THE POWER TO CONTROL IMMIGRATION IS A CORE ASPECT OF SOVEREIGNTY

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Where in our constitutional system is the power to regulate immigration assigned? Professor Ilya Somin argues that the power to regulate immigration is not a power given to Congress because it is not enumerated.[1] But I think it is so clearly a power given to Congress and that such was so well understood at the time of our founding that the Constitution did not even need to specify it. Even so, I think the Constitution does specify it.[2] The notion that the power to regulate immigration is not contained within the power of naturalization[3] is an anachronistic view of the latter power[4] that understands naturalization merely to confer citizenship and not as having anything to do with who can immigrate into this country in order to obtain citizenship.

Of course, in 1787 when that clause was written, immigration and naturalization were largely synonymous because of a couple of facts that are no longer true. First, one did not cross the Atlantic in a number of hours; it was a three-month-long journey. Most people made the trip only once in a lifetime (though if you were a diplomat, you might have to make it several times). However, making that trip meant that you were

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1. *See* Ilya Somin, *Immigration, Freedom, and the Constitution*, 40 HARV. J.L. & PUB. POL'Y 1, 5–6 (2017).

2. U.S. CONST. art. 1, § 8, cl. 4 ("Congress shall have the Power To . . . establish an uniform Rule of Naturalization . . . .").

3. *Id.*

4. *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 393 (2010) ("Equally revealing, [the Framers] regarded the formation of naturalization rules as tantamount to the construction of an immigration policy for the new nation.").

relocating and taking on a new allegiance and becoming a member of a new body politic.

The second thing was property law. If you were not a naturalized citizen, you could not inherit property—and in many cases you could not even own property.[5] And so, before you made the decision to immigrate, you had to know what the naturalization rules were. Giving Congress the power to naturalize—to determine who can become citizens and members of our body politic—necessarily encompassed the power to decide who could come here in order to put themselves up for that naturalization.

Proof that this was the understanding of the naturalization power is found in the negative implication of the text of Article I, Section 9 of the United States Constitution, which specifically states: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808] . . . ."[6] What is the negative implication to be drawn from that restriction on Congress's power? The negative implication is that Congress does have the power to restrict migration and importation, although it cannot exercise that power until 1808. This provision was aimed at slavery, but it says migration *and* importation, not just importation, and that additional word meant that the prohibition (and hence the implied power) applied more broadly than just in the slavery context. In other words, the Supreme Court was correct when, in the Chinese Exclusion Cases, it recognized that Congress has inherent power over immigration, a power that is essential to and an incident of sovereignty.[7]

However, this notion of sovereignty did not begin in the Chinese Exclusion Cases. Rather, it began forty years earlier in *The Passenger Cases*.[8] Those cases confronted the fact that New York and Massachusetts each imposed a head tax on every

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5. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 70 (1832) (characterizing rights of property ownership as "civil privileges, conferred upon aliens, by state authority").

6. U.S. CONST. art. I, § 9, cl. 1.

7. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 705–06 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889).

8. 48 U.S. (7 How.) 283 (1849).

passenger arriving from overseas into their ports.[9] The Court held that the power to grant ingress and egress to and from its territory belongs to every sovereign, and cited Vattel, among others, for that proposition.[10] I think this notion of an inherent foreign affairs power is correct. It is a power that the Court has recognized in many areas.

But that inherent power distinguishes between the states and the federal government. In *Federalist No. 32*, For example, James Madison explained that the Constitution left to the states issues that are of local concern but assigned to the national government all of the powers that are inherent in the definition or understanding of a national sovereignty.[11] It would have been bizarre not to have recognized the power to regulate immigration as a power of the national government because control of one's borders was such a critical and core aspect of sovereignty.

The flip side of *The Passenger Cases* is that the states could not impose that tax because it was an intrusion on foreign commerce. Congress, therefore, could impose a tax because it was an exercise of the Foreign Commerce power.[12] The Court held that Congress could use the tax as an imposition—as a way to regulate or control immigration.

What about immigration that does not involve commerce? The Court uses language in *The Passenger Cases* to say that engaging in the business of bringing passengers is an aspect of foreign commerce. The notion that passenger travel is "commerce" was decided in *Gibbons v. Ogden*,[13] so that case, too, would have to be overruled to sustain the argument that Congress has no power to regulate the transportation of people into the United States. But what about those who are not coming on a ship? What about those who are not coming on a train or a caravan across a land

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9. *Id.* at 284, 287.

10. *Id.* at 525 (citing 2 EMMERICH DE VATTEL, THE LAW OF NATIONS § 104 (1758) ("The sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare; as soon as he admits them, he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him. Accordingly, we see that every sovereign who has given an asylum to a foreigner, considers himself no less offended by an injury done to the latter, than he would be by an act of violence committed on his own subject.")).

11. THE FEDERALIST NO. 32 (James Madison).

12. *See* U.S. CONST. art. I, § 8, cl. 3.

13. 22 U.S. (9 Wheat.) 1 (1824).

border? What about those who are just walking here? There is nobody engaged in the commerce of transporting those passengers other than the people themselves.

Of course, we would have to interpret the word "commerce" more narrowly than modern precedent does in order to accept the proposition that the transportation of migrants would not be included. I advocate an understanding of the Insterstate Commerce Clause that is probably as strict as anyone in the country because I think the Founders had a much more restricted view of "commerce" than our modern cases allow, but even for the Founders, I believe the commerce power included the power to regulate immigration. In their view, the Foreign Commerce Clause encompassed not only the trade of goods but also intercourse between the two nations more broadly—and that would necessarily include the movement of peoples.[14] People coming here to take up residence and engage in the economy would have been an intercourse between the two nations, fully within the power of Congress to "regulate Commerce with foreign Nations . . . ."[15]

Taken together, the Naturalization power and the Foreign Commerce power provide a textual basis for an immigration policy. More broadly, the power to regulate migration is inherent in the very notion of sovereignty.[16] What does it mean

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14. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010) ("Understanding 'commerce' in its original sense of 'intercourse' is consistent with all of the evidence offered by rival theories of commerce as trade or economic activity; but it better explains the source of Congress's powers over immigration and foreign affairs. It also better explains Congress's broad powers over transportation and communications networks, whether or not these networks are used for purposes of business or trade."); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113 (2001) ("Commerce is defined in the 1785 edition of Samuel Johnson's *Dictionary of the English Language* as '1. Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick.'").

15. *See* Balkin, *supra* note 14, at 26 ("The eighteenth-century definition of commerce as 'intercourse' or 'exchange' among different peoples easily encompasses immigration and emigration of populations for any purpose, whether economic or noneconomic."); *see also Gibbons*, 22 U.S. (9 Wheat.) at 65–66 ("Considering it then, as a regulation of trade among the States, it becomes necessary to inquire into the foundation of the right of intercourse among the States, either for the purposes of commerce, or residence and travelling.").

16. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889) ("'The jurisdiction of the nation within its own territory is necessarily exclusive and

to have sovereignty? The Declaration of Independence gives us some guidance on that question. It begins: "When in the Course of human events it becomes necessary for *one people* to dissolve the political bands which have connected them with another."[17] After that opening statement, the drafters set out the propositions that legitimized their claim of right to renounce their former allegiance.

The Declaration's "one people" language recognizes that even though all of humanity has fundamental, inalienable human rights, in order to secure those rights, we form discrete societies of people. These groups are most often defined geographically, and they each decide how to best institute a government to protect their inalienable rights. That process requires recognition of a group of people that stands distinct from other groups. All such groups have the same natural right to create their government and to defend their inalienable rights as we have. But a right to preserve geographic borders is inherent in the understanding of how we protect rights. Boundaries serve to protect and secure the blessings of liberty and posterity for a nation's people.

If we are going to accept that proposition at all, then we have to recognize that we must make a policy determination on how large our welcome mat should be for immigration. The only way to avoid that determination is to claim that there ought to be no distinction between citizen and noncitizen, no ability to control the volume of people that come at any given time. The Founders clearly did not have that open-borders mentality.[18]

For the first century of America's history, virtually no cases dealt with immigration restrictions,[19] because the country needed to populate its vast territory. In fact, the policy judgment at the time of the founding was to encourage as many

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absolute. It is susceptible of no limitation not imposed by itself.'" (quoting The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812))).

17. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

18. *See* Pfander & Wardon, *supra* note 4, at 385.

19. *See generally* Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743 (2013) (arguing that, throughout the nation's first century, the Supreme Court found nothing constitutionally exceptional about a statute that governed foreigners engaged in the process of immigration).

individuals as possible "to people the Western lands."[20] Immigration was necessary for the successful expansion of American society but also for defense purposes. If we had not shored up our western lands and other borders, the country would not have survived its early years. It is thus not surprising that we do not see cases dealing with restrictions on immigration in the early years of the new republic. The lack of case law, however, does not suggest that the Founders and early lawmakers did not recognize that there was such a power.[21]

In fact, the Founders recognized that when considering restrictions on immigration, it is important to focus on what is necessary to protect the people here.[22] That means we can make distinctions between different parts of the world from which we accept immigrants. Quite simply, immigrants from parts of the world where despotism was the rule were more problematic because such individuals, habituated to un-republican forms of government, would tend to bring their despotic tendencies and habits to the United States.[23] These were the kinds of concerns that were expressed, for example, briefly at the Federal Convention and in the early Naturalization Acts in Congress.[24] Accordingly, we must recognize that Congress had the power to make restrictions when, in its policy judgment, such restrictions were necessary.

That is why, when it confronted these issues a century after America's founding, the Supreme Court concluded that immigration restrictions are inherent in sovereignty.[25] Moreover, this kind of policy judgment is best crafted by the political

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20. *See* ARISTIDE R. ZOLBERG, A NATION BY DESIGN 6 (2008) (arguing that foreign immigration "made a much greater contribution to [U.S.] population than had ever occurred" in Europe).

21. *See id*. at 3 ("A reexamination of the record with this in mind reveals that the absence of federal legislation does not reflect a lack of interest in regulating entry, but was attributable to the overriding of immigration policy by what was then the central issue of national politics, the matter of states' rights in relation to slavery.").

22. *See* Pfander & Wardon, *supra* note 4, at 385 (outlining extensive immigration regulations in the late eighteenth century).

23. *See* ZOLBERG, *supra* note 20, at 55–56 (referencing Franklin's and Tocqueville's discussions of an influx of immigrants who may not be accustomed to liberty).

24. *See* Pfander & Wardon, *supra* note 4, at 385–403.

25. *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

branches, not by judicial interposition. The Court thus developed a doctrine granting Congress almost unfettered plenary authority to make such judgments. The kinds of arguments that Professor Ilya Somin makes,[26] therefore, are more properly submitted to Congress, not to the courts. If you think lawmakers got the policy judgment wrong, then argue for a change in the law, because what the proper immigration policy should be is inherently a political decision that the legislative branch is entitled to make.

That is where I think the fight has to be. I do not think Congress has the mix right at the moment, and certainly, much of the existing impediments and red tape to get through the process are unnecessary. But it is Congress that has to make the decision on where to draw the line. Otherwise, we will destroy not only the notion of boundaries but also the notion of sovereignty itself, and that seems counter to the very principles of the Declaration of Independence that we ought not to break.

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26. *See* Somin, *supra* note 1.