had formed in South Carolina over the Tariff and Nullification, but before 1828, state politics was more a matter of personal relationships than party platforms.³⁹ Tellingly, Hunt and Petigru, another bona fide antebellum Unionist, despised one another. Both shared "Northern" sensibilities, harbored old Federalist ideas, and lamented South Carolina's nonchalant attitude towards the Union, but only the unfortunate death of Petigru's young son prevented a duel between the two in 1826.⁴⁰ Perhaps Hunt took the *Elkison* case to simply to show up his cross town legal rival. Perhaps the rapid growth of the South Carolina Association in Charleston persuaded Hunt to take the case as a business calculation, only to shy away from his bold arguments in *Elkison* when the Tariff fiasco transformed his position from a theory in the sky into politics on the ground. Whatever his motivation, his argument - preserved through his decision to publish and distribute it - helped transport the ideology of state sovereignty from its Virginia birthplace to the fertile

³⁹ William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965); Manisha Sinha, *The Counterrevolution of Slavery: Politics and Ideology in Antebellum South Carolina* (Chapel Hill, N.C., 2000).; John Barnwell, *Love of Order: South Carolina's First Secession Crisis* (Chapel Hill, N.C., 1982).

⁴⁰ Pease & Pease, *John Louis Petigru*, 33-34.

Carolina lowcountry. In an ironic twist, Hunt's *Elkison* argument was adored by future Nullifiers, his future political adversaries.⁴¹

In presenting his case, Hunt decided to focus on the larger issues at hand, and sidestep the more technical aspects of the case. Quite easily, Hunt could have argued that a man, like Henry Elkison, held in state custody, was beyond the reach of a federally issued writ of habeas corpus. The 1789 Judiciary Act was quite explicit; federal court judges could not force the release of individuals held in state custody unless the individual was required in federal court, or if the individual fit into some other specific set of circumstances. Elkison did not fall into any of these prescribed categories, so Hunt could have simply argued the case on this narrow ground, but the aspiring young attorney could not pass up the opportunity to use Charleston's federal courtroom as a grandstand. So, instead of focusing on habeas corpus, Hunt began his argument by declaring the paramount power of South Carolina to protect itself, a power that transcended any delegated powers surrendered to the federal government under the Constitution, including the regulation of interstate or international commerce. "If South Carolina has to dread the moral pestilence which a free intercourse with foreign negroes will produce she has, by the primary law of nature, a right within her own limits to interdict it – she is not bound to wait until her citizens behold their habitations in flames and are driven to another." Because South Carolina retained its sovereign powers to police her borders and secure the well being of her citizens, no authority could compel it to rescind the statute. Only South Carolina was capable of being "the sole judge of the means necessary for...self-preservation." Furthermore, the Constitution made no mention of federal police powers, and South Carolina "had no intention of yielding any portion of her

⁴¹ In fact, the only historian since 1935 who examined closely the primary sources of the Seamen Acts described the initial South Carolina controversy as "The First Nullification." See Alan F. January, "The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860" (Ph.D. diss. University of Iowa, 1976).

right to establish such laws...thought necessary to secure the peace of her citizens, and the security of her slave population.” South Carolina’s enormous slave population only confirmed the necessity of state lawmakers’ discretion in protecting its borders. “It was a vital interest, which [South Carolina] had not more intention of jeopardizing, than Pennsylvania [sic] or New-York, had of yielding the right of establishing health laws, to prevent the importation of diseases.” Hunt then concluded from these premises, “each state has a right to define conditions, upon which foreigners shall enter their territories.”⁴²

Since colonial times, Hunt continued, the colonies and then states had laws that protected them from the introduction of paupers and convicts. To restrict the entry of those travelers who might inflict harm to the safety and welfare of the citizens of the state was the essence of the police power, and could not be considered a form of commercial regulation. “Were Great Britain to send her *convicts* or *incurables* to our shores, the prohibition of their entry, would be no regulation of commerce.” After all, quarantine laws had been on part of colonial and state statutory law for centuries, and no one had any constitutional qualms about their legitimacy. Hunt continued,

New York subjects our vessels to quarantine, and confines our citizens to hospitals, although we have no faith in contagion. Yet, if we confine *her* negro cooks to a particular spot in Charleston, we are told it is a violation of the Constitution! We have much more reason to believe in the moral contagion they introduce, than in the importation of yellow-fever. However, as New-York judges for herself upon one point, South Carolina has the same right to decide on the other, especially as she conceives her interests and safety, are at stake [sic].⁴³

⁴² Hunt, *The Argument of Benj. Faneuil Hunt*, 9-12.

⁴³ Hunt, *The Argument of Benj. Faneuil Hunt*, 13. Emphasis in original.

If South Carolina enforced quarantine laws against all states and nations entering her ports, then no nation could complain of its operation. Only if the quarantine was applied to some nations or states and not others, then would the law “requir[e] apology.”⁴⁴

Because the law was one of police, not commerce, and because quarantine laws had long been the domain of state power and beyond the general government, then Hunt concluded that South Carolina was fully within its power to outlaw the ingress of free black seamen. To the Consul’s claim that Elkison’s incarceration was a violation of the 1815 Commercial Convention between the United States and Great Britain, Hunt scoffed. Such a claim erred in two regards. First, the language of the Treaty was quite clear; the free intercourse enjoyed by British subjects in the United States was “subject ‘to the laws of the respective countries.’” Since South Carolina was a constituent member of the United States, then its laws were part of the “laws of the respective countries” and capable of restricting British subjects. Of course, this line of reasoning afforded a convenient sidestep of a much stickier inquiry: whether black Britons were to be considered subjects in treaties with the United States. But even without this debilitating clause, Hunt believed that the federal government’s treaty-making power was circumscribed by the Constitution. “The Treaty making power, can make no stipulation which shall impair the rights, which by the Constitution are reserved ‘to State respectively, or to the people.’” In other words, the President and the Senate were incapable of enacting a treaty that would usurp any powers reserved to the states or contravene any state law properly enacted. Put differently, the same

⁴⁴ Hunt, *The Argument of Benj. Faneuil Hunt*, 9-13. Hunt also acknowledged briefly that South Carolina retained the right to regulate commerce in the absence of federal legislation. However, he was much more interested in proving the Seamen Law a quarantine regulation - a police power not ceded to the federal government - and not a commercial law that Congress could preempt.

restrictions the Constitution placed on Congress were also placed on the President and Senate in their treaty-making capacity. The Tenth Amendment limited the treaty-making power.⁴⁵

Hunt's arguments are noteworthy in several respects, many of them interrelated. First, he set the future trajectory of the Seamen Acts debates by equating the law to quarantine. Foreign (meaning from outside South Carolina) free black sailors were literally infected and required segregation. Their ailment was a "moral contagion of liberty." Some states even went so far as to label their Seamen Statutes as quarantines.⁴⁶ Hunt linked in legal terms "moral pestilence" and "moral contagion" with "yellow-fever." If New York could interdict the entry of people ailing from whatever contagious disease it defined, then South Carolina could similarly determine which contagions required quarantine. Since the colonies and states had always possessed the power to determine which contagions deserved quarantine, then South Carolina's quarantine of race was certainly legitimate. "In South Carolina," Hunt reasoned, "we think the presence of a free negro, fresh from the lectures of an Abolition Society equally dangerous" as a Charleston traveler, exposed to fever, arriving in New York.⁴⁷ The Seamen Acts were going to be intimately tied to quarantines for the remainder of the antebellum period.

Second, Hunt made no comment regarding the rights of free blacks, be they subjects, citizens, or any other legal status. Quarantine measures took no cognizance of nationality, of rights, of treaties. If one was sick and contagious, one was not allowed to interact with susceptible populations on shore. The infection determined the segregation. Hunt never bothered to consider that free blacks might not harbor these infectious ideas. This tendency, to

⁴⁵ Hunt, *The Argument of Benj. Faneuil Hunt*, 14-15. For a general overview of the constitutionality of treaties, see David Golove, "Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power," *Michigan Law Review* 98 (March, 2000): 1075-1319.

⁴⁶ Georgia's first Seamen Law was explicitly termed a quarantine regulation. See Chapter 5 below.

⁴⁷ Hunt, *The Argument of Benj. Faneuil Hunt*, 13.

assume that all free black sailors automatically carried with them a desire to destroy Southern slavery, undergirded the entire rationale for racial quarantines. Lastly, Hunt's interpretation of the 1815 Treaty between the U.S. and Britain proved incredibly resilient. By identifying the debilitating clause "Subject to the laws of the respective countries," Hunt presaged the interpretation of numerous Crown and federal officials for over twenty years. And so long as one adhered to this interpretation of the Treaty, the subjecthood claims of Afro-Britons were immaterial. Whether they were subjects or not, the United States, or more accurately South Carolina, could restrict their entry.

Only after Hunt's extended ruminations on the constitution, police powers, etc, did he address the most fundamental issue at bar. Unlike his meandering arguments over the propriety of the Seamen Law, his attack on the writ application was simple, lucid, and direct. If Elkison wished to have his case heard in a federal forum, then he would have to navigate through the state judiciary, and then, if the State Constitutional Court ruled against him, appeal on a writ of error to the United States Supreme Court.⁴⁸ Johnson was statutorily barred from freeing Elkison via habeas corpus.⁴⁹

If Hunt's defense of the Seamen Law was nothing more than grandstanding - and his decision to put the most important and basic jurisdictional issue as a postscript suggests that it was - he must have been surprised when Justice Johnson met his arguments head on and similarly treated the jurisdictional problem as an afterthought. Johnson, in front of hundreds who filled the courtroom to hear his decision, began with a quick recounting of the facts of the case,

⁴⁸ Hunt, *The Argument of Benj. Faneuil Hunt*, 18-20. There was no guarantee, however, that a writ of error, even if granted by the U.S. Supreme Court, would have been honored by the South Carolina courts. One only has to consider the hoopla over *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Cohens v. Virginia*, 19 U.S. 264 (1821).

⁴⁹ Unfortunately, the argument of Hunt's co-counsel, Isaac E. Holmes, was not recorded. Neither, apparently, was the argument of Elkison's attorney.

including the diplomatic correspondence between Secretary Adams and Stratford Canning. He acknowledged the two affidavits submitted by Elkison: one from his captain, who swore that Elkison was a subject who had resided in Liverpool for some years; the other from Elkison himself, who claimed he was born in Jamaica and a “native subject” of Great Britain. He also made reference to the fact that the state courts had upheld the statute under which the petitioner was incarcerated. After this prologue, Johnson proceeded to dismantle Hunt’s arguments.

Justice Johnson found it absurd that neither of the sheriff’s attorneys attempted to explain how the law in question did not clash with the powers of the general government as outlined in the Constitution, “the most wonderful instrument ever drawn by the hand of man.” Specifically, Johnson doubted that the law in question was a police regulation in the first place. The only “crime” the sailors committed was entering the port. Even if pressed into the state by inclement weather or if the mariner had no intention of leaving his vessel, South Carolina law mandated his arrest, and if his captain acted with “caprice,” then the mariner, who often has no ability to determine his port of call, could face enslavement. A free man, even a Native American who was technically a “person of color” guilty of simply being aboard a ship he could not steer, could become a permanent slave though he committed no “crime.” For Johnson, such a law mocked the true purpose of the police powers, as the sheriff and the ship’s captain could conceivably profit handsomely by allowing an unsuspecting tar to go up for auction.⁵⁰

As for Hunt’s brilliant maneuver - to equate the seamen law to other forms of quarantine - Johnson was not persuaded. Quarantine measures seek to prevent interaction between the infected and the vulnerable. Yet, the very penalty for entering the state “put[s] the firebrand

⁵⁰ Johnson noted how the sheriff earned half of the proceeds of a mariner’s sale at the slave auction. He also noted how captains, eager to avoid paying his seamen’s wages, could avoid payment altogether by leaving port without them. *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 495.

under our own houses.” The law mandated that sailors be taken off of their vessels, placed in a jail designated for all persons of color, and if left there, sold off to plantations. “If there are evil persons abroad who would steal to this place in order to do us mischief,” Johnson slyly retorted, “then this method of disposing of offenders by detaining them here, presents the finest facilities in the world, for introducing themselves lawfully into the very situation in which they would enjoy the best opportunities of pursuing their designs.” What sort of quarantine measure was this, one that actually “inoculate[s] our community with the plague...and turn[s] loose the wild beast in our streets.?” Whether an actual quarantine, not a bastardized form like the Seamen Law, was necessary or would be constitutional in the face of federal legislation to the contrary, Johnson “neither admit[ted] nor den[ied] it.” But the law in front of him, the one which “defeats its own ends,” could surely not “avail at all against the constitution and laws of the United States.”⁵¹

Since the law was not one of police, and certainly not a quarantine measure, then the law was one of commerce. “The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port employing colored seamen.” Yet, by infringing on commerce in this way, Johnson surmised, South Carolina usurped federal authority; to allow this law to remain intact would allow the states to “throw off the federal constitution [at their] will and pleasure” and reduce the Union to “a mere rope of sand.”⁵² By ignoring the federal government’s “exclusive” power to regulate interstate and international commerce, the respondent’s counsel would make the Union resemble “the old confederacy.” But could the

⁵¹ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 496.

⁵² *Elkison v Deliesseline*, 6. F. Cas. 493 (1823). Obviously seeing his opinion as part of a public opinion campaign, Johnson chose to have his opinion printed and published. See William Johnson, *The Opinion of the Hon. William Johnson, delivered on the 7th of August, 1823, in the case of the arrest of the British Seaman under the 3d section of the State Act, entitled, “An Act for the better Regulation of Negroes and Persons of Colour and for other purposes,” passed in December last* (Charleston, S.C., 1823).

states regulate commerce in the absence of federal legislation? In other words, did the states have concurrent powers over commerce that were only eclipsed by an active pronouncement of Congress? Johnson responded,

[Since this law must be one of commerce,] 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...It is true that it [the Constitution] contains no prohibition on the states to regulate foreign commerce. Nor was such a prohibition necessary; for the words of the grant sweep away the whole subject, and leave nothing for the states to act upon. Wherever is the case, there is no prohibitory clause interposed in the constitution. Thus, the states are not prohibited from regulating the value of coins, or fixing a standard of weights and measures, for the very words imply a total unlimited grant. The words in the present case are, 'to regulate commerce with foreign nations, and among the several states, and with Indian tribes.' If congress can regulate commerce, what commerce can it not regulate?⁵³

In coming to this conclusion, Johnson was articulating a nascent form of the Dormant Commerce Clause, that Congressional silence was a binding mandate for unrestricted commerce.⁵⁴

But Johnson did not have to depend on this broad reading of the Commerce Clause and infer the meaning of Congressional silence. The federal government had already made its will manifest through its treaty-making power. The nation's desire to protect British merchants and shipmasters (if not explicitly sailors) engaged in the United States had already been codified in the 1815 Commercial Convention between the U.S. and Britain. The treaty precludes laws that would "abridg[e] their rights to free ingress and egress, and occupying houses and warehouses for the purposes of commerce." If individual sailors might be quarantined (though not in the manner outlined in the Seamen Act), black British merchants could not. "As to them, this law is

⁵³ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 494-495.

⁵⁴ Six months after Johnson handed down this decision, Daniel Webster articulated a similar conception of the Commerce Clause when he argued against the New York steamboat monopoly in *Gibbons v. Ogden*, 22 U.S. 1 (1824). Johnson's concurrence in that case expands the ideas he sketches out here in *Elkison*. See Chapter 4 below.

an express infraction of the treaty...[and] the passing of such a law is tantamount to a declaration of war.” The treaty specifically protected all British subjects.⁵⁵ Johnson explained,

The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port from employing coloured seamen, whether citizens or subjects of their own government or not. But if this state can prohibit Great Britain from employing her coloured subjects (and she has them of all colours on the globe), or if at liberty to prohibit the employment of her subjects of the African race, why not prohibit her from using those of Irish or Scottish nativity; if the colour of his skin is to preclude the Lascar or Sierra Leone seaman, why not the colour of his eye or his hair exclude from our ports the inhabitants of her other territories?⁵⁶

Rephrased, Johnson was stating that black British subjects were as entitled to treaty protections as white British subjects, and South Carolina had no authority to determine how Great Britain defined subjecthood.⁵⁷ Like in the Missouri debates, Johnson assumed subject status as determined by British custom and law. The affidavits of the master and of Elkison proved the sailor’s subjecthood.

Before ending his decision, Johnson also pointed to the fact that the original 1822 Seamen Law targeted all “free negroes or persons of color” aboard domestic and international ships. This type of language allowed for a broad spectrum of prospective perpetrators, and the Judge ridiculed the South Carolina legislature for passing a law that could reduce a “Lascar,” “Sierra Leone,” or “Nantucket Indian” to a state of perpetual bondage. According to Johnson, these groups were historically and legally included in the general term “free people of color.” Therefore, without a clause in the law specifically excluding these groups, they were liable to

⁵⁵ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 496.

⁵⁶ Johnson, *The Opinion of the Hon. William Johnson*.

⁵⁷ *Elkison v. Deliesseline*, 8 F. Cas 493, quote at 494.

incarceration and potential enslavement, and at the sole discretion of the arresting sheriff. Even members of the United States Navy were not exempted.⁵⁸

In sum, Johnson's opinion found numerous bases on which to rule against the 1822 Seamen Act. It could result in the enslavement of a Massachusetts Indian. It defeated its own ends by introducing the "moral contagion" into jailhouses and plantations. It violated the 1815 Commercial Convention between the United States and Great Britain (and the rights of black British subjects). It usurped Congress's exclusive and plenary power to regulate interstate and international commerce. Taken together, these conclusions convinced Johnson 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." Henceforth, Charleston's sheriffs could be sued for enforcing the state law. That being said, however, Johnson admitted that he had no power to free Elkison. Hunt's reading of the 1789 Judiciary Act was correct. Prisoners in state custody remained beyond the reach of federal writs of habeas corpus.⁵⁹

In terms of the dangerous Atlantic, Johnson lamented the Seamen Law as bad policy. Johnson explained how the unwarranted fear provoked by Vesey had the potential of cutting the beneficial aspects of Charleston's Atlantic connections.

If this law were enforced upon such vessels, retaliation would follow; and the commerce of this city, as feeble and sickly comparatively as it already is, might be fatally injured. Charleston seamen, Charleston owners, Charleston vessels might *eo nomine* be excluded from their commerce...⁶⁰

⁵⁸ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 494, 496. Critics were quick to harangue Johnson for specifically referencing Nantucket Indians – frequent employees of Massachusetts shipping corporations – as incendiary and promoting sectional discontent. See [Robert Turnbull and Isaac Holmes], "Caroliniensis No. 5," in *Charleston Mercury*, August 22, 1823.

⁵⁹ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 497.

⁶⁰ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), at 494-495

Far from preserving the boons and negating the evils of the Atlantic, the Seamen Law guaranteed Charleston's severance with the Atlantic and, with it, collapse of the city's economy.

Johnson's ruling was grounds for both excitement and fear among the members of the South Carolina Association. Elkison received no redress; nonetheless, a federal court ruling had just destroyed the legal edifice on which the arrests were conducted. However, the South Carolina Association appeared content to ignore the *Elkison* ruling, and, in effect, nullify the opinion of a federal judge by continuing to force local law enforcement to arrest black sailors. And as aggressive as the Association was to have the law enforced, the government of South Carolina was equally as passive in letting the Association operate unencumbered. If Johnson's opinion was less than satisfying for the Association despite their efforts to ignore it, the publication of the Justice's ruling in Northern newspapers and in pamphlet form across South Carolina infuriated it.⁶¹ A commotion must have arisen, as Hunt decided to publish his argument in the case as a counterweight against Johnson's publication. Hunt expressed his motivation for publishing his opinion, feeling Johnson not only ruled incorrectly, but also distorted his argument before the court. "But to understand the decision and do simple justice to the unsuccessful advocate," Hunt declared, "the *case* should be reported, or his arguments *stated* with at least as much plausibility as they were *originally* presented at the hearing." His publication, then, was meant to rehash his argument to promote "free discussion," as "it is always safer to argue too much than too little."⁶²

⁶¹ Morgan, *Justice William Johnson*, 197.

⁶² B.F. Hunt, *The Argument of Benj. Fanueil Hunt*, 1-2. Emphasis in original.

After Hunt's publication, the Association continued to be the catalyst behind the enforcement of the Seamen Act, and Charleston's jails remained filled with free black sailors.⁶³ Three weeks after Johnson's ruling, the British Foreign Office in London received word that a British sailor was imprisoned in Charleston under the supposedly defunct state law. The Foreign Office forwarded this information again to Secretary of State Adams, complaining that his previous guarantees were ineffectual.⁶⁴ While Adams contemplated his reply, a ferocious debate ensued in the Charleston press regarding Judge Johnson's recent opinion and the backlash of the Association. Johnson had stepped out on a limb by engaging the issues of federalism and citizenship implicit in the Seamen Act. Johnson reopened Pandora's Box, and he was soon to feel the consequence.

Besides revealing the rift in American constitutional thought, the debate in the Charleston press also highlighted the competing visions of Atlantic and the United States' role in its future. If *Elkison* remained good law and emerged as the authoritative interpretation of the Constitution, *Elkison*'s opponents contended, then South Carolina would be powerless to protect its shores from the dangerous Atlantic, at least as long as it remained in the Union. By employing Atlantic imagery to link the expansion of federal power with slave rebellion and emancipation, Johnson's detractors helped to polarize white Charleston and dislodge the sanctity of Union as one of the primary pillars of South Carolina's political ideology.

The debate over *Elkison* began when the *Charleston Mercury* published a series of essays aimed at discrediting Johnson's decision. Under the pseudonym Caroliniensis, Isaac Holmes and

⁶³ According to one newspaper report, over 150 sailors were incarcerated under the 1822 law by October, 1823, despite Johnson's ruling in *Elkison*. See January, "The South Carolina Association," 195.

⁶⁴ Addington to Adams, 23 August 1823, and Addington to Canning, 29 August 1823, in *Correspondence*, 3-5.

Robert Turnbull⁶⁵ penned over a dozen articles in which they relentlessly denigrated Johnson and his opinion, impugning the Judge for his legal reasoning, his courtroom etiquette, and his lack of respect for the state's esteemed political institutions. Though the two attorneys were primarily attempting to inspire amongst their South Carolina countrymen the absolute necessity of state's rights as the only viable vehicle with which to protect slavery within the current constitutional order, they situated their arguments and the likely consequences of *Elkison* in a blatantly Atlantic context. Their first essay, published just a week after the opinion was uttered, did not begin with the Justice's understanding of the Commerce Clause, his impression of the extent of the federal treaty-making power, or any other overt constitutional issue. Rather, the first critique of *Elkison* ridiculed Johnson's acknowledgement of the sailor's status as a British subject. According to Holmes and Turnbull, the only hard evidence that *Elkison* was a Jamaican mulatto and not "some fugitive slave from a Southern State" was the sailor's own affidavit, an instrument statutorily unavailable to blacks in South Carolina.⁶⁶ Even if *Elkison* was a Jamaican, the Carolinensis authors argued, he was still a mulatto, and, therefore, unable to claim all of the rights of a British subject. Because *Elkison* was not "above three steps removed in linear digression from the negro," he was unable to claim the status of British subject, as dictated by Jamaican law. Turnbull and Holmes harangued Johnson on this point. How could a simple trip from Jamaica to South Carolina turn this mulatto into "a bona fide British subject?" Carolinensis accused Johnson of equating freedom with citizenship. "That a negroe [sic] is free, as soon as he sets his foot on the soil of England...we all know to be the case, [however] but this circumstance makes him no more a British subject than it would make the writer himself a British subject by going to

⁶⁵ Scholars have uniformly agreed that Turnbull and Holmes authored the articles. See, for example, Morgan, *Justice William Johnson*, 197; Edward Rugemer, *The Problem with Emancipation: The Caribbean Roots of the American Civil War* (Baton Rouge, La., 2008): 83; Golove, "Treaty-Making and the Nation," 1217.

⁶⁶ For reasons unknown, the Carolinensis authors ignored the affidavit of *Elkison*'s captain.

that country.” Of course, because Caroliniensis was about to prove that the Seamen Act was not a commercial law, but a quarantine measure, then this extended rumination on Elkison’s legal status was ultimately moot. “The moment he touches the soil of Carolina, he is as much subject to our police regulations, and to all the disabilities of his race, as if he had been born in this city.”

⁶⁷ But in terms of understanding conceptions of British subjecthood in the United States, this digression is quite revealing.

A week after this first essay hit the Charleston press, Justice Johnson pseudonymously responded to the many aspersions cast against his honor and his logic. Johnson began his defense of *Elkison* by refuting his adversaries’ analysis of British law and their circular logic regarding the relationship between rights and subjecthood.⁶⁸ If Elkison was not “entitled to *all* the privileges” of subjecthood, Johnson (writing as Philonimus) inquired rhetorically, “was he entitled to *none*?” Did Johnson’s detractors “suppose that a man cannot be a British subject unless entitled to a seat in the House of Lords?”⁶⁹ Johnson’s point was obvious. Britain maintained gradations of rank, and the fact that Elkison did not possess the full panoply of rights did not disqualify him from basic treaty protections while in the United States. Turnbull and Holmes pointed to Elkison’s lack of rights and his racial essence to classify him as a non-subject. Johnson saw a vassal under the protection of the British flag and a man thereby protected by existing treaties. Importantly, both sides of this debate emphasized the importance of British

⁶⁷ [Turnbull and Holmes], “Caroliniensis No. 1,” *Charleston Mercury*, August 15, 1823.

⁶⁸ On Johnson’s authorship of the Philonimus essays, see Morgan, *Justice William Johnson*, 199-202.

⁶⁹ Philonimus, “Review of the Numbers of Caroliniensis, No. 1,” *Charleston Mercury*, August 26, 1823. Emphasis in original.

conceptions of subjecthood in determining the applicability of the treaty to mariners like Elkison.⁷⁰

The issue of Elkison's status and his corresponding rights was prefaced Caroliniensis's second complaint, namely that the Judge overstepped his judicial authority by ruling on the constitutionality of law. Since the petitioner's writs were denied on legal grounds, the Judge had no power to go beyond "the narrowest compass" possible. Caroliniensis scolded Johnson for giving his opinion on "so delicate a subject, as that which necessarily involves a question of

⁷⁰ It was within his second number that Caroliniensis actively engaged in the legal definition of race that formed a portion of Johnson's decision. The second essay, in fact, quotes at length the *Elkison* decision, specifically the passage with which Johnson supposed that Nantucket Indians and Moors were subject to the Seamen Act under the ambiguous terminology 'persons of color.' Caroliniensis indicted Johnson on this point, accusing him of raising the eyebrows of their northern brethren, especially those in Massachusetts who are in the regular habit of employing Nantucket sailors. "How strange...that it should be proclaimed from his seat on the bench, that a Lascar, that a Moor, and last of all, that a Nantucket Indian Seamen, in whose veins flows the blood of the aboriginal of the forest...pure and as free as the air which he breathes, can be taken up in South Carolina as a person of color: and without the form of trial sold and deemed a slave forever." For Caroliniensis, South Carolina law both implicitly and explicitly defined persons of color in concrete terms. According to this critic, every student of South Carolina law knew that the designation 'free persons of color' included specifically the subgroups of slaves, free blacks, mestizos, and mulattos, and not people of Native heritage. For Caroliniensis, the term 'person of color' was the perfect term, as it could cover the widest range of racial possibilities, so long as the individual in question descended from African blood. Thus, the most pure African as well as "the descendants of negroes to the thousandth generation" were susceptible to such designation, thereby declaring blackness as the defining characteristic with which the state could deny legal rights. Caroliniensis admitted that the designation 'person of color' may have had variable handicaps across the Atlantic- among the Spanish, the French, and the British- but he was sure 'people of color' formed an easily identifiable category of humanity. As so constructed, Caroliniensis believed that Johnson's rhetoric against the hastiness of the South Carolina Legislature in passing the law was geared towards producing "the greatest possible feeling and excitement against [it]," and not on a systematic analysis of the term 'person of color.' [Turnbull and Holmes], "Caroliniensis No. 2," *Charleston Mercury*, August 16, 1823. Johnson ridiculed Caroliniensis's notion of a static definition of 'persons of color,' one that pertained only to those with African blood in their veins. "I assert, and no professional man would deny, that the terms 'persons of color' includes our Native Indians, and all other persons, except those who come legally within the description of 'free white persons.'" Racial classifications often blurred; American law did not differentiate consistently between red and black. "It is a fact well known to those who know any thing [sic] of the Statute Law of the country, that both the Indian and the Moor are repeatedly included by name in...Negro Acts." As such, the equation of race and citizenship under Caroliniensis's rubrics would leave his blessed Indian in shackles, if no middle ground would be conceded. Typically, Johnson pointed out, "we can assume that...it [the term free person of color] is the converse of white men; and in its natural and ordinary signification includes everyman who is not white." However, these were only generalities, and Philonimus was quick to declare the fluidity of the term in question. "But every professional man knows, that the legal signification of the term 'persons of color' is by no means definitely settled. It is a phrase of very recent introduction into our statute law, and may be sometimes construed in a more general, sometimes a more restricted sense, depending upon its connection with other terms used in the same law...other nations have a nomenclature peculiar to themselves. Our statute book is our standard." But because of the fluidity of that term in an international context, "at one instance offering a restricted definition, at another, a more expansive one," South Carolina needed to clarify explicitly which "persons of color" were susceptible. See [Johnson], "Philonimus Review of the Numbers of Caroliniensis, No. 2," *Charleston Mercury*, August 27, 1823.

collision between the State and General Governments, when he might so easily have avoided it.” The Judge’s motivation must have been a “to express sentiments and opinions which...will for ever [sic] be uncongenial to the citizens of this State.”⁷¹ In much the same style of the dangerous Chief Justice John Marshall, Johnson was overstepping his judicial boundaries by annulling the Seamen Act in *dicta*. These two Justices’ aims were obvious; they sought an overt consolidation of the nation and the concentration of power in the national capital, and they would ignore judicial restraint in accomplishing their agenda.

But for Caroliniensis, Johnson’s failure to comply with the standard fare of judicial propriety was much more than an institutional faux pas. The consequences of *Elkison* were dire. In their fifth essay, Turnbull and Holmes explained why the *Elkison* decision was so potentially dangerous to the very existence of South Carolina. “he [Johnson] knows the unfavourable feelings which the Act was calculated to excite abroad; then why not at the same time, give some thought to the situation and feelings of the people at home, amongst whom he lived?”

Caroliniensis continued,

He [Johnson] sees the colonial interests of the British Empire, about to be immolated on the altars of folly, and every branch of trade connected therewith, about to be surrendered to the fanaticism of a thousand Wilberforces. He hears the petitions of the colonies. They address their cruel and unnatural parent, to *spare*, and not *like Saturn destroy her own children*. Let him go over sections of this confederacy. He finds the...same spirit, under other names, and prompted by other motives, stalling abroad as a pestilence.

Caroliniensis did not hesitate to identify the source of these malicious motives, all that “fanaticism, false charity, fashionable humanity, or jealousy, of folly, can invent.”⁷²

⁷¹ [Turnbull and Holmes], “Caroliniensis No. 1,” *Charleston Mercury*, August 15, 1823.

⁷² [Turnbull and Holmes], “Caroliniensis No. 5,” *Charleston Mercury*, August 22, 1823. Emphasis in original.

Accordingly, Charlestonians should view Johnson's opinion through this Atlantic prism, in the context of the rising tide of Northern, British and French antislavery.

South Carolina ought not to be judged for its decision to limit the movement of dangerous free black sailors. After all, Turnbull and Holmes explained, it was the revolutionary Atlantic that had transformed black mariners from welcomed sight to eyesore. Before the French and Haitian Revolutions, South Carolina had no reason to restrict black sailors, because "If [doctrines of emancipation] existed at all, they existed only in the minds of a few pseudophilanthropists...[because the] *abolition society* of Philadelphia, the *British Association* in London, and the *Amis des Noirs* in Paris had not been formed." But since the French and Haitian Revolutions, "from which came licentiousness...irreligion, atheism, and every species of madness and every wrong principle of enthusiasm...calculated to overturn all governments and to unsettle the principles of obedience, and subordination in the minds of men whether bond or free," the Atlantic World was now a very dangerous place for slave societies that chose not to regulate the influx of persons of color armed with ideologies of revolution.⁷³

The deployment of Haiti was certainly strategic. Charlestonians knew that Vesey had Haitian connections, and the Carolinians authors hoped to capitalize on the recent hysteria in Carolina consciousness. In their strategy to vilify *Elkison*, the vivid imagery of Haiti was imminently useful. "What is this [decision]," Turnbull and Holmes asked rhetorically, "but to say that if the people of the Northern States shall desire a commerce with the Emperor of Hayti [sic] and they are now complaining that they have not this trade, that the President and Senate may permit the brigands of St. Domingo to come here freely and securely, with their cargoes, and we must quietly and tamely submit?" To make sure the point was not missed, they

⁷³ [Turnbull and Holmes], "Caroliniensis No. 10," *Charleston Mercury*, September 6 1823. Emphasis in original.

continued, “She [South Carolina] never intended, that commerce should be so regulated [by the federal government] as to have the blacks of the West Indies and of the world, to be forced on her against her will.” Caroliniensis hijacked the rhetoric of black sexual aggression to show how the federal government’s agent, Judge Johnson, was advocating a policy that would permit the rape of South Carolina society. And this wholesale sexual assault on the virtue of South Carolina was guaranteed if Johnson’s decision “to admit the black subjects, merchants and traders of Great Britain (and she will probably have a few hundred thousand of them, if *Wilberforce* and his aide-de-camp *Buxton* be not confined in a mad-house) into our state, and here to *reside* and remain as merchants...” Great Britain, Paris, Haiti, and Judge Johnson in conjunction with the material interests of the North were combining to achieve nothing less than the wholesale rape and pillaging of South Carolina. Moreover, *Elkison* must be resisted because Britain was toying with the idea of free its slaves and possibly making them subjects. If emancipation were to occur, then *Elkison* would demand the free ingress of Afro-Britons into South Carolina.⁷⁴

Obviously, Johnson was not persuaded by this logic. The Atlantic World was changing, and South Carolina had to come to terms with these changes. Simple global demographics demanded that the Caroliniensis authors and their comrades examine closely the ramifications of their position.

The time may not be far distant, when we shall see the new and the old world arrayed against each other on the vital principles of all free governments. And when many millions of people, three fourths of them colored, I mean the inhabitants of the South American providences, may invite us to a most lucrative intercourse. Shall the states mar and incumber [sic] the interests, not only of the United States, but of half the World, by unlimited exercise of exclusion...?

⁷⁴ [Turnbull and Holmes], “Caroliniensis, No. 10,” *Charleston Mercury*, September 6, 1823.

Johnson was thoroughly convinced that future of foreign policy demanded a more congenial relationship between countries with large “colored populations” and predominantly white nations. The financial and political repercussions of limiting commerce to “white nations” were all too obvious. Turnbull and Holmes were increasingly fearful of the changing Atlantic World; Johnson may have been wary, but understood that South Carolina could not sequester itself and still prosper.

Thus, when the South Carolina Assembly met for their winter term in 1823, they confronted a legal quagmire as they considered amending the 1822 Act. The U.S. Department of State, an organization of Northern shipmasters, and a federal court ruling pressured the legislature to annul the law outright. Yet, a homespun organization of instrumental local personalities clamored for continued enforcement, and the state judiciary had declared the law constitutional. Ultimately the state legislature did amend the 1822 Act. To a certain extent, the revision was more lenient; it exempted free black sailors aboard war vessels of the United States as well as foreign countries, so long as they stayed on board their vessels. This exemption was more an act of pragmatism than benevolence. Charleston sheriffs would be hard pressed to board a warship and remove enlisted men. The revised statute also mandated that incarcerated sailors left behind by their ships be expelled from the state and whipped upon return, instead of enslaved. The law also streamlined the enforcement process, setting straight the dispute between harbormaster and sheriff regarding the acquisition and dispersal of gaol fees. The Sheriff was personally responsible for the enforcement of the Act; any dereliction of duty in enforcement would leave the Sheriff liable to be fined \$500, with the informer receiving half.⁷⁵ This gave a

⁷⁵ *Acts of South Carolina...1823* (Columbia, S.C.); Hamer, “Great Britain,” 9.

monetary incentive for the South Carolina Association to continue its oversight of the Seamen Act's execution.

The revised statute also explicitly identified which “persons of color” needed to be segregated from the domestic colored population. It specified, “Nor shall this act extend to free American Indians, free Moors, or Lascars, or other colored subjects of countries beyond the Cape of Good Hope, who may arrive in this State in any merchant vessel.” Rather, the act applied only to “such persons...deemed and adjudged to be persons of color...as shall be descended from negroes, mulattoes, and mestizoes, either on the father's or mother's side.”⁷⁶

The aim was obvious; Atlantic-savvy free blacks, armed with knowledge of the revolutionary Atlantic and its ascending abolition societies, must not infiltrate the state. Those ‘colored’ persons beyond the Cape of Good Hope – in other words beyond the Atlantic –who came into Charleston would not be molested. The legislature believed that the true threat to South Carolina came from black Atlantic sailors. However, this new definition inadvertently allowed a new defense for those suspected of contravening the Seamen Law. Despite the best efforts of antebellum (and postbellum, for that matter) law, racial categories and the ascriptive traits that defined them were hardly obvious or objectively evident. Proving race was often a difficult chore.⁷⁷

In all, the debates between Philonimus and Caroliniensis lasted just short of two months, ending just days before Johnson left for Washington to sit on the Supreme Court's winter session. The debates within the South Carolina state government lasted an even shorter time,

⁷⁶ *Acts of South Carolina...1823* (Columbia, S.C.).

⁷⁷ For an interesting look at the identification of race in U.S. courtrooms, see John Tehranian “Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America,” *Yale Law Journal* 109 (2000): 817-848; Ariela Gross, “Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South,” *Yale Law Journal* 108 (1998): 109-188.

less than a couple of weeks. However, the debate over the Seaman Act had just begun, and the forum for the debate was growing ever larger. The spirited conversations over the enforcement of the Seamen Act were gaining a wider audience, and the determination of the South Carolina Legislature to enact a more streamlined law only assisted in sensationalizing the issue even further. The new statute flew in the face of a federal court ruling and endorsed the constitutionalism of the South Carolina Association. South Carolina was going to continue to protect itself from the dangerous Atlantic, the exertions of Secretary Adams, the subjecthood claims of Afro-Britons, and the judicial power of Justice Johnson notwithstanding. And whether this new “quarantine” was a commercial regulation or a police measure, South Carolina lawmakers denied the ability of federal officials to meddle in their domestic racial policies.

In understanding the first year of the Seamen Act, one must recognize the local, national, and Atlantic variables at work. In Charleston, the Seamen Act might have died in its infancy, if not for the concerted efforts of the South Carolina Association. The Association’s deep pockets and prestigious member list prevented a formidable opposition to develop in Charleston itself. The goal of this local, ultra-legal institution was to enforce the state Seamen Act, but its motives were explicitly Atlantic, as the essays from Robert Turnbull and Isaac Holmes attest. In their reaction to Justice Johnson’s decision in *Elkison*, they explained that the law was absolutely necessary considering the spike in the number of Atlantic abolition societies and the naivety of British metropolitan authorities who were considering an empire without slavery. In viewing the Atlantic from a far different perspective, Justice Johnson explained the short-sightedness of this position, which seemingly ignored the fact that the vast majority of the Atlantic World was nonwhite. Barring free people of color, Johnson reasoned, was the same as destroying Charleston’s economic future. And the entire debate, of course, emanated from lawsuits

instituted by British consuls on behalf of British sailors. At the national level, neither Congress nor the State Department wanted to engage in a frontal assault on the Seamen Act against South Carolina. The Missouri Crises and the budding states' rights philosophy persuaded Congress to ignore a petition from aggravated Boston shipmasters. Secretary of State John Quincy Adams largely evaded the protests of British ministers in Washington, only offering assurances on the assumption that local officials in Charleston would see the inefficacy of the Seamen Statute without overt federal interference.

And at the heart of the connection between the local, the national, and the Atlantic was the discussion of the rights of black sailors. Across the Atlantic, free people of color experienced a wide variation of legal handicaps. For white South Carolinians, local freemen's lack of citizenship rights proved that the terms "freemen" and "citizen" were not synonymous. On the national level, however, the lack of specific rights in the individual states did not automatically correlate to the absence of citizenship. Different states conceptualized citizenship in different ways, some states so expansively as to include people of color despite their inability to exercise all the rights that white citizens possessed. But the incongruity across the nation caused problems, as the Second Missouri Crisis so powerfully illustrated. Best to leave the questions of federal African-American citizenship unanswered. But despite the wide variations concerning the citizen of free people of color, a consensus seemed to exist about where citizenship originated. It was a locally determined status; Massachusetts would decide who comprised its citizenry, the same for New York and South Carolina. The disagreement was not whether each state could determine its own citizenry, but whether the lack of specific rights disqualified people of color from citizenship. Put simply, South Carolinians would not deny the citizenship of free blacks from Massachusetts because South Carolina did not recognize black citizenship. Rather,

they would deny it because Massachusetts free blacks did not exercise the full panoply of citizenship rights in Massachusetts. When those same South Carolinians considered black British subjecthood, they employed the same logic, denying subjecthood because of the legal handicaps black Britons faced in their home jurisdictions. Subsequently, the Seamen Act did not violate the citizenship or subject rights of anyone, as none of the incarcerated sailors were citizens or subjects.

In less than a decade, this method of deducing citizenship would prove ineffectual against a British Empire that was altering the face of its realm of subjects. But before the Seamen Act defenders had to contend with “bona fide British subjects” with black skin, they had to navigate through the murky waters of federal commercial authority and the Marshall Court.

CHAPTER 4
LEGITIMATING RACIAL QUARANTINES: THE JACKSONIAN MANIPULATION OF
GIBBONS V. OGDEN

By the end of 1823, constitutional battles lines had been drawn. The dangerous Atlantic convinced anxious Carolinians to prevent the introduction of all foreign free blacks in hopes of preempting the spread of revolutionary ideologies of liberty and freedom to the enslaved. The State Assembly obliged and passed a law forbidding all free black sailors from entering the state upon pain of imprisonment, probably in response to the revelation that Denmark Vesey employed free black sailors to communicate with Haiti and West Africa. The South Carolina Constitutional Court upheld the Seamen Statute explicitly in *Calder v. Deliesseline*, and a voluntary group of prominent Charlestonians formed the South Carolina Association to assist (or force) local police officials to execute the Seamen Law and other race-specific regulations. When Supreme Court Justice William Johnson struck down the Seamen Law in federal Court in 1823, it set off a firestorm in the Charleston press, eventually leading to Johnson's exile from his native city. Johnson claimed the Seamen Statute violated federal treaties and usurped Congressional authority to regulate interstate commerce. Despite Johnson's ruling, the South Carolina Association continued to demand enforcement, and Secretary of State John Quincy Adams's supplications to local officials proved fruitless. In utter defiance of *Elkison*, the South Carolina Assembly re-enacted the Seamen Act in its December, 1823 session. The state legislature reasserted its police power to regulate the ingress of specific colored people into the state, regardless of the subsequent, incidental impact on interstate or international commerce.

Despite the recalcitrance of federal officials to overtly intervene (William Johnson excepted), the combination of *Elkison* and the 1823 revised Seamen Statute had set the stage for a potential constitutional show down. And in 1824, the Supreme Court heard the great steamboat case, *Gibbons v. Ogden*, in which the interface between state regulatory laws and

federal commercial authority took center stage. Though *Gibbons* might have had a definitive impact on the Seamen Act controversy in South Carolina, Marshall's ambiguous decision proved anticlimactic. The Chief Justice left quarantines in a type of constitutional purgatory, and both sides of the Seamen Act debate could take solace in Marshall's equivocal opinion. This chapter traces the impact of the ambiguous *Gibbons* decision on the Seamen Act controversy.

Ultimately, the ascendance of the Jacksonian Democrats resulted in federal endorsement of the Seamen Acts and a restricted interpretation of the Commerce Clause. By 1831, the Commerce Clause proved to be an impotent weapon against state racial quarantining.

In the fall of 1823, Benjamin Hunt's and William Johnson's pamphlets on the *Elkison* decision spread across the country, and several newspapers chose to reprint the entire decision, verbatim.¹ The nation took note of the constitutional dilemmas arising from the *Elkison* case, and the sensationalism increased dramatically after the rhetorical war in the Charleston press between Johnson and Robert Turnbull and Isaac Holmes. The fighting was so intense that Chief Justice John Marshall sent a letter to Joseph Story regarding it. "Our brother Johnson," Marshall lamented, "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." He could not have been more prescient. William Johnson never considered Charleston home after his skirmish with the South Carolina Association, choosing to reside in Philadelphia between his circuit-riding and Supreme Court sessions. Marshall did not "suppose that [*Elkison*] would have excited so much irritation," though he was quite aware that the emerging States' Rights philosophy was "one of much feeling in the south." Marshall indicated that soon there might be a case before the Supreme Court dealing with the Seamen Act, and he joked about the

¹ See *Charleston Mercury*, August 15, 1823 through October 7, 1823.

problems such a case might pose. Marshall remarked to Story that he once had the opportunity to expand extensively on the Commerce Clause in a case back in 1820, but he refused to do so. Not being “fond of butting against a wall in sport,” he instead “escaped on the construction of the act.”² Marshall was soon to have another chance to adopt a broad reading of the Commerce Clause, but his cognizance of political fallout after *Elkison* (which mirrored the reaction to *McCulloch* four years earlier) motivated him to relegate his broad understanding of the Commerce Clause to *dicta*.

The Georgia legislature did not share Marshall’s hesitancy in officially discussing the issues in *Elkison*; when it joined the chorus over the Seamen Act and Johnson’s increasingly infamous decision at its winter 1823 session, it did so in grand style. The Georgia Assembly proposed an Amendment to the Federal Constitution and sent it to the other state legislatures and to Congress along with a stout defense of South Carolina’s right to restrict its shores. Short and emphatic, the proposed amendment read, “That no part of the Constitution of the United States, ought to be construed, or shall be construed to authorize the importation or ingress of any person of color into any one of the United States, contrary to the laws of such state.” The Mississippi Legislature endorsed the amendment, but it did not garner enough support to be submitted to Congress. Its very circulation, however, demonstrates that the Seamen Act issue had entered the national political discourse and with varying degrees of approbation.³ Moreover, Georgia’s

² See John Marshall to Joseph Story, September 26, 1823 in Charles Hobson, ed., *The Papers of John Marshall*, Volume 9 (Chapel Hill, N.C., 1998): 338. *Brig Wilson v. U.S.* 30 F. Cas 239. In *dicta*, Marshall declared that Congress had unilateral and ultimate authority over all interstate and international commerce, using very similar language that Johnson used in *Elkison* as well as language similar to that found in *Gibbons*. See also, William Wiecek, “Slavery and Abolition Before the United States Supreme Court, 1820-1860,” *Journal of American History* 65 (June 1978): 34-59.

³ *Acts and Resolution of the State of Georgia* (1823): 231. The states of Maine and Ohio voted against it. See *Journal of the House of Representatives for the State of Delaware* (1825): 9-10. Mississippi endorsed the amendment. *Laws of the State of Mississippi* (1825): 138. See, generally, Herman V. Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History* (New York, 1970).

decision to circulate a constitutional amendment reveals their unease about the current constitutionality of South Carolina's peculiar restriction of foreign sailors.

The Seamen Act was also causing a commotion internationally. The British Foreign Office, aware that South Carolina was continuing to incarcerate its subjects, began again its solicitation of the State Department. The Board of Trade feared the problems that the Seamen Act would have on future commercial relationships between the United States the British colonies in the Caribbean. The Foreign Office, however, despite its understanding of the complexity of the American federated system of government, still felt compelled to direct its diplomatic attention to the State Department in Washington, confident that the Federal Government would be in the best position to alter the contemptible policy in place in South Carolina.⁴ Secretary Adams continued to be involved with negotiations with British diplomats and offer assurances that the Seamen Law's life would be short one.

While it is doubtful that Adams was referring explicitly to the upcoming Supreme Court session, he might have understood the relationship existing between the recent *Elkison* decision and the pending Steamboat Case from New York, *Gibbons v. Ogden*. If the Supreme Court ruled expansively in *Gibbons*, then the future of the Seamen Act would be in serious jeopardy. The well known facts of the case of *Gibbons v. Ogden* do not need to be restated here.⁵ What is important for current purposes are the arguments of counsel regarding the exact contours of federal authority over commerce and the relationship between commercial and police powers. *Elkison* had raised some controversial questions. Could the states regulate commerce if the

⁴ *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Series 5, Volume 579, *Foreign Office Papers*, Public Records Office, London (hereafter referred to as *Correspondence*): 6-8.

⁵ For a brief summary of the facts of the case and its course through the New York Courts, See Norman R. Williams, "Gibbons," *New York University Law Review* 79 (2004): 1406-1410.

federal government had not explicitly legislated on a particular item? Were quarantines and pilotage laws commercial regulations? What was to happen if state police laws contravened federal commercial laws? When Thomas Gibbons began transporting passengers from New Jersey to New York in violation of a New York statute granting Aaron Ogden a monopoly on that particular traffic, some of the questions from *Elkison* demanded answers from the High Court.

Daniel Webster, on behalf of Gibbons, began the oral arguments on February 4, 1824. For Webster, the prevailing reason for the actual adoption of the Constitution was to correct the significant errors found in the Articles of Confederation. None of these errors were more pressing than the hindrance of interstate commerce. With the various states able to regulate trade independently, the result was “perpetual jarring and hostility.” The Framers, more than all else, sought a “uniform and steady system” to correct the corrosive impact of the haphazard commercial networks operating under the Articles.⁶ Regarding claims of concurrent power over commerce, Webster was emphatic.

We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general concurrent power, in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power...From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of the States was to be an unit; and the system by which it was to exist and be governed, must necessarily be complete, entire, and uniform.⁷

After explicitly refuting concurrent power over commerce as the original intent of the Framers, Webster followed in the steps of Johnson in *Elkison*. For Webster, in those cases when Congress

⁶ *Gibbons v. Ogden*, 22 US 1 (1824), at 14.

⁷ *Gibbons v. Ogden*, 22 US 1 (1824), at 16, 17.

remained silent, or dormant, on an issue of commerce, in those instances when Congress had not acted, its intent was to leave that particular aspect of commerce unregulated. Here, then, is the full articulation of the Dormant Commerce Clause: “All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.”⁸ Advocates of concurrent power looked to quarantine laws, pilot laws, toll roads, and other established powers of the states as evidence that Congressional power was hardly plenary. For Webster, however, these various laws were not commercial regulations *per se*. Rather, they were police regulations that happened to have an incidental impact on commercial activities. Quarantine was a health regulation above all else. If the quarantine law was enacted for another primary purpose other than health regulation or if it unnecessarily affected commercial activity, then the law risked being an unconstitutional violation of the Commerce Clause. And although Webster never explicitly identified which governmental organ would make such a determination, he would most likely have wanted the federal courts to be that authority.⁹ But Webster agreed with Benjamin Hunt, Robert Turnbull, and Isaac Holmes, laws passed for the safety and welfare of the citizens of a state were not on their face violations of the Commerce Clause. However, by hinting that a federal agency ought to determine if a state law had “intended” to be a police measure or a commercial regulation, Webster was etching out a powerful role for the federal judiciary.

Thomas Oakley and Thomas Emmet, arguing for Ogden and in favor of upholding the New York monopoly law, echoed many of the claims brought forth by B.F. Hunt in the *Elkison* case the previous summer. Oakley was adamant that the individual states were independent

⁸ *Gibbons v. Ogden*, 22 US 1 (1824), at 22.

⁹ *Gibbons v. Ogden*, 22 US 1 (1824), at 25.

nations with absolute authority within their jurisdictions upon signing the Declaration of Independence. With the signing of the Constitution, the states only relinquished limited, specific, enumerated powers to the national government.

The national constitution must, therefore, be construed strictly, as regards the powers expressly granted, and the objects to which those powers are to be applied. As it is a grant of power in derogation of State sovereignty, every portion of power, not granted, must remain in the State Legislature.¹⁰

For Oakley, Johnson's rhetoric in *Elkison* was grossly misstated. If the Constitution does not prohibit the States from acting, like in coining money or regulating commerce, then the States may constitutionally enact such measures. Just because the Constitution empowered the national government did not automatically prevent the States from acting. Only in those occasions when the national government has exercised its specific enumerated power, like national laws regarding currency, were the states prevented from enacting similar legislation. In short, Oakley denied the dormant power of the federal government. Only positively enacted laws of Congress dealing with explicitly granted powers, would divest the states of their powers to legislate on a specific topic. So even if defenders of the Seamen Acts conceded that they were commercial regulations *per se* (a position fewer and fewer would take after *Gibbons*), they were to remain in force until Congress chose to enact laws contravening them. Thus, if Oakley's position were applied, then *Elkison* was bad law, and the states had no obligation to abide by its mandates.

United States Attorney General William Wirt presented the final oral argument to the Court, and like Webster argued on behalf of *Gibbons*. Unlike Webster, Wirt accepted concurrent powers, but identified certain forms of commerce regulation that had to remain firmly within the purview of the national government. While Wirt was ambiguous about the exact line separating state and federal regulatory power over commerce, he was quite certain that interstate and

¹⁰ *Gibbons v. Ogden*, 22 US 1 (1824), at 43.

international navigation should be the sole domain of the national government. He was, however, equivocal on the interface between the police powers of the state and enumerated powers of the Federal Government.¹¹

It took three weeks for the Justices to hand down the opinion. John Marshall, as was his custom, wrote the opinion for the Court. He had several options open to him considering the breadth of arguments presented at bar. Each of the four attorneys considered the interpretation of the Commerce Clause to be the most analytically relevant part of the decision, yet Marshall did not rest his decision on the Commerce Clause.¹² In *dicta*, he reiterated much of what Webster laid out in the opening argument. He agreed that “commerce” was not to be narrowly construed; it encompassed traffic as well as intercourse and navigation. Thus, Marshall refuted Emmet’s contention that ships carrying passengers (and not marketable goods) ought not to be considered eligible for commercial regulation.¹³ Furthermore, Marshall sided with Webster that no concurrent power of commerce regulation existed under the Constitution, unlike the concurrent power of taxation. And most importantly for the purposes here, Marshall agreed with defense counsel, as well as Webster, that quarantine laws and pilot laws were actually elements of police power and not essentially regulations of commerce. More importantly, the “incidental” restrictions of commerce caused by such police laws, were constitutional according to the great Chief Justice.¹⁴

Marshall did not identify the exact contours delineating commerce regulation, expressly granted to Congress, and police laws like quarantine, explicitly reserved to the states. Nor did he

¹¹ *Gibbons v. Ogden*, 22 US 1, at 157-185.

¹² Norman Williams, “Gibbons,” 1414.

¹³ This position would be reiterated in *New York v. Miln*, 36 U.S. 102 (1837).

¹⁴ *Gibbons v. Ogden*, 22 U.S. 1 (1824), at 186-199.

articulate a rule to determine which type of law would be paramount. But considering the case before him, he did not have to. After leading the courtroom through his wholesale endorsement of Webster's theory of the Commerce Clause, Marshall refused to make it the basis of his reasoning. Marshall was content to announce, "There is great force in this [Webster's] argument, and the Court is not satisfied that it has been refuted."¹⁵ Marshall then explained that the New York monopoly law was unconstitutional not because of any broad reading of the Commerce Clause, but because it came into direct conflict with an obscure act of Congress passed three decades before. In passing the Federal Navigation Act in the 1790s, Congress had clearly legislated on the process by which coasting licenses were to be granted, and when the New York monopoly forbade Gibbons, who held a federal license, from engaging in his coasting business, the monopoly conflicted with federal law. For this reason, because the New York law explicitly conflicted with a federal statute, the state must yield on the basis of the Supremacy Clause.¹⁶ Marshall intentionally and specifically sidestepped Webster's Dormant Commerce Clause position and deviated from the path blazed by Johnson in *Elkison*.

In his concurring opinion, Johnson ventured where Marshall only investigated. He emphatically endorsed the Dormant Commerce Clause, a view he advocated since *Elkison*. New York had overstepped its constitutional powers by impeding commerce, the regulation of which was the plenary power of Congress.

The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one

¹⁵ *Gibbons v. Ogden*, 22 US 1 (1824), at 209.

¹⁶ *Gibbons v. Ogden*, 22 US 1 (1824), at 209-222.

potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.¹⁷

So even if Congress never passed the Federal Navigation Act decades before, New York's monopoly law was still unconstitutional. While Marshall rested his decision on the now well-established Supremacy Clause, Johnson articulated a new, broad conception of the Commerce Clause.

As for the Seamen Act, Johnson never explicitly engaged them in *Gibbons*, nor did he ever contemplate any quarantine laws in general. However, he did mention briefly inspection laws, and that discussion deserves attention because of the legal proximity between inspection laws and quarantine regulations. Though the States reserved the power of inspection, Johnson reasoned, the Federal Government exercised oversight of this power because of its plenary power over commerce. Johnson explained,

Inspection laws are of a more equivocal nature, and it is obvious, that the constitution has viewed that subject with much solicitude...It was obvious, that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country.¹⁸

As such, the Federal Government would exercise oversight of state inspection laws because they had an impact on interstate and international trade. In Johnson's view, if the Seamen Act was a commercial law, it was an invalid usurpation of Congress's sole power to regulate commerce. But even if it was considered to be a police law, the federal government could step in if it determined that the state law unnecessarily impeded interstate or international commerce. Whether Johnson believed that Congress had to step in, or if federal judges could make such a decision, we do not know. But, considering his position in *Elkison*, it appears as though he

¹⁷ *Gibbons v. Ogden*, 22 US 1 (1824), at 227.

¹⁸ *Gibbons v. Ogden*, 22 US 1 (1824), at 235-236.

would endorse the power of the federal courts to determine the reasonableness of state inspection and quarantine laws, including the Seamen Act.

Marshall, on the other hand, by hedging of the Dormant Commerce Clause, provided a far less extensive grant of power to the federal government. Marshall's decision, and thus the position of the Court, remained silent as to the exact relationship between state police powers – including quarantine and the Seamen Act – and federal power to regulate commerce. Ultimately, the ambiguity in *Gibbons* provided powerful ammunition for proponents of the Seamen Act in South Carolina. The legitimacy of *Elkison* had been undermined, and the power of the federal courts to interfere in the administration of quarantine laws did not receive the official endorsement of the Court.

Marshall's ambiguity caused confusion about the application of *Gibbons* in the Seamen Act controversy. Some commentators believed that *Gibbons* established the broad national powers set out by Webster and endorsed by Johnson, and thereby destroyed the Seamen Acts altogether. Others highlighted the vindication of state policing powers that Marshall identified as legitimate. Along these lines, the Seamen Acts were constitutional up until Congress specifically refuted them in positive legislation. Still others saw the decision for what it was, a political and constitutional compromise that sought to establish national power without provoking further states' rights advocates. For such jurists, the Seamen Act remained in a constitutional gray area between federal regulatory power over commerce and state powers of inspection and quarantine. In *Gibbons*, *Elkison* did not receive the blessing of the Supreme Court, and the resulting inconsistency legitimated the recalcitrance of South Carolina officials who continued arresting free black mariners at the behest of the Association. Despite the fact that *Gibbons* did not reinforce *Elkison*, it also did not refute it. Some protestors of the Seamen Act remained hopeful

that the Supreme Court might overturn the obnoxious law and use the opportunity to officially interpret the Commerce Clause.

Less than a month after the *Gibbons* decision was handed down, a minister in the British Consulate in Washington suggested that the Foreign Office pursue such a test case. One British diplomat suggested, “the most certain mode of settling the question [of the Seamen Act] would be...to carry up by appeal to the Supreme Court of Judicature the first case which may in future occur of injury inflicted under...the statute...upon the person of a British subject.”¹⁹ By going to the Supreme Court, the Foreign Office could bypass the State Department altogether. This would have been a welcomed change, considering Secretary Adams had twice promised that the South Carolina law would soon be no more and twice failed to deliver.²⁰ If the British government would agree to fund a lengthy appeal process, then “the matter would thus be brought at once to an issue.”²¹

Perhaps because of hearing that such a case might be initiated by a British subject, the Monroe Administration sought the opinion of Attorney General Wirt regarding the impact of *Gibbons* on the South Carolina law. Wirt was unequivocal. He was certain that the state law was in direct violation of the Constitution, and, therefore, any lawsuit brought forth by a sailor incarcerated under the operation of the Seamen Act would find a receptive ear if the case made its way to Washington.

On May 8, 1824, Wirt sent his official opinion to the State Department. Wirt charted a middle road between Marshall’s opinion and Johnson’s concurrence in *Gibbons*. Like Marshall

¹⁹ Addington to G. Canning, 4 April 1824, *Correspondence*, 8.

²⁰ Concerning the general dissatisfaction of the Foreign Office with Adams and the State Department, see Addington to Adams, 9 April, 1824, *Correspondence*, 9-10.

²¹ Addington to G. Canning, 4 April 1824, *Correspondence*, 8.

in *Gibbons*, Wirt dodged a broad reading of the Commerce Clause, and instead, he found that the Seamen Laws violated the Supremacy Clause.²² For Wirt, the fact that Congress had legislated on commerce at all meant that that august body had said all it intended to say on the matter. Unlike Marshall, who found a direct conflict between a federal law and the New York monopoly, Wirt did not find any direct conflict. As soon as Congress legislated in any capacity regarding commerce, it closed the door on state commercial regulatory authority. Though not explicit, Wirt appears to deny dormancy; Congress had to act, however broadly, before the states relinquished their capacity to legislate on matters specifically granted to Congress. Wirt explained,

Congress has exercised this power [over commerce]; and among those terms there is no requisition that the vessels which are permitted to enter the ports of the several States shall be navigated wholly by white men...No state can interdict a vessel which is about to enter her ports in conformity with the laws of the United States, nor impose any restraint or embarrassment on such a vessel in consequence of her having entered in conformity with those laws, 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.²³

Once Congress had passed commercial laws, then any claims to concurrent power by the states evaporated. Since Congress made no mention of racial restrictions on foreign or interstate mariners, then it meant that no such regulations should be made. Along this reasoning, Wirt confidently proclaimed, “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

²² William Wirt, “Opinion of the Attorney General, May 8, 1824.” Reprinted in *House Report 80*, 27 Cong., 3 sess. (1843): 35-36.

²³ Wirt, “Opinion of the Attorney General,” 35.

void.”²⁴ However, Wirt never mentioned if the States retained power in instances where Congress had not exercised one of its enumerated powers.

Wirt obviously knew that *Gibbons* did not construe the Commerce and Supremacy Clauses in the same way that his official opinion did. What is likely is that Wirt anticipated litigation involving the Seamen Act to come before the Court, and he was quite sure that the Court would follow up *Gibbons* with another decision endorsing federal power. Wirt’s opinion, if adopted by the Court, would effectively allow a bypass of dormancy by embracing a very broad reading of the Supremacy Clause. Such a decision would diminish claims to concurrent power over commerce without treading into heretofore uncharted constitutional waters. In this way, Wirt was augmenting the position taken by Marshall. He, too, wanted to enhance the power of the federal government without provoking ire towards the Supreme Court. The most effective way to do this was to place the power in Congress. Since Congress had spoken – for Marshall it was the Federal Licensing Act, and for Wirt it was any commercial law – the Supreme Court had to honor the Supremacy Clause and invalidate contravening state laws, including South Carolina’s Seamen Law.

What Wirt avoided was the possibility the Seamen Act was not a commercial law at all, and therefore not in direct conflict with Congressional law. And the language of *Gibbons* appeared capable of supporting such a proposition. While impossible to determine precisely, Marshall may have chosen to dodge the Commerce Clause because of the Seamen Act controversy. One thing is for certain, in 1824, no one was exactly sure how the Supreme Court would rule if a test case made its way in front of Marshall. Adams, hearing about another incarcerated sailor and probably aware of Britain’s contemplation of pursuing a test case,

²⁴ Wirt, “Opinion of the Attorney General,” 36.

instructed the United States District Attorney in Charleston to file suit on an American sailor's behalf in hopes of allowing the Supreme Court to rule on the Seamen Acts' constitutionality. The District Attorney, himself a member of the South Carolina Association, could not follow Adams's instructions because the sailor in question had already been released and supposedly had left the state.²⁵ Another test case was not forthcoming; Adams was about to leave the State Department and assume the White House in a cloud of controversy. Once Adams left his post as Secretary of State, federal pressure to pursue a test case evaporated. The British Foreign Office also decided against initiating litigation. Despite the suggestion of at least one official, Great Britain remained committed to the less costly policy of diplomatic jousting with the State Department. Not until the 1850s would a federal courtroom hear another case involving a Seamen Act.

Though Wirt and Adams appeared optimistic that an appeal to the Supreme Court would occur and likely result in the end of the Seamen Acts, William Johnson, who was on circuit in the Carolinas for the summer of 1824, could see the handwriting on the wall and doubted seriously that such a case would ever make it that far. In a letter to Adams, Johnson expressed dismay at his inability to assist the multitude of black sailors that sat in jail in Charleston. "I am wholly destitute of the power," Johnson lamented, "of arresting those measures...[as both] the writs of habeas corpus and injunction I am precluded from using." Even if he could issue them, he was unsure that anyone would obey, "since the district attorney is himself a member of the Association." Because of the power of the Association, incarcerated sailors and their aggrieved captains could expect no assistance from local officials. "The only resource of the masters for having their men taken from them, or of the men, and the only mode of bringing the subject to

²⁵ Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848" *Journal of Southern History* 1 (February 1935): 10.

the Supreme Court, is by an action for damages.” And Johnson knew the incredible expense attached to such a suit. “But without friends, without funds, and without time, mariners cannot resort to suits at law.”²⁶

Johnson’s feeling of impotence was compounded by the utter unwillingness of the South Carolina courts to adjudicate against the Seamen Law. To highlight the state court’s position, Johnson mailed to Adams a newspaper clip that summarized a recent post-*Gibbons* decision. The case, *State of South Carolina v. Daley*, created quite a buzz around Charleston, and the newspaper summary reveals the trajectory of the Seamen Act debates in the wake of the ambiguous holding in *Gibbons*. Amos Daley, a Rhode Island native, was arrested a second time for entering the state illegally under the 1823 Seamen Act. In his defense, Daley’s attorney called three witnesses, two of whom were his captain and the first mate. Both claimed to know him and his family, and they swore that both of Daley’s parents were Narragansett Indians. The captain even declared that Daley was “entitled to all the rights and privileges of citizenship in Rhode Island.” To rebut, the State called two witnesses, Robert Turnbull and Alfred Huger, both of whom specifically recalled speaking with the captain who admitted to them he did not know Daley’s father.²⁷ Because Daley’s father’s racial essence was not definitely determined, the state sought to establish Daley’s African race through external markers. “Complexion,” one witness testified, “was not the test of genuine blood, but...hair was the characteristic universally relied on.” So, despite the fact that Daley was not darker than many Indians, his “woolly” hair was

²⁶ Johnson to Adams, 3 July 1824. Reprinted in *House Report 80*, 27 Cong., 3 sess. (1843): 14-15.

²⁷ Alan January, “The First Nullification: The Negro Seamen Act Controversy in South Carolina, 1822-1860 (PhD Dissertation, University of Iowa, 1976): 204. Turnbull authored the 1822 Seamen Act and co-wrote the Carolinensis essays in the *Charleston Mercury* after the *Elkison* decision. See Chapter 3 above. Alfred Huger would come to play a role in racial quarantines in 1835, when he served as Charleston postmaster during the Abolitionist Mail Campaign.

clearly evidence that he was of African descent and, therefore, in violation of the law.²⁸

Interestingly, the state never engaged the issue of Daley's Rhode Island citizenship. Once his race was established, his citizenship was immaterial.

Daley's two attorneys, probably unsure of the efficacy of their arguments concerning their client's racial classification, attacked the constitutionality of the Seamen Act. One argued that the Seamen Act violated the Constitution's "Privileges and Immunities Clause," as Daley was a citizen of the State of Rhode Island. The other attorney argued that the recent case of *Gibbons v. Ogden* meant that the Seamen Act violated the Constitution's Commerce Clause. The State, represented by Isaac.E. Holmes,²⁹ argued that Daley had not sufficiently proven that he was not of African descent, as the defense's witnesses had been refuted by prosecution testimony.³⁰ Holmes also argued that the resolution to the "Missouri question" had denied the use of the Privileges and Immunities Clause in cases dealing with racial minorities. If Missouri could prevent the immigration of black citizens, certainly South Carolina could restrict their entry as well. Of course, the Missouri Compromise did not warrant such conclusions, but in South Carolina's state courts, this interpretation held powerful sway. Moreover, Holmes explicitly denied that *Gibbons v. Ogden* had any direct bearing on the case before the court. Apparently, Holmes was referring to the quarantine exemptions that Marshall listed as legitimate exercises of

²⁸ *State of South Carolina v. Daley* was reprinted in *Charleston Mercury*, June 23, 1824. For general accounts on the legal construction of race in the litigation of racial identity, see Ariela Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108 (1998): 109-188; John Tehrenian, "Performing Whiteness: Naturalization Legislation and the Construction of Racial Identity in America," *Yale Law Journal* 109 (2000): 817-848.

²⁹ Holmes was the co-counsel with B.F. Hunt in *Elkison v. Deliesseline*. He was also the sitting Solicitor for the South Carolina Association and the other author of the Caroliniensis essays.

³⁰ Regarding questions of slave status, South Carolina law assumed all those with black skin to be slaves. So, like in the *Calder* case, the State was required to prove that the accused were, in fact, slaves. However, in terms of designating racial identity, no such onus was on the State. It was the individual's responsibility to prove his blood was free of African pollutants.

police power. Holmes admitted that *Gibbons* was somewhat ambiguous, and suggested to the court, “We should await the judgment of the Supreme Court in our own case before we yield.”³¹

The court agreed with Holmes, and Daley received thirteen lashes across his bare back.

The Daley case highlights the ambiguous interpretation of *Gibbons* as it applied to quarantine laws generally, and the Seamen Acts in particular. If the Seamen Law could be considered a quarantine measure, than its “incidental” effect on interstate and international commerce was constitutional according to Marshall’s decision. Though Webster’s argument and Johnson’s concurrence allowed for federal oversight of such state police laws, Marshall made no such pronouncement in *Gibbons*. The relationship between quarantine and commerce remained constitutionally amorphous.

But the lower courts in South Carolina were not the only government agency in the state that doubted the applicability of *Gibbons* in relation to the Seamen Act. In fact, in their winter session of 1824, six months after Daley failed to win his case, the State Senate passed resolutions explicitly reinforcing the State court’s position regarding the power to pass laws restricting the ingress of free blacks. “The Legislature of this State,” one resolution stated, “has carefully considered [the situation]...and can yet perceive no departure from the duties and rights of this state, or of the United States, in that law.” The final resolution was even more direct, and deserves to be quoted at length.

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 that part of her property which forms the colored population of the State, and which property they will not permit to be

³¹ *State v Daley* in *Charleston Mercury*, June 23, 1824.

meddle with or tampered with, or in any manner ordered, regulated, or controlled, by any other Power, foreign or domestic, than this Legislature.³²

In even more emphatic language, the South Carolina Legislature reiterated the decision in *Daley*. *Gibbons* left unanswered the interface between state police and federal commerce powers, and the State of South Carolina, by the authority of its Legislature and courts, believed its “quarantine” of black sailors remained beyond the purview of Congress and the Supreme Court.

Of course, even if the U.S. Supreme Court ruled the Seamen Act unconstitutional, South Carolina may have refused to rescind the law. This confrontation, however, was avoided by Marshall’s opinion in *Gibbons* and the recalcitrance of state officials in South Carolina. But, so long as Southern states framed laws against free black sailors in terms of quarantine, then federal officials would be hesitant to interfere, at least until the ambiguity between police powers and commerce regulation could be resolved. Officials like William Wirt and some British diplomats expected that resolution to come on the heels of *Gibbons* and result in the dismantling of the Seamen Act; those expectations would never be realized. The political and constitutional world of Jacksonian American would provide a resolution, but not the one Wirt anticipated.

The Seamen Act remained in force in South Carolina for the rest of the decade. Though no arrest records or official court documents remain that would give insight into the number of incarcerations and despite the fact that the correspondence of the British Foreign Office did not mention the Seamen Act from 1824-1830, abundant evidence supports the claim that enforcement continued unabated.³³ First, the South Carolina Association was still in full force,

³² These resolutions are reprinted in Enclosure 5 in Addington to G. Canning, 2 January 1825, *Correspondence*, 13-14.

³³ Another historian described enforcement during this period as “intermittent.” See Philip Hamer, “Great Britain, the United States, and the Negro Seamen Acts, 1822-1848,” *Journal of Southern History* 1:1 (1935): 12.

and their dedication to the Seamen Act did not subside.³⁴ Furthermore, the South Carolina Assembly amended the Seamen Act in 1825, apparently in response to suspected black sailors impersonating American Indians or Lascars to avoid prosecution. Supposedly, mariners would carry doctored papers proving their non-African heritage.³⁵ Furthermore, in 1826, the Charleston Chamber of Commerce sent a lengthy memorial to the state legislature asking for repeal of the law, as its continued enforcement would bring “an end to our trade with the British ports.” The Memorial was persuasive, as the House sent a bill amending the Seamen Act to the Senate, where it eventually stalled. The amended statute would have allowed black sailors to remain aboard their vessels, along the lines suggested by William Johnson in the *Elkison* case and more closely resembling an actual quarantine. Even the more conservative *Charleston Mercury* ran an editorial that lamented the Assembly’s failure to adjust the statute.³⁶ Renewed efforts in 1827, 1828, and 1830 all failed, each more drastically than last.

The most likely reason for the lapse in British diplomatic and consular correspondence concerning free black sailors was the rapid deterioration of trade between the United States and the British West Indies. New duties imposed by Parliament stifled shipping between the two areas, and only after 1830 when Parliament lifted the duties, did trade resume with frequency. British consular complaints about the Seamen also resumed in 1830, and when they did, they found a far less responsive federal government in place and a South Carolina Assembly dedicated to its Seamen Statute. It was the arrest of Daniel Fraser in Charleston in November

³⁴ In fact, the South Carolina Association sought a corporate charter from the state in 1828, and when the Assembly granted the charter, the Association became a private policing agency. See Alan January, “The South Carolina Association: An Agency for Race Control in Antebellum Charleston,” *The South Carolina Historical Magazine* 78:3 (1977): 198.

³⁵ See *Statutes of South Carolina Passed in December, 1825* (Columbia, S.C., 1826): 41-42.

³⁶ *Charleston Courier*, April 11, 1826; *Charleston Mercury*, December 25, 1826; Alan January, “The First Nullification: The Negro Seamen Act Controversy in South Carolina, 1822-1860 (PhD diss., University of Iowa, 1976): 229-232.

1830 that re-ignited British diplomatic efforts against the Seamen Act. His arrest was apparently unremarkable, and the most likely motivation for British intervention was the reopened trade routes between the British Caribbean and the United States. Accordingly, Fraser's predicament might foreshadow hundreds, maybe thousands, of British subjects entering Charleston, Savannah, and Wilmington.³⁷ The Foreign Office first chose to plead with local magistrates and law enforcement officials in Charleston, but to no avail.³⁸ Only after incessant attempts to secure general relaxation of the law from city and state officials, did the Foreign Office again contact the United States State Department.³⁹

It was at the behest of British diplomats that Secretary of State Martin Van Buren contacted Attorney General John Berrien concerning the constitutionality of the Seamen Acts, and from Berrien would come the official position of the federal government for the next decade, at least concerning the impact of *Gibbons* on the Seamen Act. Despite Van Buren's tongue-in-cheek assurance that Great Britain would soon be rid of the irritating laws, Berrien handed down an opinion that endorsed wholeheartedly the Seamen Acts. In his opinion, Berrien explicitly connected Marshall's imprecision in *Gibbons* with the Seamen Acts while undermining Van Buren's assurances to the British Foreign Office.

Berrien's opinion set out to resolve all of the inconsistencies regarding state quarantine laws, like the Seamen Acts, and federal powers over commercial regulation. In defending the Seamen Acts, Berrien looked to *Gibbons* to support his position. In contemplating where the

³⁷ By the time Fraser was arrested, Georgia and North Carolina had already passed their own seamen acts. See Chapter 5 below for a detailed explanation of the laws' emergence in those states.

³⁸ Even the South Carolina Attorney General admitted that the State law was going to remain on the books and operational. Despite his regret, and despite the supplications of some Charleston traders, the Attorney General indicated that the law "must run its course" as the Legislature specifically chose to leave the current Seamen Act in place without amendment. See Legaré to Sheriff of Charleston, undated, in *Correspondence*, 26-27.

³⁹ For a more thorough relation of the Fraser incident, see Hamer, "Great Britain," 14-15.

authority for commercial legislation resided, Berrien was confident that Congress was the supreme, if not exclusive, power. Berrien argued,

I am not unmindful of what was said by the court in the case of *Gibbons v. Ogden*, 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, as the court did in fact substantially affirm, that the acts of the Legislature of New York were laws affecting commerce, which conflicted in their operation with the laws of the United States, passed in the exercise of power given by the Constitution, “to regulate commerce with foreign nations, and between the several States.”⁴⁰

As Berrien noted, the New York law was a commerce law *prima facie*. However, the Seamen Acts were not commercial regulations *per se*. They emanated from a quite different area of constitutional authority.

I repeat the inquiry, then: Upon what principle is it that these laws of quarantine, emanating solely from the authority of the States, and operating directly upon the commerce of the Union, are allowed to have a constitutional validity and effect, which are denied to the act under consideration? Founded on the same reserved right – the right of the State to regulate its own internal police; and devoted to the same object – the personal security of the citizen.⁴¹

By identifying the Seamen Acts as a police measure, Berrien showed that the reasoning behind *Gibbons* was wholly inapplicable in determining their constitutionality.

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 the 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. The question, therefore, is still open to inquiry.⁴²

⁴⁰ John M. Berrien, “Opinion of the Attorney General, March 25, 1831,” reprinted in *House Report 80*, 27 Cong., 3 sess. (1843): 52-53.

⁴¹ Berrien, “Opinion of the Attorney General,” 56-57.

⁴² Berrien, “Opinion of the Attorney General,” 52-53.

So, for Berrien, the primary question, the question that was specifically avoided by the Court in *Gibbons*, was still to be answered. And to find that answer, Berrien looked to an unlikely place for guidance.

For Berrien, the commercial power of the federal government was constitutionally restricted from enacting measures that would conflict with properly-enacted State police laws, unless those commercial laws were absolutely “necessary and proper.”

If the power to regulate their own internal police be, as I think it is, clearly reserved to the respective States, laws passed by the General Government, in the exercise of the right to regulate commerce, cannot control the exercise of this reserved power of the States, except in so far as those laws may be both *necessary and proper* to the preservation of the commerce of the Union. The consequence is, as I apprehend, that the police laws of the several States must continue to operate within their respective limits, if they can so operate without prejudice to the efficient exercise of the commercial power; that the power of Congress itself, over the subject, is liable to this restriction; and that, subject to this limitation, the general terms of the a law or commercial regulation of the Federal Legislature must be so construed as to allow their operation.⁴³

Because the forceful admittance of free black sailors was not “necessary” for the commerce of the country, then Congress was obligated not to pass laws guaranteeing the entrance of such persons in contravention of State police laws. And the silence of Congress reinforced Berrien’s position; Congress never spoke explicitly about the use of nonwhite sailors. Thus Berrien intertwined the Seamen Acts and *Gibbons* to upend the *McCulloch* reading of “necessary and proper” in those instances where federal regulatory powers over commerce interacted with the sovereign powers of state governments. Unlike *McCulloch*, where Marshall saw “necessary and proper” as a sweeping grant of federal authority, Berrien, like Spencer Roane and John Taylor of Caroline before him,⁴⁴ saw that clause as an inhibition on federal action. In

⁴³ Berrien, “Opinion of the Attorney General,” 52-53. Emphasis in original.

⁴⁴ John Taylor, *Construction Construed and Constitutions Vindicated* (Richmond, 1820); Spencer Roane, “Hampden Essays,” reprinted in Gerald Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland* (Palo Alto, Ca., 1969).

enacting laws, Congress could not contravene properly-passed state laws unless the federal law was absolutely necessary for the preservation of the enumerated power. And even then, there had to be an obvious conflict between the State law and Federal law – as there was, supposedly, in *Gibbons* – before the State law could be struck down. In identifying police powers and locating them under the protection of the Tenth Amendment, Berrien foreshadowed the judicial recognition of police powers in *New York v. Miln*.⁴⁵ Furthermore, Berrien’s opinion, unofficially adopted by the Jacksonians for the next two decades, slammed closed any attempt to dismantle the Seamen Acts based on the Commerce Clause in the Constitution. The arrest of Daniel Fraser, a black British sailor, precipitated the first official pronouncement of state police powers by a member of the Jackson Cabinet.

But at the very moment when Berrien removed the Commerce Clause from the list of potential weapons against the Seamen Acts, the question of citizenship resurfaced with a vengeance. Though the issue of African-American citizenship remained on the periphery, the question of Afro-British subjecthood was being broached daily by a host of imperial and Parliamentary officers. When reforms swept through the British Empire in the early 1830s, they carried with them a new threat to the Seamen Laws. British Toleration Laws undermined one of the soundest theoretical justifications for racial quarantines. No longer could South Carolinians point to the legal handicaps of a West Indian sailor in his home islands as proof of his lack of subjecthood. Britain, in its sovereign capacity, had bestowed full subjecthood rights on many of its “free coloureds.” Now Jamaican mulattos like Henry Elkison could rightfully claim the protection of the Union Jack as “bona fide subjects.” But within the same group of liberal reforms came the legal abolition of British slavery. With Emancipation, the “moral contagion of

⁴⁵ 36 102 (1837).

liberty” would be running rampant in the British West Indies, and South Carolina would be even more certain of the necessity of racial quarantining. Put another way, by extending full subjecthood rights to colonial “free coloureds” and dismantling slavery in the same breath, the British government proved the efficacy of the Seamen Act while simultaneously forcing the law’s defenders to invent a new theory of subjecthood to deny the claims of Afro-Britons.

CHAPTER 5
THE EXPANDING SEAMEN ACTS: DAVID WALKER, BRITISH POLITICS, AND THE
JACKSON ADMINISTRATION

Until 1829, South Carolina maintained the only Seamen Act in the United States. Though other states like Georgia and Mississippi defended South Carolina's right to preclude the entry of any colored person, no other state made it part of their own racial policy. The statutory reaction to the Vesey Conspiracy remained confined to South Carolina's borders, but the fear of the dangerous Atlantic was spreading. When authorities in Georgia and North Carolina discovered clandestine shipments of *Walker's Appeal*, a radical abolitionist pamphlet, both states enacted seamen restrictions of their own in 1829 and 1830, respectively.¹ Frustrated sailors and captains would find little solace in the federal government. The expansion of the Seamen Acts coincided with the ascension of the Jacksonian Democrats, and as noted in the previous chapter, part of the Democratic Party's dramatic shift away from the nationalizing tendencies of their predecessors was John Berrien's Attorney General Opinion on the South Carolina Seamen Act. Berrien, in the face the previous Attorney General, William Wirt, assured President Jackson and Southern lawmakers that the Seamen Laws were beyond the reach of the federal government's authority. In a bold articulation of state police power, Berrien believed the Tenth Amendment limited the Commerce Clause; the federal government could not force the admittance of dangerous or sick people into the individual states.² By 1830, with the expansion of the Seamen Acts and the acquiescence (or even outright approval) of the Jacksonians in Washington, the British government read the handwriting on the wall and withdrew their formal complaints against the racial quarantines. By conceding in 1830, British metropolitan authorities implied that black

¹ *Acts...of the State of Georgia...1829*, 168-171; *Acts...of the State of North Carolina...1830-1*, 29-31.

² John M. Berrien, "Opinion of the Attorney General," March 25, 1831, reprinted in *House Report 80*, 27 Cong., 3 sess. (1843): 49-58.

Britons were not subjects and acknowledged that black skin could be as legitimate a public nuisance as cholera or yellow fever.

How quickly things changed in two years. British colonial politics in the early 1830s betrayed the Board of Trade's concession to the Seamen Acts in 1830. The Toleration Laws, which granted some people of color in the Empire the full panoply of subject rights, contradicted the implications of diplomatic retreat. The British Colonial Office commenced a series of liberal reforms that marginalized race in defining subjecthood in the Empire only a year after the Board of Trade admitted that the United States had no obligation to recognize the rights of black sailors. To make matters more complex, the British government also streamlined trade between the United States and the British West Indies, inching ever closer to free trade. One unforeseen consequence of these reopened trade routes was a marked increase in the number of British Caribbean vessels entering U.S. port cities. Subsequently, the British Foreign Office again fielded a score of complaints from Consuls acting on behalf of an ever-increasing number of incarcerated mariners. The British metropolitan authorities had to reconcile their seemingly contradictory policies. In other words, how much teeth did the Toleration Laws have in Anglo-American diplomacy? Would the Foreign Office follow the lead of the Colonial Office and liberalize their definition of subject and demand recognition by the United States? And if the British Government altered their position vis-à-vis the Seamen Acts and began demanding the recognition of its black subjects, would the United States be responsive?

When the Foreign Office decided to renew their protests on behalf of their "new" black subjects, they put the Jackson Administration into a bit of a bind. The domestic political scene in the United States had altered the Seamen Acts' dynamics. The recently penned opinion from John Berrien – the one that celebrated state police power as a potent and effective

countermeasure to overbearing federal encroachments – seemed far less attractive to the Democrats in Washington in 1832 than in 1830. Under the leadership of fallen Vice President, John C. Calhoun, the South Carolina government debated Nullification of the federal tariff. And even though Berrien’s opinion in no way justified Nullification, it did project a potent defense of state sovereignty which Nullifiers would find appealing. Furthermore, Berrien’s recent resignation – a result of the Eaton Affair, Berrien’s close connection to the Bank of the United States, and fear of his connection to Calhoun – motivated Jackson and his new Cabinet to review his opinion on the Seamen Acts. This task fell on the new Attorney General, Roger B. Taney, and his opinion on the rights of black sailors articulated a new notion in the evolution of citizenship in modern republics and foreshadowed the most nefarious Supreme Court decision in the U.S. history.

This chapter follows the course of the Seamen Acts controversy from its expansion into Georgia and South Carolina to Taney’s unpublished opinion in 1832. It will illustrate how *Walker’s Appeal* inspired among white Georgians and North Carolinians the same perceptions of the dangerous Atlantic that proliferated in the aftermath of the Vesey Conspiracy in South Carolina. It will then show how the British government, in the context of the Emancipation Bill and Toleration Laws, pursued an aggressive attack on the Seamen Acts in the name of its black British subjects. The chapter then concludes with a detailed analysis of Taney’s opinion, written just as South Carolina threatened Nullification and with Great Britain clamoring for Afro-British subjecthood.

As we have seen, the fear of slave insurrection proved to be the most direct cause for the first set of laws that restricted the movement of free black sailors. The Vesey revolt convinced many white Charlestonians that free black sailors were contaminated with a “moral contagion”

of liberty, an affliction that could very easily spread to South Carolina plantations with disastrous effects. To prevent such an epidemic, the South Carolina legislature enacted a law that prevented “infected” black sailors from entering the state, setting off intense diplomatic and constitutional debates.

Considering the protection of quarantine seemingly created by the *Gibbons* decision, it should not be surprising that when Georgia and North Carolina passed their Seamen Acts in 1829 and 1830, respectively, they framed them explicitly in quarantine terms.³ In these two states, the laws arose as responses to fears of slave insurrection, much like their South Carolina predecessor. The primary catalyst for these laws was not news of an overt conspiracy, however, but rather the discovery of a shipment of an incendiary, abolitionist pamphlet in the ports of Savannah and Wilmington. The pamphlet, commonly referred to as *Walker’s Appeal*, created the same frenzied state in these two port cities as Vesey’s rebellion incited in Charleston years earlier. The content as well as the distribution of the pamphlet instigated a violent backlash against free blacks generally and against black sailors in particular.

The author of the *Appeal*, David Walker, was a free black born in North Carolina in the 1780s. After traveling throughout the country, Walker settled in Boston, where he began a clothing business in the mid 1820s. In 1827, he became an agent for the first African-American newspaper, *Freedom’s Journal*. Walker occasionally addressed congregations in Boston, usually focusing on the need for black unity in the fight against slavery. In 1829, Walker put into print

³ The correlation between limiting the ingress of free black sailors and preventing the circulation of *Walker’s Appeal* is obvious. Both sets of laws sought to limit the introduction and circulation of dangerous ideas. One set to limit the movement of bodies – and thereby the speech emanating from those bodies – but only as a means to prevent incendiary ideas. The other attempted to limit publications, or the press, but again, only to contain hazardous ideas. In a sense, the laws against *Walker’s Appeal*, and later restrictions against antislavery publications using the federal postal service, and the seamen laws were early forms of censorship. In this way, community standards were paramount in determining what was determined dangerous or inappropriate.

the ideas he had been espousing to local groups.⁴ *Walker's Appeal* was the result; it was a scathing rebuke of slavery, the complacency of free blacks in the United States, and detestable colonization schemes. In forceful language, Walker demanded an immediate end to slavery, even if that end had to come from bloody revolution. So corrupted was the system of slavery, so degraded was the slave in the United States, that slaveowners deserved violent retribution if the peculiar institution was not obliterated immediately. Colonization was not a viable option for Walker; African-American blood and sweat had created the wealth of the United States, and the degraded race deserved the fruits of its labor.

For current purposes, the most vital aspect of *Walker's Appeal* concerns his primary audience. More than anyone else, Walker was addressing fellow free blacks. "Men of colour, who are also of sense," Walker pleaded, "for you particularly is my appeal designed. I call upon you therefore to cast your eyes upon the wretchedness of your brethren and to do your utmost to enlighten them." But for Walker, enlightenment was not just intellectual advancement, but rather a realization of the injustice of the slave system. "I advance it therefore to you," Walker pled with free blacks unmoved by Southern slavery, "that your full glory and happiness, as well as all other colored people under heaven, shall never be fully consummated, but with the *entire emancipation of your enslaved brethren all over the world.*" Walker's message was clear; free blacks had only two options in front of them. "You may therefore, go to work and do what you can to rescue, or join with tyrants to oppress them and yourselves, until the Lord shall come upon you like a thief in the night." As for white defenders of slavery – those "natural enemies" who

⁴ William Loren Katz, Introduction to Reprint (New York, 1969), *Walker's Appeal in Four Articles & An Address to the Slaves of the United States of America* (New York: J.H. Tobitt, 1848): i-iii.

stood in the way of such enlightenment – Walker averred, “My colour will yet, root some of you out of the very face of the earth!!!!!!”⁵

For white Southerners, *Walker’s Appeal* proved beyond doubt that free blacks sought nothing less than the immediate and complete destruction of Southern slavery. The dangerous pamphlet confirmed the assumptions that Charlestonians made in the wake of Denmark Vesey. Free blacks were more than a nuisance; they were conniving subversives. One no longer had to conjecture about the motives of free blacks; Walker had given voice to those motives, and they were sinister. Northern free blacks were being instructed to spread ideas of liberty and freedom to their Southern brethren, both free and enslaved. Of course, had Southern slaveowners looked at the pamphlet from a more detached position, they might have understood that *Walker’s Appeal* actually proved that all free blacks were not infected. Otherwise, why was Walker so irritated with their collective apathy towards slavery? Nonetheless, when shipments of *Walker’s Appeal* were found in Southern port cities, it established in the white Southern mind the effectiveness of Walker’s message. Northern free blacks had heeded the call and were attempting to realize Walker’s demands. Walker’s “enlightenment” was underway, and the discovery of his publication in Southern cities meant that his message was inspiring action.

In less than two months after its initial publication, shipments of *Walker’s Appeal* were heading southward. In December, 1829, the Savannah police uncovered a clandestine shipment of the notorious pamphlet. Apparently, a white steward aboard a ship from Boston was caught transferring the cargo to a local black minister. The shipment was seized; copies of the *Appeal* were forwarded to the Savannah Mayor and state authorities.⁶ When questioned about the

⁵ David Walker, *Walker’s Appeal*, in *ibid*, 40-42, 83. Emphasis in original.

⁶ There may be some disagreement in the historiography about the identity of the person who was initially in possession of the shipment of pamphlets. Compare Hasan Crocket, “The Incendiary Pamphlet: David Walker’s

contents of his delivery, the steward claimed naivety, and, lacking any other evidence, the Savannah authorities released him. The Mayor of Savannah, William Williams, immediately wrote to the Mayor of Boston, Harrison Otis, demanding the arrest of David Walker. Otis appeared sympathetic; he sent one of his agents to speak to Walker about the distribution of his writing. The informal pressure was unsuccessful, and Walker assured Otis's representative that his shipments Southward would continue despite the threats of the Savannah authorities. Unable to reason with Walker, Otis turned his attention to the captains and crews on board of Southern-bound ships, warning them of the consequences of importing the pamphlet. As for arresting Walker, however, Otis refused. As he informed Mayor Williams in his return letter, Walker had not broken any law of the State of Massachusetts, so he could not be legally restrained.⁷

When Georgia Governor George Gilmer received a copy of the pamphlet as well as a warning from Mayor Williams, he decided to convene a special session of the state legislature and provided it with copies of the *Appeal*. Governor Gilmer thought the Assembly should “prohibit the entry into Georgia harbors any of the ships with Negro crewmen” as well as limit the number of slaves entering the state from Virginia and Maryland.⁸ Apparently, these individuals would be most likely to distribute the pamphlet or the incendiary rhetoric contained therein despite the fact that a white sailor was the first distributor. The legislature responded to

Appeal in Georgia,” *The Journal of Negro History* 86 (Summer 2001): 305-318 with Clement Eaton, “A Dangerous Pamphlet in the Old South,” *Journal of Southern History* 3 (August 1936): 326. Both admit that a white steward introduced the contraband, but Eaton speaks of a slave who came into possession while Crockett identifies a free black minister. In any event, the first shipment was smuggled by a white deckhand, but the Georgia legislature and Governor Gilmer thought the best protection against further shipments would be the quarantining of black seamen.

⁷ For a general overview of the reaction of Georgians to the arrival of *Walker's Appeal*, see Hasan Crockett, “Incendiary Pamphlet”; Cary Howard, “The Georgia Reaction to David Walker's Appeal,” (Master's Thesis, University of Georgia, 1967).

⁸ Quote taken from Crockett, “The Incendiary Pamphlet,” 310. Of course, the irony to this entire Georgia Negro Seamen Act is that it was a white sailor who first brought *Walker's Appeal* to Savannah, though no Georgians appeared cognizant of the paradox.

the recommendation, placing a quarantine of forty days on ships carrying free black sailors into the state. Free blacks could remain on board their respective ships, so long as no communication with domestic slaves or free blacks occurred. If free blacks broke quarantine and came ashore, or if a person of color boarded a quarantined vessel, then the offending person of color would be arrested and whipped. Sailors found on shore would be arrested until their ship left harbor, with the captain being responsible for the costs of incarceration. If the captain refused to pay the costs, he could face criminal charges, and the poor sailor faced the whip, up to thirty-nine lashes. Exceptions were made for vessels of war, steam vessels, and shipwreck. The law was also very specific about which types of colored sailors fell into the quarantine category; the law exempted “free American Indians, free Moors, Lascars, or other coloured subjects of the countries beyond the Cape of Good Hope...but such persons only shall be deemed and adjudged to be persons of colour, within the meaning of this Act, as shall be descended from negroes or mulattoes, either on the father’s or mother’s side.” Thus, Atlantic blacks were to be the specific focus of the quarantine. As for slaves from the Upper South, the state legislature made no restrictions. In terms of sailors of color, sojourning slaves possessed greater freedom of movement in Savannah than their free counterparts.⁹

In 1823, when South Carolina first started arresting sailors, merchants and captains from Massachusetts immediately objected. However, the Georgia law faced far less criticism, at least initially. An editor of a Boston newspaper defended the new law. “This act...appears necessary

⁹ While the vast majority of the law dealt with black seamen, the final two sections that do not deal with them have received the most attention from scholars. These sections forbade persons from teaching anyone of African descent how to read or write, with a fine or corporal punishment being inflicted against the perpetrator. The final part of the new statute imposed death on the distributors of written material “exciting to insurrection, conspiracy, or resistance among the slaves, negroes, or free persons of colour.” *Acts of the General Assembly of the State of Georgia...1829*: 168-171. Why the legislature exempted steam vessels is unknown. In 1837, however, Nicholas Trist, the U.S. Consul in Havana argued that black sailors were “peculiarly suited” to work aboard steam vessels, as they could better withstand the intense heat. Perhaps this explains the steamship exemption. See Chapter 7 below.

to the immediate safety of the whites.” Apparently, *Walker’s Appeal* made the difference. Speaking of the pamphlet, the editor opined, “Its character is entirely mischievous, without one redeeming quality, and we should judge from the drift that the writer, whatever may be his exterior complexion, bears a heart...dark and cruel.”¹⁰ In protecting themselves from the insidious influence of *Walker’s Appeal*, Georgians had every right to prevent its introduction into the state, even if that required the quarantine of a class of persons most likely to smuggle the contraband. The call to violence posed a direct threat to the safety and welfare of Savannah.¹¹ Even the most radical white abolitionist groups decried the ideas Walker espoused. Quaker writer and lecturer Benjamin Lundy, who edited *The Genius of Universal Emancipation*, condemned the pamphlet, and William Lloyd Garrison found the distribution of the *Appeal* as a setback for the antislavery cause. While both authors applauded Walker for highlighting the plight of Southern slaves, they refuted his call to arms.¹² Of course, the fact that sailors were not placed in jail may also explain the less vitriolic responses to Georgia’s Seamen Statute. Unlike South Carolina, Georgia actually implemented a true quarantine.

Both Governor Gilmer and Mayor Williams wrote letters to U.S. Senator John Forsyth about the role the federal government should play in the Walker ordeal. Forsyth, former Georgia governor, and future Secretary of State under Martin Van Buren, received conflicting instructions; Mayor Williams suggested that Forsyth introduce to Congress, “some means for

¹⁰ *Columbian Centinel* (Boston): January 16, 1830. Quoted in Eaton, “A Dangerous Pamphlet in the Old South,” 328. Apparently, *Walker’s Appeal* precipitated a ‘clear and present danger’ to the Savannah community.

¹¹ Garrison, though against the violence espoused by Walker, reprinted his *Appeal* in April and May, and helped to nationalize the issue. See *Liberator*, April 30, 1831; May 14, 1831; May 28, 1831. In response, the “Vigilance Association of Columbia” in South Carolina offered rewards for information leading to the arrest of anyone distributing the *Liberator* or *Walker’s Appeal*. See *Niles Weekly Register*, October 29, 1831.

¹² William Loren Katz, Introduction to reprint of *Walker’s Appeal in Four Articles & An Address to the Slaves of the United States of America* ((New York, 1969): ii.

counteracting the effects of [Walker].”¹³ For Williams, Walker’s threat demanded Congressional intervention, most likely since the Massachusetts authorities were unwilling to apprehend Walker and close down his operations.¹⁴ Governor Gilmer disagreed; he refused to introduce to the state legislature a resolution that would compel Forsyth to act in the federal Senate. In defending his position, Gilmer did not concede that the threat posed by *Walker’s Appeal* was exaggerated. The threat was real, but “no other authority [besides the state] can or ought to be permitted to legislate upon that subject. The power of the state is competent.” For Gilmer, Congressional interference must be avoided at all costs. Give it an inch, and Congress might take a yard. “The exercise of any authority in relation to our slaves though its pretense may be to secure us from danger of insurrection might eventually lead to the assumption of legislative control over the whole subject.” To hammer home his point, Gilmer concluded, “Any interference with our slaves by the U.S. Government would endanger our rights...more than we can suffer from individual incendiaries.”¹⁵ For Gilmer and many other Georgians, a cure from Congress would be worse than the illness created by the *Appeal*.

Gilmer’s strong desire to leave Congress out of the race-policy business in his state may have been motivated by the ongoing saga between Georgia and the Cherokee Nation. Gilmer and the rest of the Georgia state government refused to participate in the case *Cherokee Nation v. Georgia*, when members of the tribe objected to state interference in their tribal lands and internal operations. In the subsequent case, *Worcester v. Georgia*, Gilmer and other Georgia officials refused to abide by the dictates of the United States Supreme Court regarding the power

¹³ See Williams to Gilmer, March 5, 1830, *Governor Letters Book*, Georgia State Archives, Atlanta, Georgia; Crocket, “Incendiary Pamphlet,” 312.

¹⁴ Apparently, when one group of Georgians heard that Boston officials were not going to arrest Walker, they initiated a hunger strike and put a bounty on his head. See Crocket, “Incendiary Pamphlet,” 313

¹⁵ Gilmer to Forsyth, March 12, 1830 in Crocket, “Incendiary Pamphlet,” 312-3.

of Georgia law in Cherokee territory.¹⁶ For Gilmer and his compatriots, racial policy was beyond the purview of the federal government and any intrusion by federal officials had no bearing on state officers. If the ideological link between the Cherokee drama and the new race quarantine were not enough, Samuel Worcester, the missionary to the Cherokees whose arrest initiated the Supreme Court case, was found to have copies of *Walker's Appeal* when he was arrested. Evicting the Cherokees and quarantining free blacks were two facets of one overarching racial policy, and the Georgia state government was to be the sole architect of that policy.¹⁷

The British Government eventually conceded the right if not the efficacy of Georgia to protect itself from the ideas in *Walker's Appeal*, though many underlings in consular positions objected. The British Consul in Savannah was quick to alert his superiors regarding Georgia's Seamen Act following its enactment, doubting the law to be a "legitimate exercise" of quarantine. Upon reading the letter from Savannah, British officials in Washington also believed that the Georgia law was in direct violation of commercial treaties between Britain and the United States, thus mimicking the position initially staked out in 1823.¹⁸ Seeking affirmation of its position – the same position taken during the foray over the first Seamen Act in South Carolina almost a decade earlier – the Foreign Office sought the legal opinion of the Board of Trade.¹⁹ In his response to the first objection regarding quarantine, the Solicitor for the Board indicated that the Georgia law, though an "absurd" application of quarantine, did not break any

¹⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); Eaton, "Dangerous Pamphlet," 328. For a recent analysis of the two Cherokee cases, see Gerald Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (Lawrence, Kan., 2007): chapter 3.

¹⁸ See Molyneux to Backhouse, January 13, 1830, *Correspondence*, 17-19.

¹⁹ Lord Dunglas to Clerk of Council in Waiting, February 20, 1830, *Correspondence*, 20.

“general rule of the law of nations.” The Solicitor continued, “If such be the internal condition of Georgia that the security of the Government requires, or is supposed by the Legislature to require, such a restriction as the present, it cannot be regarded as indicating a hostile mind towards foreign nations.” Because Georgia believed itself to be in “extreme jeopardy,” it could pass whatever measures to “avert a supposed danger,” and Great Britain had “no right to dictate on such subjects to an independent State.” As for the second issue, concerning Georgia’s Seamen Act being an encroachment on existing treaties, the Solicitor indicated that the 1815 Commercial Convention between the United States and Britain “was subject always to the laws and statutes of the two countries respectively.” Since the Georgia law applied to all Atlantic free blacks, and not those specifically from Great Britain, then the treaty was impotent to attack Georgia’s Seamen Act.²⁰ Unlike its fellow Tory predecessor, the Wellington Ministry (1827-1830) appeared content to let the law remain in force.

Parliament, too, acquiesced to Georgia’s law and found no grounds, save diplomatic posturing, to end its enforcement. Legal redress would not be forthcoming, and Britain had conceded that the Seamen Laws, though detestable, were not in contravention of international law or existing treaties. South Carolina’s persistence, in spite of British diplomatic efforts and a federal court ruling, motivated copycat legislation in other states and succeeded in convincing the British government that its own black subjects were not protected by a treaty that specifically protected all British subjects. Unless something changed in the commercial treaties between the

²⁰ See Stephen to Lack, 16 March 1830, *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Series 5, Volume 579, Foreign Office Papers, Public Records Office, London (hereafter referred to as *Correspondence*);20-22. The position of the Board of Trade in 1830 resembles closely some of the initial arguments put forth by B.F. Hunt in the *Elkison* case. See *The Argument of Benj. Faneuil Hunt, in the case of the arrest of the Person claiming to be a British Seaman, under the 3d section of the State Act of Dec. 1822, in relation to Negroes, &c before the Hon. Judge Johnson, Circuit Judge of the United States, for 6th Circuit* (1823), in Paul Finkelman, ed., *Slavery, Race, and the American Legal System, 1700-1872*, Series VI, Volume 2 (New York, 1988): 2-3.

nations, or until the federal government intervened decisively, free black British sailors were at the mercy of Southern law enforcement officials, according to the Board of Trade in 1830.

However, this official position of the British government did not prevent some British consuls in the United States from actively lobbying state and local authorities. Eager to remain in the good graces of the British merchants and traders under their care, some energetic consuls chose to intervene nonetheless. One such consul was Charles Peshall, the British agent in Wilmington, North Carolina. Perhaps in defiance, perhaps in ignorance, Peshall pursued diplomatic avenues and sought judicial relief for his countrymen laboring under the North Carolina law, both of which contravened the express wishes of the Board of Trade.

Unlike its predecessors in South Carolina and Georgia, and its successors in Alabama, Mississippi, Florida, and Louisiana, the North Carolina Seamen Act met a quick death. In less than one year, the state judiciary ruled the law unconstitutional, and the General Assembly subsequently rescinded the law. Federal pressure was almost nonexistent; in fact, John Berrien had just penned his opinion defending the South Carolina Seamen Act. Consul Peshall's diplomatic efforts tended to irritate local officials rather than convince them of altering their course of action. Why, then, did North Carolina buck the trend?²¹

²¹ One historian claims that the large number of free blacks in North Carolina obviated the need for laws against free black sailors. As this argument goes, state officials in the Upper South, North Carolina included, were no more fearful of free blacks from other jurisdictions as they were of free blacks already inhabiting the state. See Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (New York, 1974): 215-6. Berlin bases his explanation on the analysis of John Hope Franklin, *The Free Negro in North Carolina, 1790-1860* (Chapel Hill, N.C., 1943). While this sentiment may be true in a general sense, it ignores specific pieces of evidence. First, if this sentiment was true, why did the state ever pass a Seamen Act in the first place? Second, the state court that ruled against the racial quarantine did not in any way discourage the legislature from barring the ingress of free black sailors. Rather, the logic of the decision seemed to criticize the state quarantine law for not doing enough. Third, this explanation ignores the fact that although no state laws against black sailors were passed in North Carolina following the 1831 rescission, municipal codes were enacted in Wilmington that basically reinstated the Seamen Law and forced black sailors entering the port back into jail. For the reemergence of racial quarantining in Wilmington, see *Correspondence*, 93-98.

Ironically, the unique story of the North Carolina Seamen Act begins in the same way as its predecessors in South Carolina and Georgia. In fact, the exact same catalyst instigating the Georgia law resulted in the one put in force in North Carolina in 1830. In the months following the discovery of *Walker's Appeal* in Savannah, officials uncovered various copies of the detestable publication in North Carolina, in Fayetteville, Wilmington, and New Bern. Reports flooded into Governor John Owen's office regarding the circulation of the *Appeal* and the very real threat of slave conspiracies. When rumors of rebellion surfaced in Wilmington in the fall of 1830, Owen responded by sending a message to the state legislature with a copy of the *Appeal* attached.²² Owen had been convinced that free blacks were being recruited by rabble-rousing abolitionists and sent into the state to distribute incendiary literature and incite rebellion.

In a secret session, the state legislature contemplated the Governor's message as well as the impact of *Walker's Appeal*. In response, it outlawed the circulation of seditious pamphlets and criminalized the teaching of slaves and free blacks to read or write.²³ As it discussed these reactionary measures, the legislature also adopted a revised quarantine statute.²⁴ This law mandated ships entering the state from any other state or nation to ride quarantine for thirty days if they employed any free person of color, American Indians exempted. No domestic person of color, free or enslaved, was permitted to contact the sailors riding quarantine. Any infraction of quarantine, either by the sailors coming ashore or domestic blacks going aboard, would result in imprisonment, and under certain conditions, corporal punishment. Captains of such vessels were

²² On the threat of rebellion in Wilmington, see *Trumpet and Universalist Magazine*, September 4, 1830, 39.

²³ Eaton, "Dangerous Pamphlet," 330-332.

²⁴ See *Journals of the Senate and House of Commons of the General Assembly of the State of North Carolina* (Raleigh, N.C., 1831): 94.

obliged to pay detention fees and guarantee exodus for their sailors who broke quarantine and were committed to jail. Once again, the statute made no mention of seafaring slaves.²⁵

When the British schooner *Bahamian* was about to enter Wilmington, the Collector of the Port informed the captain of the new quarantine since he employed two free persons of color. The captain, however, on the advice of Consul Peshall, brought his ship into port, breaking quarantine. Peshall had taken the two men ashore, in direct violation of the law, and considered them to be under his personal protection.²⁶ According to Peshall, the law was “universally admitted to be unconstitutional by the well-informed,” and he was hoping to prevent the men’s incarceration, worried that their arrests might still be upheld by local courts. Authorities arrested the men over Peshall’s objections, and despite his belief that the arrests would be maintained in court, Peshall filed suit for the costs of incarceration. Peshall immediately contacted his supervisors in Washington, imploring them to push the federal government into action and to remunerate him for the costs of the impending lawsuit. Peshall was apparently prepared to take the case to the U.S. Supreme Court.²⁷ What Peshall must not have known was that the Board of Trade had recently instructed the Foreign Office to desist in bringing the Seamen Acts before the courts, convinced that judicial relief was impossible. So, when Peshall requested reimbursement,

²⁵ *Acts passed by the General Assembly of the State of North Carolina, 1830-31* (Raleigh, 1831): 28-32. New Orleans officials also discovered a shipment of the *Appeal* in early 1830, and the state legislature responded by preventing the introduction of all new free persons of color, *sailors excepted*, and evicting all free persons of color who entered the state after 1825. See *African Repository and Colonial Journal*, 6 (March, 1830): 29; *Statutes of Louisiana...1830*, 90-94.

²⁶ See James Owen to Thomas Devereux, December 7, 1831 in *Miscellaneous Letters of the Department of State, 1789-1906*, Records of the Department of State (RG 59, M179), National Archives, College Park, Md..

²⁷ C.J. Peshall to Consul-General St. John Baker, October, 11, 1831 in *Correspondence*, 31-2; C.J. Peshall to Charles Bankhead, 31 October 1831 in *Correspondence*, 31.

the Consul-General's Office in Washington flatly refused. To add insult to injury, Peshall also received a tongue-lashing for his direct violation of North Carolina law.²⁸

Per the new policy, the Consul-General's office contacted Jackson's Secretary of State Edward Livingston in hopes of securing the same kind of pledge that Secretary Adams had given seven years earlier. Livingston was not nearly as cooperative; apathetically, he simply stated that he would look into the matter.²⁹ After refusing Peshall's requests and being brushed aside by the State Department, the Consul-General's Office could do very little, and considered contacting London for further instructions. After all, the Whigs had recently swept the 1830 elections, the new Prime Minister, Earl Grey, and the new Foreign Secretary, Lord Palmerston, were both reform-minded. In the midst of preparing a letter to inform the new Ministry of the uncooperative position taken by the Jackson Administration, officials in the Consul-General's office received some interesting news from Consul Peshall in Wilmington. The British captain had won his case, and, moreover, the quarantine law was overturned by the North Carolina Superior Court! The decision was handed down the day after Peshall received word from Washington that the litigation he commenced on behalf of the incarcerated sailors from the *Bahamian* would not be refunded by the Consul-General. As soon as the Board of Trade abandoned litigation as a vehicle for relief, a British sailor won his suit. Peshall certainly felt vindicated, but he was aware, as were his superiors in Washington, that the decision was only a pyrrhic victory. The ruling was hardly a reason for celebration for British officials.

The jury trial of the *Bahamian* captain came before Judge Robert Strange, a Jacksonian Democrat who would later serve his state in the U.S. Senate. After the jury heard the testimony

²⁸ John McTavish to C.J. Peshall, November 4, 1831 in *Correspondence*, 35; Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848," *The Journal of Southern History* 1 (February 1935): 17-18.

²⁹ Livingston to Bankhead, November 8, 1831, in *Correspondence*, 33.

and evidence, they received their instructions from Strange. The judge began his charge to the jury by reiterating propositions laid down by John Marshall in the famous *Gibbons v. Ogden*³⁰ case. Strange, like Marshall, suggested that Congress maintained exclusive authority over interstate and international commerce. Also like Marshall, Strange explained that quarantine was a police power – a power of self-preservation – and not a commercial power. As such, quarantine was reserved to the states under the Tenth Amendment and not relinquished to the federal government. Despite the fact that quarantine inhibited commerce, it did so incidentally. Quarantine regulations, like inspection laws, emanated from the power of the state to protect its citizens, not from any ability to regulate commerce. As for determining the object of quarantine, the state was to be the sole authority. Whether it was “to prevent the introduction within her limits of febrile or pestiferous contagion” or “to legislate to prevent the influence of a moral contagion,” the governments of the states were to decide precisely what posed a danger to its citizens.³¹

For Strange, Marshall’s premises led to an obvious conclusion; the individual states had the constitutional power to restrict the entry of free black sailors if the state legislature determined that they posed a threat to the safety of the states’ citizens. But it was upon this very conclusion that Strange struck down the North Carolina Seamen Act. The judge’s qualm was not over the power of the legislature, but about the particular exercise of that power. The legislature determined that free blacks were infected with a hazardous ideology. So, asked Strange, why does the law allow free black sailors infected with a moral contagion to enter the state after riding quarantine for thirty days? One month of quarantine was not going to cure the ailment.

³⁰ 22 U.S. 1 (1824).

³¹ This quote of Judge Strange taken from an enclosure entitled, “Judge Strange’s Charge,” found in a letter from John McTavish to Viscount Palmerston, November 23, 1831 in *Correspondence*, 36.

Therefore, Strange surmised that the result of the law was contrary to its stated aims. Free black sailors, “a nuisance to society,” would have free reign in any port city after waiting the mandatory thirty days. The quarantine law only delayed the introduction of infected sailors; it did not prevent it wholesale. As such, the North Carolina legislature would have earned Strange’s consent had it created a harsher Seamen Act.³² Had the quarantine law prevented all free blacks sailors from entering the state altogether, rather than for a specified period of time, then the law would have remained intact. In other words, had North Carolina framed its law like the one in force in South Carolina instead of the one in Georgia, the North Carolina Superior Court would have upheld its operation.

As stated earlier, Strange’s distinction between commercial regulations, entrusted to Congress, and quarantine regulations, reserved to the states, was identical to the rather ambiguous position taken by Marshall in the famous *Gibbons v. Ogden* case.³³ An obvious question remained: what law was to yield when a constitutionally enacted commercial law passed by Congress conflicted with state regulatory power, like quarantine for instance, a power historically exercised by the individual states and protected by the Tenth Amendment? Marshall hinted strongly that the state law would yield. Yet, he refrained from ever definitively answering the question, preferring not “to butt against a wall in sport” by unnecessarily provoking proponents of states’ rights.³⁴ In fact, Marshall skirted the issue by clearly stating that the New

³² Compare to Johnson’s *Elkison* decision, when he would have been handcuffed had South Carolina enacted a law that more closely resembled quarantine. Strange came to an opposite conclusion, that quarantine was unacceptable. The only middle ground between Strange and Johnson on this point would be a law that mandated an absolute quarantine on all black sailors.

³³ Strange’s position also echoes the opinion of the U.S. Attorney General John Berrien. In March, 1831, Berrien issued an opinion about the constitutionality of the Seamen Acts. He cited extensively from *Gibbons*, and believed that case to be a solid defense for the seamen acts. See John Berrien, Opinion of the Attorney General, March 25, 1831 in *House Report 80*, 27 Cong., 3 sess. (1843): 52-53.

³⁴ See John Marshall to Joseph Story, September 26, 1823 in Charles Hobson, ed., *The Papers of John Marshall*, Volume 9 (Chapel Hill, N.C., 1998): 338.

York law in *Gibbons* was not a law emanating from the police power of the state, like health and quarantine regulations. In ruling on the North Carolina Seamen Act, contrarily, Strange answered the question that Marshall avoided, but not in the way the Great Chief Justice would have. Though he declared the law unconstitutional, Strange did so “without for a moment surrendering the right of a sovereign State to legislate for the peace and safety of the citizens.”³⁵ So while striking down the law with his right hand, Strange, with his left hand, upheld the power of the state assembly to enact another Seamen Act.

There is no direct evidence to suggest that Judge Strange issued his opinion to prevent an appeal to the U.S. Supreme Court via a writ of error. However, had the jury upheld the conviction and the fines, the captain and seamen could have appealed to the High Court, where John Marshall, Joseph Story, and William Johnson would have heard the case. If Strange truly honored the brand of federalism he espoused in his charge to the jury, Strange would much rather see a state court invalidate the North Carolina Seamen Act on strict grounds rather than see a federal court rule broadly against the power of the states to even enact such measures. Of course, we shall never know how the Marshall Court in its waning years would have responded to such an appeal. If Strange shared the estimation of Roger B. Taney, then he would have assumed that the 1831 Supreme Court would have ruled against the Seamen Acts if a case came before it.³⁶ Thus, Strange would have had a compelling interest to see the jury return a verdict of not guilty so as to preempt an appeal to the Marshall Court.

³⁵ “Judge Strange’s Charge,” *Correspondence*, 36.

³⁶ Taney’s prediction is found in Carl B. Swisher, “Mr. Chief Justice Taney,” in Allison Dunham & Philip Kurland, eds., *Mr. Justice* (Chicago, 1956): 35-62. Taney was probably correct. Besides Johnson, Marshall, and Story, the 1831 US Supreme Court also contained Gabriel Duval (a Madison appointee), Smith Thompson (a Monroe appointee), John McLean, and Henry Baldwin (both Jackson appointees). From various sources, we can reasonably conclude that Marshall (*Gibbons* dicta), Story (*Miln* dissent), and Johnson (*Gibbons* concurrence) would have ruled against the North Carolina seamen act. If Duval acted as usual, he would have sided with Marshall, as the two disagreed publicly on only two cases in Duval’s twenty-three years on the bench. So even if Baldwin, Thompson,

Though it was unlikely Strange's intention, his opinion closed the door to federal judicial interference, and despite the outcome of the case, Wilmington officials continued to impose quarantine on vessels employing free blacks. At least some merchants in Wilmington were aggravated about the restriction in trade. Consul Peshall was peeved. He had unintentionally transgressed Foreign Office policy and received a bitter rebuke from his superior in Washington, only to be vindicated in state court. Now, after his victory, municipal authorities steadfastly executed the law despite the recent decision. On Christmas Eve, 1831, Peshall again hailed British ministers in Washington, this time about the persistent efforts of city officials in executing a law struck down by the state judiciary.³⁷ In that letter, Peshall described how town officers prevented a British ship from Antigua from reaching the custom house because it failed to perform the thirty-day quarantine. The consul could not understand how a law determined void by a legitimate authority and despised by "most merchants and inhabitants" of the state could be maintained. Opportunities abounded with the reopening of the West Indies. For Peshall, the law "shackles commerce...[and] will effectively destroy the British West Indian trade throughout the state," mainly because there were so few white sailors to be had in the Caribbean. Since British ships had no choice but to employ persons of color, a quarantine law against black sailors amounted to a virtual ban on West Indian trade. According to Peshall's report, several British vessels skipped past Wilmington and unloaded their cargoes in New York upon hearing that the North Carolina quarantine was still in force. If his superiors in Washington could (or would) not assist him in protecting the interests of British subjects, Peshall warned, then he would be forced to go over their heads and consult directly with London about the

and McLean all dissented – and who knows where McLean may have come down in 1831 – the majority would still have overturned the Seamen Acts. Had the court ruled in this favor, it would have been the most hotly-contested decision in the Court's short history.

³⁷ Coincidentally, Peshall's letter was written just as the Christmas Revolt in Jamaica began.

atrocities perpetrated in Wilmington. Peshall seemed confident that the new Whig Ministry would alter the obsequious posture of the recently departed Tories.³⁸ After all, the new Ministry was already pressing for sweeping reforms in Britain and the Empire, and these new policies would alter the diplomatic calculus of Seamen Act diplomacy. If Consul Peshall decided to press the issue, he would do so in a radically different political universe, though he would never get the chance, as the state legislature abided by the Superior Court decision and rescinded the race quarantine at its next session.³⁹

Up until this point, the Seamen Acts were preventative measures meant to preclude slave insurrection by limiting the interaction of poisonous ideas of rebellion from reaching the ears of otherwise dotting slaves. In 1831, as Peshall initiated his attack on the North Carolina race quarantine, only three states had enacted laws to stymie this interaction, but the perception of danger was about to multiply exponentially. The world of antebellum Virginia was turned on its head by Nat Turner and seventy other slaves, who precipitated the most “successful” slave rebellion in the history of the United States. The rebels killed over fifty white people on a rampage across the Virginia countryside, wreaking havoc throughout Southampton County. In an effort to explain the rebellion and thereby avert recurring insurrections, the Governor of Virginia sent a widely circulated letter, a copy of which was addressed to James Hamilton, the Governor of South Carolina.⁴⁰ In his letter, the Virginia Governor explained that the cause of the

³⁸ Peshall to Baker, December 24, 1831 in *Correspondence*, 37-38. One aspirant for Congress claimed the opening of the West Indies to be the crowning achievement of the Jackson Administration and believed that the state must focus on fostering this potential source of revenue. "Without it, our trade languishes; with it, we must prosper forever." See the statement of L. Bethune in *The North Carolina Journal* (Fayetteville), July 6, 1831.

³⁹ *Acts...of North Carolina, 1831-1832* (Raleigh, N.C., 1832): 14-15.

⁴⁰ Hamilton was no racial conservative. He was the Mayor of Charleston during the Vesey Conspiracy, and he spearheaded an effort to tighten restrictions against slaves and free blacks in the aftermath of the botched rebellion. Hamilton had his detractors, who accused him exaggerating the threat so as to enhance his own prestige in preventing the revolt and bringing the perpetrators to justice. See Chapter 2 above.

rebellion was obvious: the “spirit of insubordination” was directly attributable to “Yankee peddlers and traders” who instilled grandiose ideas of equality and freedom amongst domestic slaves. Black churches eagerly abetted, distributing antislavery literature and preaching the sins of slavery. Abolitionist “fanatics” had turned otherwise passive slaves into murdering monsters.⁴¹ Southerners now had direct evidence that publications like *The Liberator* and *Walker’s Appeal* were having a tangible, pernicious influence on Southern slaves. Debates over the morality of slavery and the future of the institution were inspiring bloodshed. The lesson from Southampton was clear and simple; interaction between the ideologies of “fanatics” and domestic slaves must be stopped at all costs.

To anxious white Southerners, the links between antislavery evangelicals and slave insurrection were reinforced by news of the Christmas Revolt in Jamaica.⁴² On December 27, 1831, the slaves around Montego Bay began a widespread rebellion that took the better part of a month to quash. Despite the loss of only fourteen whites (less than a fourth of the total exacted by the Turner rebels), the destruction of property was extensive and the psychological damage beyond enumeration. Planters immediately pointed to the same culprits that the Virginia Governor identified. White missionaries in Jamaica faced accusations of fomenting rebellion, and white slaveowners quickly labeled the uprising the “Baptist War.” Plantation owners cited the increasing visibility of missionary activity and slave churches as the primary catalysts of rebellion. Abolitionist newspapers and antislavery tracts had been entering the island and disseminated by erstwhile Baptists and members of black church congregations. The illiteracy of most slaves only exacerbated the problem, as literate slaves and free blacks read out loud and

⁴¹ Quotes from Governor Floyd to Governor Hamilton taken from William Freehling, *Prelude to Civil War*, 64.

⁴² Rugemer, *The Problem of Emancipation*, 114-116.

explained the ideas to large congregations of slaves. Supposedly, these informal meetings, this quasi-public sphere, both honed slaves' desire for freedom and provided a ready-made battalion if violence broke out.⁴³

Another issue distressed the West Indian elite. In less than a year before the Christmas uprising the Jamaican colonial assembly granted equal rights to some free blacks of the island, finally bending to the will of the Grey Ministry and Palmerston's Colonial Office in London. "Free coloreds" were now on a level legal playing field with the island's white population, and in 1831, men of color were elected to the Jamaican Assembly.⁴⁴ The recent elections and the Rebellion convinced planters that their world was unraveling. Worse yet, planters appeared certain that slaves were misconstruing the new legislation. Slaves, the planters contended, maintained a foolhardy belief that equal rights for free coloreds meant that a similar extension would soon be offered to the enslaved of the island. Some even suggested that slaves misunderstood the law and thought that emancipation had been declared. Obviously, the colonial assembly did no such thing and had no such intention, though the Grey Ministry was already contemplating a world without colonial slavery. When slaves attempted to strike, either as an exercise of the rights they thought they possessed or as a protest to the government's refusal to meet the slaves' quixotic expectations of emancipation, whites reacted viciously. The ensuing counter-reaction by the slaves marked the beginning of the rebellion, and within days, it was in full swing.⁴⁵ In the aftermath of the revolt, retribution was swift and severe. Hundreds of

⁴³ See two footnotes down.

⁴⁴ For Jamaica's toleration laws, see "Laws passed by Jamaica Legislature for Relief of Catholics, Jews, and Free Persons of Colour," *House of Commons Papers*, Volume XXXI, Paper 59 (1831): 275. For St. Vincent, see "Laws passed by Colonial Legislatures in W. Indies for Relief of Catholics, Jews, and Free Persons of Colour," *House of Commons Papers*, Volume XXXI, Paper 363 (1832): 287.

⁴⁵ On the Christmas Rebellion generally, see Mary Reckord, "The Jamaican Slave Rebellion of 1831," *Past and Present*, 40:3 (1968): 108-125; Gad Heuman, "A Tale of Two Jamaican Rebellions," *Jamaican Historical Review*,

slaves faced the gallows, and Baptist missionaries left the island in fear for their lives. Reactionary white Jamaicans tarred and feathered one minister and threatened several others with lynching. A few missionaries received indictments for inciting rebellion, but were eventually acquitted. Despite exoneration, missionaries continued to feel unwelcomed, as white Jamaicans nonetheless harbored deep distrust of them and their message. Baptist missionaries who returned to Great Britain told of their unceremonious dismissal from the island.⁴⁶

Proposals for preventing another rebellion were remarkably similar in the aftermath of the Nat Turner and Christmas Revolts. Some called for harsh restrictions against slaves, free blacks, abolitionists, and incendiary publications. Others considered emancipation as the most foolproof remedy for the ailment of slave insurrection. It is well known that the Virginia legislature contemplated the efficacy of emancipation, and the same Virginia Governor who blamed abolitionists for Nat Turner believed that ending slavery was the only way to truly prevent another mass slaughter.⁴⁷ Similarly, the British Parliament and the Colonial Office began serious consideration of an emancipation bill in the direct aftermath of the winter revolt in Jamaica.⁴⁸ Of course, Virginia refused to adopt any type of emancipation measures, as powerful slaveowners maintained significant positions of power in the state government, and public opinion was hardly pressing lawmakers to eradicate slavery. This scenario was hardly the same in Britain, where abolitionists were executing one of the most impressive public initiative projects in British history, and a responsive Whig Administration appeared willing to cater to the growing influence

19 (1996): 1-8; K. R. M. Short, "Jamaican Christian Missions and the Great Slave Rebellion of 1831-2," *Journal of Ecclesiastical History*, 27:1 (1976): 57-72.

⁴⁶ Rugemer, *The Problem of Emancipation*, 111-114

⁴⁷ *The Southampton Slave Revolt of 1831: A Compilation of Source Material* (University of Massachusetts Press, 1971).

⁴⁸ William Green, *British Slave Emancipation: The Sugar Colonies and the Great Experiment* (Oxford, 1976): 111-115.

of abolition societies.

In the United States, accounts of the Christmas Revolt varied greatly. Northern papers focused on the extent of the uprising, enumerating casualties and estimating the loss of property. Anecdotes from travelers and reports from the island littered Northern papers for the first half of 1832. Southern papers, contrarily, rarely gave any press coverage. The Charleston *Mercury* called the rebellion a local disturbance, and focused on the restoration of law and order. Other Southern papers gave short shrift to the rebellion or similarly focused on the quick suppression of the uprising. The reason for such silence was the fear of a copycat insurrection. If Southern slaves learned of the tens of thousands of Jamaican slaves who risked life and limb for freedom, then they might decide to make the same kind of sacrifice.⁴⁹ Whereas the British public was outraged at the oppressive tactics of the planters, most people in the United States, and especially in the South, were more concerned with the breakdown of law and order that allowed the insurrection in the first place.

Interestingly, two Southern papers did expound on the extent of the havoc wreaked by the Jamaican rebels after assuring readers that colonial officials had effectively subdued the insurgents. Both the Pensacola *Gazette* and the Tallahassee *Floridian* ran the same article, which detailed the enormity of the insurrection and estimated 36,000 slaves to be involved in the destruction of nearly two hundred plantations.⁵⁰ These articles appeared just as the Florida Legislative Council considered a bill “to prevent the future migration of free negroes and mulattoes, into this territory and for other purposes.” The bill received no debate on the floor of the council, and within ten days of the bill’s introduction, it became law. After the law’s

⁴⁹ Rugemer, *The Problem with Emancipation*, 114-116.

⁵⁰ Tallahassee *Floridian*, 21 February 1832.

enactment, no free black or mulatto could legally enter the state, seamen included. All offenders would be arrested and placed in jail until they could be sent out of the state. Captains were responsible for paying a bond to cover the expenses of any offender they brought into the state. Failure to pay such a security would result in the captain's incarceration until he made such payment. Furthermore, if any offender recommitted the same crime of entering the state, that offender would be sold into slavery for five years, with proceeds going to the coffers of the county in which the "crime" took place.⁵¹ The slave rebellions of 1831 had convinced territorial authorities on the southern U.S. frontier to restrict the ingress of free people of color. Jamaica's proximity surely was a motivating factor.

Much like in Florida, the rest of the South responded to the slave revolts by contemplating the efficiency of their racial policy over the course of 1832. In South Carolina, however, the protection of slavery was cloaked beneath the raging debate over Nullification, as William Freehling so colorfully illustrated.⁵² No detailed examination of Nullification is required here, but, unsurprisingly, the reaction of British metropolitan authorities in the wake of the Christmas Rebellion illustrated the potential catastrophe of distant policymakers interfering in local racial policies. Parliament was falling under the sway of abolitionist agitators, and the colonial planter class was losing the war in the metropole. *The South Carolina Exposition and Protest*, penned by Calhoun in 1828 and partially inspired by Robert Turnbull's prophecies in his 1827 *The Crisis*, suddenly appeared to be the most efficacious protection of slavery for many South Carolina planters, especially now that Britain began serious contemplation of emancipation. In much the same way that colonial planters feared the machinations of distant officials in the

⁵¹ *Acts of the Legislative Council of the Territory of Florida...1832*, 143-145.

⁵² William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965).

imperial capital, South Carolinians viewed Congress's Tariff of Abominations as a menacing precursor to federal interference in Southern slavery. British metropolitan imposition in colonial slavery shone through in the language of Nullification. The South Carolina Assembly's Committee on Nullification proudly proclaimed the state's duty "to redeem ourselves from the state of colonial vassalage."⁵³ In the words of one historian, "West Indian tumult fueled Carolinian fire."⁵⁴ Undoubtedly, the summer, 1832 Parliamentary debates over colonial slavery infused Nullifiers with a new sense of urgency.

Unsurprisingly, leading Nullifiers stood in stout defense of the right of South Carolina to protect its borders and restrict the ingress of black sailors, regardless of federal interlopers. The South Carolina Association had proven the effectiveness of outright defiance in the wake of the 1823 *Elkison* decision, and many of the strongest defenders of the Seamen Law turned out to be rabid Nullifiers. Robert Hayne so profusely defended the constitutionality of the Seamen Acts that John Quincy Adams noted it in his memoirs. James Hamilton, the political orchestrator of Nullification, objected to any federal plans to interdict in the enforcement of South Carolina's Seamen Statute. Robert Turnbull, another venerated Nullifier, was an active member of the South Carolina Association and rabid anti-abolitionist. Isaac E. Holmes was one of the attorneys who defended the Charleston Sheriff in *Elkison*, and he co-authored the "Caroliniensis" articles attacking Justice William Johnson's decision in that case.⁵⁵ Even more than its ideological correlation with Nullification, the continued enforcement of the Seamen Acts after *Elkison v. Deliesseline* proved the effectiveness of outright resistance to federal authority. In fact, for many

⁵³ "Report of the Committee of the Convention, to whom was referred an Act to provide for calling a Convention of the People of South Carolina," in *State Papers on Nullification* (Boston, 1834): 17, 21.

⁵⁴ Rugemer, *The Problem of Emancipation*, 114.

⁵⁵ On Robert Hayne's dinner remark, see JQA Memoirs as cited by Hamer, "Great Britain," 4. For Turnbull, see [Robert Turnbull], *The Crisis* (Charleston, S.C., 1827). For Hamilton and Holmes, see Chapters 2-3 above.

in the Nullification camp, *Elkison* not only provided a powerful example to emulate, but it also emphatically linked slavery's protection to the circumscription of federal power.⁵⁶

The opponents to the Nullifiers in South Carolina, the Unionists, varied in their approach to the Seamen Act, though most of them conceded that racial quarantines were a state's constitutional prerogative. Hugh S. Legaré, for example, routinely sponsored memorials from citizens protesting the Seamen Act when he served in the State Assembly. Between 1824 and 1830, Legaré argued in the Assembly on behalf of bitter Charleston merchants who believed the legislation was abetting the destruction of the city's commerce, as ships carrying free blacks were choosing to avoid Charleston altogether rather than submit its crews to prison. For Charleston brokers, many of whom formed the bedrock of the Unionist Party in 1832, the benefits of the Seamen Act were inconsequential compared to the loss of revenue that the law precipitated, especially after the reopening of the West Indian trade in 1830.⁵⁷ However, when Legaré was the State Attorney General, he wanted no part of any municipal policy by which the state law could be circumvented. In a letter to the Charleston Sheriff, he explained that he was not interested in meddling with the law's enforcement, despite his personal views on the matter. "Under all circumstances," Legaré stated almost apologetically, "I think the law must take its course."⁵⁸ Benjamin F. Hunt, another Charleston Unionist, thought the Seamen Act bad policy,

⁵⁶ Two historians in particular have highlighted this utilization of the seamen acts by Nullifiers. Both of them appear to agree with the Nullifiers that the survival of the seamen acts post-*Elkison* was a prototype to the Nullification Doctrine. See William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965); Alan January, "The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860" (Ph.D. Diss. University of Iowa, 1976). Of course, the theoretical positions underlying the two acts of state defiance were hardly identical, as (we shall soon see) Taney's opinion makes abundantly clear. It was one thing to butt against the *dicta* of a federal court judge on an issue lacking a consensus concerning constitutionality. It was another to defy a sitting Congress and President in the exercise of a power that did enjoy a constitutional consensus, especially if that President was Andrew Jackson.

⁵⁷ See January, "The First Nullification," 214-233.

⁵⁸ See Legaré to Steedman, no date, *Correspondence*, 26. Perhaps Legaré refused to assist in the circumvention of the law because of the potential political fallout even though his own constituents were largely opposed to the law in

but tenaciously defended its constitutionality. For Hunt, like Legaré, the proper forum within which to debate the Seamen Act was the state legislature, far removed from federal and judicial interference. While some South Carolinians still denied its constitutionality, the primary division over the Seamen Acts during the 1832 Nullification debates was not over constitutionality. Unionists and Nullifiers were much more likely to bicker over the law's relative worth, not its constitutional validity.⁵⁹

In the summer of 1832, Andrew Jackson and his coalition had to walk a political tightrope. On the one hand, Jackson defended Southern interests and states' rights purists in his approach to the Cherokee question in Georgia. Though apocryphal, his challenge to Marshall to enforce the *Worcester* decision nonetheless comported with Old Hickory's belief that the only appropriate place for Native Americans in the mighty White Republic was in the largely uninhabited western territories. But the fact that Georgia was flying in the face of the federal government mandated political nimbleness on Jackson's part. Nullifiers in South Carolina also applauded Georgia's defiance of federal authority, citing it as evidence of the sovereignty of the states and Calhoun's compact theory of the Union. Jackson's desire for Indian Removal and his distaste for the Marshall Court were being manipulated by Nullifiers to justify resistance to the tariff. But Jackson's hatred for Calhoun and disunion, on the other hand, would not tolerate any such ideological alliance with the Nullifiers. If Jackson could not find a consistency in his aversion to Nullification and his acquiescence to Georgia's resistance, he might see his Southern coalition unravel on the eve of the 1832 election. Whigs would highlight Jackson's corruption of the

1830. However, it seems even more likely that Legaré subscribed to view similar to Taney, believing the halls of the legislature to be the proper place to debate the efficacy of laws. As an agent of the governor, his duty was to see that the laws were faithfully executed.

⁵⁹ William Johnson, for example, maintained his *Elkison* position in 1832. See Morgan, *Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia, S.C., 1971): chapter 14.

Constitution in his denial to execute a Supreme Court mandate, and Calhoun supporters could expose Jackson's anti-states' rights credentials in his opposition to Nullification. At this pivotal moment, the Seamen Acts reemerged on the national political agenda, narrowing Jackson's tightrope.

It was the renewed aggressiveness of British diplomats that exacerbated this already tense political and constitutional moment, forcing the Jackson Administration to consider the Seamen Acts – and by extension South Carolina's (and possibly Georgia's) defiance of federal judicial power – in conjunction with *Worcester* and Nullification. The new, assertive British position was inspired by the imminent fall of colonial slavery. By the summer of 1832, Emancipation was almost a certainty, though the exact path it would take was an absolute mystery. British Parliamentary officials hotly debated how to integrate politically, economically, and legally the freemen and mulattoes in post-Emancipation society.⁶⁰ But the Toleration Laws and impending Emancipation did more than just raise questions about the political status of “coloureds” and future freemen in the Empire. The Foreign Office and Board of Trade also had to consider anew the rights of Afro-Britons traveling abroad, especially to the Southern United States. How would slaveholding nations react to the fluctuating definition of British subjecthood? Could Great Britain expect these nations to incorporate coloureds and freemen into the definition of “subject” in existing commercial agreements? With the reopening of British West Indian trade with the United States, and with the expansion of the Seamen Laws, these questions demanded swift attention.

In this new context, Britain quickly lowered its white flag and resumed its attack on the Seamen Laws, and this time in the name of black British subjects. In a letter to the Foreign

⁶⁰ Green, *British Slave Emancipation*, 121-155.

Office, Crown officers sang a familiar tune and declared the Seamen Laws to be “a most arbitrary and oppressive measure, placing the trade between His Majesty’s West India possessions and the United States under restraints and restrictions which are altogether inconsistent with...Treaties between the two countries.” However, Crown officials went further this time, calling the Seamen Laws “injurious to the rights of His Majesty’s subjects, as secured to them by Treaty.” Accordingly, British officials in Washington received instructions to press for the immediate alteration of these “misapplication[s] of quarantine” that were so obviously “not connected with the preservation of health.”⁶¹ If the particular status of new freemen remained ill-defined in the metropole and in the colonies, the British government was going to presume them to be full-fledged British subjects when they traveled to the United States.

Thanks to British officials, the Jackson Administration now had to contend with laws that united Georgia and South Carolina at the very moment when Jackson wanted to isolate South Carolina and its reigning Nullification government from Georgians weary of federal power. As Secretary of State Livingston ruminated on the appropriate response to the Seamen Laws in the midst of Nullification, he read the opinion of the recently departed Attorney General John Berrien, who had returned to his native Georgia. Berrien initially received his post as a firm supporter of President Jackson in the Cherokee saga in Georgia, but he was on the outside looking in as an agitator in the Eaton Affair and as a defender of the Bank of the United States, to which he often served as an attorney during his days in Savannah.⁶² Berrien’s dismissal in the Cabinet purge of 1831 angered many Georgians, though Jackson’s continued support of Cherokee removal mitigated their disapproval. In the end, the Administration wanted to uphold

⁶¹ Herbert Jenner to Viscount Palmerston, March 23, 1832, in *Correspondence*, 39-40.

⁶² For a well written and detailed analysis of the Eaton Affair and its impact on the Jackson Cabinet, including John Berrien, see Jon Meacham, *American Lion: Andrew Jackson in the White House* (New York, 2008): 125-178.

the Seamen Acts without uniting Georgia and South Carolina on the issue of Nullification. If Secretary Livingston only knew Berrien was no favorite of Calhoun (he later explicitly rejected Calhoun's Nullification in 1833), he might not have sought a new opinion from Berrien's successor.⁶³ To guarantee that the opinion of the recently departed Berrien complimented the aims of the new Kitchen Cabinet and would not splinter the Democratic coalition, Livingston demanded the opinion of the new Attorney General, Roger B. Taney. Livingston's first request for Taney's opinion occurred back in 1831 just after his appointment, though it appears as though Taney never responded.⁶⁴ But after a second entreaty – no doubt motivated by the new political environment – Taney provided an elaborate opinion. In it, Taney laid down his initial position and tackled a number of provocative issues, opining on the limits of the treaty-making power, the possibility of black subjecthood and citizenship, the obligation of the executive to obey judicial pronouncements, and the contour between judicial oversight and legislative

⁶³ For an excellent essay on the weirdness of Berrien's stint as Attorney General, see Thomas Govan, "John M. Berrien and the Administration of Andrew Jackson," *Journal of Southern History* 5 (November 1939): 447-467. In 1844, Berrien attended the Whig National Convention that nominated Henry Clay for the presidency. What really attracted Berrien to Jackson and vice versa was the Indian question. No other policy appeared closer to Jackson's heart, and Berrien wholeheartedly agreed with Jackson about the need of evicting the Cherokees from northern Georgia. It was on this issue alone, apparently, that Berrien was appointed Attorney General. Later in his stint, Berrien punted when Jackson asked him to opine about the unconstitutionality of the Bank.

⁶⁴ Livingston to Taney, August 9, 1831, *Domestic Letters of the Department of State*, Roll 22, National Archives, College Park, MD. In the fall of 1831, Taney did offer his opinion on a case similar in some regards to the seamen acts. Taney's letter to Livingston concerned a British master whose slave was set free by a state law or court. Taney forcefully declared that the federal government had no business getting involved, saying that the debilitating clause in the treaty meant that all state laws were part of the laws of the United States. Taney also foreshadowed the future breakdown of interstate comity when Northern States, starting with Massachusetts in 1836, start offering the same *Somerset* habeas corpus rights to slaves that England did. In England after the famous decision by Lord Mansfield, slaves who entered England could not be compelled to leave the country his or her master. While the decision did not free the slave *per se*, it did prevent the slaveowner from holding his slave against the slave's will. By the 1820s, this decision had become a "fixed principle," as Taney referred to it. Taney to Livingston, December 6, 1831; See Roll 71 in *Miscellaneous Letters of the Department of State, 1789-1906*, Records of the Department of State (RG 59, M179A), National Archives, College Park, MD. In the case of *Commonwealth v. Aves*, 35 Mass. 193 (1836), the Massachusetts Supreme Court created the same kind of precedent by granting a writ of habeas corpus to a slave who was brought voluntarily into the state by her master. After this decision, other Northern states started to create similar precedents, eliminating the right of slaveowners to travel through Northern territories with their human property. For an excellent overview of the *Aves* decision, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, N.C., 1981). See Chapter 8 for the rapid destruction of interstate comity and the constitutional stalemate created by the seamen act-sojourning slaveowner contradiction.

discretion. In its depth on these subjects, this opinion put constitutional muscle on the political skeleton of the Jacksonian agenda.⁶⁵

In his first draft, Taney's first order of business was to answer Livingston's most pressing question: did the South Carolina Seamen Act come into an unconstitutional conflict with the 1815 treaty with Great Britain. For Taney, there was no conflict. The treaty stipulated that British rights were always subject to "the laws and statutes of the country." Since the law of South Carolina was enacted by proper authority and because no competent judicial authority had ruled the law unconstitutional, then the Seamen Acts were officially part of the laws and statutes of the United States. The law operated on all free people of color, Americans included, and "has been submitted to by the citizens of the United States & recognized & obeyed by them as valid and obligatory."⁶⁶ Thus, the British government had no ground upon which to complain to the State Department of a treaty infraction. If an individual British subject thought the law inappropriate, his only potential recourse would be through American judicial channels (though Taney would soon discredit this avenue of recourse as well) and not remonstrations through the British government and U.S. State Department.

But Taney denied that black British sailors were subjects according to the 1815 Treaty. In its "extended" meaning, Taney conceded, the term "subject" could *now* apply to free people of color in the British Empire. But in good originalist fashion, Taney looked to the treaty

⁶⁵ This handwritten, unpublished opinion can be found in Box 1 (1790-1839), *Records of the Attorney General's Office, Opinions on Legal Questions, 1790-1870*, National Archives, College Park, Md. One Taney biographer, Carl Swisher, has a transcribed copy of the draft in his collection and that typed copy proved convenient. See Box 21 in the Carl Brent Swisher Papers, Manuscript Division, Library of Congress. Two other historians have written about this draft as well as the actual opinion sent to the State Department. See Carl Brent Swisher, "Roger B. Taney," and Austin Allen, *The Origins of the Dred Scott Case; Jacksonian Jurisprudence and the Supreme Court, 1837-1857* (Athens, Ga., 2006). All quotes in the following paragraphs are taken from the original draft until otherwise noted.

⁶⁶ Taney obviously chose to omit Johnson's *Elkison* decision as well as the numerous objections of Northern merchants (and even some South Carolinians) who claimed the law unconstitutional.

negotiators of 1815. For them, and Taney thought this was obvious, “this word [subject] cannot be regarded as having been used in that extensive sense.” Much like in the United States, “That unfortunate people came into the dominions of Great Britain not as aliens coming to settle...but as slaves; whose posterity it was then intended should always to remain so [sic].” In an eerie foreshadowing of *Dred Scott*, Taney continued, “The privileges there granted to some of them, are rather favours than rights inherent in British subjects.” As such, any treaty referring generally to “subjects of Great Britain” were not meant to include free people of color, and any jurisdiction honoring the subjecthood claims of free black Britons did so out of generosity not obligation. For Taney, British Emancipation did not alter any aspect of existing treaties, and neither the federal nor the state governments were under any obligation to alter their laws based on Britain’s new racial policy. Afro-Britons remained outside the common legal understanding of subject and thus susceptible to racial quarantines in the United States.

In his revised draft, the one he actually sent to Livingston, Taney was much more equivocal about the potential integration of colored people into the British body politic. He focused much more on common understandings of the people in both countries; both considered the other a nation of white men and did not consider those of African descent to be constituent members of the nation. Taney did delete much of his discussion of black British subjecthood, most likely because of the sweeping reforms of the colonial assemblies and Parliament. However, he still maintained that the common understandings of the two nations would require future treaty-makers to employ specific language if they wanted to include free people of color.⁶⁷

Based on the request sent by Livingston, Taney could have ended his opinion here, stating clearly that the State Department was under no obligation to interfere in the operation of the law

⁶⁷ Taney to Livingston, June 9, 1832, Roll 73, *Miscellaneous Letters of the Department of State, 1789-1906*, National Archives, College Park, MD.

as requested by the British legation. However, Taney went much further, and connected Afro-British subjecthood to African-American citizenship. In the same way that the black Britons were outside the common understanding of subject, so, too, were African Americans outside the realm of citizens. As for any future claims of Northern free blacks based on the Privileges and Immunities Clause of the Constitution, Taney did not mince words. “The African race in the United States even when free, are every where [sic] a degraded class - & exercise no political influence.” Like black British subjects, Taney said of African Americans, “The privileges they are allowed to enjoy, are accorded to them as a matter of kindness & benevolence rather than of right...& are permitted to be citizens by the sufferance of the white population & hold whatever rights they enjoy at their mercy.” As for the individual states, they could “withhold such privileges as they deemed proper.” People of African descent were obviously not intended to be included by the contracting parties of the Constitution, so the Privileges and Immunities Clause was not applicable to them. Otherwise, the slaveholding states would never have adopted the Constitution in the first place. In the same way that jurists ought to have employed originalism and looked at the intent of the 1815 Treaty framers to deduce the meaning of British subjecthood, Taney believed that American citizenship (at the federal level, at least) could only be surmised by analyzing the common understanding of the term “citizen” in the 1780s. And that common understanding, according to Taney, did not include people of color.

Unlike previous denials of Afro-British subjecthood and African-American citizenship, Taney’s opinion on the Seamen Acts represents a radical departure. Previously, both sides of the debate looked to local law to determine the citizenship status of free people of color. As shown in Chapter 2, the status of sojourning free people of color could be deduced by the rights they exercised in their home jurisdictions. Senators denying African-American citizenship during the

Missouri debates pointed to the absence of particular rights in their home states. Because free black men from Massachusetts, for example, could not marry a white woman, they could not possibly claim to be citizens, since citizens could marry whomever they wished. In the 1823 *Elkison* decision, and in the debates that raged in its aftermath, British subjecthood was deduced by the same logic. Both Justice Johnson and his detractors looked to Jamaican and British law to determine the British mariner's status, and both sides acknowledged that subjecthood was malleable. Statuses and rights could change over time. Taney's new theory, call it the Contracting-Parties Theory, allowed for these types of changes in local law and even acknowledged that those changes could even go so far as to grant the full panoply of citizenship rights. But those rights, according to this theory, were statutory in nature, and not constitutional. In other words, those rights could be taken back. Local changes in rights and status could not alter the status of non-constituent members of the national body politic. Similarly, one nation's alteration of their realm of subjects could not *post facto* obligate recognition by other nations. Consequently, Taney's Contracting-Parties theory of citizenship denied interstate and international comity. Any changes one jurisdiction made to its realm of subjects or citizens were not binding on other jurisdictions. Put differently, Britain's decision to grant subjecthood to its free coloreds had no legal impact on existing treaties with the United States. Likewise, any changes that Massachusetts or Ohio might make to its state citizenry in the future would have no bearing on federal or constitutional citizenship. Therefore, neither Anglo-American treaties nor the Privileges and Immunities Clause in the Constitution could be invoked to protect these "new" British subjects or state citizens.⁶⁸ For Taney, the Naturalization power of Congress was the

⁶⁸ According to Taney, the Privileges and Immunities Clause was reserved for the contracting parties of the Constitution and their descendants. This understanding was a strange combination of volitional and birthright citizenship. On these theories of citizenship, see James Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, N.C., 1978).

only method to alter federal, or constitutional, citizenship. And Congress's decision to limit naturalization to "white persons" proved that black naturalization and black national citizenship were impossible.

The similarities between Taney's Contracting-Parties Theory enunciated in 1832 and his majority opinion in *Dred Scott* are unmistakable, and several scholars have noted the resemblances in logic.⁶⁹ However, these scholars focus entirely on Taney's discussion of African-American citizenship and fail to recognize that Taney was making an argument that was not limited by the borders of the United States. After all, British diplomatic efforts spurred Livingston's inquiry, and Taney answered the Secretary of State first regarding free blacks in the British Empire. British Toleration Laws and impending Emancipation were political reality in 1832, and Taney had to contend with immediate British protests. Only changes in British subjecthood can explain Taney's decision to implement a twisted form of original intent to limit subjecthood and citizenship. No state in 1832 approached Britain's liberalization of racial policy (albeit on paper and not necessarily on the ground), so Taney's application of Contracting-Parties on African Americans was only speculative. If a state decided to extend all rights to free blacks, then the other states could still refuse to acknowledge their citizenship status. Furthermore, Taney saw a close correlation between the United States and Great Britain, the leading constitutional nations of the day. He envisioned both nations, and both constitutional systems, as reserved to white members specifically. For the future Chief Justice, constitutional modernity was strictly a Caucasian accomplishment.

⁶⁹ For example, see Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York, 1978); Carl B. Swisher, "Mr. Chief Justice Taney," 35-62; Austin Allen, *Origins of the Dred Scott Decision*; Leon Litwack, "The Federal Government and the Free Negro, 1790-1860," *Journal of Negro History* 43 (October 1958): 274.

After illustrating how British and American sailors' rights claims were ineffectual against the Seamen Acts, Taney shifted his analysis from citizenship and subjecthood to federal relations. In articulating his understanding of federalism, Taney considered the right to legislate on slavery and free persons of color to be guaranteed to the individual states by the Tenth Amendment and beyond the legislative and treaty-making power of the federal government. While a treaty became the supreme law of the land upon ratification, federal authorities were not constitutionally capable of creating and ratifying an unconstitutional treaty. "A treaty would be void," Taney explained, "which interfered with the powers expressly granted to Congress." No treaty could place the power of coining money in the hands of a foreign power. No treaty could alter the confirmation process of Supreme Court Justices. But the expressed powers of the federal government were only one limitation on the treaty-making power. Treaties "would be void if it came in conflict with rights reserved to the states." Taney explained that no treaty could legitimately take territory away from a state without its consent, nor could a treaty force a state to adopt a non-republican form of government. Analogously, no treaty could violate the Tenth Amendment and force a state to allow the entrance of free blacks if that state restricted their entry as a means of securing its internal safety. If such a treaty was ratified, the states were obliged to prevent its enforcement within its borders, even if that meant that the federal government had to provide compensation to the aggrieved nation.

In case anyone thought this particular defiance of federal law smacked of Nullification, Taney made sure to explain the difference between an unconstitutional treaty and a constitutional tariff. In enacting laws to carry into effect constitutionally-granted powers, legislatures had free reign. For Taney, the Tariff was a perfect, and timely, example.

The power for example of regulating commerce plainly gives to Congress the right to impose a tariff for the protection of domestic industry. This power may be

oppressively exercised so as to throw an unjust or unequal burthen on one portion of [illegible] in order to enrich the other. Yet the law would I apprehend be constitutional & valid - & every body [sic] bound to obey it – because the constitution has given the power and left the mode of exercising it to Congress.

This was a sly maneuver. The tariff was a method by which Congress was to achieve its constitutional ends, and “every body was bound to obey it.” Contrarily, a (hypothetical) treaty which overstepped its constitutional bounds and violated the Tenth Amendment demanded state interposition. In Seamen Acts’ terms, South Carolina was right to question *Elkison* but erred in defying the tariff.

As for the possibility that other British officers might follow Consul Peshall in Wilmington and initiate suits to test the Seamen Acts’ constitutionality, Taney denied the propriety of judicial review over such laws. Taney admitted that racial quarantines were “more sever[e] and oppressive than necessary.” While Taney was quite sure that the desired aim of the law – to prevent the intermingling of Atlantic-savvy free blacks with domestic slaves – was appropriate, he was also certain that milder measures could achieve those ends. For Taney, though, and this was crucial, the measures taken by a legislature in pursuit of a constitutionally-granted power were beyond the purview of the judiciary. Thus, the Seamen Acts were not for the courts regardless of the severity or excessiveness of the punishment. Taney explained, “What means are sufficient must of necessity be a question of Legislative discretion.” Courts cannot rule on the manner in which a legislature chooses to carry into effect a power it is admitted to possess. For support, the future Chief Justice turned to an unlikely source: his predecessor on the High Court. For Taney, the case of *McCulloch v. Maryland* was emphatic. In that case, the Marshall Court illustrated the limits of judicial inquiry; it was not for the Court to determine if the Bank of the United States was a legitimate mode for Congress to exercise its power to tax and coin money. Since Congress had the constitutional power to tax and coin money, its decision to

create a bank to facilitate that power was one of legislative discretion and “beyond all judicial control.” The only recourse was the ballot; if citizens disapproved of the mode by which Congress exercised its power, then they could express their contempt by instructing their legislators to alter their position or by removing them from office on Election Day. Or, of course, the electorate could elect a President to veto a Bank Charter Bill.⁷⁰

Judicial action was only appropriate on those occasions when a state legislature and the federal Congress, both in exercising the same power, created laws that came into conflict. Only in that scenario would the courts be forced to step in, appraise the situation, and strike down the state law if the two laws were obviously contradictory. Luckily for defenders of the Seamen Act, Congress had no power to dictate racial policy to the states, so no conflict could ever arise, so long as Congress did not overstep its constitutional limitations. Most pertinent for British seamen, Taney found that no recourse existed. Diplomatic pleading in Washington could have no bearing, and no court of law ought to have jurisdiction to consider the efficacy of the Seamen Acts. Black British sailors were at the absolute mercy of the individual states.

Obviously, Taney sought to eliminate judicial relief for the sailors, but the future Chief Justice was quite sure that his views on the treaty-making power and on the limited role of the judiciary over legislative discretion were not shared by many of the sitting Supreme Court Justices. “Indeed,” Taney warned, “judging from the past I think it highly probable that the Court will declare the law of S. Carolina null & void...whenever the question comes before it.” But if the Supreme Court did strike down the Seamen Law as Taney suggested it might, that did not mean that President Jackson was bound to execute the decision. In a ringing endorsement of

⁷⁰ Interestingly though not ironically, Taney was contributing to Jackson’s Bank Veto message at about the same time as he was writing this opinion. See Jon Meachem, *American Lion*, 187-200

Jackson's actions in the wake of *Worcester v. Georgia*, Taney outlined the proper course of action for the Chief Executive upon an adverse judgment by the Supreme Court.

I am not prepared to admit that a construction given to the constitution by the Supreme Court in deciding in any one or more cases fixes of itself irrevocably & permanently its construction in that particular & binds the states & the Legislative & executive branches of the General government, forever afterwards to conform to it...If the judgment pronounced by the court be conclusive it does not follow that the reasoning or principles which it announces in coming to its conclusions are equally binding & obligatory.

Taney was suggesting that Jackson follow the same route as he did with the Cherokee Cases: allow the state law to remain in force despite a contrary decision by the federal Supreme Court.

But at the same time, President Jackson was obliged carry through the execution of the tariff (as was South Carolina obliged to pay the duties), as "every body was bound to obey" a constitutionally enacted federal law.⁷¹ In other words, Jackson was under no obligation to enforce Marshall's decision against Georgia and for the Cherokees, but he was absolutely required to enforce the tariff in South Carolina. Taney's minimization of judicial authority and his conceptualization of legislative discretion gave structure to Jackson's apparent ambiguity regarding nationalism and states' rights during the tumultuous year of 1832.

Taney's opinion on the Seamen Acts was tactically brilliant, if logically muddled. It provided a coherent constitutional framework that consolidated a number of central Jacksonian tenets and distinguished racial quarantines from the Bank issue, the tariff and Nullification, and the Cherokee dilemma. His Contracting-Parties theory obviated the need for federal intervention on behalf of British and Northern sailors incarcerated under the Seamen Acts all the while celebrating the United States as a White Republic. Taney's concept of legislative discretion at

⁷¹ Several scholars have great difficulty explaining Jackson's strong nationalism in the Nullification controversy while maintaining a strong states' rights stance in the Cherokee cases. See, for example, Gerald Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Constitutional Regimes* (Lawrence, Kan., 2006).

once justified the federal tariff (and therefore destroyed Nullification) while upholding racial quarantines. His understanding of Presidential and judicial power entrusted Jackson with the ability, or more appropriately the responsibility, of vetoing the Bank Recharter Bill while simultaneously defending the President's apathy towards the *Worcester* decision. This same understanding also suggested that a Marshall Court ruling against the Seamen Statutes would likewise lack Presidential enforcement, making it a dead letter. Taken as a whole, the Seamen Act opinion provided consistency to the apparently haphazard policies of President Jackson as the election of 1832 drew near.

Jackson's opposition to Nullification, his advocacy of Indian Removal, his veto of the Bank, and his acquiescence to the Seamen Laws translated into an electoral victory in November. Taney's utility in crafting and defending these positions made him a valuable asset in the Cabinet. He would soon move from the Attorney General's Office to the Treasury before being tapped as Chief Justice after Marshall's death. During his tenure on the High Court, Taney would see many of the constitutional ideas sketched in his Seamen Acts opinion embedded into constitutional law, with the culmination being *Dred Scott*.

If one combined the opinions from Berrien and Taney, the Democratic Party's position on the Seamen Acts came into stark focus. In terms of policy, racial quarantines were questionable, but in terms of constitutionality, they were valid. Understood this way, Georgia and North Carolina acted within their proper spheres of authority to restrict the movement of free black sailors. If state authorities believed *Walker's Appeal* to represent an imminent threat to the safety and welfare of the people, then racial quarantines could be employed to avert its introduction. Furthermore, these quarantines could withstand the claims of African-American citizenship and British subjecthood, even though the latter grew louder and more incessant as the

early 1830s progressed. Despite the changing face, or color, of British subjecthood, the United States was not going to adjust its diplomatic and constitutional position to compensate for alterations in British colonial policies. Unfortunately for African Americans, the pressure from British diplomats to recognize black British subjecthood elicited from Attorney General Taney the most vicious theory undermining black citizenship in the United States. In this way, the most contemptible portion of the *Dred Scott* decision had its origins in the transnational debates over race and status in the era of British Emancipation.

But the impact of British Emancipation on the Seamen Acts was much more immediate than Taney's 1857 *Dred Scott* opinion. Once the Emancipation Act went into effect, it had instant consequences in the United States. While motivating abolitionists in New York, Boston, and other Northern areas, British Emancipation simultaneously expanded the fear of outside agitators in slaveholding jurisdictions. Southern politicians' anxiety level escalated with fear of Atlantic ideologies of abolition percolating into plantations. After all, abolitionism had proven effective in dismantling the most extensive slave empire in the Caribbean. With Emancipation, Southerners were convinced that these ideologies, and the people who recklessly espoused them, had to remain outside the state. When abolitionists in the United States went on the offensive, sending hundreds of thousands of antislavery periodicals southward, white Southerners unified in resistance to the dangerous Atlantic. This unified resistance combined with problems in the British West Indies to cripple the British diplomatic effort against the Seamen Acts. With the British reeling and with a unified South against outside agitation, the Supreme Court, then under Roger B. Taney, would formally enshrine state police power, further protecting the Seamen Laws from federal intervention.

CHAPTER 6
THE IMPLICATION OF LEGISLATIVE DISCRETION: BRITISH EMANCIPATION,
AMERICAN ABOLITIONISTS, AND THE ENSHRINEMENT OF POLICE POWER, 1832-
1838

“It is not the fanaticks [sic] at the North that the South fear...It is the abstract love for liberty, it is that the moral power of all Europe is against us – it is this that the South fears.”

- Robert Y. Hayne
South Carolina Statesman, 1835¹

David Walker and his *Appeal* created the environment that motivated legislatures in both North Carolina and Georgia to enact restrictions against free black sailors. Thanks to the loophole created by the *Gibbons v. Ogden* decision and exploited by Attorneys General John Berrien and Roger B. Taney, these new laws, couched in quarantine terms, received an ambiguous acceptance by the Democrats in Washington. In terms of policy, many Jacksonians, including Taney, believed the laws to be foolhardy and ineffective and hoped that they would soon be expunged from Southern statute books. However, though many disagreed with the laws in terms of policy, the Jacksonians as a whole defended their constitutionality as a legitimate exercise of state power. Only the states could determine which “moral contagions” deserved to be withheld from their respective jurisdictions. Of course, the racial component of these laws served as the fulcrum for their constitutionality. Because Jacksonians (and many Whigs and Nullifiers, too) scoffed at claims to citizenship by racial minorities, they could condone this particular exercise of state police powers. Despite potential philosophical fissures created by the Bank, the Cherokees, and Nullification, the Democratic Party by 1835 had united behind the constitutionality of the Seamen Acts; into the 1840s nearly all Democrats toed the party line and

¹ Quote taken from William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965): 308.

considered federal interference in these laws absolutely unconstitutional. Neither federal law nor treaties could infringe on such rights of the states to protect the racial status quo.

Unfortunately for black sailors, the implication of judicial noninterference and federal impotence was a general belief among the ruling Democrats that only the legislative bodies that created the racial quarantines could rescind them. It was up to businessmen, merchants, and racial moderates to lobby their state lawmakers and convince them of the imbecility and impropriety of such laws. From the time the first Seamen Act was passed in South Carolina in 1822, groups attempted to do just that, convince state legislators of the impropriety of the law. In North Carolina they were effective, at least temporarily; in 1831 the General Assembly destroyed the law after only one year on the books, abiding by the state's Superior Court. However, in the rest of the South where Seamen Acts were in force, the possibility of convincing state legislatures that the laws were unnecessary or unwarranted seemed slim. News from the British West Indies inspired abolitionists in the United States while simultaneously convincing anxious Southern slaveholders that their peculiar institution was under attack. This context not only made rescission in Florida, Georgia and South Carolina impossible, it also led Alabama to enact similar restrictions against free black sailors. Ultimately, state laws protecting citizens from the dangerous Atlantic received the imprimatur of the Supreme Court in 1837.

This chapter focuses on the hardening resolve of the South against perceived attacks on slavery. News from Jamaica suggested that Great Britain might send an army of freemen to incite a region-wide race war. British officials – like those who freed the slaves of shipwrecked Americans in the Bahamas – appeared intent on undermining Southern slavery in a less militaristic mode, but for white Southerners, the endgame was identical. Abolitionists in New York were sending hundreds of thousands of pamphlets southward, and for white Southerners,

this was the equivalent of instigating rebellion. Southerners fortified their defenses. They passed a Gag Rule in Congress. They enacted state laws criminalizing the introduction of incendiary literature. They implemented new or harsher Seamen Acts. Most importantly, they proclaimed loudly their constitutional ability to protect slavery through their state police powers. Their arguments were convincing. In 1837, in the case of *New York v. Miln*, the Supreme Court upheld state restrictions against morally contagious individuals seeking admittance. Henceforth, state law would be the primary shield against the dangerous Atlantic.²

British Emancipation provided a powerful example for people in the United States, and Northerner and Southerner alike paid close attention to the events unfolding in the Empire. But Emancipation did more than sculpt Americans' visions of their own national destiny. British Emancipation did not occur in a laboratory; no glass walls protected American observers from the British players involved in the mighty experiment. Scholars of transatlantic antislavery have long understood this social impact of Emancipation. Northern abolitionists did not just read the success of British antislavery efforts as a text, as a tarot card hinting towards the potential future of the United States; they interacted with British abolitionists. They crisscrossed the Atlantic, they pooled resources, they prayed together, and they created a network of support. In enumerating the social impact of Emancipation on the United States, another variable was also at play. The Act of Emancipation literally created hundreds of thousands of free blacks, and no consensus emerged concerning the proper social, economic, and legal position these freemen and freewomen occupied. While Emancipation inspired hope and fear in Americans North and South, the new economic and legal status of former British slaves aroused important questions for people in the United States. What was Great Britain going to do with these former slaves? If

² Or, at least until the Court ruled to the contrary in 1849.

the plantation economy collapsed, as many Southerners believed it would, what would be the replacement? Would more free blacks work as ministers, as sailors, as stewards? Would they stay in the West Indies, or would they look to expand antislavery to the rest of the Atlantic World? How would a slaveless British Empire compete against slaveholding nations?

These questions about the freed slaves demanded answers, and one person who attempted to provide them was Robert Monroe Harrison, the United States' Consul to Kingston, Jamaica.³ From 1831 until the early 1840s, Harrison's letters to the State Department painted horrid pictures and bespoke an impending apocalypse on the island. Harrison also sent numerous warnings of British plans to arm the ex-slaves, coordinate them into regiments, and then unleash them on the Southern United States. Though these letters rarely matriculated into the press and to the wider public, they still represent the apprehension felt by many Southerners and federal officials in the aftermath of August 1, 1834. Though it would be imprudent to place too much emphasis on the power of Harrison's correspondence to manipulate the State Department, his ideas about the intention of Great Britain and the newly freed slaves represent a powerful example of a specific type of anxiety that Southerners felt in the wake of Emancipation, an anxiety about the physical presence of ex-slaves and the potential catastrophe they could inflict on the South. Harrison's letters, exaggerated as they may have been to enhance his own position as quasi-diplomat to the island, still provide convincing evidence of the immediate threat posed by Jamaican freedmen.⁴

³ Harrison was a self-described "native Virginian," though he spent much of his life outside the United States, often holding various consular and diplomatic posts in the Caribbean. Apparently, he never betrayed his roots as a proud descendant of Southern slaveholders. He defended the institution until his death in 1858. See Edward Rugemer, *The Problem of Emancipation: The Caribbean Roots of the American Civil War* (Baton Rouge, La., 2008): 185-186.

⁴ Edward Rugemer provides a fine analysis of the Consular letters of Robert Harrison in *The Problem of Emancipation*, 188-197. In the following paragraphs, I cite Harrison's consular letters, but I largely paraphrase Rugemer's findings.

Even before the Emancipation Bill passed Parliament, Harrison bemoaned the activities of abolitionist-inspired free blacks, who “will go from hence to New York and find their way to our Slaveholding States.” Harrison’s prescription, even before Britain declared emancipation, was to prohibit the entry of all free black Jamaicans into the United States, as their primary agenda was to “poison the minds of the *Negroes* in the *Slaveholding States*.”⁵ Harrison despised the free coloreds in Jamaica. Since the moment he was first appointed to be Consul in Kingston in 1831, he had watched them “poison the minds of the slaves [in Jamaica] by seditious harangues and vile publications.” Now, with Parliament taking the side of the abolitionists, slaves, and free blacks, white inhabitants in Jamaica could only expect “actions of the most *diabolical* nature.”⁶

Harrison’s warnings only continued after August 1, 1834.⁷ His premonitions – that free black Jamaicans would head to the United States with the ultimate aim of attacking slavery there – were coming to fruition. Harrison assured Secretary of State John Forsyth that black emissaries were preparing for departure and would use the cloak of diplomacy to undermine Southern slavery in secret, silently inspiring slave uprisings. He suggested to Secretary of State Forsyth that the United States adopt a program the Spanish authorities recently implemented. Spanish diplomats in Kingston possessed the power to deny passports to anyone of questionable character heading to the Spanish Caribbean. Thereby, Spain could protect slavery in its dominions by preventing the emigration of British emissaries, white and black, who aimed at

⁵ Harrison to Louis McLane, July 24, 1833, *Despatches from U.S. Consuls in Kingston, Jamaica, 1796-1906* (RG 59, T 31) National Archives, College Park, MD. Emphasis in original.

⁶ Harrison to Edward Livingston, August 12, 1832, *Despatches from...Kingston*. Emphasis in original.

⁷ Harrison to McLane, August 11, 1834, September 6, 1834, *Despatches from...Kingston*.

destroying slavery by inciting slave rebellions. British diplomats might object, but the security of Southern slavery rested on the government hindering the exploits of Jamaican freemen.⁸

By 1838, Harrison became convinced that Britain reconsidered its covert strategy of undermining Southern slavery from within. Now, Harrison claimed, the British were in favor of outright military engagement. He wrote to Washington of free blacks who openly described a plan by which black Jamaicans would “unite themselves with Hayti [sic], and then attack Cuba, from whence with *three or four hundred thousand men*, they would go to America.” At first, Harrison was unsure whether British officials were coordinating the plan or simply allowing it to unfold. But by the following year, Harrison’s uncertainty evaporated completely. He informed the State Department that the British military had just outfitted four black regiments to be stationed in the Windward Islands and Canada, where they would remain stationed until an all-out assault on the United States could be planned.⁹ After forming beachheads in the South, “black officers in disguise” would train runaway slaves in an eerie reenactment of Dunmore’s Proclamation during the American Revolution. These runaways would form a “powerful auxiliary army” capable of advancing through the countryside.¹⁰ According to Harrison, war was imminent; as soon as Britain could garner enough troops and formulate an effective strategy, the United States would be under attack.

⁸ Harrison to Forsyth, September 8, 1837, *Despatches...from Kingston*. Emphasis in original. Harrison’s letters may have influenced Forsyth’s decision not to object to the Spanish Seamen Act. In 1837, Spain prohibited the entry of all blacks, free and enslaved, sailors and immigrants, from entering Cuba or Puerto Rico. Despite some pressure from New York merchants, Forsyth did not lodge any formal complaints to the Spanish Legation. He also informed the Consul in Havana, Nicholas Trist, that the law in effect was no breach of international law or treaty. See the following chapter for a fuller treatment of the Cuba Seamen Act controversy.

⁹ There is no evidence that such regiments ever existed. However, the British did utilize free blacks in their navy and marine forces. In fact, Spain enacted its prohibition against the introduction of all foreign-born blacks in these “famosos soldados.”

¹⁰ Harrison to Forsyth, August 27, 1838, April 2, 1839, *Despatches from...Kingston*.

While hardly pervasive, Harrison's idea of a black invasion was not all that farfetched for some Americans. For example, George Templeton Strong of New York admitted to his diary that an army of "woolly-headed and flat-nosed" soldiers could possibly land in South Carolina, with absolute chaos ensuing. A British tactic of this sort would surely unravel Southern society.¹¹ Most Americans, though, probably did not envision an all out military offensive, choosing to believe that Britain learned its lesson from the Revolution and from the Battle of New Orleans in 1815. But if most Americans scoffed at the predictions of Harrison and Strong, they nonetheless shared suspicions of British dreams of worldwide abolition. For many Americans, Great Britain would love nothing more than to witness the downfall of Spanish and American slavery, and abolitionists and free blacks would be useful tools in accomplishing this feat.

Thomas Ritchie, the editor of the Richmond *Enquirer*, forecasted that Jamaica could not escape economic collapse without slavery so long as it existed amongst competing producers. The editor of the *Columbia Telescope* in South Carolina, cut to the chase and asked rhetorically, "[When] the sound of the passage of an emancipation bill is heard throughout the Union, how should we be able to save ourselves from extermination?" Duff Green, the influential editor of a leading Democratic newspaper, the *United States Telegraph*, and staunch Calhoun supporter, led the charge in casting aspersions at the Machiavellian designs of British foreign policy. While abolitionists were crucial in attacking Atlantic slavery, the real impetus behind the success of the international antislavery movement was savvy British politicians. British politicians shrouded their intentions with a cloak of humanitarianism; their true motivation was plain greed. If Atlantic slavery fell, then the competitive labor advantage that slavery bestowed would diminish,

¹¹ Rugemer, *The Problem of Emancipation*, 197.

and Britain could remain on its perch as the world's preeminent economic nation. Whether predicting economic disaster or the apocalypse, and whether blaming abolitionists or Parliamentarians, Southerner publishers demonized British emancipation measures and empathized with distraught West Indian planters.¹²

Great Britain seemed to do more to confirm than counter the conspiracy theories of those like Green and Ritchie. The North Carolina legislature became convinced that Britain sought worldwide abolition. It lambasted Britain after hearing a memorial from John Waddell, who was aboard a United States vessel sailing from Charleston to New Orleans in February, 1834. Waddell was heading to a plantation in New Orleans with twenty-two of his slaves. Apparently, a random collision with a reef forced the brig to seek refuge in the Bahamas. After initially refusing to let the wrecked vessel dock, the Lieutenant General of New Providence finally allowed it to enter port. But before the boat docked, British officials boarded the ship and escorted ashore Waddell's slaves along with twenty-three other slaves of various owners. The Customs' officer, at the behest of the Lieutenant Governor, summarily freed the slaves. Waddell was outraged. Through the U.S. Consul in Nassau, Waddell supplicated to the Governor of the islands, but his pleading fell on deaf ears. If Waddell attempted to maneuver around British authorities and "interfere with the *manumitted slaves*," the Governor would honor his "duty to *hang him*."¹³ The North Carolina Legislature informed other states and the federal government of the incident in the Bahamas, and the fiasco suggested further that British policy aped the antislavery rhetoric pouring out of the Isles. When word of the Waddell's mishap in the Bahamas reached Secretary of State John Forsyth, he assured North Carolina officials that

¹² Joe Bassette Wilkins, Jr., "Window on Freedom: The South's Response to the Emancipation of Slaves in the West Indies," (Ph.D. Diss. University of South Carolina, 1977): chapters 2-3.

¹³ *Acts of the General Assembly of the State of North Carolina at the Session of 1834-1835* (Raleigh, N.C.): 94-95. Emphasis in original.

President Jackson would lodge a formal complaint and request that steps be taken to prevent such outrages in the future.¹⁴

The clamor of Southern slaveowners over Waddell's treatment at the hands of Bahamian authorities was about to be reciprocated thanks to the unfortunate arrest of the free black Bahamian, William Forster. Back in 1833, an American schooner discharged its crew in Key West after completing its wrecking voyage. Among the crew was Forster, who was apparently unaware of the 1832 Florida law against black emigration and seamen. After discharge, Forster attempted to reside in Key West for a short time until he could procure employment aboard another coasting vessel. Local authorities apprehended him, convicted him of transgressing Territorial law, and ordered his immediate departure. Forster seemingly complied, but two years later, he found himself aboard the *Amelia*, an American vessel from Baltimore that began a wrecking voyage off the coast of Florida. Forster knew he could not leave the vessel but was not cognizant of the portion of the 1832 law relating to black sailors in port. To Forster's surprise, local authorities boarded the ship while stopped in harbor and arrested him. After being hauled before a local Justice of the Peace, Forster received his punishment; the court ordered Forster sold into slavery for a term of five years according the provisions of the statute. At the subsequent auction, Forster went in shackles to the plantation of the highest bidder.¹⁵ In an inadvertent quid pro quo, Florida authorities were enslaving British subjects of the Bahamas while British authorities in the Bahamas were freeing American slaves. Just as slaves could not

¹⁴ See Forsyth to Governor (NC) David Swain, February 4, 1835, in *Domestic Letters of the Department of State, 1784-1906* (RG 59, M 40, Reel 25), National Archives, College Park Md. Waddell's loss of property was hardly unique. Edward Rugemer details four other instances of British officials freeing slaves of American masters who accidentally ended up in British territory. See Rugemer, *The Problem of Emancipation*, 197-203.

¹⁵ Jonathan Baldwin to Governor of the Bahamas, July 2, 1835 in *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Series 5, Volume 579, *Foreign Office Papers*, Public Records Office, London (hereafter referred to as *Correspondence*); 45.

breathe the free air of British dominions, so, too, did it seem that no free black Britons could breathe the air of the U.S. South.

As soon as the news of Forster's enslavement reached the Governor of the Bahamas, he informed the Foreign Office, which in turn instructed its diplomats in Washington "to inquire into the case, and to take such as steps as may appear practicable to obtain [Forster's] freedom."¹⁶ When asked unofficially about the possibility of the Executive Branch interceding on the sailor's behalf, Secretary of State Forsyth doubted anything could be done. Since Forster had already become private property, the hands of the State Department, and everyone else's in Washington, were tied. The only possible recourse, according to Forsyth, was judicial; if British officials could uncover some "irregularity" in the arrest or judicial proceedings, then they could sue for Forster's release.¹⁷ Charles Bankhead, British Chargé d'Affaires in Washington, suspected that such irregularities existed, believing that the law should not have applied to Forster because he never intended to set foot on Florida soil, and only disembarked because local authorities hauled him off to jail. Bankhead was mistaken as to the applicability of the Florida statute. That did not mean, however, that no irregularity in Forster's case existed; apparently, the magistrate who ordered the arrest and then convicted him was the same person who bought Forster's labor at auction! Unfortunately for Forster, this seeming conflict of interest did not result in his release, but fate did choose to intervene on the poor sailor's behalf. His former captain, perhaps distraught over the enslavement of one of his crew, purchased Forster's freedom from the wily justice of the peace. Forster immediately traveled to Key West, where he was able

¹⁶ Viscount Palmerston to Sir Charles Vaughn, September 23, 1835 in *Correspondence*, 46

¹⁷ Bankhead to Palmerston, December 5, 1835; Bankhead to Forsyth, November 14, 1835; Forsyth to Bankhead, November 20, 1835, all in *Correspondence*, 47-49.

to procure conveyance back to Nassau.¹⁸ In all, Forster spent less than six months as an American slave.

Despite Forster's release, Bankhead was furious. He experienced firsthand the diplomatic nightmare precipitated by the Seamen Acts in South Carolina, Georgia and North Carolina. However, the Florida legislature had enacted something unprecedented. With the acquiescence of the United States government, Florida was enslaving free British subjects. Bankhead contacted the British Solicitor-General and the King's Advocate Attorney, praying that the Forster case that so violated his sensibilities also contradicted international law. To Bankhead's dismay, British legal officials reinforced Forsyth's understanding of the law. Unless some irregularity in the arrest or trial could be proven, the British government could do nothing. After all, Britain condemned to death alien convicts who returned after a sentence of deportation. If Florida's enslavement penalty violated the law of nations, then Britain would have to rewrite its own alien penal codes.¹⁹ The most Bankhead could do was to suggest to the officials in the Bahamas of publishing the Florida law in order to prevent a similar debacle in the future. While the law's legitimacy was debatable, enslavement-as-punishment was no violation of international law.²⁰

British Emancipation did not occur in a vacuum, and Southerners did not just watch the events in the British Caribbean as a detached experiment. British desires were much more nefarious. Some Americans, like Robert Harrison, believed the worst. Britain was arming slaves, organizing them into battalions, and setting their aims on the South. Other Americans, like Duff Green and Thomas Ritchie, did not foresee a racial Armageddon, but they, too,

¹⁸ Bankhead to Palmerston, December 21, 1835, in *Correspondence*, 49-50

¹⁹ J. Dodson, J. Campbell, R. Rolfe to Palmerston, January 30, 1836, in *Correspondence*,

²⁰ Bankhead to Palmerston, December 21, 1835, in *Correspondence*, 50.

believed wholeheartedly that Great Britain actively sought the downfall of American slavery.

This paranoia spelled disaster for black sailors in general, and William Forster in particular.

British diplomat Charles Bankhead summarized the point perfectly

Since the abolition of slavery in His Majesty's West India possessions, the authorities in the Southern States have increased their vigilance, in order to prevent the introduction among their slaves of free persons of colour. However expedient this may be for their own tranquility, it is very burthensome towards those of His Majesty's subjects whose avocations may call them to make a temporary sojourn to any of the southern ports from the West Indies.²¹

With British Emancipation, opponents of the Seamen Laws faced an uphill battle in convincing Southern legislatures of the harmlessness of free black sailors.

But British Emancipation also indirectly precipitated a major domestic crisis that united the South against the designs of antislavery advocates. In less than two decades, abolitionists transformed from political outcasts into a powerful political bloc, and the once quixotic plan for gradual abolition ultimately culminated in immediate emancipation. Abolitionism in Britain was literally an institutional rags-to-riches story, and its fairy tale ending of Emancipation left an indelible impression on antislavery societies in the Northern United States. Inspired by the success of British abolitionists, abolitionism in the United States reached new heights in the mid-1830s. Seeking to replicate their counterparts' victory, abolitionists on the west side of the Atlantic borrowed British tactics, money, and personnel.

What was a fairy tale to Northern antislavery advocates was tragedy for Southern slaveowners. British Emancipation revealed the inherent dangers of abolitionists in the United States, despite their current miniscule numbers. Many Southern slaveholders wondered about the security of their own peculiar institution. For many moderate Southerners, the political impotence of the West Indian planters – who were nothing more than “a proud people being

²¹ Charles Bankhead to Viscount Palmerston, December 5, 1835 in *Correspondence*, 47-48.

forced by the majority party in Parliament to accept emancipation against their will” – caused them to reflect on the doctrines of Nullification.²² In 1834, white Southerners may have still considered Nullifiers to be a misguided group of rabble rousers, but Britain’s centralized imperial government exposed the potential problems with a consolidated, majoritarian national government in the United States. If the federal government could enact a tariff at the behest of a national majority to the detriment of South Carolina’s economy, what would stop that same federal government from following the will of an antislavery majority (if it materialized) and attacking slavery through some constitutional channel? Might slavery be attached to interstate commerce, or interstate comity, and thereby legislated against? Only Nullification, according to Calhoun, Duff Green, and others, could protect slavery from the will of an antislavery majority, should it ever develop. While other Southerners were not yet ready to make the leap to Nullification, they shared the anxiety over a federal government unresponsive to Southern prerogatives. Though Nullification fractured the South, Parliament’s Act of Emancipation was acting as a sort of ideological splint, a point of departure for a regional rallying cry. Abolitionism must be curtailed at all costs, lest the Union would be sacrificed (at best) or Southern society be destroyed. In short, Northern abolitionists were on the verge of initiating their own public outreach campaign at the very moment when white Southerners began taking seriously the political threat that abolitionists posed.

Into these tumultuous waters entered Lewis Tappan, the rather moderate New York abolitionist.²³ In May, 1835, he proposed a seemingly innocuous plan to the American Anti-

²² The words are Thomas Ritchie’s, taken from Wilkins, “Window on Freedom,” 48.

²³ For a general overview of the mail campaign, see Michael Kent Curtis, “Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-1837,” *Northwestern University Law Review* 89 (1995): 787; Leslie Neeland Harvey, “The Negro Seamen’s Acts and the South Carolina Association: The Role of the Citizenry in Articulating and Enforcing South Carolina’s State Police Power over Slavery in the 1820s” (Master’s Thesis, University of Virginia, 2005, on file with the University of Virginia); Bertram Wyatt-Brown, “The Abolitionists’

Slavery Society of which he was a member of its executive committee. The delegates responded enthusiastically and approved his designs for inundating the postal service with newspapers and pamphlets that highlighted the immorality of slavery and extolled the benefits of abolition. The plan was national in scope, and more than 20,000 Southerners appeared on the initial mailing lists. The American Anti-Slavery Society acted quickly as over 175,000 copies of abolitionist newspapers and pamphlets passed through the New York Post Office by the end of July, 1835. Some abolitionists predicted the likely Southern reaction of disgust and contempt, but others believed the mail campaign would convince slaveowners that the global condemnation of slavery meant that they should consider voluntary manumission.²⁴

On July 29, 1835, the steam packet *Columbia* sailed into Charleston Harbor with a large shipment of abolitionist publications addressed to ministers, notable slaveowners, and other members of South Carolina society. A scrupulous Charlestonian had discovered the shipment, and quickly informed the editors of the Charleston *Southern Patriot* that the *Columbia* was contaminated with a “moral poison” that the citizens of Charleston had to suppress.²⁵

Charleston’s Postmaster, Alfred Huger, attempted to turn away an angry mob composed of “respectable men of all parties” that demanded he turn over the abhorrent publications.²⁶ Huger knew he could not return the publications; as soon as the mail left the Post Office, it would surely be confiscated as the “Whole civil authority were [sic] in favor of arresting the Mail.” The

Postal Campaign of 1835,” *The Journal of Negro History* 50 (October 1965): 227-238; Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965): chapter 10.

²⁴ Bertram Wyatt-Brown, “The Abolitionists Postal Campaign of 1835,” 238.

²⁵ *Charleston Southern Patriot*, July 29, 1835

²⁶ Interestingly, Alfred Huger testified in the case of *State of South Carolina v. Daley* back in 1825. In that case, Amos Daley sought exemption from the South Carolina seamen act because he claimed to Narragansett Indian, and not of African descent. Huger testified that he had spoken to Daley’s captain, and the captain mentioned he did not know Daley’s father. Thus, Daley could not prove his race, and was found guilty and whipped. See Chapter 4 above.

Postmaster then promised the mob that he would sort out the objectionable portion of the shipment and prevent its delivery until he received direction from his superiors in Washington. The mob apparently dispersed, but the sequestered mail was stolen from the Post Office later that night.²⁷ The next day, a crowd of three thousand assembled and burned the mail bags along with effigies of Arthur Tappan and William Lloyd Garrison.²⁸

The occasion brought together heretofore estranged members of South Carolina high society. “Nullifiers and Union men, Jackson men and Clay men, Van Buren men and White men who differ on all points agree[d]” on the need to repress this vile use of the mail privilege. Huger himself was evidence enough. He was a Union man in 1832, and he was a diligent federal employee. Yet, he was emphatic in denying the right of abolitionists to use the mail system to set master against slave and undermine the very foundation of Southern society. Huger would stand with his old political enemies, “Shoulder to Shoulder – and for once the Nation will see the Extraordinary Spectacle of a whole state; unanimous.”²⁹ Such a grand statement was not hyperbole; it was quite possibly an understatement, for the rest of the South joined South Carolina in protest. Unlike the 1832 Nullification controversy, the other Southern states agreed with South Carolina on the propriety of their reactionary measures. Nearly every major city in the South participated in some way against the mail campaign, whether through public meetings, torch-lit parades, or the creation of vigilance societies. John C. Calhoun even suggested the

²⁷ Alfred Huger to Samuel L. Gouverneur, August 1, 1835. All of the letters between Huger to Gouverneur can be found in the *Gouverneur Papers* in the Manuscript Room of the New York Public Library. Typed, edited copies can be found in Frank O. Gattell, ed., “Postmaster Huger and the Incendiary Publications,” *South Carolina Historical Magazine* 64 (January 1963): 193-202.

²⁸ Wyatt-Brown, “The Abolitionists’ Postal Campaign,” 230

²⁹ Huger to Gouverneur, August 1, 1835 and August 6, 1835. Apparently, the only disagreement was whether the mail should have been taken clandestinely or not. Many Charlestonians wished the confiscation happened in broad daylight. Others wished confiscation only if federal officials in Washington instructed Huger to deliver the mail. See *Charleston Southern Patriot*, July 30, 1835 and *Charleston Courier*, July 31, 1835.

possibility of disunion if initial efforts to suppress the mail campaign proved unsuccessful. Death threats daily reached members of the AA-SS.³⁰

Popular outrage led Southern state legislatures into immediate action. Virginia declared its unilateral “right to control or interfere with the subject of domestic slavery within its limits, and that this right will be maintained at all hazards.” While pleading with “non-slaveholding states of the Union” to adopt codes criminalizing the distribution of abolitionist literature, it also claimed the right for “the slaveholding states to enact such laws and regulations as may be necessary to suppress and prevent the circulation of any incendiary publications within their respective limits.” Furthermore, Virginia stipulated that all cargo manifests sworn to by a free black had to be cosigned by “some respectable white person.” The object, of course, was to prevent free blacks from abetting abolitionists in circulating incendiary material within the Commonwealth.³¹ The North Carolina Assembly was equally emphatic. According to the Tarheel State legislature, it would be gross violation of constitutional principles for Northern States “to permit their own subjects to set on foot, any project the object or tendency of which would be to disturb our peace by arraying one portion of our society against another.” If left to their own devices, (white) North Carolinians could maintain a peaceful and prosperous society based on black chattel slavery. Outside interference caused the problems. “But we do ask,” the North Carolina Legislature declared accordingly, “and think we have a right to demand, that others shall not teach [slaves] evil, of which they think not themselves...[or] be stimulated by the base and violent of other lands, to deeds of bloodshed.”³² In Alabama, lawmakers came to

³⁰ *Southern Patriot*, September 30, 1835; Wyatt-Brown, “The Abolitionists’ Postal Campaign,” 230, 234; *Niles’ Weekly Register*, September 12, 1835.

³¹ *Acts...of Virginia, 1835* (Richmond, Va.): 44-45.

³² *Acts and Resolutions...of North Carolina, 1835-1836*, 119-121

similar conclusions, condemning abolitionist literature and antislavery travelers seeking to enter the state. Northern States were obliged to help prevent “the dark, deep, and malignant designs of the Abolitionists...[from] sending to our country their agents and incendiary pamphlets and publications, lighting up fires of discord in the bosoms of our slave population.”³³

In Virginia, Alabama, and North Carolina these firm resolutions about the introduction of poisonous ideas dovetailed nicely with the rationale employed by Georgia, Florida, and South Carolina in enacting their racial quarantines. In fact, the events of 1835 led directly to amendments in both the South Carolina and Georgia Seamen Laws.³⁴ In Columbia, lawmakers’ revisions increased the penalty for recalcitrant captains and statutorily prohibited sheriffs from failing to execute the law. Henceforth, Sheriffs could not selectively enforce the law without facing indictment.³⁵ The Georgia modifications also imposed heavier penalties. Since 1829, free black sailors entering Georgia only had to ride quarantine for forty days, after which they appeared to have every right to enter the state. After the 1835 revisions, free black sailors could not go ashore even after riding quarantine. If they did, they faced a fine and imprisonment, and if they could not afford the fine, they would be hired out to cover the costs.³⁶ The British Consul

³³ “A Memorial of the General Assembly of the State of Alabama to the General Assemblies of the several States of the Union,” *Resolutions...of Alabama, 1835-1836*, 174. Unsurprisingly, South Carolina joined the chorus and reached many of the same conclusions regarding the duty of the Northern States to outlaw specific abolitionist activity. See the report from the Senate’s Committee on Federal Relations, December 16, 1835, in *Reports and Resolutions...of the Senate...of South Carolina, 1835*, 26-28.

³⁴ Alan January, “The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860” (Ph.D. Diss. University of Iowa, 1976): 247. The legislature refused to act on a motion to amend the Seamen Act in 1834. The next year, the same motion passed, leading to the 1835 revisions.

³⁵ See *Acts...of the State of South Carolina...1835*, 34-39.

³⁶ See *Acts...of the State of Georgia, 1835*.

in Savannah was so alarmed by the modification that he sent a circular to the governors of the British West Indian colonies to warn them.³⁷

Abolitionist determination and Southern recalcitrance put the federal government in a bit of a predicament. While Alfred Huger was busy hording the mail in Charleston and trying to convince the New York Postmaster to halt all shipments of abolitionist literature, Postmaster General Amos Kendall contemplated the policy of his department. Initially, he instructed his underlings that he had no legal grounds to prevent the delivery of the publications. However, he also indicated that prudence, and perhaps the law, should compel the local Postmasters to suspend deliveries. He suggested to his agent in Norfolk that the inflammatory materials be sent only to actual subscribers and not to unsuspecting Southerners. Kendall set a similar set of “instructions” to the New York Postmaster, who then suspended the transmission of the provocative tracts and informed Huger that the shipments would soon cease.³⁸ Thus, the abolitionists’ mail campaign was temporarily tabled without any decisive comment from Jackson, Kendall, or Congress. During this bureaucratically administered hiatus, the Administration and Congress contemplated their official positions.

In a letter to his Postmaster General, Andrew Jackson lamented the actions of the abolitionists, and instructed Kendall to allow the delivery of the abominable letters to only those who actually held subscriptions until Congress could pass an applicable law to criminalize their efforts. Jackson also suggested to Kendall that the names of the subscribers be made public, so as to agitate the community against those who so wantonly ignored the dangers of circulating abolitionist propaganda. Upon hearing of Jackson’s position, Kendall wrote a lengthy letter in

³⁷ E. Molyneux to Viscount Palmerston, February 21, 1837, in *Correspondence*, 53.

³⁸ Curtis, “Curious History,” 818; Gouverneur to Huger, August 9, 1835.

which he criticized the audacity of the abolitionists and questioned their legal reasoning. In direct contradiction to the rationale of the AA-SS, the Postmaster General suggested that local Postmasters could be arrested for violating state laws that outlawed the circulation of antislavery literature even if they were acting in an official capacity as an employee of the federal government. Kendall despised the idea that someone in his office could be arrested for fulfilling his duty, but the onus for such a situation would fall squarely on abolitionists who diabolically sought to use federal employees as pawns in their assault on sacred, Southern institutions.³⁹

When Amos Kendall reported to Congress at the end of 1835, he had refined many of his positions. Certainly, the Constitution allowed the slave states to “fence and protect their interests...as, in their sovereign will, they may deem expedient.” In applying the police power doctrine articulated by Berrien and confirmed by Taney as Attorneys General, Kendall confirmed that state laws shutting out incendiary publications or dangerous people were appropriate exercises of reserved powers. Moreover, in states with regulations against specific publications, all citizens were subject to the law, “whether private citizens, officers of the State, or functionaries of the General Government.” As such, federal postmasters could be imprisoned for having in their possession publications outlawed by various states’ legislatures. After establishing the propriety of state law prohibiting the introduction of abolitionist literature, Kendall went one step further and denied any federal ability to protect the delivery of publications deemed obnoxious by state authorities. For Kendall, the Constitution’s mandate to the federal government to assist a State “against domestic violence” proved that Congress could not forcibly allow the Post Office to deliver publications contrary to state law. “There is no

³⁹ Curtis, “Curious History,” 818-9. Kendall was a slaveholder from Tennessee, and a close confidante of Andrew Jackson.

quarter,” Kendall explained, “whence domestic violence is so much to be apprehended in some of the States, as from the servile population.” Kendall continued,

It is to obviate danger from this quarter that many of the State laws, in relation to the circulation of incendiary papers, have been enacted. Without claiming for the General Government the power to pass laws prohibiting discussions of any sort, as a means of protecting States from domestic violence, it may safely be assumed that the United States have no right, through their officers or departments, knowingly to be instrumental in producing within the several States the very mischief which the constitution commands them to repress.

As such, the Constitution emphatically denied the ability of Kendall’s employees to deliver publications contrary to state law. As for Congress, Kendall believed his policy as Postmaster General had precluded the need for immediate and direct Congressional action (because the questionable publications were not being delivered). Nonetheless, to protect his employees, he suggested that Congress consider the efficacy of a federal law that might outlaw Postmasters from delivering publications contrary to any state law. For Kendall, Congress could not pass any law abridging state regulations against incendiary mail, but it could pass laws assisting state authorities.⁴⁰

We can only conjecture about whether Andrew Jackson agreed with Kendall about the power of state laws to indict federal employees in the fulfillment of their duties. Also unknown is Jackson’s position about Congress’s ability to protect the mail as a species of federal property despite any state laws to the contrary. However, we do know that Jackson, like Kendall, hated the abolitionist mail campaign and sought Congressional action to criminalize their project. For Jackson, the Constitution’s empowerment of Congress “to establish post-offices and post-roads” meant that Congress could regulate the postal service as it saw fit, including the ability to prohibit the circulation of specific types of publications, especially those that sought to incite

⁴⁰ “Report of the Postmaster General,” *Congressional Globe*, 24 Cong., 1 sess. (1835): 398-400.

slave rebellion.⁴¹ As such, Jackson requested that Congress prohibit the use of the Post Office for the circulation of publications seeking to incite slave insurrection, regardless of any state laws already in operation.

The Senate responded, but not in the way that Jackson had hoped. Unfortunately for Old Hickory, the Select Committee on Incendiary Publications was led by John C. Calhoun, and on February 4, 1836, Calhoun presented his report on a bill that contradicted the wishes of the White House.⁴² The bill itself did not follow Jackson's guidelines about creating a federal standard of prohibited conduct; instead, it demanded that postal employees abide by state legislative standards regarding incendiary publications. It also required the Postmaster General to provide his employees with all state laws concerning the prohibitions on circulation.⁴³ Calhoun's report explained the impropriety of creating a federal standard as the President wished. The argument could be made, Calhoun explained, probably with a dismissive air, that the constitutional provision that empowered Congress to establish the post office also granted an authority to regulate postal circulation. Even if this line of reasoning was appropriate (and Calhoun certainly did not think it was), such Congressional authority could not be exercised as the President desired.

For Calhoun, the roadblock was to be found in the First Amendment. Regardless of the power of Congress to legislate on the Post Office, it could not "abridge the liberty of the press." Any attempt by Congress to restrict the circulation of any publication, no matter how vile and disruptive, would be akin to the detested Sedition Act of 1798. "The principle on which the

⁴¹ Curtis, "Curious History," 820-833.

⁴² Calhoun's report reprinted in *Niles Weekly Register*, February 13, 1836. The following Calhoun quotations are taken from this reprint.

⁴³ Curtis, "Curious History," 824.

sedition act was condemned [by Madison in the Virginia Resolutions] was a general one...[withdrawing] from congress all right of interference with the press, in any form or shape whatever.” To prohibit circulation was the same as prohibiting publication itself. Just because the Sedition Act was ignoble and a federal law against abolitionist literature would be good policy did not negate the fact that both sets of regulations remained beyond the constitutional authority of Congress. Furthermore, Calhoun reiterated Kendall’s position regarding domestic insurrections. The federal government could only assist states upon their application; it certainly could not determine for itself when to intervene. Thus, Congress could not decide for itself which publications threatened public safety and which did not.

Of course, Calhoun believed the publications could be restricted by state authorities as a legitimate exercise of police powers. In explaining the relationship between enumerated, federal power and the reserved powers of the states, Calhoun found a logical correlation between the Seamen Acts and laws against the distribution of incendiary publications.

If, consequently, the right to protect her internal police and security belongs to a state, the general government is bound to respect the measures adopted by her for that purpose, and to co-operate in their execution, as far as its delegated powers may admit, or in measure may require. – Thus, in the present case, the slaveholding states having the unquestionable right to pass all such laws as may be necessary to maintain the existing relation between master and slave in those states, their right, of course, to prohibit the circulation of any publication, or any intercourse calculated to disturb or destroy that relation, is incontrovertible. In the execution of the measures which may be adopted by the states for this purpose, the powers of congress over the mail, and of regulating commerce with foreign nations and between states, may require co-operation on the part of the general government; and it is bound...to respect the laws of the state in their exercise.

Again, history provided Calhoun with proof of his position. In 1799, Congress enacted a law requiring federal customs officials and military personnel to abide by and assist in enforcement

of all quarantine and health laws adopted by the various states.⁴⁴ Thus, both reason and experience vindicated state restrictions and proved both federal impotence to act of its own accord and federal obligation to respect state regulations. The Senate bill followed this logic.

Ultimately, Calhoun's incendiary publications bill did not pass the Senate. Opponents criticized the bill on both constitutional and policy grounds.⁴⁵ Only in the 1836 Post Office Act did Congress mention anything about the obligation of postmasters, and the language was incredibly vague. The statute barred postmasters from unlawfully detaining the mail. But what was unlawful? More directly, did state laws impose restrictions on federal postmasters within their jurisdiction?

Congress refused to offer any definitive answers to these questions. However, Congressional inaction had the desired effect in the South without raising red flags about constitutional powers. The Postmaster General, with the acquiescence of the President, allowed individual postmasters the ability to prevent the circulation of abolitionist literature, and they did so. The problem facing commentators on both sides of the debate was that the informal, *de facto* embargo created through Executive inaction was hardly a guarantee that future administrations would honor the Jacksonian example. Future Congresses might choose to contemplate the mail issue if a new Administration took office and was not so willing to allow individual Post Offices the kind of leeway permitted by Kendall. If such a future Congress decided that mail in federal

⁴⁴ The House Post Office Committee came to similar conclusions, though its report never circulated. See Curtis, "Curious History," 826-7.

⁴⁵ Senator Davis, for example, criticized Calhoun's bill using the South Carolinian's own logic. Davis wondered how Calhoun's bill was still not a federal regulation of the press. If the federal government, by adopting the prescriptions of the individual states, refrained from delivering incendiary mail, was that not the same violation of the First Amendment as a federal law outlawing such deliveries? Henry Clay thought state legislation was sufficient, as Congress had not power to touch the issue. See Curtis, "Curious History," 830-5.

possession was an object beyond the scope of state legislation, then Pandora's Box would assuredly be pried wide open.

This acquiescence to state aggressiveness in protecting its citizens from incendiary publications was precisely the position the Jacksonians assumed towards the Seamen Acts through 1836. The Administration and Congress had chosen to remain aloof, granting a type of informal acceptance of the laws as necessary exercises of internal police. Yet, there was nothing formally instituted that could protect the states in the future. An unlucky election might result in a new policy and, subsequently, disaster. Attorneys General Berrien and Taney believed state laws preventing the introduction of free blacks and incendiary literature to be protected against federal interference. These theories of federal noninterference and judicial restraint quickly became some of the arch principles of Jacksonian constitutionalism, but those principles had not been canonized. In 1837, though, the Supreme Court took the first step towards institutionalizing the protection of the Seamen Acts and laws against incendiary publications. Although *New York v. Miln* did not address these two subsets of quarantine *per se*, it did address the constitutionality of state police laws in general, and Justices were well aware of the impact of the *Miln* decision on protecting Southern slavery. The result was a ringing victory for defenders of the Seamen Acts.

In *New York v. Miln*, the issue before the Court was the constitutionality of a New York law requiring the captain of all vessels entering the port of New York City to provide municipal officials with a list of passengers and to post a bond to prevent those passengers from becoming public charges. When the ship *Emily* entered the port, and its captain refused to pay the bond, city officials brought suit against George Miln to collect the statutory penalty for the captain's noncompliance. This case initially came before the Court in 1835, when Marshall was still Chief

Justice.⁴⁶ However, the case was tabled, as the fully empanelled Court was not present to hear the case, and Marshall apparently believed that all cases of a constitutional matter demanded the full slate of Justices. Technical issues prevented the case from coming back to the Court until 1837, after Marshall's death.

In making their arguments before the Court (after eight years of litigation), the counsel for New York looked to *Gibbons v. Ogden* and the Seamen Acts in defending the state pauper law. In turning to *Gibbons*, they sought to draw a distinct line between state commercial regulations – which could potentially be an unconstitutional usurpation of federal power if Congress chose to preempt – and state police laws, which the Tenth Amendment explicitly protected. In framing their argument, counsel believed the great John Marshall to be authoritative. They quoted him in asserting that the pauper law fell under the protection of the police power, a power that “embraces every thing [sic] within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves [including] Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state.” These laws, like the one before the Court, affected commerce without emanating from the power to regulate commerce. Rather, it originated in the state power to protect its citizenry. If such laws were in fact commercial regulations, the plaintiff argued, then federal jurisdiction would have few limits, and the federal government could legislate on issues that the Framers clearly intended to remain with the states. If Congress could interfere in these laws through its commerce provisions, then “All vagrant laws, all poor laws, and police regulations, become, at once, solely of federal jurisdiction.”⁴⁷

⁴⁶ *New York v. Miln*, 34 U.S. 85 (1835).

⁴⁷ *New York v. Miln*, 36 U.S. 102 (1837), at 124.

However, plaintiff's counsel did not want to pin the Court in a corner by placing all of its eggs in one basket. Even if the Court found the law one of commerce and not police, even if the Court would expand federal jurisdiction so grotesquely, that did not mean the pauper law was on its face unconstitutional. Since Congress had not explicitly legislated on the issue of paupers, as the argument went, the state laws ought to remain intact until Congress acted. Only when a direct conflict occurred would the state law yield. What was utterly unimaginable for the plaintiff was the possibility that the Court would rule the law one of commerce and then strike it down as a violation of the Congress's exclusive power to regulate interstate and international commerce.⁴⁸ This scenario was untenable, counsel claimed, because it would not only expand federal legislation beyond the intention of the Framers, but also destroy all species of state laws incidentally touching commerce. If the Court struck down the New York law as an infringement of interstate and international commerce, "The laws of the southern states in relation to the intercourse and traffic with slaves, and to the introduction of coloured persons into those states, also [would] become the subjects of federal jurisdiction and the state laws...abrogated." The implications were obvious; if the Court ruled in this manner, it was opening a can of constitutional worms in which certain racial policies in the South would fall under Congressional authority.⁴⁹

In his dissenting opinion, Justice Thompson agreed wholeheartedly with the plaintiff.⁵⁰ For Thompson, it did not matter whether the law in question was one of commerce or one of

⁴⁸ This was the logic of William Johnson's concurrence in *Gibbon v. Ogden*, 22 U.S. 1 (1824).

⁴⁹ *New York v. Miln*, 36 U.S. 102 (1837), at 125.

⁵⁰ Thompson's opinion is in dissent because the only issue facing the Supreme Court was whether the New York law was one of police or of commerce. Since Barbour and the majority ruled it a police law, Thompson dissented to argue that the exact categorization was immaterial. In dissent, Thompson agreed with the majority that the law should stand.

police. In either instance, the law had to stand. As a police law, it would stand ad infinitum and as a commercial law, it would at least until it came into a direct and obvious conflict with a constitutionally enacted federal law. “It is not necessary, in this case,” Thompson explained, “to fix any limits upon the legislation of congress and of the states, on this subject, or to say how far congress may, under the power to regulate commerce, control state legislation in this respect.” He continued, “It is enough to say that whatever the power of congress may be, it has not been exercised so as, in any manner, to conflict with the state law; and if the mere grant of power to congress does not necessarily imply a prohibition of the states to exercise power, until congress assumes to exercise it, no objection, on that ground, can arise to this law.”⁵¹

Though in practice the source of power from which the pauper law emanated was immaterial to the case at bar, Thompson still supposed it to be one of police. “Can any thing [sic] fall more directly within the police power and internal regulation of a state,” Thompson asked, “than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance?”⁵² If the Court went so far as to annul the New York law, it would create “the most serious and alarming consequences...especially for those [states] bordering on the Atlantic.” To abrogate state laws of police “ought not to be done, unless demanded by the most clear and unquestioned construction of the constitution.”⁵³ It is not difficult to imagine Thompson protecting Southern laws against moral contagions in the same breath in which he supported New York’s desire to limit other undesirables.

⁵¹ *New York v. Miln*, 36 U.S. 102 (1837), at 146.

⁵² *New York v. Miln*, 36 U.S. 102 (1837), at 149.

⁵³ *New York v. Miln*, 36 U.S. 102 (1837), at 151-152.

Also in dissent, Joseph Story came to opposite conclusions as Thompson. With respect to *Gibbons*, Story agreed that Marshall outlined the “nature and character” of quarantine, health measures, and other “police laws,” but he refuted New York’s conclusions. For Story, he admitted “the power of the states to pass such laws, and to use the proper means to effectuate the objects of them; but it is with this reserve, that these means are not exclusively vested in congress.” Story continued, “A state cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority.” Here we see not so much Marshall’s opinion in *Gibbons*, but Johnson’s concurrence. Since Congress has the sole authority to regulate commerce, then the states cannot use commercial regulations as a means to effectuating the object of its health or quarantine laws. For Story, the New York law in particular was definitively a commercial law, placing specific restrictions on interstate and international commerce as defined by Marshall more than a decade beforehand. In sum, Story believed the law one of commerce and, therefore, an unconstitutional usurpation of Congressional authority. And Story was emphatic about where Marshall stood on the case, as he ended his dissent with a smug reminder to his colleagues that the Great Chief Justice, before he died, had agreed with Story about the unconstitutionality of the New York law in question.⁵⁴

In a sense, the Court charted a middle ground between the poles occupied by Story and Thompson, though that middle ground sat much closer to Thompson and emphatically legitimated the constitutional edifice on which the Seamen Acts rested. In complete opposition to Marshall’s definition of commerce as including navigation and passengers on board of vessels, Barbour and the majority (including Taney) denied that persons “were the subject of commerce,” as they were surely not “imported goods.” And if persons were not objects of commerce, then

⁵⁴ *New York v. Miln*, 36 U.S. 102 (1837), at 151-152.

Congress had no power to act on the subject under the Commerce Clause. But the Court did not rest its decision on such debatable propositions. Instead, it bypassed the issue of commerce altogether. In fact, the majority explicitly refused to comment on the legitimacy of concurrency, or the power of both the states and Congress to regulate interstate and international commerce. The Court was satisfied to simply proclaim the law in question “not a regulation of commerce, but of police.” With this sleight of hand, the Court began the task of identifying and defending the power of the states to protect the health, safety, and welfare by all means not explicitly forbidden by the Constitution.⁵⁵

In a passage that could have come from Robert Strange, John Berrien or I.E. Holmes in defending the Seamen Acts, Barbour wrote,

[A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained.⁵⁶

And to prove that police laws could rightfully interfere with commerce, the Court specifically cited quarantine laws,

the power to pass quarantine laws, operates on the ship which arrives, the goods which it brings, and all persons in it, whether the officers and crew, or the passengers; now the officers and crew are the agents of navigation; the ship is an instrument of it, and the cargo on board is the subject of commerce: and yet it is not only admitted, that this power remains with the states, but the laws of the United States expressly sanction the quarantines.⁵⁷

⁵⁵ *New York v. Miln*, 36 U.S. 102 (1837), at 168.

⁵⁶ *New York v. Miln*, 36 U.S. 102 (1837), at 183.

⁵⁷ *New York v. Miln*, 36 U.S. 102 (1837), at 189.

If the Court's constitutional position alone would paste a grin on Holmes, Berrien, and Strange, its application of this position on quarantine involved much more than disease.

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.⁵⁸

With its decision in *New York v. Miln*, the United States Supreme Court declared moral contagions, including race, to be permissible objects of quarantine regulations. With a stroke of Philip Barbour's pen, the fears of Southern officials that the High Court might strike down their Seamen Laws along the lines sketched in *Gibbons v. Ogden* fell by the wayside. At least for the foreseeable future, the Supreme Court appeared to be endorsing the positions set out by Attorneys General Berrien and Taney. The Seamen Laws were within the legislative discretion of the individual states. And with the recent mail campaign and rumors of British tampering with Southern slavery, Southern legislatures were not going to voluntarily rescind their racial quarantines.

The 1830s proved to be a good decade for the defenders of the various state Seamen Laws. The apparent antipathy that the National Republicans and the Marshall Court exhibited towards the Seamen Acts during the 1820s shifted as Andrew Jackson and the Democrats seized and consolidated power in state governments, in Congress, in the White House, and ultimately in the United States Supreme Court. Thanks to Taney's theory of legislative discretion, the unwillingness of Congress to pass any law in regards to incendiary publications (nonetheless on the rights of black sailors), and the ruling of the Supreme Court in *Miln*, racial quarantines appeared insulated from attack. According to these terms of Jacksonian constitutionalism, only

⁵⁸ *New York v. Miln*, 36 U.S. 102 (1837), at 191.

the state legislatures that enacted the Seamen Acts could dismantle them. Unfortunately for opponents of the laws, the events of the mid-1830s further convinced the state assemblies of the necessity, not the impropriety, of the Seamen Acts. British Emancipation and the abolitionist mail campaign conspired to prove to Southerners that their institutions were under attack. Subsequently, laws insulating the slave states from people and ideas subversive to slavery were absolutely necessary. Georgia and South Carolina strengthened their Seamen Laws, and Florida even enslaved a free British subject who entered the state illegally. For adorers of Anglo-American harmony, the ascendancy of the reform-minded Whigs and their platform of antislavery conflicted sharply with the increasing approval of the Seamen Acts in the United States.

But the blistering impact of British Emancipation on the rights of black sailors was not confined to the American South. The Spanish Crown, too, feared the onslaught of hundreds of thousands of free blacks from Jamaica, only a shouting distance from Cuba and Puerto Rico. Just as Consul Harrison in Kingston feared the waves of freemen who might be unleashed in the U.S. South, officials in the Spanish Caribbean likewise fretted about the pejorative effects of freed slaves on Cuban plantations. In 1837, not coincidentally, the Spanish Crown prohibited the entrance of all people of African descent into the islands of Cuba and Puerto Rico. Slaves and free blacks, whether employed on board of British or American ships, would be imprisoned once their ships entered harbors within the Spanish Caribbean. At the very moment when the state Seamen Acts appeared immune from all attacks, the federal government was faced with the news that American sailors of color were being held in confinement in Havana.

CHAPTER 7
EXPANDING SUBJECT AND CONSTRICTING CITIZEN: BRITISH ABOLITION,
NICHOLAS TRIST, AND THE CUBAN SEAMEN ACT

Ninety miles separates Jamaica from Cuba, and in the social and political wake of British Emancipation, that distance must have seemed small indeed for Cuban slaveowners. Cuban elites must have shuddered as they looked southward and imagined the designs of British abolitionists and the manpower provided by the newly liberated freemen. Unfortunately a glance to the east provided little comfort, as a similar miniscule distance separated Cuba from Haiti, the Black Republic. Only to the North could a Cuban slaveowner look (if he was intuitive enough to ignore the Bahamas) to find another slaveholding nation with which to commiserate about Britain's grand experiment, and the closest plantation in that nation was hundreds of miles away. However, the physical distance between Cuba and the United States belied the philosophical proximity between the two in limiting the impact of British emancipation on their respective slave societies. From 1822 until 1837, parts of the U.S. South closed their shores to all free black sailors as a means of limiting the penetration of hazardous ideas of abolition, and these laws took on an added importance with British Emancipation. Beginning in 1837, Cuba followed suit and began barring the admittance onto the island all foreign persons of African descent, sailors implicitly included, upon pain of imprisonment.¹

The restrictions in the two slave societies were not completely analogous. Unlike its counterparts in the United States, the new Cuban restriction was not only a reaction to apprehension about the "moral contagion" of free blacks. Otherwise, the Royal Decree mandating the racial quarantine would simply have barred free blacks and not slaves as well. The decision to include slaves in the quarantine was a result of a strained relationship between

¹ David Turnbull, *Travels in the West: Cuba; with Notices of Porto Rico and the Slave Trade* (London, 1840): chapter 4.

Spain and Great Britain regarding the illegal slave trade to the Spanish Caribbean. Spain and Britain had agreed to end the international slave trade in a treaty signed in 1817, which allowed Her Majesty's Navy the right to search all Spanish vessels suspected of slave trading. And search they did, though Cuban officials routinely obstructed British efforts to bring perpetrators aboard Spanish-outfitted ships to justice.² Consequently British authorities continued to assume that deliveries of "odious cargo" routinely entered the island despite wholehearted Spanish protestations to the contrary. So, in addition to protecting Cuban slaveowners from a potential epidemic at the hands of free blacks, the Royal Decree also served as a gesture of good faith towards British authorities suspicious of Spain's commitment to stopping the slave trade.

This chapter will examine the reactions of British and United States officials who encountered the Cuban racial quarantine from 1837 until 1841, when the quarantine was mitigated. In accord with their method of attack on Seamen Laws in the United States, British diplomats excoriated Spanish metropolitan authorities for the treatment of their black subjects in Havana. But in Cuba, British authorities went even further, intimidating colonial officers and threatening armed invasion, taking advantage of existing friction between Madrid and Havana over the rights of white Cuban Creoles. Spanish colonial relations and the strong British military presence in the Caribbean allowed British officials to succeed in Cuba where it failed in the United States. In contrast, American officials had a limited arsenal with which to attack the quarantine. Black citizenship, while contemplated, was jettisoned as a weapon. Moreover, American involvement in the illicit slave trade to Cuba combined with the desire to preserve Cuban slavery made a strong-armed approach from Washington imprudent. Even when Native

² Britain continued to press Spain for increased enforcement of anti-slave trade treaties, and Spain responded in 1826 and again in 1835, but British officials still complained of the continued inundation of African cargoes. See David R. Murray, *Odious Commerce: Britain, Spain and the Abolition of the Cuban Slave Trade* (Cambridge, 1980): especially chapters 5-6.

Americans faced incarceration for being of African descent, the United States did not press the issue. In the end, the Cuban experience highlights the divergence of British and American ideologies of black citizenship.

The man responsible for putting the Royal Decree into effect was the recently appointed Captain-General of the island, Don Miguel Tacón y Rosique. In the words of one scholar Tacón was “the greatest protector the slave traders ever had...allegedly receiv[ing] half an ounce of gold for every slave brought to Cuba.”³ Ruling the island under martial law despite imperial constitutional reforms in 1835, Tacón sought to maintain the slave trade, prevent a recurrence of Haiti and Jamaica in Cuba, and stifle the meddling of British abolitionists and officials in Havana. So when the Crown sought to limit all foreign persons of color, slave and free, from entering the island, Tacón applied it prejudicially, aiming it towards free blacks instead of the cargo of slave traders. Tacón began arresting black sailors in mid-spring, 1837, soon after receiving the Royal Decree, but the first record of imprisoned mariners from the United States did not reach Washington until the fall. Then, the U.S. Consul in Havana, Nicholas P. Trist, informed the State Department of the recent arrests of American seamen.

Nicholas Trist had impressive political credentials. Before his appointment to Cuba, Trist was a personal secretary to former President Andrew Jackson, and according to one of Jackson’s early biographers, “there was none who enjoyed more of [Jackson’s] affection and none more worthy of it” than Nicholas Trist.⁴ But long before he served Jackson, Trist studied law under former President and national icon Thomas Jefferson. Trist cemented his relationship to Jefferson by marrying his granddaughter, starting a plantation, and pursuing a legal career.

³ Murray, *Odious Commerce*, 107.

⁴ The biographer is James Patron, and the quote is taken from Wallace Ohrt, *Defiant Peacemaker: Nicholas Trist in the Mexican War* (College Station, Tex., 1997): 73.

When Jackson appointed him to Havana in 1833, Trist readily accepted the post. The Havana Consul position was a lucrative one, allowing Trist to garner a comfortable income, supplementing his investments in the States. Trist was grateful for his post, as many other worthy competitors sought the prized position, including close confidants to Martin Van Buren. Once there, though, Trist often wished the demands of his office did not occupy so much of his time. Also, Trist's wavering health compelled him to spend the uncomfortable Cuban summers in Washington with his family, a luxury that was probably afforded him because of his political pedigree.⁵ Perhaps because of this routine, the first report to reach Washington concerning the application of the Cuban "seamen law" was written by Trist in September following his return to the island.

On Sunday, September 3, the U.S. Schooner *Deposit*, from Boston, came into the port of Havana. As usual, a boarding boat greeted the master and crew. A Cuban official checked the passenger lists and asked the captain if he had any black or colored persons on board his vessel. The captain answered in the affirmative and produced his cook, who was promptly taken into custody. When the captain objected, the officer plainly told him that his protestations were in vain. If the captain sought exception from the law, he would have to procure that exception from Captain-General Tacón, the highest ranking officer in all Havana.⁶

The next morning, the captain of the *Deposit* hailed Trist, who scoffed at the idea that he could somehow "wave [his] Consular wand" and ameliorate the situation. Even if he could, he was not altogether convinced that that the new law was inappropriate. He certainly did not share

⁵ Robert W. Drexler, *Guilty of Making Peace: A Biography of Nicholas P. Trist* (Lanham, MD, 1991): 53; Ohrt, *Defiant Peacemaker*, 73-76.

⁶ Nicholas Trist to John Forsyth, September 14, 1837, *Despatches from U.S. Consuls in Havana, 1783-1906*, Volume 7, #34, copies of which are located in the Latin American Collection, Smathers Libraries, University of Florida. [Hereafter referred to as *Despatches*]. Originals are housed in RG 59 at the National Archives, College Park, Md.

the outrage of the captain about the insulting treatment of his countryman. Trist assumed that the law was some kind of response to the aggressive actions of the British Commissioners on the slave trade. If that was the case, then Trist believed the law “had a good foundation.”⁷ Trist had no patience for abolitionist musings, and laws preventing slave insurrections were something that would not have bothered Trist, who routinely inquired in his letters about the security of his own plantations.⁸

Though initially hesitant about interposing in the administration of the law, Trist changed tune over the next ten days as he became increasingly inundated with complaints from numerous U.S. captains who faced the same fate as the master of the *Deposit*. Annoyed that the law was put into effect “without sufficient notice, nor even the formality of an announcement...to foreign Consuls,” Trist resolved to relieve himself of the “peculiarly inconvenient” complaints, and he decided to approach Captain-General Tacón in hopes of securing both an explanation and exceptions for U.S. sailors.⁹ However, Trist was not sure how to approach Tacón. Initially, he decided to draft a note in which he recounted the events on board the *Deposit* that led to the cook’s arrest. To win sympathy, Trist stressed the impropriety of the arrest because not only did it deprive the master and crew the services of the cook, it also subjected “to great hardship a citizen of the United States innocent of all offense.” Trist requested that Tacón explain the object and extent of the law to him so that he could relay the information to the aggrieved captains. He also hoped to ascertain whether the law was temporary or permanent in nature so that he could take the appropriate steps to warn U.S. ports of the new regulations.¹⁰

⁷ Trist to Forsyth, September 14, 1837, *Despatches*, Volume 7, Number 34.

⁸ Ohrt, *Defiant Peacemaker*, 74-75.

⁹ Trist to Forsyth, September 14, 1837, *Despatches*, Volume 7, Number 34.

¹⁰ Consul Trist to Captain General Tacón, undated, *Despatches*, Volume 7, Number 34, Enclosure A.

It is noteworthy that Trist first contemplated citizenship as the mode by which to approach the Cuban authorities for redress, especially considering the official position of the federal government regarding the existing Seamen Laws in the United States. For Trist the Consul, the black cook was to be protected by the federal government as a rights-bearing citizen. Shielded by that status designation, the cook ought to be exempt from arbitrary laws like the one in place in the Spanish Caribbean, as it violated existing treaties between the United States and Spain. Since these commercial agreements protected the citizens of each nation while engaged in legitimate trade activity, the cook aboard the *Deposit* should not be subject to incarceration. Interestingly, Trist's first instinct was to mimic the arguments put forward by Henry Elkison when he was incarcerated under the South Carolina Seamen Law. In that case back in 1823, Elkison argued that treaties between the United States and Great Britain and his birthright as a British subject sheltered him from South Carolina's oppressive law.¹¹ Though the federal court agreed that South Carolina had infringed on Elkison's rights as a British subject under the existing treaties between the nations, the law remained intact and had accumulated an impressive list of endorsers, including Trist's primary benefactor, Andrew Jackson. Trist probably understood and condoned what the federal government conceded back in 1831: black skin was a legitimate cause for quarantine in a half-free, half-slave Atlantic World. Thus, upon reflection, Trist decided not to send the letter.

Had Trist decided to go with his first instincts and press the issue of African-American citizenship, he would have found it difficult to defend his position. First, most Americans in 1837 would not have considered free blacks to be "citizens of the United States." Roger Taney had already given his take in 1832 (a view that would be reiterated in his *Dred Scot* decision),

¹¹ *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823); see Chapter 3 above.

and found the “descendants of slaves” to be outside the constitutional compact and therefore ineligible to claim American citizenship based on birthright. With public opinion in the United States uneasy about the possibility of the citizenship claims of African Americans in the late 1830s, then Consul Trist would have needed a miracle to convince Cuban authorities to respect rights that black American sailors did not even enjoy in their native country. If the Cuban authorities simply looked to the Charleston jailhouses and saw so-called African-American “citizens” languishing, then they could heartily reject Trist’s contention of African-American rights in Havana. Of course, Trist’s personal experiences with slaves and free blacks, his proximity to Jefferson and Jackson, and his Virginia roots precipitated his own refusal of African-American citizenship.

Trist apparently understood the weakness of his citizenship argument in his first draft, and he certainly wanted to put his best foot forward when approaching Tacón. According to Trist, the Captain-General rarely contemplated the same measure twice; if the Consul rushed an inquiry, he might receive an equally rushed reply and thereby prevent a true contemplation and possible rescission of the law. Trist was well known to have strong connections with Cuban officials, so his characterization of Tacón was probably apt. So, Trist decided to employ a different approach in his communications with Tacón. In his second letter, the letter he actually sent to the Captain-General, Trist did not mention the abuses perpetrated against U.S. citizens by the Spanish government. Instead, the letter stressed the profitable commercial intercourse between Cuba and the United States as well as the fear that regulations against sailors of color would impact negatively that relationship. Trist indicated that “ninety-nine out of one hundred” cooks currently employed on American vessels were black or mulatto, and the proportion of colored employees onboard U.S. steamships was even greater. And considering the rate with

which steamships were coming to replace outmoded sail vessels, the number of African-American sailors was bound to rise. For Trist, it was natural that men with black skin would be better suited to the conditions on board a steam ship. Descendants of Africa were preferable to white men because of their ability to “withstand the effects of the high temperatures to which the greater part of persons employed onboard of steamboats are necessarily exposed.” So, if the Cuban authorities continued to incarcerate U.S. sailors, then the “practice *cannot possibly fail to produce, within three months after it becomes generally known, a sensible decrease of the American shipping in this port.*”¹²

To avoid such commercial decline, Trist recommended to Tacón that black crew members from the United States be allowed to stay inside their vessels. Such an arrangement would more effectively segregate foreign blacks from Cuban slaves than arrest and confinement. Again, Trist was raising a point from the *Elkison* decision from back in 1823. Judge William Johnson similarly ridiculed the South Carolina seamen law. By bringing free black sailors ashore and placing them in jail with domestic slaves, Johnson explained, “we ourselves inoculate our community with the plague, we ourselves turn loose the wild beast in our streets, and we put the fire-brand under our own houses.”¹³ By leaving free blacks on board their vessels, Trist likewise deduced, the Cuban authorities could more effectively accomplish the law’s primary goal: insulating Cuban slaves from outside agitation.

To prove this method effective, Trist indicated that South Carolina preferred to keep free blacks on board their vessels while in port. According to Trist, South Carolina mandated captains to pay a one thousand dollar bond to guarantee that the sailor would not set foot on

¹² Consul Trist to Captain General Tacón, undated, *Despatches*, Volume 7, Number 34, Enclosures B & C. Emphasis in original.

¹³ *Elkison v. Deliesseline*, 8 F.Cas. 493 (1823) at 496.

shore. Only when the ship was at the wharf, Trist explained, would the sailor have to be confined in jail. Further, Trist was under the impression – and he passed this impression on to Tacón – that South Carolina exempted from the law those “free negro and colored persons who are native and residents of States where slavery exists.” If South Carolina could exact such changes, then Cuba could as well. After all, Trist insisted, “no government could be more firmly determined than that of that State to prevent the entrance of any free negro or mulatto whatsoever.”¹⁴

In describing South Carolina law, Trist was largely incorrect in both of his descriptions. As to South Carolina permitting free blacks to stay on board their vessels, South Carolina had no such stipulation. In 1825, South Carolina permitted those sailors suspected of being “persons of color” who had documentation proving their Native American or Middle Eastern heritage to remain on board their vessels so long as the vessels remained a certain distance from shore. The 1825 law did not alter the 1823 Seamen Act in any other capacity, so all free black sailors still faced incarceration.¹⁵ The 1835 revisions to the South Carolina Seamen Statute similarly contained no provision to allow free blacks to remain on board their vessels. Equally erroneous was Trist’s position that South Carolina offered exemptions to free black sailors who were “natives and residents of States where slavery exists.” Again, South Carolina made no distinction in its laws. It is possible that Trist misunderstood an 1835 South Carolina statute that forbade the entrance of slaves who had lived in or visited “the West Indies, or Mexico, or any other part of South America, or...Europe, or...any other sister State, situated to the North of the Potomac river [sic], or the City of Washington.”¹⁶ Thus, slaves who had never been to areas

¹⁴ Consul Trist to Captain General Tacón, undated, *Despatches*, Volume 7, Number 34, Enclosures B & C.

¹⁵ *Acts...of the State of South Carolina...1825* (Columbia, S.C.): 41-43.

¹⁶ *Acts...of the State of South Carolina...1835* (Columbia, S.C.): 37.

with strong concentrations of free blacks and abolitionists were allowed to enter the state, but this provision only applied to slaves, not free blacks. Even if the exemption granted to slaves also extended to free blacks, the statutory inclusion of the “West Indies” as a unified entity, which included slaveholding Cuba and Puerto Rico, makes Trist’s arguments untenable.

In fact, the only Seamen Law that included such an exemption was an 1830 Savannah City Ordinance, which supplemented the 1829 state quarantine law that demanded all vessels with free black employees to ride quarantine for forty days. The Savannah ordinance stipulated that vessels from other states and countries could bypass the state-mandated, forty-day quarantine if the captain allowed his free black passengers and employees to be taken into custody and paid the costs of their detention. The municipal ordinance exempted free blacks on “the regular packets trading between this port and those in South Carolina.”¹⁷ However, the exemption was short-lived, as the 1835 state revisions to the quarantine law preempted the Savannah ordinance. So even if Trist knew of the Savannah exemption, it was not in force when he approached Tacón in 1837.

Trist’s apparent errors in his description of South Carolina’s Seamen Law beg explanation. Was Trist intentionally misleading the Cuban leader in order to secure exemptions for aggrieved American captains? This is certainly a possibility; Trist was an astute politician, but flatly lying to a foreign dignitary was probably not his *modus operandi*. Additionally, numerous merchants and ship captains complained of Trist’s intimacy with Cuban officials.¹⁸ Even if one dismisses the actual attacks on Trist as overblown reactions to Trist’s appointment (instead of the

¹⁷ For the Savannah ordinance, E. Molyneux to Viscount Palmerston, July 1, 1835, in *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Series 5, Volume 579, *Foreign Office Papers*, Public Records Office, London (hereafter referred to as *Correspondence*);, 43-44.

¹⁸ Ohrt, *Defiant Peacemaker*, 93; “Memorial to the President of the United States from Ship-masters and Ship-owners at New York,” *House Report 707*, 26 Cong., 1 sess. (July 21, 1840): 1-13.

numerous New Yorkers vying for the position), that does not mean that Trist and Havana officers were not close. If Trist was honest to Tacón and correct in his appraisal of South Carolina's Seamen Law, then Charleston officials were allowing free blacks from slave jurisdictions to bypass the Seamen Law without statutory permission.¹⁹ But if South Carolina did trust their own free blacks, seeing them as troublemakers, it seems unlikely that it would view free blacks from New Orleans, for example, to be any less rebellious.

Trist's summation of South Carolina as well as his legal expertise may have given him a level of confidence as he emphatically highlighted the probable ambiguities of the Cuban law in question. Loopholes surely existed that astute minds and hungry pockets could exploit. For Trist, Tacón could surely make exemptions for U.S. sailors without violating the spirit of the Royal Decree. However, when Tacón formally received Trist to discuss personally the cause of the Consul's complaint, his determination to adhere to the letter of metropolitan law dashed Trist's hopes. Tacón's utter disdain for British abolitionism easily overshadowed any unrealized commercial repercussions emanating from the law's enforcement. The South Carolina example that Trist articulated had no effect. The Captain-General apologetically confirmed that the Crown's demands left little room for his manipulation, whatever the consequences. The note from Madrid was explicit; Tacón "under the shadow of no pretext" was to allow the entry of any "colored person from a foreign country."²⁰

While Trist was wrong in believing he could use economic logic and legal finesse to alter the law's operation, his suspicions concerning the origins of the law were on point. Tacón readily admitted to the Consul that the law was a direct response to black British soldiers

¹⁹ Again, there is no direct evidence in South Carolina that these exemptions were made, but local arrest records for this period are extremely fragmentary.

²⁰ Trist to Forsyth, September 14, 1837, Volume 7, Number 34.

employed by the Royal Navy to intercept slave trading ships headed to the Spanish Caribbean. These “famosos soldados” were to never set foot on Cuban soil. Tacón revealed his contempt for British abolitionists, who were bent on the destruction of his island. Just recently, Tacón relayed, a British mulatto was arrested upon entering the island, having in his possession several incendiary pamphlets.²¹ Tacón took personally his obligation to protect Cuban institutions from self-righteous British agitators. Just like Southern officials in the United States, Tacón believed his constituents under attack by a British nation eager to destroy slavery worldwide. Recently emancipated freemen were to be pawns in this attack, and Tacón would gladly execute any metropolitan policy aimed at hampering Britain’s underhanded designs. And the fact that Tacón brought up incendiary pamphlets must have raised a red flag in Trist’s mind. The Virginian must have been all too aware of the alleged connection between abolitionist propaganda and the infamous Nat Turner Rebellion in 1831. In the same way that the Abolitionist Mail Campaign united Southerners in defense of quarantines, Tacón’s story might have convinced Trist of the propriety of the Royal Decree.

Trist forwarded his letters and the summaries of his discussions with various captains and with Tacón to Secretary of State John Forsyth in Washington. Forsyth was no newcomer to laws against black sailors. He was representing Georgia in the U.S. Senate when Savannah officials first discovered a clandestine shipment of *Walker’s Appeal*. Both the Governor of Georgia and the Mayor of Savannah sent letters to Forsyth apprising him of the situation and requesting various federal actions, just as Georgia enacted its first seamen quarantine regulation. As Secretary of State, Forsyth also received formal complaints from the British Foreign Office when the Territory of Florida sold a black British subject at auction for breaking its Seamen Law in

²¹ Trist to Forsyth, September 14, 1837, Volume 7, Number 34..

1835. He had already explained to British diplomats that the Florida law was beyond the reach of the federal executive, and the fact that the British subject was now a slave (and thereby personal property) meant that any federal interference would be unconstitutional. So when Trist's correspondence reached his desk, Forsyth was already a seasoned veteran of the Seaman Act debates.

However, one would not assume from Forsyth's curt reply that the Secretary of State had formed any opinion on the matter. His one sentence response offered no guidance for Trist in handling the affair. Forsyth simply informed Trist that his letter and enclosures had been received.²² Perhaps, the legality of Seamen Laws was a *fait accompli* for Forsyth and the members of the Van Buren administration. This would explain their apparent lack of interest. Even those who denied the constitutionality of the various state Seamen Laws in the United States did necessarily deny the power of another nation to restrict the entry of whatever foreigners its government deemed a threat.²³ British emancipation released an epidemic, and the Spanish authorities had the power and responsibility to prevent the contagion from penetrating their dominions. Forsyth's brevity may also be a tacit approval of Trist's approach to the matter.

Despite the fact that Trist was largely unsuccessful in his first meeting with Tacón and his belief that any future endeavors with the Captain-General would be unfruitful, Trist found himself again hailing the Cuban leader on the issue of American mariners. Island officials arrested five crewmen from a U.S. brig in January, 1838, and apparently, two of them should not

²² Forsyth to Trist, January 2, 1838, in *Instructions to Consuls*, Records of the Department of State, Series 11, Volume 1, Book 8 (January 5, 1835 - December 31, 1840), National Archives, College Park, MD.

²³ Take, for example, Joseph Story, whose dissent in *New York v. Miln* revealed his belief that the state seamen laws were beyond the power granted to the state governments. However, in his *Commentaries on the Conflict of Laws*, Story acknowledged the right of sovereign nations to "make laws for all foreigners, who merely pass through [its] domains." See *New York v. Miln*, 36 U.S. 102 (1837), at 153; Story, *Commentaries on the Conflict of Laws Foreign and Domestic*, 3rd ed. (Boston, 1837): chapter 14.

have been arrested. As Trist described it, they were not “people of color” but rather “Indians, descendants of aborigines of America.” Since the men were “totally distinct in every respect from the African race,” Trist believed they fell outside of the law and should be released immediately. The port authorities refused to discharge them, so Trist sought Tacón’s intervention. Not only did Trist want the men returned to their vessel, he also wanted Tacón to prevent the “recurrence of [the] misapplication of [the law’s] letter and spirit.” Considering the large number of Native American seamen, especially from Rhode Island, such a “misapplication” could result in an unnecessary and severe handicap to American shipmasters.²⁴

Trist’s objection to the arrests of Native Americans resembles closely the position taken by Amos Daley, a man arrested for violating the South Carolina Seamen Act in 1825. Daley’s attorneys attempted to prove their client’s racial purity, by calling witnesses who could verify Daley’s race. Daley’s external markers, especially his “woolly hair,” proved to the court that he was of African descent. It declared him susceptible to quarantine, and he received thirteen lashes before being sent out of the state.²⁵

Trist’s inquiry gave Tacón reason for pause. He contacted two members of his inner circle regarding the recent arrests of American Indians. Tacón apologized to Trist for the confusion and allowed him to remove the men from custody and place them under the Consul’s personal care. However, the law was not going to change, and U.S. sailors, both “red” and “black” were going to be arrested as they had since the quarantine went into effect. Apparently, Tacón would honor Trist’s specific requests for the individual release of Native Americans, but no systematic exemption was given. Trist apparently laughed off this potential end-around of the quarantine

²⁴ Trist to Tacón, January 18, 1838, *Despatches*, Volume 7, Number 37, Enclosure D.

²⁵ *State of South Carolina v. Daley* reprinted in *Charleston Mercury*, June 23, 1824.

and, instead, “suggest[ed] that [future] efforts be made at Madrid, to procure a Royal Decree” for exemptions. Apparently, Trist had no intention of bogging himself down with the day to day maintenance of Native American sailors.²⁶

When Trist contacted Secretary Forsyth about this fiasco, his tone was one of exasperation. Trist informed the State Department that his protestations with Tacón were in vain, and unless Madrid made some sort of definitive clarification allowing sailors to remain aboard their vessels, then Cuban authorities would continue incarcerating American mariners. The Consul from Santiago de Cuba confirmed this point.²⁷ Trist suggested that Forsyth procure the precise intent of the law from metropolitan authorities in Madrid in hopes of proving to local authorities in Havana that sailors who remained aboard their vessels were beyond the scope of the regulation.²⁸ In the meantime, Trist thought it prudent that Forsyth make the seamen law public so as to minimize the “inconvenience” to shipmasters (and their Havana Consul). By the summer of 1838, U.S. captains had the ability to keep their black sailors on board by paying a hefty bond as security against those mariners going ashore. For Trist, this alteration of the Cuban seamen law (which, as we shall see, was a result of British efforts) removed any motive for contacting the State Department regarding Cuban treatment of African-American mariners. In fact, the next time that Forsyth heard from Trist about the Seamen Law, it was a complaint against an American captain, not about Cuban policy.

²⁶ Trist to Forsyth, January 25, 1838, in *Despatches*. Volume 7, Number 37.

²⁷ See Consul Mahon to Forsyth, February 26, 1838, *Despatches from the U.S. Consul in Santiago de Cuba*, Roll 2. Microfilm copies available at the Latin American Collection, University of Florida. Originals are housed in RG 59 at the National Archives, College Park, Md.

²⁸ In fact, Forsyth had already done so, having received from John Eaton in Madrid an explanation of the Cuban quarantine. Forsyth forwarded the note from Eaton to Trist with very little commentary, apparently content to allow the law to operate unencumbered. See Forsyth to Trist, March 29, 1838, in *Instructions to Consuls* (January 5, 1835-December 31, 1840), Series 2, Volume 1, RG 59, National Archives, College Park, MD.

In the summer of 1838, Trist recounted to Forsyth, Captain Jacob Howell of the brig *Antelope* had abandoned five crewmen who had been arrested and confined under the island's Seamen Law. The custom for sailors in jail was for the captain to provide food and water, and then pay for the detention once the ship was set to leave the island. Apparently, Howell had not fed them for two days, after which the starving sailors finally hailed Trist for assistance. Trist sent word to the Howell that such actions were not acceptable, and, a heated exchange ensued. Howell bashed Trist for ever getting involved in the matter in the first place. Trist lambasted Howell for being an alcoholic and skirting his duty in taking care of the men under him. After a couple of days, the captain returned to inform Consul Trist that he had procured for the five sailors passage to Boston on a vessel that was to set sail the following morning. Trist was relieved to hear of the arrangement and hoped that this meeting with Howell would be the last he would hear of the matter. However, two days after the boat on which the prisoners were supposed to return set sail, Trist again received a note from the city jail. Four of the five men who were supposed to be halfway to Boston were still in confinement, and still starving. Ultimately, Trist was able to procure passage to Massachusetts for the sailors, and he even went so far as to offer a letter of introduction for the men in which he requested "a Member of the New Bedford Bar" to assist the aggrieved mariners in their possible lawsuits against Captain Howell.²⁹

Trist also requested from Tacón an immediate investigation into Howell's actions, and supplied the Cuban authorities with sworn statements of the *Antelope's* first mate and Trist's assistant, who had been in daily contact with the confined men.³⁰ It does not appear from the

²⁹ See Trist to Forsyth, July 21, 1838, *Despatches*, Volume 8, Despatch 48. In an enclosure to this dispatch, Trist included a copy of his letter of introduction to the New Bedford Bar.

³⁰ See Enclosures 3 and 4 in Trist to Forsyth, 21 July 1838, *Despatches*, Volume 8, Despatch 48.

available sources that such an investigation precipitated, but Captain Howell did not lie idly by while Trist cast his aspersions. The slandered captain wrote a letter to none other than President Martin Van Buren, informing him that Nicholas Trist wantonly deprived him of his crew without his consent. Howell called for Trist's dismissal, as his "high-handed measures" were antithetical to the demands of his post.³¹

Howell's actual culpability in the mistreatment of his sailors is less important than the experience of the sailors themselves. Their sustenance as well as their freedom depended on the beneficence of their captain. If their captain refused to pay the bond to keep his men aboard, then the sailors were sent to the Havana jail, a place not celebrated for its hospitality. If their captain did not feed them, they starved. If their captain set sail without them, then the men presumably remained in jail until someone procured their release. And any captain with a love of money and dishonorable intentions could simply haul his sailors into Havana, leave them in jail to rot, and keep their wages for himself. The sailors' freedom remained completely lodged in the hands of a man who could directly benefit by their demise.

For Trist, moral obligation should motivate captains like Howell to protect the men in their stead and not take advantage of the potential despotism that the Cuban law placed in their hands. In a sense, Howell's presumed apathy (or antipathy) for his sailors disturbed the paternalistic understanding of the racialized social hierarchy that characterized the Southern plantation life Trist knew so well. Captain Howell, like a typical slaveowner, was under an obligation to provide for "his people." Whatever the sailors' transgressions, Howell remained their patriarchal guardian, the man responsible for the men's well being. In Trist's mind, Howell's dereliction of his paternal duty blatantly violated one of the basic social norms of Southern society, that

³¹ A copy of the letter from Howell to Van Buren, July 26, 1838, is included among the other documents in, *Despatches*, Volume 8, Despatch 48.

physical abuse on people of color was only acceptable when discipline was required. Howell's callousness resembled all too closely the actions of a plantation tyrant who abused his slaves for no acceptable reason. Howell's abuse of power and his disregard for the social structures Trist held dear helps explain the Consul's disgust over the captain's actions. And as Trist scolded Howell, the old captain must have felt the irony of a rich Virginian slaveowner preaching to him about the proper treatment of black Americans.

Howell's anger towards Trist's "meddling" was shared by many Northern shipmasters. In fact, a group of captains and merchants petitioned Congress to have Trist removed for his "wanton, tyrannical, unlawful, and unjust" conduct towards "one hundred and fifty-five respectable ship-masters and citizens of Havana." Trist allegedly "incit[ed] Spanish authorities to the unlawful condemnation and imprisonment of American captains and seamen for alleged and unfounded offences," and such actions was "enough to stamp the name of Trist with infamy, and to prove him totally unworthy to hold his high and (what ought to be) honorable station." The New York shipmasters called for Trist's immediate removal, and swore to raise funds for civil suits against Trist.³²

Ultimately, Congress and the State Department agreed that the allegations against Trist were spurious, lacking any concrete evidence of misconduct.³³ However, Trist's problems hardly ended there. From 1838 until 1841, Congress became increasingly interested in Nicholas Trist, but not because of his actions towards aggrieved New York shipmasters. Rather, British military officials and diplomats accused the Consul of actively assisting the illegal slave trade to Cuba. Under existing treaty stipulations, Spain and England had agreed to outlaw the slave

³² "Memorial to the President of the United States from Ship-masters and Ship-owners at New York," *House Report 707*, 26 Cong., 1 sess. (July 21, 1840): 11-13.

³³ "Memorial to the President of the United States from Ship-masters and Ship-owners at New York," 1-2.

trade, and British captains had the right to search all Spanish ships suspected of engaging in the illicit barter. One way that conniving slave traders could bypass British enforcement was by utilizing vessels with American flags. Great Britain did not legally possess the right to search American vessels, so slave traders would procure American vessels and outfit them as slave ships.³⁴ At first, British officials complained to Trist about the misuse of American shipping papers, believing the slave traders to be taking advantage of unsuspecting American consuls. When Trist refused to administer different protocols to ensure the American flag was only waving atop of bona fide American vessels, British authorities accused Trist of complicity.³⁵ Consequently, Congress conducted a detailed investigation into the Consul's endeavors, as did the State Department. In both cases, the Consul was officially cleared of any wrongdoing, despite the absolute certainty with which British officials in Havana proclaimed their accusations. In 1841, Trist was removed from his lucrative post following the electoral victory of the Whigs. Upon the Democrats victory in 1844, Trist was tapped as deputy Secretary of State in the Polk Administration, where he eventually brokered the contentious Treaty of Guadalupe Hidalgo, which ended the Mexican-American War in 1848.³⁶

Unfortunately for the present inquiry, Trist spent most of his time and energy in Havana from 1839 to 1841 gathering documents and witnesses for his defense, both against British claims of slave-trade activity as well as accusations from New York merchants who accused him

³⁴ For a superb analysis of American complicity in the international slave trade and the use of American vessels in the illicit commerce, see Gerald Horne, *The Deepest South: The United States, Brazil, and the African Slave Trade* (New York, 2007).

³⁵ See Turnbull, *Travels in the West*, 435-449.

³⁶ Drexler, *Guilty of Making Peace*, 58-59.

of failing to act in the best interest of U.S. citizens under his watch.³⁷ As a result, he tabled many of his other obligations and correspondences, including his reports regarding U.S. sailors suffering under the Seamen Law. Likewise, most of Forsyth's instructions to Trist involved damage control, whether from international accusations of slave trading or domestic indictments of consular malfeasance.

Trist's eventual apathy towards the victims of the Cuban quarantine did not stop the news from getting out back in the States. *The Colored American*, a New York-based African-American newspaper, made several references to the fate of black sailors Cuba.³⁸ Stories from aggrieved sailors eventually motivated a group of politically active African Americans in New York City to memorialize Congress for redress. They sent their petition to Churchill Cambreleng, their representative in Congress. Included with the petition was a personal letter that bespoke of specific sailors currently incarcerated in Havana. Dutifully, Cambreleng forwarded both to Secretary of State Forsyth, either to bring him to speed or to ascertain the Administration's approach to the diplomatic issue.³⁹

Perhaps Forsyth understood the irony of a New York City Congressmen presenting him with a protest about a police power measure of the Spanish authorities. Only the year before, the Mayor of New York won the leading constitutional case on the subject of police powers, vindicated state laws circumscribing the free ingress of foreigners suffering from a "moral

³⁷ On one occasion, Trist wrote a monstrous, 250-page, hand-written note to Forsyth explaining in excruciating detail his innocence. See Despatch 131 in *Despatches*, Volume 8.

³⁸ See October 21, 1837 and July 7, 1838, for example.

³⁹ A copy of the petition can be found in *Miscellaneous Letters of the Department of State*, RG 69, M 179, Reel 85, National Archives, College Park, Md.

pestilence.”⁴⁰ Now, after the Supreme Court had ruled in favor of New York’s police power to restrict entry to its port, a Congressman from that state was requesting the State Department to help alleviate the burden imposed by the application of a similar quarantine measure by a foreign government. We do not know if Forsyth saw the irony, but he certainly defended the Spanish authority to pass and enforce such regulations. “The regulation in question,” Forsyth explained to Cambreleng, “is alleged to be a necessary measure of self defence [sic] against the attempts of abolition societies to introduce dissatisfaction and insubordination among the slaves of the Island, and being viewed in this light it is not to be supposed that it would be revoked upon the application of any foreign government.” After his unsuccessful application to Forsyth, Cambreleng introduced the petition to Congress, where, apparently, no action was taken.⁴¹

For John Forsyth, and the rest of the federal government, the thought of following the British lead and protesting Cuba’s seamen restrictions based on the rights of African-American “citizens” was impracticable. If Forsyth pressed Madrid to recognize African-American citizenship rights guaranteed by treaty, he would have opened up the ideological floodgates and precipitated a flood of new attacks on the Southern Seamen Laws. Having already defended domestic racial quarantines, and even condoning the temporary enslavement of a free black Briton in Florida, Forsyth had little choice but to avoid the black citizenship issue. In contrast, British officials implemented the same arguments as they did in their recent and ongoing battle against sailor restrictions in the United States. They harped on the rights of British subjects, and

⁴⁰ *New York v. Miln*, 36 102 (1837). The decision equated physical and moral pestilence as appropriate subjects of state quarantine measures.

⁴¹ Forsyth to Cambreleng, March 16, 1838, in *Domestic Letters of the Department of State*, RG 59, M 40, Reel 27, National Archives, College Park, Md. *Congressional Globe*, 25 Cong. 2 Sess., 426; Philip Hamer, “Great Britain, the United States, and the Negro Seamen Acts, 1822-1848,” *Journal of Southern History* 1 (February 1935): 21 at footnote 76.

in so doing, highlighted American unwillingness to acknowledge the rights of its own free black population.

The British attack on Cuba's racial quarantine also originated in 1837, when the *HMS Romney*⁴² entered the harbor at Havana with its largely black crews, many of whom were former slaves. The ship was well known to be a slave patrolling vessel, often having on board former slaves who had been rescued from illicit slavers. The black regiment on board petrified Tacón and other persons invested in Cuban slavery and slave trading, as they were armed and protected by the Her Majesty's Navy. The Cuban authorities, led by Tacón, refused to let the men disembark, citing the Royal Decree and fearing that the presence of these "famosos soldados" in Havana could incite rebellion and discourage slavers from entering the port. Interestingly, Cuban authorities did not attempt to board the *Romney* and escort the men to jail. Apparently, a British man-of-war with a company of armed black tars convinced Cuban law enforcement to make an exception.⁴³

When the white officers from *Romney* informed the British commissioners in Havana about the men stranded on board, the diplomats were aghast. They immediately sought instructions from the Foreign Office about the racial quarantine and the predicament of the *Romney*'s crew. In the meantime, the *Romney* became an even stronger object of Tacón's scorn when the Mixed Commission in Havana began to send the slaves they freed to the *Romney*, and the ship remained a *de facto* holding facility until the end of the quarantine.⁴⁴ The presence of

⁴² Other sources refer to the ship as the *Romany*.

⁴³ Turnbull, *Travels in the West*, Chapter 4; Correspondence between Kennedy and Schenley, British Commissioners in Havana, with the Foreign Office, 1838-1839 in *British and Foreign State Papers, 1838-1839*, Volume 27 (London, 1856): 229-268.

⁴⁴ The Mixed Commission was created and reorganized by the various slave trade treaties between Spain and England. The Commission investigated suspected slave imports and had the power to free slaves illegally imported into Cuba. The Commission also served as a type of judicial tribunal for trying suspected slave traders, though, as

the ship in harbor motivated the strict execution of the Royal Decree and also helps explain why Tacón refused Trist's requests to relax enforcement.

After hearing the news from Havana, Britain sought immediate recourse in Madrid, and Lord Clarendon spearheaded the diplomatic efforts to secure the repeal of the Royal Decree in force in Cuba. In criticizing Spain's quarantine, Clarendon mixed economic logic with a radical formulation of British subjecthood. Since Spain and England were friendly powers, then "the free and industrious [British] subjects...who in their own country, enjoy every privilege to which their fellow-citizens are entitled, should not, on reaching the shores of Cuba...be so treated as if they brought with them some physical or moral pestilence." British protests had to be forceful, "now that slavery ha[d] been abolished in the British colonies...[and] it might be expected that many free negroes...would be employed in navigating vessels trading from island to island in the West Indies; and thus the practice complained of would every day become more and more vexatious to British commerce."⁴⁵ The British Foreign Office could not depart any further from the official position of the United States federal government, which conceded that race was a legitimate object of quarantine regulation. And unlike the utter failure in Washington, DC, British diplomacy in Madrid produced fruitful returns, albeit only after repeated efforts.⁴⁶

A large measure of British success in convincing Madrid to loosen the racial quarantine can be attributed to Spanish imperial-colonial relations and the ability of Britain to use subjecthood claims to criticize the *Romney* affair. Apparently, Tacón's relationship with the

mentioned above, colonial leaders like Tacón often frustrated the Commission's investigations. For the *Romney*'s role as a holding facility, see David Eltis, *Economic Growth and the Ending of the Atlantic Slave Trade* (New York, 1989): 198.

⁴⁵ Turnbull, *Travels in the West*, 69-70.

⁴⁶ Kennedy and Schenley to Palmerston, 20 April 1838 in *British and Foreign State Papers, 1838-1839*, Volume 27 (London, 1856): 232.

Creole oligarchy in place in Havana was incredibly strained, and his antagonistic relationship with the native Cubans put pressure on Madrid to remove Tacón.⁴⁷ His alleged complicity in the slave trade afforded his enemies on the island with plenty of ammunition, especially to a British Foreign Office eager to hear of such abuses and use them as diplomatic ammunition against imperials in Madrid. The United States was much more lackadaisical about condemning the slave trade, quite possibly because of the extensive involvement of Americans in the illicit commerce to Cuba. Since the United States had a vested interest in protecting Cuban slavery and the even the slave trade to the island, Nicholas Trist could not similarly exploit the rift between the Creoles and Tacón.⁴⁸

Sources disagree about the exact date of Tacón's resignation⁴⁹, but his successor, Captain-General Don Joaquim de Espeleta, did not share his predecessor's overt disgust of the British. While Espeleta kept the law in force until word came from Madrid, he appeared susceptible to British overtures. Espeleta did not obstruct the quarantine lift when metropolitan officials decided to ease enforcement. The continued pressure from Clarendon in Madrid, the ominous presence of the *Romney* in Havana harbor, and the near-universal dislike of Tacón brought about relaxed enforcement, and ultimately repeal, of Cuba's racial quarantine.⁵⁰ By 1841, the racial

⁴⁷ See Hugh Thomas, *Cuba, or, The Pursuit of Freedom* (New York, 1998): 194-202.

⁴⁸ Yet Trist vehemently maintained that there was little he could do about it without enforcement procedures and military support from the Spanish. See Ohrt, *Defiant Peacemaker*, 94-95; Don Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York, 2001): 164.

⁴⁹ British correspondence dates Tacón's resignation in April, 1838, but Trist's correspondence still refers to Tacón as the Governor in the summer. A British historian writing in the 1840s dated Tacón's resignation in April, 1839. See Kennedy to Palmerston, 15 May 1838, *British and Foreign State Papers, 1838-1839*, Volume 27 (London, 1856): 235; Trist to Forsyth, July 21, 1838 in *Despatches*, 48; R.R. Madden, *The Island of Cuba: Its Resources, Progress, and Prospects...* (London, 1849).

⁵⁰ Palmerston to [Havana] Commissioners, September 29, 1838, *British and Foreign State Papers, 1838-1839*, Volume 27 (London, 1856): 246-247; Turnbull, *Travels in the West*, 72.

quarantine was a dead letter, and British and American sailors of African descent plied their trade without molestation.

By 1837, the United States government under the Democrats had officially endorsed the position that race could be classified as a “moral pestilence” and thereby susceptible to quarantine regulations. This position liberated the Southern states in enacting Seamen Laws, but it also handicapped the State Department in dealing with the incarceration of African-American sailors after the Spanish Crown implemented a new policy prohibiting the ingress of all people of color into Cuba and Puerto Rico. Since the Democrats conceded that such regulations were no breach of the law of nations and that free blacks were not to be considered as citizens or subjects in interpreting treaties with foreign nations, U.S. diplomats had to find alternative arguments in their attempts to persuade Spanish and Cuban authorities to alter or suspend the law’s enforcement. Nicholas Trist initially framed his protest in terms of the citizenship rights United States’ sailors, regardless of race. However, he quickly abandoned that rationale and instead couched his objections in terms of the commercial impact of the law. Once American mariners were allowed to remain aboard their ships and not be forcibly taken into custody, Trist all but stopped his protests. Thereafter, the onus was on American ship captains to prevent the arrest of their sailors by posting bond and keeping them from going ashore.

Consul Trist remained firmly committed to a social order in which the rights of people with black skin only existed at the pleasure of white citizens. Thus, his primary objective when dealing with Cuba’s racial quarantine was to prevent abuses by American captains who did not properly fulfill their paternal obligation to provide for the men under their watch. He attempted to construct a different social order in his first letter to Tacón, where people with black skins had rights of their own, beyond the leisure of white patrons. Ultimately, Trist could not reconcile

this version of racialized citizenship and reverted to racial stereotypes, like their ability to withstand heat, in constructing his economic argument against the law.

Ultimately, Tacón's refusal to interpose in the enforcement of the Cuban Seamen Law hinged on several factors: his disdain for British abolitionists and the *Romney* in particular, his complicity in the slave trade that Britain so wholeheartedly combated and Americans participated, and his precarious position between retreating Spanish imperial power and a Creole oligarchy disenchanted by his rule. Yet, these factors that caused Tacón to refuse Trist's suggestions also resulted in the law's eventual demise. British dedication to the rights of black sailors in Havana and their exploitation of Tacón's lack of local political clout precipitated Tacón's dismissal and the end of Cuba's racial quarantine.

For British sailors heading to the Southern United States, however, British success in Havana did not correspond to success in the United States. So stout was state resistance and so thorough was federal acquiescence that British officials doubted their ability to secure any changes in the law. Even when the Whigs took power in 1841, British efforts proved fruitless. And when the stronghold of the American Seamen Acts, South Carolina, appeared ready to make concessions to a politically savvy and non-confrontational British Consul, aggressive "diplomats" from Massachusetts undermined the process.

CHAPTER 8
FROM CONGRESSIONAL CONTEMPLATION TO INTERSTATE DISASTER

They have attempted to go too far, to define and fix that, which cannot, in the nature of things, be defined and fixed. They seem to have forgotten, that they wrote on a question, which touched the comity of nations, and that comity is, and ever must be, uncertain... That no nation will suffer the laws of another to interfere with her own to the injury of her citizens... That in a conflict of laws, it must often be a matter of doubt, which should prevail; and that whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of a stranger...

- Joseph Story¹

By the end of 1837, the Seamen Acts appeared constitutionally impenetrable. The reigning Jacksonians had constructed an impressive fortress around racial quarantines. The Supreme Court's decision in *New York v. Miln* animated theretofore hazy definitions of state police powers. In that decision, quarantines were specifically cited as distinct from federal commercial authority and, therefore, beyond the purview of Congressional legislation. British supplications were fruitless. The same reforming impulse that brought about British Emancipation convinced Southern legislatures that outside agitators – abolitionists, free people of color, etc. – sought the Atlantic-wide destruction of chattel slavery. Whig Ministries pressed Democrats in Washington to intervene in the Seamen Acts' enforcement, but Jacksonian constitutional principles prevented both federal and judicial intervention. Furthermore, Taney's Contracting-Parties theory sat poised to confront claims by African-American "citizens" from Northern States in same way that it hindered the rights claims of Afro-British "subjects" in the wake of the Toleration Laws. The Seamen Acts were so firmly rooted in the American political landscape that even a similar racial quarantine enacted by Spanish authorities in Cuba did not result in formal protests from

¹ Joseph Story, *Commentaries on the Conflict of Laws Foreign and Domestic*, 3rd ed. (Boston, 1837): 39.

President Van Buren's State Department. When Alabama lawmakers enacted a Seamen Statute in 1839, they must have believed themselves on solid constitutional footing.²

Southern and Jacksonian resolve to allow the Seamen Acts to remain in force took a toll on the Whig Ministries in London. Unable to convince the United States to recognize black subjects, the Whigs were in no position to follow up diplomatic remonstrance with any meaningful policy changes. Already hard pressed by Conservatives and Chartists for their domestic policies and facing criticism for the problems with colonial Apprenticeship, the liberally minded Whigs found public opinion turning against them, ultimately losing Parliament in 1841. The new Tory Ministry, headed by Sir Robert Peel, abandoned formal protests against the Seamen Acts, probably aware of the futility of previous governments. Individual Consuls could flatter local lawmakers in hopes of gaining exemptions for black Britons, but the Foreign Office was officially out of the Seamen Acts game. Ironically, the same year in which the Tories took Parliament and abandoned formal efforts, the American Whigs wrestled control of the federal government from the Democratic incumbents. Largely favoring economic development at the federal level - including an expansive understanding of the general government's role in facilitating interstate and international commercial activity - the Whigs would seem to be much more responsive to protests against racial quarantines. The same Northern urban seaports that supported the Whigs often contained leading opponents of the Seamen Acts. Put bluntly, British efforts ceased at the exact moment when Washington was most likely to be persuaded.

A prominent group of Boston shipmasters and attorneys understood the likelihood of Congressional intervention under the Whigs, sending a petition to the House of Representatives. Motivated by political opportunism and a rapidly expanding antislavery movement, the

² *Acts...of Alabama 1838*, 134-136. The act actually passed in February, 1839.

petitioners hoped to convince Washington to enact legislation that protected African-American sailors plying their trade in Southern ports. Their expectations were not realized; after extensive debate, the Whig House decided against interfering in the Seamen Acts, despite the fact that the majority report from the Commerce Committee found the laws unconstitutional. Upon hearing of Congressional inaction, the Massachusetts state government decided to take matters into its own hands. In an attempt to bring the Seamen Acts before the federal courts, the Massachusetts legislature and governor sent two agents into the South, only to have them evicted with threats of mob violence.

This chapter explores the shifting political world of the 1840s and its impact on the Seamen Acts debate. As racial quarantines expanded into Alabama, Mississippi, and especially Louisiana, British Consuls, Northern merchants, and antislavery societies complained bitterly. Inspired by Congressional apathy, aghast at Southern audacity, and increasingly persuaded by abolitionist protests, state officials in Massachusetts assumed the leadership role in attacking racial quarantines in the absence of formal British protests. Heading Southward with threats to bring the Seamen Acts into federal court, Bay State officials inadvertently undermined British conciliatory gestures. In supreme irony, British flattery – a diplomatic carrot – had almost secured a relaxation in the South Carolina Seamen Law when a Massachusetts “emissary” – armed with a diplomatic stick – convinced South Carolinians that any alteration would be a sign of moral and political weakness. South Carolina lawmakers wanted to prove their strength. They adopted Taney’s Contracting-Parties theory of citizenship and criminalized all “foreign” interference with the administration of the Seamen Act. Interstate comity had lost all meaning.

As early as 1833, abolitionists took notice of the Seamen Laws and the threat they posed to interstate comity. David Lee Child, most well known for being the husband of Lydia Marie

Child, was never accused of being a brilliant attorney. He apparently chose law as an afterthought, having served as a United States diplomat before being admitted to the Massachusetts bar. His career as an attorney was short-lived, as his abolitionism caused him to seek other pursuits, namely the development of the sugar beet and the editing and publishing of antislavery pamphlets and periodicals, of which his wife was a prodigious contributor. However, in a speech he gave in 1833, David Child foreshadowed several complicated constitutional questions that would emerge in the succeeding decades. “Citizens of free states, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New-York, and Pennsylvania,” Child described the victims of the Seamen Acts, “have been seized and sold into bondage...[and] torn from the protection of that flag of which we boast, that flag which we expended millions, and sacrificed thousands of lives, to vindicate from outrage similar in kind, but not half as great in degree, and not half as barefaced!” Invoking the language employed by War Hawks in 1812, Child claimed the laws incarcerating black sailors resembled the impressment of American sailors by British adversaries.

For Child, Southerners’ hypocrisy was obvious. Black citizens from the North had no constitutional protections in the South, but Southern slaveowners traveling above the Mason-Dixon Line demanded protection of their human property while in Northern states. “Every slave state has nullified from ten to twenty years the only article of the constitution, which protects our free fellow-citizens among them,” Child pontificated, “while at the same time they come and claim to the last pound of flesh the execution of that provision of the Constitution, which secures to them their property in slaves among us.” Slaveowners’ hypocritical employment of interstate comity irked Child, and he chided his fellow Bay Staters to assume a stouter, more assertive

position in dealing with Southern manipulations of the Constitution. In a remarkable premonition of the events that would transpire nearly a decade later, Child continued,

But then the union, what will become of the union if we stand out, instead submitting and pacifying our Southern brethren? We all love the union... We are superstitious in our devotion to the union. All this the slave states know, and they have played upon us by means of it. Our tried attachment to the union is a bank of political power, upon which southern jealousy and ambition have made what drafts they please... It is time for us to assume a manly bearing, just and considerate towards our unreasonable countrymen, but at the same time steady and resolved in ourselves.³

When “Southern brethren” chose to ignore black citizenship, these “unreasonable countrymen” emasculated Massachusetts protestors.

David Child’s speech highlighted the emerging – and soon to be exploding – problem associated with the Privileges and Immunities Clause in the Constitution. Child was disgusted that Southern slaveholders could flaunt their human property in Boston, relying on that clause to protect their chattel while sojourning in or through Massachusetts. In 1833 when Child gave his speech, the Massachusetts judiciary had not yet adopted the *Somerset* principle, that any slave breathing the free air of Massachusetts could not be forced back into slave territory.⁴ Child grimaced as white slaveowners employed this part of the Constitution to protect their property, while South Carolina and Georgia ignored similar claims made by free black sailors from Massachusetts, who fell victim to the Seamen Acts in Charleston and Savannah. For Child, it was a gross miscarriage of justice that white Southerners could claim this protection of the Constitution while simultaneously denying it to Child’s “free fellow-citizens.”⁵

³ Speech by David Child to the New England Anti-Slavery Society at their First Anniversary Meeting, January 16, 1833 reprinted in *The Liberator*, July 27, 1833.

⁴ For the definitive work on the application of *Somerset* in the United States, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, N.C., 1981).

⁵ A similar observation about the hypocrisy of comity can be found in *Northern Star and Freeman’s Advocate*, 20 March 1842, in which the editorial’s author, Stephen Myers, links the plight of suspected runaways in the North

Unfortunately for Child's rhetoric (and slaveholders traveling to Boston), Massachusetts began applying the *Somerset* principle three years later when Chief Justice Lemuel Shaw honored a *habeas corpus* claim for a young slave girl in *Commonwealth v. Aves* in 1836. Thereafter, any slave voluntarily brought into Massachusetts could not be compelled to return to slave territory, indirectly liberating the slave, so long as that slave remained within Massachusetts. Though the Constitution declared, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," Massachusetts claimed that slaveholding was not a privilege of the citizens in the several states. Slavery was not recognized in Massachusetts, so Southern slaveholders could not consider it a "privilege...of citizens in the several States." In other words, Massachusetts citizens had no power to own or control slaves, so *Aves* did not discriminate against Southern slaveowners; it only placed them on equal footing with citizens of Massachusetts.

By implementing *Somerset* in 1836, however, Massachusetts undermined Child's rhetorical strategy and posed problems for free black sailors incarcerated in Savannah and Charleston (and soon Mobile, Biloxi, New Orleans, etc.). If Massachusetts could define which citizenship rights were to be equally honored to its own citizens and citizens of other states, then South Carolina and Georgia could also decide which rights to honor to its own citizens and the citizens from Northern States. Seen in a specific light, Massachusetts' decision to deny the property claims of sojourning slaveowners could be twisted by Southern jurists to undermine comity arguments against the Seamen Laws.

Up until the early 1840s, however, the plight of black citizens and issues of comity remained ensconced in abolitionist circles, on the periphery of mainstream American political

with the precariousness of Northern sailors in Southern port cities. A copy of the editorial can be found in Peter Ripley et al., eds., *The Black Abolitionists Papers*, Volume 3 (Chapel Hill, N.C., 1991): 380-382.

and constitutional concerns. The ascendant Democrats had help put to bed the two primary constitutional issues involved with the Seamen Acts, at least at the federal level; the Supreme Court had given express life to the concept of police powers in *New York v. Miln* in 1837 – thereby undercutting the ability of the Commerce Clause to combat the Seamen Laws – and the elected branches appeared content to ignore the larger question of African-American citizenship, though they had a powerful weapon in Taney’s Contracting-Parties theory if (and when) the issue became unavoidable. And at the state level, most governments restricted the rights of African Americans over the course of the 1830s, though avoiding the thorny term “citizen” as they did so. In short, it seemed unlikely that the Seamen Laws would come under federal review any time soon.⁶

However, a decade later, Massachusetts forced federal contemplation, deciding to follow Child’s advice, even though the *Aves* decision had meddled with the constitutional logic

⁶ A quick perusal of the many state constitutional convention during the 1830s reveals that most states sought to curb the rights of African Americans, but did not explicitly describe citizenship in racialized terms. The 1839 Pennsylvania Constitution reserved the right to vote to “white freemen,” but provided no other disabilities to African Americans. In Article XI, Section 2, the Constitution states, “The freemen of this Commonwealth shall be armed, organized and disciplined for its defence [sic],” while in Article IX, Section 21, it provides, “That the right of the citizens to bear arms, in defence [sic] of themselves and the State, shall not be questioned.” There appears to be a general correlation between freemen and citizens, though most of the rights set out in Article IX applies to all “persons.” In the 1839 Florida Territorial Constitution, the only race-specific rights concern the right to keep and bear arms, the right to hold office, and the ballot. At some points, the term citizenry is utilized in distinction to the people, but no racial distinctions are elaborated. The 1832 Mississippi Constitution begins, “That all freemen...are equal in rights.” While the Constitution protects only citizens in their rights to assemble, petition, and bear arms (in distinction to other rights granted to all), it specifically designates “free white citizen” when protecting from exile and in describing the Legislature’s ability to extend rights to Native Americans. Voting is reserved for free white men, and representation was based on free white inhabitants. In the 1835 North Carolina Constitution, free blacks were disfranchised, but all other rights did not include race-specific language. The problem was directly confronted in *Crandall v. State*, 10 Conn. 339 (1834), where the Connecticut Supreme Court refused to touch the claims of black citizenship, resorting to legal technicalities to maintain silence on the issue. Abolitionists were aghast at the decision. “Whether free people of color are entitled to the protection of the constitution as citizens, is one of the most interesting in important questions that has ever been agitated in the courts of law in our country, involving in its decision directly the rights of three hundred thousand free people of color, and indirectly of more than two million slaves. That free people of color, born in the country are citizens, would seem to us to admit of no dispute, had it not been doubted by respectable lawyers and judges in Connecticut...The last year has exhibited a rapidly increasing interest in this country in the rights of slaves and free people of color...More has probably been written and published on this subject during the last year, than in double the time at any preceding period, except perhaps during the agitation of the Missouri question.” *Second Annual Report of the New England Anti-Slavery Society* (Boston, 1834): 15-16.

underwriting his position. The exact causes for Massachusetts' aggressiveness in the early 1840s are difficult to ascertain precisely. Surely, resentment had been building steadily since the 1820s, when South Carolina first began to routinely imprison free mariners for the crime of having dark skin. Yet, mounting pressure does not answer why 1842 was the year to act. Most likely, it was a confluence of factors leading Massachusetts to stiffen in its defense of black sailors. The actions of the Supreme Court, British agents in the Caribbean, and vindictive Southern legislatures most likely precipitated the newfound hostility to racial quarantines.

In 1842, the Supreme Court handed down *Prigg v. Pennsylvania*, the landmark case concerning the enforcement of the 1793 Fugitive Slave Act. In that case, a Maryland slaveowner hired Edward Prigg to retrieve her slave property, a woman named Margaret Morgan, who had fled to Pennsylvania. Prigg found the fugitive slave and returned her to Maryland, in contravention of Pennsylvania's 1826 anti-kidnapping statute. Prigg was arrested and convicted, and his appeal to the Supreme Court forced the Justices to confront the duty of the State officials to enforce federal law. In overturning the Pennsylvania statute, the opinion, written by Joseph Story, declared, "the National Government...is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."⁷ Furthermore, Story denied a concomitant obligation on the part of the states, even going so far as to suggest that states could enact laws prohibiting state officers from enforcing federal laws. The decision may have motivated some conscientious advocates of black sailors to confront the federal Congress about enacting legislation to effectuate the Constitution's Privileges and Immunities Clause.

⁷ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), with quote from 541.

Much more likely, the decision by people in Massachusetts to actively combat the Seamen Laws precipitated from the quarantines' expansion. Earlier in 1842, Mississippi enacted its Seamen Act, literally weeks before Massachusetts adopted its proactive strategy. The Mississippi variant barred the entry of free black sailors, inflicting corporeal punishment for first-time offenders and mandating enslavement for repeat perpetrators. The previous winter, Alabama amended its racial quarantine to streamline the arrests of black sailors. Louisiana was about to enact its own version as well, though it is unknown how much Boston lawmakers knew of the legislative calendar of Louisiana. And even the Territory of Florida re-enacted its provisions against free black seamen at its 1842 legislative session.⁸ So, at the very moment when Massachusetts “assumed a manly bearing” towards the Seamen Laws, to borrow David Child’s phrase, the reach of the Seamen Acts was at its greatest. They were in force in South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana. The entire southeastern coastline of the United States, from Wilmington, North Carolina to the Lone Star Republic, possessed a statutory force field repelling free black mariners.

Interestingly, the expansion of the Seamen Acts – a major motivating factor in eliciting official protests from Massachusetts – was largely a response to Great Britain’s penchant for freeing American slaves who ended up on British soil. In November, 1841, the most notorious instance occurred when a portion of the human cargo aboard the U.S. brig *Creole* mutinied and killed the captain and most of the crew. The ship had been carrying slaves from New Orleans to Richmond, but the mutineers figured British soil would be a more attractive destination. When

⁸ *Acts...of the State of Mississippi...1842*, 65-71; *Acts...of the State of Alabama...1841*, 11-12; *Acts...of the State of Louisiana...1841-1842*, 308-318; *Acts...of the Territory of Florida...1842*, reprinted in *House Document 72*, 27 Cong., 3 sess. (1843): 25-28. Abolitionist papers kept close tabs on these new laws. On Alabama’s Seamen Law, see *National Anti-Slavery Standard*, March 17, 1842; on Louisiana, *National Anti-Slavery Standard*, June 23, 1842 and October 6, 1842. The latter issue also contained a warning to all sailors and shipmasters who might have been unaware of the new regulations.

the *Creole* reached the Nassau, British authorities investigated the mutiny and decided to free all of the slaves (numbering more than one hundred) who had not directly contributed to the murders of captain and crew. Southerners were outraged and demanded immediate compensation for the slaveowners' loss of property. Newspapers across the South fumed over Britain's disregard for American property rights.⁹ In Louisiana, the state legislature cursed Britain's "interference with the rights of property in the case of American" vessels in the same breath that it enacted its first Seamen Statute.¹⁰ Immediately, British and Northern sailors flooded New Orleans' jailhouses. The South's most vital international port had just outlawed black sailors.

People in Boston were fully aware of the *Creole* incident as well as the new Seamen Laws it spawned.¹¹ British agents also became painfully aware of Southern reactions to the liberation of the *Creole*'s cargo. In a very telling letter to his superior regarding the *Creole* mess and its relation to the Seamen Laws, British Consul in Charleston, William Ogilby, proclaimed, "For if the laws in force here, persons who have been guilty of no crime can be taken from under the protection of the national flag, and thrown into prison, and even made to suffer corporal punishment, surely the people of the southern States ought not to complain of the laws of England setting at liberty persons of the same description, when they arrive within the limits of Her Majesty's possessions."¹² Ogilby's analogy was far from perfect; several distinctions could

⁹ See Edward B. Rugemer, *The Problem with Emancipation: The Caribbean Roots of the American Civil War* (Baton Rouge, La., 2008): 197-204.

¹⁰ See "No. 28," *Resolutions...of the State of Louisiana, 1841-1842*, 72.

¹¹ See *Boston Courier*, December 30, 1841; *Daily Atlas* (Boston), February 26, 1842; *Boston Courier*, February 28, 1842; *Liberator*, January 21 and 28, 1842.

¹² Consul William Ogilby to the Earl of Aberdeen, 20 January 1842, in *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Series 5, Volume 579, *Foreign Office Papers*, Public Records Office, London (hereafter referred to as *Correspondence*); 54-55.

be drawn between the actions of British officials in the Bahamas who freed the *Creole* mutineers and the enforcers of the Seamen Laws. However, Ogilby's sense of Southern hypocrisy was defensible. If South Carolina's local law could determine which rights sojourning people of color would enjoy, certainly the local laws of Jamaica could honor the freedom earned by the mutineers on the high seas. And if the United States at behest of its Southern statesmen continued to press for compensation, Ogilby suggested then the Crown ought to escalate its exertions against the Seamen Laws.

Unfortunately for Consul Ogilby's understandable frustration, the Whig Ministry that had spearheaded the protests against the Seamen Laws during the 1830s fell out of power in 1841. Ogilby suggested a more direct and aggressive approach, but the incoming Tory government altered Britain's policy in the other direction.¹³ The new Foreign Secretary, Lord Aberdeen, like his Whig predecessor, sought the opinion of the government's legal advisors. In responding, the Queen's Advocate retreated from the aggressive position staked out in 1832 in the midst of Emancipation.¹⁴ Instead, legal advisors toed the line staked out in the aftermath of the initial South Carolina Law in 1823.¹⁵ Great Britain had "no right to insist" on the Seamen Acts' repeal. The Foreign Office ought to simply "protest in a friendly way" in hopes of a voluntary rescission of the statutes. The Seamen Laws did not explicitly violate the commercial conventions between the United States and Britain. The Foreign Secretary, Lord Aberdeen, assented to this strict reading of the statute. From 1841-1846, during the entirety of Sir Robert Peel's tenure as Prime

¹³ The Foreign Office under the Tories was far more amenable to the United States, seeking to ease diplomatic tensions. During the Peel Ministry, Anglo-American relations improved on the whole. The boundary dispute in Maine was resolved by the Webster-Ashburton Treaty in 1842. Britain refused to become officially embroiled with Texas for fear of antagonizing Washington. And, in 1846, the dispute over Oregon was resolved quickly so the United States could take advantage of the conciliatory Peel Ministry, which was about to lose control of Parliament.

¹⁴ Herbert Jenner to Viscount Palmerston, March 23, 1832, in *Correspondence*, 39-40.

¹⁵ This position, that the 1815 Commercial Convention did not protect black British sailors, was most clearly enunciated in Stephen to Lack, March 16, 1830, *Correspondence*, 20-22.

Minister, the British government refrained from engaging directly racial quarantines in the United States.¹⁶ Interestingly, the expansion of the Seamen Acts across the Deep South and the *Creole* Affair convinced British diplomats to consider a softer, more localized approach while those same factors, ironically, motivated Massachusetts to pick up the stick of hard diplomacy.

The new aggressive posture in Massachusetts manifested on two levels, one in a potent petition to the federal Congress and the other in the halls of the state legislature. In the spring of 1842, the Massachusetts legislature provided the first domestic, (meaning within the United States) government-authorized renunciation of the Seamen Laws since William Wirt's 1824 Attorney General Opinion.¹⁷ The state legislature resolved, "That the imprisonment of any citizen of Massachusetts by the authority of any other state in the Union, without the allegation of the commission of any crime, and solely on account of his color, is a gross violation of the federal constitution, as well as the principles of rational liberty." Both the Constitution and natural law, it seemed to Boston lawmakers, outlawed this facet of Southern racial policy. To correct these irrational and unconstitutional enactments, the legislature mandated,

That whenever his excellency the governor shall be applied to in behalf of any citizen imprisoned as aforesaid, and it shall appear to him, by a representation under oath, made by an creditable person, that such citizen, so imprisoned, is held in prison on account of his color only, it shall be the duty of the governor forthwith to take all suitable and proper measures to cause such citizen to be discharged from his imprisonment, and the legality of such imprisonment to be tried and determined by the courts of the United States.¹⁸

¹⁶ Dodson to Aberdeen, 4 August 1843, December 9, 1843, and December 29, 1843, all in *Correspondence*, 61-71. On Aberdeen's explicit rejection of official protest, see Aberdeen to Pakenham, May 7, 1844, in *Correspondence*, 82.

¹⁷ Remember, Judge Strange's opinion in North Carolina struck down the state's Seamen Law, but only for its ineffectiveness, not its constitutionality. See Chapter 5 above.

¹⁸ See "Resolves relating to the Imprisonment of Citizens of this Commonwealth in other States," Chapter 82, *Acts...and Resolutions...of the State of Massachusetts*, at 568, passed March 3, 1842.

Massachusetts would fit the bill for a federal court case in which the Seamen Law's constitutionality would be examined.

With this declaration, Massachusetts officials broke what had become a long tradition of acquiescence to the Seamen Laws. Ever since the Democrats took office in 1828 and installed their conception of state police powers (with *New York v. Miln* as the crowning achievement), the Seamen Laws had remained immune from governmental attack on commerce grounds, at both the federal and state levels. To be sure, protestors cried foul over the treatment of black sailors on citizenship grounds, but these protests remained outside official state apparatuses, with David Child's speech representing a perfect example. With this 1842 resolution, the discourse on the Seamen Acts took a decisive turn. Now, agents with the sharpened blade of state power supplemented private citizens' dull and unwieldy attacks. Subsequently, defenders of the Seamen Laws were forced to fortify their defenses. Georgia was the first to erect the powerful constitutional embankment set out by former Attorney General and sitting Chief Justice Roger B. Taney in hopes of repelling the Massachusetts assault on the Seamen Laws.

When the Georgia legislature received a copy of the Massachusetts resolutions, it sought to confront directly the suggestion of black citizenship that lay at the heart of the matter. In a resolution passed unanimously by the Georgia Senate, the legislature proclaimed, "we deem it our duty to repel the charge [of the seamen laws' unconstitutionality] as unfounded in truth, and as manifesting a spirit, which, if not rebuked and checked, will, sooner or later, destroy our institutions and dissolve our Union." Rephrased, if Massachusetts demanded constitutional recognition of black citizenship, then Georgia was willing to part ways with the United States. However, Peach State officials flatly denied that Massachusetts's claim had any merit. Rehashing Taney's 1832 opinion regarding black British subjecthood, Georgia retorted,

Georgia has never rebuked Massachusetts for fraternizing with negroes, nor held her up to the reprobation of the States of this Union, for her violations of the Charter of Confederacy, by proclaiming those citizens, who were not so at the time of the adoption of the Federal Constitution; thereby attempting to add to that sacred instrument, and thus violating the letter and spirit of the compact...It is an universal rule of construction, that terms used in Statutes, are to be construed according to their generally received import; and this rule applies with great force to the Constitution of the United States...were negroes or persons of color, regarded as citizens at the time of the adoption of the Federal Constitution[?] They were not; and the term citizen, as used in that instrument, can only refer to those who were embraced in its definition at the time of its adoption.

Considering these facts, the Assembly resolved, “That negroes, or persons of color, are not citizens, under the Constitution of the United States, and that Georgia will never recognize such citizenship.”¹⁹

Georgia’s stance brought into sharp focus the conflicting ideas of citizenship held by the two states. Georgia implemented, at least in its first official pronouncement, Taney’s Contracting-Parties theory of citizenship and looked to the Framers and ratifiers of the Constitution to glean the contours of federal citizenship. Whatever Massachusetts had determined to do with its colored population in the intervening years since ratification, those actions could have no impact on the Constitution and the terms by which that instrument was understood during the ratification process. Just as Taney denied that status changes of Afro-Britons during Emancipation altered the operation of a previously enacted treaty, Georgia denied black citizenship along the same logic.

But before Georgia enunciated this utter denial of black citizenship and before the Massachusetts government underwrote any specific lawsuit on behalf of a black sailor, a group of free blacks in Massachusetts decided to exercise their First Amendment rights in protest of the Seamen Laws, resolving, “That we, the colored citizens of Boston, memorialize Congress...at

¹⁹ *Acts...of the State of Georgia...1842*, 181-182.

their next sessions, for their action in this case.”²⁰ Georgia may declare federal citizenship a white reserve, but African Americans in Boston were going to exercise their right to petition Congress regardless. Their arguments must have been persuasive. Apparently, the meeting caught the attention of some of Boston’s wealthiest and most prominent families – including members of the Spragues, the Danas, the Pickerings, and the Curtises – who signed the petition.²¹ Their petition was incredibly brief. The Memorialists requested Congressional intervention for two reasons. First, the Seamen Laws in “Charleston, Savannah, Mobile, and New Orleans” were prejudicial to “the commerce of these states.” Hopefully, the Whig Congress would implement strong, national commercial laws that would bring the Seamen Statutes into direct conflict with federal legislation. Under the *Gibbons* precedent, such federal commercial laws would demand judicial annulment of the Seamen Statutes under the Supremacy Clause.²² Second, Congress should interfere simply to “grant them [black sailors] relief, and render effectual in their behalf the privileges of citizenship secured by the Constitution of the United States.”²³ In 1842, then, both constitutional arguments came before the federal Congress for contemplation for the first time in almost twenty years.

When the petition reached the federal House of Representatives, it was sent to the Commerce Committee, with Robert Winthrop – a Massachusetts Whig, conveniently - presiding.

²⁰ See “Resolutions Adopted at a Meeting of Boston Negroes, October 27, 1842,” reprinted in *Liberator*, November 4, 1842.

²¹ The leading name on the petition was Benjamin Rich, who was a longtime president of the Human Society of Massachusetts and held the welfare of sailors and captains sacred. See Alexander Young, *Discourse Occasioned by the Death of Benjamin Rich, Esq. Delivered in the Church on Church Green, June 8, 1851* (Boston, 1851). One of the Curtis’s was B.R. Curtis, future United States Supreme Court Justice and dissenter in *Dred Scott*. Interestingly, when the Commerce Committee referred to the memorial, they never mentioned the fact that free blacks were among the petitioners. Compare the Committee’s report below with the description in Philip Foner and Ronald Lewis, eds., *The Black Worker*, Volume 1 (Philadelphia, 1978): 217-218.

²² See Chapter 4.

²³ Petition reprinted in *House Report 80*, 27 Cong., 3 sess. (1843): 7-9. (Hereafter referred to as *House Report 80*)

As might be imagined considering the often loose coalition of politicians that comprised the Whig Party in 1842, the issue polarized the Commerce Committee. In fact, the Committee published two conflicting reports on the Seamen Laws' constitutionality and disseminated them to the rest of Congress; five thousand copies were ordered. The majority report, authored by Winthrop, ruefully admitted that Seamen Laws had for so long "been most oppressively executed." Unsurprisingly given Winthrop's constituents, the majority report purported "no hesitation in agreeing with the memorialists, that the acts of which they complain" were unconstitutional. Even before engaging the issue of interstate commerce, Winthrop looked to citizenship as the primary proof of the illegality of racial quarantines.

The Constitution of the United States expressly provides (art. 4, sec. 2,) that "citizens of each State shall be entitled to the all the privileges and immunities of citizens in the several States." Now, it is well understood that some of the States of this Union recognise no distinction of color in relation to citizenship. Their citizens are all free; their freemen all citizens. In Massachusetts, certainly – the State from which this memorial emanates – 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, nine years before the adoption of the Constitution of the United States. 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 in the several States.²⁴

The language of the majority report is telling. Winthrop intertwined two well-worn theories of citizenship with a rather novel one. He resorted to the common perception of an undifferentiated citizenry. He relied on the familiar connection between the possession of rights and the designation of citizenship. However, unlike his Congressional compatriots for decades passed, Winthrop also interjected Taney's Contracting-Parties theory, a theory recently adopted by the Georgia legislature in denying federal citizenship for sojourning African Americans. Though he came to a far different conclusion than the Chief Justice and the Georgia Assembly,

²⁴ Majority Report, *House Report 80*: 1-7.

he nonetheless acknowledged the importance of identifying eligible federal citizens based on the political culture of the 1780s. Perhaps Winthrop was attempting to engage the enemy on their own terrain, but the end result was a tacit acknowledgement to the proposition that the groups eligible for citizenship had not changed since the Ratification debates. But since free blacks were citizens in 1787, they were protected in the Constitution.

Winthrop's decision to spearhead his attack on the Seamen Acts with citizenship is puzzling. Among Whigs, a well-reasoned Commerce Clause argument would have been persuasive, especially if Winthrop hoped to earn some votes from Southern members of his party. By prioritizing citizenship, or maybe by even bringing it up, he may have undermined his own ability to get the House to approve his proposed resolutions against the Seamen Acts. The second and third propositions in Winthrop's report were certainly more palatable to mainstream Whig ideology and were reiterations of constitutional arguments against racial quarantines first promulgated twenty years earlier. Mimicking Daniel Webster's argument and Justice Johnson's concurring opinion in *Gibbons*, Winthrop cited the Dormant Commerce Clause,

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 construed...The power to *regulate* admits of no partition. It excludes the idea of all concurrent, as well as of all conflicting, action. Regulation may be as much disturbed and deranged, by restraining what is designed to be left free, as by licensing what is designed to be restrained.

On this basis, Winthrop concluded, "the laws in question, imposing severe penalties, as they do...are infringements, by the States in which they have been enacted, upon this exclusive authority of the General Government." Furthermore, Winthrop looked to the treaty-making power of the federal government to discount the Seamen Acts. "But the provisions of the laws in question," the report argued, "wherever they are applicable to the crews of foreign vessels, are in

direct conflict with most, if not with all, of the commercial treaties which have been made by the United States with foreign nations.”²⁵

To counteract claims that the Seamen Acts were police powers, i.e. quarantine measures, and to prevent the type of legal gymnastics that emerged from *Miln*, Winthrop explicitly elaborated the proper function of quarantine measures.

That American or foreign seamen charged with no crime, inflicted 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, or it may be, while asleep in their berths; should be rendered liable, in certain contingencies over which they may have no possible control, to be subjected to the ignominy and agony of the lash, and even to the infinitely more ignominious and agonizing fate of being sold into slavery for life, and all for the purposes of police; - 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 birth, and which are as permanent as their being.

Winthrop’s analysis of the quarantine powers, though elliptical and done in passing, shot to the very heart of racial quarantines. It exposed the crevice in Southern lawmakers’ logic. Race was not a contagion. No seamen could pass his race on to someone else by coming ashore. What was being quarantined was abolitionism, or at least the idea that blackness and enslavement were not synonymous. Southern legislatures were probably correct in assuming that black sailors did not care for slavery, but the law assumed they carried with them the “moral contagion of liberty.” There were no tests, no way to prove that race and the contagion were inextricably linked. Alternatively, the law also ignored the very plain fact that many white sailors probably suffered from the same “moral contagion.” The law did not quarantine the infection; it only quarantined non-slaves with black skin, regardless of contagion. In an era before the Fourteenth

²⁵ Majority Report, *House Report 80*, 2-3, emphasis in original. On *Gibbons*, see Chapter 4 above. Winthrop also suggested that enforcement of the laws against foreign nations “has of late years been suspended.” However, the historical record simply does not endorse this perception. British protests grew all the louder in the early 1840s, pouring in from all over the Deep South’s port cities.

Amendment, Winthrop seemed to be enunciating an early form of an Equal Protection argument, a precursor to a premise that would concern the Supreme Court half a century down the road.²⁶

Revelatory of the fractured state of the Whig Party, a North Carolina Whig, Kenneth Rayner, submitted the minority report. In it, he merged the amorphous, extra-constitutional concept of necessity with specific constitutional arguments. Much like an individual's inalienable rights which cannot be bartered in the social compact, the States in the Union could not barter away via the Constitution the "means of safety, or protection, of self-defence [sic], forced...by stern necessity, and which, after all, is the end and object of all government." For Rayner, self-preservation was "a right of which the Federal Constitution never intended to deprive [the states], and the taking away of which from any State, by any ingenious implication, would convert our boasted freedom into a mere mockery." In short, the Constitution did not offer an avenue to controvert the Seamen Acts, and if the Constitution could be manipulated to controvert them, then the "end and object" of Union would be destroyed, and freedom converted into "mere mockery." The implication of this argument was radical (and prescient); if the Constitution could be wrung to allow federal interference, then the Constitution was not worth keeping.²⁷

However, Rayner was not advocating disunion. To the contrary, his minority report focused primarily on showing how the Seamen Acts were not repugnant to the Constitution, and

²⁶ Majority Report, *House Report 80*, 3-4. Interestingly, Winthrop cited the recent *Prigg* decision in discussing the power of the federal government to interpose in the enforcement of state police laws when constitutional mandates are at stake. Winthrop's discussion of rights echoes also John Quincy Adams's ruminations about natural rights, the Declaration of Independence, and American ideals, in his argument on behalf of the *Amistad* mutineers. See *Argument of John Quincy Adams Before the Supreme Court of the United States in the case of the United States, Appellants, vs. Cinque, and others, Africans, captured in the schooner Amistad, by Lieut. Gedney, Delivered on the 24th of February and 1st of March 1841* (Washington, D.C., 1841).

²⁷ Minority Report, *House Report 80*, 37-49. The Minority report was reprinted in *Raleigh Register & NC Gazette*, March 24, 1843.

how federal interference was not sanctioned. In repelling the Privileges and Immunities argument, Rayner used the *Aves* precedent against the Massachusetts' petitioners.

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... The supreme court of Massachusetts has decided 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 reclaim him.

Southern slaveowners did not seek redress from *Aves* decision in Congress because they understood the “proper” meaning of the Privileges and Immunities Clause. Remember, *Aves* barred sojourning slaveholders the ability to force their slaves out of Massachusetts. Once a South Carolina citizen slaveowner entered Massachusetts, he held the same rights as a Massachusetts citizen. Since Massachusetts citizens cannot hold slaves, neither could citizens from South Carolina while in Massachusetts. Though slaveholders might not like it, Massachusetts could have these *habeas corpus* laws because the Privileges and Immunities Clause did not forbid it. Southern citizens and Northern citizens were being treated equally. Contrarily, Rayner argued, Massachusetts could not claim *Aves* and deprive slaveowners of rights to property by local law in one moment, and then refute South Carolina's right to deprive free blacks rights to movement by local law at another. So long as free blacks from Massachusetts were being treated the same as free blacks in South Carolina, then the constitutionality of the Seamen Laws fulfilled the Privileges and Immunities requirement.²⁸

Just in case his interpretation of comity was unconvincing, Rayner denied that free blacks in Massachusetts were state citizens. Rehashing the claims made during the Second Missouri Crisis, the minority report looked to the legal handicaps that free people of color endured in the Northern states to prove the absence of citizenship. Because free people of color could not vote,

²⁸ Minority Report, *House Report 80*, 39-45.

hold office, bear arms, etc., they were not citizens in the classic Roman and Greek formulation. In reserving citizenship status for only those who could enjoy the full spectrum of rights, Rayner attempted to prove the inapplicability of the Privileges and Immunities Clause. Of course, Rayner never confronted the paradox of white, female citizenship (nor did his opponents, for that matter) a telling sign of the gendered understanding of political citizenship.²⁹

Rayner also denied the majority report's conclusion regarding the Commerce Clause. Citing both John Marshall and Joseph Story (though incorrectly), he defended the concurrency of commerce regulation. Since Congress had not acted, the states were free to do so. Of course, by this logic alone, a simple act of Congress could undo the Seamen Laws. To combat this possibility, Rayner drew from the rationale of *Miln* to declare inspection and quarantine laws to be health measures, not regulations of commerce. Considering that "every State has the power to punish offences against its authority," the Southern states could certainly "punish those who disseminate seditious and insurrectionary doctrines among the slaves." To prove his point Rayner ruminated, "suppose the leaders of abolitionism were to go to Savannah, Mobile, or New Orleans...could they in security harangue the slaves on the wharves, merely because they stood on the decks of ships...[and supposedly] under the protection of the General Government?" The Seamen Laws were police measures; "The right to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law." Of course, Rayner's opponents could do as Winthrop had, and point to the fact that free negroes were being convicted on their race and status, and not from shouting (or even thinking) abolitionist ideals. Rayner's opponents

²⁹ In this regard, Rayner did not join Georgia in adopting Taney's Contracting-Parties theory.

could simply ask, "May Louisiana bar all interstate travelers on the assumption that some of them will commit crimes?"³⁰

As intense as the ideological dissension within the Commerce Committee, one might presume a raucous debate on the House floor. This assumption is strengthened by the fact that five thousand copies of both reports were published and disseminated, but only after at least two votes. However, the resolutions against the Seamen Acts were laid on the table without debate, and there they stayed, victim to the apparent apathy or timidity of House Whigs in becoming embroiled in such a polarizing issue.³¹

When the federal House of Representatives tabled the resolutions against the Seamen Acts, the Massachusetts Anti-Slavery Society fumed and the Massachusetts Assembly earnestly continued its program of initiating lawsuits in federal court.³² Unlike the previous year's vague demands, the *Resolves relating to the Imprisonment of the Citizens of this Commonwealth in other States*, authorized the Governor "to employ an agent in the ports of Charleston...and New Orleans...of the purpose of collecting and transmitting accurate information respecting the number and the names of citizens of Massachusetts who have heretofore been...imprisoned without the allegation of any crime." This was not simply to be exercise in data collection. "The said agent," the *Resolve* continued, "shall also be enabled to bring and prosecute, with the aide [sic] of counsel, one or more suits in behalf of any citizens that may be so imprisoned, at the expense of Massachusetts, for the purpose of having the legality of such imprisonment tried and

³⁰ Minority Report, *House Report 80*, 45-49.

³¹ *Niles' National Register*, January 28, 1843; *Congressional Globe*, 27 Cong., 3 sess. (1843): 384; *Journal of the House of Representatives* 27 Cong. (1843): 242. It was a small world; Isaac Holmes, the co-counsel for the Charleston Sheriff in *Elkison* and the prosecuting attorney in *Daley*, was the senior Congressman from South Carolina. He voted against the resolutions in the majority report.

³² See the *Eleventh Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1843): 18-19.

determined upon in the supreme court of the United States.”³³ Congress may have chosen to ignore petitions, but the federal courts would not be able to evade involvement with the Seamen Acts.

Although these new *Resolves* appeared to be part of an aggressive agenda with decisive, purposeful steps, some abolitionist groups doubted the muscle behind these proclamations. In its Annual Report, the Massachusetts Anti-Slavery Society applauded this “dignified and proper proceeding,” but wondered about waning enthusiasm for redress. In the months since the *Resolves* passed, “our colored seamen are still shut up in the gaol of Charleston, our agents still be punished by law if they interfered in their behalf.” The proof was in the pudding. “We shall now see whether Massachusetts, after another year of sufferance, is disposed to make it the badge of all her tribe, in all time to come, or wither she is disposed to redeemed the pledge made in her Protest to do her duty to her people.” The Society had its doubts. “We fear that her policy on this and kindred subjects will be marked by ‘a wise and masterly inactivity.’” If the Society doubted the resilience of its state government, it was certain of the impotence of the federal government. In “*abjur[ing] our allegiance to the Constitution of the United States and the Union,*” the Society pointed to Congress’s apathy towards “our colored fellow-citizens [who] are utterly denied the rights of citizenship throughout the slave-claiming States.”³⁴ Though nominally outside “formal” politics, the members of the Massachusetts Anti-Slavery Society continued to excoriate state officials for supplementing the federal government’s catering to the slave power.

³³ *Resolutions...of Massachusetts...1843*, Chapter 67.

³⁴ *Twelfth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1844): 30-31, 83-85. Emphasis in original.

What these abolitionists construed as moral weakness, a lack of masculinity, and political puffery was actually just poor administration on the part of the Massachusetts state government. Originally, Governor Marcus Morton³⁵ attempted to appoint Benjamin F. Hunt as the agent in Charleston. Morton might have thought Hunt a good choice. He was a Massachusetts native, long time Charleston resident, and an esteemed member of the Carolina bar and the South Carolina legislature. Hunt, as we shall soon see, was in favor of easing the restrictions of the Seamen Acts, and if Morton knew of this, it would certainly have contributed to his decision to seek Hunt's employ. However, if Governor Morton dug a little deeper, he would have realized that Benjamin Hunt was not the best choice. He battled tooth and nail with Supreme Court Justice William Johnson during and after the *Elkison* decision back in 1823. Though a moderate in South Carolina politics, Hunt was no friend of erstwhile Northern interlopers, nor was he comfortable with a federal court dictating state racial policy.

Despite the assumption by the Massachusetts Anti-Slavery Society that "Mr. Hunt never took the slightest notice of his appointment," Hunt did in fact publicly engage the prospect of this potential employment, and so did his political adversaries. The Charleston *Mercury* ran an article in which it rhetorically asked "What is this?" concerning the suspected collaboration between the Massachusetts State government and the esteemed attorney. The *Mercury*, long the mouthpiece of the more radical elements of Carolina states-rightsers, had previously celebrated Hunt's contribution to anti-federal ideology back in 1823. By 1843, the combination of a new editorial staff and Hunt's cooperationist stance with the federal government broke the close relationship that once existed. Now, the *Mercury* looked at Hunt with a suspicious eye, curious

³⁵ The members of the MA-SS had every reason to doubt Morton's dedication to combating the Seamen Acts. See Jonathan Earle, "Marcus Morton and the Dilemma of Jacksonian Antislavery in Massachusetts, 1817-1849," *Massachusetts Historical Review* 4 (2002): 61-88.

as to his true loyalty. When the paper learned of Governor Morton's solicitation of the old Colonel, the *Mercury* must have believed they had ousted another internal enemy. Hunt vociferously refuted the *Mercury's* contention that he was in the pocket of Massachusetts. In a letter written to the *Charleston Courier*, historically the more moderate and less cantankerous paper, Hunt dispelled any rumors about his alleged collaboration with the Bay State or its conniving cadre of abolitionists. Hunt defended the Seamen Act and pointed to his prestigious pedigree in the law's history. He proudly explaining that he voted for the original 1822 legislation and defended the law in federal court in 1823. The intervening years cemented his opposition to federal interference, wrote Hunt, and his position was in "no way affected by an appointment to which my previous assent was not sought, and which I have not assented." Hunt's letter was reprinted in newspapers across the country.³⁶

Morton's luck was no better in securing an agent in New Orleans. His nominee, John A. Maybin, similarly declined the office, "on the ground that it was incompatible with duties he owed to the State of which he was a citizen."³⁷ A radical New York newspaper was less forgiving in describing Maybin's refusal, accusing him of prioritizing "the public favor at the South" over "the rights of the oppressed."³⁸

While Massachusetts bumbled in putting into practice its new aggressive policy vis-à-vis the Seamen Laws, British Consuls in New Orleans and Charleston continued updating the Foreign Office of the brutal treatment of Afro-British sailors, even though the Peel Ministry had

³⁶ *Twelfth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1844): 8-10; *Niles' National Register*, December 2, 1843.

³⁷ *Twelfth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1844): 8-10; *Documents...of the House of Representatives...of Massachusetts...1844*, 7-8.

³⁸ *New York Evangelist*, January 18, 1844.

ceased formal protests.³⁹ One particular incident demands elaboration. According to the British Consul in Charleston, William Ogilby, four sailors – the second mate, a steward, a cabin boy, and an apprentice – were forcibly removed from the British ship *Higginson*, and placed in jail according to the 1835 South Carolina Seamen Act. The Consul immediately sought the removal of the second mate, formally requesting the Sheriff to release the man into his custody.

Apparently, the Sheriff complied with this request.⁴⁰ But when the Consul visited the jail, he found that the steward, a man named John Jones, was in solitary confinement. According to Jones, he had been placed in isolation following an altercation with the gaoler. The previous morning, the jailer had instructed Jones to sweep the lower section of the jailhouse, to which Jones complied. When the steward later found that no other incarcerated seamen were required to do any physical labor, he stated he would make his mistreatment known to his captain. The gaoler overheard the comment, and it “enraged him very much, and caused him to lay hold of Jones and inflict a very severe beating on him with a stick, after which he locked him up” in solitary confinement. According to the Consul, Jones’s statement “was afterwards admitted by the gaoler to be correct.”⁴¹

News of Jones’ corporal punishment made it all the way to the Queen’s legal advisors, but they denied that South Carolina’s Seamen Act violated international law or existing treaties. Though Jones’s harsh treatment “entitled [him] to legal redress,” the Crown’s advisor admitted, “I cannot take upon myself to say that the law in question, harsh and abominable as it is, amounts

³⁹ See John Crawford to Earl of Aberdeen, June 8, 1842, in *Correspondence*, 58-61; Ogilby to Earl of Aberdeen, November 4, 1843, in *Correspondence*, 62-63.

⁴⁰ The historical record is largely silent about the pervasiveness of this process. There is simply too little evidence to make any definitive claims about the tendency of South Carolina law enforcement to allow British sailors to remain on board.

⁴¹ Ogilby to the Sheriff of Charleston, November 3, 1843 and Ogilby to Earl of Aberdeen, November 4, 1843, both in *Correspondence*, 62-63.

to so clear a breach of the Treaty, as to confer upon Her Majesty's Government the right of insisting upon repeal, or of demanding compensation for such of Her Majesty's subjects as have suffered under its provisions." Because the individual protections enumerated in the treaty concluded with the debilitating phrase, "subject always to the laws and statutes of the two countries respectively," the Seamen Acts did not breach the commercial contract.⁴² Lord Aberdeen detested the law, but instructed the legation in Washington to seek modification only in "a friendly way."⁴³

Even before receiving explicit instructions, Consul Ogilby traveled to Columbia to talk with state lawmakers (in a "cautious" tone) about the problems with the law's enforcement. Ogilby admitted he "ventured so far to overstep what I consider, in strictness, to be the prescribed limits of my Consular duties" by rubbing elbows with state lawmakers. Whether because of the Consul's actions or from other, domestic reasons, the South Carolina House considered altering the Seamen Act to allow seamen to remain on board their ships. Governor Hammond suggested such a modification, and he pointed to the fiasco over John Jones.⁴⁴ Apparently the South Carolina Association had printed a report about Jones's punishment, vindicating the gaoler and accusing the British sailor of "haranguing three or four negroes" and using "insurrectionary language" about their foolishness in doing the jailer's bidding. The Association's report justified the jailor's actions, but highlighted the problems with the Seamen Act. Namely, "the very danger which it is intended to avoid in imprisoning [sailors], is multiplied." While the Association wanted to keep incarceration in place, they wanted a new

⁴² Dodson to Earl of Aberdeen, December 9, 1843, in *Correspondence*, 63-64

⁴³ Aberdeen to Pakenham, December 18, 1843, in *Correspondence*, 65-66.

⁴⁴ Unfortunately, James Hammond did not write in his diary for the entirety of 1843, so his exact motivation for seeking an amendment is unknown. See Carol Bleser, ed., *Secret and Sacred: The Diaries of James Henry Hammond, a Southern Slaveholder* (New York, 1988): 117.

jailhouse built for the sailors. Contrarily, Governor Hammond read the Association's report as evidence that incarceration was impractical, and sailors should be quarantined aboard their own vessels. The State House concurred with Hammond's prescription, and considered a bill easing the severity of the Seamen Act's enforcement.⁴⁵

For Consul Ogilby, moderates in the State House, Governor Hammond, and the Whiggish editors of the *Charleston Courier* all agreed that the Seamen Act needed revision.⁴⁶ These voices held powerful sway in South Carolina, but Consul Ogilby doubted the law would be amended unless this collection of Palmetto State politicians could operate without federal interference.

Ogilby wrote to his superiors in London,

And above all I most anxiously hope that your Lordship has not thought it necessary to instruct Her Majesty's Minister in Washington to address any communication to the Federal Government connected with this matter; for, from what I know of the character of the people of this State, and of their extreme sensibility in regard to everything relating to or arising from their slave institutions, I feel quite confident that any interference on the part of the General Government would not only not be productive of any good in obtaining redress, but might completely frustrate my efforts for repeal of the law.⁴⁷

Luckily for Ogilby's forecast, British diplomats in Washington, though authorized to talk "in a friendly way" had not interfered with racial quarantines at all. So when the Foreign Office agreed to bypass federal diplomacy in the Jones fiasco in Charleston, it was in accord with

⁴⁵ *Message of the Governor of South Carolina*, November 30, 1843, reprinted in *Correspondence*, 69; James Simons, *In the Matter of James Jones, a British Coloured Seaman, of the "Higginson"* reprinted in *Correspondence*, 69-70; Ogilby to Earl of Aberdeen, December 8, 1843, in *Correspondence*, 68-69.

⁴⁶ The editors of the *Courier* were in favor of modifying the seamen law, allowing sailors to remain aboard their vessels instead of "thrust[ing] them into the most intimate contact [in jail] with that part of the population most likely to imbibe and cherish feelings and notions dangerous to the peace and good order of the community." Though certain the seamen law that remanded sailors into custody was constitutional, the editors saw in its current form "defects that in practice pervert" the law's actual aim. The *Courier* article reprinted in *Niles' National Register*, December 2, 1843.

⁴⁷ Ogilby to Earl of Aberdeen, December 8, 1843, in *Correspondence*, 68-69.

current policy. The forum for redress would remain within the Palmetto State, or so at least the British Foreign Office believed.⁴⁸

Consul Ogilby exhibited a keen understanding of South Carolina politics. Any political issue, no matter how mundane, could become flammable if combined with a reference to federal power. Because of the general mistrust of Carolinians in the 1840s regarding the ability of the federal government to weigh evenly competing regional interests, South Carolina politicians could manipulate any federal action into a rhetorical attack on their in-state adversaries. Put another way, Ogilby understood that any news of federal activity on the Seamen Laws would predispose South Carolina lawmakers to avoid liberalization of the quarantine. If Washington promised intervention, then any vote against the existing Seamen Law could be manipulated into a betrayal of South Carolina independence and sovereignty. With no federal action, Ogilby reasoned, opponents of moderation could not impugn proponents as unwitting federal drones or malevolent Judases. One had to look no further than Governor Hammond for proof. Hammond wanted to see an amendment to the Seamen Law, but his dedication to Southern separation and his almost paranoid fear of federal motives made his suggestion of an amendment conditional, contingent on federal silence. Amending the law was good policy, but it could easily be sacrificed for larger, more important political considerations.⁴⁹

Ogilby's perception paid off. The State House passed the bill allowing for sailors to be quarantined aboard their vessel by a vote of nearly two to one. Instrumental in the bill's passage was a report from the Chairman of the Committee on Federal Relations, Benjamin Hunt. Besides echoing the sentiments of Governor Hammond, Hunt argued that South Carolina,

⁴⁸ Earl of Aberdeen to Pakenham, January 10, 1844, in *Correspondence*, 70-71.

⁴⁹ See Drew G. Faust, *James Henry Hammond and the Old South: A Design for Mastery* (Baton Rouge, La., 1988): 250-253.

Maintained the undoubted right...to judge for himself of the measures of self-protection, and what police regulations were necessary. But if those regulations can at the same time meet the necessities of commerce, it was due to the comity of nations so to adopt them. It was the opinion of our most elevated citizens deeply interested in the property and policy of the State, that the Bill would effectually accomplish the desired effect...The removal of seamen, parading them through the streets, and confining them idle among the negroes in jail, was injudicious... To retain the sailors on board, was in conformity with the principle that the flag covers the crew, a principle important to our nation's negotiations. Although this principle [of comity] yields to the inalienable right of self-protection, still it is comity to observe as strict an analogy as practicable.⁵⁰

South Carolina Whigs were attempting to accomplish what federal Whigs could not. But in South Carolina, Hunt and others were looking to alter the Seamen Acts as a matter of policy, not constitutionality.⁵¹ And there arguments were partially convincing. And certainly, Hunt's decision to reject Massachusetts' offer of employment bolstered the credibility of his report.

Hunt's position vis-à-vis the Seamen Act had changed incredibly since his staunch defense in *Elkison v. Deliesseline* back in 1823. In 1843, Hunt no longer saw the forced incarceration of black sailors as good policy. The immediate threat posed by the Vesey Conspiracy had evaporated in the intervening decades. South Carolina could afford to lower the guard somewhat, especially if that gesture would attract commercial development. Hunt, representing a Charleston district hit hard by financial distress, had every reason to dismantle any obstructions to trade. The economic setting of the early 1840s was an ugly one for South Carolina in general. Anything that could be done to spur growth deserved serious consideration. However, though Hunt may have changed stance regarding the Seamen Act as policy, he never questioned his state's constitutional right to enact any racial measure it deemed expedient, regardless of federal overtures to the contrary.

⁵⁰ Hunt's report reprinted in *Correspondence*, 71-74

⁵¹ This would fall in line with Taney's notion of legislative discretion discussed in Chapter 6 above.

Much to Colonel Hunt's dismay, the report did not convince the upper house of the assembly. The State Senate killed the bill, but resolved to construct a separate jailhouse for incarcerated sailors, thus allowing the true aim of the Seamen Act to be accomplished: the complete segregation of infected Atlantic sailors from domestic slaves. Though the ends were not what the British Consul and Col. Hunt wished, at least the South Carolina legislature had admitted that the current mode of the quarantine's enforcement needed to be altered.

While the end result of the 1843 legislative session did not procure the exact alterations sought by Great Britain (for sailors to remain on board) or Massachusetts (wholesale repeal of the Seamen Act), Consul Ogilby considered the resolutions a good omen, a harbinger of future curtailments.⁵² In fact, just two months later when the South Carolina Assembly came to a close, Consul Ogilby declared, "I have every reason to believe that such an advance was made at the last session of the State Legislature towards a repeal of the objectionable law, that it will be so modified on the next meeting...as to do away with its harsh and oppressive features." Ogilby was convinced by his conversations with Charleston merchants that their "ardent desire" for a "most liberal system of commercial intercourse with Great Britain" would ultimately force rescission of the Seamen Act. Importantly, Ogilby also suggested to the Foreign Office that it continue to avoid putting pressure on Washington to intervene. "If the law in question ever is to be repealed," Ogilby postulated, "it will not be on the remonstrance or through the intervention in any way of the General Government." Even the most vocal opponents of the Seamen Laws in South Carolina would be forced to abandon attempts at alteration if federal officials intervened for fear of political backlash. "If the United States Government was to move at all in the is matter," Ogilby warned, "it would be the strongest reason possible...for retaining the law on

⁵² Ogilby to Earl of Aberdeen, December 26, 1843, in *Correspondence*, 74-75.

their Statute book, and enforcing it with the utmost rigor.” Aberdeen, the Foreign Secretary, readily assented to Ogilby’s wishes and informed his Washington legation to remain inert on the Seamen Act controversy. The esteemed Foreign Secretary wanted to see if this localized diplomacy could succeed where formal centralized diplomacy had failed for two decades. Moreover, Ogilby’s policy dovetailed with the Foreign Office’s overall policy of avoiding direct conflict with Washington.⁵³

Unfortunately for the hopes of Ogilby, the Earl of Aberdeen, and all of the free black sailors en route to Charleston, Massachusetts did not share the optimism over South Carolina’s debates regarding the Seamen Act’s amendment. Instead, state officers in Boston, still reeling at Congress’s decision to table discussion on Southern race quarantines, understood this gesture by the South Carolina Assembly as evidence of recalcitrance. What motivated British diplomats to maintain the diplomatic status quo and remain inert contrarily provoked Massachusetts’ officials to press forward and threaten federal judicial intervention.

The Massachusetts Anti-Slavery Society, for example, believed this slight modification did nothing to correct the abuses affecting U.S. citizens.⁵⁴ Even more boisterously, the *Liberator* scoffed at South Carolina’s empty efforts. In a lengthy article, the editors ridiculed Benjamin F.

⁵³ Ogilby to Aberdeen, February 5, 1844; Pakenham to Aberdeen, March 14, 1844; Aberdeen to Pakenham, May 7, 1844, all in *Correspondence*, 79-82. In Pakenham’s letter, he (despite Britain’s pusillanimous approach to securing repeal of the Seamen Laws) continued to consider the quarantines “at variance with the rights which British subjects are accustomed to claim and to enjoy in other parts of the civilized world, and at variance also with the spirit and intent of that stipulation in the Treaty between Great Britain and this country, by which it is agreed that the inhabitants of the two countries shall enjoy freedom and security in their mutual intercourse.” He blended concepts of natural law (in civilized countries) with an expansive reading of subject in the existing treaty with the United States. Despite his convictions, he knew of the futility of British diplomatic efforts to date and readily agreed to experiment with Ogilby’s theory.

⁵⁴ *Twelfth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1844): 8-10. Society unanimously adopted the following resolutions, brought for by William Lloyd Garrison concerning the 1844 Election. The Whigs unanimously nominate Henry Clay; Democrats to nominate Van Buren or Calhoun, either nomination would be “an act of monstrous turpitude...for its base [sic] to the slaveholding power.” Clay was a “hardened, incorrigible slaveholder” and a “determined and desperate foe of the anti-slavery movement.”

Hunt's report about potential liberalization of the Seamen Laws, even mocking the proposition that sailors be permitted to remain aboard their vessel. Only complete rescission would appease the Garrisonians.⁵⁵ The Massachusetts legislature apparently agreed with the conclusions of the abolitionists; in another resolution, it re-appropriated funds to procure new agents to conduct the war against the Seamen Laws. The new governor, George Briggs, must have learned from his predecessors errors, for he appointed two well respected Massachusetts attorneys to posts in Charleston and New Orleans.⁵⁶

The eventual selection of Samuel Hoar for the Charleston post was much more astute than the first candidate, Benjamin Hunt. Hoar was a well-known attorney, "the leading lawyer of Middlesex County," as one historian described him. Chief Justice Shaw of the Massachusetts Supreme Court noted of Hoar, "no man in the State had so much influence with a jury as Sam Hoar of Concord, due not simply to his legal ability, but to the confidence the people had in his integrity and moral character." Hoar disliked slavery, and as we shall see, sought to curb the institution through all constitutional means. He eventually left the Whig Party, objecting to both Zachary Taylor and Lewis Cass in the 1848 election. In 1855, when Hoar was in his seventies, he attended the convention that launched the Republican Party in the Bay State. As if his own accomplishments were not enough, Hoar also had the distinction of being wed to the youngest daughter of Roger Sherman, the Revolutionary hero and signer of the Articles of Confederation, the Declaration of Independence, and the United States Constitution.⁵⁷

Samuel Hoar's personal relationship with the sitting South Carolina governor, James Henry Hammond, may have contributed to his appointment. Back in the 1830s, while both were

⁵⁵ *Liberator*, January 12, 1844.

⁵⁶ See "Governor's Message, January 6, 1845," *Documents...of the Senate...of Massachusetts* (1845).

⁵⁷ Frederick Gillett, *George Frisbie Hoar* (Boston, 1934): 3-7, with Shaw's quote taken from 4.

serving in Washington, Hammond had suffered a seizure while walking in the Capitol. Hoar, who had been strolling with Hammond, helped him to a doctor, where he fully recovered.

Thereafter, Hammond always spoke fondly of his benefactor, although Hoar's impending trip to Charleston would not afford Hammond the opportunity to play the part of welcoming host.⁵⁸

When the new Massachusetts governor requested Hoar's services, the then-retired attorney and increasingly disenchanted Whig must have wondered about the potential reception awaiting him in South Carolina. Even without any direct knowledge of British diplomatic efforts in the Palmetto State, Hoar must have imagined the political fallout if and when his mission became public. South Carolina had long prided itself on its independent - or defiant - spirit, and meddlers in its "domestic institutions" did not usually earn the amour of the Palmetto State's citizenry. The Nullification Controversy and Mail Campaign are but two of many examples. And the recent rumors that South Carolina firebrands, including Hammond, sought a Southern convention to discuss the relative advantages of disunion may have caused the old Concord attorney to wonder about his prospects for success.

Certainly, Hoar's distance from mainstream abolitionism would only abet his odds of success, and his moderate views on slavery contributed to his appointment. Obviously, any avowed abolitionist walking around downtown Charleston would never have a chance to pursue a test case against the Seamen Law because he would find himself in jail alongside the sailors or perhaps even at the end of a noose. Furthermore, if Massachusetts wanted to keep the issue of anti-slavery and free African-American citizenship separate, then picking agents without any antislavery credentials would aide that perception. If this mission could be depicted as bona fide remonstrance against specific constitutional violations, and not a backdoor attack on Southern

⁵⁸ Faust, *James Henry Hammond*, 181, 250-251.

slavery, then perhaps moderate Southerners might give Hoar their blessing. Yet, the Massachusetts legislature undermined this very separation and guaranteed that the Seamen Acts controversy would be seen as part of a larger antislavery initiative. In the spring of 1844, the Massachusetts General Court formally petitioned Congress and the individual states to consider a federal constitutional amendment that would officially annul the Three-Fifth's Clause. The result spelled dread for Hoar and his mission; the Massachusetts legislature effectively rattled the lion's cage just before sending in one of its native sons. Now Hoar would attempt to prosecute a test case at the precise moment when the South Carolina Assembly would read a proposed amendment to abolish the Three-Fifth's Clause, decimating Southern representation in Congress and the Electoral College. The Massachusetts Assembly guaranteed that South Carolinians would view Hoar's mission and the assault on Southern federal representation as part of a well orchestrated, multifaceted, antislavery agenda.

If these circumstances did not damn Samuel Hoar from the outset, another entity also provoked the slave states in the months directly preceding his trip southward. In Hoar's hometown of Concord, Ralph Waldo Emerson delivered a lengthy First of August speech celebrating the tenth anniversary of British Emancipation. In case South Carolina did not make the obvious connection about the relationship between attacks on the Seamen Laws and the efforts of abolitionists in destroying the Three-Fifth's Clause, Emerson made it absolutely explicit. His eloquent and inflammatory remarks deserve to be cited at length.

Forgive me, fellow citizens, if I own to you, that in the last few days that my attention has been occupied with this history [of British Emancipation], I have not been able to read a page of it without the most painful comparisons. Whilst I have read of England, I have thought of New England... I see very poor, very ill-clothed, very ignorant men, not surrounded by happy friends, - to be plain, - poor black men of obscure employment as mariners, cooks, or stewards, in ships, yet citizens of this our Commonwealth of Massachusetts, - freeborn as we, - whom the slave-laws of the States of South Carolina, Georgia, and Louisiana, have arrested in the vessels in

which they visited those ports, and shut up in jails so long as the vessel remained in port, with the stringent addition, that if the shipmaster fails to pay the costs of this official arrest, and the board in jail, these citizens are to be sold of slaves, to pay that expense. This man, these men, I see, and no law to save them, Fellow citizens, this crime will not be hushed up any longer...If such a damnable outrage can be committed on the person of a citizen with impunity, let the Governor break the broad seal of the State; he bears the sword in vain. The Governor of Massachusetts is a trifler: the State-house in Boston is a play-house: The General Court is a dishonored body: if they make laws which they cannot execute...I am no lawyer, and cannot indicate the forms applicable to the case, but here is something which transcends all forms. Let the senators and representatives of the State, containing a population of a million freemen, go in a body before the Congress, and say, that they have a demand to make on them so imperative, that all functions of government must stop, until it is satisfied...As for the dangers to the Union, from such demands! – the Union is already at an end, when the first citizen of Massachusetts is thus outraged. Is it an union and covenant in which the State of Massachusetts agrees to be imprisoned, and the State of Carolina to imprison?... Let the citizens in their primary capacity take up their cause...and say to the government of the State, and of the Union, that government exists to defend the weak and the poor and the injured party; the rich and the strong can better take care of themselves. And as an omen and assurance of success, I point you the bright example which England set you, on this day, ten years ago.⁵⁹

British Emancipation required Northern men to demand an end to the Seamen Acts. The town of Concord would have been hard pressed to find a less courteous departing gift for its most acclaimed citizen than Emerson's incendiary invective.

As if the stage was not perfectly set for the emissaries' failure, a federal Court in Massachusetts heard a case touching Louisiana's Seamen Act as Hoar prepared for his voyage. In the case of *The Cynosure*,⁶⁰ a black cook sued his captain over withheld wages during a recent trip to New Orleans. When the vessel arrived in New Orleans, the cook was arrested and confined in jail until *The Cynosure* was set to leave the Crescent City. The captain, per Louisiana statute, paid the expenses of the cook's incarceration, and sought to deduce the costs of imprisonment from the cook's wages. The primary question before the court concerned the

⁵⁹ Ralph Waldo Emerson, *An Address Delivered in the Court-House in Concord Massachusetts, on 1st of August, 1844, on the Anniversary of the Emancipation of the Negroes in the British West Indies* (Boston, 1844): 22-26.

⁶⁰ 8 F. Cas. 1102 (1844).

sailor's financial liability in paying the fees attached to the Seamen Law. The captain claimed the fees to be a personal expense, while cook claimed them to be the responsibility of the ship.

The case was heard by Peleg Sprague, former federal Congressman and one-term Senator from Maine. Sprague was a Whig who was appointed to the U.S. District Court of Massachusetts in 1841 and served for there for over two decades. Before receiving his appointment, Sprague was offered a chairmanship at Harvard, which he declined. Amongst his most ardent admirers were Richard Dana, Jr., one of the finest attorneys in Boston (and the cook's attorney) and Benjamin R. Curtis, Supreme Court Justice. Both of these esteemed jurists commemorated Sprague on the occasion of his retirement. Incredibly well versed in maritime law, Sprague was also no friend to advocates of states' rights. While in the Senate, Sprague gave an impassioned speech about the atrocity of Indian Removal and the indignities of the Georgia state government. He believed slavery itself to be a moral evil and politically corrupt. However, he privileged above all else law and order, and so it should be no surprise that the more vocal abolitionists of Massachusetts did not care for this old sage of maritime law. During the Abolitionist Mail Campaign, for example, Sprague criticized abolitionists for using government functionaries to fuel controversy. His criticisms irked William Lloyd Garrison, who described Sprague as "diabolical."⁶¹ Sprague was an abolitionist in the style of Salmon P. Chase, who sought a protracted, constitutional asphyxiation of slavery, not a quick deathblow outside the channels of existing institutions.⁶²

Despite Sprague's penchant for irritating members of the radical Massachusetts Anti-Slavery Society, he saw eye-to-eye with them in regards to the rights of black sailors. In ruling

⁶¹ For Garrison's distaste for Sprague, see Lindsay Smith, *William Lloyd Garrison* (Philadelphia: George W. Jacobs & Co., 1911). For Sprague's speech against Indian Removal, see Gerald Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (University Press of Kansas, 2007): 27.

⁶² See William Wiecek, *The Sources of Antislavery Constitutionalism* (Ithaca, N.Y., 1977).

on the cook's claims against the *Cynosure*'s captain, Sprague unapologetically undermined the constitutional edifice of the Seamen Laws in *dicta*.

The statute referred to, prohibits free persons of color from coming into the state, as mariners on board any vessel, and requires them to be imprisoned, and the master to give bonds to carry them out of the state, and compels him to pay the expenses of their imprisonment. A state cannot thus interfere with the navigation of the United States, nor dictate to the owners of an American vessel the composition of her crew. The only ground of disability [*2] is color. If one color may be excluded, any other may; -- if dark complexions may be subject to prohibition, white may be equally so; -- or both whites and blacks may be excluded; or any other physical quality, or religious or political opinion, may be selected as the criterion of exclusion, or admission. If the parties may be subjected to imprisonment, expenses and bonds, any other penalties and punishments may be inflicted. Such legislation is not consistent with the regulations of commerce established by the laws of the United States, pursuant to authority expressly given by the constitution; and this statute is invalid... [Furthermore], this statute seems to be clearly in contravention of the provision of the constitution, with reference to the rights of citizens in other states.⁶³

Sprague's decision, however, did not rest on his appraisal of Louisiana's racial quarantine, so its precedence was not binding on other courts. Its interference with interstate commerce was not at issue in the suit. Furthermore, the citizenship and comity clauses were "not material in the present case," Sprague explained, "because there is no allegation, or proof, that the libellant was a citizen of any state. He is not, therefore, in a position to invoke the protection of that clause of the constitution." Though the cook was denied his claim to compensation for damages, Sprague ordered McClure to reimburse the sailor for his garnished wages.⁶⁴

To make sure nothing is lost, Samuel Hoar from Concord, a town celebrating the anniversary of British Emancipation by condemning the Seamen Acts, was heading to Charleston to initiate a test case against racial quarantines. He was set to arrive in a boat that

⁶³ This block quote comes from two different recordings of the case. The first is the official record of the court in *The Cynosure*, 8 F. Cas. 1102 (1844), at 1103. The second source is Peleg W. Chandler, ed., *The Law Reporter*, Volume 7, (Boston, 1845); 227-228.

⁶⁴ *The Cynosure*, 8 F. Cas. 1102 (1844) at 1103.

may have also carried news of Massachusetts' formal proposed amendment to abolish the Three-Fifths Clause. That same boat may have also come with the news of the recent *Cynosure* decision, where a federal court (in *dicta*) had just mentioned that the Seamen Laws were likely unconstitutional. And, of course, Consul Ogilby was eternally optimistic about the Seamen Act's demise because he assumed that outside interference would be nonexistent. Shakespeare himself could not have created a situation so ripe for tragicomedy.

Unsurprisingly, Samuel Hoar's stay in South Carolina was short-lived. He arrived in Charleston on November 28 and immediately sent word to the South Carolina Governor, his old acquaintance James Hammond, of his arrival and his official capacity. Hammond received the communication less than a week after he assisted in submitting resolutions to Assembly calling for a Southern Convention, in hopes of forcing both parties and federal officials to take seriously Southerners' concerns over the future of slavery in the United States during debates over Texas annexation. The resolutions died quickly, but Hoar's presence lent a measure of credence to Hammond's position that the South was under attack.⁶⁵

The morning after his arrival, Hoar went directly to work, attempting to make contact with Charleston's mayor in order to procure the necessary documents with which to construct his report and begin litigation. The mayor was not in town, and Hoar decided to renew his efforts the following week when the mayor was scheduled to return. The following Monday, Hoar discovered that his letter to Governor Hammond had been passed to the legislature, and that "it raised quite a commotion." Later that night, as Hoar returned to his hotel, three men intercepted him at the lobby door. The men were the Sheriff of Charleston, the acting mayor and a city alderman, and they requested a meeting with the Massachusetts emissary. Hoar obliged, and the

⁶⁵ See Hammond's diary entries for November 28, 1844, November 29, 1844, December 1, 1844, reprinted in Bleser, *Secret and Sacred*, 128-130.

men quickly questioned his abolitionist credentials, to which Hoar honestly replied in the negative. After showing the men his official commission from the Massachusetts governor, the Sheriff stated, according to Hoar, “It is considered a great insult on South Carolina by Massachusetts, to send an agent here on such business. This city is highly incensed. You are in great danger and you had better leave this city as soon as possible.” Hoar claimed to be undeterred even after the Sheriff produced a letter from the State Attorney General that begged the Sheriff to intervene to prevent a lynching.⁶⁶

Hoar’s letter to Hammond did “cause quite a commotion” in the State Assembly. The Committee on Federal Relations declared,

Massachusetts has seen fit to contest this right [of self-preservation], and has sent an agent to reside in the midst of us, whose avowed object is to defeat a police regulation essential to our peace. This agent comes here, not as a citizen of the United States, but as an emissary of a foreign Government, hostile to our domestic institutions, and with the sole purpose of subverting our internal police. We should be insensible to every dictate of prudence if we consented to the residence of such a missionary, or shut our eyes to the consequences of his interference with our domestic concerns.⁶⁷

The General Assembly then approved resolutions that espoused South Carolina’s right, and the governor’s duty, to “expel from our territory the said agent after due notice to depart.”

Furthermore, the legislature resolved to “exclude from [its] territories seditious persons or others, whose presence may be dangerous.” Apparently, white attorneys were another element of the dangerous Atlantic that required quarantining, except that all white attorneys (unlike black sailors) would not be excluded, just those who attempted to assume the label “foreign

⁶⁶ Hoar’s narrative is printed in *Documents...Senate... of Massachusetts...1845*, 13-24. Reprinted in *Niles’ National Register*, January 18, 1845.

⁶⁷ “Report of the Committee on Federal Relations upon the Communication of the Governor transmitting a Letter from Samuel Hoar, an Agent from the State of Massachusetts,” *Reports and Resolutions...of the General Assembly...of South Carolina...1844*, 159-160. The Report was reprinted and sent to the Foreign Office. See Ogilby to Aberdeen, December 7, 1844, in *Correspondence*, 82-84.

emissaries.” And as for those black sailors, the South Carolina Assembly, in denouncing Massachusetts and celebrating its police powers, summarily declared, “That free negroes and persons of color are not citizens of the United States within the meaning of the Constitution, which confers upon the citizens of one State the privileges and immunities of the several States.” In reaching this conclusion, the legislature reasoned that because neither South Carolina “nor Massachusetts herself” treated free blacks as citizens “either at the adoption of the Constitution or since,” citizenship was beyond their reach.⁶⁸ In this resolution, South Carolina joined Georgia in officially denying federal citizenship for all African Americans, adopting Taney’s Contracting-Parties theory.

In accord with the Assembly’s resolutions, Hammond sent word to the Charleston Sheriff to execute his order. In case Hoar sought local legal counsel, Hammond also dispatched his Attorney General and one of his aides, Preston Brooks, to stymie any legal intervention. The historical record is silent on whether Brooks carried his infamous cane with him. Hammond hoped that nothing “violent would be done” to his old friend, but he lauded the Assembly for so bold an action, “the most decided yet made by any State towards another in the Union.” Perhaps, this “bold action” would prove to be a catalyst towards Hammond’s dream of a united South.⁶⁹

While Hammond’s minions were in route to Charleston, several other men approached Hoar and reiterated the Sheriff’s warnings. Hoar’s confidence was shaken by these random encounters, and he contacted a friend, and they mapped a plan to expedite the litigation. He went to the Sheriff’s office to procure statements with which to initiate a suit on behalf of two formerly incarcerated Bay State sailors. The Sheriff refused to give a statement, and Hoar left

⁶⁸ “Report of the Committee on Federal Relations upon the Communication of the Governor transmitting a Letter from Samuel Hoar, an Agent from the State of Massachusetts,” *Reports and Resolutions...of the General Assembly...of South Carolina...1844*, 159-160.

⁶⁹ See Hammond’s diary entry for December 7, 1844, reprinted in Bleser, ed., *Secret and Sacred*, 131-132.

dismayed. On his return to the hotel, a random man on the street approached him and suggested he leave the city in all haste. Later that same afternoon, another man, an elderly doctor who shared Boston acquaintances with Hoar, approached the emissary and told him of his “unutterable mortification.” The doctor had just come from the city council and informed Hoar, “danger was not only great but imminent; that the people were assembled and assembling in groups...to bring on an attack.” The doctor told Hoar where to fetch a carriage and offered his plantation, some miles outside the city, as a temporary refuge. The weather would prevent his immediate departure, but the doctor suggested a tavern where he could spend the night and then flee the city the following morning.⁷⁰

Even this threat of imminent violence did not deter Hoar, or so he claimed. The following day, three men, including two attorneys and a bank president, met with Hoar and demanded he leave the city. The men told Hoar that in the next two hours, a pair of men (probably Attorney General Bailey and Preston Brooks) would “either conduct [him] or escort [him] to the boat” heading out of the city. Despite the men’s gentility and affable dispositions, Hoar knew the men meant business. He prepared for his departure, but his escorts never appeared. Apparently, a problem arose aboard the vessel destined to remove the Northern attorney from the Palmetto State. The next day, the old doctor returned and told Hoar that the hotelier had requested the emissary’s eviction to prevent any potential damage that a mob might inflict on his property. Hoar believed the old doctor and resolved to leave the hotel. As he packed and debated the next course, a waiter approached and informed him of a group of men waiting for him outside the hotel

⁷⁰*Documents...Senate... of Massachusetts...1845* (Boston): 13-24. Reprinted in *Niles’ National Register*, January 18, 1845.

Hoar's heart must have been thumping through his chest. As the old attorney exited the hotel, the attorneys from the previous day, accompanied by a flock of carriages awaited him. Hoar asked if he was being forced out of the city, to which the attorney replied that they had no power "to order him away," only to offer an escape to preserve his health and "the peace of the city." Whether what followed was a threat or a friendly recommendation is difficult to discern, but Hoar considered it the prior. "It seemed, then, that there was but one question for me to settle which was, whether I should walk to a carriage or be dragged to it." Hoar grabbed his things, boarded the carriage, and was taken to the wharf and placed aboard a northbound vessel.

The Hoar fiasco caused much ink to be spilt by the Massachusetts Anti-Slavery Society, which was surprised that Hoar's presence "excited a sensation such as might be justified by the descent of a black army from Haiti." How these abolitionists could imagine a warm reception is nearly beyond belief, and their (feigned?) surprise lends credence to their characterization in Southern circles as utterly insane. Furthermore, the Society lamented Hoar's lack of persistence and failure to fulfill his obligation to his state and fellow citizens. "It is to be regretted, that Mr. Hoar did not at least remain until the intentions of his visitors were put beyond question, by some overt act. It was not necessary to have been dragged through the streets, but that it should have been made clear that the purpose of his forcible removal was fixed and inevitable...and as the matter stands, the Charleston party have a color, at least, for their statement that he left without violence, and of his own accord." The Society even went so far as to ridicule the doughfaced reactions to Hoar's eviction on the part of state authorities in Massachusetts.

Her Governor and Legislature have just solemnly sworn to support the Constitution of the United States...Shall she fit out an armament, officered by merchants and lawyers and manned by ploughmen and artisans, against Charleston, as she did a century ago against Louisburgh? Oh, no! That would be a violation of the Constitution! Shall she pass retaliatory laws and subject every citizen of South Carolina, coming into Massachusetts, to the treatment she administers to our

colored seamen? No, indeed! The Constitution would forbid such measures! Shall she seize upon any South Carolinian whom she may find within her limits, and expel him as an offset to the treatment Mr. Hoar received? Alas, that, too, would be an infringement of the Glorious Constitution! Men say, and say truly, because South Carolina does a wrong, shall we do one too? Because she breaks her oath, shall we perjure ourselves? And so nothing remains for poor insulted Massachusetts but to pass preambles and resolutions, which Carolina regards as so much idle wind. There is nothing for Massachusetts to do, as long as she consents to the existence of the present Union, but to submit...She as tied her own hands and must consent to take the blows which her companion...chooses to inflict.⁷¹

Though more interested in highlighting the fool's (Hoar's) errand as evidence of the Constitution's corruption, the Society still wanted to hear the facts from the horse's mouth, so to speak. The Society contacted Hoar, hoping the recent exile from Charleston would describe his "recent experience of the fruits of Slavery." After all, the question of Texas annexation "seems to have awakened the fears and created apprehension the most serious, among a large portion of the Northern people, who have heretofore stood aloof from this question, and have generally considered the institution of Slavery...of no positive or particular concern of the non-slaveholding States. A more correct view of this subject seems now to pervade the public mind, and it is more generally felt and acknowledged, that nay vital error or disease in one part of the body politic will most certainly and serious affect the whole system."⁷² Hoar denied the Society's request. Though Hoar despised slavery, he only sought to curb its extension, and he did not want anyone to impart on him a new-found sense of zealotry on the subject.⁷³

Hoar's eviction from Charleston probably doomed his counterpart, Henry Hubbard, who Massachusetts Governor Briggs had hired to initiate a test case in New Orleans. After arriving in

⁷¹ *Thirteenth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1845): 40-45.

⁷² Francis Jackson to Samuel Hoar, January 17, 1845, reprinted in *Thirteenth Annual Report of the Massachusetts Anti-Slavery Society* (Boston, 1845): 72-73.

⁷³ Hoar to Jackson, January 20, 1845, reprinted in *Thirteenth Annual Report of the Massachusetts Anti-Slavery Society* (Boston, 1845): 73-74.

the Crescent City, Hubbard received word from the Louisiana Governor that his arrival in the state was unwelcomed, that his mere presence smacked of aggressive abolitionism, and that, considering Hoar's fate, Hubbard's mission was "provoking public feeling...[and] caus[ing] great excitement." The governor, according to Hubbard, warned that his mission "could not fail of involving [Hubbard's] safety, if not life." Hubbard admitted that his goal in New Orleans was to initiate litigation and bring the new Louisiana Seamen Law under federal judicial scrutiny, but he, like Hoar, ensured state officers, "My mission had not connection with abolition, or slaves, or slavery, at the south."

On Hubbard's second day in the city, his co-traveler, Captain Bossiere from New York, assailed the Massachusetts' attorney and described the formation of a lynch mob bent on exacting swift justice on the intruding emissary. He informed Hubbard, "If you do not promise to leave the city your life is not safe this night...and if you stay here another night your life would certainly be taken." Though in a letter to the Louisiana Governor, Hubbard doubted his life was ever truly at risk, he actually felt otherwise and readily obliged the wishes of his supposed protectors and left New Orleans, convinced "that nothing could be effectually done by me in the agency with which I was charged." In relaying his experiences to Massachusetts Governor Briggs, Hubbard concluded, "To characterize the mission as inefficient and unsafe, affords but a vague and imperfect representation of its impracticability and insecurity." Consequently Hubbard resigned his commission.⁷⁴

The Massachusetts legislature, notwithstanding the aspersions of the state antislavery society, issued a stern rebuke in the wake of Hubbard and Hoar's expulsion in the form of a

⁷⁴ Hubbard's Report reprinted in *Niles' National Register*, February 22, 1844. Correspondence between Louisiana Governor Mouton and Hubbard reprinted in *Journal of the Senate of the State of Louisiana* (1845): 5-6.

nineteen-page typed “Declaration.”⁷⁵ In its tone, its position vis-à-vis the Constitution, its ringing endorsement of self-defense, and its denunciation of unprovoked aggression by other states, the “Declaration” rivaled any secession manifesto penned by Robert B. Rhett, A.P. Butler or any other dubious celebrities of 1860. According to the Declaration, the Seamen Act surpassed all the “offences charged upon the mother country, as justifying the separation of the Colonies” at the moment of Independence. “Had there been no peculiar ties of sympathy,” the Massachusetts’ Declaration continued, “to bind South Carolina and Massachusetts together...these acts of the former...would justify retaliation and even war.” But the two states were bound by something more than international comity, they were linked by the Constitution, which provided federal courts to resolve conflicts between the states to prevent armed conflict. The recent Hoar fiasco proved, however, “That South Carolina now deliberately refuses to recognize the authority of the federal tribunal...[and] sets herself above the restrictions of the Constitution.” And if the federal government “has neither power or will to interpose” and force compliance, then “it becomes a grave question to consider, whether the citizens of Massachusetts can much longer remain bound by their obligations...under the compact.”⁷⁶

The Massachusetts legislature was not necessarily advocating disunion, however, but insisting that South Carolina and Louisiana bend to the dictates of the Constitution. The variance between North and South concerning the Seamen Acts ought to be decided in the federal courts,

⁷⁵ Hubbard’s return from New Orleans also piqued the interests of the Massachusetts Anti-Slavery Society. It similarly lambasted Louisiana as it had South Carolina for its inhospitable treatment towards one of the Massachusetts’ darling sons. “It is certain that many humble and useful citizens of the Free States, have been obstructed in their honest avocations, and have suffered imprisonment and outrage for no crime, but their complexion; it is probably that some have been consigned to a life-long servitude. By uniting their atrocities of black citizens with white, the Society presumed that the Southern States had become so comfortable in their debauchery that had inadvertently instigated their own demise. “The more impartially the South bestows its injuries, the less distinction it makes in the distribution of its wrongs, between the white and the black, the bond and the free, the more hope is there that an adequate spirit of resistance may be roused which shall end them all together.” *Fourteenth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1846): 21-22.

⁷⁶ *Act and Resolutions...of Massachusetts...1845*, 633-636.

and the recent evictions of Hoar and Hubbard effectively eliminated the very venue that the Framers constructed to resolve interstate problems. For Massachusetts lawmakers, the reason for this outrage was obvious; the South's understanding of the Privileges and Immunities Clause was utterly incompatible with the Constitution, and the federal courts were bound to rule against racial quarantining. Not even Taney's Contracting-Parties theory of citizenship, recently adopted by South Carolina and Georgia, could deny the fact that Massachusetts had citizens of color. When Massachusetts adopted its state constitution, "in the midst of the fiery trial of the Revolution," it made no racial distinctions. When the federal Constitution was ratified, it was done so by the citizens of Massachusetts, black and white. Thus, black Massachusettians were and are citizens of the United States. But Massachusetts was not adopting Taney's theory; rather, the legislature acknowledged the rights of the states to determine their own citizenry. And the Privileges and Immunities Clause obligated every state to honor the designations decided by the other states. Otherwise, "Massachusetts...might with as much reason decide that none but the free negro of South Carolina should be considered...entitled to the privileges and immunities of citizens within [Massachusetts's] limits."⁷⁷

This Declaration from the Massachusetts legislature anticipated the cold reception of *Dred Scott* a decade later. Boston legislators did not buy Taney's Contracting-Parties theory, but even if they did, Massachusetts' history proved that black citizens of Massachusetts were constituent members of the United States Constitution.

⁷⁷ *Act and Resolutions...of Massachusetts...1845*, 633-636. The Massachusetts Anti-Slavery Society was correct, though. The state government limited their retaliation to a declaration.

Hubbard's and Hoar's stories reached a vast audience, as newspapers North and South ran editorials either applauding or condemning the emissary's actions.⁷⁸ And was it not for the escalation of the Texas question, the ramifications may have been more extensive. Nonetheless, other Southern States jumped to South Carolina's defense, though only South Carolina and Georgia went so far as to endorse Taney's Contracting-Parties theory in explicitly denying African-American citizenship. Within a month of Hoar's eviction, the Alabama Committee on Federal Relations informed the legislature, "The State of South Carolina has the same authority for the enactment of these laws, as she would have – 'to provide precautionary measures against the moral pestilence of paupers, vagabonds, or convicts,' – or to 'guard against the physical pestilence which may arise from a ship, the crew of which may be laboring under an infectious disease.'" But in case Alabama's constitutional arguments were unpersuasive, "the right to exercise this power [of quarantine] is *higher than the Constitution*."⁷⁹ Louisiana passed similar resolutions outlawing test cases on behalf of free black sailors and any other "interference subversive of our domestic order."⁸⁰ In similar fashion, Florida formally "resolved that self-preservation is a natural right alike to a body politic or an individual...[and] those [seamen] laws are not aggressions upon the right of Massachusetts, or those of any other State, but purely a defence [sic] of the rights" of a slaveholding state.⁸¹ Mississippi and Georgia also joined the chorus in defending the evictions.⁸²

⁷⁸ For example, see *The Southern Quarterly Review*, April 1845 and the *Niles' National Register* ran several stories between December 1844 and February 1845, often citing articles from regional papers.

⁷⁹ Report of the Committee on Federal Relations, January 27, 1845, *Acts of Alabama, 1845*, 211-214. Emphasis in original.

⁸⁰ "Resolution 138," *Acts of Louisiana, 1845*, 79-80.

⁸¹ "Resolution 9," *Acts of Florida, 1845*, 54.

⁸² *Laws of Mississippi... 1846*, Chapter 293; *Resolutions of Georgia (1846)*: 206-207.

The fantastic stories of Hoar and Hubbard only solidified Congressional resolve to avoid the Seamen Acts' controversy altogether. Just as the Hoar story was hitting the presses in Washington, Representative John Giddings presented the House with a petition requesting Congress to intervene against racial quarantines. The petition was sent to the Judiciary Committee, where it died. Later that year, Resolutions passed by the Massachusetts Legislature demanding Congressional interference were read before the federal House and then summarily laid on the table, where they remained. A month later, in January, 1846, Resolutions from the Georgia Legislature were similarly read before the House. The Resolutions harangued Massachusetts for sending agents into the South simply to bring their police laws under the purview of the federal government. Like the Resolutions from Massachusetts, the Georgia Resolutions were also quickly tabled.⁸³ It appeared to Congress that the Seamen Acts' stalemate was a *fait accompli* and further debate would only worsen the regional rift. With the Texas and Oregon questions demanding political sophistication with respect to regional sensitivities, further consideration of the Seamen Acts would be utterly counterproductive.

Massive Southern resistance and Congressional apathy to the Hubbard and Hoar excursions was to be expected, as Consul Ogilby had foreseen. Though he did not want federal interference, the "foreign emissaries" from Massachusetts had filled the role of outside agitators and destroyed all hopes for any formal relaxation of the racial quarantines. Ogilby's carefully laid plans had almost materialized until, like bulls in a china shop, Bay State "diplomats" entered the scenario. Ogilby watched as his masterpiece of diplomacy unraveled. In a letter to London, Ogilby said of Hoar's mission, "but within the last few days, circumstances have occurred which, I regret to say, have deprived me of all hope of any change being made in the law, unless

⁸³ *Journal of the House*, January 27, 1845; *House Document 34*, 29 Cong., 1 sess., (1845); *House Document 87*, 29 Cong., 1 sess. (1846).

indeed it is to make it more oppressive in its operation, and to cause it to be more rigidly enforced than ever.” Evidently, the Foreign Office would have to go back to the drawing board in their designs against the Seamen laws.⁸⁴

As the Seamen Acts saga proceeded into the late 1840s and into the 1850s, the question of black citizenship and federal power would continue to divide the various commentators on racial quarantines. Abolitionists accelerated their press coverage of incarcerated sailors, incensing moderate Northerners increasingly suspicious of Southerners’ audacity. The Supreme Court decided *The Passenger Cases* in 1849, and in the aftermath, the Commerce Clause re-emerged as a potential judicial weapon against the Seamen Laws. Furthermore, the Whigs in Britain resumed power, and Lord Palmerston refocused the Foreign Office on aggressively pursuing an end to the incarceration of British sailors. French Emancipation precipitated official French protests against racial quarantining. On the domestic front, the expansion of slavery into the territories coincided with prolonged arguments about the Seamen Acts. Thus, the last chapter of the Seamen Acts’ drama would prove to be the most complex and consequential.

⁸⁴ Ogilby to Aberdeen, December 7, 1844, in *Correspondence*, 82-83.

CHAPTER 9
A SERIES OF ANTICLIMAXES: THE DEATH AND RESURRECTION OF THE SEAMEN
LAWS, 1847-1859

As has been the case of the entirety of the Seamen Acts' controversy, British politics, U.S. federal relations, and developments in constitutional doctrine explain the laws' history. In the ten plus years preceding secession, this trend did not change. In fact, the 1850s highlight with immense illumination the interplay of these forces on the predicament of black sailors entering the port cities in the Southern United States. The rocky history of British metropolitan politics translated into a schizophrenic diplomatic agenda regarding racial quarantines. Teetering between forceful jostling with federal officials and covertly courting state lawmakers, British authorities eventually catered to Southern sympathies during this period, even going so far as to withdraw from the Supreme Court docket a test case of South Carolina's Seamen Law. Most commentators agreed that with the recent decision in *The Passenger Cases*, the Supreme Court might strike down the law. Even formal protests from the French National Assembly did not translate into a more rigid British position. In Washington, Congress learned its lesson from 1844. Time and again thereafter, it refused to engage the Seamen Acts. Despite the efforts of some Whig Senators to include protections of black sailors in the revised Fugitive Slave Bill in 1850, Congress did not legislate on race quarantines. Again, the disagreements over black citizenship prevented any sort of compromise. The abolitionist press and mainstream Northern newspapers paid increasing attention to the Seamen Acts debates, and the actions of British and federal officials became part of the larger national political discourse. In 1852, the Free Soil Party included in its platform an attack on the Seamen Laws. But the mainstream parties in 1852 refrained from interfering.

In utter acts of anticlimax, British conciliation and federal noninterference eventually persuaded Southern lawmakers to question the necessity of their restrictive laws. Georgia and

Louisiana, at the gentle chiding of British Consuls, agreed to allow black sailors to remain aboard their vessels while in port, only arresting those who came ashore without explicit permission from municipal authorities. This modification earned the approbation of moderate British officials, though more radical politicians and outspoken abolitionists demanded full repeal. Eventually, even South Carolina yielded, liberalizing its law in 1856. This accomplishment was over thirty years in the making, but it did not mark the final chapter of the Seamen Acts controversy. The new Republican Party decried the laws, even after modifications, and the Texas legislature enacted its first seamen restrictions in 1856. More importantly, the Taney Court handed down *Dred Scott* the next year, legitimating the position staked out by defenders of the Seamen Acts since 1832. Then, as a paramount exercise in anticlimax, Louisiana reinstated its harsh Seamen Law in 1859, animating *Dred Scott*'s warning that African Americans "had no rights which the white man was bound to respect."¹

After a brief hiatus, the Whigs reassumed control of Parliament in February 1846. The repeal of the Corn Laws had brought down the Peel Ministry and ended the tenure of the Earl of Aberdeen as Foreign Secretary. Aberdeen's conciliatory approach to South Carolina's Seamen had nearly succeeded in convincing the state to liberalize its restrictions. Only the untimely interference of Samuel Hoar, the "foreign emissary" from Massachusetts, thwarted Aberdeen's success. Under the Tories, British policy avoided direct contact with federal agencies and refrained from engaging state officials through formal channels. Additionally, the Tories did not press for outright repeal, choosing instead to seek amendments that would keep British subjects out of jail.² Aberdeen's successor – who was also his predecessor – Lord Palmerston preferred

¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857), at 407.

² Though acknowledging the Seamen Laws were obnoxious to the "civilized parts of the world," the Peel Ministry simply sought to prevent the "degrading" incarceration. See Pakenham to Aberdeen, March 14, 1844, in

direct engagement with both federal and state authorities during his previous tenure. Would Palmerston continue his old policy before the Tory interruption, or would he continue Aberdeen's indirect methods?

Within six months of his appointment, Palmerston had revealed his desire to resume formal protests. Just two years before, however, the Crown's legal advisors had informed Aberdeen that he had "no right to insist" on the Seamen Acts' repeal. According to these advisors, the 1815 Treaty had a debilitating clause that protected racial quarantines. Liberty of commerce was guaranteed, "subject always to the laws and statutes of the two countries respectively."³ For Palmerston's Foreign Office, this position was ridiculous; so he sent a carefully argued letter to the Crown's legal advisors in which he refuted their previous position. According to Palmerston, under the Treaty, "liberty is to exist." The whole purpose of the Commercial Convention was to secure liberty in trade; the entire document must be understood in this light. No portion of the Treaty could destroy its *raison d'être*. The Crown's previous position was "impossible to maintain" because the so-called debilitating proviso would be able to "sanction a law, the effect of which [would] prevent that liberty from being enjoyed." In other words, the Treaty cannot contain a clause that would make the entire Treaty meaningless. If the Crown's position stood, Palmerston reasoned, South Carolina could quarantine away all the liberties supposedly protected by the Treaty. For the sake of internal safety, could South Carolina prevent the introduction of all British sailors? Obviously not. South Carolina was criminalizing behavior expressly permitted by the Treaty. The Crown, Palmerston argued,

Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851, Series 5, Volume 579, Foreign Office Papers, Public Records Office, London (hereafter referred to as Correspondence); 80-81.

³ On the Crown's legal opinion under Aberdeen, see Dodson to Aberdeen, August 4, 1843, December 9, 1843, December 29, 1843, all in *Correspondence*, 61-71.

should alter its position.⁴ The letter was evidently convincing. When the Queen's Advocate replied, he conceded his previous misreading of the Treaty. Palmerston was correct; the Seamen Laws violated rights specifically protected by commercial agreements between the United States and Great Britain. Consequently, the Foreign Office had every right to demand compensation and repeal.⁵

With the Crown's legal advisors now behind him, Palmerston hailed U.S. Secretary of State James Buchanan in January, 1847. Invoking the poor treatment of William Forster – the Bahamian-born sailor enslaved by Florida in 1835 – the Foreign Secretary demanded immediate federal intervention in every state currently imprisoning British mariners. The Polk Administration was not going to welcome this sudden shift in tactics. Since 1844, the federal government had enjoyed British silence on the Seamen issues, as it coordinated with Congressional dedication to noninterference. Now, with the Maine and Oregon border disputes resolved, and with Texas safely a part of the Union, now uppity Whigs in Parliament were going to pressure the federal government, and on so controversial a subject as the Seamen Laws? Secretary of State Buchanan, apparently in preparation for his colossal commitment to apathy in 1860, never officially replied to Palmerston's letter. In private conversation with British diplomats in Washington, however, Buchanan revealed his position. According to one British agent, Buchanan indicated that the federal government would sooner annul all commercial treaties with Britain before confronting the South on the Seamen Acts. If the federal government actively engaged Southern lawmakers, Buchanan reasoned, the Union would crumble. No treaty was worth that ultimate price. Considering Buchanan's resolve, British diplomats in Washington

⁴ Addington to Dodson, October 7, 1846, in *Correspondence*, 94-95.

⁵ Dodson to Palmerston, December 26, 1846, in *Correspondence*, 99-100.

suggested Southern legislatures as more appropriate venues for attack.⁶ The Foreign Office agreed, but did not yet give up hope for federal intervention.⁷

Luckily for Palmerston, enforcers of the Alabama Seamen Act abetted his agenda. The law went into effect in 1842, in the immediate aftermath of the *Creole* incident and in synchronization with the Louisiana Seamen Law. British authorities in Mobile took little notice of the new quarantine. British vessels were not uncommon in Mobile, so the lack of consular noise was likely a result of intermittent enforcement or even an unflinching acceptance of Aberdeen's policy of disengagement. But in January, 1848, the attempted rape of a black stewardess would supply British diplomats with the first successful foray against racial quarantines since 1831. The bedlam began when the British ship *Queen* entered Mobile Bay, and James Banks and Mary Roberts were hauled off to jail in accordance to the Seamen Statute. While incarcerated, the city jailer, "an infamous scoundrel," committed "an outrage upon humanity" by attempting to "commit a rape upon the negress."⁸ According to the alleged victim's deposition, the jailor called her into his office on the fourth day of her confinement. Roberts's testified of the interaction,

He said, "Sit down, I wish to talk with you." Deponent replied, "I had rather not; I am not in the habit of sitting in gentleman's rooms, but wished to know what he had to say." He said, "I want you to tell me about the United States of America and England." Deponent said, "I know nothing about those places, for I have never been there." He then asked, "Did you not sail from England?" Deponent answered, "I did, but was only there four weeks, and am therefore unacquainted with country; and I now want to know what I was sent for?" He told me, "I want you to sit down, for [I] want to marry you for a little while." Deponent replied, "I do not wish to sit down, nor do I wish to be married; for when I marry, it shall be for life." He then said despondent had a fine set of teeth, and proceeded to tell how

⁶ Pakenham to Palmerston, March 29, 1847, in *Correspondence*, 105-106.

⁷ Palmerston to Pakenham, April 19, 1847, in *Correspondence*, 112.

⁸ The description is British Consul Robert Grigg's. See Grigg to Palmerston, January 20, 1848, in *Correspondence*, 112-115.

he lost his...He then stepped forwards...[and] the deponent retired to the door, which was ajar. He then put one hand on the door, and the other on the deponent's bosom...Deponent pushed his hand off from her person, and said, "I do not wish you to take any liberties with me..." and added, "that she did not know we (meaning herself and other free coloured persons) were put in gaol for the use of the gaol-keepers."

Roberts was able to escape the room, as the door had fortunately been left ajar. When she relayed the incident to her cellmate, a young slave named Charity, she responded, "I knew all this before, for every free person who comes here is had by [the jailor] to his own advantage." Roberts then informed her captain, who intervened immediately. The jailor denied any criminal activity, but admitted he had acted lewdly, though not "villainously" towards the British stewardess.⁹

Upon hearing of the incident, Palmerston immediately instructed the Consul in Mobile and the British Chargé d'Affaires in Washington to "put an end to the practices which have no parallel in the conduct of any other civilized country."¹⁰ He also confronted the U.S. Minister to Great Britain, George Bancroft. Probably remembering Buchanan's comment about scrapping the treaty before attacking the Seamen Acts, Palmerston informed Bancroft that his government, too, was willing to sacrifice the benefits of trade on the issue of racial quarantines. Why have a treaty, Palmerston asks, when Americans treat British subjects "in so barbarous a manner...sent into prison like felons?"¹¹ If U.S. diplomats wanted to play hardball, Palmerston was up to the challenge. But in Washington, this rigid stance led only to dead ends. Buchanan was even less interested in taking up the cause now, in the summer of 1848, for he had intentions on the White

⁹ The Deposition of Mary Frances Roberts was enclosed in Grigg to Palmerston, January 25, 1848 in *Correspondence*, 112-115. When confronted with Roberts's deposition, Charity refused to corroborate the comments attributed to her. Grigg was convinced she had been threatened, but admitted that her testimony was useless in a criminal charge against the jailor.

¹⁰ Palmerston to Crampton, February 25, 1848, in *Correspondence*, 113-114.

¹¹ Palmerston to Bancroft, February 25, 1848, in *Correspondence*, 114-115.

House in the upcoming election and could ill afford a conflict.¹² As for a writ of habeas corpus instituted in federal court, it would prove ineffective, as the sailors were in state custody.¹³ Despite the futility of federal interventions, local efforts were quite successful. On March 6, 1848, just weeks after British officials began their diplomatic defense of Mary Roberts, the Alabama legislature amended their law to allow free people of color to remain aboard their vessels.¹⁴

For decades, demands for recognition of British subjects fell on deaf ears in the Slave South. But other discursive weapons were available and proved effective. The attack of a defenseless woman, whether white or black, was a gross violation of Victorian gender norms, both in Britain and in the United States. This was certainly the case in the Old South, where the patriarchal structure undergirded both gender norms and slavery. The jailor, a white man in a position of power, had violated his authority and bowed to his animal passions. But the jailor also violated prevailing racial norms, exacerbating his transgression. Interracial sex was taboo, at least in theory, and accusations of intimate relations, even if consensual, nonetheless if coerced, would have earned the scorn of the community. With accusations of rape against a white authority figure, Mary Roberts had altered the grounds of protest. This effrontery was a mockery of “quarantine,” and the crime against her trivialized esoteric debates over the exact contours of British subjecthood. In terms of rhetorical power, the adoration of female chastity and the impropriety of miscegenation overwhelmed the routine and monotonic declarations of British subjecthood rights. This was not about treaty rights or the origins of citizenship; this was

¹² Crampton to Palmerston, February 9, 1848 and March 23, 1848, in *Correspondence*, 115, 120.

¹³ Crampton to Grigg February 29, 1848, in *Correspondence*, 115. This was the same technicality that prevented Justice William Johnson from freeing Henry Elkison from custody in South Carolina in 1823. See Chapter 3.

¹⁴ Nicolas to Palmerston, May 25, 1848, in *Correspondence*, 122-123. *Acts of Alabama* (1848): 130-131.

an attempted rape of a young woman by an agent of the state of Alabama. British ministers, themselves white protectors in this instance, were obligated to demand official intervention. Alabama lawmakers conceded. In the end, it was the protection of female chastity that initiated the liberalization of Alabama's Seamen Law. Black British stewardesses – and their male counterparts – could remain on their ships, far removed from Mobile's dangerous jailhouses.

If British diplomats found the 1848 news from Mobile reason for optimism, the recent and impending decisions of the Supreme Court would have given them even more reason to believe that the end of the Seamen Acts was near. Ever since *New York v. Miln* in 1837, the Court allowed the states to limit the introduction of people into their jurisdictions. For those who hoped to attack the Seamen Laws with the blade of the Commerce Clause, the *Miln* decision effectively placed a sheath, a sheath of state police power, around the Commerce Clause blade. However, in 1847, the Court contemplated a reinscription of the boundary between state police power and federal commercial authority. Then, in 1849, the Court limited the power of the states to restrict the entrance of interstate and international travelers. The decision in *The Passenger Cases* suggested that the Seamen Acts might not survive a Supreme Court case.

In the midst of the Market Revolution and in response to the Second Great Awakening, moral crusaders attempted to perfect society in preparation for the Millennium. These advocates sought to cure the insane, rehabilitate the prostitute, free the slave, preserve the Sabbath, Americanize the immigrant, and dry out the drunkard. When moral suasion failed, reformers looked to the power of the law to effectuate their agendas, especially in their attempts to minimize the pernicious effects of alcohol. In many states, legislatures mandated licenses to sell liquors or imposed taxes on the distribution of alcohol. While many Americans undoubtedly opposed outright prohibition, few saw constitutional problems with state assemblies protecting

the health and welfare of society by restricting when and how liquor could be purchased. But as valued as moderation became in the ascending ethos of American reformism, the rights to property remained solid, and purveyors of spirituous liquors fought against these “blue laws,” and in so doing, forced the Court to revisit the wildly unstable constitutional partition between police and commercial regulatory authority.

In each of the three suits that comprised *The License Cases*, the plaintiffs claimed state laws violated particular constitutional protections, specifically the exclusive ability to regulate interstate and international commerce. Liquor purveyors in Massachusetts, Rhode Island, and New Hampshire demanded that state regulations passed to protect the safety and welfare of citizens could not limit their interstate and international trading activities. The Court was lost on how to respond. In total, the Court published nine opinions. Chief Justice Taney, Justice Daniel, and Justice Grier each wrote one opinion for all three cases, and all three defended state police powers to restrict the purveyors’ rights, though only Taney contemplated the possibility that the state laws in question were commercial in nature, and then only to show that they would still withstand constitutional scrutiny. Justice McLean¹⁵ wrote three separate opinions for each of the cases, wrestling with the impact of federal intrusion into state police laws. He denied concurrent commercial authority, and could only justify the laws on police powers grounds. Justice Catron wrote two opinions and completely disagreed with McLean. He denied that state police laws could hedge federal commercial authority. Instead, he insisted that the liquor laws were commercial laws, and since the federal government had not yet legislated, then concurrent

¹⁵ Justice McLean was appointed to the High Court in 1829 by President Jackson. Derisively known as “the politician on the Supreme Court” by his adversaries, McLean’s political vane shifted drastically during his thirty-plus years on the Bench. By 1849, McLean had abandoned the Party of his nominator and aligned himself (both politically and constitutionally) with the Whigs and Free Soilers. See Melvin Urofsky, *The Supreme Court Justices: A Biographical Dictionary* (New York, 1994).

commercial authority allowed the states to pass laws until Congress intervened.¹⁶ Taken together, the various opinions revealed a wide range of opinions about the interface between federal and state powers. The inconclusive findings of the Court suggested that future suits would soon matriculate up the appeals ladder.

Just two years later, in 1849, the Court heard *The Passenger Cases*. Both New York and Massachusetts had statutes on their books that mandated shipmasters to pay fees or bonds for their passengers with most of the revenue to support the indigent. Under *Miln*, the Court had allowed a similar law to stand as an appropriate exercise of police power. In fact, the Massachusetts law passed the legislature just months after *Miln* came down. When two British shipmasters refused to pay the required fees, they were sued by the appropriate state authorities. Both of the state courts, following *Miln*, upheld the statutes, and the Supreme Court heard the two cases together. While not quite as jumbled as *The License Cases*, *The Passenger Cases* confounded the High Court, eliciting opinions from eight different Justices. Though for very different reasons, the five to four majority struck down the state laws.¹⁷ For soldiers in the Seamen Act war, a couple of the opinions were incredibly noteworthy.

Justice McLean, proclaiming the states impotent to regulate commerce even in Congressional silence, had only one question to answer in making his decision. Were the statutes regulations of commerce? It was not so simple a question. “No one has yet drawn the

¹⁶ *The License Cases*, 46 U.S. 504 (1847). On the relevance of decision on the Seamen Acts, consider the following passages, the first from Justice Greer’s opinion. “Paupers and convicts are refused admission into the country. All these things are done not from any power which the states assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation according to the exigency which requires their interference,” *Ibid*, at 632. Contrast this position with the one charted by Justice Daniel. “[The merchant] has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import, or introduce his merchandise -- the right to come in with it in quest of a market, and nothing beyond this,” *The License Cases*, 46 U.S. 504 (1847), at 616.

¹⁷ *The Passenger Cases*, 48 U.S. 283 (1849).

line clearly, because, perhaps, no one can draw it, between the commercial power of the Union of the municipal power of a state.” For McLean, it would be improper to consider the New York statute a “health regulation,” as every person on every vessel was subject to some sort of tax. “Except to guard its citizens against diseases and paupers, the municipal power of a state cannot prohibit the introduction of foreigners brought to this country under the authority of Congress.” Likewise, the Massachusetts law that demanded a bond for the introduction of any “lunatic, idiot, maimed, aged, or infirm person” was an appropriate measure to prevent the introduction of paupers. But since the statute also taxed all alien passengers, McLean considered it a commercial law, and deemed it unconstitutional.¹⁸

Justice James Wayne,¹⁹ in one of the most complicated opinions of the antebellum period, agreed that state police laws could not tax articles of interstate and international commerce in contravention of federal law or treaty. In language that eerily resembled the Anglo-American battle over the Seamen Acts, Wayne said, “in treaties providing for such mutual admission of foreigners between nations, it is universally said, ‘but subject always to the laws and statutes of the two countries respectively,’ but certainly not to such of the laws of a state as would exclude the foreigner, or which add another condition to his admission into the United States.” Furthermore, “the international right of visitation...the freedom or liberty of commerce...and the constitutional obligations of the states of this Union to the United States” explicitly prohibits the exclusion of foreigners “who are not paupers, vagabonds, or fugitives from justice.” Yet, Wayne quickly defended the Seamen Acts, stating that the Constitution did not protect free people of color headed South because the Southern states would not have endorsed the

¹⁸ 48 U.S. 283, at 402 (1849), at 406,410.

¹⁹ Justice Wayne was appointed by Andrew Jackson in 1835. He opposed the Bank of the United States and federally funded internal improvements, but was an early advocate of free trade and an ardent nationalist.

Constitution in 1789 if such protections were attached.²⁰ This vague reference to the implicit understandings at the Founding moments smacked of Taney's 1832 Contracting-Parties theory.²¹

This apparent change in Court doctrine, as meandering and inconclusive as it may have been, had the potential of undermining the constitutional edifice on which the Seamen Act rested. If a case made its way onto the High Court's docket, the Seamen Acts had a sporting chance of being struck down. In the near future, British diplomats would seek this route, but not before making representations to the new Whig Administration. Unfortunately, the new Taylor Administration was not better in 1850 than the Democrats had been in 1848. Much like Secretary of State James Buchanan who threatened an end of Anglo-American trade rather than interpose in the Seamen Acts, the new Secretary, John Clayton, admitted he had no power to force individual states to allow the ingress of black Britons, even if a treaty explicitly guaranteed their entry.²² The Seamen Acts were poisonous fruit for nationally elected officials. Any position taken on this issue would have far reaching consequences come election time. However, members of the Congress did not have to worry about appeasing a national constituency. And thanks to the multitude of contentious issues facing Congress in 1850, diehard opponents of the Seamen Laws found numerous instances in which to propose

²⁰ 48 U.S. 283 (1849), at 426-429. Justice Grier, who also concurred in the judgment, also defended the right of the states to intercept the introduction of "lunatics, idiots, or paupers" as well as free blacks. The power was not Constitutional, but ultra-constitutional, as it "has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul." at 457. Justice Woodbury, in dissent, mentioned that the result of this case would be an admission on the Court's part that Congress could command the entrance of "any kind of free person...into any state." at 542. The dissenting opinions doubted that *The Passenger Cases* could be limited to avoid destruction of the Seamen Acts.

²¹ Unsurprisingly, Chief Justice Taney dissented in the case.

²² Secretary of State John Clayton declared himself powerless to force any Southern State to halt their imprisonment of free black sailors, even if those arrests were in contravention of treaties with foreign countries. See *The Black Worker: A Documentary History from Colonial Times to the Present: Volume 1*, Philip S. Foner and Ronald Lewis, eds. (Temple University Press, 1978): 437. On Clayton's refusal to issue passports to free people of color from the United States, See Leon Litwack, "The Federal Government and the Free Negro, 1790-1860," *The Journal of Negro History* 43 (October 1958): 271-272.

legislation to end racial quarantines. And the recent activity of the Supreme Court indicated that federal legislation protecting black sailors would destroy concurrency and might withstand judicial scrutiny.

The most conspicuous discussion of the Seamen Acts during the 1850 Congress was during the debates on the Fugitive Slave Act. On August 23, Whig Senator John Davis²³ of Massachusetts introduced an amendment to the Fugitive Slave Bill that would certainly make it more palatable to his Massachusetts constituents. The proposal read,

That if any mariner or other free colored person arriving on board of any vessel in any port or place in the United States shall be imprisoned or deprived of his liberty without any alleged crime or offence against law, it shall in all such cases be the duty of the District Attorney of the United States within and for the district where such imprisonment or detention may occur, to cause any such person so imprisoned or detained to be brought by writ of habeas corpus before the circuit or district judge of such district, and it shall be the duty of the judge before whom any such person is brought, to inquire into and decide whether such imprisonment or detention is lawful, and if he find the same to be unlawful, he shall thereupon discharge from custody any such person.

In support of his amendment, Davis recounted the sensational Hoar Affair, even going so far as to reproduce Hoar's letter to Governor James Hammond and the resolutions of the South Carolina Assembly, which authorized Hammond to "expel [Hoar] from the State." The reason for his current amendment, Davis explained, was to counteract a South Carolina law that precluded individuals like Hoar "from the right of having this question [of the law's constitutionality] settled in the courts of Justice." To make sure his amendment did not reek of abolitionism, he assured his fellow Senators that his amendment sought "to do one single thing, and nothing else, and that is, to submit this question to the tribunal which the constitution has

²³ Perhaps not coincidentally, Davis was married to Eliza Bancroft, whose brother, George, was the U.S. Minister in Great Britain who fielded Palmerston's complaint over the Alabama Seamen Act and attempted rape in 1848.

provided for its final settlement.” Davis wanted to see the Seamen Acts come before the post-*Passenger Cases* Supreme Court.²⁴

South Carolina Senator A.P. Butler took exception to the Davis Amendment. Besides being unrelated to the Fugitive Slave Bill, the Amendment sought to create black citizens in South Carolina when that state denied that very possibility. As for Davis’s recollection of the Hoar Affair, Butler remembered it very differently. Hoar was politely asked to leave Charleston, and “not a hand was raised against him.” As for Hoar’s safety, it was never endangered; “there was no mob,” Butler promised. But Hoar’s mission was unnecessary, as was a judicial proceeding. The question of citizenship was easily answered, and no resort to federal court was necessary. “I do not say that a person of this character [free person of color], so long as he confines himself to the State that chooses to confer on him these privileges, may not enjoy the complete rights and immunities of a citizen there, but I do deny the proposition that it is in the power of any one State to confer upon them the right to enjoy those privileges in any State where the laws forbid it, or where a status of that description is unknown.” If Davis pressed his Amendment, it would mean the “defeat of this bill.” Southern Senators, Butler was indicating, had better prevent a prolonged debate on the Davis Amendment, for it became attached to the Fugitive Slave Bill, the South would lose its Fugitive Slave Bill in the same breath that lost California to free soil. Unfortunately for Butler’s agenda, debate ensued.

The other Senator from Massachusetts came to his compatriot’s aide. Robert Winthrop, who had just taken over the Senate seat of Daniel Webster (who just became Secretary of State), was not new to the Seamen Acts debate. He was the very man who chaired the 1842 House

²⁴ *Proceedings of the United States Senate, on the fugitive slave bill, - the abolition of the slave-trade in the District of Columbia, - and the imprisonment of free colored seamen in the southern ports: with speeches of Messrs. Davis Winthrop and others* (Washington, D.C., 1850).

Commerce Committee that reported on the Seamen Laws. In his report, he found the laws to be a blatant violation of the Privileges and Immunities Clause, though the rest of the House ended up tabling his resolutions to preempt Southern racial quarantines.²⁵ Perhaps remembering the cold reception of his House report eight years prior, Winthrop altered his approach. Much like the Mary Roberts fiasco, Winthrop attempted to move the locus of the debates away from citizenship. “It is no mere question of citizenship,” Winthrop explained,

Which we desire to have settled. The question is, whether, upon the ground of police regulation, or upon any ground, the States of South Carolina, Alabama, Louisiana, and Florida shall have the right to take the stewards and mariners out of our vessels, and imprison them, and even sell them into slavery for life, for no other crime than their color. It matters little to this issue whether they are citizens or not. They are persons “held to service or labor,” if you please to call them so. They have entered into articles of agreement, with the master of the vessel on board of which they are shipped, to perform service and labor of a certain sort, during the voyage. Under these Southern laws, they are taken out of the vessel in which they are thus articulated and employed, carried on shore and incarcerated. . . . And all we now ask is, that the constitutionality of such a statute should be solemnly adjudicated by some competent and disinterested tribunal.²⁶

In framing the Amendment in these terms, Winthrop hoped to equate the plight of shipmasters deprived of their sailors to the plight of slaveowners deprived of their slaves. Along these lines, the Amendment fit in perfectly with the Fugitive Slave Law, and it did so without treading in any way on the polarizing issue of black citizenship.

Winthrop’s move was a sophisticated one, and unfortunately, his fellow Northerners allowed themselves to be pulled into a larger debate over citizenship and slavery, a debate they had no chance of winning, at least on the floor of the Senate. Senator Roger S. Baldwin, for example, pressed the issue about a free black who had been enslaved in South Carolina, and the

²⁵ See Chapter 8.

²⁶ *Proceedings of the United States Senate, on the fugitive slave bill, - the abolition of the slave-trade in the District of Columbia, - and the imprisonment of free colored seamen in the southern ports: with speeches of Messrs. Davis Winthrop and others* (Washington, D.C., 1850).

debate shifted to the veracity of Baldwin's enslaved freeman. In the ensuing fracas, the questions of judicial cognizance and rights of shipmasters were subsumed under the speculation of Baldwin's punitively enslaved mariner.²⁷ When it came to vote, the Davis Amendment was effectively killed by a coalition of Southerners and Northern Democrats, the same coalition that saw through the revised Fugitive Slave Law.

Northern reception to the Fugitive Slave Law's passage does not need to be recounted here. But part of the uproar emanated from feelings of Southern hypocrisy. Southern slaveowners now possessed a streamlined judicial process by which to retrieve their human bondage while black citizens of Northern states had no judicial relief for their incarceration in South Carolina, Florida, Louisiana, and Mississippi.²⁸ One of the most outspoken critics of this perceived duplicity was Lewis Tappan. In a speech he later had published in pamphlet form, Tappan proclaimed,

It is not enough that it [the South] seizes our Northern seamen in Southern ports, and sells them into slavery – not enough that it denies us the benefit of the laws, and mobs us when we go there to bring the cases of our enslaved and persecuted citizens before the courts – but with unaccountable insolence, it enacts that we shall return them to bondage if the escape to their Northern families and homes... It is said, "The compromises of the Constitution must be observed; these men are not citizens, but only slaves." This is said by those who basely submit to the violation of the Constitution by South Carolina, imprisoning our colored seamen, citizens of Massachusetts, and selling them to pay jail fees... Yet these men cry out that the compromises of the Constitution are trampled upon at the North, and Daniel Webster and his retainers insist we owe it to the South to seize and deliver up fugitive slaves, while the South utterly refuses to relinquish the practice of

²⁷ *Proceedings of the United States Senate, on the fugitive slave bill, - the abolition of the slave-trade in the District of Columbia, - and the imprisonment of free colored seamen in the southern ports: with speeches of Messrs. Davis Winthrop and others* (Washington, D.C., 1850); *The Sun* (Pittsfield, MA) August 29, 1850 reported on the defeat on the Davis Amendment.

²⁸ See, for example the editorial in the *National Era* (Washington, D.C.): May 5, 1851 and *The Framers' Cabinet* (Amherst, NH), October 22, 1851. The Georgia and Alabama variants did not mandate imprisonment unless the seamen broke quarantine.

imprisoning and selling into perpetual slavery, to pay for jail fees, the black seamen of the free states!²⁹

Tappan and some of his fellow abolitionists in the United States lambasted the federal government for its adherence to a Constitution devoid of the principles of equality and justice.³⁰

If some antislavery groups in the United States were disgusted by the recent compromises secured by Webster and Clay in 1850, they found hope in some of the gestures of foreign administrations. Abolitionist publication routinely chimed in with stories and editorials about foreign engagement with the Seamen Acts.³¹ Perhaps the most interesting article came out of the May 30, 1850 issue of the *North Star*. Recounting a conversation in Britain about the atrocity of racial quarantines, the editorial lampooned,

I learn from your recent article upon the subject that it is the custom in Charleston, U.S., to seize upon the person of every British negro who may chance to arrive there in a British vessel, and to remove him from his ship to jail, where he is kept so long as it remains in the harbor. Thus his employer loses his services, and the man himself loses his wages, besides being made (without having committed any offence) to lie in a jail, and to pray for his maintenance whilst there. All the Americans condescend to say about the matter is, "If you don't like the custom, don't bring your nasty stinking niggers to Charleston..." I know that it is useless to argue with them on black subjects, and I would, therefore, suggest that we should, in retaliation, commit to Bridewell, every red haired American, the moment he enters the Mersey...[and when] Mr. Lawrence remonstrates, as he probably will do, all we have to answer is, "if you don't like the custom, don't bring your carrotty countrymen to Liverpool."

If British tongue-in-cheek humor was not enough, abolitionists could also look to the new French Republic for optimism. French Emancipation had inspired a new, aggressive stance by

²⁹ Lewis Tappan, *The Fugitive Slave Bill: Its History and Unconstitutionality, with an Account of the Seizure and Enslavement of James Hamlet, and His Subsequent Restoration to Liberty*, 3 ed. (New York, 1850): 28-33.

³⁰ Abolitionists were of two minds about the relationship between the Constitution and the Seamen Acts. Some saw the Constitution as a protector of the rights of free blacks. Others believed the Constitution did not offer such protections, and was hopelessly corrupt. See William Wiecek, *The Sources of Antislavery Constitutionalism in American, 1760-1848* (Ithaca N.Y., 1977).

³¹ See, for example, *National Era*, June 27, 1850 and December 19, 185. *Sixteenth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1848): 56.

the National Assembly.³² “We desire simply that our Government...join with the Cabinet of St. James in making at Washington courteous but earnest representations on the subject.”

Combined, “the two great nations of Europe” would certainly “obtain from the wisdom and generosity...of the United States an honourable response on a question in which are engaged the sovereign principles of the civilization and reason, as well as the imprescriptible prerogatives of human dignity.”³³

Perhaps motivated by these gestures on behalf of foreign government, abolitionists began trumpeting the plight of black sailors. During the late 1840s and into the 1850s, abolitionist presses became increasingly interested in the Seamen Laws. The *National Anti-Slavery Standard* was among the first to take up the cause with gusto. As early as 1846, that organ highlighted the personal effects of racial quarantines. “John H. Slate,” one article explained, “was compelled to work in the chain-gang four years and six months” to pay the costs of his detention. Supposedly his labor, “ditching in the winter, and digging graves” in New Orleans netted him twenty-five cents a day. He would have never been able to pay the jail fees associated with his detention at that rate, and only by the intervention of a local attorney was Slate released. Similarly, “Charles Becket...was sentenced to work the chain-gang until he could prove his freedom.” This took three years.³⁴ The Louisiana Seamen Law seemed to earn

³² The Massachusetts Anti-Slavery Society actually reprinted the entire Act of Emancipation, and later commented, “the actual equality established by the Abolition of French Slavery, has received its seal before the whole world, in the presence of two black and two colored Members of the National Assembly, – one of the former having been once a slave...When shall we see a man of color admitted to a seat in Congress, or even in the Legislature of one of the Free States?” *Sixteenth Annual Report Presented to the Massachusetts Anti-Slavery Society* (Boston, 1848): 49-56.

³³ The excerpt is from the November 27, 1850 session of the French National Assembly. Reprinted in *The Anti-Slavery Reporter*, March 1, 1851, 47-48. The editorialist for the paper was illustrating how the Assembly “is under an illusion, and that relief will not easily be obtained.” See also *North Star* (Rochester, N.Y.): April 17, 1851. Apparently, before 1850, the French only officially complained of the Seamen Acts once, in 1837. See Philip Hamer, “British Consuls and the Negro Seamen Acts, 1850-1860,” *Journal of Southern History* 1 (May 1935): 144.

³⁴ *National Anti-Slavery Standard*, October 8, 1846. Reprinted in Foner & Lewis, *Black Worker*, 200-201.

the greatest scorn. Another editorial spoke of a dozen men, incarcerated in the “police prison of the second municipality” of New Orleans, who had been in custody for years without ever coming before the local magistrate. In attempting to quantify the effects of the Seamen Laws, the *Standard* estimated that over 1100 U.S. sailors faced incarceration annually, with a cumulative cost of nearly half a million dollars.³⁵

It would be a mistake to take the *Standard* at its word. Even Senator Winthrop supposed the numbers and costs to be overestimated, and some of the supposed sailors languishing in New Orleans jail were reportedly arrested before the Seamen Law was even enacted in Louisiana. But the proliferation of articles in the late 1840s and especially the 1850s brought the Seamen Acts to a much larger Northern audience. The Fugitive Slave Act and its relationship to the Seamen Acts received heavy treatment, and abolitionist papers reported the actions of British diplomats and Southern legislatures all the way to the Civil War. The issue of the Seamen Laws had become so widespread in the North that the Free Soil Party officially made the rescission of the quarantines an official plank in their 1852 platform.³⁶

One of the more sensational stories that reached the antislavery presses concerned the covert interactions between the British Consul in Charleston, George Mathew, and South Carolina officials. Considering the abortive attempts of Congress in the fall of 1850, British ministers in Washington continued Palmerston’s plan of direct engagement, but shifted their

³⁵ *National Anti-Slavery Standard*, October 15, 1846. Reprinted in Foner & Lewis, *Black Worker*, 203-204. British antislavery publications also began highlighting the treatment of black sailors. See *The British and Foreign Anti-Slavery Reporter*, May 1, 1850; *The Anti-Slavery Reporter*, January 1, 1851 and March 1, 1851.

³⁶ Free Soilers resolved, “That as, by the Constitution, “the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states,” the practice of imprisoning colored seamen of other states while the vessels to which they belong lie in port, and refusing the exercise of the right to bring such cases before the Supreme Court of the United States, to test the legality of such proceedings, is a flagrant violation of the Constitution and an invasion of the rights of the citizens of other states, utterly inconsistent with the professions made by the slaveholders that they wish the provisions of the Constitution faithfully observed by every state in the Union.” Platform adopted at the Free Soil Convention, August 11, 1852, in Pittsburgh, PA. See Horace Greeley & John Cleveland, *A Political Text-Book for 1860* (New York, 1860): 21.

focus to the state governments. President Millard Fillmore hoped for success, and even thought that South Carolina's distaste for the federal government might help the British succeed.³⁷

Hoping to play to the secession-minded South Carolina government, Mathew penned a formal diplomatic note to Governor John Means. The letter reiterated the sentiments of Palmerston's 1848 letter to Secretary of State James Buchanan, but substituted "South Carolina" for the "the United States." Mathew stressed the fantastic commercial relationship between British merchants and the cotton and rice producers in the state. Like Palmerston, he also offered a word of warning; the continued arrests of British subjects might force London to reconsider the existing commercial treaties currently in force. Most revealing was Mathew's closing remarks, in which he implored South Carolina to amend the law to exempt British sailors in order to "strengthen the existing bond of commerce, of friendship, and of mutual [with] a kindred nation."³⁸ To an objective outsider, this letter had all the looks of formal diplomatic note between two nations. Even a member of the British legation in Washington thought Mathew had assumed "too much the tone of the British Minister to South Carolina." Considering the possibility of secession, Mathew's formal approach to South Carolina could be seen as British recognition of an independent nation.³⁹

Though at first hesitant, Governor Means eventually forwarded the note to the Assembly, but South Carolina lawmakers had far more pressing matters than British mariners, particularly whether to secede immediately or await Southern cooperation. Ultimately, the Cooperationists won the day, but the vast majority of the South Carolina governing elite foresaw an impending

³⁷ Hamer, "British Consuls and the Negro Seamen Acts," 145.

³⁸ Mathew to Means, December 17, 1850, in *Correspondence*, 151-152.

³⁹ Hamer, "British Consuls and the Negro Seamen Acts," 149.

disintegration of the United States.⁴⁰ In such an event, the maintenance of friendly relations with Great Britain and other European powers would be a top priority. But those negotiations would have to wait, and so the legislature's contemplation of Mathew's note would have to wait for the next session, in December 1851.

Considering the victory of the Cooperationists in early 1851, South Carolina officials understood the importance of keeping the Mathew-Means correspondence under lock and key. Local newspapers agreed not run the story, though numerous copies had been printed for the use of the legislators. One of these copies, however, ended up in the hands of a New York *Evening Post* correspondent. The letter was published, along with a scathing editorial, in late January, 1851. The story circulated widely, and aspersions were cast in all directions, from both antislavery and mainstream publications. Some harangued Great Britain for encouraging Southern secession; others lambasted President Fillmore for not enforcing federal treaties in South Carolina; still others saw the correspondence of evidence that South Carolina already considered itself a separate sovereignty. One paper mockingly invited South Carolina to secede, for if it were independent, it would have no choice but to remove the Seamen Act from its statute book. Even in the South, editorials were unkind to the diplomatic negotiations, tending to alienate South Carolina firebrands from their Southern brethren and diminishing the likelihood of a concerted Southern withdrawal from the Union. British ministers in Washington explained, or rather apologized, to Secretary of State Daniel Webster. The Consuls were not engaged in formal diplomacy; they were simply trying to convince local authorities to alter enforcement of a

⁴⁰ On the secession issue in 1850, see John Barnwell, *Love of Order: South Carolina's First Secession Crisis* (Chapel Hill, N.C., 1982); Manisha Sinha, *The Counterrevolution of Slavery: Politics and Ideology in Antebellum South Carolina* (Chapel Hill, N.C., 2000).

municipal regulation.⁴¹ Despite the vituperative characterization of his government by American newspapers and though publicly denouncing Mathew's disrespect of established diplomatic procedure, Palmerston privately endorsed Mathew's conduct.⁴²

Unsurprisingly, the Charleston *Mercury* applauded Consul Mathew's tact. It was time to let bygones be bygones. South Carolina should forgive Great Britain's error in demanding recognition for its black subjects, especially because "the British Government does not ask or expect [anymore] that this fundamental principle of the distinction of races shall be yielded up in her favor." While this interpretation of British policy is almost indefensible, it did comport to the larger message of amelioration. Carolinians should forgive British officials for their emancipation of the *Creole* mutineers, and now embrace Mathew's olive branch. After all, Mathew's actions were preferable to the "Mission of Mr. Hoar," who attempted to bypass the proper state authorities in securing repeal of the Seamen Law.⁴³ What the editors of the *Mercury* did not know was that Consul Mathew had clandestinely secured legal advice from James Petigru, who suggested that the Seamen Acts would not withstand judicial scrutiny. The very man the *Mercury* applauded for respecting the state's institutions was planning to circumvent them through judicial channels if the state legislature failed to amend the law.⁴⁴

Secretary of State Daniel Webster thought a suit in federal court to be a wonderful idea. In the current state of affairs, his hands were tied, as were the rest of the members of the federal

⁴¹ Hamer, "British Consuls and the Negro Seamen Acts," 149-154; *National Era*, July 24, 1851.

⁴² Palmerston to Mathew, January 3, 1851 and March 21, 1851, in *Correspondence*, 156, 189; Hamer, "British Consuls and the Negro Seamen Acts," 149, 154.

⁴³ The *Mercury* article reprinted in *Correspondence*, 169-171.

⁴⁴ Mathew to Palmerston, 2 April 1851, in *Correspondence*, 194-197. Petigru, of course, was no stranger to the Seamen Laws, and in his opinion to Mathew, he revealed his long relationship with racial quarantines. He was the South Carolina Attorney General who failed to defend Sheriff Deliesseline and the Seamen Act in 1823. See Chapter 3 above.

executive. But if the Supreme Court struck down the law, as Webster believed it would if given the chance, the President would be obliged to enforce the decision. For Webster, the best (and only) way to compel federal intervention was through a mandate from the High Court.⁴⁵ When Palmerston heard of the idea, he readily approved it and sent instructions to commence the suits.⁴⁶ Despite all this optimism, the British Consul in Savannah was less sanguine about the finality of a Supreme Court decision against the Seamen Acts. “If the several laws of the slaveholding States on this subject were declared unconstitutional,” the Consul predicted, “I firmly believe, from the frenzied state of feeling of the people generally in Georgia and South Carolina, that the decision of the Supreme Court will be disregarded.”⁴⁷

Meanwhile, in New Orleans, Consul William Mure had received the same instructions about securing repeal from state officials. Probably aware of the hoopla over the Mathew-Means correspondence, Mure suggested a more informal method of securing repeal. In addition to informal conversations with state lawmakers, he would secretly hire a prominent Baton Rouge attorney to write a bill that would grant British sailors exemption from the state Seamen Law. If the bill passed, the attorney would earn an even greater fee. The attorney’s residence in Baton Rouge would prevent accusations of British meddling. Over the course of 1851, Mure executed his plan and waited for the winter term of the legislature.⁴⁸ His anticipation must have increased when he received word from a self-proclaimed British subject who had been punitively enslaved

⁴⁵ On Webster’s recommendation, see Crampton to Palmerston, 1 December 1851 in *Correspondence*, 206.

⁴⁶ Palmerston to Crampton, 19 December 1851, in *Correspondence*, 207

⁴⁷ Molyneux to Bulwer, January 11, 1851 in *Correspondence*, 166. In another note, the Consul included a short clip from a Savannah newspaper about the Seamen Laws. “They [South Carolinians] will not submit to have their ports thrown open to the unconditional ingress of and regress of black abolitionists neither from Old England nor New England.” See Molyneux to Palmerston, February 3, 1851, in *Correspondence*, 172-173.

⁴⁸ Mure to Bulwer, February 10, 1851, in *Correspondence*, 192-193.

for the last decade. The success of Mure's mission would have profound effects for British sailors, like this one, who had been "sold ten distinct times as a slave."⁴⁹

At the end of 1851, both South Carolina and Louisiana contemplated liberalization of the Seamen Laws, though the routes leading to these two contemplations differed drastically. In the Louisiana legislature, Consul Mure's clandestine bill passed both houses with large majorities. It cost the crown over five hundred dollars, but henceforth, all free black mariners would be allowed to remain aboard their vessels and even allowed to land if municipal authorities approved. Like Alabama, Louisiana's Seamen Law had been stripped of its most flagrant element, incarceration.⁵⁰ In Columbia, however, South Carolina lawmakers refused to amend the Seamen Act early in their session, though they went to great lengths to illustrate that their racial quarantine was not meant "to embarrass their [British] commerce or offend their just pride."⁵¹ Disappointed but not surprised, Consul Mathew replied to the legislature in a letter to the governor. In it, he regretted the intransigence of the Assembly. Though not officially revealing his intention to go to the courts, Mathew quoted eminent "legal authorities" - including sitting Supreme Court Justices Grier, McLean, and Wayne - concerning the viability of state laws in contravention of federal treaties. Citing *The Passenger Cases* but not explicitly, Mathew was indirectly telling the South Carolina Assembly that the U.S. Supreme Court would soon be hearing a case involving racial quarantines. When the governor relayed the message to the Assembly, one State Congressman understood the thinly veiled threats and nearly succeeded in having Mathew forcibly removed from the state under the provisions passed during the Hoar

⁴⁹ See Mure to Palmerston, November 21, 1851, in *Correspondence*, 203-205.

⁵⁰ *Acts of Louisiana* (1852): 193-194.

⁵¹ See "Report of the Special Committee of the Legislature of South Carolina on the Law of Coloured Seamen," reprinted in *Correspondence*, 207-210.

Affair. When the end of the legislative session approached and the Seamen Act remained unamended, Mathew again hailed the governor. In an even more biting letter, Mathew specifically cited the *Passenger Cases* as evidence that the Seamen Act would certainly fall if the state legislature did not rescind it. As for the legislature's reliance on the universal absence of rights for all people of color in South Carolina, Mathew laughed. He explicitly referenced Taney's Attorney General Opinion from 1832 and the South Carolina Resolutions, both of which refuted Afro-British subjecthood and African-American citizenship. Those legal positions, though debatable, were now moot. The British no longer had to fight the uphill battle for the recognition of its black subjects. Thanks to *The Passenger Cases*, the Commerce Clause was back in play.⁵²

Despite his audacity towards South Carolina officers, Mathew was much more equivocal when he wrote a confidential letter to the Foreign Office a few days later. Apparently, secessionists loved the idea of a lawsuit. Nothing would suit their designs better than a "collision with the...Federal Government, upon a question which might be worked up to excite the sympathy and support of the other Southern States." If the British initiated litigation as they planned, they might help disintegrate the Union. "I have reason to fear," Mathew revealed in private, "that every effort will be used, by the Co-operation and Union parties, to prevent a decision by the Supreme Court." If the litigation strategy proved ineffective, Mathew hoped the Foreign Office would seek retaliation by bumping the imposts on American-made rice and cotton. It would be a risky venture, and Mathew hoped that the threat of litigation would be motivation enough for the Assembly's voluntary rescission.⁵³

⁵² See Mathew to Palmerston and enclosures, January 7, 1852, in *Correspondence*, 218-234.

⁵³ Mathew to Palmerston, January 10, 1852, in *Correspondence*, 235-236.

If Mathew doubted that the litigation strategy would work, he did not show it. He maintained a stoic poker face, and in the spring, he initiated two cases. The first was on behalf of Manuel Pereira, a Portugal-born deckhand serving aboard a British vessel. Having been arrested, Mathew and his attorneys filed for *habeas corpus* in state court, to the thunderous applause of Northern newspapers.⁵⁴ The hope, of course, would be that the state judiciary would deny the writ up the appeals ladder, which would eventually allow for an appeal to the federal Supreme Court.⁵⁵ As anticipated, the trial court denied the writ, and Pereira petitioned the South Carolina Court of Appeals. While waiting for the Court to rule, Mathew paid for Pereira's release and secured him a ship to New York. His attorney, James Petigru, assured the Consul that Pereira's release from confinement would not affect the legal question brought before the Court of Appeals. The Court's next session was set for January, 1853.⁵⁶

Continuing with the plan, Mathew initiated another suit, this time in federal court, on behalf of Reuben Roberts. Suing for damages attached to Roberts's false imprisonment, Mathew sought four thousand dollars from the arresting officer, Sheriff Jeremiah Yates.⁵⁷ To appear on behalf of the Sheriff was a constellation of legal talent. The South Carolina Attorney General was joined by two members of the South Carolina legislature, as well as United States Senator Andrew P. Butler.⁵⁸ The original court date was set for November, but a delay moved it back to the following spring.

⁵⁴ See, for example, *New York Daily Times*, April 27, 1852. "The accomplishment of this point will be remembered as the object of the mission to Charleston of Hon. Mr. Hoar of Mass., who was politely but forcibly reminded that Carolina could not contain him twenty-four hours." See also *Frederick Douglass Paper*, June 17, 1852 and August 6, 1852.

⁵⁵ Mathew to the Earl of Malmesbury, April 24, 1852, in *Correspondence*, 242-244.

⁵⁶ Mathew to Malmesbury, May 18, 1852, in *Correspondence*, 259-260.

⁵⁷ Mathew to Malmesbury, June 16, 1852, in *Correspondence*, 261.

⁵⁸ *Roberts v. Yates*, 20 F. Cas. 937 (1853).

The pieces were in place. Two test cases were in the works, and the South Carolina Assembly was meeting for its winter 1852 session with full knowledge of Consul Mathew's exploits. If the legislature amended the Seamen Act, then the cases would be abandoned. If the legislature resisted, the British government would be faced with a dilemma. They could admit their bluff, and protect their Unionist allies by dropping the cases, anyway. Or they could continue with their litigation. A favorable ruling from the Supreme Court might end the problem, but it might also end the Union. An adverse ruling would undercut the Secessionists in South Carolina, but at the expense of British sailors. Considering the possibilities of litigation, the British Foreign Office hoped that the South Carolina Assembly would remedy the situation on its own. Consul Mathew, however, would have to watch from afar; he left the state, probably for fear of being arrested and evicted.⁵⁹

In his message to the Assembly, Governor Means did not budge. He hoped the legislature would leave the Seamen Act alone. He also suggested lawmakers statutorily protect law enforcement officials, like Sheriff Yates, who might be sued in federal court when acting in their official capacities and in accordance with state law. Means admitted that he once contemplated easing the restrictions, "but since an attempt has been made to defy our laws, and bring us in conflict with the Federal Government, on a subject upon which we are so justly sensitive, our own self-respect demands that we should not abate one jot."⁶⁰ The Assembly responded to Means's directions. Though they refrained from enacting a law indemnifying state officers, they

⁵⁹ Acting-Consul Lance to Malmesbury, November 24, 1852, in *Correspondence*, 263

⁶⁰ "Message of the Governor of South Carolina," November 23, 1852, reprinted in *Correspondence*, 263-265.

did not touch the Seamen Act. The British now had to decide if they were going to maintain their suits and force the courts to interpose. Northern papers watched with eager anticipation.⁶¹

The Pereira case was heard while the legislature was still in session. However, the Court of Appeals did not play their part in the drama being orchestrated by the British Foreign Office. Instead of denying Pereira's petition and opening the door for a writ of error to be taken to the U.S. Supreme Court, the South Carolina Court of Appeals never made a ruling. "He is at liberty. Hence we should do a vain act to hear this appeal. It is therefore, on motion of the Attorney-General, struck from the docket."⁶² From a legal standpoint, this decision was highly suspect, but from a political point of view, it was brilliant. There were few options open to Pereira's attorneys. Without a ruling from the Court of Appeals, the Supreme Court could not intervene if it wanted to. Though Pereira's case had no bearing on the trajectory of the Seamen Acts, the sailor's story was about to make international headlines. At some point either during or immediately after his imprisonment in Charleston, Pereira told of his exploits under the Seamen Act to a writer calling himself F.C. Adams. Adams turned the Portuguese sailor's narrative into a book-length diatribe against the Seamen Acts, against States' Rights, and against slavery. The book was internationally renowned amongst abolitionists, and its currency and sensationalism only enhanced its notoriety.⁶³

In February, 1853, the Russell Ministry fell to a Conservative coalition that anointed Lord Aberdeen, an old Peel advocate, Prime Minister. Aberdeen was experienced with the Seamen

⁶¹ See, for example, *New York Daily Times*, November 24, 1853 and December 6, 1853. The latter article included the entire message.

⁶² *Ex-parte Manuel Pereira*, reprinted in *Correspondence*, 266. See also Petigru to Mathew, February 4, 1853, in *Correspondence*, 265-266.

⁶³ F.C. Adams, *Manuel Pereira; or, The Sovereign Rule of South Carolina with views of Southern Laws, Life, and Hospitality* (Washington, D.C., 1853). On the book's international reception among antislavery advocates, see *National Era*, Feb 17, 1853 and Aug 25, 1853; *The Anti-Slavery Reporter*, August 1, 1853.

Acts. His policy of quiet supplication in 1844 had nearly resulted in a relaxation of the law in South Carolina until the exploits of Samuel Hoar undermined it. Now as Prime Minister, Aberdeen apparently sought to reapply this policy. His Foreign Secretary, the Earl of Clarendon, began gathering information on *Roberts v. Yates* from the British legation in Washington. As Clarendon considered the efficacy of litigation, the U.S. District Court for South Carolina upheld the Seamen Act opening the door, finally, for an appeal to the United States Supreme Court.⁶⁴ Petigru was ready to file the appropriate paperwork, which would have placed the case on the High Court upcoming winter term.⁶⁵ All he needed was word from the Foreign Office.

But the new Conservative Ministry had no intention of pursuing the case any further. When a British minister in Washington put a temporary hold on the appeal to the Supreme Court, for fear that the Supreme Court might evade it on technical grounds, Clarendon had found his escape.⁶⁶ He instructed the British Legation to make the suspension permanent, as “no good end would be answered by proceeding further with this case.”⁶⁷ When news broke that Clarendon dropped the suit, it unleashed a whirlwind of criticism from the Northern press.⁶⁸

Why would Clarendon want to stop the suit? Most likely, it was a combination of factors. Clarendon was well informed of Mure’s recent success in Louisiana, using discreet diplomacy and guile. The Foreign Secretary may have wanted to pursue a similar course in South Carolina.

⁶⁴ The District Court’s decision was reprinted or summarized in various Northern newspapers. See *Chicago Daily Tribune*, May 3, 1853; *New York Daily Times*, June 29, 1853; *National Era*, May 5, 1853, June 30, 1853, and July 14, 1853.

⁶⁵ *Roberts v. Yates*, 20 F. Cas. 937 (1853). See also *Correspondence*, 269-271. *The Anti-Slavery Reporter*, June 1, 1853.

⁶⁶ Crampton to Clarendon, May 2, 1853, in *Correspondence*, 271-272.

⁶⁷ Clarendon to Crampton, May 20, 1853, in *Correspondence*, 272.

⁶⁸ *The Barre Patriot* (Barre, Mass.): July 1, 1853; *The Framers’ Cabinet* (Amherst, N.H.): May 5, 1853 (though this article was absolutely wrong, reporting that Pereira was suing in federal court for \$4000); *New York Daily Times*, December 5, 1853.

It is also possible that Clarendon shared the opinion of his boss, the Earl of Aberdeen, that threats of federal intervention were no way of persuading Southern fire-eaters to alter their policies. It is also likely that Clarendon believed, as his Consul in Savannah did, that any decision by the federal Supreme Court would be summarily ignored by some of the Southern States. Lastly, Clarendon may have been attempting to distance himself from the previous administration. Lord Palmerston, besides pressing for this lawsuit in particular, had faced a political firestorm in the wake of the Don Pacifico Affair, when he ordered the Royal Navy to seize Greek ships after the Greek government failed to compensate a British subject for his loss of property in Athens. Palmerston's extremism may have suggested a more moderate and covert approach from his successor.

Whatever his motives, Clarendon invited an onslaught with his decision to abandon *Roberts v. Yates*. In the House of Lords, Lord Beaumont wanted to know what Clarendon's plans were now that litigation had been abandoned.⁶⁹ Others were more direct and ferocious. Former Prime Minister Sir John Russell blasted Clarendon for dropping the case, and indicated that the only avenue now open was economic sanctions.⁷⁰ Abolitionists were up in arms. An editorial in *The Anti-Slavery Reporter* (incorrectly) blamed Consul Mathew for dropping the case and bowing to the slave power in the South. In case the citizens of Charleston might view the Foreign Office's decision to drop the case as evidence of Britain's acquiescence to "the necessity of the South Carolina police law," the author emphatically denied that "the British public"

⁶⁹ *New York Daily Times*, June 27, 1853. Luckily for historians, Beaumont requested that all correspondence related to the imprisonment of black British seamen be compiled and presented. Clarendon obliged.

⁷⁰ *The Anti-Slavery Reporter*, July 1, 1853 and August 1, 1853.

condoned the Seamen Act.⁷¹ An editorial in the *London Times* was equally unnerved by the decision to abandon the case.

There is a question which should be put to Lord Clarendon before the session closes. It is a question which has been asked of successive Ministers, and the time seems to be come for a final answer. We want to know more of what has been done, and what is to be done, about the treatment of British seamen in the port of Charleston, South Carolina?...[That] little community which boasts that it holds the British empire and the liberties of its citizens at its mercy; but we feel it to be necessary...to have it proved that South Carolina is not to overbear the world, place all its commerce under an intolerable condition, because she chooses to outrage its moral sense, and insult its principles of liberty by a 'peculiar institution,' which is reprobated by all civilized society.⁷²

The fury over *Roberts v. Yates* was directed at both Parliament and obstinate South Carolina.

But Clarendon was attempting to turn the tables on South Carolina Secessionists. Consul Mathew was removed from his post in Charleston, "offer[ing] the few remaining shreds of the consul's reputation in South Carolina as a sacrifice to the proud and stubborn state."⁷³ (Little did South Carolinians know, but Mathew was appointed to a post in Philadelphia.) Now, Secessionists had to make a decision; should they reciprocate Britain's act of magnanimity and amend the law? If they remained inflexible now, they would be angering a friendly administration, and such callousness now might be counterproductive if South Carolina left the Union. British support would be absolutely necessary for the survival of an independent South Carolina. Unionists must have blown a sigh of relief when Britain dropped the case. Now, they could advocate a Seamen Act amendment in accord with desires of their merchant-based constituency with hopes that Secessionists would jump on board. But the pressure was on them; if the Secessionists refused to budge on an amendment, Britain might resume litigation, forcing a

⁷¹ *The Anti-Slavery Reporter*, August 1, 1853.

⁷² The editorial was reprinted in *New York Daily Times*, September 2, 1853.

⁷³ The words are Hamer's. See "British Consuls and the Negro Seamen Acts," 161.

decision by the Supreme Court. And any decision coming down from the High Court would play into the Secessionists hands.

The new South Carolina Governor, John Manning, was in favor of concessions, but despite a warm reception in both Houses, the Assembly refused to alter the Seamen Law in any way. Apparently, Mathew's impetuous decision to litigate left a bad taste in the legislators' mouths.⁷⁴ Mathew's successor, Robert Bunch, took the news in stride and assured Clarendon that conciliation was the surest strategy for repeal. Time and diplomatic finesse could fix what Palmerston and Mathew had broken. Over the course of the year, Bunch mimicked the actions of Consul Mure in New Orleans in 1851. He informally met with legislators and the governor. He provided copies of Louisiana's amended law. In February, the Georgia legislature abetted Bunch's plans. It altered its Seamen Act; henceforth, free black sailors did not have to ride quarantine for forty days. Ship captains still had to report all people of color on their vessels, but local magistrates could offer passports at their discretion. Now, free black sailors were not automatically assumed to be "morally contagious." Local authorities could determine which people posed threats and which ones did not. The British Consul in Savannah, E. Molyneux, was instrumental in the law's alteration. Like Consul Mure in New Orleans, Molyneux covert chidings had dulled the intense anger felt by Georgians in the wake of *Roberts* and *Pereira*. Also like Mure, Molyneux had hired an attorney, co-authored the bill, and had a well respected member of the Assembly present the legislation.⁷⁵

Bunch's hard work did not pay off at the next session of the legislature. The State Senate passed a revised Seamen Act in line that abolished incarceration, but Lower House defeated it,

⁷⁴ *Journal of the South Carolina Senate* (1853): 26-27; Hamer, "British Consuls and the Negro Seamen Act," 161-162; January, "The First Nullification," 373-374.

⁷⁵ January, "The First Nullification, 375; *Acts of Georgia, 1853-1854*, 106-107.

“resort[ing] to parliamentary tricks,” according to historian Alan January.⁷⁶ Unlike the previous year, Consul Bunch was far less accepting of defeat, reportedly dubbing South Carolina, “the Japan of the Western Hemisphere.” But the election of a new, anti-modification Governor meant that Bunch would have a difficult job at the next legislative session. His fears proved well founded; the winter session of 1855-1856 saw no modification, and Bunch feared the window of opportunity had closed. Over the course of the next year, Bunch focused very little on the Seamen Act amendment.

But Bunch’s fatalism in Charleston was not a result of the machinations of the wider political universe. In 1855, the Whigs retook the Prime Minister’s chair and none other than Lord Palmerston now ran the British government. Additionally, in 1856, James Buchanan was put into the White House, but the Republicans made a strong showing. Many of the members of the new Republicans came out of the Whig and Free Soil Parties, both of which tended to demonize racial quarantines. The walls seemed to be closing in on the South Carolina Assembly. If they continued in their bullishness, they would alienate the North, the federal government, and the British. If South Carolina did not concede ground on the Seamen Law, they would also be isolated from the other major Southern players, namely Georgia and Louisiana. Those two states might resent South Carolina intransigence at this critical political moment. “Are we more subject to northern incendiaries,” Unionist John Harleston Read asked rhetorically, “than...our sister states? Are our institutions weaker than theirs?” Read and fellow Unionist Richard Yeadon, the editor of the *Courier*, assembled enough votes to push the amendments through the legislature.⁷⁷ According to the new law, black sailors, both foreign and

⁷⁶ January, “The First Nullification,” 376-377. See, also, Hamer, “British Consuls and the Negro Seamen Acts,” 162-163.

⁷⁷ January, “The First Nullification,” 386-387.

domestic, could remain aboard their vessels if bond was given to ensure they would not go ashore. Specific exemptions were granted to victims of shipwreck and inclement weather as well.⁷⁸ Though anticlimactic – the state legislature modified the law the very year in which just about everyone conceded the futility of the endeavor – success had finally been achieved in the Southern stronghold of South Carolina. Northern and abolitionists presses joined in the British celebration.⁷⁹

This moment, just before Christmas, 1856, should have been a moment of ultimate triumph for the many people who had tried to undo the Seamen Acts since their inception in 1822.⁸⁰ In the states with the most vital ports – South Carolina, North Carolina, Georgia, Alabama, and Louisiana, law enforcement officials were no longer obliged to haul black sailors off their vessels and into jail on account of their complexion. Certainly, there was work left to do for the diehard opponents of racial quarantines; black seamen were still not exercising the rights and liberties of their white counterparts. But the most egregious feature of the Seamen Acts had largely been extinguished from Southern statute books. Certainly, Consul Bunch, Lord Clarendon, and Lord Palmerston were all very relieved that South Carolina had decided to follow the rest of the South in honoring the Union Jack. Anticlimactic or not, the achievement was impressive. Regrettably, this moment of vindication was short-lived.

⁷⁸ *Acts of South Carolina, 1856*, 573-574.

⁷⁹ See *New York Evangelist*, January 8, 1857; *New York Daily Times*, January 6, 1857

⁸⁰ Unfortunately, Samuel Hoar did not survive to see his mission fulfilled, at least partially. He died earlier in 1856. See *National Era*, November 20, 1856.

CHAPTER 10
EPILOGUE: DRED SCOTT, REENACTMENT, AND SECESSION

Less than three months after opponents of racial quarantines celebrated their most hard fought victory in South Carolina, the United States Supreme Court handed down the infamous *Dred Scott* decision. The notorious opinion of Chief Justice Roger Taney denied federal citizenship to all free African Americans, formally embedding his Contracting-Parties Theory of citizenship into American constitutional law. Twenty-five years earlier, Taney first elaborated this contentious understanding of citizenship in an opinion on the Seamen Acts that he penned as Attorney General for President Andrew Jackson. Initially employed as a means to deny treaty rights for black Britons, Taney's theory was eventually adopted by Georgia and South Carolina in the early 1840s. These states found Taney's theory useful when Massachusetts sought the same protections – originating in the Constitution rather than a treaty – for its black sailors that British diplomats sought for their black countrymen. Then, in March, 1857, the Supreme Court adopted the same premise, that African Americans were not, and never were, citizens of the United States of America. In Charleston, the *Mercury* celebrated the decision, explicitly connecting Taney's opinion to South Carolina's actions during the Hoar Affair in 1844. The Palmetto State was vindicated in evicting the “foreign emissary,” and denying the application of the Privileges and Immunities Clause to African Americans.¹

As if a preface to *Dred Scott*, the Texas legislature made it criminal for shipmasters and captain to bring into the state any free person of color after January, 1857. The law was quite vague, remaining silent on the issue of sailors, cooks, and stewards. It also refused to identify the exact location where the law went into effect.² Were the harbors exempt? Did sailors have

¹ *Scott v. Sandford*, 60 U.S. 393 (1857); *Charleston Mercury*, March 16, 1857.

² *Acts of Texas, 1856*, Chapter CXIX.

to go ashore before the captain violated the law? What was to happen to the sailors, as the law only criminalized the actions of the captain? The law went into effect just weeks before *Dred Scott* came down, and the British Consul was instructed to inquire with caution.³ The British Foreign Office plugged one hole in the dam of racial quarantine in South Carolina, only to see another hole emerge in Texas. And after thirty-five years, the same questions were still being posed.

And more holes were on the horizon. In 1859, Louisiana altered its Seamen Act to reinstitute mandatory incarceration.⁴ The reenactment was part of a larger legislative strategy to dispel any doubts about the future of the United States if Louisiana was to remain in the Union. During the same session, the state senate's Committee on Federal Relations passed resolutions to reopen the African slave trade to New Orleans. Another Committee also passed a resolution requesting the immediate annexation of Cuba.⁵ Louisiana's message was clear. South Carolina seemed to be in accord. The following year, 1860, South Carolina took the next logical step after Republican Abraham Lincoln won the presidential election. But even after South Carolina formally seceded from the Union, the Seamen Acts were influencing events. Only weeks after the news broke that Columbia had approved secession, federal Congressmen contemplated a bill that would dismantle many of the personal liberty laws that hampered enforcement of the 1850 Fugitive Slave Law, hoping to use such a law to lure South Carolina back and prevent other

³ Hamer, "British Consuls and the Negro Seamen Acts," *Journal of Southern History* 1 (May 1935): 167.

⁴ *Acts of Louisiana, 1859*, 70-72.

⁵ "Report of the Committee on Federal Relations to the Senate of Louisiana, on the Bill Entitled 'An Act to Authorize the People of Louisiana to Import Negro Slaves,'" and "Report of the Committee on Federal Relations to the House of Representatives on the Joint Resolution relative to the Acquisition of Cuba," in *Documents of the...Legislature of Louisiana* (Baton Rouge, La., 1859).

Deep South States from withdrawing. House Democrats, however, voted it down because the law would also make void the various Seamen Acts.⁶

But the Deep South did secede, and the Civil War was fought to bring them and the rest of the Confederacy back into the United States. With a small touch of irony, the Union blockade of the Southern coastline finally prevented the ingress of any free black sailors, including Britons, into Southern port cities. The dangerous Atlantic had been hemmed in by Union warships. But after Emancipation and the Thirteenth Amendment, the “moral contagion of liberty” was no longer a pressing problem for Southern lawmakers. Even if they were, the constitutional dilemma of racial quarantines had been solved by the Fourteenth Amendment, which obliterated Taney’s Contracting-Parties Theory by overturning key portions of *Dred Scott*. Moreover, the federal government’s control of interstate and international commerce was undoubted in the years following the war.

When looking back at the Seamen Acts, several factors seem to explain their contentious history. Racial quarantines sat at the intersection of two of the most vexing constitutional issues of the antebellum period: the protection of slavery and the power of the federal government. Neither issue was resolved before Appomattox, so it should be unsurprising that the Seamen Acts survived into the 1860s as well. No consensus ever emerged on the Seamen Laws, and leading legal minds and political pundits came to very different conclusions on the constitutionality of racial quarantines. Supreme Court Justices, Attorneys General, Whigs, Democrats and others could not agree amongst themselves about their legality. This lack of consensus most often translated into a federal government dedicated to nonintervention, seeing no possible positive outcome by engaging the South on murky constitutional issues (especially

⁶ *Fayetteville Observer* (NC): December 31, 1860.

one so closely related to slavery). In the entire history, the only overt federal intervention occurred at the beginning, in 1823, when William Johnson attempted to strike down the first Seamen Law in *Elkison v. Deliesseline*. Though subsequent Congresses and Administrations considered following Johnson's footsteps, they never did. Far more often, the federal government condoned racial quarantines.

Yet, even among the greatest advocates of the Seamen Acts, one gets a sense that the laws' survival was more a matter of pride than constitutional principle, international politics, or a dedication to policy. One only has to consider that the greatest successes came during Tory or Conservative Ministries - when the Foreign Office refrained from engaging directly with federal or state officials - and during periods of federal apathy. Most often, especially in the 1850s, the debates on the Seamen Acts typically hinged on the presence or absence of outside interference, not on new or persuasive constitutional or political arguments. If liberalization was seen as a homegrown idea, Southern legislatures often amended their statutes. If liberalization was suggested or demanded by British or Northern agitators, on the other hand, Southern lawmakers refused to budge. Policy and constitutionality became secondary to displays of Southern independence.

Undoubtedly, domestic political and constitutional issues are insufficient in explaining much of the Seamen Acts' history. British politics are an essential ingredient. British sailors filed lawsuits; British Consuls cajoled state assemblies; British Ministers pressed Secretaries of States; and Foreign Secretaries orchestrated policies. In fact, every liberalization and rescission of a racial quarantine was a result of British interference. In contrast, when federal or Northern interlopers sought amendments, they failed miserably. Also, British colonial reforms, mainly Toleration Laws and Emancipation, forever altered the Seamen Acts debates and helped

guarantee decades of turmoil. British Emancipation provided Southern States with the evidence they needed to prove the dangers of abolitionism and black sailors, but it also motivated British Whigs to demand recognition of black British subjects. Whether it was British Emancipation inspiring the roots of *Dred Scott*'s denial of African-American citizenship or British pressure leading to formal articulations of the states' police power, British politics and constitutional change had a tangible impact on the trajectory of U.S. constitutional development. In the end, the history of the Seamen Acts makes clear that much of U.S. antebellum history can only be understood fully in a larger, transnational context.

BIBLIOGRAPHY

Unpublished Primary Sources

Carl Brent Swisher Papers, Manuscript Division, Library of Congress, Washington, DC.

Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851, Series 5, Volume 579, Foreign Office Papers, Public Records Office, Kew, England.

Despatches from U.S. Consuls in Havana, 1783-1906. Record Group 59, T 20. National Archives, College Park, MD.

Despatches from U.S. Consuls in Kingston, Jamaica, 1796-1906. Record Group 59, T 31. National Archives, College Park, MD.

Despatches from U.S. Consuls in Santiago de Cuba. Record Group 59, T 55. National Archives, College park, MD.

Domestic Letters of the Department of State. Record Group 59, M 40. National Archives, College Park, MD.

Governor's Messages to the General Assembly. South Carolina Department of Archives and History, Columbia, SC

Consular Instructions. 201 volumes. *Central Files of the Department of State, 1778-1963*. Record Group 59.2. National Archives, College Park, MD.

Miscellaneous Letters of the Department of State, 1789-1906. Record Group 59, M 179. National Archives, College Park, MD.

Records of the Attorney General's Office, Opinions on Legal Questions, 1790-1870. Record Group 60.2. National Archives, College Park, MD.

Reported Court Cases

Calder v. Deliesseline, Harper 186 (SC, 1824).

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Cohens v. Virginia, 19 U.S. 264 (1821).

Commonwealth v. Aves, 35 Mass. 193 (1836).

Corfield v. Coryell, 8 F. Cas. 546 (1823).

Crandall v. State, 10 Conn. 339 (1834).

The Cynosure, 8 F. Cas. 1102 (1844).

Dred Scott v. Sandford, 60 U.S. 393 (1857).
Elkison v. Deliesseline, 6 F. Cas. 493 (1823).
Gibbons v. Ogden, 22 U.S. 1 (1824).
The License Cases, 46 U.S. 504 (1847).
Martin v. Hunter's Lessee, 14 U.S. 304 (1816).
McCulloch v. Maryland, 17 U.S. 316 (1819).
New York v. Miln, 36 U.S. 102 (1837).
The Passenger Cases, 48 U.S. 283 (1849).
Prigg v. Pennsylvania, 41 U.S. 539 (1842).
Roberts v. Yates, 20 F. Cas. 937 (1853).
Worcester v. Georgia, 31 U.S. 515 (1832).

Government Documents

Acts and Resolutions of the State of Georgia. Milledgeville, GA, 1822-1860.
Acts...and Resolutions...of the State of Massachusetts. Boston, 1842-5.
Acts of the Legislative Council of the Territory of Florida. Tallahassee, FL, 1830-1844.
Acts of Louisiana. New Orleans, 1830-1848. Baton Rouge, 1849-1860.
Acts of Alabama. Tuscaloosa, 1838-1845. Montgomery, 1846-1860.
Acts...of the State of North Carolina. Raleigh, 1822-1860.
Acts...of the State of South Carolina. Columbia, 1822-1860.
Acts of Texas. Austin, 1856.
Acts...of Virginia. Richmond, 1830-1860.
Annals of the Congress of the United States, 1789-1824. Washington, DC, 1820-1824.
British and Foreign State Papers. 170 volumes. London, 1838-1839.
Congressional Globe. 46 volumes. Washington, DC, 1834-1860.

Constitution of Mississippi. Jackson, 1832.

Constitution of Missouri. St. Louis, 1820.

Constitution of North Carolina. Raleigh, 1835.

Constitution of Pennsylvania. Harrisburg, 1839.

Documents...of the House of Representatives...of Massachusetts. Boston, 1844-1845.

Documents of the...Legislature of Louisiana. Baton Rouge, 1859.

Documents...of the Senate...of Massachusetts. Boston, 1844-1845.

House of Commons Papers, Volume 31, Paper 59 and Paper 363, London, 1831-1832.

House Document 87, 29 Cong., 1 sess. Washington, DC, 1846.

House Report 72, 27 Cong., 3 sess. Washington, DC, 1843.

House Report 80, 27 Cong., 3 sess. Washington, DC, 1843.

House Report 707, 26 Cong., 1 sess. Washington, DC, 1840.

Journal of the House of Representatives. Washington, DC, 1842-1850.

Journal of the House of Representatives for the State of Delaware. Dover, 1825.

Journal of the Senate and House of Commons of the General Assembly of...North Carolina.
Raleigh, 1831.

Journal of the Senate of the State of Louisiana. Baton Rouge, 1845.

Journal of the South Carolina Senate. Columbia, 1853.

Laws of the State of Mississippi. Jackson, 1825-1860.

Massachusetts Legislative Documents. Boston, 1842-1845.

Register of Debates (of Congress). Washington, DC, 1824-1833.

Reports and Resolutions...of the General Assembly...of South Carolina. Columbia, 1844.

Reports and Resolutions...of the Senate...of South Carolina. Columbia, 1822-1860.

Resolutions...of Alabama. Tuscaloosa, 1835-1845. Montgomery, 1846-1860.

Resolutions...of the State of Louisiana. New Orleans, 1830-1848. Baton Rouge, 1849-1860.

Territorial Constitution of Florida. Tallahassee, 1839.

Newspapers and Periodicals

The Anti-Slavery Reporter (London), 1850-3.

African Repository and Colonial Journal (Washington, DC), 1830.

Barre Patriot (Barre, MA), 1853.

Boston Courier, 1841.

The British and Foreign Anti-Slavery Reporter (London), 1850-9.

Charleston Courier (SC), 1822-1860.

Charleston Mercury (SC), 1822-1860.

Chicago Daily Tribune, 1853.

Daily Atlas (Boston), 1842

Fayetteville Observer (NC), 1860.

Floridian (Tallahassee, FL), 1832.

Framer's Cabinet (Amherst, NH), 1851-3

Frederick Douglass Paper (Rochester), 1852

Boston Liberator, 1831-1860.

National Anti-Slavery Standard (New York), 1842-1846

National Era (Washington, DC), 1850-6

New York Daily Times, 1852-7

New York Evangelist, 1844-57

Niles' Weekly Register (Baltimore), 1822-1837.

Niles' National Register (Baltimore), 1837-1849.

The North Carolina Journal (Fayetteville), 1830-1832.

Northern Star and Freeman's Advocate (Albany), 1842

North Star (Rochester), 1851

Raleigh Register & NC Gazette, 1843.

Richmond Enquirer, 1819.

Southern Patriot (Charleston, SC) 1827-1844.

Southern Quarterly Review (Columbia, SC), 1845.

The Sun (Pittsfield, MA), 1850

Trumpet and Universalist Magazine (Boston), 1829-1844.

Published Primary Sources

Achates [Thomas Pinckney]. *Reflections, Occasioned by the late Disturbances in Charleston*. Charleston, SC: A.E. Miller, 1822.

Adams, F. C. *Manuel Pereira: or The Sovereign Rule of South Carolina with Views of Southern Laws, Life, and Hospitality*. Washington, DC: Buell and Blanchard, 1853.

Adams, John Quincy. *Argument of John Quincy Adams Before the Supreme Court of the United States in the case of the United States, Appellants, vs. Cinque, and others, Africans, captured in the schooner Amistad, by Lieut. Dedney, Delivered on the 24th of February and 1st of March 1841*. New York: S.W. Benedict, 1841.

Annual Reports of the New England Anti-Slavery Society. Boston, 1834.

Annual Reports Presented to the Massachusetts Anti-Slavery Society. Boston, 1842-8.

Bleser, Carol, ed. *Secret and Sacred: The Diaries of James Henry Hammond, a Southern Slaveholder*. New York: Oxford University Press, 1988.

Brutus [Robert Turnbull]. *The Crisis: Or, Essays on the Usurpations of the Federal Government*. Charleston, SC: A.E. Miller, 1827.

Chandler, Peleg, ed. *The Law Reporter*. Volume 7. Boston: Bradbury, Soden, and Company, 1845.

- Commons, John R., et al., eds. *A Documentary History of American Industrial Society, Volume II*. Cleveland, OH: The Arthur H. Clark Company, 1910.
- Emerson, Ralph Waldo. *An Address Delivered in the Court-House in Concord Massachusetts on 1st August, 1844, on the Anniversary of the Emancipation of Negroes in the British West Indies*. Boston: John Chapman, 1844.
- Finkelman, Paul, ed. *Slavery, Race, and the American Legal System, 1700-1872, Volume 2*. New York: Garland Publishing, 1988.
- . *Slave Rebels, Abolitionists and Southern Courts: The Pamphlet Literature, Volume 1*. New York: Garland Publishing, 1988.
- Foner, Philip and Ronald Lewis, eds. *The Black Worker: A Documentary History from Colonial Times to the Present*. 8 volumes. Philadelphia: Temple University Press, 1978-1989.
- Ford, Paul, ed. *The Works of Thomas Jefferson*. 12 volumes. New York: G.P. Putnam's Sons, 1904-1905.
- , ed. *The Writings of Thomas Jefferson*. 10 volumes. New York: G.P. Putnam's Sons, 1892-1899.
- Gattell, Frank, ed. "Postmaster Huger and the Incendiary Publications." *South Carolina Historical Magazine* 64 (January 1963), 193-202.
- General Court of Massachusetts, Committee on the Library. *State Papers on Nullification*. Boston: Dutton and Wentworth, 1834.
- Greeley, Horace and John Cleveland, eds. *A Political Text-Book for 1860*. New York: Tribune Association, 1860.
- Gunther, Gerald, ed. *John Marshall's Defense of McCulloch v. Maryland*. Palo Alto, CA: Stanford University Press, 1969.
- Hamilton, James. *An Account of the Late Intended Insurrection among a Portion of the Blacks of the City of Charleston, South Carolina*. Charleston, SC: A.E. Miller, 1822.
- Hobson, Charles and Herbert Johnson, eds. *The Papers of John Marshall*. 12 Volumes. Chapel Hill, NC: The University of North Carolina Press, 1974-2006.
- Hunt, Benj. Faneuil. *The Argument of Benj. Faneuil Hunt, in the case of the arrest of the Person claiming to be a British Seaman, under the 3d section of the State Act of Dec. 1822, in relation to Negroes, &c before the Hon. Judge Johnson, Circuit Judge of the United States, for 6th Circuit*. Charleston, SC: A.E. Miller, 1823.
- Jervey, Theodore D. *Robert Y. Hayne and His Times*. New York: Macmillan, 1909.

- Johnson, William. *The Opinion of the Hon. William Johnson, delivered on the 7th of August, 1823, in the case of the arrest of the British Seaman under the 3d section of the State Act, entitled, "An Act for the better Regulation of Negroes and Persons of Colour and for other purposes," passed in December last.* Charleston, SC: C.C. Sebring, 1823.
- Kennedy, L.H. & T. Parker. *An Official Report of the Trials of Sundry Negroes Charged with an Attempt to Raise an Insurrection in the State of South Carolina.* Charleston, SC: J.R. Schenck, 1822.
- Madden, R.R. *The Island of Cuba: Its Resources, Progress and Prospects.* London: Partridge & Oakey, 1853.
- Proceedings of the United States Senate, on the fugitive slave bill, - the abolition of the slave-trade in the District of Columbia, - and the imprisonment of free colored seamen in southern ports: with speeches of Messrs. Davis, Winthrop and others.* Washington, DC: Press of T.R. Martin, 1850.
- Ripley, C. Peter, ed. *The Black Abolitionist Papers.* 5 volumes. Chapel Hill, NC: University of North Carolina Press, 1985-1992.
- Starobin, Robert, ed. *Denmark Vesey: The Slave Conspiracy of 1822.* Englewood Cliffs, NJ: Prentice-Hall, 1970.
- Story, Joseph. *Commentaries on the Conflict of Laws Foreign and Domestic.* 2nd edition. London: 1841.
- Tappan, Lewis. *The Fugitive Slave Bill: Its History and Unconstitutionality with an Account of the Seizure and Enslavement of James Hamlet, and His Subsequent Restoration to Liberty.* 3rd Edition. New York: W. Harned, 1850.
- Taylor, John. *Construction Construed and Constitutions Vindicated.* Richmond, VA: Shepherd & Pollard, 1820.
- Tragle, Henry Irving, ed. *The Southampton Slave Revolt of 1831: A Compilation of Source Material.* Amherst, MA: University of Massachusetts Press, 1971.
- Turnbull, David. *Travels in the West: Cuba with Notices of Porto Rico and the Slave Trade.* London: Longman, Orme, Brown, Green, and Longmans, 1840.
- Walker, David. *An Appeal to the Coloured Citizens of the World.* Boston, MA: D. Walker, 1829.
- Young, Alexander. *Discourse Occasioned by the Death of Benjamin Rich, Esq. Delivered in the Church on Church Green, June 8, 1851.* Boston: John Wilson & Son, 1851.

Secondary Books, Articles, Theses, and Dissertations

- Alderson, Robert. "Charleston's Rumored Slave Revolt of 1793." In *The Impact of the Haitian Revolution in the Atlantic World*, edited by David Geggus, 93-111. Columbia, SC: University of South Carolina Press, 2001.
- Allen, Austin. *Origins of the Dred Scott Decision: Jacksonian Jurisprudence and the Supreme Court, 1837-1857*. Athens, GA: University of Georgia Press, 2006.
- Ames, Herman V. *The Proposed Amendments to the Constitution of the United States during the First Century of Its History*. New York: B. Franklin, 1970.
- Barnwell, John. *Love of Order: South Carolina's First Secession Crisis*. Chapel Hill, NC: University of North Carolina Press, 1982.
- Bailyn, Bernard. *Atlantic History: Concepts and Contours*. Cambridge, MA: Harvard University Press, 2005.
- . *The Ideological Origins of the American Revolution*. Cambridge, MA: Belknap Press of Harvard University Press, 1967.
- Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. New York: Cambridge University Press, 2002.
- Berlin, Ira. *Many Thousands Gone: The First Two Centuries of Slavery in North America*. Cambridge, MA: Belknap Press of Harvard University Press, 1998.
- . *Slaves Without Masters: The Free Negro in the Antebellum South*. New York: Pantheon Books, 1974.
- . "Time, Space, and the Evolution of Afro-American Society on British Mainland North America." *American Historical Review* 85 (February 1980): 44-78.
- Beveridge, Albert J. *The Life of John Marshall*. New York: Houghton Mifflin Company, 1918.
- Blackburn, Robin. "The Power of Example." In *The Impact of the Haitian Revolution in the Atlantic World* edited by David Geggus, 14-18. Columbia, SC: University of South Carolina Press, 2001.
- Bolster, W. Jeffrey. *Black Jacks: African-American Seamen in the Age of Sail*. Cambridge, MA: Harvard University Press, 2007.
- Bradburn, Douglas. *The Citizenship Revolution: Politics and the Creation of the American Union, 1774-1804*. Charlottesville, VA: University of Virginia Press, 2009.

- Brewer, Holly. *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority*. Chapel Hill, NC: University of North Carolina Press, 2005.
- Calavita, Kitty. "The Paradoxes of Race, Class, Identity, and 'Passing': Enforcing the Chinese Exclusion Acts, 1882-1910." *Law & Social Inquiry* 25 (Winter 2000): 1-40.
- Cleveland, Sarah H. "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs." *Texas Law Review* 81 (November 2002), 1-284.
- Crocket, Hasan. "The Incendiary Pamphlet: David Walker's Appeal in Georgia," *The Journal of Negro History* 86 (Summer 2001), 305-318.
- Curtis, Michael Kent. "Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-1837." *Northwestern University Law Review* 89 (Spring 1995): 785-802.
- . *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History*. Durham, NC: Duke University Press, 2000.
- Drescher, Seymour. "The Limits of Example." In *The Impact of the Haitian Revolution in the Atlantic World* edited by David Geggus, 10-13. Columbia, SC: University of South Carolina Press, 2001.
- Drexler, Robert W. *Guilty of Making Peace: A Biography of Nicholas P. Trist*. Lanham, MD: University Press of America, 1991.
- Earle, Jonathan. "Marcus Morton and the Dilemma of Jacksonian Antislavery in Massachusetts, 1817-1849." *Massachusetts Historical Review* 4 (2002): 61-88.
- Eaton, Clement. "A Dangerous Pamphlet in the Old South." *Journal of Southern History* 3 (August 1936), 325-332.
- Edwards, Laura. *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*. Chapel Hill, NC: University of North Carolina Press, 2009.
- . "Southern History as U.S. History." *Journal of Southern History* 75 (August 2009): 1-32.
- . "Status without Rights." *American Historical Review* 112 (April 2007): 365-393.
- Egerton, Douglas. *He Shall Go Out Free: The Lives of Denmark Vesey*. Madison, WI: Madison House, 1999.

- Ellis, Richard E. *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic*. New York, NY: Oxford University Press, 2007.
- Eltis, David. *Economic Growth and the Ending of the Atlantic Slave Trade*. New York, NY: Oxford University Press, 1989.
- Faust, Drew G. *James Henry Hammond and the Old South: A Design for Mastery*. Baton Rouge, LA: Louisiana State University Press, 1988.
- Fehrenbacher, Don. *The Dred Scott Case: Its Significance in American Law and Politics*. New York: Oxford University Press, 1978.
- . *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*. New York: Oxford University Press, 2001.
- Finkelman, Paul. *An Imperfect Union: Slavery, Federalism, and Comity*. Chapel Hill, NC: University of North Carolina Press, 1981.
- Finkelman, Paul and Melvin Urofsky. *March of Liberty: A Constitutional History of the United States*. 2 volumes. New York: Oxford University Press, 2002.
- Ford, Lacy K. *Deliver Us from Evil: The Slavery Question in the Old South*. New York: Oxford University Press, 2009.
- Frankfurter, Felix. *The Commerce Clause under Marshall, Taney, and Waite*. Gloucester, MA: Peter Smith, 1937.
- Franklin, John Hope. *The Free Negro in North Carolina*. Chapel Hill, NC: University of North Carolina Press, 1943.
- Fraser, Walter. *Charleston! Charleston! The History of a Southern City*. Columbia, SC: University of South Carolina Press, 1989.
- Freehling, William. *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836*. New York: Harper and Row, 1965.
- Games, Alison. "Atlantic History: Definitions, Challenges, and Opportunities." *American Historical Review* 113 (June 2006): 741-757.
- Gilje, Paul. *Liberty on the Waterfront: American Maritime Culture in the Age of Revolution*. Philadelphia, PA: University of Pennsylvania Press, 2004.
- Gillett, Frederick. *George Frisbie Hoar*. Boston: Houghton Mifflin, 1934.
- Gilroy, Paul. *Black Atlantic: Modernity and Double-Consciousness*. Cambridge, MA: Harvard University Press, 1993.

- Golove, David. "Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power," *Michigan Law Review* 98 (March 2000): 1075-1319.
- Govan, Thomas. "John M. Berrien and the Administration of Andrew Jackson," *Journal of Southern History*, 5 (November 1939): 447-467.
- Graber, Mark A. "Desperately Ducking Slavery: *Dred Scott* and Contemporary Constitutional Theory." *Constitutional Commentary* 14 (1997): 271-318.
- Green, Jack P. *The Intellectual Construction of America: Exceptionalism and Identity from 1492-1800*. Chapel Hill, NC: University of North Carolina Press, 1993.
- . *Negotiated Authorities: Essays in Colonial Political and Constitutional History*. Charlottesville, VA: University of Virginia Press, 1994.
- . *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and United States*. Athens, GA: University of Georgia Press, 1987.
- Green, William. *British Slave Emancipation: The Sugar Colonies and the Great Experiment, 1830-1865*. London: Clarendon Paperbacks, 1991.
- Gross, Ariela. "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South." *Yale Law Journal* 108 (October 1998): 109-188.
- Hamer, Philip, "British Consuls and the Negro Seamen Acts, 1850-1860," *Journal of Southern History* 1 (February 1935): 138-168.
- . "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848," *Journal of Southern History*, 1 (May 1935): 3-28.
- Harris, Cheryl. "Whiteness as Property." *Harvard Law Review* 106 (June 1993): 1707-1791.
- Harvey, Leslie Neeland. "The Negro Seamen's Acts and the South Carolina Association: The Role of the Citizenry in Articulating and Enforcing South Carolina's State Police Power in the 1820s." Master's Thesis, University of Virginia, 2005.
- Heuman, Gad. "A Tale of Two Jamaican Rebellions." *Jamaican Historical Review* 19 (1996): 1-8.
- . *Between Black and White: Race, Politics, and Free Coloureds in Jamaica*. Westport, CT: Greenwood Press, 1981.
- Higginbotham, A. Leon. *In the Matter of Color: Race and the American Legal Process*. New York: Oxford University Press, 1978.
- . *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*. New York: Oxford University Press, 1996.

- Hindus, Michael. "Black Justice Under White Law: Criminal Prosecution of Blacks in Antebellum South Carolina." *The Journal of American History* 63 (December 1976): 575-599.
- Howe, David Walker. *What Hath God Wrought: The Transformation of America, 1815-1848*. New York: Oxford University Press, 2007.
- Horn, Gerald. *The Deepest South: The United States, Brazil, and the African Slave Trade*. New York: New York University Press, 2007.
- Horwitz, Morton. *The Transformation of American Law, 1780-1860*. Cambridge, MA: Harvard University Press, 1977.
- Howard, Cary. "The Georgia Reaction to David Walker's Appeal. Master's Thesis, University of Georgia, 1967.
- Huebner, Timothy S. *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*. Athens, GA: University of Georgia Press, 1999.
- . *The Taney Court: Justices, Rulings, and Legacy*. Santa Barbara, CA: ABC-CLIO, 2003.
- Hulsebosch, Daniel J. *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*. Chapel Hill, NC: University of North Carolina Press, 2005.
- January, Alan. "The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860." Ph.D. Dissertation, University of Iowa, 1976.
- . "The South Carolina Association: An Agency for Race Control in Antebellum Charleston," *The South Carolina Historical Magazine* 78 (July 1977): 191-201.
- Johnson, Michael P. "Denmark Vesey and His Co-Conspirators." *William and Mary Quarterly* 58 (October 2001): 915-976.
- Katz, William Loren. *Walker's Appeal in Four Articles & An Address to the Slave of the United States of America*. New York: Arno Press and the New York Times, 1969.
- Kerber, Linda. *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship*. New York: Hill and Wang, 1998.
- . "The Stateless as the Citizen's Other: A View from the United States." *American Historical Review* 112 (February 2007): 1-34.
- Kettner, James. *The Development of American Citizenship, 1608-1870*. Chapel Hill, NC: University of North Carolina Press, 1978.

- Kramer, Larry. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press, 2004.
- Lakwete, Angela. *Inventing the Cotton Gin: Machine and Myth in Antebellum America*. Baltimore, MD: The Johns Hopkins University Press, 2003.
- Linebaugh, Peter and Marcus Rediker. *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic*. Boston: Beacon Press, 2000.
- Litwack, Leon. "The Federal Government and the Free Negro, 1790-1860." *Journal of Negro History* 43 (October 1958): 261-278.
- . *North of Slavery: The Negro in the Free States, 1790-1860*. Chicago: The University of Chicago Press, 1961.
- Magliocca, Gerald. *Andrew Jackson and the Constitution: The Rise and Fall of Constitutional Regimes*. Lawrence, KS: University of Kansas Press, 2007.
- Maltz, Earl M. "Fourteenth Amendment Concepts in the Antebellum Era." *The American Journal of Legal History* 32 (October 1988): 305-346.
- Meachem, Jon. *American Lion: Andrew Jackson in the White House*. New York: Random House, 2008.
- Miller, Thornton. "John Marshall Versus Spencer Roane: A Reevaluation of *Martin v. Hunter's Lessee*." *The Virginia Magazine of History and Biography* 96 (July 1988): 297-314.
- Morgan, Donald G. *Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge*. Columbia, SC: University of South Carolina Press, 1971.
- Murray, David R. *Odious Commerce: Britain, Spain and the Abolition of the Cuban Slave Trade*. London: Cambridge University Press, 1980.
- Nelson, William. *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*. Cambridge, MA: Harvard University Press, 1988.
- . *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980*. Chapel Hill, NC: University of North Carolina Press, 2001.
- Neuman, Gerald. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton, NJ: Princeton University Press, 1996.
- . "The Lost Century of American Immigration Law (1776-1875)." *Columbia Law Review* 93 (December 1993): 1833-1901.

- Newmyer, R. Kent. *The Supreme Court under Marshall and Taney*. New York, NY: Thomas Y. Crowell Company, 1968.
- . *John Marshall and the Heroic Age of the Supreme Court*. Baton Rouge, LA: Louisiana State University Press, 2001.
- Ohr, Wallace. *Defiant Peacemaker: Nicholas Trist in the Mexican War*. College Station, TX: Texas A&M University Press, 1997.
- Olken, Samuel. "John Marshall and Spencer Roane: An Historical Analysis of Their Conflict over U.S. Supreme Court Appellate Jurisdiction." *Journal of Supreme Court History* (1990): 125-141.
- Olwell, Robert. *Masters, Slaves, & Subjects: The Culture of Power in the South Carolina Lowcountry, 1740-1790*. Ithaca, NY: Cornell University Press, 1988.
- Paquette Robert. "From Rebellion to Revisionism: The Continuing Debate About the Denmark Vesey Affair." *Journal of the Historical Society* 30 (Fall 2004): 291-334.
- Pearson, Edward. *Designs against Charleston: The Trial Record of the Denmark Vesey Slave Conspiracy of 1822*. Chapel Hill, NC: University of North Carolina Press, 1999.
- Pease, William H. and Jane H. Pease, *James Louis Petigru: Southern Conservative, Southern Dissenter*. Athens, GA: University of Georgia, 1995.
- Reckord, Mary. "The Jamaican Slave Rebellion of 1831." *Past and Present* 40 (July 1968): 108-125.
- Rugemer, Edward B. *The Problem with Emancipation: The Caribbean Roots of the American Civil War*. Baton Rouge, LA: Louisiana State University Press, 2008.
- Senese, Donald. "The Free Negro and the South Carolina Courts, 1790-1860." *The South Carolina Historical Magazine* 68 (July 1967): 140-153.
- Shklar, Judith, *American Citizenship: The Quest for Inclusion*. Cambridge, MA: Harvard University Press, 1991.
- Short, K.R.M. "Jamaican Christian Missions and the Great Slave Rebellion of 1831-2." *Journal of Ecclesiastical History* 27 (1976): 57-72.
- Siegel, Stephen. "The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry." *Northwestern University Law Review* 92 (Winter 1998): 477-590.
- Sinha, Manisha. *The Counterrevolution of Slavery: Politics and Ideology in Antebellum South Carolina*. Chapel Hill, NC: University of North Carolina Press, 2000.
- Smith, Lindsay. *William Lloyd Garrison*. Philadelphia: George W. Jacobs & Co., 1911.

- Smith, Rogers. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. New Haven, CT: Yale University Press, 1997.
- Sterkx, H.E. *The Free Negro in Antebellum Louisiana*. Rutherford, NJ: Fairleigh Dickinson University Press, 1972.
- Swisher, Carl B. "Mr. Chief Justice Taney." *Mr. Justice*, eds. Allison Dunham and Philip Kurland. Chicago: University of Chicago Press, 1956.
- . *Roger B. Taney*. New York: The Macmillan Company, 1935.
- Tehrani, John. "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America." *Yale Law Journal* 109 (January 2000): 817-848.
- Thomas, Hugh. *Cuba, or, The Pursuit of Freedom*. New York: De Capo Press, 1998.
- Tinkler, Robert. *James Hamilton of South Carolina*. Baton Rouge, LA: Louisiana State University Press, 2004.
- Torpey, John. *The Invention of the Passport: Surveillance, Citizenship, and the State*. New York: Cambridge University Press, 2000.
- Urofsky, Melvin. *The Supreme Court Justices: A Biographical Dictionary*. New York: Garland Publishing, 1994.
- Wade, Richard C. "The Vesey Plot: A Reconsideration." *Journal of Southern History* 30 (May 1964): 143-161.
- Wiecek, William. "Slavery and Abolition Before the United States Supreme Court, 1820-1860." *Journal of American History* 65 (June 1978): 34-59.
- . *The Sources of Antislavery Constitutionalism in America, 1760-1848*. Ithaca, NY: Cornell University Press, 1977.
- Wilentz, Sean. *The Rise of American Democracy: Jefferson to Lincoln*. New York: W.W. Norton & Co., 2005.
- Wilkins, Joe Bassette. "Windows on Freedom: The South's Response to the Emancipation of Slaves in the West Indies." Ph.D. Dissertation, University of South Carolina, 1977.
- Williams, Norman. "Gibbons." *New York University Law Review* 79 (October 2004): 1398-1498.
- Wong, Edlie. *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel*. New York: New York University Press, 2009.

Wyatt-Brown, Bertram. "The Abolitionists' Postal Campaign of 1835." *Journal of Negro History* 50 (October 1965): 227-238

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