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ELKISON v. DELIESSLINE: RACE AND THE CONSTITUTION IN SOUTH CAROLINA, 1823

SCOTT WALLACE STUCKY*

I. INTRODUCTION

The involvement and influence of the federal judiciary upon the controverted issues of race and slavery in antebellum America have been little studied. Some recent works have demonstrated an increased interest in this area, but many, if not most, general works go no further than the *Dred Scott* case,¹ or perhaps *Prigg v. Pennsylvania*,² preferring the clashes in Congress and other foci of public opinion to the technical minutiae of judicial opinions.³ This emphasis is understandable, particularly in view of the paucity of basic material existing; judges have rarely shown a predisposition to grasp dangerous political nettles unnecessarily, and the limited jurisdiction of federal courts before 1865 gave added effect to this reluctance.⁴ Nevertheless, much of importance for the future of America and American law can be found in existing judicial opinions, dealing as they did with issues that would one day be settled through internecine war, and yet dealing with them in a constitutional framework that, though altered, is ours today.

*Elkison v. Deließeline*⁵ is one of the earliest and most singular cases on the issue of state and national power in the areas of race and slavery. The opinion, delivered in 1823 by Associate Justice William Johnson of the United States Supreme Court, sitting as a Circuit Justice in

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1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

2. 41 U.S. (16 Pet.) 539 (1842).

3. See, e.g., E. CHANNING, *THE PERIOD OF TRANSITION, 1815-1848* (1921); C. BEARD & M. BEARD, *A BASIC HISTORY OF THE UNITED STATES* (1944); S. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1955). But see S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 508 (1965). Recent works which have made major contributions to an understanding of race and American law include D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978), and L. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978).

4. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846). *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) was, of course, a striking exception to this outlook.

5. 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366).

Charleston, South Carolina, declared a racially-motivated state statute—the Negro Seamen Act—to be void as a violation of the commerce clause of the Constitution.⁶ Although not influential as a direct precedent,⁷ the case is nevertheless of signal importance. It was the first major exposition of the commerce clause as a restraint on state power,⁸ and pointed the way for the enormous later development of that constitutional theme. Historically, it provoked an uproar which prompted some of the earliest serious talk of nullification and secession in a southern state, and which, to some extent, colored American diplomacy and sectionalism down to 1861.

In analyzing *Elkison* and its place in our constitutional and political history, it is necessary first to examine the background which gave rise to the opinion. The early career of Justice Johnson, its author, is briefly discussed, as is Charleston in the 1820's, the *milieu* which gave rise to the events in question. Next, the Denmark Vesey "insurrection" in Charleston in 1822, the immediate cause of those events, is examined, with particular attention to its legal aspects and to the extra-judicial part played by Justice Johnson.

The discussion of *Elkison* follows, beginning with the South Carolina legislative reaction to the Vesey incident, which included the passage of the Negro Seamen Act, and continuing with the British-U.S. diplomatic maneuvers of early 1823 over the enforcement of the Act. Following this, the immediate controversy of *Elkison* is examined, particularly the arguments and the opinion. Finally, the prolonged newspaper controversy engaged in by Johnson and his opponents is analyzed, since it produced a great deal of elaboration by both sides.

The aftermath of the case, particularly the continuing diplomatic controversy over South Carolina's enforcement of the Act, concludes the discussion and is followed by a section setting out the author's conclusions on the subject.

II. BACKGROUND

A. *William Johnson—the Man and the Judge*

William Johnson, Associate Justice of the Supreme Court of the United States, was born in Charleston, South Carolina, on December 27, 1771. His father, also named William, was a blacksmith who became prominent among the Patriots of Charleston. Described as one of

6. U.S. CONST. art. I, § 8, cl. 3.

7. Only two direct citations of the case as authority are recorded. *Bartelson v. Giles*, 6 F. Cas. 1103 (C.C.S.D.N.Y. 1829) (No. 3,530); *The Cynosure*, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3,529).

8. Morgan, *Mr. Justice William Johnson and the Constitution*, 57 HARV. L. REV. 328, 338 (1944).

the class of men who, "enjoying neither the advantages of hereditary social position, nor liberal education, nor great wealth, yet wielded a large influence among the people, and contributed not only to the success but to the character of the Revolution,"⁹ the elder Johnson prospered in the decade following the Revolution. He was elected to the state's legislature, and served as a delegate to the state convention which ratified the Constitution.¹⁰

Having high ambitions for his son, the future Justice, he sent him to Princeton, where he graduated with the highest honors in 1790.¹¹ Following his graduation, the younger Johnson read law with the famed statesman, Charles Cotesworth Pinckney, who had studied with Blackstone at Oxford and at the Inns of Court, and was admitted to the bar in 1793.

In March of 1794, Johnson married Sarah Bennett, the daughter of Thomas Bennett, an architect of Charleston. The marriage, apparently a happy one, produced eight children. It had an importance other than personal, however. Sarah's brother, Thomas Bennett, Jr., became a close friend of Johnson's and, as Governor of South Carolina, would play a leading role in the Vesey affair and, thus, in the events leading to *Elkison*.

In the same year he married, Johnson entered political life. Although his legal mentor, C.C. Pinckney, was a moderate Federalist, Johnson attached himself to the Jeffersonian Republican party formed around Pinckney's cousin, Charles Pinckney. In late 1794, Johnson was elected to the House of Representatives of the General Assembly (state legislature) where he served three terms.

The state legislature in South Carolina offered exceptional opportunities for ambitious and able men; the Constitution of 1790 (which remained in effect until after the Civil War) subordinated other agencies of government to the legislature in a manner unique in the United States. The governorship was regarded as a position of honor and given very little real power; governors, judges, and presidential electors were all chosen by the General Assembly. Substantial property qualifications, both for the suffrage and for membership in the legislature, and an apportionment which favored Charleston and the coastal counties at the expense of the "up-country" assured continued domination by wealthy and conservative planters.¹² This imbalance of power be-

9. I J. O'NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 72 (Charleston 1859).

10. D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER (1954); 10 DICTIONARY OF AMERICAN BIOGRAPHY 128-29 (D. Malone ed. 1943).

11. D. MORGAN, *supra* note 10, at 19-20.

12. *Id.* at 27, 30-31; see S. C. CONST. of 1790.

tween branches of government was also to have its effect upon the events surrounding *Elkison*.

Johnson's legislative career, though brief, was distinguished; in his last term, he served as Speaker of the House of Representatives. Although he was not a member of the old Charleston aristocracy, he helped defeat measures designed to change the balance of political power in the state, including an attempt to increase the power of the governor and reapportionment bills.¹³ In national politics, he took a major role in the forwarding of Republican policy, castigating Washington's administration for Jay's Treaty and the administration of John Adams for the Alien and Sedition Acts.¹⁴

The chief domestic issue during Johnson's term as Speaker was reform of the state's judicial system. Johnson had served on a committee investigating the subject, and then steered the bill embodying the committee's recommendations through the House. One of its features was enlargement of the state's highest court, the Constitutional Court. The legislature appointed Johnson to one of the new seats, thus beginning his judicial career.¹⁵

Although Johnson sat on this state court for five years, his tenure there sheds little light on his later career. Most of the cases, and the abbreviated reports issued, are not particularly instructive.¹⁶

While Johnson occupied the bench in his state, his party captured the executive and legislative branches of the federal government in the election of 1800. The federal judiciary, however, remained dominated by Federalists. The Supreme Court was armored with life tenure and immeasurably strengthened by the appointment (at the very end of Adams' term) of the brilliant John Marshall as Chief Justice. Marshall quickly established himself as the spokesman for a unified and almost invariably unanimous Court, in contrast to previous experience.¹⁷ The landmark case of *Marbury v. Madison*,¹⁸ where Marshall deftly managed to avoid certain disobedience by the President and still assert the power of judicial review over Acts of Congress, illustrated this new strength and brought affairs to a high pitch of excitement.¹⁹ Thoroughly provoked, President Jefferson attempted to purge the judiciary through impeachment. He selected, as a target, Circuit Judge John

13. D. MORGAN, *supra* note 10, at 27, 30-31.

14. *Id.* at 31-36.

15. *Id.* at 34-36.

16. See 2 S.C.L. (2 Bay) *passim* (1796-1804); 3 S.C.L. (1 Brev.) *passim* (1793-1805).

17. D. MORGAN, *supra* note 10, at 34-36, 45-47.

18. 5 U.S. (1 Cranch) 137 (1803).

19. Twenty years later, Jefferson would still describe the decision in acid terms as a "gratuitous interference" and a "perversion of justice." Letter from Jefferson to Johnson (June 12, 1823), reprinted in 15 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 447 (1903).

Pickering of New Hampshire, who was a Federalist and certifiably insane, but not a criminal. When Pickering was impeached and removed, the President found a higher target in Samuel Chase of Maryland, the most obnoxious Federalist Justice on the Supreme Court. This effort, however, came to nothing; although the House of Representatives impeached Chase, the Senate failed to convict him, and Jefferson abandoned impeachment as a means of judicial reorganization.²⁰ Almost simultaneously, however, a new avenue opened; Justice Alfred Moore resigned because of ill-health, and Jefferson, after three years in office, had the opportunity to make a Supreme Court appointment.

Since Moore had served the Sixth Circuit, comprised of Georgia and South Carolina, it was to those states that the President looked for a replacement, who, naturally, was to be a Republican. Since Charles Pinckney was serving as Minister to Spain and hence unavailable for advice, Jefferson turned to Senator Thomas Sumter and Representative Wade Hampton of South Carolina, who prepared a list of five possible nominees. By a process of elimination, they recommended Johnson's name to Jefferson; he was the only person on the list who had never flirted with Federalism and who had the youth and good health to stand the strain of circuit-riding and to promise a substantial tenure.²¹ Johnson's name was sent to the Senate, apparently without his knowledge.²² The Senate confirmed the nomination in March, 1804, and Johnson, while registering his surprise, promptly accepted.²³ In May, he ascended to the federal bench he occupied for thirty years.

Justice Johnson was a large, ruddy man, open and pugnacious. His most notable feature was a pronounced independence of mind, both on and off the bench; a contemporary spoke of his "inflexible, almost haughty independence of political authority on the one hand, and popular opinion on the other."²⁴ His independence of political authority, even authority which he admired, was manifested early in his career, when he rebuked President Jefferson's executive actions in enforcing the Embargo Act,²⁵ chilling his relations with the President for more than a decade.²⁶ As for popular opinion, Johnson's refusal to bow to its demands will be evident in his actions in the Vesey trials and the *Elkison* case.

20. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 273-95 (1922).

21. J. WOLFE, *JEFFERSONIAN DEMOCRACY IN SOUTH CAROLINA* 196 (1940); D. MORGAN, *supra* note 10, at 49-50.

22. D. MORGAN, *supra* note 10, at 50-51.

23. *Id.*

24. 1 J. O'NEALL, *supra* note 9, at 74.

25. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5,420).

26. D. MORGAN, *supra* note 10, at 73-74.

On the Supreme Court, Johnson's independence manifested itself in a great many dissenting and concurring opinions, especially striking on a Court whose influential and persuasive Chief Justice preferred unanimity. During his tenure on the Court, Johnson wrote thirty-two full-dress dissents and concurred specially on twenty-three occasions, far more than any other Justice.²⁷ His independence was not merely an upholding of Republican doctrine on a Federalist bench; as has been seen in his Embargo Act opinion, he did not hesitate to oppose that party when he thought it wrong on the merits. Between 1810 and 1820, for example, he carried the Court with him in refusing to allow the construction of a federal common law of crime—generally favored by earlier Federalist judges—but did so in the context of a common-law prosecution brought by a Republican administration against alleged libellers of Jefferson.²⁸ During the same period he concurred in the result in the famous case of *Martin v. Hunter's Lessee*,²⁹ which upheld federal judicial power over state courts, but questioned what he considered to be the overbreadth of Justice Joseph Story's opinion.³⁰ On the other hand, in 1819 he joined with the Court's majority and approved Marshall's landmark opinion in *McCulloch v. Maryland*,³¹ which strongly espoused the concept of implied congressional powers, a concept which was anathema to Jefferson and many other Republicans. Two years later, writing for the Court, he expressly accepted this concept in the context of congressional power to punish nonmembers for contempt.³²

Not surprisingly, a man of such parts provoked widely-differing estimates from contemporaries. The South Carolina lawyer and author, John Belton O'Neill, praised Johnson's "manner . . . admirably tempering dignity with grace," and the "softened and attractive charm [of] the powers of his mind."³³ John Quincy Adams, later his ally in the *Elkison* affair, labeled him a "restless, turbulent, hot-headed, politician caballing Judge."³⁴ He was a man of vigorous opinions and vigorous utterance, an intelligent and noteworthy occupant of the bench; these

27. *Id.* at 306-07.

28. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

29. 14 U.S. (1 Wheat.) 304 (1816). Johnson had dissented from the Court's decision on the merits of the case. *Fairfax' Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813).

30. On the question at issue—whether the Constitution vested all of the Article III judicial power in the federal courts without further ado, or whether Congress could determine the limits of the power given to the courts—Johnson's support of the latter position has become the accepted answer. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

31. 17 U.S. (4 Wheat.) 316 (1819).

32. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

33. 1 J. O'NEALL, *supra* note 9, at 78.

34. 5 J.Q. ADAMS, *MEMOIRS OF JOHN QUINCY ADAMS* 20 (1875).

qualities would never be more apparent than during the Negro Seamen Crisis of 1823.

B. Charleston—The Milieu

The events which gave rise to the *Elkison* case stretch back decades before 1823, and are indissolubly intertwined with the evolution of the State of South Carolina and particularly of the city of Charleston. The city had been, since the seventeenth century, the cultural capital of a region largely dependent upon lowland rice cultivation.³⁵ In politics, it was largely Federalist until after 1800, reflecting a certain solidarity with mercantile and shipping interests throughout the United States.³⁶ Even after Republicanism had replaced Federalism, the city retained a definitely aristocratic air. A northern observer wrote: "Charleston was the most aristocratic city in the Union notwithstanding her Jacobin club . . . liberty caps, and fraternal hugs. The political professions of her leading men . . . were of the Jefferson school, but their practice was aristocracy complete."³⁷

This continuity in tone and in rule by influential families, however, masked very substantial changes in the early national period. Indeed, perhaps no other of the original thirteen states underwent the degree of demographic change which South Carolina did between 1790 and 1820. The invention of the cotton gin promoted a great surge in cotton culture throughout the South and thus enormously increased the need for slave labor. This need became so acute that South Carolina, independently, re-instituted the foreign slave trade.³⁸ In the five years between 1803 and Congress' ending of the trade in 1808, 39,075 new slaves were brought in. The population figures, which in 1790 had shown a white majority, had changed by 1820 to a situation in which whites were outnumbered by slaves. In 1790, the state had 140,178 whites, 1,801 free Negroes, and 107,094 slaves. By 1820, the census showed that the white population had less than doubled, to 237,440, but the number of slaves had increased almost two-and-one-half times, to 258,475. Slaves thus constituted a majority of the state's population, an imbalance which continued until 1865. Free Negroes were a miniscule minority—6,826 in 1820.³⁹ The Negro preponderance in and

35. See generally A. SALLEY, *THE INTRODUCTION OF RICE CULTURE INTO SOUTH CAROLINA* (1919); HARRIGAN, *The Charleston Tradition*, 9 AM. HERITAGE 48 (1958).

36. U. PHILLIPS, *THE SOUTH CAROLINA FEDERALISTS passim* (1909); D. FISCHER, *THE REVOLUTION OF AMERICAN CONSERVATISM* 162, 397-409 (1965).

37. I. E. THOMAS, *REMINISCENCES OF THE LAST SIXTY-FIVE YEARS* 33-34 (Hartford 1840).

38. The state had prohibited the trade in 1788. Act of Nov. 4, 1788, art. 16, in 5 T. COOPER, *THE STATUTES AT LARGE OF SOUTH CAROLINA* 91-92 (Columbia 1839).

39. R. MILLS, *STATISTICS OF SOUTH CAROLINA* 177 (Charleston 1826); H. HENRY, *THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA* 3 (1914).

around Charleston was even more striking. In 1820, Charleston and its environs had 19,376 whites to 57,221 slaves and 3,615 free Negroes.⁴⁰ The events recounted herein were played out against a background of minority status for the white race and the effect of this imbalance upon public anxiety was considerable.

Against this background of change, the influential aristocracy of the state, while no longer Federalist in name, continued to maintain generally nationalist sentiments until the 1820's. In December, 1820, for example, the state House of Representatives spoke of the commerce power as one "expressly given up by the States and vested in Congress by the Constitution," and decried "the practice . . . of arraying upon the questions of national policy, the States as *distinct and independent sovereignties* in opposition to . . . the general government."⁴¹ The next year, the General Assembly concurred in Marshall's broad reading of implied constitutional powers by resolving that Congress possessed a general power of chartering banks in the states.⁴² Such sentiments were not to endure, however; the state was already beginning to be perceived as falling behind the North economically, and the advantages which had been expected to accrue under a national system of protection and encouragement of industry—such as had been suggested by John C. Calhoun after the War of 1812—had not been forthcoming.⁴³ In the early 1820's, this still inchoate discontent was set ablaze by the issue of race—always a potential firestorm in a slave state with South Carolina's demography. The instrument of this change was a free Negro named Denmark Vesey.

C. *The Vesey Rebellion*

Denmark Vesey was a skilled carpenter, a man of about fifty-five who had gone to sea as a slave. He later purchased his freedom with the proceeds of a lottery which he won and then managed to amass a substantial amount of property for a Negro. In early 1822, he formed a conspiracy among slaves, with the apparent object of capturing the city

40. D. MORGAN, *supra* note 10, at 128.

41. W. FREEHLING, *THE NULLIFICATION ERA* 8-9 (1967).

42. P. Wild, *South Carolina Politics: 1816-1833*, at 42-43 (unpublished dissertation, University of Pennsylvania, 1949).

43. In fact, the state's economic picture in the early 1820's was a mixed one. Its balance of trade was quite favorable; exports were more than double imports in the years 1821-1823. On the other hand, 1823, the year of the crisis, was not a good one economically, due to falling prices for the state's staples. The value of South Carolina exports fell from \$7,260,320 in 1822 to \$6,898,814 in 1823, although the number of bales of cotton exported rose from 130,000 to almost 160,000, and rice exports rose as well. J. VAN DEUSEN, *ECONOMIC BASES OF DISUNION IN SOUTH CAROLINA* 332-33 (1970). It should also be noted that, while enthusiasm for federally-funded internal improvements may have waned, a broad program of state-funded improvements was pursued throughout the decade, including canals, public buildings, and the surveying and mapping of the state. *INTERNAL IMPROVEMENTS IN SOUTH CAROLINA: 1817-1828 passim* (D. Kohn ed. 1938).

of Charleston, and then either setting up a Negro state or escaping to Haiti. Vesey had managed to suborn slaves in prominent households, including two of Governor Thomas Bennett, whose sister was married to Justice Johnson. The insurrection, planned for June 16, was exposed prematurely when one of those involved attempted to recruit a slave who reported the conversation to his master.⁴⁴ Armed patrols surrounded the city, and most of those implicated were quickly arrested.

Within a few days, a court was convened, pursuant to the colonial slave code of 1740, to try the malefactors. The provisions of this code, itself passed after widespread slave uprisings which killed at least forty-five whites and an unknown number of Negroes, were quite stringent.⁴⁵ In a capital case, the local justice of the peace was required to select and convene a court for the trial of the accused slave. This court consisted of the justice, another magistrate, and three freeholders. The trials were held *in camera*; there was no jury and no appeal.⁴⁶

The procedural shortcomings of this code were in fact substantially mitigated during the Vesey trials. The two successive courts convened to try the slaves were composed of well-known Charlestonians, some of whom—such as Robert Y. Hayne and Joel Poinsett—attained national prominence.⁴⁷ Aware of the lack of due process in the code, they modified it in several important ways. No slave was to be tried except in the presence of his owner or counsel; the owner was to have advance notice of the trial. A sentence of death would not be imposed on the basis of one person's testimony. The rules of evidence for criminal trials were applied. One important qualification vitiated these laudable changes: adverse witnesses who requested anonymity were *not* brought into court, and thus *ex parte* testimony was still employed.⁴⁸

On June 21, 1822, just as the trials were getting under way, the conservative *Charleston Courier* caused a sensation by printing an article entitled *Melancholy Effects of Popular Excitement*. Although the article was unsigned, it soon became known as the work of Justice Johnson. It narrated an event which purportedly occurred in 1810, in the South Carolina back country, when a false report of an impending uprising, which began as a hoax and was kept going for political reasons, produced a popular hysteria. According to the story, a militia trumpeter searching for slaves became drunk and blew his bugle at some passing

44. J. LOFTON, *INSURRECTION IN SOUTH CAROLINA: THE TURBULENT WORLD OF DENMARK VESSEY* *passim* (1964).

45. J. COFFIN, *AN ACCOUNT OF SOME OF THE PRINCIPAL SLAVE INSURRECTIONS* 14 (New York 1860).

46. Act of May 10, 1740, art. 9, *reprinted in* J. GRIMKE, *THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA* 166 (Philadelphia 1790).

47. T. JERVEY, ROBERT Y. HAYNE AND HIS TIMES 132-33 (1909).

48. J. HAMILTON, JR., *AN ACCOUNT OF THE LATE INTENDED INSURRECTION AMONG A PORTION OF THE BLACKS OF THIS CITY* 12 (Charleston 1822).

cavalry. Thinking it was the tocsin for the revolt, the cavalry galloped off in all directions. Capturing a half-witted Negro, they whipped him and threatened him with death. Under this duress, he implicated another slave who, being owned by a boat captain, had a boat horn in his cabin. Although the horn was full of cobwebs and obviously unused, the man was lynched by a crowd, largely on the basis that he had once been accused of stealing a pig. A local judge who attempted to intervene was threatened with impeachment.⁴⁹

Johnson spoke of "crowds of execrating spectators," and "the popular demand for a victim."⁵⁰ While the Vesey affair was not mentioned, the analogy was obvious; Johnson believed the threat to Charleston had been exaggerated, the fearful public reaction had been unwarranted, and that the trials had been precipitate.

Public reaction was immediate and unfavorable. On June 22, James Hamilton, Jr., the Intendant (*i.e.*, Mayor) of the city, replied in the *Southern Patriot*, on behalf of the city government:

It is with great pain that I am constrained . . . to notice and mark with the most pointed reprobation [Johnson's article]. . . . I have only to remark that the discretion of the writer is altogether equal to the unjust libel he has insinuated against his Fellow-Citizens. It was to have been hoped that the measures adopted by the corporation in a spirit of the most perfect justice and moderation, in arranging such a court for respectability and intelligence as has rarely been convened . . . in our country, would have screened them from the salutary monitions of a Mentor, however wise he may be . . . who seems at least to want some of the qualifications of a Dictator.⁵¹

The members of the court naturally took the anecdote as a slur upon themselves and replied in the *Courier* of June 29. They stated that Johnson, when confronted, had first promised to publish a disclaimer stating that he had not intended to defame the court or to imply that it would be swayed by popular prejudice, but had afterward refused to do so. Their further response had a touch of outraged innocence:

Injured and defamed as the Court considers itself to be, they nevertheless owe it to themselves and the community, not to degrade themselves by the use of epithets and expressions which the occasion would seem to require. . . . [T]o the individual they will only say, that they are at a loss as to how to reconcile his conduct with that which ought to influence a gentleman respecting his solemn promise, and sensible of the obligations of decency and propriety.⁵²

Unchastened by these rebukes, Johnson on the same page promised a

49. Charleston Courier, June 21, 1822, at 2, col. 5.

50. *Id.*

51. Charleston Southern Patriot, June 22, 1822, at 2, col. 5.

52. Charleston Courier, June 29, 1822, at 2, col. 4.

reply to "one of the most groundless and unprovoked attacks ever made upon the feelings of an individual . . . an instance of the most unprecedented pretension."⁵³

Shortly thereafter, he issued a sixteen-page pamphlet, *To the Public of Charleston*, in which he stated that his purpose in publishing the story had been to quiet popular fears, particularly among women, and to illustrate the danger of false rumors. After the court members demanded an apology, he had attempted to oblige, but they returned several of his drafts, and their conduct became so peremptory that he became determined to defy them. Johnson, while disclaiming intention to interfere with the judicial process and any personal animosity toward the court members, criticized their "high-handed" conduct of the trials: "He would deserve to be disfranchised, who would submit" to such treatment. His closing statement, heavy with injured pride, proclaimed his faith in an eventual vindication:

My reputation . . . is in safe hands, and defies scrutiny. But I wish to live in harmony with those who surround me. The smiles of my fellow-citizens are dear to me. They will read and consider my deference; and though for a time a cloud may intercept the beams of their favour, I fear nothing.⁵⁴

With this prickly pamphlet, laudable in its intent but strangely obtuse to the very real nature of the conspiracy and the fears of the citizenry, Johnson's public participation in the Vesey affair and the trials ended.

The trials continued until August. The two courts, to their credit, appear to have taken their judicial responsibilities seriously and to have behaved in a scrupulous manner, given the underlying assumptions of the slave system. Certainly the result was no *auto-da-fe*. Of 131 persons tried, thirty-five were found guilty and hanged; twelve more were sentenced to death, but the sentences were commuted to banishment; twenty-two others were found guilty and sentenced to transportation outside the United States; thirty-six were acquitted after trial; and prosecutions were dropped against twenty-five others.⁵⁵ Johnson's faith that his fellow citizens would come to agree with him was unfounded; evidently the only other prominent Charlestonian to express similar sentiments was his brother-in-law, Governor Bennett. According to Johnson, Bennett had been shocked when the courts allowed anonymous testimony and had asked Hayne, the Attorney-General, for an opinion. Hayne, unfortunately for Bennett, upheld the practice.⁵⁶ Bennett had also attempted to save one of his slaves, Bat-

53. *Id.*

54. D. MORGAN, *supra* note 10, at 133.

55. J. HAMILTON, JR., *supra* note 48, at 43-47.

56. Letter from Johnson to Thomas Jefferson (December 10, 1822), *reprinted in* D. MORGAN, *supra* note 10, at 138.

teau, from the gallows by an appeal to the court for delay. The court refused to entertain the appeal, however, and the slave was hanged.⁵⁷

Charleston public opinion in the aftermath of the trials pointed to a number of causes for the uprising and suggested various remedies. However, a common thread ran through almost all of the published comments: a conviction that lax treatment of slaves promoted rebellion and, consequently, a call for more stringent restrictions in the future. An anonymous pamphlet published in 1823 called for stricter moral and religious instruction for slaves and tighter control over their religious gatherings. Repeating a frequent claim that the rebellion had started in a schismatic "African Church," which had seceded from the Methodists, it stated that Episcopalian slaves had taken no part in the uprising because of the orderly and controlled nature of their worship.⁵⁸ James Hamilton, Jr., in his report, stated the revolt was caused by "misguided benevolence," which resulted in a hatred of whites and a lust for booty, spurred on by the idea of embarking for Haiti. He also shared the idea that the uncontrolled "African Church" had been involved.⁵⁹

Others thought the northern states should share some of the responsibility. While the trials were in progress, the *Southern Patriot* published an editorial blaming the affair on northern journalists and antislavery men, whose agitation over the Missouri Compromise, it claimed, had made the slaves dissatisfied.⁶⁰ Charles Cotesworth Pinckney's brother Thomas, a prominent Federalist and former Minister to Britain and Spain, published an anonymous pamphlet in which he pointed to the example of Haiti, the "Northern zeal for universal liberty," indulgence of slaves in Charleston, and the disparity in numbers between the races as the causes.⁶¹ In contrast to later southern fulminations at the North, however, he doubted that much could be done about northern opposition to slavery, since the Constitutional three-fifths compromise made the institution antithetical to northern interests. Stating that public apathy and economic realities would pose strong obstacles to any harsh measures against the hiring out and other indulgences of slaves, he declared that only an increase in the white population in proportion to the Negro would solve the problem.⁶² He therefore proposed to replace the slaves by more efficient free white

57. J. LOFTON, *supra* note 44, at 166-67; J. HAMILTON, JR., *supra* note 48, at 43.

58. A SOUTH-CAROLINIAN, PRACTICAL CONSIDERATIONS FOUNDED ON THE SCRIPTURES RELATIVE TO THE SLAVE POPULATION OF SOUTH-CAROLINA 33-37 (Charleston 1823).

59. J. HAMILTON, JR., *supra* note 48, at 29-30.

60. Charleston Southern Patriot, August 5, 1822, at 2, col. 4.

61. ACHATES (T. PINCKNEY), REFLECTIONS, OCCASIONED BY THE LATE DISTURBANCES IN CHARLESTON 6-7 (Charleston 1822).

62. *Id.* at 8-9.

labor, particularly Irish emigrants, but stated that the Negroes would have to be removed, in some undefined way, before such emigrants would consent to come.⁶³ A more ominous indictment of the North was published by Edwin C. Holland, who claimed that a plot to destroy the South had been hatched at the Hartford Convention; the Vesey incident, itself provoked by northern religious tracts, had been part of the conspiracy. Holland declared that the Union was not worth preserving unless southern rights were secured.⁶⁴

Although the trials ended in August, the pressure for new and harsher slave legislation increased throughout the fall, since the General Assembly was scheduled to convene in November. Letters to the Charleston newspapers suggested a variety of new restrictions.⁶⁵ In October, the Charleston grand jury held an inquest and recommended that sumptuary legislation directed against Negroes be adopted, that limitations be placed on the hiring out of slaves by masters, and that action be taken to end the importation of slaves from other states.⁶⁶

There was also sentiment, perhaps not surprising in view of Vesey's free status, favoring tighter restriction of free Negroes.⁶⁷ This class of people had long been regarded as *sui generis*, occupying a position between freedom and slavery but closer to the latter.⁶⁸ Most southern states prohibited them from owning other slaves, bearing arms, training with the militia, or engaging in any learned profession.⁶⁹ Many southerners regarded them as an irritant, believing that even their limited freedoms might excite envy and rebellion among the enslaved.⁷⁰

The laws of South Carolina reflected this attitude by imposing substantial disabilities upon free Negroes. They could not testify in the superior courts, nor in the inferior courts except without oath and against other Negroes. They were triable before the slave courts in the

63. *Id.* at 10-16.

64. E. HOLLAND, A REFUTATION OF THE CALUMNIES CIRCULATED AGAINST THE SOUTHERN AND WESTERN STATES REFLECTING THE INSTITUTION AND EXISTENCE OF SLAVERY 9-12 (Charleston 1822).

65. See, e.g., "Rusticus", Charleston Southern Patriot, September 12, 1822, at 2, col. 4, calling for sumptuary laws; "Hale", *id.*, September 19, 1822, at 2, col. 5, decrying Bennett's pardon of some convicts and calling for an end to the power of the governor to pardon those convicted of insurrection; "Experience", *id.*, July 19, 1822, at 2, col. 4, urging an end to the hiring out of slaves and regulation of saloons frequented by Negroes.

66. J. LOFTON, *supra* note 44, at 186, 269.

67. In fact, however, free Negroes were hardly involved at all in the Vesey affair. Only four of the 131 persons arrested in connection with it were free, including, of course, Vesey himself. J. HAMILTON, JR., *supra* note 48, at 43-47.

68. T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 314-16 (Savannah 1858).

69. 1 J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 249-300 (Boston 1858); W. GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE 353-71 (New York 1853).

70. S. MORISON, *supra* note 3, at 506.

same manner as slaves. They were not allowed to carry weapons without special permission and were liable to a poll tax. No free Negro, however provoked, was allowed to strike a white.⁷¹ Furthermore, the state had over the years placed increasingly stringent restrictions upon the entry of free Negroes and upon manumission. An act of 1794, declaring that free Negroes presented a threat of insurrection, prohibited their entry into the state and declared that those entering would be expelled. This statute, renewed in 1800, was obviously not too stringently enforced, for in 1819 the House of Representatives resolved that the "future introduction" of free Negroes should be stopped.⁷² More ominous was the increasing disfavor of manumission and consequent decline in the number of slaves freed in the state. In 1820, the General Assembly prohibited all emancipation of slaves except by its own edict; no longer could an owner free slaves by will or by deed, as he could dispose of other property.⁷³ The state courts construed this statute very stringently against manumission.⁷⁴ The effect in later antebellum times was substantial; in 1850, only two slaves were officially manumitted in the state.⁷⁵

This darkening picture was not totally unrelieved; free Negroes continued to live in the state and sometimes, like Denmark Vesey, to prosper. There was even an occasional official recognition that this class of people, though black, was not utterly devoid of rights. In 1832, the state's highest court held that a free Negro could bring an action for assault and battery against a white. Free Negroes, stated the court, though without political rights, possessed both civil and natural rights and, therefore, could sue in such cases. The Court of Errors delivered a similar holding in 1843.⁷⁶ Nonetheless, the position of free Negroes in South Carolina after 1822 grew generally worse, and one of the principal legal setbacks to that position was the laws of the General Assembly of that year.

71. J. O'NEALL, *THE NEGRO LAW OF SOUTH CAROLINA* 13-16 (Columbia 1848); H. HENRY, *supra* note 39, at 180.

72. Charleston Southern Patriot, December 3, 1819, at 2, col. 3.

73. H. HENRY, *supra* note 39, at 179.

74. *Frazier v. Frazier*, 11 S.C. Eq. (2 Hill Eq.) 304 (1835); *Carmille v. Administrators of Carmille*, 27 S.C.L. (2 McMul.) 454 (1839). *But see* Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Judge John Belton O'Neill*, 21 S.C.L. REV. 141, 154-66 (1969).

75. M. WIKRAMANAYAKE, *A WORLD IN SHADOW: THE FREE BLACK IN ANTEBELLUM SOUTH CAROLINA* 45 (1970) (citing *COMPENDIUM OF THE SEVENTH CENSUS OF THE UNITED STATES* 64 (J.D.B. DeBow ed.)).

76. *State v. Harden*, 29 S.C.L. (2 Speers) 151 (1832); *State v. Hill*, 29 S.C.L. (2 Speers) 150 (Ct. Errors 1843).

III. *ELKISON V. DELIESSLINE*A. *Legislative Reaction*

In November, 1822, the General Assembly met at Columbia, South Carolina, clearly in a mood for restrictive modification of the Negro laws. This feeling was not abated by Governor Bennett, who provoked an uproar when, in his second message to the Assembly, he maintained that the Charleston courts had usurped the state's judicial power (since they were organized under municipal authority), that the public and judicial reactions were over-violent, and that better enforcement of old laws, not new ones, was needed. Bennett defended his controversial commutation of several of the death sentences, stating "the exercise of mercy was at once consistent with duty and policy," and proclaiming, despite unfair public criticism, he had "loved justice and done mercy before God."⁷⁷

Whatever influence Bennett might otherwise have had was vitiated by the fact that his term in office was expiring. A few days later, the Assembly elected John L. Wilson as Governor; Wilson's views were much closer to those of the majority.⁷⁸

The Assembly proceeded to amend the old slave code with some stringent new provisions. Free Negroes who departed the state were prohibited from returning under penalty of being sold into slavery, and heavy taxes and guardianships were required of most free arrivals.⁷⁹ The hiring out of male slaves was prohibited.⁸⁰ Most important for the future history of the state, however, and most productive of controversy, was the Negro Seamen Act.⁸¹ The statute was based on the premise that South Carolina slaves might be polluted with seditious doctrines carried into the state by free seamen, whose exposure to many countries and cultures was expected to make them less amenable to the *status quo*. Although no seamen were implicated in the Vesey conspiracy (save Vesey himself, who had not gone to sea for over thirty years), and there was no evidence that free seamen were actually spreading sedition, the Assembly approved it.⁸² In view of its impor-

77. Bennett, *Message of December 6, 1822*, Charleston Southern Patriot, December 13, 1822, at 2, col. 1.

78. The vote was fairly close, Wilson defeating the Federalist Benjamin Huger by 83 votes to 72. Wilson was a planter from Georgetown, the author of books on the rules of gambling and dueling; he later sat in the Nullification Convention. E. REYNOLDS & J. FAUNT, BIOGRAPHICAL DIRECTORY OF THE SENATE OF THE STATE OF SOUTH CAROLINA 336 (1964); P. Wild, *supra* note 42, at 47; J. LOFTON, *supra* note 44, at 190-97.

79. Act of Dec. 21, 1822, ch. 3, §§ 1, 2, 7, 1822 S.C. Acts 11, 11-13.

80. *Id.* § 6.

81. *Id.* § 3.

82. Evidently the passage of the Seamen Act through the General Assembly was not without dissension. The Charleston Southern Patriot reported on December 20, 1822, that it had passed the House, but was considered doubtful in the Senate. Charleston Southern Patriot, December 20,

tance to the subject, the relevant section warrants quotation in full:

. . . [I]f any vessel shall come into any port or harbour of this state, from any other state or foreign port, having on board any free negroes or persons of colour, as cooks, stewards, mariners, or in any other employment on board the said vessel, such free negroes or persons of colour shall be liable to be seized and confined in gaol, until said vessel shall clear out and depart from this state: and that when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro, or free person of colour, and to pay the expenses of his detention; and in case of his neglect or refusal to do so, he shall be liable to be indicted; and on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes or persons of colour shall be deemed and taken as absolute slaves, and sold. . . .⁸³

Chapter 4 of the Act gave the sheriff a share of the proceeds of the sale of the seamen into slavery, if the prosecution were commenced by his information.⁸⁴

Such a statute would obviously not be enforced without controversy. It was one thing for the state to pass laws, such as that respecting the hiring out of slaves, which affected only her population, but quite another to regulate entry into a busy port such as Charleston. Both American and foreign ships carried free Negroes aboard, and their operations would obviously be affected. As such controversy was, indeed, soon to erupt and to find its way into the British Foreign Office, into the State Department, and into Justice Johnson's court, an examination of the somewhat cloudy state of the relevant law in 1822 is in order.

The Constitution, while nowhere employing the term, clearly recognized the existence of slavery.⁸⁵ The only specific grant of power to Congress in the area was couched in negative terms; it provided, in essence, that no act suppressing the slave trade could be passed prior to 1808.⁸⁶ In 1803, Congress had passed an act prohibiting the importation of Negroes into any state forbidding such importation.⁸⁷ Since the power of the states to regulate slavery within their boundaries was essentially uncontested, a strong theoretical case could have been made for the legitimacy of the Seamen Act, particularly if the tenth amendment's reservation of nondelegated powers to the states had been read broadly.⁸⁸ It could have been maintained, first, that the states had not,

1822, at 2, col. 3. On December 24, the same paper reported its passage, without further comment. *Id.*, December 24, 1822, at 2, col. 3.

83. Act of Dec. 21, 1822, ch. 3, 1822 S.C. Acts 11, 12.

84. *Id.*

85. *E.g.*, U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3.

86. *Id.* art. V.

87. Act of Feb. 28, 1803, ch. 10, 2 Stat. 205.

88. U.S. CONST. amend. X.

in ratifying the Constitution, intended to give up the power to exclude certain classes of persons, and that the power remained theirs under the tenth amendment; secondly, it could have been argued that, even if Congress possessed any power in the area, the Act of 1803 expressed a national policy in favor of such state regulation.

On the other hand, the Constitution also expressly granted to Congress the power "To regulate Commerce with foreign Nations, and among the several States. . . ."⁸⁹ A state law, like the Seamen Act, was arguably a regulation of such commerce, insofar as it touched upon ships from other states or nations. In 1822, the scope of Congress' power under the commerce clause was not clear; the Supreme Court had not yet addressed the question. There were, however, some intimations, both in the ratification debates and in case law.

Alexander Hamilton, in *The Federalist*, had attempted to delineate the areas in which Congress' power over interstate commerce would be exclusive, on the one hand, or concurrent with the states, on the other. His reading was fairly restrictive. Congress had exclusive power to regulate commerce only: (1) where there was an exclusive delegation in the Constitution; (2) where there was an explicit denial of the power to the states; (3) where the exercise of the power by the states would be "absolutely and totally contradictory and repugnant" to its exercise by Congress.⁹⁰ The Supreme Court, in contrast, had given an expansive reading of national power in *McCulloch v. Maryland*,⁹¹ upholding the doctrine of "implied powers," and casting serious doubt upon the proposition that any congressional power (including commerce) was restricted in its boundaries to the explicit words of the Constitution. A stronger intimation of the Court's inclinations on the commerce power came when President Monroe, after vetoing the Maysville Turnpike Bill, asked the Justices for an advisory opinion on the constitutionality of such internal-improvement legislation. Ignoring the Court's fixed precedent against such opinions,⁹² the Justices replied through Johnson that *McCulloch* committed the Court to the constitutionality of such legislation, and hence, impliedly, to a broad view of the commerce power.⁹³

Another potential legal issue in the situation involved treaty rights. The United States had negotiated commercial conventions with several

89. *Id.* art. I, § 8, cl. 3.

90. THE FEDERALIST No. 32, at 241-44 (A. Hamilton) (B. Wright ed. 1961).

91. 17 U.S. (4 Wheat.) 316 (1819).

92. See Correspondence of the Justices (1793), in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-66 (1973); 1 C. WARREN, *supra* note 20, at 105-11.

93. Schroeder, *The Life and Judicial Work of Justice William Johnson, Jr.*, 95 U. PA. L. REV. 344, 362 (1947).

nations, most notably with Great Britain in 1815. The British convention provided that the inhabitants of the two nations should have "liberty freely and securely to come with their ships and cargoes . . . to enter into the same, and remain and reside in any parts of the said territories . . . and generally . . . [to] enjoy the most complete protection and security for their commerce." It also recited that its provisions were subject to the laws of the contracting countries, a clause which assumed importance in the controversy following *Elkison*.⁹⁴ Enforcement of the state's law against seamen on foreign vessels would certainly raise questions as to the relative power of the state, on the one hand, and the United States, acting in pursuance of the treaty-making power, on the other. While the Constitution explicitly made treaties part of the supreme law of the land,⁹⁵ there was little or no case law on the subject, and the question was thus open to controversy, especially in view of the relative effect of the Act of 1803, also part of that supreme law.⁹⁶

Finally, there existed in 1822 one unclear judicial precedent. On circuit in Virginia in 1820, Chief Justice Marshall had construed the 1803 Act as inapplicable to a Virginia statute similar to South Carolina's.⁹⁷ This was done by reading the state statute so narrowly that it did not exclude the Negroes in question; since it did not exclude them, the federal law did not come into operation.⁹⁸ This case was more illustrative of Marshall's desire to tread lightly in the sensitive area of slavery than it was a strong constitutional precedent.⁹⁹ In summary, then, in 1822 there existed a confusing body of law, which was used to buttress both sides of an argument having major constitutional dimensions.

B. *Diplomatic Minuet*

The first confrontations over the Negro Seamen Act were in fact political and diplomatic, not judicial. Enforcement of the Act commenced early in 1823. The first recorded victims of the new policy were Andrew Fletcher and David Ayres, steward and cook on a coastal packet plying the Charleston-Savannah route. The packet's master, Jared Bunce, petitioned the state court to release them on *habeas corpus*. The court granted the writ, but the sheriff's return stated that the men were held by authority of the Act. Bunce then moved for a discharge of

94. Morgan, *Justice William Johnson and the Treaty-Making Power*, 22 GEO. WASH. L. REV. 187, 191 (1953).

95. U.S. CONST. art. VI, cl. 2.

96. *Id.*

97. *Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846).

98. *Id.* at 243-45.

99. 2 C. WARREN, *supra* note 20, at 83-84.

the men, on the ground that the Act was unconstitutional. The court refused, holding that it was constitutional. Bunce appealed to the Constitutional Court which, after some hesitation, upheld the Act.¹⁰⁰ By that time, many other ship captains were in Bunce's position—one had his ship left entirely untended when all his hands were arrested—and, on February 7, 1823, while Bunce's case was before the Constitutional Court, forty-one of them petitioned Congress for relief. Their petition claimed that the Act was unconstitutional because it destroyed the "liberty of freemen," and because it interfered with free navigation, thereby violating the commerce clause.¹⁰¹ Representative John Sergeant of Pennsylvania introduced the petition in the House of Representatives. It was referred to the House Judiciary Committee, which took no action on it.¹⁰² The immediate controversy was defused, however, when Justice Johnson, through the United States District Attorney, prevailed upon the state authorities to release the imprisoned men.¹⁰³

Further trouble was not long in coming, however, and it was complicated by the fact that the next men seized, five in number, were British subjects on British ships. Stratford Canning, the British minister in Washington, protested this action vigorously to Secretary of State John Quincy Adams, both on the basis of international law and on the 1815 commercial treaty between the nations. Describing the enforcement of the Act as "reprehensible" and the treatment of British subjects under it as "grievous and extraordinary," Canning left no doubt that he intended Adams to take action to prevent the enforcement of the Act in the future.¹⁰⁴ To the British, the South Carolina law was an obvious violation of the treaty's provision allowing British subjects "liberty . . . to come . . . to enter . . . and to remain and reside" in American territory.

Adams sought out James Hamilton, Jr. and Joel Poinsett, Representatives from South Carolina. While Hamilton (who was also Intendant of Charleston) was noncommittal, Poinsett, who was an intimate of Justice Johnson's, gave sufficient assurances to Adams to enable the latter to reply to Canning on June 17, 1823, stating that the United States had removed the cause of the aggravation:

100. In an apparently unpublished opinion. See generally *Memorial of Sundry Masters of American Vessels Lying in the Port of Charleston*, 17th Cong., 2d Sess. 1-4 (February 19, 1823) [hereinafter cited as *Memorial of Sundry Masters*]. Johnson later claimed that three judges had dissented. *Charleston Mercury*, September 5, 1823, at 2, col. 1.

101. *Memorial of Sundry Masters*, *supra* note 100, at 4.

102. 40 ANNALS OF CONG. 1056 (1823).

103. Schroeder, *supra* note 93, at 363. See *Elkison v. Deliesseline*, 8 F. Cas. 493, 493-94 (C.C.D.S.C. 1823) (No. 4,366).

104. Letter from Canning to Adams (February 15, 1823), reprinted in H.R. REP. NO. 80, 27th Cong., 3d Sess. 10 (1843).

I have the honor of informing you that immediately after [your letter's] reception measures were taken by the government of the United States for effecting the removal of the cause of complaint set forth in it, which, it is not doubted, have been successful, and will prevent the recurrence of it in the future.¹⁰⁵

For several months thereafter, the Charleston authorities took no action to enforce the Act,¹⁰⁶ and the British temper cooled. The respite, however, was to prove a deceptive one.

C. *The Case and the Opinion*

This temporary lull in affairs came to an abrupt end in late July. The fear of foreign sedition and consequent insurrection which produced the Seamen Act remained very much alive in the white populace of Charleston. On July 24, a group of influential Charlestonians held a public meeting and formed the South Carolina Association, a society dedicated to the strict enforcement of the Negro laws.¹⁰⁷ Pressure for enforcement of the Seamen Act was brought to bear on the responsible officials, who, after the squabbles of the spring, seemed to have been willing to let the matter lie. However, the influence of this well-organized group, which included some prominent Charlestonians, was evidently too great and enforcement began anew.¹⁰⁸

In early August, Sheriff Francis G. Deliesseline of Charleston went aboard the British vessel *Homer*, then in Charleston harbor, and took off Henry Elkison, a Jamaica-born British subject.¹⁰⁹ Elkison, in accordance with the statute, was lodged in the local jail. The British consul at once conferred with Justice Johnson, who was holding circuit court in Charleston at the time.¹¹⁰ The consul showed Johnson a copy

105. Letter from Adams to Canning (June 17, 1823), *id.* at 11. Benjamin F. Hunt later claimed that Hamilton had told him that nothing had transpired which authorized Adams to assure Canning that the arrest of seamen would not continue. However, the fact remains that enforcement of the Act was suspended for a time. B. HUNT, THE ARGUMENT OF BENJAMIN 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 DECEMBER 1822, IN RELATION TO NEGROES, BEFORE THE HON. JUDGE JOHNSON, CIRCUIT JUDGE OF THE UNITED STATES, FOR 6TH CIRCUIT 2 (Charleston 1823).

106. J. LOFTON, *supra* note 44, at 198-201; D. MORGAN, *supra* note 10, at 193.

107. Charleston Southern Patriot, July 28, 1823, at 2, col. 4. A newspaper advertisement from the Association stated that its objectives were to assist in the execution of the laws, to keep the city quiet, to correspond with like-minded persons throughout the state, and to "restrain the licentiousness of our slaves in their language and manners in the streets . . ." Charleston City Gazette, July 29, 1823, at 2, col. 3. See also "Marion", *id.*, August 1, 1823, at 2, col. 6.

108. W. FREEHLING, PRELUDE TO CIVIL WAR 113 (1966).

109. The *Homer* had arrived in Charleston, 63 days out of Liverpool, on the afternoon of July 23. Charleston Southern Patriot, July 24, 1823, at 2, col. 6. Thus approximately one and one-half weeks elapsed before Elkison's arrest, a circumstance which lends additional weight to Johnson's belief that the officials were not eager to become embroiled again in diplomatic controversy.

110. Justices of the Supreme Court were expected, as part of their duties, to ride circuit and try cases along with the federal judges appointed within the various geographical circuits. Thus a Justice could find himself sitting in judgment on an appeal from his own decision. While the

of Adams' June 17 letter to Canning, and stated that he regarded it as a pledge which must now be redeemed.¹¹¹ Thereafter, a local attorney named King was retained and an action brought in Johnson's federal court, praying for Elkinson's release on *habeas corpus* or, in the alternative, on a writ *de homine replegiando*. King's motion was clearly intended to draw the validity of the statute into issue.¹¹² The stage was set for a trial on the issues of law which, in a wider context, formed a major part of American jurisprudence for decades, and which, as political questions, were the most inflammatory in the nation's history.

Elkinson was argued before Johnson in early August, and he rendered his decision on August 7. Elkinson's counsel, King, appears to have argued, without a great deal of elaboration, that the Act was invalid as an infringement on the commerce clause and the treaty with Great Britain.¹¹³ Although the constitutionality of the state statute was drawn into question, no counsel appeared for the state. Instead, two prominent Charleston attorneys, Benjamin F. Hunt and Isaac E. Holmes, argued the case as counsel for the South Carolina Association. Their presence strongly emphasized the importance of this private group in bringing affairs to this pass and lent additional credence to Johnson's belief that the local authorities found the Seamen Act troublesome and preferred to "let it sleep."¹¹⁴

Hunt's argument for the statute's validity was elaborate and ingenious. He first addressed the substantive power of the state to pass such a law. South Carolina, said Hunt, was sovereign prior to the ratification of the Constitution and, thus, possessed all the attributes of sovereignty, including the right to exclude whom it pleased. Because of the particular circumstances of slavery, the state could not have intended to give up the right to pass such laws.¹¹⁵ Drawing a distinction which has continued in American jurisprudence to the present day, Hunt argued that the Act was not a regulation of commerce, but an exercise of local police power, like a quarantine. The law merely "prescribes the manner in which the commerce regulated by the Congress should be carried on."¹¹⁶ South Carolina did not object when New York quarantined its

custom was for such a Justice to recuse himself, there was no formal requirement for it. This unwieldy system, although frequently criticized, survived until the introduction of the Circuit Courts of Appeals in 1891. Act of March 3, 1891, ch. 517, 26 Stat. 826.

111. Greenberg, *Justice William Johnson: South Carolina Unionist*, 36 PA. HIST. 307, 310 (1969).

112. *Elkinson v. Deliesseline*, 8 F. Cas. 493, 493 (C.C.D.S.C. 1823) (No. 4,366).

113. D. MORGAN, *supra* note 10, at 193.

114. *Elkinson*, 8 F. Cas. at 494. The Association had earlier expressed an intention to undertake prosecutions under the Negro laws at its own expense. *A Member*, Charleston Courier, July 24, 1823, at 2, col. 4.

115. B. HUNT, *supra* note 105, at 4-12.

116. *Id.* at 12.

ships for yellow fever, although South Carolina did not believe in the contagion theory. In the final analysis, both New York's disease quarantine and South Carolina's racial one were legitimate exercises of the police power, founded on the inalienable right of self-preservation.¹¹⁷

Nor did the treaty with Britain impair the state's right to make such a law, argued Hunt. An ambassador making a treaty for the United States was, in effect, an attorney for the states and had only such powers as the states delegated to him. The right of self-preservation being inalienable, South Carolina had not delegated it to the United States for treaty purposes. Moreover, Hunt argued, the reservation for the law of the contracting parties settled the question anyway. The treaty power, like all other delegated powers, was subject to the Constitution and could not invade those rights reserved to the states and to the people under the tenth amendment. The substantive conclusion was clear to Hunt—the state's law was legitimate and constitutional.¹¹⁸

In this part of his argument, Hunt constructed an internally consistent view of the Union as a government of strictly limited delegated powers. While not denying that the United States possessed some implied powers, he restricted them to those *strictly necessary* to the exercise of delegated powers.¹¹⁹ The proposition that the states retained all the powers not expressly delegated to the national government or necessary thereto was a logical corollary of this position. Nonetheless, the broad nationalism recently espoused by the Supreme Court in *McCulloch* raised questions as to the validity of Hunt's states' power proposition.

The substantive arguments did not exhaust Hunt's arsenal. He moved on to a procedural argument, attacking the court's jurisdiction to grant the relief requested. The Court could not issue *habeas corpus*, he stated, because the prisoner was held under state, not federal, authority, and only a state court could grant the writ. The ancient writ *de homine replegiando*¹²⁰ could not issue either, he maintained; it was requested against the sheriff, and, since the sheriff was acting as an agent of the state, it was in essence a suit against the state, and hence barred

117. *Id.* at 13-14.

118. *Id.* at 14-17.

119. *Id.* at 12.

120. This writ, in English law, lay to order a sheriff to deliver a prisoner on bail, unless he was taken at the King's special command, or for one of a few irreplevisable offenses. It was essentially the process of replevin, adapted to freeing a person from imprisonment, and could ordinarily be obtained as a matter of course from the Chancellor. It differed from *habeas corpus* substantively in that the release was on bail, rather than unconditionally. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 585 (2d ed. 1898); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (1st ed. 1926); 3 *id.* 497 (3d ed. 1923); 4 *id.* 526 (2d ed. 1937).

by the eleventh amendment.¹²¹ Moreover, the Judiciary Act of 1789 required that the forms of writs in a federal court be the same as in the courts of the state in which the court sat. Since Elkison was a Negro, he could not bring *de homine replegiando* in South Carolina; he could only sue in ravishment of ward, the medieval remedy for damage done to a lord's serf or ward.¹²²

Hunt stood on fairly firm ground in his procedural argument, at least as to *habeas corpus*.¹²³ In granting the federal courts power to issue writs in aid of their jurisdiction, the Judiciary Act of 1789, had specifically limited *habeas corpus* to prisoners held by federal authority.¹²⁴ The courts had concurred in this limitation.¹²⁵ Congress would not, in fact, grant federal courts a general *habeas corpus* power over state prisoners until 1867.¹²⁶ The eleventh amendment question on *de homine replegiando* was more difficult, but Hunt's position was quite arguable, in view of the constitutional language.¹²⁷

Holmes' argument was brief and to the point; rather than see the state give up the power to exclude whom it chose, he preferred a dissolution of the Union. Johnson, shocked, recorded his own reaction: "Everyone saw me lay down my pen, raise my eyes from my notes, and fix them on the speaker's face. He still proceeded, and in a style which bore evidence of preparation and study."¹²⁸

The case had attracted wide attention, and before a crowded courtroom Johnson read his decision on August 7. After stating the facts at some length and describing, as a diplomatic aside for Britain's benefit,¹²⁹ the private rather than state efforts to enforce the statute, Johnson dropped his bombshell on the commerce question.

On the unconstitutionality of the law under which this man is confined, it is not too much to say, that it will not bear argument . . . it is a subject of positive proof, that it is altogether irreconcilable with the powers of the general government; that it necessarily compromises the public peace, and tends to embroil us with, if not separate us from, our sister states; in short, that it leads to a dissolution of the Union, and

121. U.S. CONST. amend. XI; B. HUNT, *supra* note 105, at 18-21. See also Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822-1848*, 1 J.S. HIST. 3, 6 (1935).

122. B. HUNT, *supra* note 105, at 21.

123. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

124. *Id.* at 81, § 14.

125. *E.g., Ex parte Cabrera*, 4 F. Cas. 964 (C.C.D. Pa. 1805) (No. 2,278).

126. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

127. This question was not settled until 1908, when it was determined that such an action against a state officer was not barred by the eleventh amendment. *Ex parte Young*, 209 U.S. 123 (1908). For earlier, but post-Elkison decisions on the subject, see *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Sundry African Slaves v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828).

128. D. MORGAN, *supra* note 10, at 193-94.

129. *Elkison v. Deliesseline*, 8 F. Cas. 493, 494 (C.C.D.S.C. 1823) (No. 4,366).

implies a direct attack upon the sovereignty of the United States.¹³⁰ With this pungent statement, Johnson showed himself bold and prescient. He grasped at once the irreconcilable conflict implicit in Hunt's elaborate construction and explicit in Holmes' straightforward statement, and the danger such conflicts portended.

Johnson's substantive analysis first resorted to *reductio ad absurdum* to show the possible scope of the statute:

But if this state can prohibit Great Britain from employing her colored subjects . . . or if at liberty to prohibit the employment of her subjects from the African race, why not prohibit her from using those of Irish or Scottish nativity? If the color of his skin is to preclude the Lascar or the Sierra Leone seaman, why not the color of his eye or hair exclude from our ports the inhabitants of her other territories? In fact it amounts to an assertion of the power to exclude the seamen of . . . any . . . nation, altogether.¹³¹

Declaring that such an assertion would be utterly incompatible with the commerce power, Johnson explained the particulars of the conflict:

The seaman's offense, therefore, is coming into the state in a ship or vessel; that of the captain consists in bringing him in, and not taking him out of the state, and paying all expenses. Now, according to the laws and treaties of the United States, it was both lawful for this seaman to come into this port, and for the captain to bring him in . . .; and yet these are the very acts for which the state law imposes these heavy penalties. Is there no clashing in this? It is in effect a repeal of the laws of the United States, pro tanto, converting a right into a crime.¹³²

There was thus no room for any state regulation of interstate or foreign commerce, concurrent with Congress or otherwise.

[T]he right of the general government to regulate commerce . . . is a paramount and exclusive right. . . . It is true that [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, leaving nothing for the states to act upon.¹³³

After this bold assertion, especially notable as one of the first judicial constructions of the clause, Johnson turned to the question of the treaty. The constitutional question was quickly disposed of; treaties were expressly part of the supreme law of the land and, thus, superior to state law.¹³⁴ No unilateral legislative act could vary the terms of a treaty, only the agreement of the parties themselves.¹³⁵ To the argu-

130. *Id.*

131. *Id.*

132. *Id.* at 495.

133. *Id.*

134. U.S. CONST. art. VI, cl. 2. *Cf.* *Missouri v. Holland*, 252 U.S. 416 (1920).

135. *Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4,366).

ment that necessity and self-preservation superseded all treaty obligations, the Justice had a stinging retort:

Where is this to land us? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure? If it can be done as to any particular article, it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand.¹³⁶

The substantive section of the opinion closed with a lengthy dictum which attacked the Act's efficacy to accomplish its purpose, suggesting that the state's interest in public order could be satisfied by merely requiring that Negro seamen remain aboard ship while in Charleston, rather than being jailed and threatened with sale. Johnson drew a distinction between seamen and merchants or masters, holding that the freedom of trade guaranteed by the treaty of necessity required that the latter be allowed free access to the city, while doubting that it required the same for mariners themselves.¹³⁷ He warned the city that the continued holding of presumably seditious seamen in the state, as prisoners in jail or as slaves, would only aggravate the spread of inflammatory doctrines. Merely excluding them would be more effective and less objectionable constitutionally.¹³⁸

Having thus disposed of the substantive issues, the Justice turned to the prickly problems of jurisdiction. Elkison's attorney had admitted that the Judiciary Act of 1789 precluded the issue of *habeas corpus*, unless the restrictive section of that Act could be said to violate the constitutional guarantee of the writ,¹³⁹ or unless a prisoner held under an unconstitutional state statute could be deemed not to be in confinement *under state authority*. Johnson, who had long taken a rather restricted view of federal *habeas corpus*,¹⁴⁰ quickly disposed of the first contention. He held that the situation at issue was not such as was contemplated in the Constitution. After toying with the second contention, he also rejected it on the ground that the Judiciary Act required "custody under . . . the authority of the United States"¹⁴¹ for issuance of the writ. A mere absence of legitimate state authority was insufficient.¹⁴²

136. *Id.* at 496.

137. *Id.*

138. *Id.*

139. U.S. CONST. art. I, § 9, cl. 2.

140. See *Ex parte Bollman and Swartwout*, 8 U.S. (4 Cranch) 75 (1807), where Johnson dissented from the Court's grant of the writ to two of Aaron Burr's accomplices.

141. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81.

142. *Elkison*, 8 F. Cas. at 497. Here Johnson foreshadowed the eventual solution of the eleventh amendment problem raised in the case by suggesting that a person held under an unconstitutional state statute is not held "under state authority," but arbitrarily by a state officer. Eighty-five years later, the Supreme Court adopted such a formulation in a civil context, invoking the fiction that a suit against a state officer claiming unconstitutional conduct was not a suit against the state for eleventh amendment purposes. *Ex parte Young*, 209 U.S. 123 (1908).

He then turned his attention to the alternative request for the writ *de homine replegiando*. This, he held, could issue as a matter of right; it was known to the ancient law and "ingrafted . . . into the jurisprudence of South Carolina."¹⁴³ The argument that ravishment of ward was the only appropriate remedy was incorrect, since that writ applied only to slaves, and the Act was limited by its terms to freemen, who could bring *de homine replegiando*. The Justice doubted, however, that it would lie against the sheriff, although it would certainly lie against the purchaser if Elkison were sold into slavery pursuant to the Act. He left it to Elkison's counsel whether to sue out the writ.¹⁴⁴ Upon this rather ambiguous note, the opinion closed, but not without Johnson's reiterating his substantive holding: "Upon the whole I am led to the conclusion that the third clause of the act under consideration is unconstitutional and void, and the party petitioner, as well as the shipmaster, is entitled to actions as in ordinary cases."¹⁴⁵

Johnson's opinion, as might be expected of a bold departure which challenged public opinion on an exceedingly emotional issue, caused an uproar. As far as Elkison himself was concerned, it changed nothing; the local authorities ignored it, and the seaman remained in confinement.¹⁴⁶ The focus of the controversy shifted from the relatively hushed atmosphere of the courtroom to the unrestrained forum of contemporary public opinion—the press.

D. *The Newspaper Controversy*

Johnson had hoped to have his opinion appear in the Charleston newspapers; however, none would print it.¹⁴⁷ Accordingly, he had it

143. *Elkison*, 8 F. Cas. at 497. Although Hunt and Holmes had argued that the writ was obsolete, Johnson was clearly correct in this holding. While no pre-*Elkison* case issuing the writ (or, for that matter, raising the issue) is to be found, the South Carolina Constitutional Convention of 1790, while drafting the constitution which was in effect until 1865, had resolved that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses." The constitution contained a provision prohibiting excessive bail in the same general terms as the eighth amendment. The relevance of these provisions to the writ, which involved release on bail, is obvious. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, MAY 10, 1790-JUNE 3, 1790, at 29 (F. Hutson ed. 1946); S.C. CONST. of 1790, art. IX, §2.

144. *Elkison*, 8 F. Cas. at 497-498. In fact, in early English practice the writ would lie against a sheriff to procure the release of a prisoner on bail. 4 W. HOLDSWORTH, *supra* note 120, at 526 (2d ed. 1937); 9 *id.* at 105 (1st ed. 1926).

145. *Elkison*, 8 F. Cas. at 498.

146. Hamer, *supra* note 121, at 8-9. Thereafter, the master of the *Homer* paid Elkison's jail costs, and he was released. The *Homer* left Charleston, with Elkison aboard, on August 14. Charleston City Gazette, August 15, 1823, at 3, col. 1.

147. See Charleston Mercury, August 18, 1823, at 2, col. 1., arguing that the opinion was too long, that it was already published as a pamphlet, and that those wishing to learn its contents from the newspaper could do so by reading the attacks of "Carolinensis" on it! See also Charleston City Gazette, September 12, 1823, at 2, col. 5, a statement evidencing substantial vacillation by this paper on the question of publication.

published as a pamphlet. On August 11, he sent a copy to Thomas Jefferson with a letter expressing his shock and dismay at the virulent controversy and its danger to the Union:

That greatest of Evils Disunion, appears to be losing its Terrors. My Ears are shocked at Times by Expressions that I hear on this subject. . . . I hope there may be temperate Men enough among them to control the furious Passions and false Policy which govern most of them. . . . If it be true that 'quem Coelum perdere vult prius dementat' I have received a warning to quit this City. I fear nothing so much as the Effects of the persecuting Spirit that is abroad in this Place. Should it spread thro' the State & produce a systematic policy founded on the ridiculous but prevalent Notion—that it is a struggle for Life or Death, there are no Excesses that we may not look for—whatever be their Effect upon the Union.¹⁴⁸

News of Johnson's opinion was widely reported by both northern and southern newspapers. The Washington *National Intelligencer* reprinted the opinion in full.¹⁴⁹ The New York *Commercial Advertiser* praised the opinion as an exposition of the privileges and immunities clause of the Constitution but questioned whether other states would take freed slaves from South Carolina.¹⁵⁰ The *Franklin Gazette* of Philadelphia and the New York *American* also reported favorably on the opinion.¹⁵¹ In the South, the Columbia *Telegraph* carried letters attacking the opinion,¹⁵² and the New Orleans *La Courier* reported the controversy in both English and French.¹⁵³ However, prolonged and vituperative controversy over the affair was limited to the Charleston newspapers.

Attacks on Johnson and on his decision began within a few days after its rendition and continued for some two months; the published expressions of opinion were uniformly unfavorable. Johnson engaged in controversy with two principal opponents and a number of minor ones, a controversy which, while it produced much *ad hominem* invective, also illuminated some of the implications of the Justice's position.

The first of Johnson's two principal opponents was "Caroliniensis," a pseudonym for the joint efforts of Isaac Holmes and Robert J. Turnbull, secretary of the South Carolina Association and one of the judges on the first Vesey court.¹⁵⁴ In thirteen letters to the *Charleston*

148. Letter from Johnson to Thomas Jefferson (August 11, 1823), reprinted in D. MORGAN, *supra* note 10, at 193.

149. Washington *National Intelligencer*, September 8, 1823, at 2, col. 1.

150. Charleston City Gazette, August 25, 1823, at 2, col. 4. See U.S. CONST. art. IV, § 2, cl. 1.

151. See Charleston City Gazette, August 25, 1823, at 2, col. 4.

152. "Civis," reprinted in Charleston Courier, September 11, 1823, at 2, col. 1; *id.*, September 15, 1823, at 2, col. 5.

153. New Orleans La Courier, September 15, 1823 (English); New Orleans Courier de la Louisiane, September 17, 1823 (French).

154. D. MORGAN, *supra* note 10, at 197.

Mercury, "Caroliniensis" upheld a strict doctrine of state sovereignty, narrowly construing the commerce and treaty-making powers and holding the federal government to be only an agent of the state, which could disregard its acts if they were beyond its expressly-delegated powers.¹⁵⁵ The writers repeatedly attacked Johnson for the "extrajudicial" and "unnecessary" character of his constitutional decision and for his "betrayal" of his native state by the publication of the opinion, which provoked outside criticism of South Carolina's policy. The Justice, maintained the writers, should have passed by the constitutional question silently rather than inflame public opinion and irritate the citizens of his own state.¹⁵⁶ These political and policy arguments were mixed with a good deal of personal abuse, accusing Johnson of "libels on our jurisprudence," of "cruel and ingenuous conduct" toward Holmes as an attorney, and of twice holding the state "up to odium"—the first time being the Vesey trials.¹⁵⁷

Johnson at first restrained his natural pugnacity, writing only one letter over his own name, in which he refuted an assertion that he had in his opinion misrepresented Holmes' statement regarding dissolution of the Union. The letter closed with a dismissal of "Caroliniensis," stating that only this accusation "shall ever give me a thought."¹⁵⁸ However, five days later he rejoined the fray with the first of a series of letters defending his views, under the pseudonym "Philonimus."¹⁵⁹ "Philonimus" answered "Caroliniensis'" charges of extrajudicial action, maintaining that it was necessary for him to examine the constitutionality of the Act, since it was the leading question of the case, and an opinion favorable to the Act would have disposed of Elkison's pleas then and there. Johnson eloquently pointed to the common law's regard for individual liberty, stating that the judiciary must interpose itself between the individual and the misguided power of the state. He decried the de facto censorship of his opinion by the newspapers, stating that George Washington, if he were present, would not approve of such tactics.¹⁶⁰ In later replies to "Caroliniensis," he engaged in *ad hominem* attacks of his own, claiming that "Caroliniensis" was dishon-

155. "Caroliniensis" appeared in the Charleston Mercury from August 15 to September 11, 1823, and was later published in pamphlet form.

156. "Caroliniensis," Charleston Mercury, August 15, 1823, at 2, col. 2; *id.*, August 22, 1823, at 2, col. 1; *id.*, August 23, 1823, at 2, col. 1.

157. *Id.*, August 16, 1823, at 2, col. 1; *id.*, August 20, 1823 at 2, col. 2; *id.*, September 11, 1823, at 2, col. 1.

158. Letter from Johnson to Charleston Mercury, *id.*, August 21, 1823, at 2, col. 1.

159. "Philonimus," *id.*, August 26, 1823, at 2, col. 1. Johnson claimed that "Philonimus" meant "the defender of a good name"—an etymology which local Latinists argued at some length. See, e.g., "Philobombos," Charleston City Gazette, September 24, 1823, at 2, col. 6.

160. "Philonimus," Charleston Mercury, August 26, 1823, at 2, col. 1; *id.*, August 27, 1823, at 2, col. 1.

orable, not a true southerner, and a blunderer,¹⁶¹ and expressed his faith that many in the city agreed with his opinion: "There are thousands . . . which will show themselves as soon as men feel it quite as safe to speak as to think."¹⁶²

The principal substantive content of these later letters, however, was twofold. First, Johnson upheld a broad conception of the treaty-making power against the narrow "agency" construction held by his opponents. While admitting that the states had originally possessed such power as an attribute of sovereignty, he maintained that in the Constitution it had been "wholly relinquished, and vested in the general government."¹⁶³ Why had this power been totally relinquished? Because of the crucial nature and unpredictability of foreign affairs, it was thought best to leave policy-makers a great deal of flexibility. Thus, the only substantive restriction on the power was the requirement for senatorial consent. While the power was limited by the express provisions of the Constitution, it was not affected by the rights reserved to the states in the tenth amendment; the Justice listed some thirty-six treaties that had, in his opinion, restricted those rights.¹⁶⁴ The second important point was the assertion that slaves were not "articles of commerce" but were regarded by federal law as men. This point was made in response to an argument that Great Britain had never asserted, under Jay's Treaty of 1794, the right to engage in the slave trade, thereby recognizing the state's power to exclude whom it chose. Johnson's answer disposed of the immediate argument by stating the foreign slave trade was not part of the foreign commerce contemplated in that treaty. However, it foreshadowed the greater controversy over the question of slaves as articles of interstate commerce which colored later Supreme Court jurisprudence.¹⁶⁵

Johnson's other principal opponent in the controversy was an anonymous author who wrote six letters to the *Charleston Courier* under the name "Zeno." "Zeno" was a more dignified and earnest observer than "Caroliniensis," and the "Philonimus-Zeno" exchange generally maintained a higher tone than the other. "Zeno," after paying a compliment to the "stoical intrepidity" with which Johnson delivered an opinion "calculated to produce deep resentment in every mind," outlined a social contract theory in opposition to Johnson's position. Since the first great object of government was to protect the contractors—the members of the body politic—from the violence of other men, all govern-

161. *Id.*, September 8, 1823, at 2, col. 3.

162. *Id.*, September 5, 1823, at 2, col. 1.

163. *Id.*, September 11, 1823, at 2, col. 3.

164. *Id.*, September 13, 1823, at 2, col. 1; W. FREEHLING, *supra* note 108, at 113-14.

165. "Philonimus," *Charleston Mercury*, September 13, 1823, at 2, col. 1; "Caroliniensis," *id.*, September 10, 1823, at 2, col. 1.

ments had an inherent right to protect their members, a right which controlled all constitutional and statutory construction. Therefore, the commerce clause could not be construed to obstruct South Carolina's preventing the implements of commerce from being turned to its destruction. All treaties, declared "Zeno," were subject to the local laws of the parties, and all foreigners in a country were subject to its municipal laws. "Zeno" saw the South as facing an array of enemies; any relaxation of control, he maintained, would cause the free Negroes of Haiti and the North to come to the South and stir up insurrection. The North, he stated, would soon control the national government, leaving the South only the alternatives of violating the Constitution or altering it. This statement presaged the demand for positive federal protection of slavery which arose in the late 1850's.¹⁶⁶

Johnson, as "Philonimus," replied to "Zeno" in a letter full of self-justification. Claiming the controversy over his opinion was the result of a conspiracy by the South Carolina Association, the Justice made the untenable assertion that, prior to the formation of the conspiracy, the opinion "was the subject of universal applause."¹⁶⁷ After defending his intention to do his duty, regardless of the consequences, he turned to the treaty question. "Zeno's" construction, he maintained, was destructive, for what diplomat would consent to a commercial treaty which left a state free to interfere with commerce? He reiterated his own opinion that the treaty power was of necessity broad and covered the whole ground occupied by the British treaty. After taking a swipe at former nationalists who were now states' rights men, he repeated his conviction that the controversy was caused by exaggerated public fear of insurrection: "Men have worked each other up to a belief that . . . it is a case of life and death; and I wonder not at their impatience of all constitutional restraint."¹⁶⁸

"Zeno" replied with an assertion that Johnson's position would allow free northern Negroes to come to South Carolina without restriction. "Philonimus" answered by drawing a close distinction between their right to come as seamen and their right to remain, uncontrolled by municipal laws. The latter, he asserted, his opinion did not support.¹⁶⁹ "Zeno," however, was not satisfied. Pointing to the privileges and immunities clause of the Constitution, he claimed that, since Negroes were virtually citizens in some northern states, South Carolina could not constitutionally control them except by its inherent police power.

166. "Zeno," *Charleston Courier*, September 3, 1823, at 2, col. 5; *id.*, September 4, 1823, at 2, col. 5; *id.*, September 5, 1823, at 2, col. 5.

167. "Philonimus to Zeno," *id.*, September 10, 1823, at 2, col. 5.

168. *Id.*

169. "Zeno," *id.*, September 11, 1823, at 2, col. 5; "Philonimus to Zeno," *id.*, September 13, 1823, at 2, col. 4.

Indeed, "Zeno" said that if a Negro seaman has a right to come, based on an inference from the commerce clause, a Negro citizen would have a higher right, based on the express words of the privileges and immunities clause.¹⁷⁰ Johnson's answer was somewhat tortuous. He stated that the privileges and immunities clause applied only to persons who could by any possibility become citizens of the *receiving* state; since Negroes could not become South Carolina citizens, the state was not constitutionally compelled to receive them. To rule otherwise would be to allow one state to write a constitution for another. The privileges and immunities clause is simply a guarantee against citizenship in one state being made the ground of exclusion by another.¹⁷¹

The controversy with "Zeno" is of primary interest because of this argument regarding the scope of the privileges and immunities clause, which is one of the Constitution's more opaque sections. It was half a century before the Supreme Court began to answer some of the larger questions raised therein.¹⁷²

"Philonimus" provoked letters from other correspondents, most of whom wrote only one or two letters. Except for one, these were notable for scurrilous abuse rather than substantial argument.¹⁷³ The exception was a writer calling himself "Philo-Caroliniensis." After the "Caroliniensis" series had appeared, he raised the question of the federal Act of 1803's prohibition of the importation of Negroes into states forbidding it. The effect of the Act had not been raised in *Elkison* by counsel for either side, although it had been argued before Chief Justice Marshall in 1820.¹⁷⁴ "Philo-Caroliniensis" argued that the Act sanctioned and federalized state statutes like the Negro Seamen Act, thereby using Congress' commerce power to support state exclusion of Negroes. Johnson's reply was somewhat flaccid; perhaps he was tired of the whole controversy. He neither examined the Act of 1803 with regard to whether it sanctioned the exclusion of free blacks as opposed to slaves, nor considered whether the 1815 treaty repealed the Act with respect to Great Britain. Instead, he admitted that the federal act sanctioned existing and future exclusions by the state, continuing to draw his distinction between commerce and residence.¹⁷⁵ When "Philo-Caroliniensis" repeated his arguments, Johnson admitted that the Act sanctioned South Carolina's action insofar as it could, thus, tacitly call-

170. "Zeno," *id.*, September 16, 1823, at 2, col. 4; *id.*, September 25, 1823, at 2, col. 5.

171. "Philonimus to Zeno," *id.*, September 22, 1823, at 2, col. 1.

172. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

173. See, e.g., "Wabsea," *Charleston City Gazette*, September 20, 1823, at 2, col. 5; "Legion," *id.*, September 24, 1823, at 2, col. 5; *id.*, September 29, 1823, at 2, col. 5.

174. *Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846).

175. "Philo-Caroliniensis," *Charleston Mercury*, September 18, 1823, at 2, col. 1; "Philonimus to Philo-Caroliniensis," *id.*, September 26, 1823, at 2, col. 2. See also "A Southerner," *id.*, October 7, 1823, at 2, col. 1.

ing into question the commerce clause section of his opinion. He repeated his conviction that the Seamen Act violated the treaty.¹⁷⁶

With this exchange, the Charleston newspaper war finally ended. While Johnson did not always best his opponents—particularly in his rather tortured construction of the privileges and immunities clause and his treatment of the federal Act of 1803—his letters, when shorn of their invective, show him a far-sighted judicial analyst, perhaps the first, of constitutional theory in American foreign relations. His thoughts on the scope of the power and on the need for flexibility and unfettered decision-making in foreign affairs anticipate by over a century congruent Supreme Court decisions in the area and form the basis of a policy suitable for a nation far more significant in world affairs than the Republic of 1823.¹⁷⁷

Unfortunately, the newspaper controversy also revealed another fact of more immediate importance—Johnson's total lack of public support in his own city. Not one of the dozens of letters published in the newspapers following his opinion supported his position. It was left to the Justice, under his own name and as "Philonimus," to defend himself. Two of the Charleston newspapers published editorials opposing his position; the others were silent.¹⁷⁸ The Justice's often-proclaimed faith in public vindication, in the support of, as it were, a "silent majority" of Charlestonians, was a false one. South Carolina public opinion was overwhelmingly hostile to the *Elkison* doctrines. This fact would complicate all future efforts at adjustment of the situation.

IV. AFTERMATH

A. *The Diplomatic and Legislative Aftermath*

While the Charleston newspaper war sputtered to a close, the controversy over the opinion spread far beyond the borders of South Carolina. John Quincy Adams, at dinner in Massachusetts with South Carolina's Senator Robert Y. Hayne, found that distance did not cool passion on the subject: "Hayne discovered so much excitement and

176. "Philo-Caroliniensis," *id.*, September 30, 1823, at 2, col. 1; "Philonimus to Philo-Caroliniensis," *id.*, October 7, 1823, at 2, col. 4.

177. D. MORGAN, *supra* note 10, at 201. Cf. *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

178. *Charleston City Gazette*, August 5, 1823, at 2, col. 4 (defending the Seamen Act); *Charleston Mercury*, September 17, 1823, at 2, col. 1. Even the august *Washington National Intelligencer*, which published the opinion in full, editorially questioned it. *Washington National Intelligencer*, September 13, 1823, at 3, col. 1. *Id.*, September 29, 1823, at 2, col. 1. However, this paper refused to publish the "Caroliniensis" series, stating that "the temper, as well as substance, of them . . . seemed to be peculiar to the meridian in which they have appeared, being evidently influenced by . . . considerations which the public at large are not acquainted with." *Id.*, October 8, 1823, at 2, col. 5.

temper that it became painful, and necessary to change the topic."¹⁷⁹ Chief Justice Marshall, writing to Justice Joseph Story, could not resist a smirk at his colleague's discomfiture and a satisfied reflection on his own judicial avoidance of the issue in the *Wilson* case:¹⁸⁰

Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny State-Rights in South Carolina, and will find some difficulty, I fear, in getting off into smooth, open, ground. . . . You have, it is said, some laws in Massachusetts, not very unlike the principles to that which our brother has declared unconstitutional. We have its twin brother in Virginia; a case has been brought before me in which I might have considered its constitutionality, but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act. . . . The decision has been considered as another act of judicial usurpation; but the sentiment has been avowed that if this be the constitution, it is better to break that instrument than submit to the principle. . . . Fuel is continually adding to the fire at which *exaltees* are about to roast the judicial department.¹⁸¹

The focus of affairs shifted back to the diplomatic arena, as diplomacy again tried to resolve matters among the prickly state, the federal government, and Great Britain.

After Johnson's opinion had failed to secure Elkinson's release, Henry U. Addington, the British charge in Washington, turned to Secretary of State Adams.¹⁸² Embarrassed by South Carolina's response to his previous assurances, Adams stated that indirect measures to effect modification of the law would be the best method; however, the United States would have to assert its authority if the state proved contumacious. Addington was impressed by Adams' arguments and wished to avoid a direct confrontation; thus, when South Carolina evidenced some disposition to compromise by releasing several seamen without payment of the costs of imprisonment, he dropped the matter.¹⁸³

This disposition to compromise continued through the legislative session of 1823. In that session, the General Assembly amended the Seamen Act, abolishing the provision for enslavement and replacing it with whipping and banishment from the state. Additionally, United States warships and foreign vessels were exempted from the provisions of the Act, as long as their Negro seamen remained on board.¹⁸⁴ The

179. 6 J.Q. ADAMS, *supra* note 34, at 176 (entry of September 4, 1823).

180. *Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846).

181. Letter from Marshall to Story (September 26, 1823), reprinted in E. BATES, *THE STORY OF THE SUPREME COURT* 128 (1938); 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 383 (1919).

182. Canning, the British Minister, had left the United States on August 9, 1823, on leave of absence. Addington served as charge d'affaires during his absence. *Washington National Intelligencer*, August 14, 1823, at 3, col. 1.

183. Hamer, *supra* note 121, at 8-9.

184. Act of Dec. 20, 1823, ch. 20, 1823 S.C. Acts 60-61.

Act also received a judicial interpretation from the South Carolina courts, upholding Johnson's opinion of its applicability. It was held that the Act applied only to free Negroes, and that a ship captain could recover jailor's fees paid to release slave seamen from confinement.¹⁸⁵

The period of relative quiescence was of brief duration. Although both sides had attempted to mute the controversy, neither was willing to give up its legal position. The state still maintained that it could legitimately enforce the statute, while the administration and Great Britain stood on the commercial treaty. It required little to reheat an affair which evoked such passion, and that little was soon forthcoming. In December, 1823, four Negro seamen from the British ship *Marmion* came ashore in Charleston harbor and were thrown into jail. The captain of the ship, to his disgust, had to pay for their confinement and to secure their release. Upon his arrival in Liverpool, he complained to the Board of Trade, which passed the matter to the Foreign Office. The Foreign Office instructed Addington to demand satisfaction from the United States.¹⁸⁶ In a hot note to Adams on April 9, 1824, which displayed much vigor but little knowledge of American political realities, Addington implied that Adams' efforts to resolve the affair had been insufficient. Addington demanded that he:

use every effort in your power . . . to induce the authorities of South Carolina to repeal the obnoxious law, or at least so to modify it as that it shall no longer operate to the detriment of nations trading to the United States, on the faith of conventions, of which it is a direct and unqualified violation.¹⁸⁷

Adams, distressed by the affair, conferred with President Monroe, who suggested that he obtain an opinion from Attorney General William Wirt on the constitutionality of the Act. Adams requested one, and Wirt replied on May 8. Though he was a Virginian, a resident of a state with a similar law, he held the South Carolina statute unconstitutional in forceful and direct terms:

Here is a regulation of commerce, of a highly penal character, by a State, superadding new restrictions to those which have been imposed by Congress; and declaring, in effect, that what Congress has ordained may be freely and safely done, shall not be done but under heavy penalties. It seems very clear to me that this section of the law of South Carolina is incompatible with the national constitution and the laws passed, and is, therefore, void. All nations in amity with the United States have a right to enter the ports of the Union for the purposes of commerce, so long as, by the laws of the Union, commerce is permit-

185. *Calder v. Delieesseline*, 16 S.C.L. (Harp.) 186 (1824). See *Elkison v. Delieesseline*, 8 F. Cas. 493, 497 (C.C.D.S.C. 1823) (No. 4,366).

186. Hamer, *supra* note 121, at 9.

187. Letter from Addington to Adams (April 9, 1824), reprinted in H.R. REP. NO. 80, 27th Cong., 3d Sess. 11-12 (1843).

ted. . . . And inasmuch as this section of the law of South Carolina is a restriction of this commerce, it is incompatible with the rights of all nations which are in amity with the United States.¹⁸⁸

At the same time, the Secretary attempted to get a test case involving an American seaman, John Gardner, to the Supreme Court for a determination of the Act's constitutionality. The attempt was unavailing, however, since the case was rendered moot when Gardner was released and departed from the state.¹⁸⁹ He also communicated with Johnson, evidently requesting the Justice's opinion on further judicial remedies. Johnson, rather despairingly, replied that little or nothing could be done in the situation:

I am wholly destitute of the power of arresting these measures. Both the writs of *habeas corpus* and injunction I am precluded from using, because the cases assume the forms of State prosecutions; and if I could issue them I have nobody to call on, since the district attorney is himself a member of the association; and they have, further, the countenance of five other officers of the United States in their measures. . . . The only recourse of the masters . . . — or of the men — and the only mode of bringing up the subject to the Supreme Court is by an action for damages. But without friends, and without time, mariners cannot resort to suits at law. . . . I do not hesitate to express the opinion that the whole of the alarm of 1822 was founded in cases that were infinitely exaggerated. A few timid and precipitate men managed to disseminate their fears and their feelings, and you know that popular panics spread with the expansive force of vapor.¹⁹⁰

With his other avenues of approach closed and Addington continuing to press him for action,¹⁹¹ Adams decided to approach the state, in the hope to secure a stay of enforcement of the law. He accordingly sent Wirt's opinion to Governor Wilson, requesting such a stay.

Unfortunately for Adams, late 1824 was not a propitious time to request such an action. The General Assembly of Ohio had petitioned Congress for the gradual abolition of slavery in the territories—an action which rekindled a good deal of fear and defiance in South Carolina.¹⁹² When the South Carolina General Assembly met, it was not in a mood to brook what it considered outside interference with its reserved powers. Governor Wilson transmitted Adams' request to the

188. 1 Op. Att'y Gen. 659 (1824).

189. Hamer, *supra* note 121, at 9-10.

190. Letter from Johnson to Adams (July 3, 1824), reprinted in Levin, *Mr. Justice William Johnson, Jurist in Limine: The Judge as Historian and Maker of History*, 46 MICH. L. REV. 131, 165-66 (1947).

191. See letter from Addington to Adams (July 12, 1824); letter from Adams to Addington (July 19, 1824), reprinted in H.R. REP. NO. 80, 27th Cong., 3d Sess. 13 (1843).

192. J. HOUSE OF REPRESENTATIVES, 18th Cong., 1st Sess. 215 (1824). The petition was referred to the District of Columbia Committee, which took no action on it. See also W. FREEHLING, *supra* note 108, at 315-16.

two Houses on December 1, 1824, with a bellicose message which conjured up visions of civil war:

A firm determination to resist, at the threshold, every invasion of our domestic tranquility and to preserve our sovereignty and independence as a state, is earnestly recommended. And if an appeal to the first principles of the right of self-government be disregarded, and reason be successfully combatted by sophistry and error, there would be more glory in forming a rampart with our bodies on the confines of our territory, than to be the victims of a successful rebellion, or the slaves of a great consolidated government.¹⁹³

Predictably, the General Assembly reacted negatively to Adams' request, although not without some division of opinion. The Senate defeated by a vote of thirty-six to ten a resolution that the Seamen Act should be submitted to the Supreme Court for decision. It then adopted by vote of thirty-six to six a rather frenzied resolution stating that the Act arose from the right of self-preservation, which was "paramount to all Laws, all Treaties, all Constitutions," and would never "be renounced, compromised, controlled, or participated with any Power whatsoever."¹⁹⁴ Somewhat cooler heads prevailed in the House, which voted ninety-eight to seventeen to table the Senate's resolutions and substitute a milder one decrying Ohio's actions and stating that the statute was a proper exercise of the police power to guarantee the safety of the state's citizens.¹⁹⁵

The flareup over Adams' request ended for awhile the efforts of the British and the Americans to have the Seamen Act modified or repealed. Succeeding South Carolina legislatures exhibited no interest in changing it.¹⁹⁶ The Act was intermittently enforced, without substantial protest, until 1830. In that year, however, the discovery of incendiary literature among certain South Carolina slaves caused the state to tighten enforcement of the Act. Another British subject, a cook named Daniel Fraser, was imprisoned, and the Foreign Office again protested

193. STATE DOCUMENTS ON FEDERAL RELATIONS 206 (H. Ames ed. 1970).

194. Hamer, *supra* note 121, at 10-12.

195. Wild, *supra* note 42, at 38-41. See also W. FREEHLING, *supra* note 41, at 115. Interestingly, Senator Robert Y. Hayne, who the year before had reacted so violently to *Elkison v. Delles-seline* while with Adams, expressed regret over the legislature's action. "The proceedings of our Legislature on the free Negro question are certainly not very acceptable here and I think it is very much to be regretted that a tone of at least more moderation had not accompanied whatever measures were deemed necessary in the present occasion." Letter from Hayne to C.C. Pinckney, Jr. (December 21, 1824), reprinted in T. JERVEY, *supra* note 47, at 181-82.

196. Indeed, in 1827 a special committee of the state Senate published a lengthy report on the subject of states' rights, in which it stated that "there can be no reasoning, between South-Carolina and any other government [on racial questions]; . . . The minds of our citizens are already made up." REPORT OF A SPECIAL COMMITTEE OF THE SENATE, OF SOUTH-CAROLINA, ON THE RESOLUTIONS SUBMITTED BY MR. RAMSAY, ON THE SUBJECT OF STATE RIGHTS 19-20 (1827).

to Secretary of State Martin Van Buren.¹⁹⁷ Before taking any action, Van Buren asked the incumbent Attorney General, John M. Berrien of Georgia, for an opinion on the Act.¹⁹⁸ Berrien, in a wordy and somewhat unclear opinion, stated that it was constitutional. Taking a restrictive view of the commerce power, he stated that Congress' right to override state legislation existed only when such control was necessary to the exercise of an express grant of power. He further emphasized the quarantine aspect of the statute and definitely considered it a right reserved to the states under the tenth amendment. Finally, he held the commercial treaty was not violated, since it was subject to the internal laws of the two countries. South Carolina's law, while limited in geographical reach, was such a law, especially since Congress had recognized it as such in the Act of 1803.¹⁹⁹ This opinion buttressed the determination of the Jackson administration, already involved in the nullification crisis with South Carolina over the tariff, to avoid any issue which carried the danger of injecting race into the controversy.

Weight was added to Berrien's opinion the next year when Attorney General Roger B. Taney, later Chief Justice, rendered an unpublished opinion on the subject, which held that the slave states had never given up the right to enact such laws, since the result would be inevitable insurrection.²⁰⁰ Such opinions supported the tendency of the federal government of the 1830's and 1840's, more sensitive to the issue of slavery, to leave the Seamen Act issue alone. Britain, in its continuing campaign against the Act, turned to direct negotiations with South Carolina through its consuls.²⁰¹

In 1843, a promising effort to amend the statute (the harsher provisions of which, including enslavement, had been re-enacted in 1835) miscarried, despite, ironically, the support of Benjamin F. Hunt, who had argued the *Elkison* case twenty years before. Meanwhile, a new element of opposition to the law had arisen in Massachusetts. Strong in antislavery sentiment and resentful of the effects of such laws on its sea-going commerce, this state, in 1839, empowered its governor to retain counsel to secure the release of its Negroes imprisoned under the Act. In 1842, Massachusetts resolved that imprisonment of its citizens

197. Letter from British Minister Charles Vaughan to Van Buren (December 26, 1830), reprinted in H.R. REP. NO. 80, 27th Cong., 3d Sess. 23-24 (1843).

198. Hamer, *supra* note 121, at 14-16.

199. 2 Op. Att'y Gen. 426 (1831).

200. Op. Att'y Gen. (Unpublished opinion of May 28, 1832) (discussed in C. SWISHER, *THE TANEY PERIOD, 1836-1864*, at 380 (1974)). See also letter from Taney to Secretary of State Edward Livingston (June 9, 1832) (Department of State Papers, National Archives).

201. Hamer, *British Consuls and the Negro Seamen Acts, 1850-1860*, 1 J.S. HIST. 138, 143 (1935).

on the basis of color was unconstitutional.²⁰² Late in 1842, a group of prominent Massachusetts citizens petitioned for congressional action in the matter, the first serious effort on the subject in Congress since 1823.²⁰³ Early in 1843, under the aegis of Representative Winthrop of Massachusetts, the Commerce Committee of the House of Representatives issued a majority report condemning such legislation as violative of the privileges and immunities clause of the Constitution,²⁰⁴ of the comity of nations, and of the commerce power. A minority report upheld the Act on the basis of the state's reserved police power.²⁰⁵ In March, the resolution came up for consideration in the full House and by a vote of eighty-six to fifty-nine was tabled.²⁰⁶

Massachusetts then shifted its attention to the older idea of obtaining a definitive Supreme Court opinion on the matter. The Massachusetts legislature of 1844 authorized the sending of agents to Charleston and New Orleans to commence such litigation. Samuel Hoar of Concord, an elderly and conservative jurist, was sent to Charleston, arriving in late November, 1844. He at once acquainted the authorities with the purpose of his visit and requested copies of the relevant municipal records. This provoked a violent uproar. The General Assembly, then in session, almost unanimously resolved to request the governor to expel Hoar from South Carolina.²⁰⁷ Mobs rioted outside his hotel, and he was forced to leave Charleston under imminent threat of physical harm. Henry Hubbard, the agent sent to Louisiana, had a similar experience.²⁰⁸ While the violent rebuff caused indignation in Massachusetts—the legislature resolved that war would be justified if it were not for the Constitution²⁰⁹—it had been effective; the proposed litigation

202. REPORT OF A JOINT SPECIAL COMMITTEE ON THE TREATMENT OF SAMUEL HOAR BY THE STATE OF SOUTH CAROLINA 16-18 (1845) (Massachusetts Senate).

203. The group included a future Justice of the Supreme Court, Benjamin R. Curtis; the son of a sitting Justice, the noted artist W.W. Story; George Ticknor Curtis, who was to argue the *Dred Scott* case in the Supreme Court; the historian William H. Prescott; and the navigator Nathaniel Bowditch. H.R. REP. NO. 80, 27th Cong., 3d Sess. 7-9 (1843).

204. U.S. CONST. art. IV, § 2.

205. CONG. GLOBE, 27th Cong., 3d Sess. 183 (1843), H.R. REP. NO. 80, 27th Cong., 3d Sess. 1-7, 37-49 (1843).

206. CONG. GLOBE, 27th Cong., 3d Sess. 384 (1843).

207. Ironically, the only dissenter to the expulsion resolution was Christopher G. Memminger, later Confederate Secretary of the Treasury. Hoar's son, Senator George F. Hoar, recounted that James L. Petrigru, the noted Charleston attorney and Unionist, had organized a company of men to rescue Hoar if necessary. 1 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 24-26 (1903).

208. 3 H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 134-36 (1881); 1 H. WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 576-86 (1875).

209. REPORT OF A JOINT SPECIAL COMMITTEE ON THE TREATMENT OF SAMUEL HOAR BY THE STATE OF SOUTH CAROLINA 6 (1845) (Massachusetts Senate). Some conservative Whigs in the Bay State thought the legislature's action ill-advised and provocative. See A FRIEND TO THE UNION, REMARKS UPON THE CONTROVERSY BETWEEN THE COMMONWEALTH OF MASSACHUSETTS AND THE STATE OF SOUTH CAROLINA 9-21 (Boston 1845).

was never brought. In fact, Hoar's mission marked the effective end of national political controversy over the Seamen Act. Although the subject came up occasionally in Congress thereafter, it was treated tangentially in the context of other legislation, not for its own importance.²¹⁰ The Act continued to be enforced against both American and foreign ships. In 1856, Britain, after years of patient maneuvering, secured an amendment essentially restoring the amendments of 1823.²¹¹ However, by that time the United States had gone far beyond the point where a statutory modification on the subject of free Negroes in a southern state would have any effect on the national trauma.

B. *The Judicial Aftermath*

Having recounted the diplomatic and political aftermath of the *Elkison* decision, there remains to be examined the later judicial treatment of the seamen acts and the importance of the principles enunciated by Justice Johnson in the larger context of American jurisprudence. *Elkison* was the first decision on the constitutionality of such a statute, but it was not the last. While the Supreme Court never passed on the question, it was addressed three more times by lower federal courts. In a contract action for seamen's wages in 1844, Judge Peleg Sprague of Massachusetts held the similar Louisiana statute unconstitutional as a violation of the commerce and privileges and immunities clauses.²¹² Sprague expressly relied on the authority of the *Elkison* case on the issue. Needless to say, the decision produced no effect on South Carolina's enforcement of its Act (or on Louisiana's of its own), especially in view of the strained relations between the two states then existing as a result of Hoar's mission. The unconstitutionality of the Louisiana Act was reaffirmed in a similar Massachusetts federal decision in 1859.²¹³ This also had no effect on South Carolina. In 1853, the South Carolina Act was again construed by Johnson's old court—the Circuit Court for the District of South Carolina. In a charge to a jury, Judge Robert Gilchrist held the act constitutional without explanation or reasoning.²¹⁴ This case was scheduled to go to the Supreme Court on a bill of exceptions to Gilchrist's charge, but, not wanting to disturb his negotiations with the state, the British consul,

210. CONG. GLOBE, 30th Cong., 2d Sess. 418-19 (1849) (slave trade in District of Columbia); *id.*, 31st Cong., 1st Sess. 1661 app. (1850) (Compromise of 1850).

211. Act of Dec. 20, 1856, No. 4311, 1856 S.C. Acts 573. An attempt in 1848 at outright repeal of the Seamen Act had failed, despite the support of the influential Judge John B. O'Neill and the State Agriculture Society. See J. O'NEALL, *supra* note 71, at 16; REPORT OF THE COMMITTEE ON THE JUDICIARY app. 3-4 (1848) (South Carolina Senate).

212. *The Cynosure*, 6 F. Cas. 1102 (D. Mass. 1844) (No. 3,529).

213. *The William Jarvis*, 29 F. Cas. 1309 (D. Mass. 1859) (No. 17,697).

214. *Roberts v. Yates*, 20 F. Cas. 937 (C.C.D.S.C. 1853) (No. 11,919).

George Mathew, withdrew the appeal.²¹⁵ Consequently, the direct judicial construction of such legislation was never authoritatively settled; it remained ambiguous until the Civil War settled the question by quite different means.

On a larger scale, however, the principles enunciated in *Elkison* played a significant part in Supreme Court jurisprudence. The commerce clause, quiescent before 1823, was now ripe for construction as the nation's expansion generated commercial legislation and litigation. One year after *Elkison*, the Supreme Court rendered its first decision on the subject. In the celebrated case of *Gibbons v. Ogden*,²¹⁶ the Court held a New York state steamboat monopoly invalid as an impermissible regulation of commerce. Chief Justice Marshall gave a broad definition of "commerce" and implied, without explicitly holding, that the congressional power to regulate it was plenary. More immediately relevant to the *Elkison* case was his treatment of the argument that the Act of 1803 recognized a concurrent power in the states to regulate interstate commerce. Deciding the issue that he had avoided in *The Brig Wilson*,²¹⁷ the Chief Justice wrote as dictum that the Act had been a limited and specific exemption from Congress' power and had expired in 1808 when Congress became constitutionally empowered to regulate the slave trade.²¹⁸

Justice Johnson concurred in the Court's decision but wrote his own opinion, in which he went beyond Marshall's holding. The Chief Justice implied, rather than expressed, the exclusivity of congressional power and relied on the plaintiff's possession of a federal coasting license in addition to the commerce clause argument. Johnson stated that the commerce clause was enough; Congress' power in the area was paramount and exclusive. "[T]he power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the state to act upon."²¹⁹ The coasting license was essentially irrelevant. "I do not regard it as the foundation of the right set up in behalf of the appellant."²²⁰ Johnson admitted that the states had power to pass inspection and quarantine laws and the like, but denied that these were regulations of commerce, since they arose out of a different, municipal, source of power.²²¹ Nevertheless, as the Justice knew so well, "[I]t would be in vain to deny the possibility of a clashing and collision between the

215. C. SWISHER, *supra* note 200, at 394.

216. 22 U.S. (9 Wheat.) 1 (1824).

217. 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17,846).

218. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 206-07 (1824); U.S. CONST. art. V.

219. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 227 (1824).

220. *Id.* at 231.

221. *Id.* at 235-36.

measures of the two governments.”²²² Perhaps thinking of his efforts to avoid such a collision in the first days of the enforcement of the Seamen Act, he stated, “Hitherto the only remedy has been . . . a frank and candid co-operation for the general good.”²²³ Now statutes could be tested by the principles laid down by the Supreme Court and declared unconstitutional if necessary. Yet, the Justice closed his opinion with an expression of hope that such could be avoided. “Whenever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object . . . and yet . . . be kept perfectly distinct.”²²⁴ *Gibbons v. Ogden* was Johnson’s definitive statement on the commerce power. It illustrates, in a more elaborate fashion, the principle which was enunciated in *Elkison*—the superiority of national over local power in regulating commerce.²²⁵ Johnson had come a long way from his early days as a Jeffersonian legislator in South Carolina. While maintaining a reverence for Jefferson himself, he had jettisoned the more particularistic aspects of his political thought for a view of national power that key-noted much of nineteenth-century jurisprudence.²²⁶

The course of antebellum Supreme Court decisions on the commerce power after Marshall and Johnson, while not consistent, showed a continuing refinement and elaboration of the place of commercial regulation in a growing Union as well as a growing sensitivity (particularly by Chief Justice Roger Taney) to any possible application of these constitutional principles to the issue of slavery.²²⁷ In *New York v. Miln*²²⁸ the Court upheld a New York statute requiring manifests and posting of bond by masters of immigrant vessels. Chief Justice Taney stated that persons were not the subject of commerce, and consequently statutes regulating them could not run afoul of the commerce clause.²²⁹ This opinion, together with a similar one in the *License Cases*²³⁰ (involving state laws on the importation of liquor) cast serious doubt upon John-

222. *Id.* at 238.

223. *Id.*

224. *Id.* at 239.

225. M. BAXTER, *THE STEAMBOAT MONOPOLY: Gibbons v. Ogden* 58-60 (1972). None of the counsel in *Gibbons v. Ogden* mentioned *Elkison* in their arguments. *Id.* at 60.

226. Interestingly, the South Carolina Court of Errors in 1844 declared a Charleston ordinance requiring interstate vessels to use local pilots when entering the harbor unconstitutional (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)), relying on both the commerce and the privileges and immunities clauses. *Chapman v. Miller*, 29 S.C.L. (2 Speers) 769 (Ct. Errors 1844). Even twenty years after *Elkison*, the State’s judiciary was evidently prepared to give a broad reading to the commerce clause when race was not involved.

227. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* 59-60 (1937).

228. 36 U.S. (11 Pet.) 102 (1837).

229. *Id.* at 136.

230. 46 U.S. (5 How.) 504 (1847).

son's application of the clause in *Elkison*, but was distinguished and somewhat diluted in 1849 in the *Passenger Cases*²³¹ where a majority of the Court struck down a Massachusetts law imposing a tax upon immigrants. The exclusivity of the commerce power, as implied in *Gibbons v. Ogden*, was reaffirmed. The majority held that the states could exclude paupers and fugitives, but no others. Justice James M. Wayne rather confusingly added that the South need not fear an influx of free Negroes, since nothing will be allowed that will "dissolve, or even disquiet the fundamental organization of the state."²³² Chief Justice Taney dissented, insisting on a sweeping concept of state police power which would negate any federal commerce clause attempts to regulate the domestic slave trade.²³³ Finally, in *Cooley v. Board of Wardens*,²³⁴ the Court eschewed Johnson's all-inclusive approach for one related to the nature of things to be regulated. Areas of commerce demanding uniform national regulation were within the exclusive domain of Congress, while areas not needing such uniformity could be regulated by the states in the absence of federal preemption. While *Cooley* again cast some doubt on the use of the commerce clause to invalidate state restrictions on the admission and travel of persons,²³⁵ as recently as 1941 the Supreme Court struck down a California statute restricting certain persons from entering the state as a burden on interstate commerce.²³⁶ The rationale used was essentially that of Justice Johnson in *Elkison*.

Interpretation of the privileges and immunities clause, the inchoate backdrop to Johnson's opinion and the subject of much of the controversy afterward, has been much scarcer and more erratic than that of the commerce clause. The leading case on the subject for most of the antebellum period was *Corfield v. Coryell*,²³⁷ an 1825 circuit court opinion delivered by Johnson's colleague, Justice Bushrod Washington. While upholding a New Jersey statute limiting the taking of oysters to citizens of the state, Washington sketched out a fairly broad picture of the rights protected by the clause, including the right to travel or reside in another state for trading purposes. However, the controverted status of Negroes under the clause was finally settled (until the Civil War) by the famous *Dred Scott*²³⁸ decision. Chief Justice Taney, speaking for

231. 48 U.S. (7 How.) 283 (1849).

232. *Id.* at 428-29.

233. *Id.* at 463-94. See W. WIECEK, THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION 133-34 (1972); W. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848, at 132-42 (1977).

234. 53 U.S. (12 How.) 299 (1851).

235. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

236. *Edwards v. California*, 314 U.S. 160 (1941).

237. 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230).

238. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

the Court, declared that Negroes were not "citizens" as the term was understood in the Constitution; therefore, the "privileges and immunities" guaranteed by that document did not attach to them. After the Civil War and the ratification of the fourteenth amendment (which prohibited the states from abridging the privileges and immunities of United States citizens), an attempt was made to use the privileges and immunities clause, together with the amendment, as a broad-scale guarantee of fundamental individual rights. The Supreme Court rejected this approach in the famous *Slaughter-House Cases*²³⁹—still the fountainhead of fourteenth amendment jurisprudence. Thereafter, the clause languished and has only recently been revived as a means of attack on state statutes which discriminate against nonresidents.²⁴⁰

SUMMARY AND CONCLUSIONS

After this lengthy narrative and analysis, what can be said of the place of *Elkison* in American history? Any such inquiry must examine it with respect to political, diplomatic, and constitutional history, since, as a judicial opinion, it touched all three.

Politically, the reaction to *Elkison* was a symptom, not a cause. The prickly, defensive, particularity which South Carolina evidenced in 1823 was not caused by the Justice's action; rather, it antedated it, as the passage of the Act and the formation of the South Carolina Association show. The state was moving away from its former nationalism for two principal reasons: first, the Vesey conspiracy had frightened the white population—a shrinking minority—into a determination to hold down further Negro dissent at any cost; second, the failure of industry to take root in the state and its displacement in the Cotton Kingdom by the new states of Alabama and Mississippi meant that nationalism and acquiescence in protectionist policies were no longer in its interest. The reaction to the opinion was illustrative of those feelings; therefore, it is doubtful that it had any lasting political effect other than a temporary exacerbation of public sentiment. It is elsewhere that the importance of the case must be found.

In the area of international relations, the Act and the opinion set off a diplomatic minuet that, with interruptions, lasted for over thirty years. It is illustrative of the unsettling nature of the slavery question and the limited influence of the federal government before 1861 that most of the pressure on South Carolina was exerted, not by the United States, but by Great Britain. This certainly perplexed British diplomats

239. 83 U.S. (16 Wall.) 36 (1873).

240. See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (Art. IV privileges & immunities clause applied to state statutes which discriminate against nonresidents).

but did nothing to increase their respect for the federal government. It cannot be said to have had any long-term deleterious effects upon Anglo-American relations, in view of the very important diplomatic adjustments which took place during this period, such as the settling of the Oregon question and the Webster-Ashburton Treaty. Justice Johnson's view of the treaty power really belongs to the subject of constitutional history.

The true importance of *Elkison* is its place in American constitutional history. Although its effect on the immediate situation—Elkison's imprisonment—was nil, this was due to the inflamed state of public opinion and the limited authority which Johnson possessed, rather than to any lack of innate importance. The Justice, like all federal judges until Reconstruction, was very limited in his jurisdiction to deal with federal questions arising in the context of state statutes.²⁴¹ Consequently, he had to avail himself of the antiquated and ineffective writ *de homine replegiando* to exercise jurisdiction at all. Having thus obtained jurisdiction, he assured the case a place in American judicial history by holding the Act unconstitutional. This was the first voiding of a state statute on commerce clause grounds by a federal court;²⁴² therefore, in a sense, it was the precursor of the great flood of commerce clause litigation which began with *Gibbons v. Ogden* and has not yet abated.²⁴³ His second holding on the treaty power was almost as important and even more prescient, since the future development of that power followed his ideas of superiority to reserved state power and exclusivity more closely than commerce clause jurisprudence followed his holding of plenary congressional power.²⁴⁴ Finally, despite its lack of immediate effect, the opinion is most important as a milestone in what might be termed constitutional morality. For perhaps the first time in American history, a federal judge protested the treatment of Negroes by whites on the grounds of color, and did so in a situation where his courage exposed himself to public opprobrium and actual

241. Not until 1875 would the lower federal courts obtain direct general jurisdiction over federal questions such as those in *Elkison*. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

242. Morgan, *supra* note 8, at 338.

243. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). All of these recent cases involve the same basic situation as *Elkison*, i.e., a decision on the validity of state police power legislation under the commerce clause. See also *National League of Cities v. Usery*, 426 U.S. 833 (1976), suggesting, as did Benjamin F. Hunt to Johnson, that the long-ignored tenth amendment may indeed impose substantive limits on the federal commerce power. But cf. *Equal Employment Opportunity Comm'n v. Wyoming*, 103 S. Ct. 1054 (1983); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

244. *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

danger. "The Constitution furnished a protecting shield, not only for planters and merchants, but for the Elkinsons of the world."²⁴⁵ This Jeffersonian judge had traveled far from his mentor on ideas of national power, but he retained the commitment to the equality and inalienable rights of all men that had fired Jefferson in the summer of 1776. Perhaps this, even more than its place in the field of constitutional law, is the real import of *Elkison*.

William Johnson died on August 4, 1834, in New York, where he had gone to seek medical care. His last years were clouded by the nullification controversy that ensued when his native state was captured by a party with whose principles he unalterably opposed. Harassment by political foes may well have played a part in his decision to travel north at an advanced age.²⁴⁶ He was brought back to Charleston for burial. His tombstone in St. Philip's churchyard reads: "His virtue pure his integrity stern his justice exact his patriotism warm and his fortitude not shaken in the hour of Death."²⁴⁷ This and his opinion in *Elkison* are fitting memorials to a stubborn, irascible man whose courage, steadfastness, and devotion to principle made an enduring mark on American law.

245. D. MORGAN, *supra* note 10, at 203.

246. *Id.* at 280.

247. *Id.* at 282.