

The Passenger Cases and the Commerce Clause: Immigrants, Blacks, and States' Rights in Antebellum America

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Review

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Freyer, Tony Allan *The Passenger Cases and the Commerce Clause: Immigrants, Blacks, and States' Rights in Antebellum America*. University Press of Kansas, \$39.95 ISBN 9780700620081

Competing State and Federal Jurisdictions in the Antebellum South

In this study of the Passenger Cases (1848-1849), Tony Freyer has written a long-needed work of a poorly understood set of Supreme Court decisions from the antebellum period, suits that reveal much about growing sectional tensions prior to the Civil War. The cases are framed both in their own time and bracketed by related information from earlier and later periods: Freyer fully contextualizes the lawsuits, as well as describes earlier Marshall era cases to show how prior decisions like *Gibbons v. Ogden* (1824) and *Brown v. Maryland* (1827) might have influenced the Court's decisions. He then moves well beyond the Civil War in the last two chapters of the book to bring the importance of the Passenger Cases forward to the present day, for example discussing them in light of the anti-immigrant cases from Arizona and Alabama heard by the high court since 2010. As such, this book covers an amazing amount of ground in only 169 pages (plus chronology and index).

The Passenger Cases offered the Supreme Court the opportunity to weigh in on the proper division of power between states and the national government when it came to the admission or potential exclusion of immigrants from ports like New York City and Boston. Could a state require a ship captain to hand in documents about his passengers' conditions? Could it tax the ships in which immigrants arrived, to provide funds that would run a hospital for those who came to America in need of medical care? Could aliens who arrived be taxed, without exception, to support a state's poor relief funds? Most importantly, did such regulations run afoul of the national government's constitutional power to regulate commerce? The states of Massachusetts and New York each passed legislation to place these sorts of burdens upon arriving immigrants and the

captains who transported them. The money raised subsidized the growing costs associated with rising numbers of immigrants who arrived but were indigent, sickly, or both—and the funds collected grew enormous in a time when the potato famine of Ireland drove ever more desperate individuals into the coffin ships sailing for America. Know-Nothing supporters had no interest in these new arrivals, and favored heightened regulations if it would turn back would-be immigrants. Simultaneously, those ships delivered more men inclined to join the ranks of the Democratic Party in cities where politics thrived on corruption.

These issues of political power, immigration, and discrimination (ethnic, religious, and racial) were entangled with constitutional issues of balancing power between the state and the nation. Freyer's book reveals that, despite Justice Scalia's claim in *Arizona v. U.S.* (2012) that states had traditionally had greater authority to exclude immigrants and that the federal commerce clause permitted this, in fact the Supreme Court had ruled to the contrary when given earlier opportunities like the Passenger Cases. In the Passenger Cases, the court ruled 5-4 that federal power under the commerce clause gave the national government, not states, the ability to regulate aliens aboard inbound ships (in future, states would have to come up with alternate methods to fund their almshouses). This was a position the Marshall Court had avoided in earlier suits, preferring to create a distinction between commerce and persons, a distinction that did not survive the Passenger Cases—no matter how much Chief Justice Taney might have hoped such a distinction would prevail in the court's decision (this time, Taney was outvoted).

The potential to conflate commerce with persons lay at the heart of Southern nervousness about the Passenger Cases. If the Supreme Court should determine that the federal government had sole authority to regulate interstate commerce as it affected persons—in this case, immigrants—and then later deemed slaves to be legal persons, the court might thereby give Congress the power to put the internal slave trade completely out of business. Although some white Southerners mourned the closure of the international slave trade in 1808, the end of direct importation of Africans had been accomplished by a specific element of the Constitution, not by interpretation of the commerce clause. Expansion of the clause's power could give abolitionists a powerful tool to use against slavery. Moreover, if the national government's commerce clause power could trump all state-based laws that regulated the arrival or departure of individuals, Southern laws that imprisoned free black sailors during their stays in Southern ports might likewise be swept away. Thus, suits that potentially expanded commerce clause

powers garnered high levels of attention in this period; any cases the Supreme Court heard in relation to the commerce clause and individuals aboard ships (like the Passenger Cases) were bound to be incendiary, as far as the “peculiar institution” was concerned.

This book is smartly structured, giving the reader ample information on parallel cases in New York and Massachusetts, tracking their progress through lower courts, describing the key players in full (judges, lawyers, activists, politicians), and offering extensive quotes drawn from the primary sources that Freyer has obviously plumbed to the depths. This is, however, one element that may give readers some pause: the University Press of Kansas has published the book in its Landmark Law Cases and American Society series, which prints books without footnotes. Instead of footnotes, the reader is given a bibliographic essay offering pointers to where further information may be found; the essay itself is loaded with good scholarship, but locating individual quoted material using it might be close to impossible.

From a less eminent scholar, this missing apparatus might potentially compromise the book’s credibility and utility. It is here that knowledge of Tony Freyer’s earlier scholarship comes in handy. Freyer has spent a lifetime writing well-crafted legal histories that tackle tough questions. The author of ten books and numerous articles, Freyer has established himself as an expert on the intersection between federalism, business, and the commerce clause—the territory staked out in this book on the Passenger Cases.

Though novices on the commerce clause may find the concepts grappled with in this text challenging, graduate students studying slavery and those educated in legal controversies from this era will find much in Freyer’s new work to applaud, and learn from. The book deserves to find a broad audience, not just among historians, however. Our understanding of where the federal commerce clause ends and state police powers begins is not merely a question of historical interest; its impact upon questions of current day policy regarding immigration continue to give it immediacy and relevance.

Sally E. Hadden is an associate professor of history at Western Michigan University. She is the author of Slave Patrols and co-editor of A Companion to American Legal History (with Al Brophy) and Signposts: New Directions in Southern Legal History (with Patricia Minter).