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EMBEDDING FREE VERSUS SLAVE LABOR REGULATION IN THETRANSATLANTIC BRITISH EMPIRE AND THE UNITED STATES, 1835-1860

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Abstract

This study problematizes the historical perspective of jurisdiction specific legal analysis by examining the international context of the development of national labor regulatory regimes in the United States and the United Kingdom during the transatlantic immigrant and antislavery crises in the mid-nineteenth century.[2] This period is critical because of the desperate pressure these crises placed on large sources of labor at the bottom of society, poor immigrants and slaves. Starvation and enslavement compelled unprecedented migrations across national borders and within countries to different regions. The mobility of the populations brought them into contact with diverse forms of governance, from the regional differences within the balance of American federalism, to the competing national identities of the English, Irish and Canadian components of the British Empire. As a result, the transatlantic and intercontinental migrations are a particularly useful example for illustrating the importance of international context in the development of the law because of the different ways each governmental body responded to the social pressures. This study shows how the multiple and complex intergovernmental regulatory networks relating to the mobility of this labor force developed in an international context, not solely within the development of isolated national legal systems.[3]

Keywords: Migration; jurisdiction, anti-slavery; international context; regulatory regimes; mobility.

In the Free-State borderland between the American slave South and British North America, African descended people and transatlantic immigrants became enmeshed in the U.S. Supreme Court's constitutional commerce-power disputes exposing pro-slavery proponents' white-supremacy attitudes, which entrenched North-South racial struggles and labor mobility regulation trajectories. On the Upper Canadian side of the border, however, convergent immigrant and antislavery crises were ameliorated by what may be called the formal law's "color-blindness" coexisting with racial prejudice varying from place to place, within the British free-trade system. While the idea of "color blindness" in a Canadian context is just beginning to be examined, it grows out of

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[2] Philip Girard and Jim Phillips, rethinking 'the nation' in national legal history: a Canadian perspective, 29 law and history review 607 (2011).

[3] The idea of historically contextualized labor regulation draws from networked governance in John Braithwaite, regulatory capitalism how it works, ideas for making it work better, 1-4, 138, 158, 179, 204, 207 (2008); and network externalities, Douglass C. North, institutions, institutional change and economic performance at 7-8, 99 (1990) (2008).

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the general fact that within the British Empire, Upper Canadian citizenship and subjecthood did not either factually or as a matter of law, draw distinctions based on race, other than in education after the late 1840s. The insight is grounded on the absence of contrary commentary in the impressive research in African Canadian history by such scholars as Robin Winks, Barrington Walker, Donald George Simpson, and Lyndsay Campbell.[4]

This paper suggests the formation and implications of the Supreme Court's racialized commerce-power as compared to Upper Canadian "color-blind" policy. In Upper Canada formal legal equality coexisted with considerable evidence of discrimination. The contrast with the U.S Supreme Court's more racially-cognizant commerce power suggested a wider divergence during the 1850s between British free-labor inherent in the free trade system—however circumscribed that may have been especially in Ireland--and the slave versus free labor conflict in late-antebellum America. Preceding the Civil War, Charles Warren noted sometime ago, pro-and-antislavery politics influenced the Supreme Court's commerce-power decisions establishing uncertain criteria governing whether the states or the federal government possessed exclusive authority to regulate "persons" moving across interstate and international borders.[5] Although over the long-term the commerce power prescribed "persons" as commodities, Mary Bilder and others argued that the period 1837 to 1852 was unusual because the Supreme Court struggled to determine whether foreign white immigrants and slave or free blacks possessed citizenship claims. The comparative historical context helped to explain this uncertain commerce power defining "persons."[6]

Antebellum Southerners and their pro-slavery northern supporters on the Supreme Court insisted that fugitive slaves and free blacks crossing interstate and international bounders were "persons" subject primarily to state police powers.[7] My thesis is that during the transatlantic-crisis period culminating in the Irish Famine (1845-1852), the Court'scommerce-clause decisionsenforced conflicted governance regimes which entrenched tensions in the American federal polity making it impossible to resolve questions around the movement of people involving the existence of southern slavery. I also suggest that though it is difficult to theorize about legal/structural counterfactuals in the Canadas given the absence of slavery after about 1820, the borderland disputes fostered colonial unity around the British free-trade system established under the 1854 US-Canadian reciprocity treaty.

[4] Tony Freyer, constituting the free-state borderlands: New York, Pennsylvania, and Ohio; Lyndsay Campbell, the northern borderlands: Canada west, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 35-83, 195, 200-204, (Tony Freyer & Lyndsay Campbell eds., Carolina academic press 2011); robin w. Winks, the blacks in Canada: a history (Yale university press, new haven, 1971); Barrington walker race on trial: black defendents in Ontario's criminal courts, 1858-1958 (Osgood society of Canadian legal history, Toronto, on, 2010); Donald George Simpson, under the north star: black communities in upper Canada before confederation (1867) (Trenton, NJ: African world press, 2005).

[5] Charles Warren, 2 the supreme court in United States history 1821-1855 at 442 (1999) (1922).

[6] Mary Sarah Bilder, the struggle over immigration: indentured servants, slaves and articles of commerce, 61 Missouri l. Rev. 743 (1996).

[7] See for example dissenters in George Smith v. Willaim Turner, health-commissioner of the port of New York, James Norris v. The city of Boston (passenger cases), 48 U.S. (7 how.) Chief justice roger b. Taney, at 464, justice Peter v. Daniel, at 494, Justice Levi Woodbury, at 518 (1849).

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According to Karl Polanyi policies and laws constituting public governance periodically "embedded" distributive economic relations. Thus transatlantic British imperial free-trade and American state-federal governance embedded divergent free versus slave labor regulations.[8] Earlier work examined the interconnections linking "persons," transatlantic immigrant and antislavery crises, and the commerce power in the PassengerCases (1849); this study shifts the focus from commerce-power cases to the comparative historical context.[9]

During the 1837-1852 period Bilder identified, the Supreme Court rejected claims that under the federal commerce power "persons" were simply commodities.[10] Section I considers such conflicted American "personhood" during the Irish Famine immigration—including diverse security and annexation pressures London officials felt concerning America--as lawmaking began embedding American state-federal regulation of free-versus-slave labor and the British free trade system did the same for immigrant-labor in Canada and Ireland. Section II locates within the transatlantic context slavery proponents' white-supremacy attitudes, focusing particularly on commerce power disputes. Section III considers how the US-Canadian borderland and transatlantic confrontations over slavery enhanced colonial support for the British free-trade system. Section IV considers the divergence of British imperial and American republican labor regulations during the 1850s.[11] The conclusion provides a concise formulation of the argument applied to the coming of the American Civil War; it also suggests a comparison with growing Canadian unity under the free-trade system. The comparative historical contextualization of governance through labor regulation also suggested long-term paths of embedded divergent capitalism.[12]

[8] Fred Block, introduction, xxiii-xxiv in Karl Polanyi, the great transformation: the political and economic origins if our time (beacon press 2001) (1944); and see, "the federalization of immigration lawmaking between the first federal passenger act of 1819 and congress's assumption of full administrative control over the landing of immigrants in 1891 was deeply embedded in two epochal historical dynamics: slavery and emancipation, and the industrialization of labor." Matthew j. Lindsay, immigration as invasion: sovereignty, security and the origins of the federal immigration power, 45 Harv. C.r.-C.l. L. Rev. 1, 14 (2010).

[9] Tony a. Freyer and Daniel Thomas, the passenger cases (1849) reconsidered in trans-atlantic commerce clause history j. Sup. Ct. His. 2011 vol. 36 no. 3, 216-235.

[10] Bilder, struggle over immigration, 61 Missouri l. Rev. 799-818 (1996). City of New York. Miln, 36 U.S.102, 11 pet. 141 (1837); cooley v.board of wardens of the port of Philadelphia 53 U.S.299 (1852).

[11] Notes 2, 6, above; Marvin McInnis, the economy of Canada in the nineteenth Century, in the Cambridge economic history of the United states volume ii the long nineteenth century 57-59, 67-100 (Stanley l. Engerman& Robert e. Gallman, eds., Cambridge university press 2000).

[12] Kathleen Thelen, varieties of labor politics in the developed democracies in varieties of capitalism the institutional foundations of comparative advantage at72 (Peter a. Hall and David Soskice, eds., oxford university press, 2001).

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TRANSATLANTIC IMMIGRATION AND THE AMERICAN SLAVERY CRISES CONVERGE

During the late 1840's transatlantic social dislocation disrupted the distribution of labor. In 1845 many places across Europe reported that potatoes, the rural poor people's staple crop, had turned black and inedible.[13] The famine and social conflicts that followed culminated in continental Europe's1848 revolutions and a conservative backlash. More particularly, in Germany the blight engendered disorder and significant emigration of workers.[14] Ireland, however, experienced the potato blight at its most tragic: ultimately, the estimated death toll was 1.5 million, while another two million emigrated, primarily to the United States and British North America.[15] Yet unlike the continental European governments confronting revolution, British authorities encountered minimal labor violence amidst widespread political agitation for repeal of the Corn Laws up to and after1846—including modest governmental attempts at famine relief and regulation of poor laborers in ships departing British ports—ongoing Irish demands for repeal of the Irish-British Union, and Chartist petitions for more activist government.[16] London and British North America authorities addressed the massive influx of poor immigrants through passenger ship regulation.[17] In the United States battling mounting sectional and antislavery conflicts identified with the Mexican War and its aftermath, immigration regulation agitated federal commerce clause and state police-power issues before the Supreme Court testing whether slave and free labor constituted persons or commerce.[18]

During the Famine years British and U.S. governance of free labor regulation intersected. The British Parliament and the U. S. Congress enacted Passenger Acts regulating cabin and steerage space allocated wealthy and poorer immigrants—the latter workers destined for U.S. and British North American ports--on board transatlantic vessels. Although enforcement of these laws was weak, administrative historian Oliver MacDonagh concluded that they encouraged "independently" among British executive authorities and the New

[13] William l. Langer, political and social upheaval 1832-1852at 323 (Harper 1969).
[14] Id. At 324.
[15] William l. Langer, political and social upheaval 1832-1852at 323 (Harper 1969). Citing John e. Pomfret, the struggle for land in ireland, 1800-1923 (Princeton 1930), 34; lord dufferin& g.f. Boyle, narrative of a journey from Oxford to skibereen (London, 1847). The essential account of the famine is j. O'rourke, the history of the irish famine of 1847 (Dublin 1875). Also citing, r.d. Edwards and t.d. Williams, the great famine (Dublin 1956) and Cecil Woodham-Smith, the great hunger (London 1962). Also, on the conditions of the passenger ships, see Arnold Shrier, Ireland and the American emigration (Minneapolis 1958) at 157, and Oliver Macdonagh, a pattern of government growth, 1800-1860 (London 1961).
[16] Peter Mathias, the first industrial nation: an economic history of Britain 1700-1914 at 274-277 (Routledge 2001); Elizabeth Jane Errington, British migration and British America, in Canada and the British empire 140, 152 (Phillip Buckner ed. Oxford univ. Press 2008).
[17] Kevin Kenny, Ireland and the British Empire: an introduction, in Ireland and the British Empire 1, 14-15 (Kevin Kenny ed. Oxford univ. Press 2004). Seeneville Thompson, Wellington after Waterloo 220-239 (Routledge 1986); Macdonough, pattern of government growth (1961).
[18] Aristide r. Zolberg, a nation by design immigration policy in the fashioning of America, 115-165 (Harvard University press, 2006).

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York state immigrant commission, "vast central supervisory offices as the only solution to all the difficulties of regulating which bore upon them."[19] Not until the mid-1850s was the regulatory potential of expanded administration realized in either Britain or New York as the immigrant waves subsided.[20] In the US, as the federal government continued to encourage immigration, the Native American or Know Nothing Party compelled New York state and local authorities to institute the strongest immigrant regulations ever attempted to that point in American history. Although the Know Nothing Party declined after the mid-1850s, it forced compromises that replaced weak with strong immigration administration.[21]

The immigration crisis coincided with transatlantic abolitionist agitation. English, British North America, Scottish, Irish, and American Free-State abolitionist organizations increased agitation for ending race-based slavery in the American south.[22] Abolitionists also criticized the US government's acceptance of southern states' Negro Seamen Acts permitting imprisonment of black British and American Free-State merchant sailors visiting southern ports and its failure to effectively support the British Navy's campaign to enforce the international slave-trade ban.[23] Within the northern Free-State borderlands with Canada, abolitionist agitation also fostered strengthened rights for free as well as fugitive African Americans through the enactment of Personal Liberty Laws. In Ohio, Pennsylvania, New York, and other border Free States, Personal Liberty laws replaced racially-discriminatory Black Laws with increased equality in courts, property and contract rights, freedom of expressions, and strengthened state and local powers to resist enforcement of the federal fugitive slave law. To varying degrees some of the northern border Free States also granted certain African Americans the franchise.[24] Across the transnational border, according to Canadian historians, British North American authorities enforced what amounted to formal color-blind policy which, despite evidence of discrimination, recognized blacks and whites as citizens, equal before the law.[25]

[19] Oliver Macdonagh, the nineteenth-century revolution in government: a reappraisal 1(1) hist. J. 52, 65-66 (1958). Citing "p.r.o. C.o. 384/81, 1694 emigration, 30 Aug. 1848; 384/84, 4584 emigration, 22 May 1849; r.j. Purcell, 'the new York commissioners of emigration, 1847-60,' studies, xxxvii, 28-42; twentieth report New York commissioners of emigration (New York, 1866)".

[20] See Dunkley, emigration and the state, 1803-1842: the nineteenth-century revolution in government reconsidered, 23 the historical journal 353 (1980).

[21] Note 17, above; Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 212 (Macgibbon & Kee 1993) (1961).

[22] Edlie l. Wong, neither fugitive nor free atlantic slavery, freedom suits and the legal culture of travel (new York university press, 2009); Martha s. Jones all bound up together the woman question in African American public culture, 1830-1900, 1-118 (university of North Carolina press, 2007).

[23] Michael Schoeppner, "navigating the dangerous Atlantic: racial quarantines, black sailors and United States constitutionalism, " (unpublished ph. D. Dissertation university of Florida, 2010); Ernest Obadele-Starks, freebooters and smugglers: the foreign slave trade in the United States after 1808, at 109-143 (university of Arkansas press, 2007).

[24] Tony Freyer, constituting the free-state borderland, in freedom's conditions in the U.S. Canadian borderlands, 35-83 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011); Thomas d. Morris, free men all the personal liberty laws of the North 1780-1861 (Johns Hopkins university press, 1974); Paul Finkelman, an imperfect union slavery, federalism, and comity (the university of North Carolina press, 1981).

[25] Lyndsay Campbell, governance in the borderlands: upper Canadian legal institutions, 109-140; Bradley Miller, British rights and liberal law in Canada's fugitive slave debate, 1833-1843, 141-172; Lyndsay Campbell, the northern borderlands: Canada West,

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The complex intersections of immigration crisis and antislavery agitation encouraged transatlantic demands for labor regulation. Grappling with the Irish Famine emigration "disaster of 1847," British imperial authorities extended colonial administrative autonomy. Even so, MacDonagh noted, "the [North American] colonists proceeded to . . . impos[e] new restrictions on immigration. In every . . . province the basic immigrant tax was doubled, further increased by half-a-crown percap. For each day spent in quarantine . . . masters were required to enter heavy indemnifying bonds for every passenger whom quarantine officers adjudged a likely burden [which of course applied primarily to the poor who would be seeking employment]."[26] Similar taxes at issue in New York's and Massachusetts' PassengerCases aroused fears from southern slave holders that the Free-States' deployment of police powers to justify taxes might be extended giving free blacks and fugitive slaves legal protections as "persons" under the Personal Liberty Laws, which would in turn strengthen northern defiance of the federal fugitive slave laws. To avoid such calamity, southern leaders demanded stronger federal fugitive slave law enforcement but limited commerce-power regulations ensuring slaveholders' property rights against Free-States and British abolitionists.[27]

Transatlantic immigration during the Irish famine thus evolved multiple labor regulations. Amidst the Anti-Corn Law League's historic campaign, Parliament in1846 instituted extensive free trade throughout the British Empire.[28] Indeed, notwithstanding the mass starvation, unemployment, destitution, and emigration during the famine years1845 to 1852, Ireland was a netexporter of food stuffs.[29] Still, the British government addressed the crisis episodically, importing low-priced grains from the U.S. and elsewhere, providing public works employment, and implementing needs-based access to soup kitchens—twice weekly. Implementation of these programs was sufficiently incremental that Irish nationalist John Mitchel "famously" exclaimed: "the Almighty indeed sent the potato blight, but the English created the famine."[30] Urging imperial security threats identified with transatlantic Irish radicalism and Americans advocating Canadian annexation, conservatives such as Lord Wellington supported the British government's limited modifications of free trade while the famine wrecked Ireland.[31] Similarly, during the late-1840s Parliament and the US Congress enacted regulations seeking to prevent

195-226, in freedom's conditions in the U.S. Canadian borderlands in the age of emancipation (Tony Freyer & Lyndsay Campbell eds., Carolina academic press 2011).

[26] Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 212 (macgibbon&kee 1993) (1961).

[27] Notes 7, 23 above; gautham rao, the state the slaveholders made: regulating fugitive slaves in the early republic, 85-108 in freedom"s conditions in the U.S. Canadian borderlands in the age of emancipation (Tony Freyer& Lyndsay Campbell, eds., Carolina academic press 2011).

[28] Peter Mathias, the first industrial nation: an economic history of Britain 1700-1914 at 274-277 (Routledge 2001).

[29] William l. Langer, political and social upheaval 1832-1852at 323 (Harper 1969). Citing Francis Hackett, the story of the Irish nation 267ff (New York 1922); Edwards & Williams, great famine, xviii-ix (Dublin 1956).

[30] Alvin Jackson, Ireland, the union, and the empire, 1800-1960, inireland and the British Empire 123, 134 (Kevin Kenny ed. Oxford univ. Press 2004).

[31] Neville Thompson, wellington after waterloo 221-222 (Routledge 1986).

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shippers' exploitation of passengers from the laboring poor. Notwithstanding the good intentions of each nation's lawmakers, Herman Melville nonetheless affirmed, "it is hardly to be believed, that either of these laws is observed."[32]

Britain's adherence to free-trade and US-British weak enforcement of the Passenger Acts aggravated the arrival of poor immigrant laborers in America during the Famine. Melville was undoubtedly correct that the Passenger laws of 1847 did not achieve the humanitarian goals for poor immigrants. Nevertheless, in 1847American shippers feared possible enforcement of penalties sufficiently that they temporarily turned the so-called Coffin ships away from US ports to Grosse Isle, near Quebec and elsewhere.[33] Over 100,000 "destitute and miserable emigrants" overwhelmed colonial resources resulting in thousands of deaths, until two things happened.[34] First, amidst continuing tragedy and weak administration, colonial authorities gradually ameliorated the crisis, fostering humanitarian relief efforts primarily from Catholic communities in Quebec, Montreal, and Toronto. Secondly, over 60% of the new arrivals—many of whom had signed agreements to stay in British North America—nonetheless left as soon as they were able for Irish immigrant communities in the United States.[35] The next year, whereas 25,000 Irish immigrants disembarked in British North America ports, nearly 16,000 went to the US; this pattern continued through the next decade and beyond.[36]

The immediate humanitarian crisis arising from the Irish famine obscured persistent security tensions on the US-Canadian border. Since the Upper and Lower Canadian Rebellions and the border-disputes between Maine and New Brunswick during1837-38, colonial and London authorities were sensitive to American pressures to annex particular British North America provinces.[37] Wellington acknowledged that conflicts in Ireland were central to these tensions in the US-Canadian borderlands. In 1843, he exclaimed, "every Body must see that we have impending over us a Contest in Ireland; which must have an influence over disaffected parties [Britain's Chartists] in this Country and over the State of our Difficulties in Canada." Five years later Wellington echoed these sentiments amidst concerns that the Famine might foster disorder; although such fears ultimately proved to be unfounded, the European Revolutions of 1848 temporarily made them seem real.[38]Even so, as the European

[32] Aristide r. Zolberg, a nation by design: immigration policy in the fashioning of américa 146 (Harvard univ. Press 2006).
[33] Id. At 147.
[34] Elizabeth Jane Errington, British migration and British America, in Canada and the British Empire 140, 152 (Phillip Buckner ed. Oxford univ. Press 2008).
[35] Id.
[36] Elizabeth Jane Errington, British migration and British America, in Canada and the British Empire 140, 152 (Phillip Buckner ed. Oxford univ. Press 2008). Citing Cecil j. Houston & William j. Smyth, irish emigration and Canadian settlement 26 (Toronto 1990).
[37] Tony Freyer and Lyndsay Campbell, introduction, 23, 26 in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation (Tony Freyer& Lyndsay Campbell, eds. Carolina academic press 2011).
[38] Neville Thompson, wellington after waterloo 213, 235 (Routledge 1986).

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Revolutions progressed until collapsing into to backlash, South Carolina's US Senator John C. Calhoun received correspondence from an American claiming knowledge of trans-border annexation efforts.[39]

Irish radicalism also aroused British fears of transatlantic imperial security. Daniel O'Connell's movement campaigned to repeal the Union with Britain that had abolished the independent Irish Parliament in 1801.[40] O'Connell and his Repealers had many supporters in the United States; the British perceived these Irish Americans--in some cases correctly--to be natural recruits for those advocating US annexation of North America colonies. O'Connell also urged the Irish at home and in America to support antislavery.[41] Paradoxically, Irish-Americans embraced Repeal in Ireland, but rejected O'Connell's anti-slavery stance for the United States. O'Connell's 1847 death amidst the Famine strengthened the rising Young Ireland Movement identified with tougher anti-British radicals such as John Mitchel. He claimed that British leaders intentionally manipulated the Famine in order to weaken Ireland through the death and emigration of its people. Fleeing to the US around the time O'Connell died, Mitchel found Irish Americans receptive to more fervent anti-British radicalism, but he also accepted the need to embrace the Irish American's opposition to antislavery. [42] Thus, British leaders could believe, Irish American radicals' threat to Canada went from bad to worse.

The real and imagined security threats to the imperial border agitated British and American sovereignty underpinning transatlantic labor regulations. British officials' consistent refusal to return African Americans southern masters claimed to be fugitive slaves, increasingly strained US-British relations from the 1840s to 1860, encouraging fugitives seeking free-labor opportunities in Canada. In exceptional cases British North America officials accepted southern masters' assertions; generally, however, colonial authorities refused to do so, affirming British imperial sovereignty and international law. Colonial officials could feel justified in maintaining imperial sovereignty in part because the US government neglected its treaty obligation with Britain to enforce the international slave- trade ban when illicit southern slave traders eluded the Royal Navy.[43] The US government also countenanced southern officials' enforcement of their state's Negro Seamen Acts requiring imprisonment of free blacks working on merchant vessels trading in southern ports. Since the black seamen often were British subjects, the US government's deference to southern states' rights rejected British sovereignty. British North America officials, by contrast, enforced imperial over US sovereignty in fugitive slave cases.[44]

[39] Letter from Henry Young to John c. Calhoun (March 19, 1849), in 24 the papers of John c. Calhoun 1847-1849, at 353 (Clyde n. Wilson & Shirley bright cook eds., univ. South Carolina press 2001).
[40] Angela f. Murphy, American slavery Irish freedom: abolition, immigrant citizenship, and the transatlantic movement for Irish repeal 214-215 (Louisiana state univ. Press 2010).
[41] Id. 101-149
[42] Id., 214; Alvin Jackson, Ireland, the union, and the empire, 1800-1960, inireland and the British Empire 123, 134 (Kevin Kenny ed. Oxford univ. Press 2004).
[43] Note 22, 26 above; van gosse "as a nation, the english are our friends": the emergence of African American politics in the British atlantic world, 1772-1861, 113 am. Hist. Rev. 1003, 1013-14 (2008).
[44] Notes 22, 24, 36, above.

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SOUTHERN RESISTANCE AND THE CONFLICTED COMMERCE-CLAUSE STATUS OF PERSONS

The imperial security issues Lord Wellington noted paralleled mounting US fugitive slave and territorial crises by 1848.[45] North-South sectional controversy agitated whether slave or free labor regulation would extend to California and other territories the US acquired after the Mexican War. In the border Free States opposition to the US fugitive slave law's enforcement increased among state and local officials, as well as evangelical Protestant whites and African Americans who aided fugitive slaves. Employing the secret network known as the Underground Railway, thousands of African American fugitives escaped from the South across the Free States into Canada.[46] Whigs won the presidential election of 1848 opposing slavery in the Mexican-cession territories—including Gold Rush California—and the tougher enforcement of the US fugitive slave law. Whether the slavetrade might be abolished in the nation's Capitol and Texas debt and territorial border demands further compounded the dissension. South Carolina's John C. Calhoun led resistance asserting southern white racial supremacy against Free-State defiance of slave holders' property rights under federal fugitive slave laws and abolitionist emancipation claims under the commerce clause.[47]

For their constituents in January 1849 the Southern congressional delegation composed mostly of Democrats addressed the mounting crisis. A principal drafter of the address was Calhoun.[48] The crisis was the "most important subject ever presented" to the southern constituents, grounded in the "conflict between two great sections of the Union, growing out of a difference of feeling and opinion . . . existing between the two races, the European and African, which inhabit the Southern section, and the acts of aggression and encroachment to which it has led."[49] Since the 1820 Missouri Compromise establishing the line 36' 30" separating slave and free territorial settlements, the "North," constituting primarily the Free States bordering Canada, pursued "hostility to that portion of the Constitution which provides for the delivering up of fugitive slaves."[50] In many of these borderland Free States the "adoption of hostile acts" attained sufficient "progress" and "success" that the fugitive slave clause "may be regarded now as practically expunged from the Constitution."[51] Border free states resistance thus had

[45] Notes 37, 42 above.
[46] Notes 21-23, 26
[47] Compare Daniel Walker Howe, what hath god wrought the transformation of américa, 1815-1848, at 792-836 (Oxford university press, 2001) to following discussion of the 1849 southern congressional delegates' address to their constituents.
[48] The address of southern delegates in congress, to their constituents (1849), reprinted in 24 the papers of john c. Calhoun, 1848-1849, at 225 (Clyde n. Wilson & Shirley bright cook eds., univ. South Carolina press 2001).
[49] Id.
[50] Id. at 227.
[51] Id.

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"brought the South, the Union, and our system of Government to their most perilous condition," endangering southerners' "property, prosperity, equality, liberty, and safety."[52]

Southerners must grasp, Calhoun and his colleagues exclaimed, just how serious were the dangers. The framers inserted the Fugitive Slave Clause into the Constitution assuming that the Northern states would readily assist in its enforcement. The Supreme Court repeatedly affirmed that obligation. In the states bordering Canada, however, Southern masters, "in their attempt to recover their slaves, now meet, instead of aid and co-operation, resistance in every form; resistance from hostile acts of legislation, intended to baffle and defeat their claims by all sorts of devices, and by interposing every description of impediment—resistance from judges and magistrates—and finally, when these fail from mobs composed of whitesandblacks, which, by threats or force rescue the fugitive slave."[53] As a result, recovering slaves fleeing into the border Free States subjected masters to "the hazard of insult, heavy pecuniary loss, imprisonment, and even life itself." Moreover, northern Free State officials countenanced "secret combinations" known as to Underground Railroad, which aided slaves to "escape … and to pass … secretly and rapidly, by means organized for the purpose into Canada, where they will be beyond the reach of" US law and the Constitution.[54]

The chief perpetrators of these attacks, the address exclaimed, were abolitionists. Their "systematic agitation" since 1835 in the press, pulpits, election campaigns, and other "means …. "render[ed] the South and the relation between the races there, odious and hateful to the North." As a "domestic institution" slavery was dependent upon state sovereignty and states' rights underpinning police powers permitting either its existence or non-existence. "And yet," the "[a]bolitionists … openly avowing their intention, and resorting to the most efficient means for the purpose, have been attempting … to force the Southern States to emancipate their slaves," with little opposition from, or worse, implicit or even direct assistance by "Northern" states. Moreover, rejecting the Missouri Compromise 36'30" line separating slave and free states, certain Northern politicians supported applying the abolitionists' agenda to the immense Mexican territorial cession, urging the Free Soil platform. Thus, Calhoun and his colleagues asserted, "All, whether savage, barbarian, or civilized, may freely enter and remain, we [slave holding southern whites] only being excluded." In addition, northern officials endorsed the Abolitionists' cause, actively pursuing their demand to end the slave trade in the nation's Capitol.[55]

Northern defiance of the Fugitive Slave laws, excluding slavery from the Mexican cession, and abolishing the slave trade in Washington would have "depressing effects . . . on the white race at the South." These issues and outcomes would encourage the "hope . . . in the black of a speedy emancipation." Under the influence of Abolitionist "fanatics" the "great body of the North is united against our peculiar institution. Many believe it to be

[52] Id. At 242.
[53] Id. At 229 (emphasis added).
[54] Id. At 230.
[55] Id. At 231, 235, 238, 239-40.

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sinful, and the residue . . . believe it to be wrong." Some Northerners also talked of "prohibit[ing] what the abolitionists call the internal slave trade, meaning thereby the transfer of slaves from one State to another," which would "render them worthless by crowding them together" in the present southern states, "and thus hasten the work of emancipation." The "result" was "certain," Calhoun and his colleagues exclaimed, unless southerners addressed the "aggression . . . promptly." Indeed, "[t]o destroy the existing relation between the free and servile races at the South would lead to consequences unparall[el]ed in history." Such racial black to white subordination "cannot be separated, and cannot live together in peace, or harmony, or to their mutual advantage, except in their present relation." Thus, should American abolitionists succeed, as had British abolitionists in ending West Indian slavery, "wretchedness, and misery, and desolation would overspread the whole South."[56]

Moreover, the ultimate danger was that a free-interracial "combination" would dominate southern whites. American abolitionists could prevail only "through the agency of the Federal Government, controlled by the dominant power of the Northern States of the Confederacy, against the resistance and struggle of the Southern. It can then only be effectuated by prostration of the [southern] white race."[57] Concerning the "blacks of the South," however, "[o]wing their emancipation to" Northerners, the freedmen "would regard them as friends, guardians, and patrons." Such a free interracial combination "impelled by fanaticism and love of power . . . would not stop at emancipation," but would "raise" the freedmen "to a political and social equality with their former owners, by giving them the right of voting and holding public offices under the Federal Government." Moreover, the interracial "political union" would impose "complete subjection" upon the "white race at the South." Gaining federal political patronage and offices, the "blacks and the profligate whites" would "be raised above the whites of the South in the political and social scale. We would . . . change conditions with them—a degradation greater than has ever yet fallen to the lot of a free and enlightened people, and one from which we could not escape, should emancipation take place."[58]

Twenty-five years before the southern congressional delegation targeted the commerce clause, Chief Justice John Marshall worried about its relationship to slavery. Gibbons v. Ogden (1824) did not, of course, expressly mention slavery. Justice William Johnson's concurring opinion, however, advocated an exclusive federal commerce power like that he had applied on circuit the preceding year in an unsuccessful attempt to overturn South Carolina's Negro Seamen Act.[59] Marshall suggested in a letter to Justice Joseph Story that his later reliance in Gibbons on the innocuous federal coasting statute to strike down New York's steamboat monopoly--rather

[56] Id. At 238-40
[57] Id. At 240-41.
[58] Id. At 241.
[59] Note 22, above; gibbons v. Ogden, 9 wheat. (22 U.S.) 1 (1824); Maurice g. Baxter, the steamboat monopoly gibbons v. Ogden, 1824, 1-86 (Alfred Knopf 1972); David l. Lightner, slavery and the commerce power how the struggle against the interstate slave trade led to the civil war, 65-69 (Yale university press, 2006.

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than the broad claim of an exclusive federal commerce power--sought to ameliorate southern concerns about slavery.[60] Marshall's successive commerce clause decisions continued the same decisional strategy. Brown v. Maryland (1827) curbed state license-taxes on national merchant importers based on a narrowly-construed commerce power.[61] In Willson v. BlackBird Marsh Company (1829), however, Marshall upheld state police powers to regulate vessels' access to nationally-navigable waterways. Though the issues in Willson approximated those in Gibbons, by 1829 Marshall's concerns about slavery and the commerce clause probably influenced his upholding state police-power regulations. [62]

During Marshall's final years, his concerns about slavery and the commerce clause embraced federal versus state-police power regulations of foreign immigrants. During the early 1820's foreign immigration to New York, Boston, Philadelphia and other US ports reached a new high before dropping off by 1829.[63] As a result, the Empire State's legislature authorized New York City officials to require from ship captains manifests listing information which described the physical condition and legal status of disembarking immigrants. State and local authorities justified imposing upon shippers the costs of gathering and reporting the immigrants' information by employing traditional state police powers regulating the heath, welfare, and morals of people living in or seeking residence to states and localities. In the City of New York. Miln the shippers challenged the police-power authority before the Marshall Court arguing that the immigrant regulations violated an exclusive federal commerce power.[64] The case arose amidst turn-over in the Court's membership enabling President Andrew Jackson to make appointments of justices sympathetic to state police powers. Before his death in 1835, Marshall held over Miln, delaying resolution of the controversial federal commerce-clause and state police-powers issues.[65]

Abolitionist agitation in the border Free States employing police powers undoubtedly influenced the Milndecision. Marshall's delay in the case coincided with British abolitionists winning slave emancipation throughout the British Empire, Nat Turner's Rebellion in Virginia, the second edition of David Walker's Appeal to the Coloured Citizens of the World praising British abolitionism, and the increasing profile of William Lloyd Garrison's radical evangelical Protestant abolitionism.[66] During the same years abolitionists employed police-power principles established in the 1772 British slave emancipation decision of Somerset, to win in Massachusetts courts freedom of a Louisiana slave traveling with her master. At the same time, New York courts decided against abolitionist arguments thereby permitting a master to retain a sojourner slave; five years later, however, the

[60] Baxter, 58-60, the steamboat monopoly.
[61] Brown v. Maryland, 12 wheat. (25 U.S.) 419 (1827); Baxter, 88-90 steamboat monopoly.
[62] Wilson. Black Bird creek marsh c.o..., 2 pet. (27 U.S.) 245 (1829); Baxter, 90-93, steamboat monopoly.
[63] Zolberg, 115-120, a nation by design.
[64] Id. 142, 144,145, 147, 149, 190; city of New York. Miln 11 pet. (36 U.S.) 102 (1837).
[65] Warren, 250, supreme court.
[66] Tony Freyer and Lyndsay Campbell, introduction at12-13 in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation, (Tony Freyer and Lyndsay Campbell eds., Carolina academic press 2011).

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legislature reversed the court's precedent in keeping with the Somerset doctrine. Pennsylvania free blacks unsuccessfully maintained a decades-old franchise, but retained judicial protection under the state's personal liberty law, which instigated the controversial case of Prigg v. Pennsylvania (1842). Ohio courts gradually applied police powers to erode racial discrimination in the state's Black laws. [67]

The Court finally decided Miln in 1837. Chief Justice Roger B. Taney led a majority of pro-slavery Democrats upholding the police-power regulation of immigrants. The decision formally held that the state's exercise of police powers compelling shippers to bear the administrative costs of accounting for and evaluating increasing numbers of disembarking foreign immigrants did not violate an exclusive federal commerce power. The Court's 6-1 decision upheld police powers governing immigrants as persons over the commerce clause which embraced only marketable commodities.[68] In Milnthe majority suggested that the interstate slave trade could not be reached by the commerce clause because as members of an inferior black race slaves possessed a unique personhood governed by state police powers enabling the master's dominion. Accordingly, slaves were not commodities. In Groves v. Slaughter (1841) the Court's majority, despite anti-slavery protestations in Justice John McLean's dissent, followed Miln's logic inferring that the interstate slave trade was beyond the federal commerce power.[69] Indeed, in the 1842 Prigg decision upholding supremacy of the federal fugitive slave law, Justice Peter V. Daniel cited Milnin support of the principle that the federal commerce power cold not be employed to interfere with state police powers regulating slaves as persons.[70]

As Calhoun and fellow southerners declared in 1849, Mexican War agitation had emboldened abolitionist to employ radical commerce clause theories to attack the internal slave trade. Southerners insisted, too, that abolitionists joined anti-slavery Free Soilers to strengthen Free State police-power protections of free blacks and fugitive slaves under Personal Liberty Laws against enforcement of the federal fugitive slave law.[71] These struggles engulfed litigation known as the PassengerCases.[72] Begun in 1837, the same year as the Miln decision, the PassengerCases presented the question whether Massachusetts and New York taxes on embarking foreign immigrants violated the federal commerce power. By the late-1840s, the states' immigrant taxes were enmeshed in the legal status of free blacks, slaves, and white foreign immigrants as "persons." The Court's 5-4

[67] Id. 8-9; freyer, constituting the free-stateborderlands, 41-45, 47-51; aviamsoifer, 181-184, constrained choices: New England slavery decisions in the antebellumera; Jack, a negro man v. Mary Martin, 14 wend. 507 (1835); somerset v. Stewart, 98 eng. Rep. 499 (k.b. 1772); prigg v. Pennsylvania 16 pet. 539, 41 U.S.539 (1842); commonwealth v.aves, 18 pick.193 (1836); Stephen Middleton, the black laws race and the legal process in early Ohio 42-156 (Ohio university press, 2005); see also works by Morris, and Finkelman, cited note 23 above; and William m. Wiecek, the sources of antislavery constitutionalism in américa 176-1848 (Cornell university press, 1977).
[68] Notes 3, 63, 64, above.
[69] Groves v. Slaughter, 15 pet. (40 U.S.) 449 (1841).
[70] Freyer, 50, constituting free-state borderlands (full cite note 2 above).
[71] Note 23, above.
[72] Notes 3, 7, above; 7 how. (48 U.S.) 283 (1849).

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decision in the PassengerCases (1849) agreed only that the two states' taxes violated treaties enacted through the commerce clause. Eight opinions—including forceful dissents asserting supremacy of state police powers over free or slave blacks and white immigrants—were sufficiently conflicting regarding "persons" that pro-and-antislavery proponents disagreed on whose cause the decision favored.[73]

Thousands of African-descended peoples escaping from the American slave south across the Free-State borderland signaled still more complex labor regulation interventions.[74] From the mid-1840s on, the North-South crises over the northern Free States' opposition to enforcement of the federal fugitive slave laws—notwithstanding Supreme Court decisions and the federal government's consistent defense of slaveholders—aroused vigorous southern resistance led by Calhoun and his congressional colleagues. Their 1849 address to southern constituents framed ominous images linking disruption of the federal fugitive slave law to a purported northern abolitionist interracial combination endeavoring to exclude slavery from the Mexican cession, to end the slave trade in the nation's capitol, and to abolish the inter-state slave trade. According to the southern congressional delegation, these were preliminaries to the ultimate goal of slave emancipation through an interracial combination targeting southern whites, which in turn would subordinate white southern masters to free blacks.[75] By contrast, Calhoun and Webster supported employing the commerce power to enact Passenger Acts aiding foreign immigrants like the Famine Irish; they disagreed, however, over whether a federal commerce power preserved Free-States' police powers to defend free black labor.[76]

The PassengerCases signaled growing struggle over embedding free-versus-slave labor regulation networks. Southern periodicals announced Senator Calhoun's vote for federal funds to print over 5,000 copies of the Court's opinions for national distribution.[77]Massachusetts' US Senator Daniel Webster and counsel for the immigrant-shippers in the case, had noted in a letter that the "decision will be more important to the country, than any decision since the steamboat [monopoly] case."[78] The SavannahRepublican hadreported the argument of New York's lawyer John Van Buren declaring the urgent need for a decision, "especially in reference to the poor

[73] Note 7, above.
[74] for the single colony, Canada west, in 1861 of 20,000 blacks the most reliable estimate for the number fugitives is about 4,000 in Michael Wayne, the black population of Canada west on the eve of the American civil war: a reassessmentbasedonthemanuscriptcensusof1861, 465-485 histoire social/social history 48 (1995); compare: Philip j. Schwarz, migrants against slavery Virginians and the nation 37-39, 46, 48, 55-57, 65-69 (university press of Virginia, 2001).
[75] Notes 46-57, above.
[76] cong. Globe, 29th cong., 2d. Sess. 304 (feb.1, 1847); cong. Globe, 29th cong., 2nd sess. 446 (feb.1 1847); document 80 reported from Daniel Webster, 3 the papers of Daniel Webster: legal papers the federal practice part ii 709, 711, 713, 714 (Andrew j. King, ed., university press of new England 1989).
[77] Remarks on printing extra copies of a supreme court decision annulling laws of n.y. And mass. In regard to immigrant passengers (March 20, 1849) reprinted in 24 the papers of john c. Calhoun, 1848-1849, at 355 (Clyde n. Wilson & Shirley bright cook eds., univ. South Carolina press 2001). From Baltimore, md. Sun, March 21, 1849, p. 4; Petersburg, va., republican, March 23, 1849, p. 2; Charleston, s.c., mercury, March 24, 1849, p.2.
[78] Letter from Daniel Webster to Richard Milford Blatchford (Feb. 3, 1849), in3 the papers of Daniel Webster: legal papers: the federal practice part ii at 727 (Andrew j. King, ed., univ. Press of New England 1989). Webster is referring to gibbons v. Ogden.

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devils who are now at Quarantine. The cholera is raging among them with fearful mortality, and it would be a consolation to their friends to know that they are dying constitutionally."[79] During congressional debates over what became the 1850 Compromise, Illinois Democrat congressman T.J. Turner viewed the PassengerCases as enabling contradictory police powers over persons: some Free States excluded and otherwise imposed a racially-inferior status upon free blacks, whereas other Free States granted free blacks—including fugitive slaves liberated from slave catchers—conditional citizenship through Personal Liberty Laws.[80] During the 1850's these conflicts proved to be irreconcilable.

EMBEDDING FREE-LABOR REGULATIONS AIDS BRITISH IMPERIAL UNITY

British and American labor regulation steadily diverged during the 1850s. London officials embraced a security status quo within Ireland enabling termination of famine relief; they also increasingly regulated transatlantic immigrant traffic and maintained a formal "colorblind" legal policy amidst continuing discrimination towards free blacks residing in the Canadian borderlands. These imperial policies embedded the free-trade labor regulations emerging during the Irish famine.[81] Consistent British policy enforcement nonetheless depended upon less conflicted judicial intervention then that occurring in the PassengerCases, which accentuated the unusual authority federal and state courts exercised over political and social issues in the United States. Unintentionally, the PassengerCasesencouraged African Americans to assert their free legal status as "persons' under Free-State personal liberty laws--including interracial defiance of the federal fugitive slave law's enforcement--and radical abolitionist claims that the interstate slave trade was invalid under the commerce clause. The fears the Court's dissenters expressed in 1849 eventually came to pass during and after the notorious 1857 DredScott decision.[82] Unlike the unity prevailing under the British free-trade system in the Canadas, American judicial intervention in free and slave labor regulations embedded bitter North-South confrontation.

During the 1850's the outcomes of the PassengerCases for British free-trade labor regulations were immediate and long-term. The Court's over-turning of the alien taxes resulted in British captains and shippers recouping what they had paid into state treasuries.[83] Nevertheless, the Court's eight opinions generated sufficient uncertainty that states replaced the income garnered from the invalid alien taxes with what amounted to indemnification bonds targeting captains transporting poor immigrant laborers who might become public

[79] Charles Warren, 2 the supreme court in United States history 1821-1855, at 450. Citing a letter to Cleveland plain dealer, quoted in Mississippi free trader, Jan. 20, 1848; savannah republican, March 7, 1849.
[80] cong. Globe, 30th cong., 2d sess. Appendix 589 (feb. 23, 1849).
[81] Notes 15-16, 27-29, 35-44, above.
[82] Note 7; dred Scott v. Sandford, 60 U.S.393 (1856).
[83] 3 the papers of Daniel Webster: legal papers: the federal practice part ii at 719 (Andrew j. King, ed., univ. Press of new England 1989).

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charges.[84] In addition, the Court's narrow holding favoring an exclusive federal commerce power reinforced southern states' insistence that British merchant vessels must comply with Negro Seamen Acts. British consuls operating in southern ports abandoned attempts to attain federal intervention, relying instead on direct negotiations with southern officials.[85] Southern port officials' determined resort to states' rights to control free blacks, however, converged with Canadian authorities' exercise of imperial sovereignty over the borderlands, defending African Americans fleeing slave holders. Canadian deployment of "color-blind" British justice despite continued discrimination coincided with many Free-State officials enforcing Personal Liberty Laws on behalf of African Americans.[86]

These ambivalent outcomes coincided with growing transatlantic immigrant- labor regulations. Following Congressional and Parliamentary passage of Passenger Acts in 1849, several notorious violations occurred on board ships, consistent with Herman Melville's prediction of weak enforcement.[87] Accordingly, by 1855 New York went farther than either the Congress or Parliament in the same years, creating a public-funded reception depot at Castle Garden which addressed many of the most egregious violations of temporary shelter and hospital conditions private entrepreneurs foisted upon poor immigrants disembarking from ships.[88] In 1855 Parliament enacted its most far-reaching law governing immigrants leaving Liverpool and other ports, as well as spatial and living condition on board ship. There were also more enforcement agents. Though more numerous, episodic lawsuits nonetheless remained the primary mode of ensuring market accountability. Between1853 and1858 the July-December death rate among transatlantic immigrants fell from 2.11 percent to .19 percent.[89] Informed observers agreed that the humanitarian improvement resulted in part from regulatory enforcement, as well as reduced incidence of cholera, and, above all, the precipitous decline in numbers of immigrants departing the British Isles, especially Ireland.[90]

Transatlantic imperial policy embedded the free trade-labor regulations. In Ireland itself, London officials discontinued the soup kitchens and other social welfare measures by1852. Four years later, "direct emigration from Irish ports" had dropped from an average of 30,000 annually to no more than 6,000. Meanwhile, the profound depopulation due to death and immigration enhanced for the Irish the benefits of imperial Free Trade: for a decade or more after 1845 real wages increased 25 percent, thousands of part-time laborers became part-time employers and many "country towns revived." [91] Nevertheless, British security demands and costs did not

[84] Note 7 above.
[85] Note 22 above.
[86] Notes 42-43 above.
[87] Notes 18 and 19 above.
[88] Macdonagh, 315-316, a pattern of government growth
[89] Id. 304.
[90] Id. 304-336
[91] Id. 305-306

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dissipate in Ireland as the Young Ireland Movement evolved by 1858 into the Irish Republican Brotherhood known as the Fenians. The British responded with periodic police actions and suppressed civil liberties impelling a cycle of violence lasting long into the future.[92] Amidst the ascendency of free-trade liberalism throughout the British Empire at mid-nineteenth century, Ireland's place within it proved equivocal. Indeed, one historian concluded, it was "a social laboratory […]. The most conventional of Englishmen were willing to experiment in Ireland on lines which they were not prepared to contemplate or tolerate at home."[93]

British North America occupied a less-tendentious point than Ireland in transatlantic and trans-border free trade labor regulations. Between British and Canadian ports the costs of complying with the 1855 Act increased "fares by some twenty-five shillings to a total of £5." Thus, an enforcement commissioner remarked, "masters of several vessels, who have hitherto brought out a full compliment of passengers . . . preferred to send them as ballast, rather than subject them to the increased liability of the Act." Even so, the consistent record of enforcement supported the conclusion that the 1855 law "has been as effective as any measure of that kind can be."[94] Within the North American colonies themselves, the health regulations and increased taxes further heightened immigration costs, including the comparative disadvantage resulting from the demise of the Alien taxes in the US PassengerCases.[95] At the same time, the pattern of Irish Catholic immigrants arriving in Canadian ports only to leave for Irish American communities across the US border persisted. During the late 1850s, this immigration pattern became linked to the emergence of the Irish Brotherhood or Fenians, arousing Canadian and British authorities' security concerns, including fears that such threats might encourage US annexation.[96]

The imperial security demands reinforced British North Americans' embrace of the British free-trade and opposition to the United States. During the 1850's sporadic sectarian violence arose in working class Irish Catholic communities such as Halifax, Montreal, St John, and Toronto. Episodically, such violence included anti-English and, among Fenians, even pro-US annexation rhetoric. Fearing backlash, older Irish Catholic immigrant communities pronounced their shared British loyalty with the dominant Protestant communities where Protestant Irish immigrants organized themselves around the Orange Order. Indeed, throughout the 1850s Toronto was sometimes called the "the Belfast of Canada," suggesting the strength of the Irish Protestants among

[92] Elizabeth Jane Errington, British migration and British America, in Canada and the British Empire 140 (Phillip Buckner ed. Oxford univ. Press 2008); Alvin Jackson, Ireland, the union, and the empire, 1800-1960 in Ireland and the British empire, 135-137 (Kevin Kenny, ed., Oxford university press, 2004).

[93] Oliver Macdonagh, the nineteenth-century revolution in government: a reappraisal1 (1) hist. J. 52, 62 (1958) (quoting w.l. Burn, 'free trade in land: an aspect of the iris question', trans. Royal hist. Soc. 4th series, xxxi, 68; citing r.d.c. Black, 'the classical economists and the irish problem', Oxford economic papers, new series, v, 26-40).

[94] Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 305 (macgibbon&kee 1993) (1961).

[95] Id. note 7 above.

[96] Elizabeth Jane Errington, British migration and British America, in Canada and the British Empire 140, 152, 156-57 (Phillip Buckner ed. Oxford univ. Press 2008).

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the Protestant majority composed of Scots, English, and Welsh descendant immigrants. The shared pro-British identity among the older immigrant communities also defused complaints from French Canadians and their older émigré Irish-Catholic counterparts that merchants belonging to the Protestant elite discriminated regarding wages, employment, and education opportunities, though such ethno-religious discrimination did occur.[97]

African American fugitives and free black "migrants against slavery" also seized market and British-citizenship opportunities Canada offered.[98] The British sovereignty over the Canadas, Campbell suggested, accepted free blacks in a more "color-blind" status, despite persistent discrimination, than that existing in the northern free-state borderlands.[99] Moreover, the conditional free labor and civil freedoms African Americans gained on either side of the US-Canadian borderlands absolutely exceeded the servitude imposed in the American southern slave states. Thus, notwithstanding evidence of racism clearly existing among many white Canadians—which segregated education epitomized—Campbell suggests that African American long-time residents and fugitive slaves alike possessed general equality before the law in the courts. Free expression and a free press prevailed. Adult, propertied black males did vote, served in the militia, and occasionally sat on juries.[100] Thus, black activist Mary Ann Shadd informed her younger brother in 1851: "I . . . like Canada [West and the town of Windsor]. Do not feel prejudice and repeat if you were to come here or go west of this [place] where shoemaking pays well and work at it and buy lands as fast as you made any money, you would do well."[101]

Shadd's endorsement of Canadian opportunities suggested how skillfully British and Canadian authorities exploited the comparative American disadvantages. Notwithstanding racial animosity many white Canadians held towards blacks, Protestant elites among vigorous abolitionist societies and colonial authorities—including especially courts and judges—successfully enforced "colorblind" polices, Campbell suggests, in part because such policies profoundly contradicted the more pervasive state-enforced racial exclusion prevailing in the American south and some northern free-states.[102] Thus, Black descendants of American slaves residing in Nova Scotia agreed with Shadd who notwithstanding persistent racism nonetheless touted the comparative benefits of "British freedom."[103] Similarly, in public meetings Nova Scotia black abolitionists saluted as "Reformers" the provincial governor, Prince Albert, and Queen Victoria, "God bless Her—May she reign in the hearts of a free

[97] Id.
[98] Philip j. Schwarz, migrants against slavery: virginians and the nation (univ. Press Virginia 2001).
[99] Lyndsay Campbell, the northern borderlands: Canada west, infreedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 195 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).
[100] id.201-213,220.
[101] Jacqueline Tobin, from midnight to dawn: the last tracks of the underground railroad 67 (random house 2007).
[102] Lyndsay Campbell, the northern borderlands: Canada west, infreedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 195 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).
[103] Adele Perry, women, gender, and empire, in Canada and the British empire220, 227 (Phillip Buckner ed. Oxford univ. Press 2008).

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loyal and happy people."[104] Even so, when the Civil War began, about 80 % of the 20,000 blacks living in Upper Canada and British Columbia affirmed loyalty to British rule, whereas the remaining one-fifth returned to the United States.[105]

Colonial elites' defense of black fugitives reinforced the transatlantic abolitionist cause. During the 1850's colonial authorities steadily enforced British sovereignty denying US officials' and slaveholders' demands for the return of fugitives. Christian precepts undoubtedly impelled transatlantic abolitionists' insistence upon freeing slaves. British authorities also perceived the advantages for promoting imperial solidarity versus the United States.[106] Thus, William Parker's and several compatriots' escape from federal prosecution into Canada—at one point aided by Frederick Douglass--following the bloody Christiana Pennsylvania "Riot," was indicative of the Underground Railroad's increased effectiveness. In Toronto, Governor General Lord Elgin refused the Pennsylvania governor's extradition appeal, informing Parker, "You are as free a man as I am." In 1859, Parker inspired John Brown, Jr. prior to the tragic raid on Harper's Ferry.[107] By 1860, Crown courts refused to extradite John Anderson, amidst vacillation by colonial courts. Although Missouri authorities charged Anderson with murdering his master, transatlantic abolitionist societies insisted he could never receive a fair trial in an American court. British judges agreed, freeing Anderson.[108]

British free trade strengthened Canadian unity. Although Montreal conservative Tory Loyalists published a pro-annexation tract in October 1849, few embraced the claim that joining the US would improve Canadians' economic opportunity. Instead, economic historian Marvin McInnis has shown, the reciprocity most-fully instituted in the 1854 Marcy-Elgin Treaty favored Canadian wheat-flour, timber, and fisheries, protection of small manufacturers, and promotion of a first class water transport system thereby creating a unified British North American market which overcame US competition.[109] Moreover, while imperial authorities undoubtedly embraced civil and market integration for security reasons, McInnis made clear that the free-trade system benefitted French descendant farmers residing in small and large towns; they not only held their own but prospered in competition with Irish, Scotch, and English residents. The free trade system also aided the growing influx of free blacks and slave fugitives prior to the Civil War. The numbers of African descendant peoples were

[104] Harvey Amani Whitfield, blacks on the border: the black refugees in British North américa, 1815-1860 at 103 (univ. Vermont press 2006) as quoted.
[105] Elizabeth Jane Errington, British migration and British America, in Canada and the British Empire 140, 155 (Phillip Buckner ed. Oxford univ. Press 2008).
[106] Lyndsay Campbell, governance in the borderlands: upper Canadian legal institutions, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation130-134 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).
[107] Jacqueline l. Tobin with hettiejone, from midight to dawn the last tracks of the underground railroad, as quoted at 141, 143-144 (anchor books, 2008).
[108] Patrick Brode, the odyssey of john Anderson (the Osgood society by university of Toronto press, 1989).
[109] Marvin McInnis, the economy of Canada in the nineteenth century, in 2 the Cambridge economic history of the United States: the long nineteenth century 57 (Stanley l. Engerman & Robert e. Gallman eds., Cambridge university press 2000); Alexander de Conde, a history of American foreign policy 213-216 (Charles scribner's sons, NY., 1963).

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never enough to create serious market competition with Canadians of French, Irish, Scotch, or English descent.[110] Yet despite ever-present evidence of racial discrimination, "former slave" Josiah Henson declared, Christian religion and economic opportunity enabled "blacks" to "gradually become independent of the white man for our intellectual progress, as we might be also for our physical property."[111] During the 1850s in the United States, by contrast, the antislavery struggle within and without the Supreme Court undermined the Union.

DIVERGENT FREE VERSUS SLAVE LABOR REGULATION IMPERILS THE UNION

The "lower classes that inhabit" certain American cities, Alexis de Tocqueville predicted in 1850, "constitute a populace . . . even more dangerous than its European counterpart. They consist . . . of free blacks, condemned by law and public opinion to a state of hereditary degradation and misery […]." And "in their midst a multitude of Europeans" who "bring to the United States our greatest vices, and lack of any interest which might offset their influence. Living in a country of which they are not citizens, they take advantage of all the passions that agitate it. Indeed, in recent times, serious riots have been seen to erupt in Philadelphia and New York."[112] Still, Democrat Franklin Pierce's 1852 presidential election suggested that among pro-slavery and free labor proponents alike the 1850 sectional compromise might hold: popular sovereignty in the Mexican cession, abolition of the slave trade in the nation's capitol, and vigorous enforcement of the new federal Fugitive Slave Act in the Free-State borderland. In 1854, however, these hopes dissolved with a congressional law allowing slave and free labor proponents to compete for control of "bleeding Kansas" which sparked the formation of the Republican Party. As Calhoun predicted, abolitionists' radical commerce-clause claims attacking the interstate slave trade further threatened the Union.[113]

The divided opinions in the PassengerCases fostered a turning point in the regulations governing free versus slave labor.[114] Paralleling revisions in the Passenger laws Parliament enacted in 1855, Congress amended the earlier US Acts, instituting increasingly-effective enforcement provisions benefitting wealthy passengers and the laboring poor in steerage. Although American captains proved adept at evading their own nation's laws as well as Britain's, informed observers agreed that overall the US legislation improved the immigrant's condition on board vessels. Moreover, unlike the system subject to British Parliamentary supremacy, federal officials shared

[110] McInnis, economy of Canada in the nineteenth century, Cambridge economic history of the United States, 57 (Engerman & Gallman, eds. Cambridge, 2000).
[111] Josiah Henson, the life of Josiah Henson: formerly a slave 69 (1965) (Arthur d. Phelps 1849).
[112] Aristide r. Zolberg, a nation by design: immigration policy in the fashioning of américa 126 (Harvard univ. Press 2006) as quoted.
[113] James m. Mcpherson, battle cry of freedom the civil war era 117-126 (ballantine books, 1989); and note 74 above.
[114] Notes 1, 7 above.

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state-regulatory authority over immigrants beyond the Alien taxes struck down in the PassengerCases.[115] Indeed, by 1855 New York instituted provisions not found in either the US congressional or Parliament's Passenger Acts. New York funded the receiving Immigrant Station at Castle Garden, which began a course of regulation that gradually ameliorated abuses various private hotel, hospital, and transportation agents perpetrated upon newly arrived, often destitute, immigrants.[116] The state's other regulations curbing foreign immigration reflected "xenophobia" primarily targeting the Irish.[117]

New York's innovations indicated that until 1855, Know Nothing-inspired policies dominated debates over federal and state anti-immigration laws. Voters' attention following the 1850 Compromise reached the point in 1854 that Illinois Democratic U.S. Senator Stephen A. Douglas perceived Know Nothings' anti-immigrant and anti-Catholic appeals to be a greater political danger to his party's electoral fortunes—outside the South—than antislavery and abolitionist groups. Over a few months in 1854 Know Nothing party membership soared nationally from 50,000 to 1 million. In the local and state-wide elections of the same year across the Empire State, Know Nothings won 25 % of the vote; by the next year they numbered 150,000 spread among 1,000 local chapters. During the same period Massachusetts Know Nothings won 63 percent of the popular vote, further isolating the Irish minority. Amidst such compelling electoral pressure the Know Nothings identification as the American Party won in Congress immigration curbs in the 1855 Passenger Act, particularly a provision denying allocation of federal duties to local assistance societies such as those aiding new Irish and German immigrants in New York City and other major ports.[118]

Although the Know Nothings asserted the strongest influence at the state level, they encountered challenges regarding the status of "persons." In Congress, the Know Nothings practical successes were limited in part because their ultimate goal of using federal power virtually to halt immigration could not get passed Southern Democrats who rejected any broad exercise of federal commercial power which potentially might be construed to aid abolitionists' radical attacks on the interstate slave trade.[119] Thus, Know Nothings espoused deploying states' rights police powers to impose a fourteen year residency requirement before immigrants became qualified for voting rights, jury service, or militia membership. The Know Nothing Party also advocated state-action to deport unemployed, destitute, or physically disabled immigrants.[120] Each of these categories agitated the ambiguous status of "persons" disputed in the PassengerCases. Ultimately, the Know Nothings faced not only the difficult

[115] Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 201, 306, 315-16 (macgibbon & kee 1993) (1961).
[116] f. Kapp, immigration and the commissioners of immigration 105-107 (arno press 1969) (1870).
[117] Aristide r. Zolberg, a nation by design: immigration policy in the fashioning of américa 145-168 (Harvard univ. Press 2006).
[118] Aristide r. Zolberg, a nation by design: immigration policy in the fashioning of américa 155-56, 145-168 (Harvard univ. Press 2006).
[119] Id. 145-165; notes 74, above.
[120] Id. 145-165; note 7 above.

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problem of determining the constitutional status of desirable and undesirable immigrants; their efforts also became entangled in distinguishing the legal status of white immigrants versus free and fugitive blacks under state police powers and the federal commerce power.[121]

In Cooleyv. BoardofWardens (1852) the Supreme Court attempted to resolve uncertainty separating state police powers and federal commerce powers. The issue was whether license fees certain shippers paid a Port of Philadelphia regulatory body know as Wardens--to fund the use of pilots and their general welfare--was permitted under state police powers or contrary to an exclusive commerce power. The vote was 6-2. Justice Benjamin R. Curtis wrote the majority opinion, with Daniel concurring and dissenting in part; McLean, joined by Wayne, dissented.[122] The rule Curtis established was that the commerce power was exclusive where the subject matter was expressly national; conversely, where subject matter was primarily local the states' police powers enabled concurrent authority. Although the local license fees imposed considerable costs on interstate and international shippers, Curtis held, pilots were so completely the indispensible agents of local knowledge that their regulation was permissible under state police powers. Daniel accepted the states' rights result, but dissented from the suggestion the Congress possessed a concurrent regulatory power. Suggesting the abiding uncertainty, McLean exclaimed, "If this doctrine be sound, the passenger cases were erroneously decided."[123]

The Court's flexibility aided white immigrants and free blacks. By the mid-1850s Know Nothings' political force was dissolving at the very point antislavery and race issues returned to the fore, especially in the Free-State borderland. Employing police powers, Massachusetts deported as many as 30 immigrants; in conjunction with instituting Castle Garden, New York established a committee empowered to regulate new immigrants on the basis of police powers. Still, despite such impressive regulatory authority, New York officials implemented only a two year residency requirement before a foreign immigrant attained citizenship. Deportations were not repeated as Massachusetts pursued New York's compromise course. Thus, before the Civil War state immigrant regulation generally did not implement the Know Nothings' more restrictive goals.[124] Moreover, during the same period Free-State authorities followed mounting public fervor endorsing the defense of African Americans under Personal Liberty Laws against the federal government's vigorous enforcement of the 1850 Fugitive Slave Act. Also, the Massachusetts legislature enacted a law under police powers authorizing racially-desegregated public

[121] Id.
[122] Cooleyv. Board of wardens of the port of Philadelphia, 12 how. (53 U.S.) 299 (1852).
[123] id., at 325; Stuart Streichler, Justice Curtis in the civil war era at the crossroads of American constitutionalism 73-94 (university of Virginia press 2005).
[124] Notes 17-20, above.

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education; the law over-turned the "equal-but-separate" doctrine which the state's highest court established in Roberts v. City of Boston (1849).[125]

The immigration and antislavery conflicts were embedded by the mid-1850s. Increased agricultural production and labor demands attending the Crimean War influenced the precipitous drop in Europeans arriving in US ports: in 1855 European immigrants numbered 197, 337, a decline near 50% compared to the 1854 season. Among the two largest immigrant groups between1854 and1855 the Irish dropped from 101,606 to 49,627 whereas the numbers of Germans declined from 215,009 to 71,918.[126] Over the same years African Americans and whites collaborated to resist the 1850 Fugitive Slave Act, aiding African Americans to establish residence in the border Free States or to escape into Canada. Underlying the inter-racial antislavery collaboration was a less conspicuous shared commitment to evangelical Protestant faith manifesting itself against Catholic immigrants. As Know Nothing political influence dissipated, the Republican Party in Eastern Ohio, western New York and some New England states garnered black voters who previously had supported a Temperance Crusade against Catholics, especially the Irish. In these free-state locales interracial collaboration thus was both antislavery and anti-immigrant, benefitting Republicans.[127]

In border Free-States opposition to the 1850 Fugitive Slave Law protected many blacks from slave catchers. Between 1850 and 1860 the actual number of slaves accused under the 1850 Fugitive Slave Act by state was Ohio (101), Pennsylvania (88), Illinois (39), Indiana (37), and New York (21).[128] These numbers reflected amounts of human property sufficient to justify southern slave masters and free-state allies initiating federal litigation. Despite dramatic incidents of resistance and rescue, masters won most federal cases. Nevertheless, enforcement cases were episodic, and they did not stem the Underground Railroad's growing clandestine success in bringing an estimated several thousand escapees to British North America. Even so, fugitives were estimated to be a minority of African Americans removing from the United States into British North American before 1860.[129] By contrast, in Cincinnati Ohio in 1860, black families constituted 2,153 (2.8%) of the total population; black family heads of households born in slave states were 1, 557 (72.3 %) compared to 408 (19%) black heads of households born in Ohio.[130] The 1,557 free blacks heading households who had been slaves in one border-state

[125] Note 7; Roberts v. The city of Boston 5 cush. (59 mass.) 198 (1850); Tony Freyer and Lyndsay Campbell, conclusion, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 285, 288-89 (Tony Freyer & Lyndsay Campbell eds., Carolina academic press 2011).
[126] Aristide r. Zolberg, a nation by design 161 (Harvard university press, 2006)
[127] Tony Freyer, constituting the free-state borderlands: New York, Pennsylvania, and Ohio, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation, 38-41 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).
[128] Id. 57; Philip j. Schwarz, migrants against slavery virginians and the nation 37 (university of Virginia press, 2001).
[129] Id. note 104; Michael Wayne, the black population of Canada west on the eve of the American civil war, 48 histoire/ social history 465-485 (1995).
[130] John Wertheimer, Daphne Fruchtman, et al., Willis v. Jolliffe: love and slavery on the South Carolina—Ohio borderlands, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 257, 264-65 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).

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city thus greatly exceeded the 286 slave fugitives reclaimed in all the cases from the five border Free-States under the 1850 Fugitive Slave Act.[131]

By the mid-1850s struggles over restrictive immigrant regulations converged with state Personal Liberty Laws' inclusive definition of "persons" upheld in the PassengerCases. Most conspicuously the free-states repeatedly applied the Personal Liberty Laws to blunt or even defeat enforcement of the 1850 FSA.[132] In addition, along with the Massachusetts legislature's overturning of the "equal-but-separate" doctrine in 1855, small numbers of African Americans fought for and won integrated schools in New York and Ohio. More generally, blacks in several Free States voted on and otherwise controlled public funding for segregated schools not unlike Catholic immigrants facing pro-Protestant public school curriculum. Certain Free-State courts also narrowly interpreted racially-restrictive franchise provisions enabling thousand of blacks to vote.[133] Similarly, various legislative coalitions and courts blocked Know Nothing attempts to impose long-term residency before immigrants could vote. Free-State courts also applied Personal Liberty laws to affirm due process guarantees for slave fugitives and free-blacks alike, extending equality before the law. Similarly, northern states defeated Know Nothings' extreme policies attacking immigrants' judicial due-process guarantees.[134]

Convergent Free-State African American and white immigrant rights claims revealed ironies permeating the American regulations on labor availability. Calhoun and his congressional colleagues declared in their 1849 address that a Free-State interracial combination threatened slaveholders' white supremacy through failure to enforce the federal fugitive slave act, to permit southern slaveholders' entry into California and the Mexican cession, to preserve the slave trade in Washington, D.C., and to suppress abolitionists' agitation against the interstate slave trade. Southerners thus advocated federal intervention to preserve slave over free labor regulations.[135] The Supreme Court's 1857 DredScott decision affirmed southern slavery. The South urged such federal intervention at the very time it championed free-trade in cotton with Great Britain.[136] By the mid-1850s the northern Free-States, however, employed the admittedly ambiguous status of "persons" outside the federal commerce power defined in the PassengerCases, to impose new state police power regulations curbing

[131] Id. Philip j. Schwarz, migrants against slavery: virginians and the nation (univ. Press Virginia 2001)
[132] Note 23.
[133] American legal history cases and materials 273 (Kermit l. Hall, Paul Finkelman, James w. Ely, Jr. Eds., oxford university press, 3d. Edition 2005); James Oliver Horton, lois e. Horton, in hope of liberty culture, community, and protest among northern free blacks 1700-1860, 169 (oxford university press 1997); note 126, 35-59; Stephen Middleton, the judicial construction of whiteness in the borderlands of the northwest territory, 1803-1860 in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 227-256 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).
[134] Notes 23, 123.
[135] Note 74.
[136] note 80; Peter Mathias, the first industrial nation an economic history of Britain 1700-1914, 230 (Methuen, 2nd edition, 1986); Stanley l. Engerman, slavery and its consequences for the south in the nineteenth century, the Cambridge economic history of the United States volume ii the long nineteenth century, 337-351 (Stanley l. Engerman& Robert e. Gallman, Cambridge university press, 2000).

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immigrants, though the regulations did not fulfill Know Nothings' most extreme demands. Moreover, the Free-States deployed states' rights over "persons" in Personal Liberty Laws to establish conditional citizenship for free blacks and to defend them from slave catchers and federal enforcers.[137]

The British imperial and American republican transatlantic labor regulations reached a turning point during the mid-1850s. Parliament and the US Congress successively revised legislation by 1855 entrenching regulation networks that increasingly improved wealthy and poor-labor passenger comfort, safety and welfare. Even so, in America the most interventionist immigrant regulation occurred at the state level, especially New York.[138] Under Parliament's centralized system, Ireland was the subject of regulatory experimentation more so than elsewhere in the British Isle. British North America, by contrast, enforced somewhat greater interventionist market regulations, securing loyalty among English, Scots, Welsh, and Irish Protestants, French and Irish Catholics, and African descendant immigrants against varying radical Irish and American annexationist sentiments.[139] In the US, market intervention disrupting free and slave labor availability occurred within and between northern and southern states enmeshed in increasingly polarized sectional struggle. In Canada, the British free-trade labor regulation entrenched general public support for the Empire; in America, however, the state interventionist regimes embedded divergent free-slave labor regulation availability patterns disrupting the Union.

CONCLUSION

Transatlantic immigrant and antislavery crises which converged during and after the Irish Famine tested free-trade liberalism. Clearly, as Albert Venn Dicey recalled regarding his Oxford years in the 1850s, "I belong to the school of thought & feeling which [John Stuart] Mill produced […]. Individuality in its true sense is a source both of greatness and of goodness; and much as we must value all social progress with its accompanying restrictions, we must watch jealously lest these restrictions endanger individuality, and thus destroy that originality which is the very spring of true progress."[140] The free trade labor regulations in transatlantic imperial relations binding Ireland, British North America, and Britain herself as a result of the Irish Famine, nonetheless engendered security and humanitarian concerns necessitating degrees of government intervention. In the United States, by contrast, intractable North-South sectional confrontation pitted southern white-supremacy and slave-labor dependency against free-labor absolutism and evangelical Protestant abolitionism. North and South alike

[137] Notes 7, 23, 117-119.
[138] Notes, 113-116.
[139] Notes, 90-92, 95-98, 101-104, 108.
[140] Richard a. Cosgrove, the rule of law: Albert Venn Dicey, Victorian jurist 12 (univ. N.c. Press 1980) (1941). As quoted.

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demanded ever greater state or federal intervention in labor regulations in order to assert slave-versus-free labor control of American republicanism.

Transatlantic British imperial politics and ideology contested mid-nineteenth century British public discourse advocating free trade. By 1857, amidst the precarious improvements implemented under Parliament's most recent Passenger Act, the Economist warned that laissez-faire orthodoxy was under threat: "Shipping is one of the ordinary businesses of individuals, and if Governments are to prevent negligence in carrying it out, it ought to have boards to watch over the business habits and conduct of all tailors, shoemakers and merchants in the kingdom."[141] Reformer Caroline Chisholm, by contrast, offered loans underwritten by "aristocratic philanthropists" to poor immigrants; given the magnitude of the immigrant problems, she nonetheless was also a "warm advocate" of the Passenger Acts.[142] Cambridge legal historian F. W. Maitland suggested to his students several decades later that measures such as the Passenger Acts were the "result of a modern movement . . . which began . . . about the time of the Reform Bill of 1832. The new wants of a new age have been met . . . by giving statutory powers of all kinds, sometime to the queen in Council, sometimes to the Treasury, sometimes to a secretary of State."[143]

The transatlantic abolitionist crises converging in the US-Canadian borderlands fostered Canadian support for free-trade. By the late-1840's British imperial authorities and their Canadian counterparts instituted a legal presumption that African American fugitives and free black immigrants alike deserved "color-blind" justice, despite continuing evidence of discrimination. The British legal presumption prevailed despite American slaveholders' and federal supporters' repeated claims that such formal equality before the law disrupted southern states' property rights and white supremacy imposed through federal fugitive slave laws and southern states' Negro Seamen Acts. Within British North America, by contrast, the "color-blind" presumption did not displace racist attitudes shared by many Canadians; its generally consistent implementation by colonial elites nonetheless instilled among whites and blacks a shared loyalty as British subjects enjoying prosperity under the imperial free-trade system against American slave-labor competition. Accordingly, notwithstanding persistent evidence of discrimination, circumscribed yet noteworthy "color blind" transatlantic abolitionism and perceived security demands identified with radical Irish nationalism and potential US annexation helped to embed free-trade orthodoxy within British North America.[144]

[141] Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 233-34 (macgibbon & kee 1961). Citing economist, 4 apr. 1857, p. 365. See also illustrated London news, 26 apr. 1854, p. 178.
[142] Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 233-34 nt. 1 (macgibbon&kee 1961). Citing m. Kiddle, Caroline Chisholm (melbourne, 1948), chaps. Iv-vi.
[143] F.w. Maitland, the constitutional history of England 417 (Cambridge 1974) (1908).
[144] Lyndsay Campbell, governance in the borderlands: upper Canadian legal institutions, and the northern borderlands: Canada West in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 109-139, 195-225 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).

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British formal "color-blind" justice, despite ongoing discrimination, reinforced transatlantic free trade labor regulation. Although episodic racial discrimination—especially in education--persisted in British North America, it did not generally impede otherwise "equal" citizenship on a par with ethic-religious minorities such as Irish Catholics or French Canadians.[145] Even so, colonial elites—including the dominate Protestant merchant class--enforced equal property and contract rights sufficiently that, according to historians McInnis and Errington, English, Scots, Irish, French, and African-descendant groups supported the transatlantic prosperity identified with the imperial free-trade system versus the United States.[146] Similarly, the increasing regulatory intervention of Passenger Acts—including higher alien immigrant taxes and fares imposed on Canadian traffic—reinforced the improved economic gains from the end of the Irish Famine to the Crimean War. Similarly, in Ireland the Famine era welfare measures—although belatedly implemented—coincided with the continuing free trade system; the termination of these measures during the early 1850s enabled many Irish communities and individuals to recover and then to participate in greater free-trade liberalism. On both sides of the Atlantic, however, Irish nationalist agitation undercut such liberalism.[147]

In the United States, however, the pattern of labor regulation favored inconsistent state and federal intervention. The basic regulatory regimes Parliament and the Congress implemented in successive Passenger Acts from 1847 to 1855 steadily improved the spatial and humanitarian conditions wealthy or poor-labor immigrants encountered on board ships, though some captains proved adept at avoiding enforcement. But the federal Passenger legislation of the mid-1850s also incorporated circumscribed Know Nothing demands which endeavored to retard if not completely foreclose poor immigrants entering the United States. But Southerners opposed virtually any federal commerce power potentially directed against the interstate slave trade, ensuring that Know Nothings won only modest restrictions, such as prohibiting federal aide to local immigrant-support groups. Congress waited some years before it applied the Know Nothings' restrictive principle to the Chinese; thus, Aristide Zolberg has shown, the states proved most receptive to their policies before 1855. The Supreme Court's commerce-clause decisions from Miln to the PassengerCases to Cooley, upheld—except for alien taxes—extensive state police power regulations over "persons." Briefly, Massachusetts used police powers to deport immigrants; New York also did so, granting wide enforcement discretion to a commission overseeing the immigrant trade and the receiving depot at Castle Garden.[148]

The states' more interventionist police-power regulations nonetheless enforced ambivalent outcomes. In the PassengerCases, although the Court's narrow holding struck down the alien taxes, the disagreement over the

[145] Id.
[146] See supra note 138.
[147] Oliver Macdonagh, a pattern of government growth, 1800-1860: the passenger acts and their enforcement 305(macgibbon&kee 1961).
[148] Aristide r. Zolberg, a nation by design: immigration policy in the fashioning of américa 125-168 (Harvard univ. Press 2006).

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police power designation of "persons" left wide discretion to state and local officials. Concerning poorer immigrants, New York and Massachusetts shifted from strict to weak enforcement of Know Nothing-inspired policies during the mid-1850s, proscribing full citizenship based on two-year rather than fourteen-year residency. Deportations stopped. The Court's failure to agree upon the limits of state police powers regulating white immigrants or African Americans as "persons" supported local control over race-relations enforced in the border free-states' Personal Liberty Laws. Slave states, some free states, and the federal government, Taney affirmed in DredScott, imposed upon African Americans an oppressive, non-citizen personhood. The PassengerCases, however, opened a police power space across the Free-State borderland for the local redefinitions of personhood—pertaining to mobility, judicial rights claims, and freer economic opportunities—that assisted African Americans in their struggles for conditional citizenship enforced through Personal Liberty Laws.[149]

States' rights police powers affirmed in the PassengerCases also were ambivalent. The Court construed the federal commerce power targeting immigrants upholding a version of free-state sovereignty that suggested divisions among whites along political party and ethno-religious lines which thereby promoted conditional citizenship for northern free-state African Americans. Thus, like other free-state court decisions during the 1850s, a divided Court of Appeals in 1860 upheld New York's Personal Liberty Laws against a slaveholder's claim that since her voluntary residence in the state was temporary, her property rights in eight slaves was inviolate. New York's court held, however, that the "question is one affecting the State in her sovereignty. As a sovereign she may determine and regulate the status or social and civil condition of her citizens, and every description of persons within her territory. This power she possesses exclusively; and when she has declared or expressed her will in this respect, no authority or power from without can rightly interfere, except" only in proven cases under the 1850 Fugitive Slave Act. Therefore, "neither an African negro nor any other person, white or black, can be held within her limits for any moment of time, in a condition of bondage."[150]

During the transatlantic immigrant and antislavery crises divergent governance of labor regulations became embedded. While British free-trade liberalism probably predominated throughout the Empire following the Famine, transatlantic law and institutional deviations suggested a labor regulation continuum encompassing minimum to noteworthy intervention. British imperial authorities and their colonial counterparts incrementally entrenched distinct security policies embracing general equality before the law for immigrant whites and blacks alike, though discrimination persisted. Free-trade imperial solidarity prevailed in Canada but not Ireland. In the

[149] Tony Freyer, constituting the free-state borderlands: New York, Pennsylvania, and Ohio, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 35, 46-47 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011). Citing lemmon v. The people, 20 new York 562, 6 Smith 562 (1860).
[150] Tony Freyer, constituting the free-state borderlands: New York, Pennsylvania, and Ohio, in freedom's conditions in the U.S.-Canadian borderlands in the age of emancipation 35, 46-47 (Tony Freyer& Lyndsay Campbell eds., Carolina academic press 2011).

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United States, however, conditional citizenship and economic rights African Americans procured through northern Personal Liberty Laws during the 1840s to the late-1850s were too much for the slaveholding South. Consistent with Calhoun's and his colleagues' earlier predictions, by 1860 southern leaders declared that any civil or economic freedoms northern states conferred upon African Americans justified secession. Northern political elites achieved electoral advantages and ideological legitimacy from African Americans versus immigrants; in return, the two weaker groups achieved conditional economic and citizenship benefits, while increasingly they were politically and economically at odds as the South seceded.[151]

INCORPORAÇÃO LIVRE VERSUS TRABALHO ESCRAVO NO REGULAMENTO TRANSATLANTICO DO IMPÉRIO BRITÂNICO E DOS ESTADOS UNIDOS, 1835-1860

Resumo

Este estudo problematiza a perspectiva histórica da análise jurídica especificada jurisdição, examinando o contexto internacional do desenvolvimento nacional do trabalho de regimes reguladores nos Estados Unidos e no Reino Unido durante a imigração transatlântica e a crise abolicionista em meados do século XIX. Esse período é crítico devido à pressão desesperada que essas crises colocaram em grandes fontes de trabalho na base da hierarquia da sociedade, imigrantes pobres e escravos. A fome e a escravidão obrigaram migrações sem precedentes através das fronteiras nacionais e dentro dos países em diferentes regiões. A mobilidade das populações a pôs em contato com diversas formas de governança, a partir das diferenças regionais no equilíbrio do federalismo americano, para as concorrentes identidades nacionais dos ingleses, irlandeses e canadenses componentes do Império Britânico. Como resultado, as migrações transatlânticas e intercontinentais são um exemplo particularmente útil para ilustrar a importância do contexto internacional no desenvolvimento da lei por causa dos diferentes modos como cada órgão governamental respondeu às pressões sociais. Este estudo mostra como as múltiplas e complexas redes reguladoras intergovernamentais em matéria de mobilidade dessa força de trabalho se desenvolveram em um contexto internacional, não apenas no âmbito do desenvolvimento dos sistemas jurídicos nacionais isolados.

Palavras-chave: Migrações; jurisdição; anti escravidão; contexto internacional; regimes reguladores; mobilidade.

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[151] Notes 1, 2 and 10.

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