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Distinguished legal historian Tony Freyer is both an antebellum legal historian and a historian of modern American race relations. In this long-awaited and first of its kind study of the Passenger Cases, Freyer brings these two fields together. The cases themselves are complex, involving Massachusetts and New York port restrictions on newcomers, but here they are unraveled with precision and insight. Entailing questions of states’ rights and federalism, in Freyer’s hands the opinions of the justices seem as fresh and relevant today as when they were promulgated in 1849.

Freyer’s approach is both innovative and appropriate, for the nineteenth-century context of those opinions bears striking similarities to issues roiling modern jurisprudence and politics. The 1840s was the era of the great migrations from Ireland and Germany to American shores, and fears of disease, competition for jobs, and radical politics raced through New York and Massachusetts politics. It was the same fear that would make the two states home to the American Party (aka the “Know-Nothings”) in the coming years—and the same fear that motivates anti-immigration forces today.

Although the opinions did not focus on slavery per se, everyone involved, from the legislators who framed the acts to the lawyers, litigants, and judges who adjudicated the suits, knew that slavery lurked in the shadows of the cases. If a state legislature could impose a tax on incoming passengers at its ports, could it also regulate slavery out of existence? Were slaves persons or objects in the stream of commerce? Framing the justices debate over the question were Jones v. Van Zandt (1849) and Strader v. Graham (1851), suits challenging state and federal laws on slavery. The Dred Scott case was moving through the Missouri courts heading for its own day of infamy. Slavery is no longer legal in the United States, but the penumbras of the “peculiar institution” continue to reach into political discourse at the highest levels.

In the Passenger Cases, a bare majority of the Supreme Court held that the states could not so legislate without violating the Commerce Clause of the federal Constitution. But the justices’ eight opinions varied on everything from the meaning of commerce to the exclusiv-
ity of the power vested in the federal government. Similar questions of federalism vex jurists today, as states pass their own immigration laws as though regulation of immigration were not, like interstate commerce, vested in the federal government.

Freyer's work has achieved the ideal of every teacher of history—bringing the past into the present. Long overlooked, the Passenger Cases will once more be essential reading.
I am happy to thank those individuals who have aided me in writing this book. Peter Hoffer suggested the idea that the Passenger Cases (1849) would be a suitable contribution to the Landmark Law Cases & American Society series, as long as the primary state regulation of immigrants before the Civil War was clear. Readers commenting on a project proposal emphasized the importance of delineating the ante-bellum commerce power theories in relation to slavery. Commentators at professional meetings urged the need to suggest the implications the history has for contemporary debates involving federal preemption in immigration regulations and state laws challenging it. My book attempts to balance these goals, though the origins, period prominence, and precedential obscurity of the Passenger Cases are the principal focus.

Lyndsay Campbell suggested that clarification of the Passenger Cases would be useful; long ago Morton J. Horwitz inspired me that I could satisfactorily address the subject, while Forrest and Ellen McDonald provided patient encouragement. I am grateful to each one of you. I thank also my colleagues at the University of Alabama School of Law who attended a presentation of an early draft of the project at a faculty colloquium in 2010; the commentator on another version of the project as part of a panel at the 2011 annual meeting of the Law & Society Association in San Francisco; and Jim Phillips and his colleagues for including a presentation of a portion of the project at the legal history seminar in the University of Toronto School of Law, October 2012. Several Earhart Foundation Research Fellowships enabled me to buyout teaching in order to write the book during early 2012; I am indebted to Dean Robert Olin and Associate Dean Carmen Burkhalter of the School of Arts & Sciences and History Chair Kari Frederickson for approving these assignments. University of Alabama School of Law Dean Kenneth C. Randall, the Edward Brett Randolph Fund, and the Alabama Law School Foundation, as well as the Office of Academic Affairs, which endowed the university research professorship I held, provided essential financial support over several years of researching the subject.

I am fortunate indeed that colleagues in the University of Alabama
Law Library have always answered my calls for help: Paul M. Pruitt, Robert Marshall, and Penny Gibson. Elizabeth Campbell, L3, UALS, provided research assistance; my office assistant, Donna Tucker, prepared the manuscript for publication. I am also indebted to Michael Briggs, and his successor as editor in chief of the series, Charles T. Myers, and their expert staff, at the University Press of Kansas. For answering particular research questions I thank too Daniel Hammer, Historic New Orleans Collection, the Special Collections librarian at the Tulane University, Scott A. Gray, Walter Nugent, Lois Ray Carlson, Mark Brilliant, and Allison Tierres. I am particularly grateful to Hebert Johnson for advice on revisions.

For continuing care and love I thank my wife, Zu, our son Allan and daughter-in-law Rachel in Durham, North Carolina, and my sister Joan and brother Jon in San Diego, California. Thanks also to my mother-in-law, Mrs. Elaine Faller. Finally reaching the end of this project, I am more conscious than ever before of the usual caution that others have contributed whatever good the book has, while I alone am responsible for any errors.
Introduction

Before the Civil War the U.S. Supreme Court established its umpire role prescribing powers of states and the federal government. Chief Justice John Marshall led the Court in establishing the independent judiciary as the arbiter of state-federal relations, but he avoided deciding the legal status of immigrants and free blacks under the federal commerce power. After Roger B. Taney became chief justice in 1836 the Court addressed the legal status of both groups in relation to state police powers and the commerce power. In the Passenger Cases (1849) the Court’s 5–4 decision and eight opinions construing these state-federal powers influenced political responses to transatlantic famine migration, as well as fugitive slaves and western expansion of slavery at issue in the 1850 Compromise. Since the Civil War and Reconstruction growing federal regulation of immigration has supplanted state police powers. Even so, in Arizona v. U.S. (2012) Justice Antonin Scalia’s dissent recalled the past: “Notwithstanding ‘[t]he myth of an era of unrestricted immigration’ in the first 100 years of the Republic, the States enacted numerous [police power] laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and (in southern States) freed blacks.” In the Passenger Cases, however, the Supreme Court affirmed a commerce power that enabled Northern states to admit and confer limited citizenship upon immigrants and free blacks.

The following chapters focus on the origins, state court decisions, federal precedents, appellate arguments, and opinion making that culminated in the Court’s split decision of the Passenger Cases, which in turn influenced the 1850 Compromise and the coming of the Civil War. The Court’s majority and dissenting opinions, like the lawyers’ arguments for each side, expressed divergent interpretations of law
disputing the legal status of white immigrants and blacks under state police powers and federal commerce power precedents. The Court opinions and the legal arguments contested where state police powers ended and the federal commerce power began. The Court’s divided decision provided political legitimacy for the 1850 Compromise: enactment of a stronger fugitive slave law, admission of slavery in Western territories based on popular vote of residents (popular sovereignty), and the abolition of the slave trade in Washington, D.C. The divided opinions in the Passenger Cases also influenced the immigrant and slavery crises that disrupted the balance between free and slave-labor states, culminating in the Civil War. The states did indeed enact laws enabling exclusion of undesirable white immigrants and free blacks. The prevailing state and federal court precedents, however, generally granted admission to both groups in Northern and Western free-labor states. John C. Calhoun, the great defender of Southern rights and slavery, predicted in 1849 that such free admissions encouraged sectional contestation of abolition, secession, and racial reconstruction.

The divided opinions of the Passenger Cases suggested an enduring institutional independence that future individual Supreme Court members shared. In his memoir, *The Court Years 1939–1975*, Justice William O. Douglas recalled learning the scope of this independence from Chief Justice Charles Evans Hughes, who told him that “you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.” Legal historian Morton J. Horwitz sharpened Hughes’s insight, arguing that, especially during transformative historical periods such as America’s immigrant and slavery crises, judges’ opinions formulated and channeled diverse, often conflicting class, ideological, political, cultural, and institutional motivations into instrumental results. Supreme Court opinions reflected the justices’ attitudes about the commerce power and state police powers, which other courts and lawyers applied as precedents of law. Politicians, however, looked upon the Court’s opinions more simply in terms of politics. Examination of the Supreme Court commerce power opinions within state and national immigrant and racial politics revealed multiple motivations shaping judicial doctrines and precedents that culminated in the decision of the Passenger Cases.
Most of the book concerns the antebellum Supreme Court’s role prescribing state-federal regulation of immigrants in relation to free blacks that gave rise to the Passenger Cases and the decision’s impact on the immigrant and slavery crises, the 1850 Compromise, and Southern secession. The precendential decline of the Passenger Cases signaled the Supreme Court’s growing deference to federal regulation of immigrants, beginning with Justice Samuel F. Miller’s opinions, especially New York v. Henderson (1875). The limited influence of Passenger Cases during the twentieth century suggested persistent institutional imperatives that helped to explain the Court’s affirmation of congressional supremacy enforcing preferential racial quotas during the 1920s. Federal supremacy also instituted less-restrictive immigration regulations that limited the quota system between the 1940s and the 1960s. From World War II on the Court’s recognition of federal supremacy in immigration regulation further sanctioned many rights aliens shared with U.S. citizens, including the right of travel traceable to the Passenger Cases. Since the millennium the Supreme Court has upheld federal regulatory supremacy in conjunction with a modicum of aliens’ rights such as freedom of movement that undercut restrictionist demands and state laws attacking “illegal” immigrants. In the Passenger Cases, the Court had affirmed a limited commerce power and Northern states’ police powers to achieve much the same result.

The first chapter examines the origins of the cases in the financial and social welfare stake Massachusetts and New York had in maintaining open immigration under a system of bonds and commutation fees—distinct from alien taxes—that shippers endorsed. By contrast, based on the Constitution’s power over commerce and treaty making, Congress passed its first major Passenger Act in 1819, which attempted to regulate the conditions of immigrants aboard vessels traveling between U.S. and foreign ports. In addition, like the Constitution’s framers before them, state leaders engaged in compromise politics sanctioning state police power regulation of immigrants and free blacks. The Marshall Court avoided addressing the legal status of immigrants and free blacks as “persons” in its first commerce power decision, Gibbons v. Ogden (1824). The Court did not consider the question where state police power regulations over such “persons” ended and the federal power began until the 1830s. State police pow-
ers also controlled Southern slavery. The Supreme Court engaged neither the interstate slave trade nor imprisonment of free British sailors in Southern ports under Negro Seamen Acts until abolitionists began arguing that the federal commerce power enabled Congress to end both practices.

Chapter 2 considers the state courts’ decisions upholding the Massachusetts and New York alien tax, as an extension of police powers underpinning the bond-commutation system that already regulated the admission of immigrants into both states. Each state court construed the *Gibbons* precedent in light of the U.S. Supreme Court’s police-power ruling established in *City of New York v. Miln* (1837), which recognized a “commerce-person” distinction. The opinion for the Supreme Court in *Miln* distinguished between “persons,” such as immigrants, free blacks, and slaves subject to state police powers, and “commerce,” which was regulated by the federal commerce power. While privately a Supreme Court majority did not support the “commerce-person” distinction, the implications of the *Miln* ruling prompted multiple opinions addressing Mississippi’s abolition of the slave trade within its borders in *Groves v. Slaughter* (1841). By the mid-1840s the North-South sectional struggle over Texas annexation and the status of slavery in the Western territories acquired in the war with Mexico politicized the Supreme Court, blocking appointments as never before. The Court’s divided opinions implicating the “commerce-person” distinction further exacerbated the abolitionists’ claim that Congress could abolish the interstate slave trade and weaken Southern states’ control of free blacks identified with the Negro Seamen Act.

Chapter 3 discusses the lawyers’ appellate arguments in the Passenger Cases for and against the alien tax, including the great constitutional advocate Daniel Webster representing the shippers and New York attorney general John Van Buren defending the states. The discussion explores legal and political connections linking the lawyers’ appellate arguments to state immigrant regulations and new U.S. passenger legislation amid the momentous famine migration and slavery struggles during the late 1840s. The chapter also addresses the License Cases (1847), which reinforced the 4–4 impasse in deciding the Passenger Cases. Chapter 4 draws these materials together in order to explain the 5–4 vote and eight opinions in the Court’s deci-
sion-making process of the Passenger Cases, including the arrival of a fifth justice who broke the 4–4 deadlock. The announcement of eight opinions in February 1849 exposed the bitter dispute between Chief Justice Taney and Justice James M. Wayne, revealing that a majority of the Court had never supported the “commerce-person” distinction. The Court’s majority and dissenting opinions in the Passenger Cases enunciated divisions over the federal commerce power and state police powers that nonetheless provided constitutional legitimacy that ameliorated divisive sectional politics, facilitating the 1850 Compromise.

Chapter 5 examines the shifting significance of the Passenger Cases from 1849 to 1870. Against the anti-immigrant nativists identified with the Know-Nothings, pro-Southern Democrats joined Northern Whigs and Republicans in paradoxical support of stronger federal passenger laws based on the federal commerce power and treaties. Some Northern Democrats also joined Whigs and Republicans in compromise local politics, enacting state personal liberty laws that extended limited legal equality and state citizenship to immigrants and free blacks. Compromise politics also defused the Know-Nothings’ most extreme exclusion policies. Southerners’ adamant opposition to personal liberty laws and Northern states’ conferral of citizenship on blacks, however, were primary justifications for the South’s secession. The Passenger Cases remained important during the Civil War and Reconstruction, especially in the California Supreme Court’s reliance on the commerce power and treaties to overturn state discrimination against Chinese aliens. The Passenger Cases also sanctioned New York’s immigration regulations prior to 1870, which preserved the states’ bond-commutation system based on police powers.

Chapter 6 traces the more limited precedential influence of the Passenger Cases, beginning with Justice Miller’s commerce power opinions striking down California, Louisiana, and New York laws in the Henderson decision of 1875, which overturned the states’ bond-commutation system. As a result, Congress enacted and the Court affirmed federal bureaucratic supremacy that displaced the commerce power as the basis for federal taxation and regulation of immigrants. By the 1920s federal preferential-racial quotas triumphed. In Edwards v. California (1941), however, the Court upheld American migrants’ right of travel—which also embraced aliens—under a dormant com-
merce power consistent with the Passenger Cases. From World War II through the Cold War and the civil rights movement, greater alien admissions displaced the preferential-quota system, culminating in the historic Immigration Act of 1965. Amid the cycle of recession and boom from the 1970s through the millennium and War on Terror, illegal immigrants prompted restrictionists’ demands for stronger state regulation. But the Supreme Court affirmed federal supremacy and state-federal cooperation in *Graham v. Richardson* (1971) and the *De Canas Case* (1975), both of which cited the Passenger Cases. In *Arizona I* (2011) and *II* (2012), federal supremacy and state-federal cooperation triumphed. Justice Scalia’s dissent in *Arizona II* appealed to the earlier history of states’ employing police powers in order to exclude undesirable immigrants and blacks. The Passenger Cases provided a counter-history in which admission of these groups prevailed.

A reconstruction of the obscure pre-Civil War commerce power applied to states and immigrants in the Passenger Cases concerned certain broad themes. Most of the book examines the judicial interpretation of the Commerce Clause (1824–1870) that supported immigrant admissions over exclusions, though episodically, of course, the latter also were significant. In 1875 the Court initiated a new era of immigration regulation dominated by the federal government and federal supremacy rather than the commerce power analysis that prioritized balancing state-federal power. Concurrently, the post-Reconstruction Supreme Court until recently has sanctioned a pervasive federal hegemony over the regulation of virtually all commercial activity through an expanded view of the commerce power. And more recently, drawing upon the post–Civil War constitutional amendments and the Supremacy Clause, the Court enhanced the ability of immigrants to constitutionally challenge the federal government’s administration of antiquated immigration laws. This volume thus has a special importance as the current conservative Supreme Court continues to struggle with defining state police powers in regard to newly arrived and illegal immigrants, including Justice Scalia’s dissenting view that the antebellum commerce power generally did not limit states’ exclusionary polices.

Focusing on the origins, precedents, lawyer arguments, decision making, and outcomes of the Passenger Cases highlights less conspicuous influences on immigration and antislavery crises and the
South’s secession. This process demonstrates the functions and malfunctions of the pre–Civil War federal Constitution, along with the Supreme Court’s function as its principal interpreter. The 5–4 division of the Court anticipated the better-known, but even more divisive, views of the justices in the *Dred Scott* case (1857). And in consideration of the post-Reconstruction evolution of a new standard by which to judge immigration issues, the Passenger Cases revealed the continuing impact of constitutionalism that strengthened more humane concerns for alien groups. The book thus leaves no doubt as to the hardships and suffering of immigrants both before and after the Civil War. These issues continue to complicate immigration law as much today as they did more than a century and a half ago. The persistence of these problems suggests that a “decent respect to the opinions of mankind” continues to demand a coherent, humane, and more consistent immigration policy.

The antebellum Constitution’s view of immigration matters provides today’s Court with much valuable information concerning the interplay of federal and state functions in dealing with immigration issues. As discussed in the Alien Tax Cases, the individual states bore the major responsibility of caring for the welfare of newly arrived residents; that required additional revenues, or alternative financial bonding arrangements to ensure adequate controls and the availability of public health protection. Amid the limited expansion of federal authority in the era, the impact of immigration—including the complex connections to the legal status of free blacks and slavery—remained a controversial issue at both the state and national levels. Thus the Passenger Cases provided a perceptive, albeit backward, look at the complexities of governmental control and involvement in this critical area of our national life that has remained important in present times, including the so-called revolution launched by the Fourteenth Amendment’s revisions of citizenship that aliens could share with U.S. citizens. Finally, readers have indicated that the retrieval of the unfamiliar commerce power issues in this history suggests that more rather than less excavation of legal, social, and economic “details” and their analysis through repetition may be appropriate. I have done my best to strike a balance.

{ *Introduction* }
Between the 1819 U.S. Passenger Act and the 1837 Panic the states developed primary control over admitting or excluding foreign immigrants. From victory in the American Revolution to the Napoleonic Wars, shippers and agents financed relatively modest numbers of immigrants making the transatlantic passage by requiring labor contracts traded like property in Southern slaves. During the 1819 Panic Congress passed the U.S. Passenger Act, which attempted to regulate spatial conditions immigrants encountered aboard vessels. Although poorly enforced, the federal law instituted regulations governing immigrant ships that included data collection showing steady increases in the immigrants arriving annually into U.S. ports. In New York City, the nation’s leading port, the number of foreign immigrants grew from 13,000 in 1830 to 58,000 in 1836. Since federal regulation ended with immigrants’ disembarkation from aboard ship, state and local governments evolved complex police powers that facilitated admission of immigrants. These police-power regulations drew immigrants into local, state, and national party politics embracing free blacks and Southern slavery. Gradually, the state and federal judicial process led by the Supreme Court reshaped political struggles into legal and constitutional issues contesting the point where federal commerce power regulation over foreign immigrants ended and state police power regulations began.

The following narrative recognizes that state police powers in principle certainly permitted exclusion of undesirable immigrants. The evidence nonetheless supports the thesis that from 1819 to 1837 factors driving immigration from Britain and Europe to the U.S., combined with the data collected under the U.S. and New York Passenger Acts, enmeshed the immigrant trade in local and state politics. The state and federal judicial process reconstituted political struggles into
legal issues that reached the Supreme Court, ultimately contesting the
status of immigrants and free blacks as legal “persons,” the resolution
of which facilitated the immigrants’ admission more than exclusion.
The first section presents the law and politics constituting the shift in
the immigrant trade from labor contracts to free-trade competition
that coincided with Marshall Court interpretations of the Constitu-
tion’s commerce power in Article 1, Sections 8–10. The second sec-
tion focuses on New York City’s police powers and extralegal politics
governing legal “persons” under the state’s alien tax and the 1824 Pas-
senger Act; the third section presents the same political and legal con-
text for the 1837 alien tax within the Massachusetts poor law. The
fourth section examines Chief Justice Marshall’s success in deciding
*Gibbons v. Ogden* and two other commerce power precedents by avoid-
ing the legal status of “persons,” until his delayed decision of *New York
City v. Miln* left the outcome to a reconstituted Supreme Court led
by Chief Justice Taney.

The U.S. Passenger Act and the Law and
Politics of the Transatlantic Immigrant Trade,
1819–1837

Before the 1819 U.S. Passenger Act, emigration from Europe to
America gradually increased and payment for passage relied prima-
arily on labor contracts. In 1818 Pennsylvania congressman Adam Sey-
bert published statistics indicating that the annual number of foreign
immigrants arriving in the United States averaged about 4,000 from
1784 to 1794; in 1810 the estimated annual average had risen to 6,000.
As a result of agricultural blights in Europe and Britain the number
of immigrants arriving in the United States reached an estimated
10,000 in 1817. New York immigrant commissioner Friedrich Kapp
later described labor contracts used to pay for the transatlantic pas-
sage by 1818. The “great majority of immigrants” were “so poor that
they could not pay their passage, and in order to meet the obligations
incurred . . . for passage-money and other advances, they were sold,
after their arrival, into temporary servitude.” Thus, “prepayment of
the passage was the exception,” and the “subsequent discharge by
compulsory labor the rule. The ship owners and ship merchants
derived enormous profits from the sale of the bodies of emigrants, as
they charged very high rates for the passage, to which they added a
heavy percentage—often more than a hundred per cent—for their
risks. But the emigrants suffered bitterly from this traffic in human
flesh.” The U.S. Passenger Act reflected national and local politics,
including the Supreme Court that encouraged states to admit rather
than exclude growing numbers of immigrants by the 1837 Panic.

Kapp ascribed passage of the 1819 U.S. Passenger Act to South-
erners who resisted the sale of white immigrants’ labor contracts. A
Delaware congressman condemned a broker who sold Germans’ labor
contracts in the slave state in 1817. Delaware and Virginia slaveholder
congressmen then introduced into the U.S. House legislation that
regulated the space allocated poorer steerage-class passengers aboard
vessels plying the transatlantic immigrant trade. In 1819 an immigrant
labor broker unsuccessfully petitioned the U.S. Senate for assistance
in recovering Germans who abscended from labor contracts resold in
Tennessee and Alabama after Ohio courts had refused to enforce the
exploitation of white workers. In the four Southern states slavehold-
ers condemned the sale of white labor contracts as approximating too
closely the interstate slave trade that troubled Congress as it strug-
gled to separate Western slave and free-labor territories during the
years preceding the 1820 Missouri Compromise. Also prior to the
Missouri Compromise, Virginia congressional representatives briefly
supported transporting free blacks to Liberia at public expense. Free
blacks, however, would not subject themselves voluntarily to the
deplorable conditions aboard vessels offered steerage-class whites.
Accordingly, once a Virginia representative called for a final House
vote, the Passenger Act passed both houses of Congress and received
President James Monroe’s signature in 1819.

The 1819 Passenger Act proved difficult to enforce. Congress, said
Kapp, “fixed the space allotted to the emigrants to five tons, Custom
House measurement, for every two passengers, and in case of contra-
vention punished the captain with a fine of $150 for each passenger.”
The law also “declared the ship to be forfeited to the United States,
if the number of passengers carried exceeded the said portion of two
to every five tons. It further specified the amount of water and provi-
sions to be taken aboard by emigrant vessels, and exacted a fine of
three dollars for every day that any passenger was put on short allowance.” The tonnage and “customs measurement” nonetheless applied standards borrowed from the transport of material goods to people designated as “legal persons” requiring reasonable living conditions. The shippers manipulated the spatial criteria for immigrants by averaging together cabin and steerage specifications, even though disproportionate numbers—including families—occupied the steerage class. In addition, the food “provision” ignored the grim reality that very few vessels had cooking facilities sufficient for the large numbers of steerage-class immigrants. Moreover, the tonnage and customs measurements did not recognize that steerage-class passengers could afford limited food “provisions,” which often were inadequate over the weeks and months sailing vessels required to make the transatlantic crossing.

Although Kapp reported that the sale of white immigrant contract labor ended in the United States by 1819, shippers and agents crowded immigrants aboard vessels despite the U.S. Passenger Act. Like other critics in the United States and Britain, Kapp condemned the ship owners who “chartered the lower decks of their vessels to agents, for the payment of a certain sum for each ton of the whole space disposed of. The agents made the needful temporary arrangements for the accommodation of the passengers, and underlet the steerage, either to associations of emigrants, or parcelled [sic] it out to sub-agents or to single passengers.” Aside from “assigning a space, however small, to the emigrants,” agents “had no responsibility, and ran no risk whatever.” Aboard vessels, individual and family steerage passengers “had no other right than to occupy the ten or twelve square feet which were allotted to them.” These crowded conditions in conjunction with the limited provision for water, food, and the means for their preparation bred disease. Yet the “agents, in order to make the business lucrative, sent on board as many passengers as they could get hold of, without the smallest reference [to] the convenience of the steerage, the number of the births, the separation of the sexes, or anything except their own immediate profit.”

The 1819 federal Passenger Act included one regulation, however, that was enforced. The law required federal customs collectors in all U.S. ports to make quarterly reports to the secretary of state giving the “number of passengers arriving in their collection districts, by sea,
from foreign countries; also the sex, age, and occupation of such passengers, and the country in which they were born.” This statistical data thus established the numbers and national origins of the immigrants arriving in U.S. ports. From 1826 to 1830, for example, the annual totals of those entering the United States were 10,837; 18,875; 27,283; 22,530; and 23,322. Over these same years shifting proportions of immigrants came from the British Isles, including England, Scotland, Wales, and Ireland, with 7,709 in 1826; 11,952 in 1827; 17,840 in 1828; 10,594 in 1829; and 3,874 in 1830. Kapp, suggesting similar humanitarian evidence reported in Parliamentary Papers, explained that the “fluctuations were due to the great commercial panic of 1826, and the distress in the manufacturing districts of England, as well as” another “famine in Ireland, which drove thousands from their homes, who, under ordinary circumstances, would never have thought of emigration.” Political struggles, by contrast, brought numbers of German immigrants that periodically exceeded that of British immigration with annual totals from 1834 to 1837 of 17,654; 8,245; 20,139; and 23,036.

Limited regulation favoring agents’ and shippers’ profits, combined with increasing numbers of immigrants, encouraged ineffective policing of the immigrant trade in ports. Agents and shippers rebuffed criticisms of harmful conditions on vessels, declaring that immigrants often came aboard already in poor health as a result of sharp practices perpetrated in Liverpool and other British ports. Even so, from the 1820s on reformers and philanthropists repeatedly petitioned Parliament, urging increased policing and regulation targeting notorious operations of private “hotels,” “hospitals,” and “runners.” These enterprises took advantage of an immigrant’s weakened physical condition caused by famine as she or he waited for days or weeks to board ship. Parliament’s gradual funding of more policing and official oversight did not match the scale of harmful conduct. Reliance upon episodic litigation for enforcement had little deterrent effect. Moreover, the British consul in New York witnessed the deplorable condition of immigrants arriving from Liverpool in vessels that had not complied with the 1819 U.S. Passenger Act. He recommended that Parliament adopt standards that more nearly approximated those in the U.S. law. Parliament’s 1835 act, however, simply compromised low standards the London Ship Owners Soci-
Disease resulting from crowded conditions aboard vessels directly affected American states’ police powers. The most common shipboard diseases resulting from noncompliance with spatial regulations were cholera, or “ship fever,” followed by typhus and smallpox. Kapp reported medical “facts” demonstrating “that the ships on board of which cholera broke out were those which were most crowded with passengers, and the vessels on board of which deaths from other diseases occurred were next most crowded, whilst the remainder, which were healthy, had the lowest average of passengers.” Throughout history, governments empowered port officials to protect local people from possible diseases carried by those arriving on vessels from foreign ports. In Europe and Great Britain central governments delegated this police power to port officials, who administered quarantines and exercised authority to deport aliens deemed a threat to the general welfare. The U.S. Constitution established a federal-state system, however, in which the separate states rather than the federal government administered police powers governing the health, safety, and welfare of citizens and immigrant aliens alike. As the transatlantic immigrant trade gradually grew from the 1820s to the Panic of 1837, the U.S. and British passenger laws’ weak enforcement thus had profound social welfare consequences for the costs and administration of the states’ police powers.

While federal and British passenger acts encouraged the transport of both healthy and infirm immigrants to U.S. ports, state police powers separated individuals admitted from those excluded. As long as the annual volume of immigrants to all U.S. ports remained low at around 4,000, state port authorities could readily identify and decide whether to deport the small proportion of undesirables. The statistics collected under the federal Passenger Act indicated not only the increasing immigrant totals but also that New York City was by far the leading destination of all national groups, especially the Irish and Germans. Indeed, by the Panic of 1837 about two-thirds of all foreign immigrants disembarked in New York. The factual evidence also showed that German ports enforced spatial standards that reduced shipboard crowding better than did the British ports, creating divergent welfare conditions between German and Irish immigrants. New York officials...
initiated a police power system that accommodated the uneven health and welfare of immigrants seeking admission to the state. Shippers signed bond agreements guaranteeing that disembarking passengers were not diseased, destitute, criminal, or dangerous radicals who within as long as a decade might jeopardize the state’s welfare.

The bond agreements were the first step in states’ regulation of immigrants that encouraged admission rather than exclusion. The bonds required two sureties using negotiable notes, which in turn provided long-term credit designated for the support of almshouses. In addition, New York City officials granted shippers the option to “commute” the bonds by paying a fee for each immigrant carried aboard ship. Shippers could include the cost of the commutation fee in the ticket price. As the volume of the transatlantic immigrant trade increased during the 1830s, ticket prices reflected greater than ever competition, which led shippers often to pay the total commutation fees using negotiable bills and notes. Like the bond-sureties, the commutation fees provided New York City officials another source of credit, which defrayed social costs of administering the almshouses and other immigrant welfare services. The state also authorized city officials to support the immigrant regulation system with a portion of the auction duties collected from the sale of all imported goods entering the port. The state also enabled local officials to levy an “alien tax” on each and every foreign immigrant without regard to health, which funded the administration and services the city provided at the Maritime Hospital adjacent to quarantine on Staten Island. The system of bonds, sureties, commutation fees, auction duties, and the alien tax gave New York City officials a stake in admitting rather than excluding foreign immigrants.

The admission of foreign immigrants to U.S. ports also influenced citizenship. The Constitution granted the federal government the power to naturalize foreign immigrants residing within states and federal territories. Immigrants residing in federal territories acquired by treaty from foreign nations, in the Northwest Territory, which the states ceded to the federal government in 1787, or in the territories separating slavery and free labor in the 1820 Missouri Compromise acquired federal citizenship. The states Congress established from federal territories conferred state citizenship. For foreign immigrants who after admission continued to reside in New York, Massachusetts,
or other states, this state and federal citizenship triggered complex issues of interstate privileges and immunities and qualification for federal court jurisdiction. Still, Justice Bushrod Washington noted in 1824, “every citizen of a state owes a double allegiance: he enjoys the protection and participates in the government of both the State and the United States.” Robert Ernst, a historian of New York City immigrant life from 1825 to the Civil War, described the realities of acquiring what amounted to dual citizenship: “Immigrants were met at the boat; a ‘naturalization bureau’ was set up at the” city’s Tammany Hall “Wigwam where aliens were advised and assisted in filling out naturalization papers; and it was common knowledge that many of these adopted citizens voted before they had fulfilled the Federal residence requirement of five years.”

Chief Justice John Marshall’s Supreme Court established constitutional precedents interpreting the federal commerce power and state police powers that facilitated state admission of immigrants. The Constitution’s Article I, Section 8, enumerated the Commerce Clause enabling Congress “to regulate Commerce with foreign Nations, among the several states, and with the Indian Tribes.” In *Gibbons v. Ogden* (1824) the Marshall Court held that Congress possessed an exclusive commerce power to license vessels plying interstate coastal waterways and to enact treaties and other international agreements such as the tonnage regulations imposed in the federal Passenger Act. This exclusive commerce power encouraged a steady flow of immigrants to U.S. ports and among the states and territories. Marshall’s opinion in *Gibbons* also upheld state regulation affecting foreign trade, such as quarantine and use of local pilots, which the Court later upheld in the *Cooley* case (1852). Other commerce power provisions in Article I, Sections 8–10, included limited taxes, customs, and tonnage that authorized shared federal-state regulation, such as “essential inspections.” During the early 1830s in *New York City v. Miln* Marshall delayed deciding whether state police regulations regulating admission or exclusion of immigrants designated as legal “persons” violated federal laws and an exclusive commerce power. By the 1837 Panic the *Miln* litigation embraced divisive immigrant, free black, and slavery politics in New York, Massachusetts, and the Supreme Court.

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New York’s 1824 Passenger Act and Alien Tax in Law and Politics, 1819–1837

New York’s rise as the nation’s leading port in the transatlantic immigration trade drew upon federal and state regulations that encouraged admission of immigrants. The statistics stipulated under the 1819 U.S. Passenger Act established that in 1821 New York had four times the number of immigrants arriving aboard vessels from foreign ports compared to each of its closest competitors: Boston, Philadelphia, New Orleans, or Baltimore. The comparatively larger number of immigrants entering New York City resulted in the state assembly passing the Passenger Act of 1824. The U.S. Passenger Act focused on the number, birthplace, gender, age, and occupation of immigrants. New York’s 1824 Passenger Act, however, required shipmasters to provide written reports of each passenger’s physical and mental condition. The reports were the basis for bond and surety agreements between shipmasters and the city; they also established a record enabling the mayor’s office to discharge liability if the shipper instead paid the commutation fee. The reports also aided collection of the alien tax that supported the Maritime Hospital, though the tax was levied on passengers and crew alike without regard to health. Regulations instituted in U.S. and New York passenger laws enabled city officials and brokers to pursue corrupt practices through the bond, surety, and alien tax system, which in turn implicated state politics embracing immigrants, free blacks, and slavery in the 1836 presidential election.

The alien tax was integral to New York’s system of immigration regulation. Though the alien tax had operated since the 1790s, the legislature altered it in 1829 in order to support the Maritime Hospital. The law required masters of vessels arriving in the city from a “foreign port” to pay a $1.50 tax levied on the captain, each crew member, and every steerage- or cabin-class passenger. Masters of coasting vessels running from New York City to ports in other states paid twenty-five cents “for each person on board,” except that coasting vessels from “New-Jersey, Connecticut and Rhode-Island” paid the tax on only “one voyage in each month, computing from the first voyage in each year.” Ship masters, in turn, were empowered to
recover from the passengers and crew the amount of the tax. Shipmasters of vessels arriving from “foreign” ports paid the tax to the “health officer” representing the city’s “commissioners of health.” In order to collect the tax on board vessels, the “commissioners of health” also were required to “furnish a convenient boat with sufficient boatmen, for the use of the health officer.” Masters of coasting vessels, by contrast, had no more than twenty-four hours after entering port to pay the tax at the health commissioner’s New York City “office.” The penalty for noncompliance was $100. If any shipmaster refused to pay the tax, the health commissioner sued for recovery in the city’s name.

New York’s alien tax extended the federal-state regulatory system linking police powers to federal commerce power regulations. The shippers’ claim was not that the state tax on immigrants was an economic “burden,” but instead that it conflicted with the federal passenger law, which regulated the same people aboard ship. The immigrant tax city “health commissioners” enforced funded the “Marine Hospital” built on state property occupying the “easterly shore of Staten-Island.” The elaborate tax-collection process enabled maintaining and staffing the public hospital that ostensibly serviced immigrants in poor or diseased condition. Still, the alien tax was collected from shipmasters on vessels regulated under the U.S. Passenger Act, and from captains operating coastal vessels requiring a federal coasting license. Indeed, the ill-health of immigrants sent to the Maritime Hospital often arose directly from shipmasters’ or shippers’ failure to comply with the regulations stipulated in the U.S. Passenger Act. The health officer’s alien-tax collection aboard vessels arriving from “foreign” ports also embraced the same state-federal regulatory system, including the U.S. Passenger Act, local pilots, the Staten Island quarantine, and health reports prescribed under New York’s 1824 Passenger Act. Thus, city officials enforced the alien tax directly on shippers operating the transatlantic and coastal immigrant trade governed under the federal commerce power sustaining the U.S. Passenger Act within New York harbor, in order to maintain patients in the state Maritime Hospital on Staten Island.

In addition to the collection of the alien tax, the 1829 statute also stipulated Maritime Hospital governance targeting health-care accounting costs and enforcement. The “hospital monies” supported
the institution’s “physician,” titled the “health officer,” the “mates, nurses and attendants,” and the “bedding, clothing, fuel, provisions, medicine, and such other articles.” Although “[e]very sick person sent to the marine hospital, shall be there kept and attended to, with all necessary and proper care . . . no such person shall leave the hospital, until the health officer shall grant a discharge in writing.” Moreover, the health officer could compel “in writing, any constable or other citizen to pursue and apprehend any person, not discharged who shall elope from the hospital,” and to return “such person” to be “detained” at the hospital “until regularly discharged.” Indicating further the potentially involuntary nature of hospital admittance, the statute also designated that “every person who shall so elope shall be considered guilty of a misdemeanor, punishable by fine or imprisonment.” These penalties meant that the alien tax supplemented “those who [themselves] shall have paid hospital money, and such poor persons as the board of health shall exempt.” In addition, others “sent to the hospital” able to “pay a reasonable sum for their board, medicine, and attendance” could be sued for the “recovery of such sum” in the “name of [the health commissioners’] office.”

While the 1829 statute directly taxed shipmasters in order to fund the Maritime Hospital, its underlying police powers sustained systemic corruption. Like the bond-surety system, the statute imposed an enforcement process giving hospital and health officials a judicial cause of action in order to recover against shipmasters and shippers, as well as immigrants designated as “persons.” In most cases, the 1829 alien-tax statute and the bond-security system also protected New York City officials from litigation except where culpable conduct could be expressly proven, such as in cases concerning the public accounting of moneys. Following the 1819 U.S. Passenger Act, the volume of the transatlantic immigrant trade steadily grew, replacing white contract labor with cabin- and steerage-class passengers paying more competitive ticket prices. As the city’s income and credit grew from the increased immigrant trade, the state assembly granted New York City officials broader powers, including the 1824 Passenger Act and the alien tax. Commissioner Kapp later reported, however, that “old abuses were continued with the same impunity. In fact, the entire business became a private traffic between a set of low and subordinate city officials, on the one hand, and a band of greedy and unscrupulous
brokers, on the other. It was . . . legalized robbery, the headquarters of which was at the City Hall.”

New York City’s corrupt practices and the volume of immigrant trade expanded together. Whereas the annual immigration to New York averaged about 4,000 between 1819 and 1824, by 1829 it had risen to about 14,000. The 1830 census registered “aliens, foreigners not naturalized” at about 8.77 percent of New York County’s total population, compared to 2.74 percent for the rest of the state, and over twice that of Boston. In 1836 about 58,000 immigrants arrived in the city. Shipmasters and shipping firms accommodated the growing trade seasonally: part of the year they filled vessels with bulk cargos such as lumber or dry goods, but during a better-weather season they crammed the same vessels to full capacity with immigrants. Exposés of tragic conditions on board vessels transporting immigrants equated their plight with the Middle Passage in the international slave trade, which since 1808 Congress had formally outlawed. Such evils continued after the immigrants’ disembarkation into New York City. Thus, Kapp reported, “as soon as emigration assumed greater proportions, [city] law [enforcement] became susceptible of the most flagrant abuses, which were actually practiced under it, and it did not afford the slightest indemnity for the maintenance of those who became chargeable to the city [under poor laws].” Indeed, “within a day or two after landing,” many immigrants were “taken from wharves in large numbers, in a state of destitution, and sent to the Alms Houses.”

The transatlantic immigrant trade and New York City’s immigrant regulations also were entangled in party politics. Northern and Southern politicians knew that growing numbers of Irish immigrants entering New York City during the 1830s voted Democratic. These voters depended on Tammany Hall leaders turning the federal naturalization law to the purpose of recruiting immigrants who voted before completing the federal five-year residency requirement. Supported by Tammany Hall, the city’s Democratic aldermen also administered the moneys and credit from the bond-surety system, the alien tax, and other sources in return for immigrant community votes. In addition, the 1830 census showed the breakdown between the city’s free blacks and “alien foreigners” to be 13,959 and 17,773 respectively. New York enfranchised free black males, though because of a property-holding
requirement the numbers were smaller than those in Massachusetts and other New England states. Nevertheless, by the mid-1830s the city’s and the state’s black voters supported temperance and education laws Whigs enacted, which Irish Catholic immigrants and the Democratic Party resisted. Thus, while New York City’s white immigrant population gradually outstripped the numbers of free blacks, the latter’s support for Whig’s temperance and education measures ensured interracial conflict that both undercut social-class unity and strengthened political-party divisions.

The city’s interracial party conflicts affected complex statewide politics encompassing the South. Although most Southerners had limited direct involvement in the immigrant trade, Southern leaders had supported the 1819 U.S. Passenger Act, following revelations that white immigrants were treated like black slaves. Southerners also supported the New York court ruling in 1834 that state law did not shield an escaped slave, Jack, from being returned to his master. North-South sectional politics also fostered Southerners’ growing attention to Irish immigrants arriving in New York City. For decades New York usually allied itself with the Southern states in presidential elections. Victory for the intersectional alliance in the 1836 election, however, depended more than ever on city Democrats delivering the immigrant vote, as New Yorker Martin Van Buren campaigned against three different Whigs and South Carolina’s anti-Jackson candidate. New York’s internal sectional divisions nonetheless aligned western and upstate counties in which blacks joined Whigs voting against Democrats and their immigrant supporters. Although Van Buren won the election, the free black–white immigrant party conflicts that characterized New York City had become statewide. Accordingly, after 1836 Van Buren and other western or upstate Democrats gradually distanced themselves from proslavery Southern Democrats.

New York’s 1824 Passenger Act and alien tax tested the separation between federal and state regulations admitting immigrants within city, state, and national politics. The New York law facilitated implementation of the bond-surety-commutation system and the alien tax, which encouraged the city’s admission rather than exclusion of immigrants. Indeed, between 1830 and 1836 the number of immigrants entering New York port increased from 13,000 to 58,000, encouraging Tammany Hall’s immigrant-voter recruitment, corruption in
administration of immigration regulations, and party politics that divided free black and immigrant voters. Transatlantic shippers also benefited from the weak enforcement of the 1819 U.S. Passenger Act and Parliament’s 1835 law. New York’s Passenger Act and the 1829 alien tax nonetheless affected the same immigrants subject to regulation under the U.S. and British Passenger Acts and trade agreements. During the early 1830s a shipper challenged the state’s Passenger Act in *New York City v. Miln* as a violation of the Marshall Court’s commerce power precedents, U.S.-British laws, and trade agreements; the case also embraced issues concerning the Negro Seamen Act and interstate slave trade. As the *Miln* case wended its way to decision in the U.S. Supreme Court, the Massachusetts alien tax engendered a constitutional challenge to the same Marshall Court precedents, which had political ramifications for the state’s immigrants and free blacks.

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**Law and Politics in Police Powers and the Massachusetts Alien Tax of 1837**

The 1837 alien tax helped to finance the operation of the Massachusetts poor law. Since 1832 the number of immigrants entering Boston harbor had risen nearly threefold compared to the later 1820s. Roughly 60 percent of these immigrants were destitute Irish who, despite contract commitments to emigrate from Ireland to British North America, soon removed to Irish American communities such as Boston. Massachusetts courts also enforced the freedom of sojourner slaves Southern masters voluntarily brought into the state. These poorer immigrants and freed blacks encouraged levy of a $2.00 alien tax on ship captains for every foreign passenger entering the state’s ports. The alien tax supported the Massachusetts poor law enabling most destitute persons to receive certain benefits, while those designated paupers, diseased, political radicals, or criminals could be deported. The tax extended to “alien passengers” a policy existing since colonial times “designed to guard this privilege of relief at the public expense, in cases of extreme indigence, from abuse, and to secure the State and its citizens from unreasonable burdens, whilst

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providing for exercise of a duty of humanity towards those, who in the ordinary course of life are placed within its borders.” Like New York’s immigrant regulations, the Massachusetts alien tax evoked immigrant and racial politics and constitutional challenges.

The state’s empowering of port officials to collect the alien tax affected many of the same people regulated through federal laws and treaties. Boston port inspectors determined whether alien passengers arriving aboard vessels came within state police power rules that enabled excluding persons designated unfit for reasons of hygiene, immorality, criminality, or radicalism. The federal Passenger Act and U.S. treaties authorized state port officials to quarantine or deport immigrants in cases of known or suspected disease. The state inspection system also required shipmasters to post a $1,000 bond with sufficient security, affirming that the designated person or persons would not become public charges for ten years. Along with these police power regulations, the Massachusetts legislature in 1837 levied the $2.00 alien tax; Boston port officials authorized “boarding officers” to collect it from ship captains before the designated immigrants disembarked. State law and the Marshall Court commerce power precedents authorized the municipal operation of the bond-surety system, quarantines or deportation in cases of health hazards, and state regulation of pilots for vessels entering the state’s harbors. The alien tax differed, however, in that it was essentially a revenue measure funding the state poor law levied through shipmasters on the same passengers subject to federal laws and treaties sustained by the commerce power. Such state-revenue measures could raise constitutional objections.

The Massachusetts alien tax passed in 1837 amid divisive politics embracing Irish immigrants. Federal customs officers routinely collected tariff duties until South Carolina “nullified” the federal tariff during the Nullification Crisis. Although Andrew Jackson’s 1833 Force Act compelled South Carolina to capitulate, nullification set certain Massachusetts Democrats against Southern Democrats preceding the 1836 presidential election. Meanwhile, the growing numbers of Irish Catholic immigrants increasingly were segregated within certain communities near Boston, such as Worcester and Lowell. The federal five-year naturalization process nonetheless enabled Irish immigrants to readily acquire state citizenship. By the mid-1830s the
Boston *Courier* described recent Irish Catholic immigrants as belonging to the “Customs House party” of Democrats. The term suggested New York City “St. Tammanies’” political clout, which exploited Irish self-identification contained in the data customs officials collected under the U.S. Passenger Act. During the same period, poorer Irish constituted over 30 percent—a proportion greater than any other national group—of the residents in Boston’s poor houses. The 1837 alien tax thus became law not long after sectional politics divided Massachusetts Democrats, while Irish voters exercised increasing influence among Boston Democrats and destitute Irish were primary beneficiaries of the state poor law that the tax supported.

Robert C. Manners, the British consul in Boston, urged shipmasters to legally protest paying the alien tax. The legal protests signaled not only Manners’s support for the shippers’ dislike of the levy, but also the lawful presumption that if courts declared it unconstitutional, captains and shippers could recover from the state the amount of paid taxes plus interest. Even so, the Boston boarding officer levied the alien tax while requiring from the shipmaster documentation stating the immigrant passengers’ physical and mental condition. Municipal-port authorities also empowered boarding officials to deny disembarkation to immigrants from vessels whose master did not pay the alien tax. The method of protest thus reflected the reality that moneys paid the boarding officer might be recovered through litigation between the city official and the shipmaster or a ship owner. Such recovery was only possible, however, if a court declared the tax unconstitutional. In addition, unlike the bond-surety system, which was a contractual obligation generally based on negotiable commercial notes due at some later date, the tax required immediate payment. When Canadian officials imposed a similar tax, opponents’ only recourse was to lobby provincial legislatures and Parliament, which did not succeed. Manners, however, raised constitutional claims that federal or state judges—and ultimately the Supreme Court—could use to overturn and ultimately force repayment of the alien tax.

The Constitution’s federal power to naturalize aliens provided further national political context for the Massachusetts alien tax. The Federalists’ controversial 1798 Naturalization Act had extended the alien residency period from five to fourteen years; the shorter period, however, was reinstituted in 1802. Another provision of the 1798 act
that longer remained in effect stipulated that any white alien arriving in the United States should within forty-eight hours appear before a federal official authorized to grant a registration certificate. Aliens who previously were resident in the United States had six months to register. The 1802 act did away with the mandatory legal registration system at the time the alien entered the country, though a signed registration document could be used as evidence for the purpose of proving the five-year residency period. Conditional registration was repealed after Congressmen James Buchanan's 1828 report informed the House of Representatives that the system was so widely ignored that it had little practical effect. Alarmed at how readily New York Tammany Democrats and other local political machines exploited the federal naturalization process in order to confer state citizenship upon immigrants, some nativist spokesmen lobbied Congress for a return to the fourteen-year period. These nativist initiatives achieved little success, however, during the 1830s.

The Massachusetts poor law supported in part by the alien tax provided assistance to all destitute groups irrespective of gender, race, or national origin. Since 1794 the state's poor law empowered each county to confer a "settlement" upon qualified male paupers—including the disproportionate numbers of Irish in the Boston poor house—wives and families, small property holders, transients (including seamen), free blacks, and a few slaves. The 1794 law also required the county to pay litigation costs in cases challenging the administration of the poor law. By 1837 dispossessed free blacks, white steerage-class immigrants, and even a former slave could qualify for the poor-law settlement, funded in part by the alien tax. The poor law covered litigation affecting settlement claims, which guaranteed equal judicial due process including blacks and white foreign immigrants alike. Notwithstanding this procedural equality, the state's personal liberty law permitted racial separation in public schools, as well as a school curriculum reflecting Protestant values, which discriminated against Catholics. Massachusetts courts' procedural equality nonetheless was sharply distinguishable from many other free states that practiced varying degrees of racial discrimination under black laws. The state's greater legal equality for blacks and white immigrants in the administration of justice and the poor law was still more pronounced in comparison with the strict white supremacy permeating Southern slavery.

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The alien tax passed in 1837 amid fragmented party politics benefiting Democrat Marcus Morton. During the later 1830s Whig Party dominance of Massachusetts politics eroded in part because growing numbers of Irish immigrants in and around Boston provided pivotal support for Morton, who was antislavery, while some Massachusetts Democrats remained loyal to Southern Democrats’ promotion of slavery. Within greater Boston, moreover, a faction of Scots-Irish Protestant workers within the Democratic Party resisted the growing numbers of recent Irish Catholic immigrants who worked for lower wages. In 1834 and 1837 the clash between the native workers of Scots-Irish Protestant descent and the recent Irish Catholic immigrants resulted in violence, including the burning of a “fashionable” school for young women run by the Ursuline Sisters in Charlestown. Nevertheless, the solid bloc of Irish Catholic voters, combined with the state’s western farm workers identified with the “workingmen movement” and Anti-Masons, enabled Morton to receive a growing proportion of votes in gubernatorial elections. In the presidential election year of 1836 Morton’s gubernatorial vote rose to 10,765, while his victorious Whig opponent, Edward Everett, gained just 4,605 votes. Three years later Morton finally was elected governor by a single vote.

The Whigs’ eroded dominance of Massachusetts politics reflected a similar fluidity that aided passage of the 1837 alien tax. While Massachusetts Whigs were overwhelmingly Protestant, a persistent division involved support for a state temperance bill that empowered local officials to restrict consumer sale of alcohol beverages to the point of virtual prohibition. A faction of Whigs embraced prohibition, targeting Irish Catholics’ alcohol consumption; the more restrictive legislation became law in 1838. In addition, Massachusetts was one of several New England states in which adult black males voted; because generally they were devout evangelical Protestants, these same blacks tended to support those Whigs demanding the restrictive temperance law. Some Whigs also joined black voters advocating political action to abolish slavery, contrary to William Lloyd Garrison’s movement, which advocated abolition while eschewing politics. Also, Massachusetts Whigs generally opposed admitting proslavery Texas into the Union after it won independence in 1836. In the same year the Massachusetts Supreme Judicial Court decided Commonwealth v. Aves,
which freed Med, a six-year-old slave girl, from a master who had voluntarily brought her to Boston. The court held that the state constitution and many court precedents since the 1772 *Somerset* case freed slaves in states that, like Massachusetts, had abolished the institution through positive and common law.

Despite Massachusetts’ fragmented politics, the alien tax reflected bipartisan party support. The 1830 census suggested that blacks and recent immigrants occupied pivotal political constituencies: one person was designated a “slave,” while 7,048 were “free colored persons,” the number of “aliens (foreigners not naturalized)” was 8,787, and there were 603,359 “free white persons.” The Panic of 1837 hurt individuals and families in all three groups; the alien tax contributed to the poor law, which offered a county “settlement” to members of each group on the basis of legal equality. This poor-law equal access passed amid Whigs’ and free blacks’ promotion of temperance laws targeting Catholics. Support for the alien tax and poor law also coincided with the antislavery stance of free blacks, many Massachusetts Whigs, and pro-Morton Democrats, including his Irish immigrant supporters. The shared antislavery stance of each state party’s leaders also condemned the Southern Negro Seamen Act, which interfered with conservative Boston merchants’ free trade employing free-black sailors. Still, the bipartisan antislavery politics consistent with the state’s poor law was contrary to some Massachusetts Democrats’ loyalty to Southern Democrats’ defense of slavery. All groups’ equal access to the poor-law “settlement” also passed in 1837 notwithstanding discrimination imposed in the Boston schools’ “equal-but-separate” doctrine against free blacks and anti-Catholicism in the public school curriculum.

Amid contested immigrant and racial politics, Boston’s British consul Robert Manners challenged Massachusetts’ alien tax. During the 1837 Panic the tax raised costs on British and American shippers engaged in the immigrant trade; Manners represented these same commercial interests. The alien tax nonetheless helped to fund Massachusetts’ poor law, encouraging port officials to admit rather than exclude immigrants. In addition, antislavery free blacks and many Whigs embraced the legal equality of poor-law access and judicial due process conferred upon freed slaves that the alien tax also aided. From the perspective of these and other Massachusetts authorities, the 1837 alien tax merely extended the state police powers sustaining the poor
law. Manners undoubtedly perceived that the same police powers underpinned both Massachusetts’ relative legal equality and the discrimination enforced by Southern Negro Seamen Acts, which the British government resisted. He also understood, however, that unlike the bond-surety or quarantine systems, the alien tax was essentially a revenue measure levied upon the same individuals regulated by the federal Passenger Act and U.S.-British treaties. Manners thus urged ship captains to pay the tax under protest, which laid the foundation for recovery if a court held that the alien tax was a revenue measure that clashed with Marshall Court precedents establishing an exclusive federal commerce power.

Law and Politics in the Marshall Court’s Shifting Commerce Power from *Gibbons* to *Miln*

The Supreme Court did not construe the federal commerce power until *Gibbons v. Ogden* (1824). Prior to that decision Indian land claims, the international slave trade, and foreign consuls seeking federal court enforcement of admiralty jurisdiction over piracy and slave traders indirectly concerned commerce power issues. Meanwhile, Chief Justice Marshall, Justices Joseph Story and William Johnson, and others established the Supreme Court’s independence despite political attacks. Indeed, *Gibbons* arose following Virginian John Taylor’s criticism in 1823: the “consent of Congress [was] required to state laws in relation to duties . . . [b]ecause these were rights included in the principle of state sovereignty, subject to a limited federal control.” Taylor’s strict interpretation of commerce power provisions in Articles 8–10 also coincided with Charleston’s defeat of Justice Johnson’s attempted use of the exclusive federal commerce power to strike down South Carolina’s Negro Seamen Act. Political contestation recurred during the Supreme Court’s successive commerce power cases that avoided construing the status of free blacks or foreign immigrants as legal “persons.” The tensions between politics and the Marshall Court’s commerce power precedents delayed deciding in *New York City v. Miln* whether the state’s 1824 Passenger Act clashed with the U.S. Passenger Act, treaties, and an exclusive commerce power.
The basic facts in *Gibbons* were that Thomas Gibbons, operating under a federal coastal license, ran steamboats between the New Jersey shore and Manhattan. Aaron Ogden held a license from the original monopoly the New York legislature conferred upon Robert Fulton’s early steamboat. New York courts upheld the state monopoly against Gibbons on the ground that it was a legitimate exercise of police powers within the state that did not affect the interstate and international commerce power. Gibbons appealed the state police power and federal commerce power claims to the Supreme Court. In *Gibbons* Chief Justice Marshall’s opinion for the Court began with vigorous language suggesting that Congress possessed an exclusive commerce power to regulate commerce defined beyond the mere trade in goods, embracing “intercourse” on an expansive scale. Marshall’s actual holding, however, did not use the “exclusive” terminology; he overturned New York’s steamboat monopoly on the narrow ground that it conflicted with the federal Coasting Act under which Gibbons held a license. Fundamentally, Marshall struck down the monopoly employing a limited interpretation of congressional power that supported the federal coasting statute as an exercise of federal supremacy. Marshall also affirmed state police power regulations requiring quarantine, the bond-surety system, or the employment of local pilots, enabling state collection of fees, limited by the expense to the state of the service provided.

Unlike Marshall’s reliance upon the federal Coasting Act, Justice Johnson’s concurring opinion in *Gibbons* targeted police power regulation of “persons.” The South Carolina Association’s vigilante action in Charleston obstructed Johnson’s circuit case, *Elkison v. Deliesselaine* (1823). Fear of the aborted 1822 Denmark Vesey slave conspiracy fired South Carolina’s defense of the state’s Negro Seamen Act that required free-black sailors to be imprisoned while their vessels remained in state ports. Penalties for noncompliance included enslavement of free-black seamen. Johnson’s circuit decision held that the state law was contrary to an exclusive commerce power, though free-trade reciprocity with Britain was not stressed. Negotiations among British, U.S., and state officials won Elkison’s release. The local defiance, however, spurred Johnson’s sweeping concurrence in *Gibbons*, emphasizing an exclusive commerce power that denied state interference with “persons” moving in interstate commerce. Johnson did not
mention free-black seamen. He rejected, however, that state sovereignty empowered police power regulations obstructing “the right of controlling personal ingress or migration, as implied” in the commerce power affirmed in the Constitution’s Article I, Section 9, regulating the international slave trade. Johnson’s opinion impliedly embraced not only “slaves,” but also “persons of all descriptions,” including black seamen.

Marshall’s affirmation of the federal Coasting Act and an exclusive commerce power also addressed Justice Smith Thompson’s silent opinion. Appointed to the Marshall Court in 1823 during the appeal of Gibbons, Thompson did not participate in the case because of family-health reasons. As a state judge, however, Thompson had served on the New York court that upheld the steamboat monopoly, suggesting a theory of concurrent-commerce power. New York’s chief justice, James Kent, had conceded that “it may be difficult to draw an exact line between those regulations which relate to external and those which relate to internal commerce, for every regulation of one will, directly or indirectly, affect the other.” Kent regarded a “safe rule of construction” to be that “if any given power was originally vested in this state, if it has not been exclusively ceded to congress, or if the exercise of it has not been prohibited to the states, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power.” Wherever such a “collision” occurred, the “state authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provisions of the paramount law.” Avoiding a determination of where a “concurrent power” might begin or end, Marshall nonetheless applied Kent’s reasoning, resting his Gibbons opinion squarely on the federal coasting law, sustained by an exclusive commerce power.

Marshall directly confronted Thompson’s dissent in Brown v. Maryland (1827). The state imposed a license tax on Baltimore importers, testing congressional regulation of foreign commerce. A key issue was whether the license tax came within the proviso of Article I, Section 10, that “no state shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.” In the latter category, Congress had permitted state regulations such as quaran-
tine and requirements for local pilots. Consistent with the precedent of *Gibbons*, Marshall curbed state police powers through a compromised exclusive commerce power. The state license tax was invalid as applied to imported goods contained in “original packages” arriving in Baltimore from abroad; it thus was not “absolutely necessary” for “inspections.” The license tax was valid, however, imposed on goods removed from those packages for resale among local retailers. Justice Thompson’s dissent termed the distinction artificial. Any tax on importers was passed on to consumers through retail prices levied according to the police power; since the latter was constitutional, so was the former. Still, just as he had avoided the slavery and free-black issues Johnson’s concurring opinion had implied in *Gibbons*, Marshall’s *Brown* opinion did not suggest police power regulation of “persons” such as immigrants, free blacks, or slaves moving in interstate or foreign commerce.

Marshall avoided the federal commerce power in *Willson v. Blackbird Creek Marsh Co.* (1829). Employing police powers, the Delaware legislature incorporated a construction company to drain a swamp by building a dam across a navigable stream. The sloop *Sally* “licensed” under U.S. “navigation laws,” including the Coasting Act, collided with the dam. The Blackbird Creek Marsh Co. won $20,000 in damages from a jury, which the state’s highest court affirmed. Under section 25 of the 1789 U.S. Judiciary Act, Captain Thompson Willson appealed to the Supreme Court claiming that the company’s dam breached the federal commerce power embracing navigable waterways. Willson’s argument suggested that since no claim based on a federal statute was argued, the dam violated a dormant commerce power. The vessel nonetheless operated under the federal coasting license like that Marshall had used to strike down the New York monopoly in *Gibbons*. Marshall, however, ignored both the federal coasting statute and the nascent dormant commerce power, upholding the state’s police power. The Marshall Court’s decision in *Willson* favored police powers supporting state development projects like New York’s Erie Canal. Marshall’s affirmation of state police powers also avoided the implication that white immigrants or free blacks designated as legal “persons” crossing state lines or arriving from abroad aboard ships might be regulated by an exclusive commerce power.

Political pressures suggested why Marshall’s commerce power
precedents did not address the legal status of “persons” within the federal commerce power or police powers. Marshall maneuvered within state-sovereignty challenges from Virginia, Ohio, and Kentucky. In particular, Kentucky senator Richard M. Johnson repeatedly introduced legislation to eviscerate the Supreme Court’s appellate jurisdiction. When the *Gibbons* litigation coincided with South Carolina’s defiance of Johnson’s *Elkison* decision, Marshall confided in Justice Story: “Thus, you see fuel is constantly added to the fire at which the exaltées are about to roast the judicial department,” using laws “not very unlike in principles to that which our brother [Johnson] declared unconstitutional.” Similarly, Marshall said, in Virginia “a case has been brought before me in which I might have considered its constitutionality had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped into the construction of the statute.” Marshall’s same strategic avoidance rested *Gibbons* narrowly on the federal coasting law rather than solely on an expansive exclusive commerce power. Similarly, in *Brown v. Maryland* Marshall rejected that a state’s “essential inspections” embraced the “original package” doctrine that endorsed a compromised exclusive commerce power. The *Willson* decision dismissed both an exclusive and a dormant commerce power, upholding broad state police powers.

Although Marshall’s three commerce power decisions ignored the status of free blacks or immigrants designated as legal “persons,” the issue was unavoidable in *New York City v. Miln*. New York’s 1824 Passenger Act enabled city officials to require from ship captains health reports for growing numbers of immigrants. City officials fined shipmasters who refused to file the reports. In 1829 these authorities sued on a debt action in state court to recover fines amounting to $15,000 from William Thompson, captain of the *Emily*, and his consignee George Miln. As a foreign national, Miln removed the case to the U.S. Circuit Court for the Southern District of New York. Both parties agreed that recovery of the fines raised the question whether New York’s Passenger Act was a valid police power regulation, or did it violate an exclusive commerce power upon which rested federal treaties and the federal Passenger Act? Justice Smith Thompson and federal district judge Samuel Betts constituted the U.S. Circuit Court. In order to certify the appeal to the Supreme Court, Thompson and
Betts divided over the scope of the police power and the commerce power. The question in *Miln* directly addressed the legal status of white immigrants as “persons” under police powers for purposes of determining their admission to or exclusion from the state. Marshall delayed deciding *Miln* partially in order to gain support for overturning New York’s Passenger Act as contrary to an exclusive commerce power.

Marshall died in 1835, leaving *Miln* undecided until Roger B. Taney was chief justice in 1837. Meanwhile, the federal judicial process channeled state and national politics embracing immigrants and free blacks as legal “persons” into the issues *Miln* presented: whether New York’s Passenger Act and police powers clashed with the federal Passenger Act, treaties, and an exclusive commerce power. In 1837 Boston’s British consul Manners also initiated the legal-protest strategy challenging the alien tax within the state’s poor law, which brought into the state judicial process immigrant, free-black, and antislavery politics linked to the federal passenger law and exclusive commerce power. Massachusetts’ alien tax raised basically the same constitutional questions as its New York counterpart. The Supreme Court’s 1837 *Miln* decision thus would shape the law and politics of each state court’s opinions admitting or excluding immigrants, free blacks, and slavery. But the *Miln* decision depended on attitudes Jackson’s Court appointees John McLean, Henry Baldwin, and James M. Wayne held toward *Gibbons* and Marshall’s other commerce power precedents. Only Justice Story supported an expansive exclusive commerce power. For Justice Thompson *Miln* presented the opportunity again to promote the concurrent-commerce power, while it offered Jackson’s last Court appointees, Taney and Philip Barbour, the means to address Marshall’s police power and commerce power precedents for the first time.

From the U.S. Passenger Act to the delayed decision of *Miln*, the law and politics of states’ admitting or excluding immigrants concerned legal “persons.” According to commissioner Kapp, up to 1819 shippers and agents controlled immigrant labor contracts that financed the transatlantic passage. Following the Napoleonic Wars, however, British and European agricultural and industrial dislocation brought steady increases in the number of immigrants transported to American ports, especially New York City. This trade shifted to ticket-
price competition, with the U.S. Passenger Act and U.S.-British trade agreements prescribing weak shipboard spatial regulation of immigrants’ welfare. State police powers, by contrast, governed bonds, sureties, commutation fees, alien taxes, and other regulations facilitating immigrants’ admission to rather than exclusion from states. The financial and credit advantages states gained from these regulations rested on information shippers supplied port officials, which emphasized the immigrant’s national origin and physical condition as “persons” rather than “commerce.” Electoral politics and extralegal practices also promoted admitting immigrants as voters and cheap labor, despite resistance from white-native and free-black workers and citizens. By the 1837 Panic the state and federal judicial process reshaped the immigrant and racial politics into legal issues pitting state police powers against the federal commerce power in the *Miln* and the Alien Tax Cases.